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NO. 93381-2

SUPREME COURT OF THE STATE OF WASHINGTON

CHELAN BASIN CONSERVANCY,

Petitioner,

v.

GBI HOLDING CO. and STATE OF WASHINGTON,

Respondents.

SUPPLEMENTAL BRIEF OF RESPONDENT
STATE OF WASHINGTON

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I. INTRODUCTION

Chelan Basin Conservancy (CBC) sued to abate fill on the Lake Chelan shoreline. The site, known as “the Three Fingers,” contains fill placed on the lake shore in the early 1960s. The land is privately owned and was originally above the lake level until the 1920s when a dam raised the lake by 21 feet and flooded the area. In 2011, private owner (GBI) announced plans to develop. CBC sued and claimed the fill interfered with rights of public navigation and should be abated under *Wilbour v. Gallagher*, 77 Wn.2d 306, 462 P.2d 232 (1969). CP 10.

In *Wilbour*, this Court ordered the abatement of fill on a similar lot along Lake Chelan, which led to significant controversy. As noted by Senator Gissberg, who fought for the Shoreline Management Act (SMA), *Wilbour* created a concern that “every dock, most of the industry in the state that is on the water . . . is . . . subject to being removed by anyone that wants to bring the [*Wilbour*] lawsuit.” 1 Senate Journal, 42d Leg., 1st Ex. Sess., at 1411 (Wash. 1971).¹ Thus, two years after *Wilbour*, the SMA gave “consent and authorization to the impairment of public rights of navigation, and corollary rights incidental thereto” caused by certain “structures, improvements, docks, fills or developments [that were] placed

¹ See also Charles E. Corker, *Thou Shalt Not Fill Public Waters Without Public Permission – Washington’s Lake Chelan Decision*, 45 Wash. L. Rev. 65, 71-74 (1970) (“Must all fills in navigable waters be abated?”); Geoffrey Crooks, *The Washington Shoreline Management Act of 1971*, 49 Wash. L. Rev. 423, 425 (1974).

in navigable waters before December 4, 1969 [the date of *Wilbour*].” RCW 90.58.270(1). This consent applies in any case “relating to the removal of structures, improvements, docks, fills, or developments based on the impairment of public navigational rights.” RCW 90.58.270(4). This is such a case, and this provision bars CBC’s claim. CBC claims the statute is invalid or not applicable. CP 1358-62.

To avoid the statute, CBC points to a proviso withholding consent for historic fill or development “in trespass or in violation of state statutes.” RCW 90.58.270(1). Then, to claim the Three Fingers are “in violation of state statutes,” CBC shows that prior to passage of the SMA consent, fill could have been considered a statutory nuisance because it obstructed navigation without legal authority. Pet. 8; CP 1358-61. The Court should reject CBC’s interpretation. It renders the consent statute meaningless and frustrates the clear intent to bar some *Wilbour* claims. The pre-1969 need for consent is not an ongoing violation of statute that causes the proviso to deny consent.

CBC also claims the statutory consent violates the public trust doctrine but that argument fails for two crucial reasons. First, the consent does not give up or significantly reduce state control over navigable waters. Rather, consent has a limited effect of barring hypothetical *Wilbour* claims against otherwise lawful, pre-1969 structures or fill.

Second, the SMA significantly increased public control over such fills and all shorelines and public trust resources by imposing planning and regulatory protections. Thus, the SMA advances public trust values when it eliminates potential *Wilbour* claims against otherwise lawful historic fill while ensuring the SMA governs future development and use of that property and surrounding waters.

II. ISSUES PRESENTED

CBC's Petition argued that the Three Fingers should be abated under *Wilbour*. The Petition presents two issues:

1. RCW 90.58.270(1) consents to impairment of navigational use and related interests by certain developments and bars lawsuits to abate a historic fill based solely on an alleged impairment of public navigation. Can CBC's claim avoid this statutory consent based on a proviso in RCW 90.58.270(1), excluding fills or developments that "are in trespass or in violation of state statutes?"

2. Does the consent in RCW 90.58.270(1) to the interference with public navigation interests caused by pre-1969 fills and structures, which bars potential *Wilbour* claims as part of adoption of the Shoreline Management Act, violate the public trust doctrine?²

² CBC's Petition for Review mentions in passing some questions of access over vacated streets under 1927 deeds. Pet. at 5. The Petition, however, does not raise issues based on those deeds.

III. STANDARD OF REVIEW

CBC claimed that RCW 90.58.270(1) either violated the public trust doctrine, CP 370-72, or that it did not apply to give consent to the impairment of public navigation caused by this fill. CP 1358-62, 1462. The trial court granted summary judgment on the latter grounds, concluding that the fill was outside the statutory consent because it impaired public navigation on the portion of the lake occupied by the fill. CP 1618-22. This Court reviews summary judgment de novo. *Weden v. San Juan County*, 135 Wn.2d 678, 689, 958 P.2d 273 (1998). Whether RCW 90.58.270(1) is invalid under the public trust doctrine is reviewed de novo. *Weden*, 135 Wn.2d at 696-97.

IV. THE STATUTORY CONSENT APPLIES TO THE THREE FINGERS FILL, BARS A *WILBOUR* CLAIM, AND DOES NOT VIOLATE THE PUBLIC TRUST DOCTRINE

A. *Wilbour* Recognizes That Legislative Action Can and Should Decide When and Where Fill May Exist in Public Waters.

The starting place for analyzing CBC's claim about the consent statute is *Wilbour*. *Wilbour* observed that two fills along Lake Chelan "constitute an obstruction to navigation." *Wilbour*, 77 Wn.2d at 313. The Court held that the individual landowner had no right to obstruct public navigation and corollary public uses of the lake waters. *Id.* at 314-16 (public can go "where the navigable waters go"). The court remanded

“with instructions to abate the fills made by the defendants insofar as they interfere with the rights of navigation, primary and corollary[.]” *Id.* at 318.

Wilbour relies on the fact that neither state nor local government authorized the two fills or the resulting displacement of public navigation. The Court even complained that state and local government were absent, observing that such lawmakers should decide “what, if any, and where, if at all, fills and structures are to be permitted (and under what conditions)[.]” *Id.* at 318, n.13. Clearly, government could establish “areas within which fills could be made, together with carefully planned zoning by appropriate authorities to preserve” public interests in navigation. *Id.* The Court thus expressed “reluctance” to order abatement “since there have been other fills in the neighborhood about which there has apparently been no protest.” *Id.* “[U]ndoubtedly” there are “places on the shore of the lake where developments, such as those of the defendants, would be desirable and appropriate.” *Id.* But, given the lack of governmental consent to the effect on public navigation, *Wilbour* held that it “cannot authorize or approve an obstruction to navigation.” *Id.* at 318.

CBC quotes *Wilbour* to imply that *all* courts must abate *all* obstructions to public navigation. Pet. at 2. That is not required by *Wilbour* or any Washington case law. On several occasions, the Court has recognized that other laws can authorize development affecting navigable

waters. *Eastlake Comty. Coun. v. Roanoke Assocs., Inc.*, 82 Wn.2d 475, 501, 513 P.2d 36 (1974); *Portage Bay-Roanoke Park Cmty. Coun. v. Shorelines Hearings Bd.*, 92 Wn.2d 1, 4, 593 P.2d 151, 153 (1979); *Caminiti v. Boyle*, 107 Wn.2d 662, 670, 732 P.2d 989 (1987); *Orion v. State*, 109 Wn.2d 621, 627, 747 P.2d 1062 (1987); *see also* RCW 90.58.030(3)(a) (“fill” can be permitted under the SMA). The SMA, passed in response to *Wilbour*, is such a law.

B. RCW 90.58.270(1) Consented to Impairment of Public Navigational Uses by Historic Fill.

CBC’s claim seeks to apply *Wilbour*. Pet. at 2, 8; CP 3-4, 10 (Complaint); CP 1358-62, 1462 (CBC Summary Judgment). To do so, CBC must avoid the response to *Wilbour* in RCW 90.58.270(1):

Nothing in this section shall constitute authority for requiring or ordering the removal of any structures, improvements, docks, fills, or developments placed in navigable waters prior to December 4, 1969, *and the consent and authorization of the state of Washington to the impairment of public rights of navigation, and corollary rights incidental thereto*, caused by the retention and maintenance of said structures, improvements, docks, fills or developments *are hereby granted*[.] [Emphasis added]

CBC claims that it avoids this consent based on a proviso:

PROVIDED, That the consent herein given shall not relate to any structures, improvements, docks, fills, or developments placed on tidelands, shorelands, or beds underlying said waters which *are in trespass or in violation of state statutes*. [Emphasis added.]

According to CBC, the Three Fingers impaired public navigation at that spot before December 4, 1969. CP 1361, 1462. Thus, the fill triggered the proviso because it historically violated statutes that define unlawfully blocking a lake as a possible nuisance. RCW 7.48.120 (“unlawfully doing an act . . . which . . . interferes with, obstructs or tends to obstruct . . . any lake”); RCW 7.48.140(3) (public nuisance to “obstruct or impede, without legal authority, the passage of any . . . collection of water . . .”). The trial court agreed. CP 1620-22 (Opinion); CP 1615 (Order). This Court should reject CBC’s construction of the proviso.

1. Plain Language Confirms the State’s Interpretation That the Consent Applies to the Three Fingers Notwithstanding the Proviso.

The statute consents to impairment of public navigation and corollary rights. It is undeniable that the statute responded to *Wilbour*—it uses the date of *Wilbour* (December 4, 1969) to define the universe of established uses protected by the statute. It mirrors *Wilbour*’s language and consents to “impairment of public rights of navigation” and “corollary rights.” This provides the legislative approval lacking in *Wilbour* and bars a *Wilbour* claim. Fills covered by the consent are not subject to abatement as unauthorized impairments to public navigation.

Subsection (2) makes this intent clear by providing that nothing in the statute should abridge rights of action “other than a private right which

is based upon impairment of public rights consented to in subsection (1) of this section.” Thus, the consent abridges a private right of action based on impairment of public rights of navigation—like CBC’s claim. Subsection (4) emphasizes that the consent applies to “any case” after 1971 that seeks “removal of . . . fills, or developments *based on the impairment of public navigational rights.*” RCW 90.58.270(4) (emphasis added). Again, the consent is intended to bar a claim like CBC’s to abate historical fill based on impairment of public navigational rights.

CBC’s theory, which the trial court followed, is the fill impaired public navigation as of 1969 and violated RCW 7.48.120 and .140(3) at that time. Pet. at 18; CP 1358-61, 1460-62, 1618-22. That interpretation of the proviso means that the historic need for legislative consent would always be the reason such fill was “in violation of state statutes” under the proviso. Under CBC’s argument, statutory consent would never apply to fill that needs it to avoid a *Wilbour* claim—an absurd result to be avoided. *Estate of Bunch v. McGraw Residential Ctr.*, 174 Wn.2d 425, 433, 275 P.3d 1119 (2012) (court’s “duty to avoid absurd results”).

A proper construction of the proviso starts from the principle that “[p]rovisos operate as limitations upon or exceptions to the general terms of the statute” and “should be strictly construed with any doubt to be resolved in favor of the general provisions, rather than the exceptions.”

Wash. State Leg. v. Lowry, 131 Wn.2d 309, 327, 931 P.2d 885 (1997) (internal quotation omitted). This requires reading the proviso in context. In context, the statute gives consent to past development to avoid a *Wilbour* claim. RCW 90.58.270(1), (2), (4). That context shows that proviso cannot be triggered solely by *past need* for consent.

Next, the proviso is concerned with ongoing trespass or violation of statute—something that is “in trespass” or “in violation of state statutes.” Because the “statutory language is in the present or future tenses, the statute is interpreted to apply only prospectively.” *Pettis v. State*, 98 Wn. App. 553, 561, 990 P.2d 453 (1999). Read prospectively, the proviso denies consent to an ongoing trespass or statutory violation—developments that “*are . . . in trespass or in violation of state statutes.*”

The trial court imagined the proviso called for a retroactive review for violations that existed on December 4, 1969, and thus denied consent to this fill, which arguably violated RCW 7.48 on that day. CP 1618-22. But prospective application of the proviso serves the general goal of providing consent, because the proviso is triggered by an ongoing trespass or statutory violation not defined by the need for consent.

The Court should therefore reject CBC’s interpretation. The proviso should be triggered, and consent denied, only for ongoing trespass or violations of statutes. The summary judgment for CBC was error

because it relied on a misinterpretation of the proviso contrary to the language and intent of the consent statute.

2. CBC's Argument Defies Legislative Intent and Popular Understanding That the SMA Would Limit *Wilbour*.

The SMA clearly intended to limit future *Wilbour* actions. A key architect of the SMA, Senator Gissberg, explained in a colloquy that section .270 was intended to be “a savings clause” for certain pre-*Wilbour* developments in navigable water.³ When the Legislature referred the SMA (“Measure 43B”) and a competing measure (“Measure 43”) for a vote, the Voter’s Pamphlet described how the SMA consented “to the impairment of public navigational rights by the retention of certain existing improvements” but how the alternative proposal would not. Appendix (pamphlet at 108). *See also* Crooks, *supra*, 49 Wash. L. Rev. at 461 (RCW 90.58.270(1) “precludes new *Lake Chelan*-type actions against most existing uses”); Opening Br. of State at 25-29. Thus, legislative history strongly supports a construction of the consent that bars CBC’s *Wilbour* claim.

³ Sharon A. Boswell, *William A. Gissberg, An Oral History*, The Washington State Oral History Program, Office of the Secretary of State, 52-53, <https://www.sos.wa.gov/legacy/collection/pdf/gissberg.pdf>; 1 Senate Journal, 42d Leg., 1st Ex. Sess., at 1411 (Wash. 1971).

3. The State Interpretation of “Are in Trespass or in Violation of State Statutes” Gives the Proviso Effect.

CBC claims the State leaves the proviso meaningless. But the proviso ensures there can still be a *Wilbour* action where a structure or development is in trespass.⁴ Second, the phrase “in violation of state statutes” preserves a *Wilbour* action when there is a violation of a host of statutes that govern development in navigable waters.⁵ Thus, the proviso limits the consent so that it does not protect fill in trespass or in violation of law, and is far from meaningless under the State’s reading.

In another inaccurate statement, CBC claims the State’s position means that pre-1969 fill can “never” be a nuisance. Pet. at 4. But the statute does not consent to development in trespass or in violation of statute and therefore allows nuisance and *Wilbour* claims when the proviso is triggered. Second, the statute has no effect on nuisance claims based on something other than citing *Wilbour* to abate fill or structures in the public waters as CBC has done. RCW 90.58.270(3) (preserving rights of action). The State’s construction of the proviso does not prevent a claim that fill is

⁴ The importance of denying consent to structures in trespass is clear. The State owns about 70 percent of freshwater shorelands, 50 percent of tidelands, and nearly all the submerged beds of navigable waters. *Caminiti*, 107 Wn.2d at 666 (history of state sales); *Draper Mach. Works, Inc. v. Dep’t of Nat. Res.*, 117 Wn.2d 306, 313-15, 815 P.2d 770 (1991) (history). Absent authorization, a structure on public aquatic lands can trespass. RCW 79.105.210(4) (power to lease); WAC 332-30-127(1)(a) (interference with public use requires authorization); RCW 79.02.300 (trespass remedies).

⁵ The State discusses numerous such statutes in its Court of Appeals Reply Brief at page 6. For example, an obstruction could violate the statute that requires fishways and fall within the proviso. Laws of 1949, ch. 112, § 47 (codified at RCW 77.57.030).

a nuisance in fact for other reasons, consistent with *Grundy v. Thurston County*, 155 Wn.2d 1, 7 n.5, 958 P.3d 1089 (2005). It just bars CBC's claim based on impairment of public navigation.

4. Nuisance Statutes Are Not Violated by an Impairment of Public Navigation Authorized by Law.

The nuisance statutes support this reading of RCW 90.58.270. For example, RCW 7.48.120 refers to “*unlawfully* doing an act . . . which . . . obstructs or tends to obstruct . . . any lake . . .” (emphasis added). RCW 7.48.140(3) provides that the public nuisance there arises when an obstruction is done “without legal authority.” RCW 7.48.160 confirms that “[n]othing which is done or maintained under the express authorization of a statute can be deemed a nuisance.” When the consent statute is applied consistent with context and rules limiting provisos, the fill is not “in violation” of a nuisance statute. The proviso is not triggered.

C. Giving Consent in RCW 90.58.270(1) to Bar *Wilbour* Claims Does Not Violate the Public Trust Doctrine.

This Court in *Caminiti* recognized that legislative action could violate the public trust doctrine, then upheld a statute allowing private docks on state-owned aquatic land without payment. In describing this potential basis for invalidation, the opinion examined common law principles for aquatic lands in the United States: how such lands have attributes of private land (the “*jus privatum*”) as well as public use rights

called the “*jus publicum*.” *Caminiti*, 107 Wn.2d at 668. The *jus publicum* describes public rights “of navigation, together with its incidental rights of fishing, boating, swimming, water skiing, and other related recreational purposes . . .” *Caminiti*, 107 Wn.2d at 669, quoting *Wilbour*, 77 Wn.2d at 316. These public trust rights, however, are not inviolate. They can “be lost” and they “can be disposed of without any substantial impairment of the public interest in the lands and waters remaining.” *Caminiti*, 107 Wn.2d at 670.

Caminiti set out a framework to review legislative action for consistency with the public trust doctrine:

(1) whether the State, by the questioned legislation, has given up its right of control over the *jus publicum* and (2) if so, whether by so doing the State (a) has promoted the interests of the public in the *jus publicum*, or (b) has not substantially impaired it.

Caminiti, 107 Wn.2d at 670. To this day, no Washington legislative choice concerning public navigational and other public trust uses has been found to violate the public trust doctrine under this framework. The consent in RCW 90.58.270 satisfies this framework for multiple reasons.

1. CBC Faces a Heavy Burden to Show Invalidity Under the Public Trust Doctrine.

A claim that legislation is invalid faces a heavy burden. *Cf. Sch. Dist. All. for Adequate Funding of Special Educ. v. State*, 170 Wn.2d 559,

605, 244 P.3d 1 (2010). To declare a statute unconstitutional, a court must be “fully convinced, after a searching legal analysis, that the statute violates the constitution.” *Id.* at 606 (internal quotation omitted). The public trust doctrine review outlined in *Caminiti* does not enforce an express constitutional right, but CBC’s burden is just as high.⁶

To avoid this burden, CBC misinterprets the Court’s reference to a “heightened degree of judicial scrutiny” in *Weden*, 135 Wn.2d at 698. “Heightened scrutiny” does not lessen the strong presumption of validity. It refers to applying the *Caminiti* framework. *Id.* at 698.

The framework in *Caminiti* is based on *Illinois Central Railroad Company v. Illinois*, 146 U.S. 387, 453 (1892). The Supreme Court invalidated an Illinois law that conveyed all of Chicago Harbor to a railroad, granting the railroad a strangle-hold on the city’s waterborne commerce. In contrast, the Court left undisturbed grants under which the railroad had built significant improvements in the harbor which “in no respect interfered with any useful freedom in the use of the waters of the lake for commerce, foreign, interstate or domestic.” *Id.* at 444; *see also Illinois v. Illinois Cent. R.R. Co.*, 184 U.S. 77 (1902) (private improvements consistent with public navigation rights). *See*

⁶ *E.g., Wash. State Geoduck Harvest Ass’n v. Dep’t of Nat. Res.*, 124 Wn. App. 441, 447, 101 P.3d 891 (2004) (challenger under public trust doctrine must demonstrate invalidity beyond reasonable doubt).

Joseph V. Panesko, 5 *Washington Real Property Deskbook: The Public Trust Doctrine* § 18.2 (4th ed. 2011). Properly understood, the *Caminiti/Illinois Central* framework looks for irrational action, for “abdication” of sovereign powers over the *jus publicum* generally. The framework, however, necessarily defers to reasoned legislative choices on difficult questions of aquatic land development and preservation. *Cf. Dukes v. City of New Orleans*, 427 U.S. 297, 303 (1976) (when legislative distinctions are reviewed for validity under a constitutional challenge, judicial review must assume the existence of conceivable legislative facts).

2. The SMA Statute Does Not Give Up Rights of Control Over the *Jus Publicum* and Does Not Substantially Impair the *Jus Publicum*.

The consent in the SMA does not give up control over the *jus publicum* nor substantially impair the *jus publicum*. Nor has the State conceded that point as claimed by CBC. The consent has limited effect; it merely precludes *Wilbour* claims to the extent someone might have raised a viable claim.⁷ The consent does not convey any property right, change ownership, or allow new uses without controls. The effect of the statute is so limited, it appears no one has even challenged it since 1971.

⁷ One cannot assume every *Wilbour* claim would succeed. *Wilbour* involved unique circumstances. This Court could have reached different conclusions in areas of the state where local or state decisions had permitted structures or fill. *Cf. Harris v. Hylebos Indus.*, 81 Wn.2d 770, 777-78, 505 P.2d 457 (1973) (discussing legislative intent for filling tidelands). Strong equities favored those who developed aquatic lands purchased from the State for such purposes. Corker, 45 Wash. L. Rev. at 73.

This limit on potential *Wilbour* claims is not a loss of control over the *jus publicum*, and clearly not a substantial impairment, both of which are needed to violate the public trust doctrine under *Caminiti*. The framework for review does not examine the loss of one *jus publicum* use at a granular level. *Orion*, 109 Wn.2d at 640 n.9 (“We do not mean to suggest that once the state conveys to a private party property subject to the trust the property will always be burdened by trust requirements.”).

3. The SMA Increases State Control Over Use and Development Affecting Navigable Waters.

Any possible effect of limiting potential *Wilbour* claims is more than offset by the control imposed on shoreline properties and public waters. Because it is premised on a simple lack of legislative authorization, a successful *Wilbour* action is a rough tool and not inherently beneficial for the overall public interest. Indeed, part of the original *Wilbour* fill still exists; it was never removed and is regulated under the SMA. *See* CP 140, 181-82. The SMA, however, requires comprehensive planning and regulation to protect and enhance the variety of public uses of navigable waters while protecting other “reasonable and appropriate uses.” *See* RCW 90.58.020. This Court has already held that the SMA both complied with and implemented the public trust doctrine requirements. *Caminiti*, 107 Wn.2d at 671 (“the requirements of the

‘public trust doctrine’ are fully met by the legislatively drawn controls imposed by the Shoreline Management Act”); *Orion*, 109 Wn.2d at 640 n.11 (“trust principles are reflected in the SMA’s underlying policy”). Thus, the state control over navigable waters resulting from the SMA independently satisfies the *Caminiti* framework.

These attributes of the SMA also fulfill the call for legislation in *Wilbour*. SMA planning and permitting responds to the concern that “the whole area around Lake Chelan . . . could be dotted with structures on fills, or stilt-like structures[.]” *Wilbour*, 77 Wn.2d at 316 n.13. By limiting *Wilbour* claims against certain historic fills, the legislation addresses sites “about which there has been no protest.” *Id.* However, under the SMA, “future and additional development along shorelines in the state” will “be carefully planned, managed, and coordinated in keeping with the public interest.” *Portage Bay-Roanoke Park Cmty. Coun.*, 92 Wn.2d at 4. Development and use must be consistent with shoreline master program regulations. *See* RCW 90.58.100.⁸

⁸ This brief cannot examine all tools available to local and state government under the SMA. The general policy of the SMA, however, is set forth in RCW 90.58.020 and allows for “the development of these shorelines in a manner which, while allowing for limited reduction of rights of the public in the navigable waters, will promote and enhance the public interest. . . .” RCW 90.58.020. The SMA uses tools like planning, zoning, and permitting to limit non-conforming uses and encourage conforming uses. RCW 90.58.100. The SMA requires planning for habitat restoration. *See* WAC 173-26-186(8)(c) (local shoreline plans shall address restoration needs). Thus, while it is not directly material to the issues before this Court, it is clear the City intends to ensure that the Three Fingers is developed and used consistent with the SMA (CP 29-57) although

Undoubtedly, the SMA “promoted the interests of the public in the jus publicum.” *Caminiti*, 107 Wn.2d at 670. This reduces CBC’s argument to a theory that the consent is too broad, or that the public trust doctrine compels the Legislature to give consent only on a case-by-case basis. Pet. at 16. CBC’s claim that broad consent causes some harm to the public trust is, however, unfounded in the record and contrary to the Court’s obligation to assume the rationality of legislation. Moreover, this Court has recognized a far more flexible public trust doctrine that gives the State “the authority to define the limits of the lands held in public trust and to recognize private rights in such lands as they see fit.” *State v. Longshore*, 141 Wn.2d 414, 427-28, 5 P.3d 1256 (2000), quoting *Phillips Petro. Co. v. Miss.*, 484 U.S. 469, 475 (1988). Indeed, *Caminiti* shows its framework can be met by a broad categorical law concerning private docks.

4. CBC’s View of the Public Trust Doctrine Is Contrary to Washington History.

The consent statute also reflects a state history of allowing fill and structures in state waters in connection with navigation and commerce. The first territorial Legislature granted rights to wharf over public tidelands for access to navigable waters. Terr. Laws of 1854, p. 357. The state constitution allows waterfront development with sales of tidelands.

permitting conditions for the site have been appealed and are at issue in a separate case (CP 197-205).

Harris, 81 Wn.2d at 775 (“The state has invited investment in these [tide] lands . . . [to] be reclaimed and put to useful purposes.”). Article XV of the Washington Constitution reserved harbor areas for public use while encouraging private development and fill of the navigable waters up to the harbor area. *Harris*, 81 Wn. 2d at 778 (“the legislature has regarded the filling and improving of first class tidelands, particularly in commercial harbors, as an aid to navigation, rather than an obstruction.”). Major fill and development occurred statewide, including, for example, with the lowering of Lake Washington. *State v. Sturtevant*, 76 Wash. 158, 135 P. 1035 (1913).⁹

Indeed, this Court addressed the doctrine as long ago as *Hill v. Newell*, 86 Wash. 227, 149 P. 951 (1915). A navigational improvement program eliminated public use of navigable waters in parts of the Duwamish River and did not violate a public trust:

It is also settled that in the administration of this trust when the plan or system of improvement or development adopted by the state for the promotion of navigation and commerce cuts off a part of these tidelands or submerged lands from the public channels, so that they are no longer useful for navigation, the state may thereupon sell and dispose of such

⁹ *City of Seattle v. Algar*, 122 Wash. 367, 210 P. 664 (1922); *Rainier Heat & Power Co. v. City of Seattle*, 113 Wash. 95, 193 P. 233 (1920); *Bussell v. Ross*, 60 Wash. 344, 111 P.165 (1910), *reheard and rev'd on other grounds*, 64 Wash. 418, 116 P. 1088 (1911).

excluded lands into private ownership or private uses, thereby destroying the public easement in such portion of the lands and giving them over to the grantee, free from public control and use.

Id., quoting *People v. Cal. Fish Co.*, 166 Cal. 576, 584, 138 P. 79 (1913).

Given Washington's history, the SMA and the limited consent in RCW 90.58.270 is a rational way to address public trust doctrine values. It protects only a limited number of properties while ensuring that future uses and development will be governed by SMA policies.

VI. CONCLUSION

The Court of Appeals' opinion correctly applied the *Caminiti* framework by examining the effect of the legislation as a whole, not by myopically examining the Three Fingers. Slip op. at 18. The consent in RCW 90.58.270 did not substantially impair control over the *jus publicum* and, in fact, imposes more public control. The statute is valid and protects the Three Fingers fill from CBC's *Wilbour* claim.

RESPECTFULLY SUBMITTED this 9th day of January, 2017.

ROBERT W. FERGUSON
Attorney General

s/Jay D. Geck

JAY D. GECK
Deputy Solicitor General
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s/Terence A. Pruit

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*Attorneys for Respondent
State of Washington*

CERTIFICATE OF SERVICE

I certify that I caused a copy of the foregoing document to be served on all parties or their counsel of record on January 9, 2017, as follows:

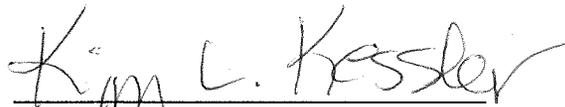
<p>Michael W. Gendler GendlerLaw PLLC 5006 Greenwood North Seattle, WA 98103 gendler@mickeygendler.com</p> <p><i>Attorney for Petitioner Chelan Basin Conservancy</i></p>	<p><input type="checkbox"/> U.S. Mail Postage Prepaid <input type="checkbox"/> Certified Mail Postage Prepaid <input type="checkbox"/> State Campus Mail <input type="checkbox"/> Hand Delivered <input type="checkbox"/> ABC Legal Messenger <input type="checkbox"/> FedEx Overnight <input checked="" type="checkbox"/> Email</p>
<p>Russell J. Speidel David J. Bentsen Speidel Law Firm PO Box 881 Wenatchee, WA 98807-0881 russ.speidel@speidellaw.com david.bentsen@speidellaw.com</p> <p><i>Attorneys for Petitioner Chelan Basin Conservancy</i></p>	<p><input type="checkbox"/> U.S. Mail Postage Prepaid <input type="checkbox"/> Certified Mail Postage Prepaid <input type="checkbox"/> State Campus Mail <input type="checkbox"/> Hand Delivered <input type="checkbox"/> ABC Legal Messenger <input type="checkbox"/> FedEx Overnight <input checked="" type="checkbox"/> Email</p>
<p>Markham A. Quehrn David S. Steele Perkins Coie LLP 10885 NE Fourth Street, Suite 700 Bellevue, WA 98004-5579 MQuehrn@perkinscoie.com DSteele@perkinscoie.com</p> <p><i>Attorneys for Respondent GBI Holding Co.</i></p>	<p><input type="checkbox"/> U.S. Mail Postage Prepaid <input type="checkbox"/> Certified Mail Postage Prepaid <input type="checkbox"/> State Campus Mail <input type="checkbox"/> Hand Delivered <input type="checkbox"/> ABC Legal Messenger <input type="checkbox"/> FedEx Overnight <input checked="" type="checkbox"/> Email</p>

<p>John Kirk Bromiley Bromiley Law, PLLC 227 Ohme Garden Road Wenatchee, WA 98801-9047 kirk@bromileylaw.com</p> <p><i>Attorney for Respondent GBI Holding Co.</i></p>	<p><input type="checkbox"/> U.S. Mail Postage Prepaid <input type="checkbox"/> Certified Mail Postage Prepaid <input type="checkbox"/> State Campus Mail <input type="checkbox"/> Hand Delivered <input type="checkbox"/> ABC Legal Messenger <input type="checkbox"/> FedEx Overnight <input checked="" type="checkbox"/> Email</p>
<p>Nick Lofing Davis, Arneil Law Firm, LLP PO Box 2136 Wenatchee, WA 98801 nick@dadkp.com</p> <p><i>Attorney for Respondent City of Chelan</i></p>	<p><input type="checkbox"/> U.S. Mail Postage Prepaid <input type="checkbox"/> Certified Mail Postage Prepaid <input type="checkbox"/> State Campus Mail <input type="checkbox"/> Hand Delivered <input type="checkbox"/> ABC Legal Messenger <input type="checkbox"/> FedEx Overnight <input checked="" type="checkbox"/> Email</p>
<p>Allan Galbraith Allan Galbraith, PLLC 949 Wheeler Hill Road Wenatchee, WA 98801-9705 allan@hillatty.com</p> <p><i>Attorney for Respondent City of Chelan</i></p>	<p><input type="checkbox"/> U.S. Mail Postage Prepaid <input type="checkbox"/> Certified Mail Postage Prepaid <input type="checkbox"/> State Campus Mail <input type="checkbox"/> Hand Delivered <input type="checkbox"/> ABC Legal Messenger <input type="checkbox"/> FedEx Overnight <input checked="" type="checkbox"/> Email</p>
<p>Kenneth W. Harper Menke Jackson Beyer Ehlis & Harper LLP 807 North 39th Avenue Yakima, WA 98902 kharper@mjbe.com</p> <p><i>Attorney for Respondent City of Chelan</i></p>	<p><input checked="" type="checkbox"/> U.S. Mail Postage Prepaid <input type="checkbox"/> Certified Mail Postage Prepaid <input type="checkbox"/> State Campus Mail <input type="checkbox"/> Hand Delivered <input type="checkbox"/> ABC Legal Messenger <input type="checkbox"/> FedEx Overnight <input checked="" type="checkbox"/> Email</p>

<p>Erik K. Wahlquist PUD No. 1 of Chelan County PO Box 1231 Wenatchee, WA 98807-1231 erik.wahlquist@chelanpud.org</p> <p><i>Attorney for Chelan County PUD No. 1</i></p>	<p><input type="checkbox"/> U.S. Mail Postage Prepaid <input type="checkbox"/> Certified Mail Postage Prepaid <input type="checkbox"/> State Campus Mail <input type="checkbox"/> Hand Delivered <input type="checkbox"/> ABC Legal Messenger <input type="checkbox"/> FedEx Overnight <input checked="" type="checkbox"/> Email</p>
<p>John Maurice Groen Pacific Legal Foundation 930 G Street Sacramento, CA 95814-1802 jmg@pacificlegal.org</p> <p><i>Attorney for Amicus Curiae Pacific Legal Foundation</i></p>	<p><input type="checkbox"/> U.S. Mail Postage Prepaid <input type="checkbox"/> Certified Mail Postage Prepaid <input type="checkbox"/> State Campus Mail <input type="checkbox"/> Hand Delivered <input type="checkbox"/> ABC Legal Messenger <input type="checkbox"/> FedEx Overnight <input checked="" type="checkbox"/> Email</p>

I certify under penalty of perjury, under the laws of the State of Washington, that the foregoing is true and correct.

DATED this 9th day of January, 2017, at Olympia, Washington.

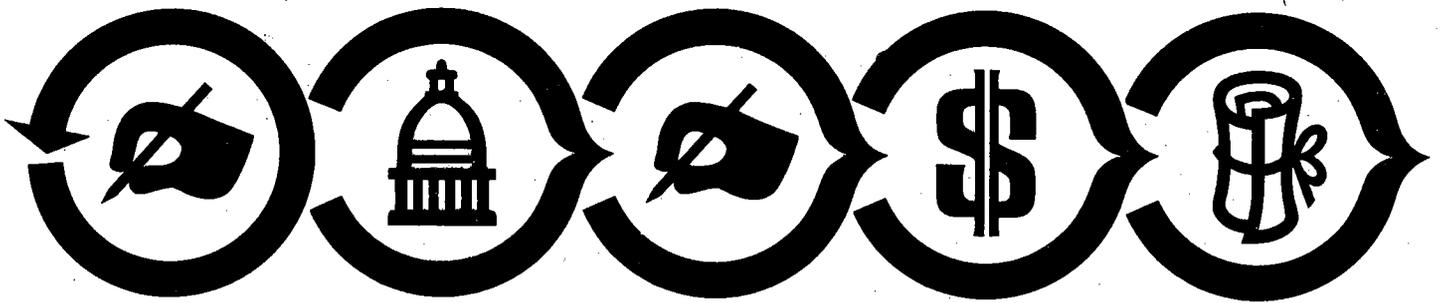


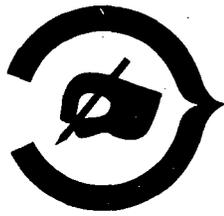
KIM L. KESSLER
Legal Assistant
Natural Resources Division

APPENDIX

Official Voters Pamphlet

Published by A. Ludlow Kramer, Secretary of State
General Election Tuesday, November 7, 1972





Initiative Measure 43

To the Legislature

NOTE: New special toll-free telephone service offered to voters requesting in-depth information on state measures. See page 5 for details.

Regulating Shoreline Use and Development

AN ACT relating to the use and development of salt and fresh water shoreline areas, including lands located within 500 feet of ordinary high tide or high water and certain wetlands; requiring the State Ecological Commission, with the advice of regional citizens councils, to adopt a state-wide regulatory plan for these areas; requiring cities and counties to adopt plans to regulate shoreline areas not covered by the state plan; requiring both local and state-wide plans to be based upon considerations of conservation, recreation, economic development and public access; and providing both civil and criminal remedies for violations of the act.

Statement for

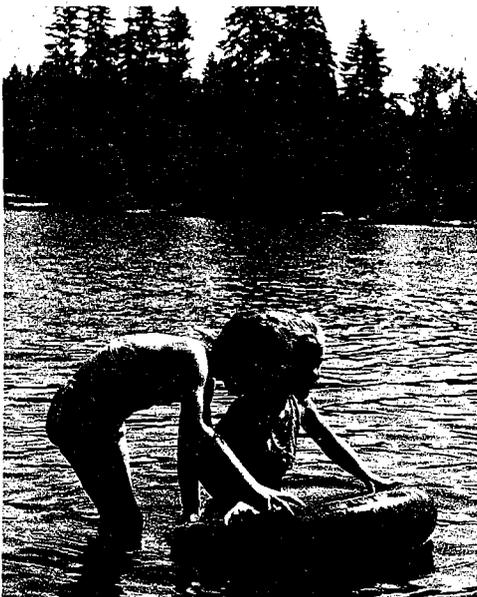
Initiative 43, the peoples' shorelines act, signed by 160,000 Washington citizens, will preserve our saltwater and fresh-water shorelines for ourselves—and future generations.

Initiative 43 *will not* grant anyone access to your private property, confiscate or condemn private property, or dis-

courage economic expansion. Initiative 43 *will* ensure that future shoreline development will be planned, with direct citizen participation, so that all private, commercial, industrial and recreational shoreline use will be in the best interest of all Washington residents.

The Future of Washington's Shorelines:

THIS?



OR THIS?



Committee appointed **FOR** Initiative Measure No. 43:

PETE FRANCIS, State Senator; GEORGE W. SCOTT, State Senator; WILLIAM "BILL" CHATALAS, State Representative.

Advisory Committee: THOS. O. WIMMER, Chairman, Initiative 43 Committee, Seattle; LEW BELL, Member and Former Chairman, Intergency Committee for Outdoor Recreation, Everett; JOHN F. FLETCHER, Richland Rod and Gun Club, Kennewick; BARBARA JACOBS, State Implementation Chairman, American Association of University Women, Moses Lake; DOROTHY MORRELL, 1971 Environmentalist of the Year, Washington Environmental Council, Bellevue. JOAN THOMAS, President, Washington Environmental Council, Seattle.

The Law as it now exists:

At the present time, a state-wide shoreline management program is provided for by a law entitled the "Shoreline Management Act of 1971" which was passed by the 1971 legislature. This law was enacted as an alternative to a proposed shoreline management law entitled the "Shoreline Protection Act" which had been submitted to the legislature as Initiative Measure 43 under the provisions of our state constitution. In enacting this law the legislature placed it into effect on June 1, 1971. However, the legislature further provided, as is required by the constitution, that this measure be submitted to the voters at the 1972 general election as an alternative to Initiative Measure 43 and would remain in effect thereafter only if approved at that election.

This legislative alternative is now designated as Alternative Measure 43B, and is explained on the next two pages of this voters' pamphlet. Under the constitution, all voters will have an opportunity:

(1) To vote, first on the question of whether either Initiative Measure 43 or Alternative Measure 43B or neither one should thereafter be effective; and then

(2) To vote their preference as between the two measures.

Even if a person first votes against both measures, he will still be able to vote a second time in order to indicate which of the two he feels is least objectionable.

If both measures are rejected, the legislature's enactment, Alternative Measure 43B, will cease to be effective and there will be no state-wide shoreline planning and regulatory law in effect in this state.

Effect of Initiative No. 43 if approved into Law:

Initiative Measure 43, if approved by the voters in the manner above described, would replace the presently effective provisions of Alternative Measure 43B.

This initiative would establish a planning and use regulation program for certain shoreline areas of the state. These areas would include the beds and water areas of all state marine waters and all streams and lakes within the state together with a 500 foot strip of adjacent areas extending landward from the line of ordinary high tide or water.

The administration of this act would be divided between local governments and the state department of ecology and ecological commission with primary responsibility being placed in these state agencies. The act would provide for state development and approval of comprehensive plans for all shoreline areas of the state (except lakes under 20 acres in size and streams that are nonnavigable for public use) within 36 months of its effective date. It also would provide for state administration of a permit system relating to various types of developments.

In developing comprehensive plans the department of ecology would be advised by seven or more regional citizens' councils each having a membership of more than 30. It would be the initial responsibility of local governments to enact legislation for the management and protection of the small lakes and streams not covered by comprehensive plans adopted by the state. In addition, under certain circumstances, local governments would be al-

(Continued on Page 108)

NOTE: Ballot title and the above explanatory comment were written by the Attorney General as required by state law. Complete text of Initiative Measure No. 43 starts on Page 88.

Statement against

Reasonable Supervision of Our Waters—YES

There is little disagreement relative to the need for some regulation of property abutting our states' sea shores, inland waterways, lakes and rivers. We all want to keep these waters as clean and pure as is reasonably possible. Some regulation may also be indicated to control the construction of buildings which might adversely affect adjoining property or docks and sea walls which constitute hazards to navigation. This type of reasonable, responsible legislation can and will be written following the defeat of both Initiative 43 and Alternative 43B.

More Super-Agencies and Dictatorial Powers—NO

Initiative 43 represents a "gigantic overkill" on the part of its well-meaning and concerned drafters. Passage of Initiative 43 would give to the Department of Ecology virtually dictatorial control over all lands within 500 feet of the high water level of essentially all bodies of water—lakes, rivers, and streams in this state. This 500 foot control zone, in the case of low land streams subject to flooding, would in some instances extend back several times 500 feet from the normal channel. Control zones would apply to small lakes and streams and even artificial reservoirs. A strict interpretation could create the 500 foot control zone around water storage reservoirs, private ponds and, yes, even private pools.

The construction of virtually any structure in excess of \$100.00 valuation would be subject to permits from Olympia, public hearings, and waiting periods. Publication of 44 newspaper ads is required to give "reasonable public notice."

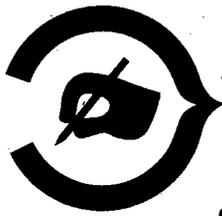
A new governmental monster would be created in the form of a State Shoreline Protection Division. Seven regional councils would be required with a minimum of 30 members

on each. The power to reasonably regulate at the local level is shifted to Olympia—another step in the destruction of local government and another infringement on the rights of the taxpaying land owner.

VOTE AGAINST INITIATIVE 43

Committee appointed to compose statement AGAINST Initiative Measure No. 43:

JAMES P. KUEHNLE, State Representative, Spokane; CHARLES E. NEWSCHWANDER, State Senator.



Alternative Measure 43B

Chapter 286, Laws of 1971
(42nd Leg., 1st Ex. Session)

NOTE: New special toll-free telephone service offered to voters requesting in-depth information on state measures. See page 5 for details.

Legislative Alternative— Shoreline Management Act

AN ACT relating to the use and development of certain salt and fresh water shoreline areas including lands located within 200 feet of the ordinary high water mark and certain other adjacent designated wetlands; establishing an integrated program of shoreline management between state and local governments; requiring local governments, pursuant to guidelines established by the state department of ecology, to develop master programs for regulating shoreline uses and providing that if they do not the department will develop and adopt such programs; granting the state's consent to certain existing impairments of public navigational rights; and providing civil and criminal sanctions.

Vote cast by members of the 1971 Legislature on final passage:

SENATE: (49 members) Yeas, 38; Nays, 9; Absent or not voting, 2.

HOUSE: (99 members) Yeas, 90; Nays, 7; Absent or not voting, 2.

Statement for

Lakes, streams and marine waters are three of Washington's most valuable natural resources. Rapidly expanding recreational means, as well as increased agricultural, domestic and industrial demands for water, must be satisfied from a fixed natural supply. The economy of many areas is dependent upon the fate of water bodies and their shoreland. The Shoreline Management Act of 1971 calls for a planned rational development of our shorelines.

The Act Doesn't Prohibit Development

The goals of the Act are to coordinate land development, to encourage development which is compatible with shoreline resources, and to discourage development which is not.

Private Property Rights and Increased Recreational Opportunities

Your property remains your own and private. There is no local or state take-over of private land.

The Act recognizes the need to improve and make available public access to public shorelines for greater recreational opportunities.

State vs. Local

The principal difference between Initiative 43 and the Shorelines Management Act 43B, lies in the delegation of responsibility. Initiative 43 gives the State control while the City and County governments have the major role under 43B.

Local governments are more likely to formulate decisions and provide the flexibility necessary in resolving critical questions within their jurisdiction than State government. The

Department of Ecology acts more as a supervisory and review agency maintaining consistency in the implementation of the Act.

Purpose of the Act

Uncontrolled development on shorelines may ultimately result in blighted recreational, agricultural and industrial areas. This Act attempts to meet these development problems in order to preserve our waters and shorelines for future generations.

Committee appointed to compose statement FOR Alternative Measure No. 43B:

WILLIAM A. GISSBERG (D), State Senator; AXEL C. JULIN (R), State Representative; AVERY GARRETT, Immediate Past President, Association of Washington Cities and Chairman, Shoreline Committee for 43B.

Advisory Committee: JOE DAVIS, President, Washington State Labor Council, AFL-CIO; LUKE WILLIAMS, JR., Chairman, Washington State Commission for Expo '74, Spokane, MRS. EVERETT GRIGGS, Tomolla Tree Farm, Graham; CLIFF ONGSARD, Chairman, Board of Yakima County Commissioners; C. W. DAVIDSON, Legislative Chairman, Northwest Marine Industries, c/o Davidson's Marina, Kenmore.

The Law as it now exists:

At the present time, a state-wide shoreline management program is provided for by a law entitled the "Shoreline Management Act of 1971" which was passed by the 1971 legislature. This law was enacted as an alternative to a proposed shoreline management law entitled the "Shoreline Protection Act" which has been submitted to the legislature as Initiative Measure 43 under the provisions of our state constitution and is explained in the preceding two pages of this voters' pamphlet. In enacting this alternative measure, the legislature placed it into effect on June 1, 1971. However, the legislature further provided, as is required by the constitution, that this law be submitted to the voters at the 1972 general election as an alternative to Initiative Measure 43 and would remain in effect thereafter only if approved at that election.

This legislative enactment is now designated Alternative Measure 43B. Under the constitution, all voters will have an opportunity:

(1) To vote, first on the question of whether either Initiative Measure 43 or Alternative Measure 43B or neither one should thereafter be effective; and then

(2) To vote their preference as between the two measures.

Even if a person first votes against both measures, he will still be able to vote again to indicate which of the two he least objects to.

If both measures are rejected, the legislature's enactment, Alternative Measure 43B, will cease to be effective and there will be no state-wide shoreline planning and regulatory law in effect in this state.

Effect of Alternative No. 43B if approved into Law:

Because Alternative Measure 43B is the 1971 legislature's shorelines management enactment, a vote for this measure will be a vote to continue the existing law in effect.

This measure established a planning and use regulation program for certain shoreline areas of the state. These include beds and water areas of all state marine waters, segments of streams having mean annual flows of more than 20 cubic feet per second, lakes of more than 20 surface acres, together with a 200 foot strip of adjacent areas (designated wetlands) extending landward from the ordinary high water mark, and other low lying areas.

The administration of the act is divided between local governments and the department of ecology. Primary responsibilities of the department of ecology include the preparation of guidelines for the development of master programs for shoreline use and the review and approval of such programs when submitted by local governments. The responsibilities of local governments include the preparation of such master programs and of inventories of the regulated areas together with the administration of a permit system pertaining to certain developments in the regulated areas. However, if a local government does not prepare this master program and inventory the department is responsible for their preparation.

The act prohibits surface drilling for oil in Puget Sound and the Straits of Juan de Fuca and adjacent uplands landward 1000 feet from the ordinary

(Continued on Page 108)

NOTE: *Ballot title and the above explanatory comment were written by the Attorney General as required by state law. Complete text of Alternative Measure No. 43b starts on Page 93.*

Statement against

Those of us who oppose Initiative 43B regard the measure only slightly preferable to Initiative 43. Although it is still a violation of private property rights it allows local officials to perform the function of permit issuing and enforcement subject to overruling by State authorities.

It is interesting to note that both of these ballot measures started out to be "Sea Coast Management" bills. Only when their intended effect was expanded to include the entire State of Washington did they get the designation "Shoreline Protection Bills".

The environmentalists managed to amend the bills until they included streams, rivers, lakes and even bodies which some of us would call puddles, plus adjacent areas in all directions (500 feet on 43 and 200 feet on 43B). With the voters' approval of either of these bills, bureaucracy will take over an area of personal rights that has been inherent since the founding of our Republic. In its present form it is "strip zoning" directed toward owners of ocean-lake-river-stream-or-trickle property, restricting their rights to build on or do what they please with their own property. But in the future the so-called planners intend to recommend similar legislation for land use management for all land in the State. (Spokane Chronicle quoting commission member Francis Schadegg, April 28, 1972)

Voters should take a real hard look at this legislation. If they do, they will recognize it as one more attempt to take away more privileges of American citizenship. They should vote No! on both so-called shoreline bills and devote a reluctant designation of 43B as the least unpalatable of the two.

MOST IMPORTANT OF ALL, VOTE NO ON THE FIRST QUESTION ON THE BALLOT—WHICH WILL INDICATE OPPOSITION TO BOTH OF THESE PROPOSITIONS.

Committee appointed to compose statement AGAINST Alternative Measure No. 43B.

CARLTON A. GLADDER, State Representative; CHARLES E. NEWSCHWANDER, State Senator.

cially provided for shall be punished by a fine of not more than ten dollars for each such violation.

NEW SECTION. Sec. 24. The following acts are each hereby repealed:

(1) Section 1, chapter 36, Laws of 1909, section 1, chapter 73, Laws of 1931, section 49, chapter 281, Laws of 1969 ex. sess. and RCW 9.61.120;

(2) Section 2, chapter 85, Laws of 1967 and RCW 9.66.060;

(3) Section 3, chapter 85, Laws of 1967, section 50, chapter 281, Laws of 1969 ex. sess. and RCW 9.66.070;

(4) Section 2, chapter 52, Laws of 1965, section 51, chapter 281, Laws of 1969 ex. sess. and RCW 46.61.650.

NEW SECTION. Sec. 25. If any provision of this 1971 amendatory act or its application to any person or circumstance is held invalid, the remainder of the act, or the application of the provisions to other persons or circumstances is not affected.

NEW SECTION. Sec. 26. This 1971 amendatory act is necessary for the immediate preservation of the public peace, health and safety, the support of the state government and its existing public institutions, and shall take effect immediately.

NEW SECTION. Sec. 27. This 1971 amendatory act constitutes an alternative to Initiative 40. The secretary of state is directed to place this 1971 amendatory act on the ballot in conjunction with Initiative 40 at the next general election.

This 1971 amendatory act shall continue in force and effect until the secretary of state certifies the election results on this 1971 amendatory act. If affirmatively approved at the general election, this 1971 amendatory act shall continue in effect thereafter.

Passed the Senate May 10, 1971.

Passed the House May 10, 1971.

Approved by the Governor May 21, 1971 with the exception of one item which is vetoed.

Filed in Office of Secretary of State May 21, 1971.

NOTE: Governor's explanation of partial veto is as follows:

VETO MESSAGE

"... This bill is a comprehensive litter control act. It established new litter control powers in the Department of Ecology, and imposes a tax upon those businesses which produce or sell items relating to the litter problem, in order to finance the administration of the act. However, by reason of the fact that the definition of "person" in section 3(7) includes state and local government, the act would by its terms impose the tax upon the State Liquor Control Board, and possibly upon certain local governmental agencies. I believe this result to be unwarranted, and accordingly have vetoed that item from section 3(7) of the act.

With the exception of the above item, Engrossed Senate Bill No. 428 is approved."

COMPLETE TEXT OF

Initiative Measure

43

Initiative Measure To The Legislature

Ballot Title as issued by the Attorney General:

Regulating Shoreline Use and Development

AN ACT relating to the use and development of salt and fresh water shoreline areas, including lands located within 500 feet of ordinary high tide or high water and certain wetlands; requiring the State Ecological Commission, with the advice of regional citizens councils, to adopt a state-wide regulatory plan for these areas; requiring cities and counties to adopt plans to regulate shoreline areas not covered by the state plan; requiring both local and state-wide plans to be based upon considerations of conservation, recreation, economic development and public access; and providing both civil and criminal remedies for violations of the act.

BE IT ENACTED, *by the people*
of the State of Washington:

SECTION 1. Title. This act shall be known and cited as the "Shorelines Protection Act."

SECTION 2. Declaration of Policy. The people of the state of Washington hereby find and declare:

(1) That the saltwater and freshwater shoreline areas of this state are held in public trust for all the people of the state and their descendants; and that they are a valuable and endangered natural resource;

(2) That the present pattern of haphazard, inappropriate and uncoordinated development of the shorelines is:

(a) Threatening the public health, safety, welfare, comfort and convenience;

(b) Diminishing the values of the shorelines held in trust;

(c) Destroying the ecological balance of plant and animal communities;

(d) Reducing open space available for public recreation and esthetic enjoyment;

(e) Diminishing the capacity of lands and waters to produce food;

(f) Diminishing public access to publicly owned shoreline areas;

(g) Obstructing the view of the shorelines;

(h) Increasing air, water, solid waste, noise, visual and other pollution;

(i) Preventing the existence and development of properly situated and designed commercial and industrial developments requiring location in the shoreline areas;

(j) Reducing present and future job opportunities for the people of this state;

(k) Limiting public navigation;

(l) Reducing the value of private property;

(m) Reducing the attractiveness of the state to tourists, thereby jeopardizing an important state industry.

(3) That the adoption, implementation and enforcement of a comprehensive plan for the shorelines will have a significantly beneficial effect on the preservation and development of the shorelines for the public good.

(4) That for the public health, safety, welfare, comfort and convenience, it shall be the policy of the state to develop, establish and implement a comprehensive planning and permit system for the shorelines of the state of Washington to accomplish the following goals:

(a) Protection of the natural resources and natural beauty of the shoreline areas;

(b) Provision of appropriate locations for aquaculture and for commercial and industrial developments requiring location on the shoreline;

(c) Protection of the public's right to an unpolluted and tranquil environment;

(d) Provision for and protection of public access to publicly owned shoreline areas;

(e) Minimization of interference with view rights;

(f) Regulation of signs and illumination in the shoreline areas;

(g) Minimization of interference with the public's right to navigation and outdoor recreational opportunities;

(h) Protection and development of the capacity of the shoreline areas for the production of food resources;

(i) Conservation and enhancement of the natural growth of fish and wildlife;

(j) Preservation of areas of historic, cultural, scientific, and educational importance;

(k) Regulation of access to and traffic in the shoreline areas by motor vehicles and motor-craft;

(l) Fulfillment of the responsibilities of each generation as the trustee of the shoreline areas for succeeding generations;

(5) That in planning for and in guiding the changing environments of the shoreline area it shall be the policy of the state to give preference to:

(a) Long term benefits over short term benefits;

(b) Statewide or regional interests over local interests;

(c) Natural environments over man-made environments;

(d) The location of industrial and commercial facilities in existing developed industrial or commercial areas over their location in undeveloped, rural or residential areas of the shoreline, in order that as great a portion of the shorelines as possible may remain in a natural and nonintensively used condition, and that existing commercial and industrial areas may be grouped, renewed and restored.

SECTION 3. Definitions. As used in this act:

(1) "Saltwater shoreline" and "saltwater shoreline area" mean:

(a) All areas of land or water extending seaward to the outer limits of the state's seaward jurisdiction from the line of ordinary high tide, including but not limited to: beds, submerged lands, tidelands; harbors, bays, bogs, channels, canals, estuaries, sounds, straits, inlets, sloughs, salt marshes; those ponds, pools and wetlands that are contiguous to or have been divided off from tidal waters; and all rock and minerals beneath these lands and waters.

(b) Those lands extending landward for 500 feet in all directions as measured on a horizontal plane from the line of ordinary high tide as such line now or hereafter may from any cause be located.

(2) "Freshwater shoreline" and "freshwater shoreline area" mean:

(a) All areas of land or water up to the line of ordinary high water of a river, lake or reservoir, including, but not limited to: beds, submerged lands, banks; marshes, bays, bogs, harbors, channels, canals, straits, deltas, inlets, sloughs; and all rock and minerals beneath these lands and waters.

(b) Those lands adjoining any river, lake, or reservoir extending landward for 500 feet in all directions as measured on a horizontal plane from the line of ordinary high water as said line now or hereafter may from any cause be located.

(3) "Shoreline" and "shoreline area" mean both saltwater shorelines and freshwater shorelines.

(4) "River" means any flowing body of water or portion

thereof including rivers, streams and creeks, but shall not include artificially constructed waterways used principally for carrying water for uses for which a legal appropriation of water exists.

(5) "Lake" means a natural or man-made inland body of standing water in a depression of land.

(6) "Line of ordinary high tide" and "line of ordinary high water" mean the line which the water impresses on the soil by covering it for sufficient periods to deprive the soil of vegetation. In any area where the line of ordinary high tide or the line of ordinary high water cannot be determined, the line of ordinary high tide shall be the line of mean higher high tide and the line of ordinary high water shall be the line of mean high water.

(7) "Navigable for public use" means having sufficient water at any time during the year to float a device or craft now or hereafter used by the public for transportation in pursuit of commercial or recreational activity.

(8) "Department" means the department of ecology.

(9) "Director" means the director of the department of ecology.

(10) "Commission" means the ecological commission.

(11) "Council" means regional citizens' council.

(12) "Owner" means holder of a legal or equitable interest in property.

(13) "Local government" means cities, counties, public utility districts, port districts, or other municipal corporations and regional planning authorities.

(14) "Person" means an individual, partnership and any organization, or officer thereof, which shall include a corporation, association, cooperative, municipal corporation, federal, state or local governmental agency, or any two or more of the foregoing.

(15) "Development" means the division of land after the effective date of this act into two or more lots, tracts, parcels, sites or divisions for the purpose of sale, lease or transfer; and the following projects commenced or altered after the effective date of this act for which either the fair market value or cost, including the cost of surveying and engineering, is in excess of \$100 in any one-year period: draining, dredging, excavating, removing of soil, mud, sand, stones or gravel; dumping, filling or depositing of any soil, mud, sand, stones, gravel, manufactured items or rubbish, driving of pilings or placing of obstructions, commercial boring, drilling, testing or exploring for any minerals, including oil and/or gas, the logging or cutting of timber for commercial purposes, the erecting or exterior alteration of a structure of any kind, or any combination of the foregoing.

(16) "Substantial development" means the division of ten or more acres of land after the effective date of this act into two or more lots, tracts, parcels, sites or divisions for the purpose of sale, lease or transfer, and any development as defined in subsection (15) herein for which either the fair market value or cost, including the cost of surveying and engineering, is in excess of \$50,000 in any one-year period.

(17) "Reasonable public notice" means notice in writing to any person who has requested such notice at least one month prior to the specified hearing and the publication of notice at least once in each of the four weeks preceding the specified hearing, in at least one newspaper of general circulation publishing at least six days of the week in all of the following cities: Seattle, Olympia, Tacoma, Everett, Vancouver, Pasco, Wenatchee, Yakima, Spokane, and Walla Walla, Washington and Portland, Oregon; and in at least one newspaper of general circulation in each of the counties affected by the subject matter of the hearing.

SECTION 4. Application and Exemptions. This act shall apply to the saltwater and freshwater shoreline areas of the state of Washington, provided that:

(1) The planning and permit authority given in this act to

the department shall not apply to freshwater shoreline areas along and including lakes that have a water surface area smaller than twenty surface acres at all times of the year nor to freshwater shoreline areas along rivers above the upstream limit of navigability for public use as determined by the department, except as provided in section 11.

(2) An applicant receiving certification pursuant to the Thermal Power Plants Act, Chapter 45, Laws of 1970, shall not be required to obtain a permit under this act to develop a thermal power plant, associated transmission lines or an off-stream body of water pursuant to said certification.

(3) An owner of property on the effective date of this act within the shoreline area shall not be required to obtain a permit under this act to construct upon said property above the line of ordinary high tide or ordinary high water a single family residence for his own use or the use of his family.

(4) This act shall not be construed to increase or decrease public access to freshwater shoreline areas used by local governments to supply water for human consumption; and

(5) This act shall not require the removal, destruction or alteration of any structure or development existing upon the effective date of this act.

SECTION 5. Preparation of the Comprehensive Plan and Inclusion Therein of City and County Plans. The department shall prepare for consideration by the commission a comprehensive plan for the shorelines of the state of Washington which shall be in accordance with the findings and declarations of section 2 of this act.

Before preparing the comprehensive plan, the department shall study the characteristics of the saltwater and freshwater shoreline areas and adjacent areas, including quality, quantity and movement of the waters, ecological relationships within the shoreline areas and the needs of the state's population for employment, recreation and esthetic satisfaction. The department shall examine present and proposed uses of the saltwater and freshwater shoreline areas and shall consider current plans and zoning regulations of the cities and counties.

In drafting a comprehensive plan, the department shall consider plans, studies, surveys, and other information concerning saltwater and freshwater shoreline areas which have been or are being developed by federal and state agencies, local governments, private individuals or organizations, or other appropriate sources. Particular emphasis shall be placed on obtaining and using scientific information regarding the hydrology, geology, topography, ecology, and other scientific data relating to the shoreline areas. The department shall consult with officials of local governments in areas affected by the plan and with the regional citizens' councils established in this act.

Cities and counties may submit plans for the shoreline areas to the department, and where the department finds that such plans are consistent with the findings and declarations of section 2 of this act, it shall consider and may include as a part of the department's proposed comprehensive plan for any given area, any part or all of the plan submitted by a city or county.

The department's comprehensive plan shall include the following elements:

(1) A conservation element for the preservation and restoration of natural resources, including but not limited to scenic vistas, water sheds, forests, soils, fisheries, wildlife and minerals, and lands and waters giving esthetic enjoyment;

(2) A recreation element for the preservation and enlargement of recreational opportunities, including but not limited to parks, beaches, and recreational easements;

(3) An economic development element for the location and design of industries, tourist facilities, commerce and other developments that require a location in the shoreline area;

(4) A public access element for the preservation and enlargement of opportunities for public access to publicly owned shoreline areas, including but not limited to trails, ac-

cess roads, streets and highways, walkways, parking areas, and boat launching and moorage areas;

(5) An historic, cultural, scientific and educational element for the protection and restoration of buildings, sites and areas having historic, cultural, scientific or educational values;

(6) Any other element which in the opinion of the commission is necessary to the development of the comprehensive plan and to accomplish the findings and declarations of section 2 of this act.

The comprehensive plan shall contain maps and written text and shall designate on the maps and in the written text the acceptable uses and the conditions to be placed on such use or uses in each portion of the shoreline.

SECTION 6. Regional Citizens' Councils. The director shall divide the state into seven or more regions which shall contain whole counties and shall reflect the geography of the river basins and the similar nature of the shorelines among the counties within the regions. One citizens' council shall be established in each region.

The regional citizens' councils shall advise the department in the preparation of comprehensive plans for their particular regions. The councils shall cease to exist after the commission shall approve the comprehensive plan pursuant to section 7 of this act.

Each council shall be non-partisan and shall be composed of more than thirty members who shall include two members of the legislative body of each county in the region, the county executive of each county in the region having a county executive, the mayor of the largest city in each county in the region, the mayor of each city having a population in excess of 10,000 at the 1970 census in the region and a number of citizen members who are not employed by or are not officials of a city or county and who shall form a majority of the council. The citizen members shall be appointed by the governor from among the electors of the state. Members of each council shall be appointed within sixty days after the effective date of this act. One-tenth of the citizen members shall represent the statewide concern for shorelines within the region and shall not be residents of the region. Any city or county official member may appoint a representative to serve in his place on the council. Vacancies shall be filled within sixty days in the same manner as the original appointments. The chairman and vice-chairman of each council shall be appointed from among the citizen members by the governor.

The council shall meet at such times and places as shall be designated by the chairman. Members of the councils shall receive reimbursement for their travel expenses as provided in RCW 43.03.060, as now or hereafter amended.

The director may from time to time establish and dissolve additional committees and task forces composed of members of the several regional citizens' councils and/or the general public to examine and comment on specific problems, river basins, shoreline areas, or amendments to the comprehensive plan. Members of these committees and task forces shall receive reimbursement for their travel expenses as provided in RCW 43.03.060, as now or hereafter amended.

SECTION 7. Adoption of the Comprehensive Plan. The department shall submit to the commission a comprehensive plan for the saltwater and freshwater shoreline areas within the state of Washington as prescribed by this act within thirty-six months of the effective date of this act.

The commission shall, after giving reasonable public notice, hold at least one public hearing in each region designated pursuant to section 6 herein.

The comprehensive plan shall be adopted and take effect upon a majority vote of all the commission. The comprehensive plan may be adopted by divisions or segments possessing geographical, topographical, political or river or lake basin identity.

The comprehensive plan, and all amendments thereto, shall be filed with the county auditor of each county of the

state and shall become part of the land records of the respective counties.

SECTION 8. Modification of Plans. The commission may by majority vote amend or rescind parts of the comprehensive plan where necessary to implement the declarations and findings contained in section 2 after giving reasonable public notice and then holding a public hearing in each county affected by the amendment or rescission.

SECTION 9. Implementation of the Plan. No person shall cause a development to take place in the shoreline areas without a permit issued by the department, or by a city or county pursuant to section 10; provided, that permits shall not be required for:

(1) Normal maintenance or repair of existing structures or developments;

(2) Construction by the owner on property he occupies for his own residential use or the use of his family of the normal protective bulkhead, dock or outbuildings common to single family residences in the immediate area or for the landscaping of such property to improve the appearance of the land or buildings;

(3) Construction on a property used for agricultural purposes of a barn or similar building above the line of ordinary high tide or ordinary high water;

(4) Any emergency measures or repairs not falling under (1), (2), and (3) above that are necessitated by fire, flood, windstorm or similar act of nature or accident, or criminal act.

The commission shall adopt appropriate administrative regulations for the granting, denying, granting subject to conditions or rescinding of permits for any proposed development in the shoreline areas, and may specifically adopt administrative regulations for the routine issuance of permits for proposed developments in intensively developed areas above the line of ordinary high tide or ordinary high water.

The department shall issue permits pursuant to this section only if the proposed development is consistent with the findings and declarations set out in section 2 and the comprehensive plan. Applicants for permits shall have the burden of proving by a preponderance of the evidence that the proposed development is consistent with the findings and declarations set out in section 2 and the comprehensive plan. The department shall rescind any permit upon finding that an applicant has either not complied with conditions imposed by the department or not followed his own previously submitted development plan, and further finding that such noncompliance results in the development not conforming with the findings and declarations of section 2 or the comprehensive plan.

Until the comprehensive plan is adopted, the department shall base its decisions on permit applications and rescissions on consistency with the findings and declarations of section 2.

All findings on permit applications, together with the applications, supportive materials and the reasons for the finding, shall be reduced to writing.

The department shall notify other state and federal agencies and local governments as well as private groups and individuals who are interested in a particular permit decision so that said entities may, if they desire, submit data to the department.

Any person aggrieved by a decision of the department in granting or rescinding a permit shall have the right to a hearing before the pollution control hearings board pursuant to procedures established by the Environmental Quality Reorganization Act of 1970, Chapter 62, Laws of 1970. The pollution control hearings board shall review the department's decision in light of the findings and declarations set out in section 2 and shall affirm, modify or reverse said decision. The decision by the department in granting or rescinding a permit shall be made without a formal hearing.

SECTION 10. Delegation of Authority by Department to Counties and Cities. Following the adoption of the comprehensive plan the department may designate and delegate to

requesting counties and cities the department's authority or portion thereof under section 9 herein over those developments that are not substantial. Such designation and delegation may be made and may be withdrawn only after the department considers the following factors:

(1) The severity of the impact of various classes of development on the ecology of the shoreline;

(2) The jurisdiction of particular state agencies, counties and cities and conflicts in jurisdiction with other state agencies or local governments;

(3) The experience and ability of particular counties and cities in regulating proposed developments.

The department shall retain jurisdiction and exercise all authority given to it by this act over substantial developments. Cities and counties exercising authority under this section shall act pursuant to and comply with all the provisions of section 9 herein; provided, that any person concerned with a decision of a city or county in granting or rescinding a permit shall have such hearing rights as may be provided by existing state laws or by existing county or city ordinances.

SECTION 11. Responsibilities of Counties and Cities. To preserve and protect freshwater shorelines along rivers that are not navigable for public use and along lakes that are smaller than twenty surface acres at all times of the year, cities and counties shall within thirty-six months of the effective date of this act enact legislation for the management and protection of such shoreline areas in conformance with the declarations and findings set out in section 2 of this act.

Within ten days of the enactment of such legislation, it shall be submitted to the commission for approval. If the commission finds that the legislation is not consistent with the declarations and findings of section 2 of this act, it shall notify the county or city of the deficiencies in its legislation. The county or city shall amend its legislation and return it to the department within ninety days.

If, within forty-eight months from the effective date of this act no legislation has been enacted and approved by the commission for a given city or county the department shall develop and propose and the commission shall adopt a comprehensive plan and regulations for the management and protection of those shoreline areas in the same manner as provided in sections 7, 8 and 9. Such plans and regulations shall have the full force of law within the county or city and shall be administered by the city or county affected.

SECTION 12. Power Reserved to Cities and Counties. The issuance of a permit by the department under section 9 or by its designee under section 10 shall not authorize a person to cause a development to take place in violation of any other state law or regulation, or any city or county ordinance or resolution.

No person shall apply for a permit pursuant to sections 9 or 10 of this act without first having complied with applicable county and city resolutions and ordinances.

SECTION 13. Shoreline Environment Erosion Control. No person shall be granted a permit pursuant to sections 9 or 10 for commercial harvesting or cutting of timber when the proposed harvesting or cutting would result in openings in the forest canopy within the shoreline areas larger in diameter than the average height of the immediately surrounding trees, except where the cutting or harvesting is in pursuit of a development other than logging or timber cutting granted a permit pursuant to this act or where the director finds that the proposed harvesting or cutting is needed to meet or avert a threat to the public health or safety.

SECTION 14. Consumer Protection. No person shall sell or otherwise transfer, except by gift or will, or offer for sale or transfer, except by gift or will, any interest in lands or waters within the shoreline area without including in any written or

printed advertisement or offer for sale or transfer and in any instruments of sale or transfer the following notice in ten-point bold-face type or larger, or if by typewriter, in capital letters:

"NOTICE: Part or all of the lands and waters concerned herein are within the shoreline area of the state of Washington and subject to the environmental protection restrictions of the Shorelines Protection Act. Developments and modifications of these lands or waters are subject to regulation. Contact the Department of Ecology, Olympia, Washington, for information regarding the regulations applying to these lands and waters, or see a copy of the regulations at the office of your County Auditor."

Failure to comply with this section shall not affect the title to any property except that such failure shall be grounds for rescission by the purchaser or transferee.

SECTION 15. Oil and Gas Exploration and Production. No permit shall be issued to any person pursuant to this act to bore, excavate, drill, test drill, conduct seismic explorations or remove any oil and/or gas from the shoreline areas of Puget Sound, including Hood Canal and the San Juan Islands; provided, that the department may conduct explorations necessary to carry out the study provisions of this section.

Within thirty-six months of the effective date of this act the director shall submit to the governor a study report and recommendations on the exploration and production of oil and gas from the shoreline areas of the state of Washington.

SECTION 16. High Rise Structures. No permit shall be issued pursuant to this act for any new or expanded building of more than thirty-five feet above average grade level on shorelines that obstructs the view of the shoreline from a substantial number of residences on areas adjoining the shoreline, except as the comprehensive plan shall designate specific areas where such buildings shall be permitted.

SECTION 17. Private Property Rights. Nothing in this act shall be construed to authorize the taking of private property without just compensation, nor impair or affect private riparian rights of owners of property in the shoreline areas as against another private individual, group, association, corporation, partnership or other private legal entity.

SECTION 18. Public Navigation Rights. Except as permitted by this act, there shall be no interference with or obstruction of the navigation rights of the public pursuant to common law as stated in such cases as the Washington State Supreme Court decision in *Wilbour v. Gallagher*, 77 Wash. Dec. 2d 307 (1969).

SECTION 19. Administration. To administer this act and pursuant to the Environmental Quality Reorganization Act of 1970, Chapter 62, Laws of 1970, there shall be established within the department a shoreline protection division responsible to the director and supervised by an assistant director.

The commission shall adopt regulations for the administration of this act, consistent with the policy of this act; provided, that prior to the adoption of any such administrative regulations, a public hearing after reasonable public notice shall be held in Thurston County.

The department is authorized and directed to assign staff to assist the commission, regional citizens' councils, and other committees or task forces established pursuant to this act, and to furnish such administrative and informational services as the director may find necessary.

SECTION 20. Right of Review. Any plans or regulations adopted pursuant to this act by the commission or any city or county, any permits granted, denied or rescinded by the pollution control hearings board or any permits granted, denied or rescinded by a city or county pursuant to sections 10 or 11

of this act shall be subject to judicial review pursuant to the provisions of Chapter 34.04 RCW. Any judicial proceedings brought by any party relating to this act shall be instituted in the superior court of the county where the property affected is located, or in the superior court of Thurston County if no definite property is related to the proceeding.

SECTION 21. Public Documents. Upon request and at the expense of the requesting party the department, city or county acting pursuant to this act shall make available for public inspection and copying during regular office hours or shall copy and mail any of the following materials:

- (1) Each permit application;
- (2) All final orders, made in the granting or denying of permit applications;
- (3) Proposed and adopted comprehensive plans, comprehensive plan amendments and related administrative regulations;
- (4) Interdepartmental memoranda, permit findings and other recorded material related to permit functions;
- (5) Administrative staff manuals and instructions to staff relating to the planning and permit functions herein that affect the public;
- (6) Minutes of commission, board or council meetings relating to the planning and permit functions herein that affect the public;
- (7) All evidence provided by applicants for permits.

SECTION 22. Enforcement. The attorney general shall enforce this act, including the provisions of any permit issued pursuant thereto and shall, at the request of the director or upon his own initiative, or upon the request of a private person, bring injunctive, declaratory, or other legal actions necessary to such enforcement.

If a private person has requested the attorney general to enforce this act, and the attorney general has declined to do so, the private person may institute an appropriate civil suit to enforce this act, including the provisions of any permit issued pursuant thereto, in the name of the public, and if he prevails, shall be entitled to reasonable attorney's fees. One-half of such attorney's fees shall be assessed against defendant and one-half of such attorney's fees shall be assessed against the state. If the court finds that the suit was commenced without reasonable cause, the defendant shall be entitled to reasonable attorney's fees from the plaintiff.

SECTION 23. Damages. Any person who violates any provision of this act or permit issued pursuant thereto shall be liable for all damage to public or private property arising from such violation, and for the cost of restoring the affected area to its condition prior to violation. The attorney general shall bring suit for damages under this section on behalf of the state, any of its agencies, or local governments. Private persons shall have the right to bring suit for damages under this section on their own behalf and on the behalf of all persons similarly situated. The court, if liability has been established for the cost of restoring an area affected by a violation, shall either compel the violator to restore the affected area at his own expense, or make other provision for assuring that restoration will be done within a reasonable time. In addition to such appropriate relief, including money damages, which is provided by the court under this or other acts, a private person bringing a damage suit in his own behalf or on the behalf of others may, in the discretion of the court, recover his reasonable attorney's fees and court costs.

SECTION 24. Civil Penalties. Any person who violates any provision of this act except section 14 shall incur in addition to any other penalties provided by the law a penalty in an amount not less than fifty dollars (\$50.00) nor more than one-thousand dollars (\$1,000.00) a day for every such violation. Each and every such violation under this section shall be

a separate offense, and in case of a continuing violation, every day's continuance shall be a separate violation. Prosecution to enforce this section may be brought by either the attorney general or prosecutor of the county where the affected property is located; provided, that if both the attorney general and the prosecutor of the county where the affected property is located refuse to prosecute under this section, a private person shall be entitled to do so. Fines collected pursuant to this section through prosecution by the prosecutor shall go to the general fund of the county. Fines collected pursuant to this section through prosecution by the attorney general shall go to the state's general fund. Fines collected pursuant to this section through prosecution by a private person shall go to the person bringing the suit.

SECTION 25. Criminal Penalties. Any person who violates any provision of this act except section 14 shall be guilty of a misdemeanor. Prosecutions pursuant to this section shall be brought in the county where the affected property is located by either the prosecutor of said county or the attorney general. Any fines collected pursuant to this section from prosecution by the county prosecutor shall go to the general fund of the county. Any fines collected pursuant to this section from prosecution by the attorney general shall go to the state general fund.

SECTION 26. Financing. To carry out the purposes of this act, there shall be appropriated to the department from the state general fund in the fiscal biennium in which this act takes effect the sum of \$500,000, and for the ensuing fiscal biennium the sum of \$900,000; provided, that such moneys as are not expended shall be returned to the state general fund.

To help meet the costs of administering this act, the department, or a city or a county issuing permits pursuant to this act shall by regulation or ordinance adopt a fee schedule for permit applications based on the estimated costs of processing different classes of permit applications. A permit applicant shall be required to pay the appropriate fee based on the fee schedule adopted by the governmental body issuing the permit. All fees collected pursuant to this section by the department shall be deposited in the state general fund. All fees collected pursuant to this section by a city or county shall go to the respective city or county general fund.

SECTION 27. Cooperation With Local Governments and Private Persons. The department shall cooperate, consult with and assist appropriate government agencies and private persons developing plans, studies, surveys, recommendations, or information on shorelines.

State and local government agencies shall cooperate fully with the department in furthering the purposes of this act.

SECTION 28. Department's Authority to Contract. For the purposes of administering this act, the department may enter into contracts or agreements with or receive funds from the state of Washington, the federal government or any governmental department, agency or any person.

SECTION 29. Official Representative. The department is authorized to be the official representative of the state of Washington to the United States and its agencies, Canada, the states of Oregon and Idaho, the Province of British Columbia, and other interested state governments, organizations and individuals, in the fields of shoreline management and policy.

SECTION 30. Severability. If any provision of this act, or its application to any person or legal entity or circumstance is held invalid, the remainder of the act, or the application of the provision to other persons or legal entities or circumstances shall not be affected.

SECTION 31. Section Headings Not Part of Law. Section headings as used in this act shall not constitute any part of the law.

EXPLANATORY COMMENT

Initiative to the Legislature No. 43 (Regulating Shoreline Use and Development)—Filed September 25, 1970 by the Washington Environmental Council. Signatures. (160,421) filed December 31, 1970 and found sufficient and the measure was certified to the Legislature as of January 29, 1971. The Legislature took no action insofar as Initiative No. 43 but did pass an alternative measure (Sub. H.B. No. 584) now identified as Chapter 286, Laws 1971, 1st Ex. Session which became effective law as of June 1, 1971. However, as provided by the state constitution, both measures must be submitted to the voters for final decision at the November 7, 1972 state general election. If both are approved, the measure receiving the most favorable votes will become law.

COMPLETE TEXT OF

Alternative Measure 43B

Ballot Title as issued by the Attorney General:

Legislative Alternative—Shoreline Management Act

AN ACT relating to the use and development of certain salt and fresh water shoreline areas including lands located within 200 feet of the ordinary high water mark and certain other adjacent designated wetlands; establishing an integrated program of shoreline management between state and local governments; requiring local governments, pursuant to guidelines established by the state department of ecology, to develop master programs for regulating shoreline uses and providing that if they do not the department will develop and adopt such programs; granting the state's consent to certain existing impairments of public navigational rights; and providing civil and criminal sanctions.

CHAPTER 286, LAWS 1971, 1ST EX. SESSION
(Sub. House Bill No. 584)

BE IT ENACTED, *by the Legislature*
of the State of Washington:

NEW SECTION. Section 1. This chapter shall be known and may be cited as the "Shoreline Management Act of 1971".

NEW SECTION. Sec. 2. The legislature finds that the shorelines of the state are among the most valuable and fragile of its natural resources and that there is great concern throughout the state relating to their utilization, protection, restoration, and preservation. In addition it finds that ever increasing pressures of additional uses are being placed on the shorelines necessitating increased coordination in the management and development of the shorelines of the state. The legislature further finds that much of the shorelines of the state and the uplands adjacent thereto are in private ownership; that unrestricted construction on the privately owned or

publicly owned shorelines of the state is not in the best public interest; and therefore, coordinated planning is necessary in order to protect the public interest associated with the shorelines of the state while, at the same time, recognizing and protecting private property rights consistent with the public interest. There is, therefore, a clear and urgent demand for a planned, rational, and concerted effort, jointly performed by federal, state, and local governments, to prevent the inherent harm in an uncoordinated and piecemeal development of the state's shorelines.

It is the policy of the state to provide for the management of the shorelines of the state by planning for and fostering all reasonable and appropriate uses. This policy is designed to insure the development of these shorelines in a manner which, while allowing for limited reduction of rights of the public in the navigable waters, will promote and enhance the public interest. This policy contemplates protecting against adverse effects to the public health, the land and its vegetation and wildlife, and the waters of the state and their aquatic life, while protecting generally public rights of navigation and corollary rights incidental thereto.

The legislature declares that the interest of all of the people shall be paramount in the management of shorelines of state-wide significance. The department, in adopting guidelines for shorelines of state-wide significance, and local government, in developing master programs for shorelines of state-wide significance, shall give preference to uses in the following order of preference which:

- (1) Recognize and protect the state-wide interest over local interest;
- (2) Preserve the natural character of the shoreline;
- (3) Result in long term over short term benefit;
- (4) Protect the resources and ecology of the shoreline;
- (5) Increase public access to publicly owned areas of the shorelines;
- (6) Increase recreational opportunities for the public in the shoreline;
- (7) Provide for any other element as defined in section 11 * [10] of this 1971 act deemed appropriate or necessary.

In the implementation of this policy the public's opportunity to enjoy the physical and esthetic qualities of natural shorelines of the state shall be preserved to the greatest extent feasible consistent with the overall best interest of the state and the people generally. To this end uses shall be preferred which are consistent with control of pollution and prevention of damage to the natural environment, or are unique to or dependent upon use of the state's shoreline. Alterations of the natural condition of the shorelines of the state, in those limited instances when authorized, shall be given priority for single family residences, ports, shoreline recreational uses including but not limited to parks, marinas, piers, and other improvements facilitating public access to shorelines of the state, industrial and commercial developments which are particularly dependent on their location on or use of the shorelines of the state and other development that will provide an opportunity for substantial numbers of the people to enjoy the shorelines of the state.

Permitted uses in the shorelines of the state shall be designed and conducted in a manner to minimize, insofar as practical, any resultant damage to the ecology and environment of the shoreline area and any interference with the public's use of the water.

NEW SECTION. Sec. 3. As used in this chapter, unless the context otherwise requires, the following definitions and concepts apply:

- (1) Administration:
 - (a) "Department" means the department of ecology;
 - (b) "Director" means the director of the department of ecology;
 - (c) "Local government" means any county, incorporated city, or town which contains within its boundaries any lands or

waters subject to this chapter: PROVIDED, That lands under the jurisdiction of the department of natural resources shall be subject to the provisions of this chapter and as to such lands the department of natural resources shall have the same powers, duties, and obligations as local government has as to other lands covered by the provisions of this chapter;

(d) "Person" means an individual, partnership, corporation, association, organization, cooperative, public or municipal corporation, or agency of the state or local governmental unit however designated;

(e) "Hearing board" means the shoreline hearings board established by this chapter.

(2) Geographical:

(a) "Extreme low tide" means the lowest line on the land reached by a receding tide;

(b) "Ordinary high water mark" on all lakes, streams, and tidal water is that mark that will be found by examining the bed and banks and ascertaining where the presence and action of waters are so common and usual, and so long continued in all ordinary years, as to mark upon the soil a character distinct from that of the abutting upland, in respect to vegetation as that condition exists on the effective date of this chapter or as it may naturally change thereafter: PROVIDED, That in any area where the ordinary high water mark cannot be found, the ordinary high water mark adjoining saltwater shall be the line of mean higher high tide and the ordinary high water mark adjoining fresh water shall be the line of mean high water;

(c) "Shorelines of the state" are the total of all "shorelines" and "shorelines of state-wide significance" within the state;

(d) "Shorelines" means all of the water areas of the state, including reservoirs, and their associated wetlands, together with the lands underlying them; except (i) shorelines of state-wide significance; (ii) shorelines on segments of streams upstream of a point where the mean annual flow is twenty cubic feet per second or less and the wetlands associated with such upstream segments; and (iii) shorelines on lakes less than twenty acres in size and wetlands associated with such small lakes;

(e) "Shorelines of state-wide significance" means the following shorelines of the state:

(i) The area between the ordinary high water mark and the western boundary of the state from Cape Disappointment on the south to Cape Flattery on the north, including harbors, bays, estuaries, and inlets;

(ii) Those areas of Puget Sound and adjacent salt waters and the Strait of Juan de Fuca between the ordinary high water mark and the line of extreme low tide as follows:

(A) Nisqually Delta—from DeWolf Bight to Tatsolo Point,

(B) Birch Bay—from Point Whitehorn to Birch Point,

(C) Hood Canal—from Tala Point to Foulweather Bluff,

(D) Skagit Bay and adjacent area—from Brown Point to Yokeko Point, and

(E) Padilla Bay—from March Point to William Point;

(iii) Those areas of Puget Sound and the Strait of Juan de Fuca and adjacent salt waters north to the Canadian line and lying seaward from the line of extreme low tide;

(iv) Those lakes, whether natural, artificial or a combination thereof, with a surface acreage of one thousand acres or more measured at the ordinary high water mark;

(v) Those natural rivers or segments thereof as follows:

(A) Any west of the crest of the Cascade range downstream of a point where the mean annual flow is measured at one thousand cubic feet per second or more,

(B) Any east of the crest of the Cascade range downstream of a point where the annual flow is measured at two hundred cubic feet per second or more, or those portions of rivers east of the crest of the Cascade range downstream from the first three hundred square miles of drainage area, whichever is longer;

(vi) Those wetlands associated with (i), (ii), (iv), and (v) of this subsection (2) (e);

(f) "Wetlands" or "wetland areas" means those lands extending landward for two hundred feet in all directions as measured on a horizontal plane from the ordinary high water mark; and all marshes, bogs, swamps, floodways, river deltas, and flood plains associated with the streams, lakes and tidal waters which are subject to the provisions of this act; the same to be designated as to location by the department of ecology.

(3) Procedural terms:

(a) "Guidelines" means those standards adopted to implement the policy of this chapter for regulation of use of the shorelines of the state prior to adoption of master programs. Such standards shall also provide criteria to local governments and the department in developing master programs;

(b) "Master program" shall mean the comprehensive use plan for a described area, and the use regulations together with maps, diagrams, charts or other descriptive material and text, a statement of desired goals and standards developed in accordance with the policies enunciated in section 2 of this 1971 act;

(c) "State master program" is the cumulative total of all master programs approved or adopted by the department of ecology;

(d) "Development" means a use consisting of the construction or exterior alteration of structures; dredging; drilling; dumping; filling; removal of any sand, gravel or minerals; bulkheading; driving of piling; placing of obstructions; or any project of a permanent or temporary nature which interferes with the normal public use of the surface of the waters overlying lands subject to this chapter at any state of water level;

(e) "Substantial development" shall mean any development of which the total cost or fair market value exceeds one thousand dollars, or any development which materially interferes with the normal public use of the water or shorelines of the state; except that the following shall not be considered substantial developments for the purpose of this chapter:

(i) Normal maintenance or repair of existing structures or developments, including damage by accident, fire or elements;

(ii) Construction of the normal protective bulkhead common to single family residences;

(iii) Emergency construction necessary to protect property from damage by the elements;

(iv) Construction of a barn or similar agricultural structure on wetlands;

(v) Construction or modification of navigational aids such as channel markers and anchor buoys;

(vi) Construction on wetlands by an owner, lessee or contract purchaser of a single family residence for his own use or for the use of his family, which residence does not exceed a height of thirty-five feet above average grade level and which meets all requirements of the state agency or local government having jurisdiction thereof, other than requirements imposed pursuant to this chapter.

NEW SECTION. Sec. 4. The shoreline management program of this chapter shall apply to the shorelines of the state as defined in this act.

NEW SECTION. Sec. 5. This chapter establishes a cooperative program of shoreline management between local government and the state. Local government shall have the primary responsibility for initiating and administering the regulatory program of this chapter. The department shall act primarily in a supportive and review capacity with primary emphasis on insuring compliance with the policy and provisions of this chapter.

NEW SECTION. Sec. 6. (1) Within one hundred twenty days from the effective date of this chapter, the department shall submit to all local governments proposed guidelines consistent with section 2 of this 1971 act for:

(a) Development of master programs for regulation of the uses of shorelines; and

(b) Development of master programs for regulation of the uses of shorelines of state-wide significance.

(2) Within sixty days from receipt of such proposed guidelines, local governments shall submit to the department in writing proposed changes, if any, and comments upon the proposed guidelines.

(3) Thereafter and within one hundred twenty days from the submission of such proposed guidelines to local governments, the department, after review and consideration of the comments and suggestions submitted to it, shall resubmit final proposed guidelines.

(4) Within sixty days thereafter public hearings shall be held by the department in Olympia and Spokane, at which interested public and private parties shall have the opportunity to present statements and views on the proposed guidelines. Notice of such hearings shall be published at least once in each of the three weeks immediately preceding the hearing in one or more newspapers of general circulation in each county of the state.

(5) Within ninety days following such public hearings, the department at a public hearing to be held in Olympia shall adopt guidelines.

NEW SECTION. Sec. 7. (1) Local governments are directed with regard to shorelines of the state in their various jurisdictions to submit to the director of the department, within six months from the effective date of this chapter, letters stating that they propose to complete an inventory and develop master programs for these shorelines as provided for in section 8 of this 1971 act.

(2) If any local government fails to submit a letter as provided in subsection (1) of this section, or fails to adopt a master program for the shorelines of the state within its jurisdiction in accordance with the time schedule provided in this chapter, the department shall carry out the requirements of section 8 of this 1971 act and adopt a master program for the shorelines of the state within the jurisdiction of the local government.

NEW SECTION. Sec. 8. Local governments are directed with regard to shorelines of the state within their various jurisdictions as follows:

(1) To complete within eighteen months after the effective date of this chapter, a comprehensive inventory of such shorelines. Such inventory shall include but not be limited to the general ownership patterns of the lands located therein in terms of public and private ownership, a survey of the general natural characteristics thereof, present uses conducted therein and initial projected uses thereof;

(2) To develop, within eighteen months after the adoption of guidelines as provided in section 6 of this 1971 act, a master program for regulation of uses of the shorelines of the state consistent with the guidelines adopted.

NEW SECTION. Sec. 9. Master programs or segments thereof shall become effective when adopted or approved by the department as appropriate. Within the time period provided in section 8 of this 1971 act, each local government shall have submitted a master program, either totally or by segments, for all shorelines of the state within its jurisdiction to the department for review and approval.

(1) As to those segments of the master program relating to shorelines, they shall be approved by the department unless it determines that the submitted segments are not consistent with the policy of section 2 of this 1971 act and the applicable

guidelines. If approval is denied, the department shall state within ninety days from the date of submission in detail the precise facts upon which that decision is based, and shall submit to the local government suggested modifications to the program to make it consistent with said policy and guidelines. The local government shall have ninety days after it receives recommendations from the department to make modifications designed to eliminate the inconsistencies and to resubmit the program to the department for approval. Any resubmitted program shall take effect when and in such form and content as is approved by the department.

(2) As to those segments of the master program relating to shorelines of state-wide significance the department shall have full authority following review and evaluation of the submission by local government to develop and adopt an alternative to the local government's proposal if in the department's opinion the program submitted does not provide the optimum implementation of the policy of this chapter to satisfy the state-wide interest. If the submission by local government is not approved, the department shall suggest modifications to the local government within ninety days from receipt of the submission. The local government shall have ninety days after it receives said modifications to consider the same and resubmit a master program to the department. Thereafter, the department shall adopt the resubmitted program or, if the department determines that said program does not provide for optimum implementation, it may develop and adopt an alternative as hereinbefore provided.

(3) In the event a local government has not complied with the requirements of section 7 of this 1971 act it may thereafter upon written notice to the department elect to adopt a master program for the shorelines within its jurisdiction, in which event it shall comply with the provisions established by this chapter for the adoption of a master program for such shorelines.

Upon approval of such master program by the department it shall supersede such master program as may have been adopted by the department for such shorelines.

NEW SECTION. Sec. 10. (1) The master programs provided for in this chapter, when adopted and approved by the department, as appropriate, shall constitute use regulations for the various shorelines of the state. In preparing the master programs, and any amendments thereto, the department and local governments shall to the extent feasible:

(a) Utilize a systematic interdisciplinary approach which will insure the integrated use of the natural and social sciences and the environmental design arts;

(b) Consult with and obtain the comments of any federal, state, regional, or local agency having any special expertise with respect to any environmental impact;

(c) Consider all plans, studies, surveys, inventories, and systems of classification made or being made by federal, state, regional, or local agencies, by private individuals, or by organizations dealing with pertinent shorelines of the state;

(d) Conduct or support such further research, studies, surveys, and interviews as are deemed necessary;

(e) Utilize all available information regarding hydrology, geography, topography, ecology, economics, and other pertinent data;

(f) Employ, when feasible, all appropriate, modern scientific data processing and computer techniques to store, index, analyze, and manage the information gathered.

(2) The master programs shall include, when appropriate, the following:

(a) An economic development element for the location and design of industries, transportation facilities, port facilities, tourist facilities, commerce and other developments that are particularly dependent on their location on or use of the shorelines of the state;

(b) A public access element making provision for public access to publicly owned areas;

(c) A recreational element for the preservation and enlargement of recreational opportunities, including but not limited to parks, tidelands, beaches, and recreational areas;

(d) A circulation element consisting of the general location and extent of existing and proposed major thoroughfares, transportation routes, terminals, and other public utilities and facilities, all correlated with the shoreline use element;

(e) A use element which considers the proposed general distribution and general location and extent of the use on shorelines and adjacent land areas for housing, business, industry, transportation, agriculture, natural resources, recreation, education, public buildings and grounds, and other categories of public and private uses of the land;

(f) A conservation element for the preservation of natural resources, including but not limited to scenic vistas, aesthetics, and vital estuarine areas for fisheries and wildlife protection;

(g) An historic, cultural, scientific, and educational element for the protection and restoration of buildings, sites, and areas having historic, cultural, scientific, or educational values; and

(h) Any other element deemed appropriate or necessary to effectuate the policy of this act.

(3) The master programs shall include such map or maps, descriptive text, diagrams and charts, or other descriptive material as are necessary to provide for ease of understanding.

(4) Master programs will reflect that state-owned shorelines of the state are particularly adapted to providing wilderness beaches, ecological study areas, and other recreational activities for the public and will give appropriate special consideration to same.

(5) Each master program shall contain provisions to allow for the varying of the application of use regulations of the program, including provisions for permits for conditional uses and variances, to insure that strict implementation of a program will not create unnecessary hardships or thwart the policy enumerated in section 2 of this chapter. Any such varying shall be allowed only if extraordinary circumstances are shown and the public interest suffers no substantial detrimental effect. The concept of this subsection shall be incorporated in the rules adopted by the department relating to the establishment of a permit system as provided in section 14(3) of this chapter.

NEW SECTION. Sec. 11. (1) Whenever it shall appear to the director that a master program should be developed for a region of the shorelines of the state which includes lands and waters located in two or more adjacent local government jurisdictions, the director shall designate such region and notify the appropriate units of local government thereof. It shall be the duty of the notified units to develop cooperatively an inventory and master program in accordance with and within the time provided in section 8 of this 1971 act.

(2) At the discretion of the department, a local government master program may be adopted in segments applicable to particular areas so that immediate attention may be given to those areas of the shorelines of the state in most need of a use regulation.

NEW SECTION. Sec. 12. All rules and regulations, master programs, designations and guidelines, shall be adopted or approved in accordance with the provisions of RCW 34.04.025 insofar as such provisions are not inconsistent with the provisions of this chapter. In addition:

(1) Prior to the approval or adoption by the department of a master program, or portion thereof, at least one public hearing shall be held in each county affected by a program or portion thereof for the purpose of obtaining the views and comments of the public. Notice of each such hearing shall be published at least once in each of the three weeks immediately preceding the hearing in one or more newspapers of general circulation in the county in which the hearing is to be held.

(2) All guidelines, regulations, designations or master programs adopted or approved under this chapter shall be available for public inspection at the office of the department or the appropriate county auditor and city clerk. The terms "adopt" and "approve" for purposes of this section, shall include modifications and rescission of guidelines.

NEW SECTION. Sec. 13. To insure that all persons and entities having an interest in the guidelines and master programs developed under this chapter are provided with a full opportunity for involvement in both their development and implementation, the department and local governments shall:

(1) Make reasonable efforts to inform the people of the state about the shoreline management program of this chapter and in the performance of the responsibilities provided in this chapter, shall not only invite but actively encourage participation by all persons and private groups and entities showing an interest in shoreline management programs of this chapter; and

(2) Invite and encourage participation by all agencies of federal, state, and local government, including municipal and public corporations, having interests or responsibilities relating to the shorelines of the state. State and local agencies are directed to participate fully to insure that their interests are fully considered by the department and local governments.

NEW SECTION. Sec. 14. (1) No development shall be undertaken on the shorelines of the state except those which are consistent with the policy of this chapter and, after adoption or approval, as appropriate, the applicable guidelines, regulations or master program.

(2) No substantial development shall be undertaken on shorelines of the state without first obtaining a permit from the government entity having administrative jurisdiction under this chapter.

A permit shall be granted:

(a) From the effective date of this chapter until such time as an applicable master program has become effective, only when the development proposed is consistent with: (i) The policy of section 2 of this 1971 act; and (ii) after their adoption, the guidelines and regulations of the department; and (iii) so far as can be ascertained, the master program being developed for the area. In the event the department is of the opinion that any permit granted under this subsection is inconsistent with the policy declared in section 2 of this 1971 act or is otherwise not authorized by this section, the department may appeal the issuance of such permit within thirty days to the hearings board upon written notice to the local government and the permittee;

(b) After adoption or approval, as appropriate, by the department of an applicable master program, only when the development proposed is consistent with the applicable master program and the policy of section 2 of this 1971 act.

(3) Local government shall establish a program, consistent with rules adopted by the department, for the administration and enforcement of the permit system provided in this section. Any such system shall include a requirement that all applications and permits shall be subject to the same public notice procedures as provided for applications for waste disposal permits for new operations under RCW 90.48.170. The administration of the system so established shall be performed exclusively by local government.

(4) Such system shall include provisions to assure that construction pursuant to a permit will not begin or be authorized until forty-five days from the date of final approval by the local government or until all review proceedings are terminated if such proceedings were initiated within forty-five days from the date of final approval by the local government.

(5) Any ruling on an application for a permit under authority of this section, whether it be an approval or a denial, shall, concurrently with the transmittal of the ruling to the

applicant, be filed with the department and the attorney general.

(6) Applicants for permits under this section shall have the burden of proving that a proposed substantial development is consistent with the criteria which must be met before a permit is granted. In any review of the granting or denial of an application for a permit as provided in section 16(1) of this chapter, the person requesting the review shall have the burden of proof.

(7) Any permit may be rescinded by the issuing authority upon the finding that a permittee has not complied with conditions of a permit. In the event the department is of the opinion that such noncompliance exists, the department may appeal within thirty days to the hearings board for a rescission of such permit upon written notice to the local government and the permittee.

(8) The holder of a certification from the governor pursuant to chapter 80.50 RCW shall not be required to obtain a permit under this section.

(9) No permit shall be required for any development on shorelines of the state included within a preliminary or final plat approved by the applicable state agency or local government prior to April 1, 1971, if:

(a) The final plat was approved after April 13, 1961, or the preliminary plat was approved after April 30, 1969, or

(b) Sales of lots to purchasers with reference to the plat, or substantial development incident to platting or required by the plat, occurred prior to April 1, 1971, and

(c) The development to be made without a permit meets all requirements of the applicable state agency or local government, other than requirements imposed pursuant to this chapter, and

(d) The development does not involve construction of buildings; or involves construction on wetlands of buildings to serve only as community social or recreational facilities for the use of owners of platted lots and the buildings do not exceed a height of thirty-five feet above average grade level, and

(e) The development is completed within two years after the effective date of this chapter.

(10) The applicable state agency or local government is authorized to approve a final plat with respect to shorelines of the state included within a preliminary plat approved after April 30, 1969, and prior to April 1, 1971: PROVIDED, That any substantial development within the platted shorelines of the state is authorized by a permit granted pursuant to this section, or does not require a permit as provided in subsection (9) of this section, or does not require a permit because of substantial development occurred prior to the effective date of this chapter.

(11) Any permit for a variance or a conditional use by local government under approved master programs must be submitted to the department for its approval or disapproval.

NEW SECTION. Sec. 15. With respect to timber situated within two hundred feet abutting landward of the ordinary high water mark within shorelines of state-wide significance, the department or local government shall allow only selective commercial timber cutting, so that no more than thirty percent of the merchantable trees may be harvested in any ten year period of time: PROVIDED, That other timber harvesting methods may be permitted in those limited instances where the topography, soil conditions or silviculture practices necessary for regeneration render selective logging ecologically detrimental: PROVIDED FURTHER, That clear cutting of timber which is solely incidental to the preparation of land for other uses authorized by this chapter may be permitted.

NEW SECTION. Sec. 16. Surface drilling for oil or gas is prohibited in the waters of Puget Sound north to the Canadian boundary and the Strait of Juan de Fuca seaward from the ordinary high water mark and on all lands within one thousand feet landward from said mark.

NEW SECTION. Sec. 17. A shorelines hearings board sitting as a quasi judicial body is hereby established which shall be made up of six members: Three members shall be members of the pollution control hearings board; two members, one appointed by the association of Washington cities and one appointed by the association of county commissioners, both to serve at the pleasure of the associations; and the state land commissioner or his designee. The chairman of the pollution control hearings board shall be the chairman of the shorelines hearings board. A decision must be agreed to by at least four members of the board to be final. The pollution control hearings board shall provide the shorelines appeals board such administrative and clerical assistance as the latter may require. The members of the shoreline appeals board shall receive the compensation, travel, and subsistence expenses as provided in RCW 43.03.050 and RCW 43.03.060.

NEW SECTION. Sec. 18. (1) Any person aggrieved by the granting or denying of a permit on shorelines of the state, or rescinding a permit pursuant to section 15 of this chapter may seek review from the shorelines hearings board by filing a request for the same within thirty days of receipt of the final order. Concurrently with the filing of any request for review with the board as provided in this section pertaining to a final order of a local government, the requestor shall file a copy of his request with the department and the attorney general. If it appears to the Department or the attorney general that the requestor has valid reasons to seek review, either the department or the attorney general may certify the request within thirty days after its receipt to the shorelines hearings board following which the board shall then, but not otherwise, review the matter covered by the requestor: PROVIDED, That the failure to obtain such certification shall not preclude the requestor from obtaining a review in the superior court under any right to review otherwise available to the requestor. The department and the attorney general may intervene to protect the public interest and insure that the provisions of this chapter are complied with at any time within forty-five days from the date of the filing of said copies by the requestor.

(2) The department or the attorney general may obtain review of any final order granting a permit, or granting or denying an application for a permit issued by a local government by filing a written request with the shorelines appeals board and the appropriate local government within forty-five days from the date the final order was filed as provided in subsection (5) of section 14 of this 1971 act.

(3) The review proceedings authorized in section 18(1) and (2) of this 1971 act are subject to the provisions of chapter 34.04 RCW pertaining to procedures in contested cases. The provisions of chapter 43.21B RCW and the regulations adopted pursuant thereto by the pollution control hearings board, insofar as they are not inconsistent with chapter 34.04 RCW, relating to the procedures for the conduct of hearings and judicial review thereof, shall be applicable to all requests for review as provided for in section 18(1) and (2) of this 1971 act.

(4) Local government may appeal to the shorelines hearing board any rules, regulations, guidelines, designations or master programs for shorelines of the state adopted or approved by the department within thirty days of the date of the adoption or approval. The board shall make a final decision within sixty days following the hearing held thereon.

(a) In an appeal relating to a master program for shorelines, the board, after full consideration of the positions of the local government and the department, shall determine the validity of the master program. If the board determines that said program:

- (i) is clearly erroneous in light of the policy of this chapter; or
- (ii) constitutes an implementation of this chapter in violation of constitutional or statutory provisions; or
- (iii) is arbitrary and capricious; or

(iv) was developed without fully considering and evaluating all proposed master programs submitted to the department by the local government; or

(v) was not adopted in accordance with required procedures; the board shall enter a final decision declaring the program invalid, remanding the master program to the department with a statement of the reasons in support of the determination, and directing the department to adopt, after a thorough consultation with the affected local government, a new master program. Unless the board makes one or more of the determinations as hereinbefore provided, the board shall find the master program to be valid and enter a final decision to that effect.

(b) In an appeal relating to a master program for shorelines of state-wide significance the board shall approve the master program adopted by the department unless a local government shall, by clear and convincing evidence and argument, persuade the board that the master program approved by the department is inconsistent with the policy of section 2 of this chapter and the applicable guidelines.

(c) In an appeal relating to rules, regulations, guidelines, master programs of state-wide significance and designations, the standard of review provided in RCW 34.04.070 shall apply.

(5) Rules, regulations, designations, master programs and guidelines shall be subject to review in superior court, if authorized pursuant to RCW 34.04.070: PROVIDED, That no review shall be granted by a superior court on petition from a local government unless the local government shall first have obtained review under subsection (4) of this section and the petition for court review is filed within three months after the date of final decision by the shorelines hearing board.

NEW SECTION. Sec. 19. The department and each local government shall periodically review any master programs under its jurisdiction and make such adjustments thereto as are necessary. Each local government shall submit any proposed adjustments, to the department as soon as they are completed. No such adjustment shall become effective until it has been approved by the department.

NEW SECTION. Sec. 20. The department and local governments are authorized to adopt such rules as are necessary and appropriate to carry out the provisions of this chapter.

NEW SECTION. Sec. 21. The attorney general or the attorney for the local government shall bring such injunctive, declaratory, or other actions as are necessary to insure that no uses are made of the shorelines of the state in conflict with the provisions and programs of this chapter, and to otherwise enforce the provisions of this chapter.

NEW SECTION. Sec. 22. In addition to incurring civil liability under section 21 of this 1971 act, any person found to have wilfully engaged in activities on the shorelines of the state in violation of the provisions of this chapter or any of the master programs, rules, or regulations adopted pursuant thereto shall be guilty of a gross misdemeanor, and shall be punished by a fine of not less than twenty-five nor more than one thousand dollars or by imprisonment in the county jail for not more than ninety days, or by both such fine and imprisonment: PROVIDED, That the fine for the third and all subsequent violations in any five-year period shall be not less than five hundred nor more than ten thousand dollars.

NEW SECTION. Sec. 23. Any person subject to the regulatory program of this chapter who violates any provision of this chapter or permit issued pursuant thereto shall be liable for all damage to public or private property arising from such violation, including the cost of restoring the affected area to its condition prior to violation. The attorney general or local government attorney shall bring suit for damages under this sec-

tion on behalf of the state or local governments. Private persons shall have the right to bring suit for damages under this section on their own behalf and on the behalf of all persons similarly situated. If liability has been established for the cost of restoring an area affected by a violation the court shall make provision to assure that restoration will be accomplished within a reasonable time at the expense of the violator. In addition to such relief, including money damages, the court in its discretion may award attorney's fees and costs of the suit to the prevailing party.

NEW SECTION. Sec. 24. In addition to any other powers granted hereunder, the department and local governments may:

(1) Acquire lands and easements within shorelines of the state by purchase, lease, gift, or eminent domain, either alone or in concert with other governmental entities, when necessary to achieve implementation of master programs adopted hereunder;

(2) Accept grants, contributions, and appropriations from any agency, public or private, or individual for the purposes of this chapter;

(3) Appoint advisory committees to assist in carrying out the purposes of this chapter;

(4) Contract for professional or technical services required by it which cannot be performed by its employees.

NEW SECTION. Sec. 25. The department is directed to cooperate fully with local governments in discharging their responsibilities under this chapter. Funds shall be available for distribution to local governments on the basis of applications for preparation of master programs. Such applications shall be submitted in accordance with regulations developed by the department. The department is authorized to make and administer grants within appropriations authorized by the legislature to any local government within the state for the purpose of developing a master shorelines program.

No grant shall be made in an amount in excess of the recipient's contribution to the estimated cost of such program.

NEW SECTION. Sec. 26. The state, through the department of ecology and the attorney general, shall represent its interest before water resource regulation management, development, and use agencies of the United States, including among others, the federal power commission, environmental protection agency, corps of engineers, department of the interior, department of agriculture and the atomic energy commission, before interstate agencies and the courts with regard to activities or uses of shorelines of the state and the program of this chapter. Where federal or interstate agency plans, activities, or procedures conflict with state policies, all reasonable steps available shall be taken by the state to preserve the integrity of its policies.

NEW SECTION. Sec. 27. (1) Nothing in this statute shall constitute authority for requiring or ordering the removal of any structures, improvements, docks, fills, or developments placed in navigable waters prior to December 4, 1969, and the consent and authorization of the state of Washington to the impairment of public rights of navigation, and corollary rights incidental thereto, caused by the retention and maintenance of said structures, improvements, docks, fills or developments are hereby granted: PROVIDED, That the consent herein given shall not relate to any structures, improvements, docks, fills, or developments placed on tidelands, shorelands, or beds underlying said waters which are in trespass or in violation of state statutes.

(2) Nothing in this section shall be construed as altering or abridging any private right of action, other than a private right which is based upon the impairment of public rights consented to in subsection (1) hereof.

(3) Nothing in this section shall be construed as altering or

abridging the authority of the state or local governments to suppress or abate nuisances or to abate pollution.

(4) Subsection (1) of this section shall apply to any case pending in the courts of this state on the effective date of this chapter relating to the removal of structures, improvements, docks, fills, or developments based on the impairment of public navigational rights.

NEW SECTION. Sec. 28. The provisions of this chapter shall be applicable to all agencies of state government, counties, and public and municipal corporations and to all shorelines of the state owned or administered by them.

NEW SECTION. Sec. 29. The restrictions imposed by this act shall be considered by the county assessor in establishing the fair market value of the property.

NEW SECTION. Sec. 30. The department of ecology is designated the state agency responsible for the program of regulation of the shorelines of the state, including coastal shorelines and the shorelines of the inner tidal waters of the state, and is authorized to cooperate with the federal government and sister states and to receive benefits of any statutes of the United States whenever enacted which relate to the programs of this chapter.

NEW SECTION. Sec. 31. Additional shorelines of the state shall be designated shorelines of state-wide significance only by affirmative action of the legislature.

The director of the department may, however, from time to time, recommend to the legislature areas of the shorelines of the state which have state-wide significance relating to special economic, ecological, educational, developmental, recreational, or aesthetic values to be designated as shorelines of state-wide significance.

Prior to making any such recommendation the director shall hold a public hearing in the county or counties where the shoreline under consideration is located. It shall be the duty of the county commissioners of each county where such a hearing is conducted to submit their views with regard to a proposed designation to the director at such date as the director determines but in no event shall the date be later than sixty days after the public hearing in the county.

NEW SECTION. Sec. 32. No permit shall be issued pursuant to this chapter for any new or expanded building or structure of more than thirty-five feet above average grade level on shorelines of the state that will obstruct the view of a substantial number of residences on areas adjoining such shorelines except where a master program does not prohibit the same and then only when overriding considerations of the public interest will be served.

NEW SECTION. Sec. 33. The department of ecology, the attorney general, and the harbor line commission are directed as a matter of high priority to undertake jointly a study of the locations, uses and activities, both proposed and existing, relating to the shorelines of the cities, and towns of the state and submit a report which shall include but not be limited to the following:

(1) Events leading to the establishment of the various harbor lines pertaining to cities of the state;

(2) The location of all such harbor lines;

(3) The authority for establishment and criteria used in location of the same;

(4) Present activities and uses made within harbors and their relationship to harbor lines;

(5) Legal aspects pertaining to any uncertainty and inconsistency; and

(6) The relationship of federal, state and local govern-

ments to regulation of uses and activities pertaining to the area of study.

The report shall be submitted to the legislature not later than December 1, 1972.

NEW SECTION. Sec. 34. All state agencies, counties, and public and municipal corporations shall review administrative and management policies, regulations, plans, and ordinances relative to lands under their respective jurisdictions adjacent to the shorelines of the state so as to achieve a use policy on said land consistent with the policy of this chapter, the guidelines, and the master programs for the shorelines of the state. The department may develop recommendations for land use control for such lands. Local governments shall, in developing use regulations for such areas, take into consideration any recommendations developed by the department as well as any other state agencies or units of local government.

NEW SECTION. Sec. 35. Nothing in this chapter shall affect any rights established by treaty to which the United States is a party.

NEW SECTION. Sec. 36. Nothing in this chapter shall obviate any requirement to obtain any permit, certificate, license, or approval from any state agency or local government.

NEW SECTION. Sec. 37. This chapter is exempted from the rule of strict construction, and it shall be liberally construed to give full effect to the objectives and purposes for which it was enacted.

NEW SECTION. Sec. 38. Sections 1 through 37 of this act shall constitute a new chapter in Title 90 RCW.

NEW SECTION. Sec. 39. To carry out the provisions of this 1971 act there is appropriated to the department from the general fund the sum of five hundred thousand dollars, or so much thereof as necessary.

NEW SECTION. Sec. 40. If any provision of this chapter, or its application to any person or legal entity or circumstances, is held invalid, the remainder of the act, or the application of the provision to other persons or legal entities or circumstances, shall not be affected.

NEW SECTION. Sec. 41. This chapter is necessary for the immediate preservation of the public peace, health and safety, the support of the state government, and its existing institutions. This 1971 act shall take effect on June 1, 1971. The director of ecology is authorized to immediately take such steps as are necessary to insure that this 1971 act is implemented on its effective date.

NEW SECTION. Sec. 42. This 1971 act constitutes an alternative to Initiative 43. The secretary of state is directed to place this 1971 act on the ballot in conjunction with Initiative 43 at the next ensuing regular election.

This 1971 act shall continue in force and effect until the secretary of state certifies the election results on this 1971 act. If affirmatively approved at the ensuing regular general election, the act shall continue in effect thereafter.

Passed the House May 6, 1971.

Passed the Senate May 4, 1971.

Approved by the Governor May 21, 1971 with the exception of an item in section 3 which is vetoed.

Filed in Office of Secretary of State May 21, 1971.

NOTE: Governor's explanation of partial veto is as follows:

one hundred

VETO MESSAGE

“ . . . Substitute House Bill 584 is one of the most significant pieces of legislation ever passed by the state legislature. It is a clear indication of the commitment of the people of the state, acting through the legislative process to assure the future environmental quality of this state. With the passage of Substitute House Bill 584 and with what I hope will be the approval of the people at the next general election this state will lead the nation in its care and concern for its waterfront areas.

This bill is the product of extensive legislative hearings, both during the 1970 and 1971 sessions and the interim. It successfully provides for a maximum of input at the local level with appropriate safeguards at the state level to protect the general public interest.

With regard to the general public interest, while the bill should provide for a diversity of participation on the part of local governments in the planning process, the authority at the state level should be confined to a single agency so that a uniform state policy can be developed. Furthermore, as a general principle an agency should not be in the position of both preparing and approving plans for land which it owns or controls.

The proviso in section 3(c) which declares that the Department of Natural Resources “shall have the powers, duties, and obligations as local government has as to other lands covered by the provisions of this chapter” places more than one agency of state government in a policy making position and in effect allows a large land owner both to make and approve its own plans. While I have the highest respect for the Department of Natural Resources and the Commissioner of Public Lands I believe the proviso in section 3(c) is contrary to sound public policy and should be vetoed.

The remainder of Substitute House Bill No. 584 is approved.”

COMPLETE TEXT OF

Initiative Measure

44

Initiative Measure To The Legislature

Ballot Title as issued by the Attorney General:

Statutory Tax Limitation—20 Mills

AN ACT to limit tax levies on real and personal property by the state, and other taxing districts, except port and power districts, to an aggregate of twenty (20) mills on assessed valuation (50% of true and fair value), without a vote of the people; allowing the legislature to allocate or reallocate up to twenty (20) mills among the various taxing districts.

BE IT ENACTED, by the Legislature
of the State of Washington:

SECTION 1. Section 84.52.050, chapter 15, Laws of 1961 as

Initiative Measure No. 276

(Continued from Page 11)

The second part of this initiative would replace the existing law regulating lobbying activities. Like the present law, it would require lobbyists (with certain exceptions) to register before doing any lobbying. The term "lobbying," however, would be expanded to include activities in connection with all state regulatory agencies as well as the legislature, and also to include lobbying between legislative sessions. Unlike the present law, the initiative would require lobbyists to file itemized and detailed quarterly reports of their lobbying activities as well as weekly reports during legislative sessions. Employers of lobbyists would be required to file additional annual reports concerning their employment or compensating of state officials, and legislators would also file written reports concerning persons employed by them. The use of state funds for lobbying would be prohibited unless expressly authorized by law. All state agencies whose employees communicate with the legislators in accordance with the act would be required to file detailed quarterly reports concerning such employees and communications.

The third part of the initiative pertains to the financial affairs of candidates and elected officials at both the state and local levels. This part would require such candidates and officials to file periodic reports of a number of designated matters relating to their financial and business affairs, and would excuse any persons filing these reports from also filing the financial disclosure reports required by the existing statute pertaining to state officers.

The fourth major part of the initiative relates to "public records," a term which would be defined as including "... any writing containing information relating to the conduct of government or the performance of any governmental or proprietary function prepared, owned, used or retained by any state or local agency regardless of physical form or characteristics." The initiative would require all such "public records" of both state and local agencies to be made available for public inspection and copying by any person asking to see or copy a particular record—subject only to certain exceptions relating to individual rights of privacy or other situations where the act deems the public interest would not be best served by open disclosure—regardless of whether or not the particular record is one which the official having custody is required by law to maintain. This part of the initiative would also impose upon all state and local governmental agencies a great number of detailed requirements with respect to the maintenance and indexing of all their records.

The initiative would also establish a "public disclosure commission" to administer and enforce its provisions and would prescribe several procedures and penalties for its enforcement. And finally, the last section of the initiative states that if approved the initiative would repeal the provisions of Referendum Bills 24 and 25 in the event that these measures are also approved at this election. Those measures are discussed on pages 12 and 14 of this pamphlet.

Referendum Bill No. 24

(Continued from Page 13)

voke lobbyist registration, enjoin lobbying activities, require filing of reports and recover treble damages for failure to file accurate reports. The boards could employ attorneys other than the attorney general. Individuals could also bring suit for damages.

The present law must be strictly construed because of its criminal penalties; however Referendum 24 expressly declares that its provisions shall be liberally interpreted in order to carry out its purposes.

Finally, this act should be compared with Initiative Measure No. 276, as described on page 10 of this voters' pamphlet, a portion of which also covers this same general subject.

Referendum Bill No. 25

(Continued from Page 15)

scribe to a code of fair campaign practices by which he would promise to uphold the principles of decency, honesty and fair play.

Persons violating the act would be guilty of misdemeanors and in most cases would be punishable by a fine of not more than \$500.

Finally, this act should be compared with Initiative Measure No. 276, as described on page 10 of this voters' pamphlet, a portion of which also covers this same general subject.

Initiative Measure No. 43

(Continued from Page 33)

lowed to operate a permit system for developments which are not substantial upon delegation of such authority by the department of ecology.

This act would prohibit the issuance of any permits to drill for oil in Puget Sound, or (with certain exceptions) to construct any buildings of more than 35 feet above average grade level on shorelines which obstruct the view of a substantial number of residences on areas adjoining the shoreline. It would also limit commercial timber harvesting in shoreline areas. The initiative further would require a consumer protection notice of the applicability of its provisions to be given in connection with certain transactions pertaining to lands or waters subject to the act's provisions.

Both Initiative Measure 43 and Alternative Measure 43B provide for comprehensive land planning and management programs. The principal differences between the two measures pertain to the relationships of state and local governments in the implementation of the respective acts and to the scope of geographical coverage. Alternative Measure 43B places a greater degree of responsibility and participation in local government than would Initiative Measure 43. Geographically, Initiative Measure 43 would be applicable to all lakes and streams, while Alternative Measure 43B does not apply to lakes of less than 20 acres or (with minor exceptions) to portions of streams with a mean annual flow of 20 cubic feet per second or less. In addition, the initiative would apply to a 500 foot strip of lands adjacent to all waters covered thereby and their underlying beds, whereas the alternative measure applies to a 200 foot strip of such lands together with (in certain instances) other adjacent low lying areas.

Finally, the general consent of the state to the impairment of public navigational rights by the retention of certain existing improvements which is contained in Alternative Measure 43B is not included in Initiative Measure 43. Instead, the initiative states that, except as permitted by it, "... there shall be no interference with or obstruction of the navigational rights of the public pursuant to common law as stated in such cases as the Washington Supreme Court decision in Wilbour v. Gallagher, 77 Wn. 2d 306 (1969)."

Alternative Measure No. 43B

(Continued from Page 35)

high water mark. Other activities expressly limited by the act include commercial timber harvesting on designated shoreline areas of state-wide significance and (with certain exceptions) the erection of structures over 35 feet in height above average grade level on shorelines where adjacent residential views on areas adjoining shorelines would be impaired.

This measure also grants the consent of the state to the impairment of the public rights of navigation and corollary rights caused by the retention of any structures, improvements, docks, fills or developments placed in navigable waters prior to December 4, 1969, except where they were placed in navigable waters in violation of state statutes or are in trespass.

Both Initiative Measure 43 and Alternative Measure 43B provide for comprehensive land planning and management programs. The principal differences between the two measures pertain to the relationships of state and local government in the implementation of the respective acts and to the scope of geographical coverage. Alternative Measure 43B places a greater degree of responsibility and participation in local government than would Initiative Measure 43. Geographically, Initiative Measure 43 would be applicable to all lakes and streams, while Alternative Measure 43B does not apply to lakes of less than 20 acres or (with minor exceptions) to portions of streams with a mean annual flow of 20 cubic feet per second or less. In addition, the initiative would apply to a 500 foot strip of lands adjacent to all waters covered thereby and their underlying beds, whereas the alternative measure applies to a 200 foot strip of such lands together with (in certain instances) other adjacent low lying areas.

Finally, the general consent to the impairment of public navigational rights by the retention of certain existing improvements which is contained in Alternative Measure 43B is not included in Initiative Measure 43. Instead, the initiative states that, except as permitted by it, "... there shall be no interference with or obstruction of the navigational rights of the public pursuant to common law as stated in such cases as the Washington Supreme Court decision in Wilbour v. Gallagher, 77 Wn. 2d 306 (1969)."

CERTIFICATION

As Secretary of State of the State of Washington, I hereby certify that I have caused the text of all laws, proposed measures, ballot titles, official explanations, etc. that appear within this publication to be carefully compared with the original such instruments now on file in my office and find them to be a full and true copy of said originals.

Witness my hand and the seal of the State of Washington this 20th day of September, 1972.



A. LUDLOW KRAMER
Secretary of State