

State of
Washington
House of
Representatives



October 26, 2009

Ms. Polly Zehm
Interim Director
Department of Ecology
Post Office Box 47600
Olympia, WA 98504-7600

Re: Proposed Shoreline Guidance by the Departments of Ecology and Commerce

Dear Ms. Zehm:

It has come to our attention that the Departments of Ecology and Commerce (hereinafter "the departments") are in the process of issuing new guidance and developing new policies on how local governments can deal with critical areas in the shorelines. We request that the departments stop implementing its latest guidance on this issue.

Last session the Legislature considered two bills recommended by the departments (HB 1653/SB 5726) to integrate the Shoreline Management Act (SMA) and Growth Management Act (GMA) provisions on critical areas. This legislation was controversial, receiving negative testimony, and failed to pass the Legislature.

The Legislature has had ample time to require local governments to force early adoption of protections for critical areas in the shorelines. It has chosen not to do so. As early as 2003, the Legislature stated:

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.

HB 1933 (C 321 L 2003). The Washington Supreme Court in *Futurewise v. Western Washington Growth Management Hearings Board*, 164 Wn.2d 242, 244-45, 189 P.3d 161 (2008), quoted the statute and stated "We hold that the legislature meant what it said. Critical areas within the jurisdiction of the SMA are governed only by the SMA." Even the dissent agreed with this statement. See *Id.* at 249. The court also stated,

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 the holding. Deciding as Ecology urges would contradict the clear language and intent of the legislature in ESHB 1933 and would add substantial cost to citizens and local governments.

Id. at 247-248.

The court rejected the Department of Ecology's arguments. The Legislature has made no changes to the law thus agreeing that the Shoreline Management Act controls in the shorelines, not the Growth Management Act.

The departments' proposed guidance continues to advocate for local governments to take additional actions to protect critical areas beyond what is required by statute and law. It is adding tremendous costs to citizens and local governments and opens the door for more litigation. We believe the departments are acting without legislative authority and in disregard of legal direction by the courts.

Specifically, the September 29, 2009 Guidance "Adoption of 'Critical Areas Segment' Amendments to the Shoreline Master Programs" states:

The position of the Departments of Ecology and Commerce is that Critical Area Ordinances remain in effect in the Shoreline area, without adoption into the local Shoreline Master Program.

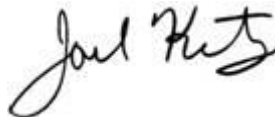
This conflicts with statutory authority and the holding of the Washington State Supreme Court. In the *Futurewise* dissent, Justice Chambers argued for Ecology's suggested policy that the Growth Management Act's critical areas ordinance control in the shoreline, and his argument failed to gather sufficient support. Specifically, he stated "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." *Id.* at 251. The Department of Ecology's position was discussed by the court and rejected. So, why is the department proceeding as if the dissenting opinion was in fact the prevailing opinion? This appears to be a blatant disregard for statute and abuse of authority.

We are concerned that the department's behavior continues to waste taxpayers' money. The guidance will only create more litigation for the departments, local governments, and the shoreline property owners rather than reduce the conflict. Much needed resources are being wasted in litigation because of the departments' choices. Let the shoreline master programs control in the shorelines without new guidance from your departments until the Legislature provides further direction on this issue.

Sincerely,



Jan Angel
State Representative
26th District



Joel Kretz
Republican Deputy Leader
State Representative 7th District

Ms. Polly Zehm

Page 3

cc: Office of the Governor

Tom Clingman, Department of Ecology

Ted Sturdevent, Department of Ecology

Hunter Goodman, Office of the Attorney General

Mary Sue Wilson, Office of the Attorney General

Marie Sullivan, Department of Commerce