



STATE OF WASHINGTON

November 24, 2009

The Honorable Jan Angel
WA State House of Representatives
P.O. Box 40600
Olympia, WA 98504

The Honorable Joel Kretz
WA State House of Representatives
P.O. Box 40600
Olympia, WA 98504

Re: Joint Ecology/Commerce Guidance on Critical Areas in Shorelines

Dear Representatives Angel and Kretz:

Thank you for your letter of October 26, 2009, regarding interim guidance related to critical areas within shoreline jurisdiction. We appreciate your interest in this complex issue. There is a great deal of confusion on the part of local governments regarding the *Futurewise* decision by the Supreme Court, and the more recent Court of Appeals decisions in *KAPO v. Kitsap County* and *Kailin v. Clallam County and Ecology*.

Because of this confusion, many local governments have requested that we issue guidance on how to proceed from here. Our interim guidance is in response to these requests. We believe that it is our responsibility, per RCW 36.70A.190 and RCW 90.58.050, to help local governments understand this issue. Our guidance does not have the force of law, and local governments, of course, are not required to follow it. We have amended our guidance to emphasize that it is based on our best analysis and that other interpretations are possible. However, we do believe that it is useful for our agencies to offer a recommended path forward for local governments.

You raise several concerns regarding whether our guidance conforms with the *Futurewise* decision. In your letter, you refer to the lead opinion in the case as the "holding" of the court. However, in order for there to be a holding, five justices of the Supreme Court need to agree. Here, only four justices signed onto the lead opinion and, as such, there is no "majority" opinion that clearly answers the questions raised in that case.

We have consulted with our Assistant Attorneys General to try to understand this complex decision and to comply with it. Our guidance is based on our interpretation of the opinion, which is as follows. A majority of justices of the Supreme Court reinstated the Growth Management Hearings Board decision related to the City of Anacortes Critical Areas Ordinance (CAO). In both the *KAPO* and *Kailin* cases, the Courts of Appeals remarked on the lack of a majority rationale in the *Futurewise* case and concluded that reinstatement of the board's decision was, in fact, the majority holding of the case. The Hearings Board decision stated that new updates to critical areas ordinances

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needed to be reviewed and approved by the WA State Department of Ecology (Ecology) as shoreline master program amendments, but 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” (WWGMHB Case 05-2-0016, 12/27/2005).

We are very sensitive to the workload that state planning requirements place on local governments. Your letter expresses concern that our guidance may increase workload and expense for local governments. However, we believe that our guidance should not create additional work and expense. We support local governments simply leaving their existing adopted CAOs in place, and applying them to all the areas they identified as critical areas. This includes areas in shoreline jurisdiction. In the perspective of Ecology and the WA State Department of Commerce (Commerce), if a CAO was not challenged within 60 days or if appeals have been completed, then local governments are not required to revisit the critical areas protections contained in those ordinances. The GMAs “presumption of validity,” found in RCW 36.70A.320, is a fundamental statutory provision that was not expressly altered by Anacortes-related decisions. However, our recommendation is that counties and cities updating their critical areas ordinances should plan for shoreline areas under the Shoreline Management Act rather than the Growth Management Act.

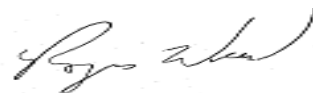
We appreciate that alternative interpretations exist and are amending our guidance to acknowledge that fact. However, our perspective is that our position and guidance best reflects the holding of the Growth Management Hearings Board decision that was reinstated by the Supreme Court, and believe that is supported by the two Appeals Court decisions that have been issued subsequent to the Anacortes Supreme Court decision.

We take very seriously our responsibility to work cooperatively with our local government partners. It is in this spirit that our interim guidance is offered. If you would like to discuss your concerns further, please contact Gordon White, Ecology Shorelands Program Manager at gordon.white@ecy.wa.gov/ 360-407-6977 or Leonard Bauer, Commerce Managing Director of Growth Management, at leonard.bauer@commerce.wa.gov/ 360-725-3055. Thank you again for your interest in this issue.

Sincerely,



Ted Sturdevant
Director, WA State Dept of Ecology



Rogers Weed
Director, WA State Dept of Commerce

cc: Senator Darlene Fairley
Senator Jim Honeyford
Rob McKenna, WA Attorney General
Senator Phil Rockefeller
Representative Geoff Simpson
Mary Sue Wilson, Attorney General's Office