JEFFERSON COUNTY
DEPARTMENT OF COMMUNITY DEVELOPMENT (DCD)
621 Sheridan Street, Port Townsend, WA 98368
Al Scalf, Director

Unified Development Code Interpretation

Date: April 14, 2010

Issued by: Jefferson County DCD Planning Manager/UDC Administrator

Affected: All properties within shoreline jurisdiction in Jefferson County

Subject: EHB 1653: Relationship between Growth Management Act (GMA) and Shoreline Management Act (SMA) jurisdiction

Summary of Issue

On March 18, 2010, Washington State approved a legislative change EHB 1653 as follows:

- The legislature affirms that development regulations adopted under the growth management act to protect critical areas apply within shorelines of the state as provided in section 2 of this act.
- The legislature affirms that the adoption or update of critical area regulations under the growth management act is not automatically an update to the shoreline master program. Apply Critical Area Ordinances in shoreline jurisdiction until an updated SMP is adopted, retroactive to July 27, 2003.

How does this legislative change affect permitting in Jefferson County?

Code Interpretation:

- The UDC Code Interpretation regarding Relationship between Growth Management Act (GMA) and Shoreline Management Act (SMA) jurisdiction dated August 22, 2008 is hereby rescinded;
- CAO provisions adopted after July 27, 2003 shall apply within shoreline jurisdiction despite the absence of an update to the shoreline master program; however
- Applications vested prior to March 18, 2010 shall be reviewed per the codes and code interpretations in effect on the date of vesting including the August 22, 2008 code interpretation, as applicable; and
- Codes in effect, including critical areas ordinances retroactive to July 27, 2003, shall apply to development within shoreline jurisdiction with a vesting date on or after March 18, 2010, the effective date of EHB 1653.

Background & Analysis:

In accordance with Article VI, Chapter 18.40 of the Unified Development Code (UDC), Jefferson County Code (JCC 18.40.350) this interpretation of the Unified Development Code is intended to interpret scope or intent. This is an administrator-initiated interpretation as allowed by JCC 18.40.360(1). The "Factors for Consideration", as identified in JCC 18.40.360(4) and listed below, were considered in making this UDC interpretation, including applicable goals and policies of the Jefferson County Comprehensive Plan:

(a) The applicable provisions of this code, including its purpose and context;
(b) The implications of the interpretation for development within the county as a whole, including the precedent the interpretation will set for other applicants; and
(c) Consistency with the Jefferson County Comprehensive Plan and other relevant ordinances and policies.

Applicable Provisions

Applicable provisions of the Jefferson County UDC include:

- JCC 18.15, an earlier Critical Areas Ordinance (eCAO) - Effective January 16, 2001 adopted pursuant to the Washington State Growth Management Act (GMA; RCW 36.70A) and the County's 1998 Comprehensive Plan in order to protect environmentally sensitive features such as critical aquifer recharge areas, frequently flooded areas, geologically hazardous areas, fish & wildlife habitat conservation areas, and wetlands; and applicable to any project permit application deemed "substantially complete" by DCD before March 17, 2008;
- JCC 18.22 Critical Areas Ordinance (CAO) – Adopted March 17, 2008 adopted pursuant to the Washington State Growth Management Act (GMA; RCW 36.70A) and the County's 2004 Comprehensive Plan in order to protect environmentally sensitive features such as critical aquifer recharge areas, frequently flooded areas, geologically hazardous areas, fish & wildlife habitat conservation areas, and wetlands; and
- JCC 18.25 Shoreline Master Program (SMP) – Adopted March 7, 1989 (including subsequent amendments through February 6, 1998) adopted pursuant to the Washington State Shoreline Management Act (SMA; RCW 90.58) to encourage water-dependent uses and promote public access while protecting shoreline natural resources and ecological functions.

Implications

Because EHB 1653 represents a major step by the Governor and the State Legislature to explain and clarify the interplay between Ch. 90.58 RCW, the Shoreline Management Act, and Ch. 36.70A. RCW, the Growth Management Act, and because EHB 1653 serves to establish what amount to "before" and "after" regulatory scenarios there are important implications for development of parcels containing critical areas, if those parcels are also within the shoreline jurisdiction. Some historical and legal background is required and is laid out here.

- Jefferson County must comply with state laws before and after adoption of EHB 1653.
  - Critical Areas within shoreline jurisdiction must be protected by the County's development regulations. The question requiring clarification is, "Which development regulation regulates

development of a parcel or parcels within the shoreline jurisdiction when critical areas are present?" Actions by the State Legislature and the Jefferson County Commission have served to change the answer to that question.

- According to EHB 1653, effective when the Governor signed the bill on March 18, 2010, once Jefferson County adopts an SMP that is in compliance with the 2003 WA State Department of Ecology guidelines then only the revised or updated SMP will serve to regulate critical areas located within the shoreline jurisdiction.
- From August 22, 2008 to March 17, 2010 only the County's 1989 SMP regulated development with the potential to impact critical areas when that development was occurring within the shoreline jurisdiction.
- Before August 22, 2008 either the eCAO or the CAO adopted on March 17, 2008 regulated land use development that might impact a critical area found within the shoreline jurisdiction. The legal doctrine of vesting determines which version of the CAO was applicable.
- Vesting rights must be preserved in order to comply with RCW 19.27.095, RCW 58.17.033 and published case law. Permits issued more than 24 days prior to the date of this Code Interpretation that have not already been challenged in Superior Court pursuant to the Land Use Petition Act cannot now be challenged, and those applicants vest to the development regulations applicable when their application became either "substantially complete" or were deemed complete by default. Permit applications that are "substantially complete" (or complete by default) but have not yet had a permit issued also vest to the development regulations in place when the application became either "substantially complete" or complete by default.

Consistency

This interpretation is consistent with the Jefferson County Comprehensive Plan as it continues to allow for use, development and protection of environmentally sensitive areas and shoreline resources through implementation of the UDC.

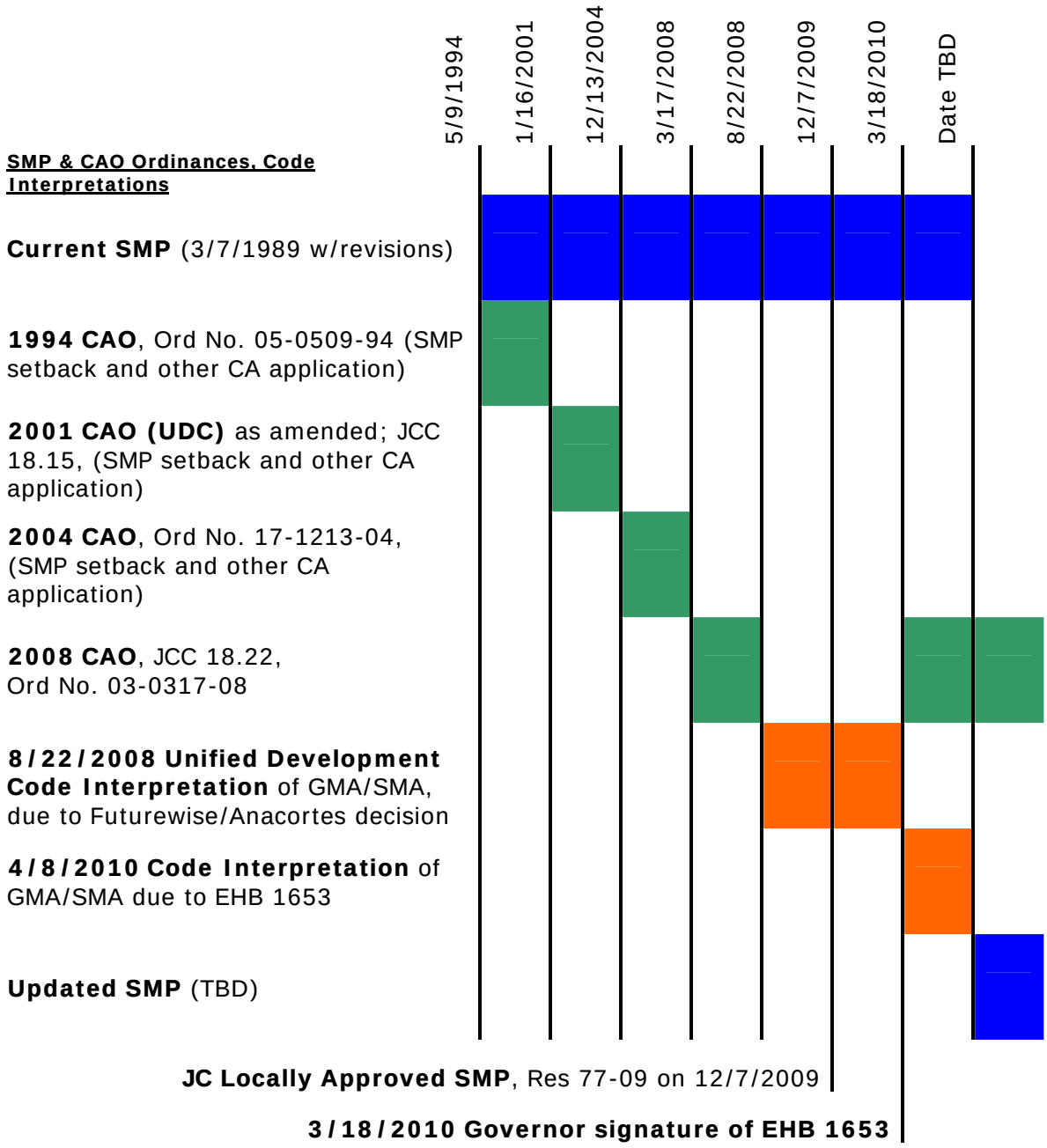
Background

The issue at hand is complex due to vesting rights, existing case law and recent legislative changes. Simply put, vesting rights set the review of an application to the codes in effect on a certain date. Case law changed the interpretation of which laws applied to applications. HB 1653 is a retroactive legislative "fix" to require application of certain laws without additional process.

Vesting is determined per various sections of the Jefferson County Code or "JCC." See below. If the application submittal was complete, the vesting date would be the date of application submittal. If the application was incomplete, the application is vested on the date the application was determined to be complete, i.e., "complete by default." An approved Site Plan Approval Advance Determination (SPAAD), Shoreline Substantial Development Permit (SDP) or Shoreline Variance (SV) allows for a future building permit to vest to ordinances in effect at time of SPAAD, SDP or SV vesting.

The diagram below details the Jefferson County application of Critical Areas Ordinances in shoreline jurisdiction.

History of Jefferson County Application of CAO and SMP Within Shoreline Jurisdiction



The gap in application of the critical areas ordinance between August 22, 2008 and March 18, 2010 resulted to achieve compliance with the Washington State Supreme Court decision No. 80396-0 titled *Futurewise, et al. v. WA State CTED, WA State Ecology v. WWGMHB, City of Anacortes*. In a Code Interpretation dated August 22, 2008 Jefferson County ceased to implement JCC 18.22 CAO

provisions within the SMP jurisdictional area defined by JCC 18.25. Accordingly, Jefferson County commenced implementing only JCC 18.25 within the SMP jurisdictional area although JCC 18.40.360(5) would otherwise require the County to apply a more restrictive and equally applicable code provision found elsewhere in the UDC, Title 18 JCC.

On March 18, 2010, the Washington State approved a legislative change EHB 1653 as follows:

- "The legislature affirms that development regulations adopted under the growth management act to protect critical areas apply within shorelines of the state as provided in section 2 of this act."
- The legislature affirms that the adoption or update of critical area regulations under the growth management act is not automatically an update to the shoreline master program. Apply Critical Area Ordinances in shoreline jurisdiction until an updated SMP is adopted, retroactive to July 27, 2003.

Analysis:
With respect to those applications that vested between March 17, 2008 and Aug 22, 2008 per the Code Interpretation dated August 22, 2008, the literal reading of HB 1653 could be that the newest CAO (found at JCC 18.22) would have to be applied to those applications when the subject parcel is inside the shoreline jurisdiction, reversing ***Futurewise/Anacortes.*** This interpretation may not be consistent with Washington State vesting laws.

For example, the County has already issued permits (denominated as "approvals" in the case of the SPAAD) and the holders of those permits are entitled to certainty once the LUPA appeal period runs.

The County is time barred from challenging issued permits after the fact. The County could not use EHB 1653 to reopen an issued permit and apply the newest CAO found at JCC 18.22 to any critical areas that might be on the subject parcel AND also within the shoreline jurisdiction.

This is because like any other aggrieved party Jefferson County had 21 days (or 24-if one includes the three days for mailing) under LUPA to challenge the conditions of a permit and Jefferson County has not done so. This doctrine of law arises from state law and the ***Chelan v. Nykreim*** case, 146 Wn. 2d 904 (2002) where Chelan County sued too late to revoke a BLA it had issued some months before.

A second reading of the EHB 1653 that is consistent with vesting laws is the application of Critical Areas Ordinances adopted on or after July 27, 2003 shall be applied within shoreline jurisdiction without requiring an update to the SMP. This interpretation satisfies the requirement that this bill apply "retroactive to July 27, 2003."

EHB 1653 did not change Washington State vesting laws, thus this does not affect vesting, including applications submitted after July 27, 2003 and prior to March 18, 2010. Under the latter interpretation, the vesting of an application would continue to be to the codes and code interpretations as they exist on the date of vesting. Since the Code Interpretation dated August 22, 2008 applied to permit applications that were vested and not yet issued, a subset of pre-March 18, 2010 vested permits exists.

Applications vested on a date prior to the code interpretation dated August 22, 2008 and included in the applicability of that interpretation, i.e. they were pending (permit not yet issued) at that time, would

continue to be vested to the August 22, 2008 code interpretation. Therefore, if the August 22, 2008 Code Interpretation is applicable to a specific application, then only the SMP and neither the eCAO or the CAO would be applicable to that application.

Code Interpretation:

- The UDC Code Interpretation regarding Relationship between Growth Management Act (GMA) and Shoreline Management Act (SMA) jurisdiction dated August 22, 2008 is hereby rescinded;
- CAO provisions adopted after July 27, 2003 shall apply within shoreline jurisdiction without an update to the shoreline master program;
- Applications vested prior to March 18, 2010 shall be reviewed per the codes and code interpretations in effect on the date of vesting including the August 22, 2008 code interpretation, as applicable; and
- Codes in effect, including critical areas ordinances retroactive to July 27, 2003, shall apply to development within shoreline jurisdiction with a vesting date on or after March 18, 2010, the date of enactment of EHB 1653.

Applicability:

This interpretation applies to:

- All permit applications that are substantially complete and have not received a permit decision; and
- All permit applications received on or after March 18, 2010.

In accordance with JCC 18.40.380, this code interpretation will remain in effect unless and until the administrator issues a written rescission or the code is formally amended (as per JCC 18.45.090) to supersede this interpretation. This interpretation may be enforced in the same manner that any provision of the code is enforced.

Appeal:

As outlined in JCC 18.40.390, a code interpretation may be appealed to the Hearing Examiner within fourteen (14) calendar days of the decision using the process for appeals of Type II permit decisions as set forth in JCC 18.40.330.

Dated this 14th day of April 2010.

Stacie Hoskins, Planning Manager/UDC Administrator

Attached: EHB 1653
Jefferson County Code Interpretation dated August 22, 2008

CERTIFICATION OF ENROLLMENT

ENGROSSED HOUSE BILL 1653

61st Legislature
2010 Regular Session

Passed by the House February 15, 2010
Yeas 58 Nays 39

Speaker of the House of Representatives

Passed by the Senate March 2, 2010
Yeas 35 Nays 10

President of the Senate

Approved

Governor of the State of Washington

CERTIFICATE

I, Barbara Baker, Chief Clerk of the House of Representatives of the State of Washington, do hereby certify that the attached is **ENGROSSED HOUSE BILL 1653** as passed by the House of Representatives and the Senate on the dates hereon set forth.

Chief Clerk

FILED

Secretary of State
State of Washington

ENGROSSED HOUSE BILL 1653

Passed Legislature - 2010 Regular Session

State of Washington 61st Legislature 2010 Regular Session

By Representative Simpson; by request of Department of Ecology and Department of Community, Trade, and Economic Development

Read first time 01/27/09. Referred to Committee on Local Government & Housing.

AN ACT Relating to clarifying the integration of shoreline management act policies with the growth management act; amending RCW 36.70A.480 and 90.58.030; adding a new section to chapter 90.58 RCW; creating new sections; and declaring an emergency.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF WASHINGTON:

NEW SECTION. **Sec. 1.** (1) The legislature recognizes that Engrossed Substitute House Bill No. 1933, enacted as chapter 321, Laws of 2003, modified the relationship between the shoreline management act and the growth management act. The legislature recognizes also that its 2003 efforts, while intended to create greater operational clarity between these significant shoreline and land use acts, have been the subject of differing, and occasionally contrary, legal interpretations. This act is intended to affirm and clarify the legislature's intent relating to the provisions of chapter 321, Laws of 2003.

(2) The legislature affirms that development regulations adopted under the growth management act to protect critical areas apply within shorelines of the state as provided in section 2 of this act.

(3) The legislature affirms that the adoption or update of critical

area regulations under the growth management act is not automatically an update to the shoreline master program.

(4) The legislature intends for this act to be remedial and curative in nature, and to apply retroactively to July 27, 2003.

Sec. 2. RCW 36.70A.480 and 2003 c 321 s 5 are each amended to read as follows:

(1) For shorelines of the state, the goals and policies of the shoreline management act as set forth in RCW 90.58.020 are added as one of the goals of this chapter as set forth in RCW 36.70A.020 without creating an order of priority among the fourteen goals. The goals and policies of a shoreline master program for a county or city approved under chapter 90.58 RCW shall be considered an element of the county or city's comprehensive plan. All other portions of the shoreline master program for a county or city adopted under chapter 90.58 RCW, including use regulations, shall be considered a part of the county or city's development regulations.

(2) The shoreline master program shall be adopted pursuant to the procedures of chapter 90.58 RCW rather than the goals, policies, and procedures set forth in this chapter for the adoption of a comprehensive plan or development regulations.

(3)(a) The policies, goals, and provisions of chapter 90.58 RCW and applicable guidelines shall be the sole basis for determining compliance of a shoreline master program with this chapter except as the shoreline master program is required to comply with the internal consistency provisions of RCW 36.70A.070, 36.70A.040(4), 35.63.125, and 35A.63.105.

((~~(a) 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 RCW 36.70A.030(5) 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, except as provided in subsection (6) of this section.~~))

(b) Except as otherwise provided in (c) of this subsection, development regulations adopted under this chapter to protect critical areas within shorelines of the state apply within shorelines of the state until the department of ecology approves one of the following:

A comprehensive master program update, as defined in RCW 90.58.030; a segment of a master program relating to critical areas, as provided in RCW 90.58.090; or a new or amended master program approved by the department of ecology on or after March 1, 2002, as provided in RCW 90.58.080. The adoption or update of development regulations to protect critical areas under this chapter prior to department of ecology approval of a master program update as provided in this subsection is not a comprehensive or segment update to the master program.

(c)(i) Until the department of ecology approves a master program or segment of a master program as provided in (b) of this subsection, a use or structure legally located within shorelines of the state that was established or vested on or before the effective date of the local government's development regulations to protect critical areas may continue as a conforming use and may be redeveloped or modified if: (A) The redevelopment or modification is consistent with the local government's master program; and (B) the local government determines that the proposed redevelopment or modification will result in no net loss of shoreline ecological functions. The local government may waive this requirement if the redevelopment or modification is consistent with the master program and the local government's development regulations to protect critical areas.

(ii) For purposes of this subsection (3)(c), an agricultural activity that does not expand the area being used for the agricultural activity is not a redevelopment or modification. "Agricultural activity," as used in this subsection (3)(c), has the same meaning as defined in RCW 90.58.065.

(d) Upon department of ecology approval of a shoreline master program or critical area segment of a shoreline master program, critical areas within shorelines of the state ((~~that have been identified as meeting the definition of critical areas as defined by RCW 36.70A.030(5), and that are subject to a shoreline master program adopted under applicable shoreline guidelines shall not be~~)) are protected under chapter 90.58 RCW and are not subject to the procedural and substantive requirements of this chapter, except as provided in subsection (6) of this section. Nothing in chapter 321, Laws of 2003 or this act is intended to affect whether or to what extent

agricultural activities, as defined in RCW 90.58.065, are subject to chapter 36.70A RCW.

((~~(c)~~)) (e) The provisions of RCW 36.70A.172 shall not apply to the adoption or subsequent amendment of a local government's shoreline master program and shall not be used to determine compliance of a local government's shoreline master program with chapter 90.58 RCW and applicable guidelines. Nothing in this section, however, is intended to limit or change the quality of information to be applied in protecting critical areas within shorelines of the state, as required by chapter 90.58 RCW and applicable guidelines.

(4) Shoreline master programs shall 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)~~)) assures no net loss of shoreline ecological functions necessary to sustain shoreline natural resources as defined by department of ecology guidelines adopted pursuant to RCW 90.58.060.

(5) Shorelines of the state shall not be considered critical areas under this chapter except to the extent that specific areas located within shorelines of the state qualify for critical area designation based on the definition of critical areas provided by RCW 36.70A.030(5) and have been designated as such by a local government pursuant to RCW 36.70A.060(2).

(6) If a local jurisdiction's master program does not include land necessary for buffers for critical areas that occur within shorelines of the state, as authorized by RCW 90.58.030(2)(f), then the local jurisdiction shall continue to regulate those critical areas and their required buffers pursuant to RCW 36.70A.060(2).

Sec. 3. RCW 90.58.030 and 2007 c 328 s 1 are each amended to read as follows:

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;

(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[s]~~)) Hearings board" means the ((~~shoreline[s]~~)) shorelines 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 June 1, 1971, as it may naturally change thereafter, or as it may change thereafter in accordance with permits issued by a local government or the department: PROVIDED, That in any area where the ordinary high water mark cannot be found, the ordinary high water mark adjoining salt water 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 statewide significance" within the state;

(d) "Shorelines" means all of the water areas of the state, including reservoirs, and their associated shorelands, together with the lands underlying them; except (i) shorelines of statewide 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 statewide 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 shorelands associated with (i), (ii), (iv), and (v) of this subsection (2)(e);

(f) "Shorelands" or "shoreland 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; floodways and contiguous floodplain areas landward two hundred feet from such floodways; and all wetlands and river deltas associated with the streams, lakes, and tidal waters which are subject to the provisions of this chapter; the same to be designated as to location by the department of ecology.

(i) Any county or city may determine that portion of a one-hundred-

year-flood plain to be included in its master program as long as such portion includes, as a minimum, the floodway and the adjacent land extending landward two hundred feet therefrom.

(ii) Any city or county may also include in its master program land necessary for buffers for critical areas, as defined in chapter 36.70A RCW, that occur within shorelines of the state, provided that forest practices regulated under chapter 76.09 RCW, except conversions to nonforest land use, on lands subject to the provisions of this subsection (2)(f)(ii) are not subject to additional regulations under this chapter;

(g) "Floodway" means the area, as identified in a master program, that either: (i) Has been established in federal emergency management agency flood insurance rate maps or floodway maps; or (ii) consists of those portions of a river valley lying streamward from the outer limits of a watercourse upon which flood waters are carried during periods of flooding that occur with reasonable regularity, although not necessarily annually, said floodway being identified, under normal condition, by changes in surface soil conditions or changes in types or quality of vegetative ground cover condition, topography, or other indicators of flooding that occurs with reasonable regularity, although not necessarily annually. Regardless of the method used to identify the floodway, the floodway shall not include those lands that can reasonably be expected to be protected from flood waters by flood control devices maintained by or maintained under license from the federal government, the state, or a political subdivision of the state;

(h) "Wetlands" means areas that are inundated or saturated by surface water or groundwater at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands generally include swamps, marshes, bogs, and similar areas. Wetlands do not include those artificial wetlands intentionally created from nonwetland sites, including, but not limited to, irrigation and drainage ditches, grass-lined swales, canals, detention facilities, wastewater treatment facilities, farm ponds, and landscape amenities, or those wetlands created after July 1, 1990, that were unintentionally created as a result of the construction of a road, street, or highway. Wetlands may include those artificial wetlands intentionally created from nonwetland areas to mitigate the conversion of wetlands.

(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 RCW 90.58.020. "Comprehensive master program update" means a master program that fully achieves the procedural and substantive requirements of the department guidelines effective January 17, 2004, as now or hereafter amended;

(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 five thousand dollars, or any development which materially interferes with the normal public use of the water or shorelines of the state. The dollar threshold established in this subsection (3)(e) must be adjusted for inflation by the office of financial management every five years, beginning July 1, 2007, based upon changes in the consumer price index during that time period. "Consumer price index" means, for any calendar year, that year's annual average consumer price index, Seattle, Washington area, for urban wage earners and clerical workers, all items, compiled by the bureau of labor and statistics, United States department of labor. The office of financial management must calculate the new dollar threshold and transmit it to the office of the code reviser for publication in the Washington State Register at least one month before the new dollar

threshold is to take effect. 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 and practices normal or necessary for farming, irrigation, and ranching activities, including agricultural service roads and utilities on shorelands, and the construction and maintenance of irrigation structures including but not limited to head gates, pumping facilities, and irrigation channels. A feedlot of any size, all processing plants, other activities of a commercial nature, alteration of the contour of the shorelands by leveling or filling other than that which results from normal cultivation, shall not be considered normal or necessary farming or ranching activities. A feedlot shall be an enclosure or facility used or capable of being used for feeding livestock hay, grain, silage, or other livestock feed, but shall not include land for growing crops or vegetation for livestock feeding and/or grazing, nor shall it include normal livestock wintering operations;

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

(vi) Construction on shorelands by an owner, lessee, or contract purchaser of a single family residence for his own use or for the use of his or her 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;

(vii) Construction of a dock, including a community dock, designed for pleasure craft only, for the private noncommercial use of the owner, lessee, or contract purchaser of single and multiple family residences. This exception applies if either: (A) In salt waters, the fair market value of the dock does not exceed two thousand five hundred dollars; or (B) in fresh waters, the fair market value of the dock does not exceed ten thousand dollars, but if subsequent construction having

a fair market value exceeding two thousand five hundred dollars occurs within five years of completion of the prior construction, the subsequent construction shall be considered a substantial development for the purpose of this chapter;

(viii) Operation, maintenance, or construction of canals, waterways, drains, reservoirs, or other facilities that now exist or are hereafter created or developed as a part of an irrigation system for the primary purpose of making use of system waters, including return flow and artificially stored groundwater for the irrigation of lands;

(ix) The marking of property lines or corners on state owned lands, when such marking does not significantly interfere with normal public use of the surface of the water;

(x) Operation and maintenance of any system of dikes, ditches, drains, or other facilities existing on September 8, 1975, which were created, developed, or utilized primarily as a part of an agricultural drainage or diking system;

(xi) Site exploration and investigation activities that are prerequisite to preparation of an application for development authorization under this chapter, if:

(A) The activity does not interfere with the normal public use of the surface waters;

(B) The activity will have no significant adverse impact on the environment including, but not limited to, fish, wildlife, fish or wildlife habitat, water quality, and aesthetic values;

(C) The activity does not involve the installation of a structure, and upon completion of the activity the vegetation and land configuration of the site are restored to conditions existing before the activity;

(D) A private entity seeking development authorization under this section first posts a performance bond or provides other evidence of financial responsibility to the local jurisdiction to ensure that the site is restored to preexisting conditions; and

(E) The activity is not subject to the permit requirements of RCW 90.58.550;

(xii) The process of removing or controlling an aquatic noxious weed, as defined in RCW 17.26.020, through the use of an herbicide or other treatment methods applicable to weed control that are recommended

by a final environmental impact statement published by the department of agriculture or the department jointly with other state agencies under chapter 43.21C RCW.

NEW SECTION. **Sec. 4.** A new section is added to chapter 90.58 RCW to read as follows:

RCW 36.70A.480 governs the relationship between shoreline master programs and development regulations to protect critical areas that are adopted under chapter 36.70A RCW.

NEW SECTION. **Sec. 5.** This act is remedial and curative in nature and applies retroactively to July 27, 2003.

NEW SECTION. **Sec. 6.** This act is necessary for the immediate preservation of the public peace, health, or safety, or support of the state government and its existing public institutions, and takes effect immediately.

--- END ---

cc: ALL DCD
EH

JEFFERSON COUNTY
DEPARTMENT OF COMMUNITY DEVELOPMENT (DCD)
621 Sheridan Street, Port Townsend, WA 98368
Al Scalf, Director

Unified Development Code Interpretation

Date: August 22, 2008

Issued by: Jefferson County DCD Planning Manager/UDC Administrator

Affected: All properties within Jefferson County

Subject: Relationship between Growth Management Act (GMA) and Shoreline Management Act (SMA) jurisdiction

Background & Analysis:

In accordance with Article VI, Chapter 18.40 of the Unified Development Code (UDC), Jefferson County Code (JCC 18.40.350) this interpretation of the Unified Development Code is intended to clarify conflicting or ambiguous wording, interpret proper classifications of a use, or interpret scope or intent. This is an administrator-initiated interpretation as allowed by JCC 18.40.360(1). The "Factors for Consideration", as identified in JCC 18.40.360(4) and listed below, were considered in making this UDC interpretation, including applicable goals and policies of the Jefferson County Comprehensive Plan:

(a) The applicable provisions of this code, including its purpose and context;
(b) The implications of the interpretation for development within the county as a whole, including the precedent the interpretation will set for other applicants; and
(c) Consistency with the Jefferson County Comprehensive Plan and other relevant ordinances and policies.

Applicable Provisions
Applicable provisions of the Jefferson County UDC include:

- JCC 18.15, an earlier Critical Areas Ordinance (eCAO) - Effective January 16, 2001 as per the Washington State Growth Management Act (GMA; RCW 36.70A) to protect

environmentally sensitive features such as critical aquifer recharge areas, frequently flooded areas, geologically hazardous areas, fish & wildlife habitat conservation areas, and wetlands; and applicable to any project permit application deemed "substantially complete" by DCD before March 17, 2008;

- JCC 18.22 Critical Areas Ordinance (CAO) – Adopted March 17, 2008 as per the Washington State Growth Management Act (GMA; RCW 36.70A) to protect environmentally sensitive features such as critical aquifer recharge areas, frequently flooded areas, geologically hazardous areas, fish & wildlife habitat conservation areas, and wetlands; and
- JCC 18.25 Shoreline Master Program (SMP) – Adopted March 7, 1989 (including subsequent amendments through February 6, 1998) as per the Washington State Shoreline Management Act (SMA; RCW 90.58) to encourage water-dependent uses and promote public access while protecting shoreline natural resources and ecological functions.

Implications
The implications of this interpretation include:

- CAO provisions, including regulations and protections standards, will not apply within shoreline jurisdiction; and
- Use and development activities within shoreline jurisdiction will be governed solely by the SMP.

Consistency
This interpretation is consistent with the Jefferson County Comprehensive Plan as it continues to allow for use, development and protection of environmentally sensitive areas and shoreline resources through implementation of the UDC.

Code Interpretation:

Effective 7/31/2008, in compliance with the Washington State Supreme Court decision No. 80396-0 titled *Futurewise, et al. v. WA State CTED, WA State Ecology v. WWGMHB, City of Anacortes*, Jefferson County will not and does not implement JCC 18.22 CAO provisions within the SMP jurisdictional area defined by JCC 18.25.

Effective 7/31/2008, in compliance with the above-described decision of the Washington State Supreme Court, Jefferson County will implement only JCC 18.25 within the SMP jurisdictional area although JCC 18.40.360(5) would otherwise require the County to apply a more restrictive and equally applicable code provision found elsewhere in the UDC, Title 18 JCC.

This interpretation applies to:

- All permit applications that are substantially complete and have not received a permit decision; and
- All permit applications received since July 31, 2008.

Applicability:

In accordance with JCC 18.40.380, this code interpretation will remain in effect unless and until the administrator issues a written rescindment or the code is formally amended (as per JCC 18.45.090) to supersede this interpretation. This interpretation may be enforced in the same manner that any provision of the code is enforced.

Appeal:

As outlined in JCC 18.40.390, a code interpretation may be appealed to the Hearing Examiner within fourteen (14) calendar days of the decision using the process for appeals of Type II permit decisions as set forth in JCC 18.40.330.

Dated this 22nd day of August, 2008.

Stacie Hoskins, Planning Manager/UDC Administrator

Attached: WA Supreme Court Decision No. 80396-0
Jefferson County Prosecutor Office Analysis of Decision No. 80396-0

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 July 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

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

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

AUTHOR:
Justice James M. Johnson

WE CONCUR:

Justice Charles W. Johnson

Justice Barbara A. Madsen, result only

Justice Richard B. Sanders

Bobbe J. Bridge, Justice Pro Tem.

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 of saying so.

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[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.

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.

AUTHOR:
Justice Tom Chambers

WE CONCUR:
Chief Justice Gerry L. Alexander
Justice Susan Owens
Justice Mary E. Fairhurst

Futurewise, et al v. WA State DCTED, WA State Ecology v WWGMHB, City of Anacortes
No. 80396-0, State Supreme Court, decision published 7/31/2008

Facts: The City of Anacortes had a Shoreline Master Program ("SMP") last approved by Ecology in 2000. Subsequent to that date Anacortes adopted new GMA-derived development regulations but continued to apply its SMP rules to GMA 'critical areas' that happened to also be within shoreline jurisdiction. Futurewise appealed to the Western WA Growth Mgmt. Hearings Bd., asserting that until Anacortes got another SMP approved by Ecology the more stringent 'critical areas' rules it adopted via its GMA-derived authority must apply to 'critical areas' that are also within the shoreline jurisdiction.

Decisions below: The WWGMHB ruled for Anacortes stating the SMP and SMA applied to 'critical areas' inside the shoreline jurisdiction, not the GMA. The trial court reversed the Hearings Board and the dispute went on 'direct review' to the Supreme Court because it was/is a disputed issue of statewide interest.

Issue: Does the SMA or the GMA control the level of regulation that local governments such as cities and counties must apply to 'critical areas' (a GMA term of art) that happen to also be within the shoreline jurisdiction?
Held: By a 5-4, majority, with the 5th Justice of the majority concurring only with the result, the State Supreme Court held that the SMA applies.

Analysis: Both sides of this decision concur that the Legislature has attempted to integrate the SMA and the GMA since, for example, the SMA goals are now the 14th goal of the GMA and Ecology's decision on whether to approve a particular SMP must be appealed to the Hearings Board. They also agree that at some point the SMA (and the Ecology rules that are guidelines for any jurisdiction writing an SMP) will control the regulations that will apply to 'critical areas' within the shoreline jurisdiction.

The sides differ on when the SMA (and the related SMP) take over, specifically they disagree on the meaning of RCW 36.70A.480(3)(a). The majority argued that in 2003 the Legislature, upset with the Central Puget Sound Growth Mgmt. Hearings Board decision in *Everett* that made the GMA superior to the SMA when it came to 'critical areas' within SMA jurisdiction, expressly stated that the SMA governed 'critical areas' inside the shoreline jurisdiction and only outside the jurisdiction did GMA apply. Thus, if a local jurisdiction had in place in 2003 a valid SMP, then only the SMA would apply in these circumstances where, at first glance, SMA and GMA jurisdiction seemingly overlapped. Anacortes held a valid SMP in 2003 and thus only the SMA would apply concluded the majority. The majority also pointed to text in the GMA at RCW 36.70A.480(3)(b) that said with limited exceptions 'critical areas' in the shoreline jurisdiction "shall not be subject to the procedural and substantive requirements of the [GMA]."

However, the dissent concluded that the SMA does not become paramount until such time as two events occurred, specifically 1) Ecology has in place shoreline guidelines that were promulgated in accordance with the rules that govern how an agency establishes it rules and 2) Ecology approves the SMP of a local jurisdiction. Until both those events occur, the dissent argued, the GMA continues to apply. Why? Presumably because the SMA already includes text at RCW 90.58.090(4) stating that any regulatory protection in an SMP for 'critical areas' inside the SMP jurisdiction must be as protective as the GMA rules that protect upland 'critical areas.' Nor did Ecology have in place valid shoreline guidelines when the *Everett* decision came down meaning the preconditions for transfer to full SMA-derived authority could not occur at that time.