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August 20, 2008

Ronald R. Carpenter, Clerk
Washington State Supreme Court
PO Box 40929
Olympia, WA 98504-0929

RE: *Futurewise, et al. v. Western Washington Growth Management Hearings Board, et al.*
Supreme Court No. 80396-0

Dear Clerk Carpenter:

Enclosed for filing in the above-referenced matter are State Agencies' Motion for Reconsideration and Certificate of Service.

Thank you for your attention to this matter.

Sincerely,

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tmr

Enclosures

cc: Counsel of Record

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,

Intervenors,

v.

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

Appellants,

WASHINGTON PUBLIC PORTS ASSOCIATION,

Intervenor.

STATE AGENCIES' MOTION FOR RECONSIDERATION

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I. IDENTITY OF MOVING PARTIES

The Washington State Department of Ecology and Department of Community, Trade and Economic Development (the State Agencies) request the relief designated in part II below.

II. RELIEF REQUESTED

The State Agencies request that the Court reconsider its decision in this matter filed on July 31, 2008, and adopt the holding of the dissent.

III. AUTHORITY AND ARGUMENT

The Court should reconsider its decision in this matter for three reasons: (1) inconsistencies between the legal analysis in the plurality opinion and the reinstated decision of the Western Washington Growth Management Hearings Board (Board) create significant confusion and uncertainty; (2) both the plurality's legal analysis and the reinstated Board decision have significant, adverse consequences for local governments and shoreline property owners that the Court may not have understood or intended; (3) the plurality's legal conclusion that ESHB 1933 is retroactive is inconsistent with the statutory language, legislative history, and case law.

A. Inconsistencies Between The Legal Analysis In The Plurality Opinion And The Reinstated Board's Decision Create Significant Confusion And Uncertainty

This Court properly recognizes the importance of finality and certainty in land use cases. Plurality Op. at 8, citing *Samuel's Furniture, Inc. v. Dep't of Ecology*, 147 Wn.2d 440, 459, 54 P.3d 1194 (2002). The result in this case does not promote either goal. The Court has not answered the question presented. Rather the plurality reinstated the Board's decision while offering reasons that conflict with the Board's decision. Ultimately, there is no legal analysis or conclusion shared by a majority to guide the lower courts, the Growth Management Hearings Boards, local governments, or landowners.¹

1. The Court Has Left In Place A Board Decision That Is Confusing And Of Uncertain Precedent

Four justices joined the plurality opinion and Justice Madsen concurred in result only. Consequently, neither the plurality nor the dissenting opinion received the necessary five votes to be precedential or binding in subsequent cases. *In re Isadore*, 151 Wn.2d 294, 302, 88 P.3d

¹ As both the plurality and dissent observed, the only issue presented to the Court was the question of *when* under ESHB 1933 critical areas protection in shorelines was to be accomplished under shoreline master program regulations adopted under RCW 90.58 (the Shoreline Management Act or SMA), rather than a critical areas ordinance adopted under RCW 36.70A (the Growth Management Act or GMA). *See* Plurality Op. at 5; Dissenting Op. at 1. The issue was not whether critical areas should be protected or whether shoreline master programs provide more effective protection—indeed, the Legislature already has made those determinations through its adoption of amendments to the SMA and GMA, and both Acts have been the subject of ongoing amendment.

390 (2004). Only the “result” received five votes: reversal of the superior court and reinstatement of the decision of the Western Washington Growth Management Hearings Board. Reinstatement of the Board’s decision is the Court’s holding.²

The first confusion here results from the unqualified reinstatement of the Board’s decision: “[t]he decision of the Western Washington Growth Management Hearings Board upholding Anacortes is reinstated.” Plurality Op. at 9. However, the Board did *not* “uphold” the City of Anacortes’ critical areas ordinance; rather, it found the City had not adopted the ordinance in compliance with RCW 90.58.090 and RCW 36.70A.290(2)(c). On page 31 of the Board’s Final Decision and Order, the Board stated the relevant conclusion:

Those critical areas regulations governing critical areas in the shorelines of Anacortes adopted by Ordinance 2702 *must be reviewed by Ecology* to ensure that they provide “a level of protection to critical areas located within shorelines of the state that is at least equal to the level of protection provided to critical areas by the local government’s critical area ordinances adopted and thereafter amended pursuant to RCW 36.70A.060(2).” RCW 90.58.090(4). *Until those regulations have been reviewed by Ecology, the changes to critical areas regulations in the shorelines are not compliant and not ripe for Board review.*

² See *W.R. Grace & Co. v. Dep’t of Rev.*, 137 Wn.2d 580, 593, 973 P.2d 1011 (1999) (holding of court is position taken by those justices concurring on narrowest grounds); *Spain v. Empl. Sec’y Dep’t*, ___ Wn.2d ___, 185 P.3d 1188, 1192 n.7 (2008) (“the holding of this court is the holding joined by a majority of the justices on a case”).

Final Decision and Order at 31 (emphasis added). On page 44 of its Decision, the Board entered the following conclusion of law:

The repeal of existing critical areas regulations and the adoption of critical areas regulations adopted by Ordinance 2702 that apply to critical areas in the shoreline including ACC 17.41.00 *constitute amendments to Anacortes' shoreline master program. Amendments to the shoreline master program must be submitted by the City to Ecology for review.* RCW 90.58.090 and 36.70A.290(2)(c).

Final Decision and Order at 44 (emphasis added). The Board required the City to achieve compliance with the GMA by December 1, 2006, by taking actions *under the SMA*, even though the Board lacks authority to compel updates to Anacortes' shoreline master program different from the schedule established in RCW 90.58.080.

These aspects of the Board's decision led to this appeal. The Board's decision conflicts with the governing statutes and that conflict creates substantial uncertainty and difficulty for local governments (and for state agencies and others that assist local governments to understand and comply with these statutes). The Court, however, reinstated the Board's decision without addressing or resolving the conflicts and uncertainty flowing from that decision.

Further confusion is caused because the plurality opinion contains legal analysis that contradicts the Board's decision. On one hand, the reinstated Board decision *explicitly rejected* the City of Anacortes'

argument for “retroactive” application of ESHB 1933 to its previously amended shoreline master program:

To accept the City’s position, the Board would have to determine that ESHB 1933 was meant to apply *retroactively to master programs adopted prior to its enactment*. A legislative amendment is presumed to apply prospectively unless there is clear legislative intention to apply it retroactively. “A legislative enactment is resumed [sic] to apply prospectively only and will not be held to apply retrospectively unless such legislative intent is clearly expressed.” . . . Such a clear expression of retroactive application is not apparent in ESHB 1933.

In fact, retroactive application would contradict another expression of legislative intent found in RCW 36.70A.480(4)

Final Decision and Order at 27-28 (citations omitted). In contrast, the plurality opinion appears to consider ESHB 1933 to have retroactive effect. *See* Plurality Op. at 5 (noting that ESHB 1933 corrected an earlier erroneous decision by a Growth Management Hearings Board, and describing the correction as “immediate (indeed retrospective)”; *id.* at 6 (explicitly rejecting the State Agencies’ argument that ESHB 1933 is prospective).³

³ ESHB 1933 did immediately reverse a Board conclusion of law that treated the entire shoreline jurisdiction as a “critical area.” ESHB 1933, § 1 (2003). In that narrow sense, the statute immediately clarified the law. That correction of the Board’s mistaken view that “everything in the shoreline is a critical area per se” is irrelevant to the issue here: when will shoreline master program regulations displace critical areas ordinances for addressing critical areas found in the shoreline jurisdiction?

Reconsideration also is warranted because the plurality opinion has misapprehended the superior court ruling. The plurality says the superior court 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.” Plurality Op. at 4. The superior court, however, did not apply any provision of the GMA retroactively. It interpreted the language of prospective legislation, ESHB 1933, to determine when protection of critical areas in shorelines would transfer from existing critical areas ordinances adopted under the GMA to shoreline master programs in the process of being updated under the SMA.

2. Reinstatement Of The Board’s Decision Raises Uncertainty About The Status Of Existing Critical Areas Ordinances

The Board ruled that critical areas ordinances adopted since 2003 must be treated as amendments to shoreline master programs if they affect critical areas in shorelines. The Board ordered Anacortes to send its ordinance to the Department of Ecology for review and approval before it can take effect in the shoreline. Board Final Decision and Order at 24-31. This would be a sea change in the way in which local governments adopt

critical areas ordinances (one that the other Growth Management Hearings Boards have not followed⁴).

Under general GMA principles, state review and approval of critical areas ordinances is not required. Rather, local ordinances are presumed valid upon adoption and, if objected to by the state, must be appealed within 60 days. *See* RCW 36.70A.290(2), .310, .320(1). Because the reinstated Board decision conflicts with these general principles, it casts a serious cloud over the 140 or so critical areas ordinances adopted since 2003 that have not been sent to Ecology for review and approval.

The Court's decision makes it difficult for a local government (or a court) to determine which local ordinances currently are valid and enforceable in shorelines. Is a critical areas ordinance adopted prior to ESHB 1933 that was found to be compliant with the GMA still considered compliant and enforceable? Can it be attacked under a theory that Ecology has not reviewed and approved it, or because it was not adopted under the procedural and substantive requirements of the SMA (which did not apply before ESHB 1933)? What protections, if any, are in place for

⁴ *See, e.g., Hood Canal Env'tl. Coun. v. Pac. Legal Found.*, CPSGMHB No. 06-3-0012c, Final Decision & Order, at 25-27 (Aug. 28, 2006) (available at <http://www.gmhb.wa.gov/central/decisions/2006/06-3-0012cHoodCanalFDO20060828.pdf>).

critical areas in shorelines in each jurisdiction during the time it takes for Ecology to review and approve an ordinance submitted by a local government?

These are not hypothetical concerns. The Court's decision already has been cited to local governments and at least one lower court for the proposition that critical areas ordinances are invalid and without effect in shorelines, even though the reinstated Board decision explicitly stated that "*critical areas within the shorelines of the state are not stripped by ESHB 1933 of protections given to them by existing critical areas regulations.*" Board Final Decision and Order at 27 (emphasis added). The Court should grant reconsideration because the status of these local ordinances that have survived or escaped challenges under the GMA is now in question.

B. Reinstatement Of The Board's Decision Potentially Causes Adverse Consequences For Local Governments And Shoreline Property Owners

Under the Board's decision, Anacortes must send its critical areas ordinance to Ecology for review and approval as if it were an amendment to its shoreline master program. Since no local government or state agency previously construed ESHB 1933 in this fashion, the Court's decision places a cloud over all critical areas ordinances adopted since 2003. As noted above, approximately 140 local governments have

adopted new critical areas ordinances since 2003. Each of these ordinances potentially is affected by the Court's decision.

Many critical areas ordinances include floodplain regulations required by both state and federal law. *See* RCW 86.16.041. These "frequently flooded areas" – i.e. floodplains – are a category of critical areas under the GMA. RCW 36.70A.030(5). Such areas are also commonly found within "shorelands" addressed by the SMA. RCW 90.58.030(2)(f). Applying the reinstated Board decision, local governments that have updated their floodplain regulations since 2003 as part of their critical areas ordinance arguably do not have a valid floodplain ordinance, because the ordinance has not been reviewed and approved as a shoreline master program update. Property owners in those jurisdictions may find themselves ineligible for federal flood insurance under the National Flood Insurance Program (NFIP). *See* 42 U.S.C. § 4022(a)(1) (enforceable local flood ordinance is prerequisite to participation in NFIP).⁵

Second, most local governments rely on their critical areas ordinance to protect critical areas in shorelines. Most counties and cities adopted their existing shoreline master programs in the 1970s and most,

⁵ By casting a cloud over local critical areas ordinances, this Court's decision also opens the door for arguments attacking the eligibility of local governments for state grants and loans, several of which use GMA compliance as a criterion of eligibility.

including the one adopted by Anacortes, contain no regulations focusing on critical areas. These shoreline master programs were adopted before the GMA was enacted (including the requirement to designate and protect critical areas where they occur), and before the directive in ESHB 1933 (codified in RCW 36.70A.480(3)(a)) that shoreline master programs designate and protect critical areas in shorelines, existed. As a result, local shoreline master programs do not provide protection that is equivalent to that provided in critical areas ordinances. RCW 36.70A.480(4); 90.58.090(4). In the future, updated shoreline master programs will specifically address critical areas as required in RCW 36.70A.480(4). Until then, the designated critical areas in shorelines require the application of existing critical areas ordinances.⁶

Third, without reconsideration, shoreline property owners will not be able to rely on existing critical areas ordinances to protect their property. Among other things, most critical areas ordinances require setbacks and buffers from wetlands, rivers, and streams. Without the orderly transition to updated shoreline master programs described in the

⁶ The plurality opinion answers this concern by assuming that old shoreline master programs provide this protection. Plurality Op. at 6-7. The record does not support this assumption. Anacortes, for example, has a shoreline master program updated in 2000, but the master program contains no provisions to designate and address critical areas consistent with RCW 36.70A.480(4). *See* State Agencies' Brief, p. 25. Instead, the master program assumes critical areas will be protected under Anacortes' critical areas ordinance.

dissent, a shoreline property owner's neighbors may seek to exploit the absence of ordinances. This may result in blocked views, increased flooding and erosion, and impaired water quality for shoreline property owners. *See Buechel v. Dep't of Ecology*, 125 Wn.2d 196, 210, 884 P.2d 910 (1994) (all property tends to benefit from reasonable setbacks).

The dissenting opinion provides an accurate, prospective interpretation of ESHB 1933 that addresses these problems. A local critical areas ordinance continues to apply as adopted by a county or city until the county or city updates its shoreline master program under the new guidelines, by the applicable deadline set in RCW 90.58.080. The new shoreline master programs adopted under ESHB 1933 will provide a level of protection for critical areas within shoreline jurisdiction at least equal to the level of protection in the critical areas ordinance. RCW 36.70A.480(4); 90.58.090(4). The county or city will be in compliance with the GMA and the SMA, and there will be no loss or gap in protection of critical areas in shorelands. This is the transition from critical areas ordinances to shoreline master programs provided in ESHB 1933.⁷

⁷ The schedule in RCW 90.58.080(2)(a) assumes it will take over a decade to update new shoreline master programs. Contrary to the plurality's assumption that Ecology is proceeding too slowly with these updates, Plurality Op. at 7, Ecology is on pace with the schedule established by the legislature.

C. The Plurality’s Legal Conclusion That ESHB 1933 Is Retroactive Is Inconsistent With Longstanding Principles That Disfavor Retroactive Application

The Court should reconsider the plurality opinion’s apparent conclusion (at page 8) that ESHB 1933 operates retroactively. ESHB 1933 does not include language, or contextual signals, necessary to overcome the presumption that it is prospective. The presumption against retroactive legislation “is deeply rooted in our jurisprudence, and embodies a legal doctrine centuries older than our Republic.” *Landgraf v. USI Film Prods.*, 511 U.S. 244, 265, 114 S. Ct. 1483, 128 L. Ed. 2d 229 (1994). The presumption is overcome only if (1) the legislature explicitly provides for retroactivity; (2) the amendment is curative; or (3) the amendment is remedial. *Densley v. Dep’t of Retirement Systems*, 162 Wn.2d 210, 223, ¶ 25, 173 P.3d 885 (2007).

The plurality opinion does not provide any analysis supporting a conclusion that ESHB 1933 is remedial⁸ or curative⁹; instead it attempts to

⁸ A remedial statute is one that relates to practice, procedures, and remedies. *Densley*, 162 Wn.2d at 223-24, ¶ 27. The plurality does not reference this basis for overcoming the presumption against retroactivity.

⁹ An amendment is curative only if it clarifies or technically corrects an ambiguous statute. *In re F.D. Processing, Inc.*, 119 Wn.2d 452, 461, 832 P.2d 1303 (1992). The plurality correctly notes that ESHB 1933 was enacted in response to a decision by the Central Puget Sound Growth Management Hearings Board, but not once does the plurality characterize the statutes interpreted by that Board as “ambiguous.” To the contrary, the plurality portrays that Board’s decision as “so conflicted with the law and the established practices” as to prompt explicit Legislative correction. Plurality Op. at 3. Consequently, although the plurality refers to ESHB 1933 as “curative” (Plurality Op. at 7), the statutory “cure” addressed an erroneous Board decision, not an ambiguous

find retroactive language in the statute. Because there is no explicit statement of retroactivity anywhere in ESHB 1933 that would overcome the presumption against retroactivity, the plurality opinion relies primarily on ambiguous language in an uncodified intent section to conclude that the legislature intended for ESHB 1933 to apply retroactively. However, as explained in the dissenting opinion (at 2-4) and shown in the State Agencies' briefing, the better understanding of that intent language is as a legislative statement of outcome (transfer of protection for critical areas in shorelines to shoreline master programs) while the directive language in RCW 36.70A.480(3)(a) specifies the timing of that transfer (when the shoreline master programs are updated). *See* Brief of Intervenor-Respondents Washington State Department of Community, Trade, and Economic Development and Washington State Department of Ecology (State Agencies' Brief), at 19-25, 28.

The dissenting opinion properly reads ESHB 1933 as prospective. First, the dissent points out that the language of ESHB 1933 uses the present tense – “approves” – which prior cases have held indicates prospective intent. *Adcox v. Children's Orthopedic Hosp. & Med. Ctr.*, 123 Wn.2d 15, 30, 864 P.2d 921 (1993); *Washington State School Director's Ass'n v. Dep't of Labor & Indus.*, 82 Wn.2d 367, 379, 510 P.2d

statute. The predicate for retroactivity under *Densley* and *F.D. Processing* is not satisfied.

818 (1973). Second, the dissent shows how a prospective interpretation is consistent with the overall statutory scheme. The dissent explains how ESHB 1933 intended an orderly transition: shoreline master programs would be updated to address protection of critical areas in shorelines and then would be reviewed and approved by Ecology; only then would they displace existing critical areas ordinances. Third, though not mentioned by the dissent, a prospective interpretation is also consistent with the legislative history of ESHB 1933. *See, e.g.,* Senate Bill Report ESHB 1933 (stating that “the trigger for having separate jurisdictions is the new [2003 Shoreline Management Act] guidelines.”)¹⁰ (cited in State Agencies Statement of Supplemental Authority, at 1); *McGee Guest Home, Inc. v. Dep’t of Soc. & Health Serv.*, 142 Wn.2d 316, 325, 12 P.3d 144 (2000) (legislative history relevant to determining retroactivity).

Here, the standards for overcoming the presumption are not satisfied. ESHB 1933 unambiguously intended to prospectively change how local governments are to develop ordinances to protect critical areas in shorelines and, read together with concurrently enacted legislation

¹⁰ SMA guidelines provide substantive and procedural directions for local governments to review and update the ordinances that directly regulate shoreline use – the local “shoreline master programs.” The original SMA guidelines were adopted by Ecology in the 1970s but, after some controversy and litigation, substantially amended guidelines were proposed and adopted as ESHB 1933 was working its way through the 2003 legislature. *See* <http://www.ecy.wa.gov/programs/sea/sma/guidelines/index.html> (providing history of SMA guidelines).

codified in RCW 90.58.080 (not acknowledged in the Court's decision), it allows for a smooth, adequately funded, phased transition that ensures continuous effective protection for those critical areas. *See* State Agencies' Brief at 23-24.

IV. CONCLUSION

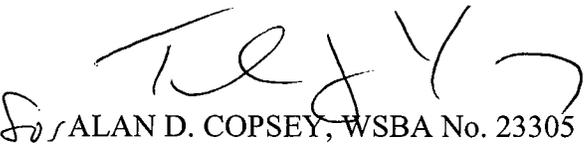
The State Agencies respectfully request that the Court reconsider its decision in this matter and adopt the holding and reasoning of the dissent.

RESPECTFULLY SUBMITTED this 20 day of August 2008.

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ASSOCIATION,

Intervenor.

CERTIFICATE OF
SERVICE

Pursuant to RCW 9A.72.085, I certify that on the 20th day of August 2008, I caused to be served State Agencies' Motion for Reconsideration and this Certificate of Service in the above-captioned matter upon the parties herein as indicated below:

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the foregoing being the last known address.

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

DATED this 20th day of August 2008, in Olympia, Washington.



TANYA M. ROSE, Legal Assistant