

No. 80396-0

**SUPREME COURT
OF THE STATE OF WASHINGTON**

FUTUREWISE, EVERGREEN ISLANDS, and SKAGIT AUDUBON
SOCIETY,

Respondents,

WASHINGTON STATE DEPARTMENT OF COMMUNITY, TRADE
AND ECONOMIC DEVELOPMENT, and WASHINGTON STATE
DEPARTMENT OF ECOLOGY,

Respondent/Intervenors,

v.

WESTERN WASHINGTON GROWTH MANAGEMENT HEARINGS
BOARD, an agency of the State of Washington,

Plaintiff,

CITY OF ANACORTES,

Appellant,

WASHINGTON PUBLIC PORTS ASSOCIATION,

Appellant/Intervenors.

RECEIVED
SUPREME COURT
STATE OF WASHINGTON
2008 AUG 20 P 3:49

DONALD R. DARFENTER
CLERK

**RESPONDENTS FUTUREWISE, EVERGREEN ISLANDS,
AND SKAGIT AUDUBON SOCIETY'S
MOTION FOR RECONSIDERATION**

Tim Trohimovich
WSBA No. 22367

Melissa O'Loughlin White
WSBA No. 27668
Matthew Taylor
WSBA No. 31938

FUTUREWISE
814 Second Avenue, Suite 500
Seattle, Washington 98104
Telephone: (206) 343-0681
email: tim@futurewise.org

COZEN O'CONNOR
1201 Third Avenue, Suite 5200
Seattle, Washington 98101
Telephone: (206) 340-1000
email: mwhite@cozen.com

Attorneys for Respondents
Futurewise, Evergreen Islands, and Skagit Audubon Society

I. IDENTITY OF MOVING PARTY

The moving parties are Futurewise, Evergreen Islands, and Skagit Audubon Society (collectively “the Futurewise parties”), the Respondents in *Futurewise et al. v. Western Wash. Growth Management Hearings Board et al.*, --- P.3d ----, 2008 WL 2930176 (Wash. No. 80396-0, July 31, 2008) (“Slip Op.”).¹

II. RELIEF SOUGHT

The Futurewise parties respectfully request that this Court grant reconsideration for the reasons expressed herein and in the motion for reconsideration being filed by the State Agencies.² At a minimum, this Court should provide much-needed clarification to the parties involved in this case as well as entities and persons throughout Washington who endeavor to honor the balance between shorelines protection and property rights. As demonstrated by the widespread confusion caused by the current decision that reinstates the Western Board’s ruling, the appropriate result would be for this Court to affirm the contrary conclusion reached by the Thurston County Superior Court. CP 451-54 (Thurston County Superior Court’s November 17, 2006 order).

¹ A copy of this Court’s decision is attached hereto as Exhibit A.

² The Futurewise Parties hereby join in the State Agencies’ Motion for Reconsideration, and adopt by reference the analysis and argument therein.

III. STATEMENT OF THE CASE

On April 18, 2005, the City of Anacortes repealed its own critical areas regulations and enacted a new stand-alone chapter of the Anacortes City Code that addressed the protections of critical areas, Chapter 17.70 of the Anacortes City Code.³ The Futurewise parties challenged the City of Anacortes' new environmental scheme as violating the Growth Management Act⁴ ("GMA"). The Western Washington Growth Management Hearings Board issued a 46-page Final Decision and Order on December 27, 2005. CP 269-315. In that Order, the Western Board, *inter alia*, added to ESHB 1933,⁵ a requirement that each new or amended protection of critical areas in shorelines must be accomplished under the Shoreline Management Act⁶ ("SMA") without regard to the staged implementation of shoreline master program updates by counties and cities expressly provided for in SB 6012.⁷ CP 292-99.

On November 17, 2006, the Thurston County Superior Court reversed the Western Board and properly confirmed the plain language of the legislation and the SMA, *i.e.*, that responsibilities for protecting Washington shorelines continue to be governed by the GMA until the

³ Ordinance 2702, codified as Chapter 17.70 of the Anacortes City Code, available at <http://municipalcodes.lexisnexis.com/codes/anacortes/>.

⁴ See RCW 36.70A (The Growth Management Act).

⁵ Engrossed Senate House Bill 1933 enacted as Session Laws Ch. 312, Laws of 2003.

⁶ See RCW 90.58 ("Shoreline Management Act of 1971").

⁷ Substitute Senate Bill 6012 enacted as Session Laws Ch. 262, Laws of 2003.

shoreline master programs are updated in the orderly manner expressly required by SB 6012. CP 451-54. The City of Anacortes appealed to the Court of Appeals, Division II. After briefing was filed, Anacortes filed a motion to transfer the case to this Court. This Court granted that motion on September 6, 2007, and heard oral argument on November 29, 2007.

On July 31, 2008, this Court issued a decision that was comprised of two opinions, and contained no majority. Four Justices concurred in the opinion authored by Justice Jim Johnson and four Justices concurred in the opinion authored by Justice Tom Chambers. The ninth Justice, Justice Barbara Madsen, joined Justice Jim Johnson's opinion, but concurred in "result only" without further explanation. Slip Op. at 9.

Although the stated rationale of the Western Board directly contradicts the discussion set forth in Justice Jim Johnson's opinion, the result joined by five Justices was to reinstate the decision of the Western Washington Growth Management Hearings Board. Slip Op., at 8 ("The decision of the trial court is reversed, and the decision of the Western Washington Growth Management Hearings Board upholding Anacortes is reinstated.").

The Western Board's decision, as reinstated by this Court, has no more authority than any other decision issued by any of the three Growth Management Hearings Boards within that Board's respective jurisdictional

boundaries. *See* RCW 36.70A.250. Indeed, decisions issued by the Western Washington Growth Management Hearings Board are not binding upon the vast portions of Washington state that fall within the jurisdictional boundaries of the Central Puget Sound Growth Management Hearings Board or the Eastern Washington Growth Management Hearings Board. *See* RCW 36.70A.250 (1)(a)-(b) (Eastern Washington Board's jurisdictional boundaries are located east of the crest of the Cascade mountains); RCW 36.70A.250 (1) (b) (Central Puget Sound Board's jurisdictional boundaries include King, Pierce, Snohomish, and Kitsap counties).

IV. GROUNDS FOR RELIEF SOUGHT

This Court should reconsider its decision where, as here, there are points of law or fact that were overlooked or misapprehended. *See* RAP 12.4(c).

The Futurewise parties and the State Agencies provided this Court with well-reasoned arguments and legal authorities that support the Thurston County Superior Court's decision to reverse the Board.⁸ Those arguments best illustrate the law and facts that were overlooked or misapprehended by the four Justices who concurred in the result and

⁸ The State Agencies and the Futurewise parties filed their substantive briefs in the Court of Appeals Division II on May 21, 2007, before this case was transferred to this Court on September 6, 2007.

reasoning presented in the opinion authored by Justice Jim Johnson. As discussed therein, the Superior Court correctly decided the narrow legal issue presented, *i.e.*, that protections for Washington shorelines continue to be governed by the GMA until the shoreline master programs are updated in the manner expressly required by the SMA. CP 451-54. Moreover, this interpretation is consistent with legislative intent, as it guarantees there will be no gap in protections to Washington shorelines. The Futurewise parties therefore ask that this Court reconsider the result in this case.

Alternatively, the Futurewise parties seek clarification of this Court's July 31, 2008 decision. Given the posture of the case (two opinions joined by four Justices each, with the ninth Justice concurring as to result only), it is not possible to assess the correct holding of the case. *See Wolfe v. Legg*, 60 Wn. App. 245, 249 n.2, 803 P.2d 804 (1991) (where a Supreme Court decision "was the result of a plurality decision with the fifth vote, concurring in the result only, being unaccompanied by an opinion[,]” the Court of Appeals concluded it was not possible to assess the correct holding of the case). Given that there is no majority holding, it appears that even though Justice Jim Johnson's opinion received a majority as to result only, it did not become the law. *See Green v. Seattle*, 146 Wash. 27, 30-31, 261 P. 643 (1927) (departmental opinion signed by

three members of the court, and affirmed en banc as to result only, had “never become the law”).

Even so, this Court’s decision has already caused widespread confusion. For example, the City of Tacoma has already cited the decision in this case as authority to the Central Puget Sound Growth Management Hearings Board in support of the proposition that the “majority opinion in *Futurewise* holds that local governments do not have authority under the GMA to regulate critical areas within shoreline jurisdiction.”⁹ Although Supreme Court decisions are typically binding authority throughout the state, a close review of this Court’s decision confirms that the majority only reinstated the Western Board’s decision. Additionally, while Justice Jim Johnson’s opinion offers reasoning to support the reinstatement, that reasoning was not joined by a majority of the Justices on this Court – a relevant issue the City of Tacoma apparently failed to appreciate in describing the impact of the opinion in this case to the Central Puget Sound Growth Management Hearings Board. Given that the ultimate result was reinstatement of the Western Board’s decision, it appears that the parties involved in this case are bound by the Board’s reasoning and determinations. This is a most perplexing result, however, as Justice Jim

⁹ A copy of “City’s Alternative Request for Finding of Compliance” filed August 5, 2008, with the Central Puget Sound Growth Management Hearings Board is attached hereto as Exhibit B.

Johnson's opinion contains reasoning that explicitly contradicts the reasons articulated by the Western Board.

Further, Justice Jim Johnson's opinion indicates that the critical areas regulations do not apply to critical areas within shoreline jurisdiction. Slip Op. at 6. While the Western Board's decision specifically concluded that the critical areas regulations do apply to critical areas within shoreline jurisdiction until the shoreline master program is updated using the current guidelines. CP 295. This conflict between Justice Jim Johnson's opinion is creating significant confusion among counties, cities, state agencies, property owners, and the public.

Justice Jim Johnson's opinion also concluded that shoreline master programs adequately protect shoreline resources. Slip Op. at 6-7. This is an error of fact. Most shoreline master programs are old, having first been adopted in the 1970s. Anacortes's shoreline master program was adopted in 1977, when we knew much less about the important resources of Puget Sound and 13 years before the concept of critical areas was recognized in state law. Slip Op. at 6; 1990 Wash. Laws First Ex. Sess. Chapter 17, Sec. 2(5) & Sec. 6. The first round of shoreline master program updates are just starting and will not be completed until 2014. RCW 90.58.080(2)(a). In contrast, local governments have updated the

critical areas regulations with the last updates being completed this year. RCW 36.70A.130(4); RCW 36.70A.130 (8).

The updated critical areas regulations contain important protections for critical areas within shoreline jurisdiction that the un-updated critical areas regulations do not. For example, the City of Anacortes's measures to protect the heronry along Puget Sound are in their critical areas regulations. CP 448-59. There are no measures to protect the heronry in the existing shoreline master program. CP 351-53. In fact Anacortes's shoreline master program recognizes that it does not include adequate protections for critical areas within shorelines jurisdiction because the shoreline master program specifically requires that development within shorelines jurisdiction must comply with the city's critical areas regulations. CP 296, 310. There is, therefore, a significant gap in protection for critical areas. So the difference between the Western Board's decision and Justice Jim Johnson's opinion actually matter on the ground. The Futurewise parties anticipate that this Court will receive an amicus brief from at least one local government making this argument more forcefully and with greater eloquence.

The Futurewise parties anticipate continued disagreement over the influence this Court intended its decision should have over proceedings involving these parties as well as non-parties involved in similar disputes.

Readers of this Court's July 31, 2008 decision will have a difficult time squaring the plurality opinion and this Court's reinstatement of the Western Board's decision. The Futurewise parties respectfully request that this Court grant reconsideration and, at a minimum, provide clarification for the parties and the public.

As a final matter, this Court's order transferring this case on September 6, 2007, this Court described the issue in this case as having "broad public import which requires prompt and ultimate determination." This case has been ongoing since 2005. In order to provide that prompt and ultimate determination, the Futurewise parties ask that this Court resolve this case via reconsideration rather than require parties and non-parties continue to debate over what this Court's decision means.

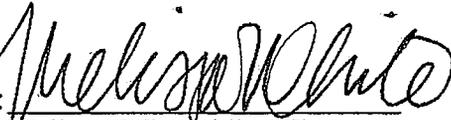
V. CONCLUSION

For the reasons set forth herein and in the motion for reconsideration being filed by the State Agencies, the Futurewise parties respectfully request that this Court reconsider its July 31, 2008 decision. The Futurewise parties urge this Court to reverse the decision of the Western Growth Management Hearings Board and affirm the Thurston County Superior Court. Alternatively, the Futurewise Parties ask that this Court assist the parties and the general public in avoiding further confusion over the impact of this Court's decision by reconciling this

Court's reinstatement of the Western Board's decision with the analysis set forth in the plurality opinion.

DATED: August 20, 2008

COZEN O'CONNOR

By: 

Melissa O'Loughlin White

WSBA No. 27668

Matthew Taylor

WSBA No. 31938

Attorneys for Respondents
Futurewise, Evergreen Islands,
and Skagit Audubon Society

DECLARATION OF SERVICE

Dava Z. Bowzer states:

I am a citizen of the United States of America and a resident of the State of Washington, I am over the age of 21 years, I am not a party to this action, and I am competent to be a witness herein.

On this 20th day of August, 2008, I caused to be filed via electronic filing with the Supreme Court of the State of Washington the foregoing RESPONDENTS FUTUREWISE, EVERGREEN ISLANDS, AND SKAGIT AUDUBON SOCIETY'S MOTION FOR RECONSIDERATION. I also served copies of said document on the following parties as indicated below:

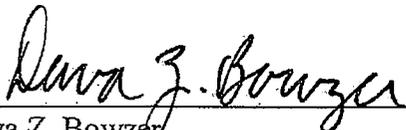
Parties Served	Manner of Service
<i>Counsel for Appellant City of Anacortes:</i>	
Bradford E. Furlong	() Via Legal Messenger
Anacortes City Attorney	() Via Overnight Courier
Anacortes Municipal Building	() Via Facsimile
PO Box 547	(X) Via U.S. Mail
Anacortes, WA 98221-0547	() Via Email
P. Stephen DiJulio	() Via Legal Messenger
Susan Elizabeth Drummond	() Via Overnight Courier
Foster Pepper, PLLC	() Via Facsimile
1111 Third Avenue, Suite 3400	(X) Via U.S. Mail
Seattle, WA 98101	(X) Via Email

Parties Served	Manner of Service
<p><i>Counsel for Plaintiff Western Washington Growth Management Hearings Board:</i> Martha Lantz, Assistant Attorney General Licensing and Administrative Law Div. Office of the Attorney General PO Box 40110 Olympia, WA 98504-0110</p>	<p>() Via Legal Messenger () Via Overnight Courier () Via Facsimile (X) Via U.S. Mail (X) Via Email</p>
<p><i>Counsel for Respondents Futurewise, Evergreen Islands, and Skagit Audubon Society:</i> Tim Trohimovich Futurewise 814 Second Avenue, Suite 500 Seattle, WA 98104</p>	<p>() Via Legal Messenger () Via Overnight Courier () Via Facsimile (X) Via U.S. Mail (X) Via Email</p>
<p><i>Counsel for Appellant/Intervenor Washington Public Ports:</i> Eric S. Laschever Steve J. Thiele Stoel Rives LLP 600 University Street, Suite 3600 Seattle, WA 98101-3197</p>	<p>() Via Legal Messenger () Via Overnight Courier () Via Facsimile (X) Via U.S. Mail (X) Via Email</p>
<p><i>Counsel for Respondent/Intervenors Washington State Department of Community, Trade and Economic Development; and Department of Ecology:</i> Alan D. Copsey Assistant Attorney General Agriculture & Health Division Office of the Attorney General PO Box 40109 Olympia, WA 98504-0109</p> <p>Thomas J. Young Assistant Attorney General Ecology Division Office of the Attorney General PO Box 40117 Olympia, WA 98504-0117</p>	<p>() Via Legal Messenger () Via Overnight Courier () Via Facsimile (X) Via U.S. Mail (X) Via Email</p> <p>() Via Legal Messenger () Via Overnight Courier () Via Facsimile (X) Via U.S. Mail (X) Via Email</p>

Parties Served	Manner of Service
<i>Counsel for Amici Curiae Kitsap Alliance of Property Owners and Pacific Legal Foundation:</i> Diana M. Kirchheim Brian T. Hodges Pacific Legal Foundation 10940 NE 33 rd Place, Suite 210 Bellevue, WA 98004	 <input type="checkbox"/> Via Legal Messenger <input type="checkbox"/> Via Overnight Courier <input type="checkbox"/> Via Facsimile <input checked="" type="checkbox"/> Via U.S. Mail <input checked="" type="checkbox"/> Via Email

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

Executed at Seattle, Washington, this 20th day of August, 2008.



Dava Z. Bowzer

SEATTLE\750553\3 096930.000

EXHIBIT A

FILE

IN CLERKS OFFICE

SUPREME COURT, STATE OF WASHINGTON

DATE JUL 31 2008

[Signature]

for CHIEF JUSTICE

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

FUTUREWISE, EVERGREEN)
ISLANDS, and SKAGIT AUDUBON)
SOCIETY,)

Respondents,)

WASHINGTON STATE)
DEPARTMENT OF COMMUNITY,)
TRADE AND ECONOMIC)
DEVELOPMENT and WASHINGTON)
STATE DEPARTMENT OF ECOLOGY,)

Respondents/Intervenors,)

v.)

WESTERN WASHINGTON GROWTH)
MANAGEMENT HEARINGS BOARD,)
an agency of the state of Washington; and)
CITY OF ANACORTES,)

Petitioners,)

and)

WASHINGTON PUBLIC PORTS)
ASSOCIATION,)

Intervenor.)

No. 80396-0

En Banc

Filed JUL 31 2008

J.M. JOHNSON, J.—In 1971, Washington voters passed the Shoreline Management Act of 1971 (SMA), chapter 90.58 RCW. The SMA meant to strike a balance among private ownership, public access, and public protection of the State’s shorelines. RCW 90.58.020. Starting that year, local governments were required to create shoreline master plans governing the use of shorelines and the Department of Ecology (Ecology) was given authority to approve plans before they became effective. RCW 90.58.070(1). The plans must be updated every seven years to make sure they still comply with the law. RCW 90.58.080(4). The city of Anacortes has a shoreline master plan, which Ecology approved in 1977. Ecology has approved Anacortes’s periodic updates several times since then, most recently in 2000. Each time, both Anacortes and Ecology held public hearings and made written findings, concluding that the plans adequately protected shorelines in Anacortes.

In 1990, the legislature passed the Growth Management Act, chapter 36.70A RCW (GMA). Its goal is to coordinate land use planning across the state. RCW 36.70A.010. The GMA has substantial requirements when actions might affect areas defined as “critical areas.” RCW 36.70A.172(1). Among other things, the GMA was amended in 1995 to require local

governments to designate and protect critical areas using the “best available science”—a benign term with often a heavy price tag. *Id.* The SMA, with its goal of balancing use and protection, is less burdensome.

The GMA also divided the state into thirds and created three administrative boards to hear appeals under the GMA. RCW 36.70A.250. In 2003, the Central Puget Sound Growth Management Hearings Board decided that the GMA retroactively applied even to those critical areas inside shoreline management areas long managed through shoreline master plans properly adopted, amended, and approved by Ecology under the SMA. *Everett Shorelines Coal. v. City of Everett*, No. 02-3-0009c (Cent. Puget Sound Growth Mgmt. Hr’gs Bd. Jan. 9, 2003). This board decision so conflicted with the law and the established practices that the legislature acted the next session by enacting a law explicitly rejecting that board’s interpretation. ENGROSSED SUBSTITUTE H.B. 1933, 58th Leg., Reg. Sess. § 1(1) (Wash. 2003) (ESHB 1933). “The legislature intends that critical areas within the jurisdiction of the [SMA] shall be governed by the [SMA] and that critical areas outside the jurisdiction of the [SMA] shall be governed by the [GMA].” *Id.* § 1(3). We hold that the legislature meant

what it said. Critical areas within the jurisdiction of the SMA are governed only by the SMA.

I

The city of Anacortes has long had a shoreline master plan for its shoreline area (last amended and approved in 2000). Anacortes adopted new standards under its GMA plan for other areas, including critical areas. Unfortunately, it is now common that litigation often follows actions by local governments relating to land use. In this litigation, the Western Washington Growth Management Hearings Board decided that the SMA continued to cover Anacortes's plan (rather than the GMA amendments), following the clear language of ESHB 1933. When litigant Futurewise appealed, the superior court disagreed and held that the GMA retroactively applies to critical areas within the shoreline master plan until the next time Ecology considers and approves an amended shoreline master plan.¹ Anacortes appealed, and we granted direct review.

II

The only issue is whether the legislature meant the GMA to apply to critical areas in shorelines covered by shoreline master plans until Ecology

¹ As is noted *infra*, Ecology has acted to approve only three (amended) county plans since 2003.

has approved a new or updated shoreline master plan. The legislature's clear intent as quoted above reads, "critical areas within the jurisdiction of the [SMA] shall be governed by the [SMA]." ESHB 1933 § 1(3).

Ecology principally relies on the language of ESHB 1933 as codified, which reads: "As of the date the department of ecology approves a local government's shoreline master program . . . the protection of critical areas . . . shall be accomplished only through the local government's shoreline master program" RCW 36.70A.480(3)(a). The tense of "approves" sounds prospective, but only at first blush. This is the same verb tense as "[t]he legislature intends," and the legislature surely did not mean its statutory correction would solve the misreading of the statute someday in the future. The cure was immediate (indeed retrospective). In the same way, the legislature uses "[a]s of the date the department of ecology approves" to refer to the date of approval of each plan. In Anacortes's case, that date was in 2000.

The subsections of ESHB 1933 surrounding this language support this reading. As codified, the very next subsection reads: "Critical areas within shorelines of the state . . . and that are subject to a shoreline master program adopted under applicable shoreline guidelines shall not be subject to the

procedural and substantive requirements of [the GMA].” RCW 36.70A.480(3)(b). The subsection after that reads: “[The GMA] shall not apply to the adoption or subsequent amendment of a local government’s shoreline master program.” RCW 36.70A.480(3)(c). None of this is prospective or delayed in effect. The legislature’s intent was that the SMA, not the GMA, should cover shorelines.

ESHB 1933 was a rebuke to one board decision that misread the law. Courts must not repeat or extend one hearing board’s mistake, especially when the legislature took only four months to adopt legislation clarifying that the board had construed the law incorrectly.

SMA coverage of shorelines has long protected the environment. Anacortes has had a shoreline master plan protecting its shorelines since 1977, which was adopted by Anacortes’s city council and approved by Ecology. Hearings, extensive study and analysis, and public input surrounded each step. Among other things, before enacting the plan, Anacortes gave notice to every interested party and allowed opportunity for input and comment. RCW 90.58.090(2)(a). The plan and its updates take into account the preservation and protection of shorelines. RCW 90.58.020. Those closest to the Anacortes shorelines, i.e., the residents and their elected

representatives, have the most invested in properly balancing smart use and environmental safeguards. Anacortes has followed the SMA and has created a master plan protecting its shorelines, and Ecology has approved the plan. The shorelines will remain protected.

The real-world effect of interpreting the transfer as prospective, as Ecology urges, would be to change the effective date of ESHB 1933 from July 27, 2003, to a much later rolling date, as Ecology gets around to processing and approving new or amended shoreline master plans. At oral argument, Ecology's attorney said Ecology had approved only 3 out of 39 county plans since 2003. And those are just the county plans; cities also have plans that Ecology must approve. At this rate, if we were to hold as petitioners and Ecology argue, it is unknown when the law would go into effect statewide. The legislature surely did not intend the effect of this curative law to delay, and such a conclusion flies in the face of express legislative intent.

Finally, Ecology's position would place local governments and landowners in an untenable position. Anacortes has long complied with the law and has a shoreline master plan in place. Landowners have relied on this plan when making long-term decisions about their property. Anacortes

and its residents have also made long-term reliance. If we were to hold as Ecology urges, both Anacortes and the landowners would spend significant time and money complying with the GMA and the SMA, until Ecology ultimately approves a new shoreline master plan. This contradicts the finality and certainty that is so important in land use cases. *See Samuel's Furniture, Inc. v. Dep't of Ecology*, 147 Wn.2d 440, 459, 54 P.3d 1194 (2002).

The trial court repeated the mistake of one errant hearings board when it held that the GMA controls procedures inside shorelines until new SMA plans are formulated and approved. The legislature clearly rejected that holding. Deciding as Ecology urges would contradict the clear language and intent of the legislature in ESHB 1933 and would add substantial costs to citizens and local governments. Ironically, legitimate conservation management efforts would be frustrated and encumbered. The decision of the trial court is reversed, and the decision of the Western Washington Growth Management Hearings Board upholding Anacortes is reinstated.²

² After oral argument, Ecology filed a statement of supplemental authority. Anacortes filed a motion to strike the statement, claiming it improperly contains argument, RAP 10.8, and that it cites to legal authorities that are not new. We deny the motion, both because the statement does not contain argument and because nothing in the rule limits its application to newly created law.

WE CONCUR:

J.M. Jensen

J. Madsen
Result only
J. Sandus

Bridge, J.P.T.

Futurewise, et al. v. W. Wash. Growth Mgmt. Hr'gs Bd., et al.

No. 80396-0

CHAMBERS, J. (dissenting) — The majority is unnecessarily critical of the Department of Ecology (Ecology) and the Growth Management Act (GMA), chapter 36.70A RCW. The majority's conclusion today is clearly driven by the belief that the Shoreline Management Act of 1971 (SMA), chapter 90.58 RCW, is wiser and more attractive than the GMA. This belief leads the majority to its overly simplistic and erroneous conclusion that because the city of Anacortes had a shoreline master plan in place in 2003, it had met its legal obligations to protect the critical areas of its shorelines, even though it had not been required to meet the relevant legal standards when designing that plan. Admittedly, harmonizing the SMA and the GMA is a challenge, both for local governments and this court. However, I must dissent because our role when interpreting statutes, which is all we are called upon to do today, is to implement the intent of the legislature. It is not to evaluate the merits of the legislation. We best achieve the goals of the legislature by interpreting its plain words in context. *Dep't of Ecology v. Campbell & Gwinn, LLC*, 146 Wn.2d 1, 9-10, 43 P.3d 4 (2002). When we read both acts together, it is clear our legislature intended to transfer management of critical areas in shorelines from the GMA to the SMA in an orderly, measured process and upon the approval of shoreline master plans that specifically protect critical areas.

The people of this state enacted the SMA in 1971, and 19 years later our legislature followed up with the GMA. LAWS of 1971, 1st Ex. Sess., ch. 286;

LAWS of 1990, 1st Ex. Sess., ch. 17. Under both acts, local governments manage the use of local land in compliance with state law and in cooperation with the State. RCW 36.70A.070, .106, .130, .250 (GMA); RCW 90.58.050, .070, .080, .090 (SMA). After much study, the legislature made its first attempt to coordinate the two acts five years after enacting the GMA. LAWS of 1995, ch. 347. In due course, a local government's attempt to plan under the coordinated acts was litigated and came before a growth management hearings board. *See Everett Shorelines Coal. v. City of Everett*, No. 02-3-0009c, at 3 (Cent. Puget Sound Growth Mgmt. Hr'gs Bd. Jan. 9, 2003). The board concluded that shorelines of statewide significance under the SMA were also categorically critical areas under the GMA, and thus, shoreline management often had to comply with both acts. *Id.* at 17.

In response, the 2003 legislature amended both the SMA and the GMA. ENGROSSED SUBSTITUTE H.B. 1933, 58th Leg., Reg. Sess. (Wash. 2003) (hereinafter ESHB 1933). I completely agree with the majority that the overarching legislative purpose was expressed clearly:

The legislature intends that critical areas within the jurisdiction of the shoreline management act shall be governed by the shoreline management act and that critical areas outside the jurisdiction of the shoreline management act shall be governed by the growth management act.

ESHB 1933, § 1(3). But the legislature did much more than merely declare that critical areas in shorelines were to be managed under the SMA as the majority

suggests. It also raised the bar for that management, requiring local governments to consider the goals and policies of the SMA when planning under the GMA. ESHB 1933, § 5(1) (codified as RCW 36.70A.480(1)). It directed Ecology to approve only those shoreline master programs that provide at least as much protection to relevant critical areas as the local critical areas ordinances would have. ESHB 1933, § 3(4) (codified as RCW 90.58.090(4)). And, most importantly for us today, it tells us *when* that transfer should take place:

As of the date the department of ecology approves a local government's shoreline master program adopted under applicable shoreline guidelines, the protection of critical areas as defined by [the GMA] within shorelines of the state shall be accomplished only through the local government's shoreline master program and shall not be subject to the procedural and substantive requirements of this chapter.

RCW 36.70A.480(3)(a) (emphasis added). This language is prospective. *Cf. In re Estate of Burns*, 131 Wn.2d 104, 110, 928 P.2d 1094 (1997). As of the date Ecology approves a municipal shoreline master program adopted under shoreline guidelines that protect critical areas,¹ management of critical areas within shorelines shall be done under the SMA, not the GMA. If the legislature intended the transfer from the GMA to the SMA to occur immediately, it was fully capable

¹ The legislature was well aware that there were no shoreline guidelines in place when it enacted ESHB 1933. *See, e.g.*, ESHB 1933, § 1(1). This was because Ecology's initial attempt to draw these guidelines was struck down by the Shorelines Hearings Board and new regulations were not substantially in place until December 2003. *See Assoc. of Wash. Bus. v. Dep't of Ecology*, SHB No. 00-037, Order Granting and Den. Appeal (Shorelines Hearings Board Aug. 27, 2001), available at <http://www.eho.wa.gov/searchdocuments/2001%20archive/shb%2000-037%20final.htm>; *see also* ch. 173-26 WAC.

of saying so. Instead, it made that transfer contingent on a future event; Ecology's approval of a revised shoreline master program approved wider applicable shoreline guidelines.

While I believe that the plain language permits no other interpretation, this interpretation also fits best within the larger statutory backdrop. Again, the 2003 legislature required, for the first time, that shoreline master programs protect critical areas as defined by the GMA. ESHB 1933, § 3(4) (codified as RCW 90.58.090(4)). ESHB 1933 also imposed two new substantive requirements on Ecology before Ecology could approve a shoreline master program. Now, Ecology can approve only shoreline master programs that (1) are consistent with RCW 90.58.020 and applicable shoreline guidelines and (2) provide protection that is "at least equal to that provided by the local government's critical areas ordinances." ESHB 1933, § 3(4) (codified as RCW 90.58.090(4)). These requirements were not in place when Anacortes's existing shoreline master program was approved. The legislature also expanded the reach of the SMA with ESHB 1933 to include "land necessary for buffers for critical areas, as defined in chapter 36.70A RCW, that occur within the shorelines of the state." ESHB 1933, § 2(2)(f)(ii) (codified as RCW 90.58.030(2)(f)(ii)). That is a significant expansion of the land under the jurisdiction of the SMA and strong reason to believe that the legislature intended the transfer to happen only after municipalities had the opportunity to revise their GMA and SMA plans with these statutory changes in mind.

Whether we look only at the timing provision of RCW 36.70A.480(3)(a) or at the larger statutory scheme, we should reach the same conclusion. The 2003

legislature intended to transfer protection of the relevant critical areas from the GMA to the SMA as municipalities enact, and Ecology approves, new shoreline master programs. Deciding otherwise does violence to the legislature's clearly expressed purpose that management of critical areas under the SMA take on some of the features of management under the GMA. Since the majority reaches a contrary conclusion, I respectfully dissent.

Chamber, J
Alexander, C. J.
Fairhurst, G.
Powers, J

EXHIBIT B

1 CENTRAL PUGET SOUND
2 GROWTH MANAGEMENT HEARINGS BOARD
3 STATE OF WASHINGTON

4 TAHOMA AUDUBON SOCIETY,
5 CITIZENS FOR A HEALTHY BAY,
6 PEOPLE FOR PUGET SOUND, AND
7 FUTUREWISE,

8 PETITIONERS,

9 v.

10 THE CITY OF TACOMA,

11 RESPONDENT.

CASE No. 06-3-0001

(CITIZENS FOR A HEALTHY BAY)

**CITY'S ALTERNATIVE
REQUEST FOR FINDING
OF COMPLIANCE**

12 I. INTRODUCTION

13 The City of Tacoma asks the Board to enter a finding of compliance in this matter
14 based on the recent ruling of the state Supreme Court in *Futurewise v. Western*
15 *Washington Growth Management Hearings Board*, No. 80396-0 (Wash. July 31, 2008);
16 copy attached. This Supreme Court decision was issued after the City filed its Statement
17 of Actions Taken in this matter and provides new authority for a finding of compliance
18 without regard to whether the City adopted amendments to its Critical Areas Protection
19 Ordinance ("CAPO") in response to the Board's prior Order Finding Noncompliance and
20 without regard to whether the City's amendments meet Growth Management Act
21 ("GMA") requirements for critical areas.

22 The majority opinion in *Futurewise* holds that local governments do not have
23 authority under the GMA to regulate critical areas within shoreline jurisdiction. They
24 must, instead, do so as part of their Shoreline Master Program updates under the Shoreline
25 Management Act ("SMA"). Based on this brand new decision, the Board should enter a
finding of compliance because the City is not required (or permitted) to regulate activity
within the marine shorelines under GMA. The City instead should address this issue as

CITY'S ALTERNATIVE REQUEST FOR
FINDINGS OF COMPLIANCE - 1

GordonDerr.

COPY

1 part of the upcoming Shoreline Master Program update, or as part of a limited Shoreline
2 Master Program amendment.

3 II. BACKGROUND

4 On November 1, 2007, the Board entered a Order Finding Noncompliance
5 regarding Tacoma's CAPO because the City had not included BAS in it's GMA critical
6 areas regulations related to marine shorelines (those areas within 200 feet of the ordinary
7 high water mark of the marine waters). The City of Tacoma adopted Ordinance No.
8 27728 on July 1, 2008 in response to the Board's November 1, 2007 Order. The City filed
9 its Statement of Actions Taken on July 14, 2008. Petitioners in this matter filed their
10 response, essentially not objecting to the City's amendments, on July 22, 2008. The
11 Board requested submittal of BAS on July 28, 2008. The City filed its BAS on August 1,
12 2008, before it had reviewed the Supreme Court decision, which was issued on July 31,
13 2008.

14 III. ARGUMENT

15 The majority opinion in *Futurewise* holds that critical areas within the jurisdiction
16 of the State SMA must be regulated under that statute and not under the GMA. ("We hold
17 that the legislature meant what it said. Critical areas within the jurisdiction of the SMA
18 are governed only by the SMA.") The court rejected the argument that the GMA critical
19 areas provisions are intended to apply to critical areas within SMA jurisdiction in the
20 interim, until the City has adopted and Ecology has approved new shoreline regulations
21 under the new SMA update schedule. The City of Tacoma must now evaluate what City
22 action is necessary to meet SMA requirements for these recent amendments. However,
23 the City needs a clear finding of compliance from this Board acknowledging the legal
24 affect of the *Futurewise* decision, to avoid the potential for conflicting mandates between
25 this Board and the Ecology/SMA update process. While it would be acceptable to the

CITY'S ALTERNATIVE REQUEST FOR
FINDINGS OF COMPLIANCE - 2

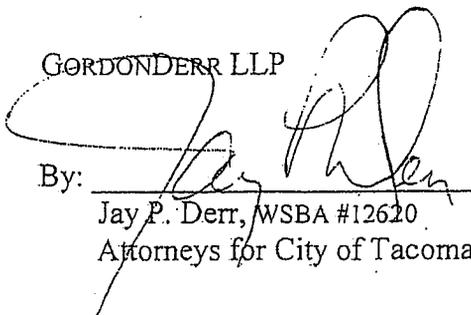
1 City for the Board to include an additional justification for compliance based on the BAS
2 submitted, the City asks the Board to rule directly on the *Futurewise* basis for compliance
3 as part of its final Order.

4
5 **IV. CONCLUSION**

6 Based on the Supreme Court ruling in *Futurewise*, the Board in these proceedings
7 should enter a finding of compliance because the City of Tacoma is not obligated to adopt
8 GMA critical areas regulations for marine shorelines subject to SMA jurisdiction. The
9 protections must be addressed in the City's Shoreline Master Program update, or as part of
10 a limited Shoreline Master Program amendment. A Board determination on these grounds
11 is necessary to provide clarity for City review of permits in the future. The City has not
12 modified (and, to date, is not expressing any intention to modify or rescind) the
13 protections in Ordinance No. 27728. However, based on the decision in *Futurewise*, the
14 City will now need to ask that Ecology review and approve the provisions of that
15 Ordinance as an interim amendment to the City's shoreline regulations.

16 Dated: August 5, 2008.

17 GORDONDERR LLP

18
19 By: 

Jay P. Derr, WSBA #12620
Attorneys for City of Tacoma

20
21
22
23 FILED AS ATTACHMENT TO E-MAIL
24
25

CITY'S ALTERNATIVE REQUEST FOR
FINDINGS OF COMPLIANCE - 3

1 **Declaration of Service**

2 The undersigned declares that s/he is over the age
3 of 18 years, not a party to this action, and is qualified
4 to testify herein. Declarant further declares under penalty
5 of perjury under the laws of the State of Washington
6 that on August 5, 2008, s/he caused a copy of this
7 document to be delivered in the manner set forth below to:

8 Keith Scully, Legal Director
9 Tim Trohimovich
10 Futurewise
11 814 Second Ave, Ste 500
12 Seattle WA 98104
13 Legal Messenger
14 Fax (206) 109-8218
15 Electronic Keith@futurewise.org
16 U. S. Mail

17
18
19
20
21
22
23
24
25


Declarant,

Dated: August 5, 2008

CITY'S ALTERNATIVE REQUEST FOR
FINDINGS OF COMPLIANCE -- 4