



ANACORTES EXECUTIVE DEPARTMENT

P.O. BOX 547, ANACORTES, WA 98221-0547
DEAN MAXWELL, MAYOR

PH (360) 299-1950
FAX (360) 293-1938

E-MAIL: dean@cityofanacortes.org

November 14, 2008

VIA E-MAIL AND U.S. MAIL

Tom Clingman
Department of Ecology
Shorelands & Environmental Assistance Program
PO Box 47600
Olympia, WA 98504-7600

RE: *Futurewise v. Western Washington Growth Management Hearings Board*
City of Anacortes Response to Ecology's October 25 Correspondence

Dear Mr. Clingman:

The City of Anacortes provides this comment on Ecology's October 25 correspondence to planning directors and interested parties. Ecology raises questions on how the Washington State Supreme Court's decision in *Futurewise v. Western Washington Growth Management Hearings Board* (Decision)¹ should be implemented.

Decision implementation is straight forward. The Decision does not create a "new" shoreline critical area amendment process. Ecology has overstated the impact of the Decision in an apparent effort to delay the implementation of ESHB 1933. The Decision simply upholds a 2005 Western Washington Growth Management Hearings Board decision. The Board's decision specifically ruled as enforceable critical area regulations within shorelines, although such regulations may have been adopted under the Growth Management Act. The City of Anacortes provides background information, and suggests a simpler approach.

1. Background

1.1 Legislative

ESHB 1933² transferred regulatory jurisdiction over shoreline critical areas from the Growth Management Act (Chapter 36.70A RCW) to the Shoreline Management Act (Chapter 90.58 RCW). The Legislature adopted the legislation in 2003 just four months after the Central Puget Sound Growth Management Hearings Board ruled that shorelines are all Growth Management Act critical areas, subject to best available science requirements.³ ESHB 1933 reversed the

¹ 164 Wn.2d 242, 189 P.3d 161 (2008).

² Chapter 321, Laws of 2003, commonly referred to as Engrossed Senate House Bill 1933, or ESHB 1933.

³ *Everett Shorelines Coalition v. City of Everett and Washington State Dept. of Ecology*, Central Puget Sound Growth Management Hearings Board Case No. 02-3-0009c, Final Decision and Order (January 9, 2003).

Central Board. Under ESHB 1933, shoreline critical areas are regulated through the Shoreline Management Act, and shorelines are not critical areas just because they are shorelines.

1.2 Litigation

In 2005, as part of its ongoing planning efforts, Anacortes amended its shoreline critical areas ordinance. Futurewise⁴ appealed to the Western Board. The Western Board required Anacortes to adopt its shoreline critical area amendments through the Shoreline Management Act.⁵ Anacortes agreed to submit the amendments to Ecology.

Futurewise objected, and appealed to Superior Court. The Superior Court reversed the Western Board. It found that the City could not submit its critical area amendments to Ecology unless the City also updated its entire 2000 Shoreline Master Program, including those provisions unrelated to critical areas. The State Supreme Court granted direct review and upheld the Western Board. Consistent with RCW 90.58.090(4) (“[t]he department shall approve the **segment** of a master program relating to critical areas...”), the Court approved segmented shoreline master program amendments. The Court’s split vote means the holding must be supported through the narrowest grounds, precluding an expansive reading.⁶ That narrow ground is the affirmation of the Western Board’s decision; and, that decision did not invalidate preexisting critical area regulations within the shoreline management area.

1.3 Factual

What has been most evident to the City is that despite the legislature’s specific direction, Ecology has refused to allow the City to amend a shoreline master program segment to protect critical areas, as the Board had directed and the Shoreline Management Act authorizes.⁷ Anacortes’ substantive Growth Management and Shoreline Management Act compliance was not in question.⁸

⁴ Futurewise, Evergreen Islands, and Skagit Audubon Society appealed the Western Board decision to Superior Court. The Washington State Departments of Ecology and Community, Trade and Economic Development intervened on their behalf (collectively, “Futurewise”). The Washington Public Ports Ass’n intervened on Anacortes’ behalf.

⁵ *Evergreen Islands, Futurewise, and Skagit Audubon Society v. City of Anacortes*, Central Puget Sound Growth Management Hearings Board, #05-2-0016, Final Decision and Order (December 27, 2005), pgs. 3 and 21-31.

⁶ “When a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, ‘the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds.’” *Marks v. United States*, 430 U.S. 188, 193, 97 S.Ct. 990, 51 L.Ed.2d 260 (1977).

⁷ “The department **shall** approve the segment of a master program relating to critical areas,” provided statutory criteria are met. RCW 90.58.090(4), emphasis added.

⁸ The Western Board found the City in compliance with the Growth Management Act, and stayed Shoreline Management Act compliance, pending appellate review. *Evergreen Islands, Futurewise and Skagit Audubon Society v. City of Anacortes*, Western Washington Growth Management Hearings Board #05-2-0016, Compliance Order (April 9, 2007).

That this case reached the Supreme Court is not a result of the City's initiative. The City had acted to update its ordinances well in advance of its Growth Management Act deadlines, and has long been forward thinking in its approach to environmental protection. The City's 2,800 acre Community Forest Lands Program permanently protects close to half the City, and is coupled with a 1,000 acre tideland protection program. These are unprecedented measures for a city the size of Anacortes. Had Ecology not objected to segmented amendments, appellate litigation would not have resulted.

2. The Decision Does Not Create New Shoreline Master Program Amendment Processes for Critical Areas

The Decision does not create any new amendment processes. It simply provides that when a jurisdiction amends its shoreline critical area regulations, it is to do so through the Shoreline Management Act, rather than the Growth Management Act. If a jurisdiction submits a shoreline master program critical areas amendment to Ecology for review and approval, Ecology reviews the submission through the Shoreline Management Act, and Guidelines at Chapter 173-26 WAC. This process has not changed. Local governments are familiar with this process, as it has been part of their responsibilities even before the Growth Management Act.

The Decision does confirm the procedural flexibility authorized by the SMA for local jurisdictions when processing Shoreline Master Program critical area revisions. For example, a local government is not required to update the entire shoreline master program to incorporate critical area amendments, but may instead amend the program's critical areas segment, as authorized by the SMA.⁹ Also, when completing a Growth Management Act update under RCW 36.70A.130, a jurisdiction has the option of addressing its shoreline critical areas then, or completing this review as part of its Shoreline Master Program update. Under either scenario, the Board's Decision recognizes Shoreline Management Act, and Ecology, jurisdiction over such shoreline critical area amendments. Ecology's process for such review is not new or unfamiliar to local government.¹⁰

3. Existing Shoreline Critical Area Regulations Remain in Place

The Decision does not invalidate existing shoreline critical area regulations enacted through the Growth Management Act. The Court upheld the Western Board decision, which states: “[c]ritical areas within the shorelines of the state are not stripped by ESHB 1933 of protections given to them by existing critical area regulations....”¹¹ If shoreline critical area regulations were amended following ESHB 1933, and not appealed, they remain valid. The Board so determined in denying an invalidity request.

[I]nvalidity would have the effect of making the newly enacted more protective critical areas protections unenforceable. The Board sees no need to impose

⁹ RCW 90.58.090(1) and (4).

¹⁰ See Chapter 173-26 WAC.

¹¹ Western Board Decision, pg. 27:9-10, emphasis added.

invalidity and encourages the City to keep the [critical area] provisions ... in place while it completes its update work.¹²

The Board's ruling is consistent with ESHB 1933. **Before** critical areas are protected through the Shoreline Management Act, they **must** be protected through 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 subject to the procedural and substantive requirements of this chapter, except as provided in subsection (6) of this section. ...¹³

Note that Ecology can approve the incorporation of critical area ordinances by reference:

[A] local government may include its critical area ordinance in the master program to provide for compliance with the requirements of RCW 90.58.090(4), provided the critical area ordinance is also consistent with this chapter. ...
[L]ocal governments shall ensure that the public has an opportunity to participate in the formulation of the regulations or in their incorporation into the master program....¹⁴

A local jurisdiction need not "re-review" an adopted critical areas ordinance to "add" it to the shoreline master program. Ecology may approve a jurisdiction's request to incorporate the critical areas ordinance by reference.

To elaborate on this process, Ecology could adopt an emergency rule, finding Growth Management Act review processes adequate to meet the Shoreline Management Act's local review provisions.¹⁵ Growth Management Act requirements, both substantive and procedural, are extensive. They are in many respects more rigorous, and provide for substantial compliance with the Shoreline Management Act. Anacortes does not believe such a step is necessary. But, if Ecology continues to believe the Western Board's ruling (as confirmed by the Supreme Court) does not provide adequate assurances, Ecology could provide clarification regarding the continued enforceability of critical area regulations through an emergency rule.

4. Summary

Ecology has devoted extensive resources to defending a posture that is contrary to the legislative directive in both the Growth Management Act and Shoreline Management Act. The states' resources would be better used in assisting jurisdictions with achieving shoreline management

¹² Western Board Decision, pg. 40:13-17.

¹³ RCW 36.70A.480(3)(b), emphasis added.

¹⁴ WAC 173-26-191(2)(b), emphasis added.

¹⁵ RCW 34.05.350.

goals. To that end, Anacortes suggests the above approaches Ecology could take to ease review processes for jurisdictions, rather than creating issues where none exist. As the Board explained:

[T]he addition of Ecology's review and approval process can only benefit all parties, including the boards, in assuring appropriate protections are in place. The expertise Ecology offers in reviewing master programs and amendments, together with the inclusive process that it brings to bear, will be of major assistance to the boards in applying sound scientific principles to the review of critical areas protections.¹⁶

Ecology's role in shoreline critical area review provides an opportunity to support local efforts to achieve both environmental and economic development goals, should it choose to embrace this process.

Thank you for this opportunity to comment. The City has throughout this process sought solutions, not road blocks, to assuring compliance with the direction of state law.

Respectfully,

CITY OF ANACORTES



H. Dean Maxwell, Mayor

cc: Hon. Christine Gregoire, Governor
Ryan C. Larsen, Director of Planning, City of Anacortes
Jay Manning, Esq.
Association of Washington Cities
Washington State Association of Counties
Washington Public Ports Association
Anacortes City Council
Gerald A. Horne and M. Peter Philley, Pierce County Prosecuting Attorney
Russell D. Hauge and Lisa J. Nickel, Kitsap County Prosecuting Attorney
Susan I. Baur and Ronald Marshall, Cowlitz County Prosecuting Attorney
Daniel T. Satterberg and Darren E. Carnell, King County Prosecuting Attorney
Tom Young, Esq.
Alan Copsy, Esq.
Eric Laschever, Esq.
P. Stephen DiJulio, Esq.
Susan Drummond, Esq.

¹⁶ Western Board Decision, pg. 30:26-31.