

Background on Critical Area Regulation in Shoreline Areas: Chronology of “Futurewise v. City of Anacortes” Decision

The following provides background information on what is commonly called the “Anacortes case,” a series of Board and Court decisions issued between 2005 and 2009 addressing how critical areas are regulated under the Shoreline Management Act (SMA) and Growth Management Act (GMA).

The complicated series of decisions started with a 2003 law that included a clear intent for critical areas in shoreline jurisdiction to be protected solely by Shoreline Master Programs (SMPs) adopted under the SMA rather than by critical areas ordinances (CAOs) adopted under the GMA. However, the law was not clear on *when* a local SMP would take over from the CAO. That ambiguity led to differing, and sometimes contrary, legal interpretations issued between 2005 and 2009.

In 2010, Governor Gregoire signed into law Substitute House Bill (SHB) 1653, which clarified, with certain exceptions, critical area regulations adopted under the GMA apply within shoreline areas until Ecology approves either a comprehensively updated SMP, or a SMP amendment specifically related to critical areas.

The exceptions in the law address concerns raised by business and farming groups regarding the status of legally existing structures and uses in shoreline areas that are within protection zones created by local CAOs. The law specifies that these uses may continue as conforming uses. The law also provides criteria about how these structures and uses may be redeveloped or modified. In addition, the law also addressed existing and ongoing farming practices.

SHB 1653 has been codified in the GMA under [RCW 36.70A.480](#). The SMA was also amended to add [RCW 90.58.610](#), which simply states that Section 480 of the GMA is where the legislature addresses the relationship between SMPs and CAOs.)

The chronology below is provided for historical reference only.

Case Chronology

2003: ESHB 1933

The “Anacortes case” has its roots in a 2003 Legislative enactment that amended both the SMA and GMA (Engrossed Substitute House Bill 1933). The intent of the bill was to clarify that critical areas in shoreline jurisdiction would be protected solely by Shoreline Master Programs (SMPs) adopted under the SMA, rather than by critical areas ordinances (CAOs) adopted under the GMA. Before this legislation, local governments applied both the SMP and CAO where the provisions of the two local regulations overlapped. The law provided that critical areas in shoreline jurisdiction would be governed solely by the local SMP “as of the date” the department of Ecology approved the local SMP.

Note: For ESHB 1933 information, use <http://search.leg.wa.gov/>. Search for ESHB 1933 2003 after selecting Legislative Documents, the year from the drop down menu, and “Bill Report”.

2005: Growth Management Hearings Board decision

Controversy arose in 2005 because of differing interpretations of the *timing* of this shift from "overlapping" jurisdiction to "sole" jurisdiction. The timing issue was raised in a dispute between environmental interests and the City of Anacortes over a locally adopted CAO, in an appeal to the Western Washington Growth Management Hearings Board (Board). In *Evergreen Islands, Futurewise and Skagit Audubon Society v. City Of Anacortes*, the Board was presented with two arguments:

- The City of Anacortes argued that the transfer of critical areas protection in shorelines occurred "**retroactively**," transferring authority over those critical areas to the city's existing SMP when it was adopted in 2000.
- The department of Commerce's predecessor (Community, Trade, and Economic Development) and the department of Ecology filed an amicus brief with the Board that took the position that the transfer takes place **prospectively, upon Ecology's approval of a comprehensive SMP update** as consistent with the shoreline guidelines adopted in 2003.

On December 27, 2005 the Board issued their Final Decision and Order in Case No. 05-2-0016. The Board rejected the City's retroactive interpretation. However, it also rejected the State's assertion that the transfer could wait until jurisdictions update their SMPs in accordance with the comprehensive update deadlines set in the SMA. The Board ruled that the transfer takes place when the City adopts new critical area regulations that affect shorelines. The Board ruled that to the extent the City's critical area regulations apply to shoreline areas, they must be submitted to Ecology for review and approval as SMP amendments before the updated regulations take effect within shoreline jurisdiction.

The Board decision contained apparently contradictory language regarding the status of critical area regulations in shoreline jurisdiction prior to the updated Anacortes CAO being approved as an SMP amendment:

- On one hand, the Board stated that the new CAO regulations "become effective only after they have been presented to and approved by Ecology."
- However, other parts of the decision emphasized that protections for critical areas in shorelines are sustained:
 - "We find that the impact on protections for critical areas in the shorelines is positive...there is nothing in this transfer of authority that in any way lessens protections for critical areas."
 - "Critical areas within the shorelines of the state are not stripped by ESHB 1933 of protections given to them by existing critical areas regulations..."

Appeal to Superior Court

When Futurewise appealed the Board's decision to superior court, CTED and Ecology intervened to provide argument on the state's interpretation of ESHB 1933. There was significant concern that the unclear language of the decision could create confusion regarding what regulations apply in Shoreline areas. The state agencies joined Futurewise,

Evergreen Islands, and Skagit Valley Audubon Society in the appeal on the basis that the Board's decision:

- Conflicted with the plain language of ESHB 1933.
- Potentially created significant gaps in regulation that protects human health and safety and environmental resources in shoreline areas.
- Created significant procedural and workload problems for local governments and Ecology.

The Superior Court accepted the state's arguments and reversed the Board's decision.

The City of Anacortes, joined by the Washington Public Ports Association (WPPA), appealed the Superior Court decision to the State Supreme Court.

2008: Supreme Court Decision

On July 31, 2008, in response to the appeal filed by the City of Anacortes, the Supreme Court issued *Futurewise et al v. Western Washington Growth Management Hearings Board et al.*, 164 Wash.2d 242, 189 P.3d 161. The Supreme Court issued what is referred to as a 4-1-4 split decision. There were two written opinions — a "lead" opinion and a dissenting opinion, each supported by four justices. The ninth (and deciding) justice concurred with the lead opinion with the stipulation that her signature supported "result only." This deciding vote was unaccompanied by an opinion.¹

The Supreme Court decision reinstated the Hearings Board decision regarding the Anacortes CAO. Under the Court decision, the City would process critical area regulation updates in the Shoreline area as a Shoreline Master Program amendment, to meet the requirements of ESHB 1933 as interpreted by the Board. However, given the nature of the Court decision and inconsistencies in the original Board decision, there was a lack of clarity on several points.

For example, due to the nature of the split decision it was not clear to what extent the reinstated Board decision applied beyond the City of Anacortes. It takes a majority of justices (in this case, five votes) for a Court opinion to establish a legal precedent that is binding on subsequent cases. Here, there was no majority Court opinion beyond reinstatement of the 2005 Board decision, and neither of the Court opinions endorsed the Board's reasoning in the Anacortes decision.

Requests for Supreme Court Reconsideration denied

On Aug. 20, 2008, the department of Community, Trade and Economic Development (now known as the Department of Commerce) and Ecology filed a motion asking the state

¹ A court "opinion" is the document that describes the legal reasoning and reason(s) for a court's decision. Ordinarily an opinion is drafted by one justice then circulated for review and signature by the other justices. If at least five of the nine justices sign an opinion, it becomes the "majority opinion" (or simply the opinion). Such an opinion constitutes the "decision" of the court, and its legal conclusions ("holdings") and analysis can be cited and relied upon in future cases. If, however, no draft opinion garners the signature of at least five of the justices, the case before the Court can still be resolved by what is referred to as a "plurality" decision. In a plurality decision, one or more justices may concur in only a portion or portions of the lead opinion or only the result (but not its analysis). In a plurality decision, therefore, the entire lead opinion is not the decision of the court, and only that portion of the lead opinion agreed to by at least five justices is precedential. The Futurewise case produced such a "plurality" decision. [[back](#)]

Supreme Court to reconsider its July 31 decision. On December 3, 2008, the Court filed an order asking for a response to the reconsideration request. Concerns identified in the motions for reconsideration included:

- Because no legal analysis in either opinion received five votes, the decision contains no clear legal holding or conclusion to guide the lower courts, the Growth Management Hearings Boards, local governments, or landowners. This lack of a clear holding may create significant confusion and uncertainty for local governments and shoreline property owners.
- Both the plurality's legal analysis - which was not agreed to by a majority of the court — and the reinstated Board decision have significant, adverse consequences for local governments and shoreline property owners that the Court may not have intended. These include the potential for uncertainty about the status of 140 existing critical areas ordinances — which creates uncertainty on vital issues including shoreline protection, access to flood insurance, and local governments' eligibility for state grants and loans.

Several local governments and the Washington State Association of Counties also filed pleadings related to this request for reconsideration.

On June 10, 2009, the state Supreme Court issued its Mandate (final action in the case), together with an order declining reconsideration requests. The Court left the July 31, 2008 decision (discussed above) in place.

2009: Kitsap Alliance of Property Owners (KAPO) case – Division Two Court of Appeals

In September 2009, the Court of Appeals Division II issued a decision in *Kitsap Alliance of Property Owners et al v. Central Puget Sound Growth Management Hearings Board et al*, No. 38017-0-II. This decision involved Kitsap County's update of Critical Area provisions in the Shoreline area. The "KAPO" decision concluded that, when the Supreme Court cannot garner a majority view for resolving an issue, the position of the court is the position of a majority of justices concurring on the narrowest possible grounds. Here, reinstatement of the Anacortes Growth Board decision was the narrowest possible grounds for five justices' concurrence. Thus, Division Two applied the Growth Board decision to the Kitsap County CAO.

As a result, the court remanded the matter to Kitsap County to do its planning for shoreline critical areas under the SMA rather than the GMA. The court did not address the issue of whether the County's prior CAO continued to apply until the SMA planning effort is complete. However, the Growth Board decision in the Anacortes case held that prior CAOs remain in effect until the SMA planning is complete. Because Division Two found that reinstatement of the Growth Board decision was the "decision" of the Supreme Court, this case supported the interpretation that prior CAOs remain in effect until a local jurisdiction completes its planning under the SMA.

2009: Kailin case – Division One Court of Appeals

In November 2009, the Court of Appeals Division II issued a decision in *Eloise Kailin, et al v Clallam County and Department of Ecology*. In the decision, the court found the Shorelines

Hearings Board lacks jurisdiction over a permit issued under a CAO if the CAO has not been incorporated into the shoreline master program. However, the court also discussed the applicability of ESHB 1933 and the "Anacortes" Supreme Court decision. The court noted that there is no majority rationale of the Futurewise case. The only conclusion that can be drawn from the case is that five justices agreed that "the decision of the trial court is reversed, and the decision of the Western Washington Growth Management Hearings Board upholding Anacortes is reinstated."

The court declined to speculate on whether the Board's decision had any precedential value. In doing so, it pointed out that the decision conflicts somewhat with both the plurality and dissenting opinions.

The court concluded there was no basis for drawing parallels between the "Anacortes" decision, which involved a challenge to a CAO, and Kailin's case, which involved a site-specific permit decision.

The court also refused to draw any conclusions based on the fact that the Legislature did not act on legislative amendments proposed to clarify the shoreline and critical areas issue in 2009.

2010: SHB 1653

After the series of contradictory and confusing decisions, representatives of local government, environmental, business and agricultural interests collaborated to support a legislative resolution. The questions addressed by the above decisions were resolved through adoption of [SHB 1653](#) in March 2010. The primary clarifications in the bill are codified under [RCW 90.58.610](#) and [RCW 36.70A.480](#).

For More Information

- [EHB 1653 \(2010\)](#)
- ESHB 1933 – Use <http://search.leg.wa.gov/> to find bill information. Search for ESHB 1933 2003 after selecting Legislative Documents, the year from the drop down menu, and "Bill Report".
- [RCW 90.58.610](#)
- [RCW 36.70A.480](#)

Contact

- Tim Gates, Shoreline Management Policy, tim.gates@ecy.wa.gov, 360-407-6522