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The Honorable Jan Angel
Washington State Representative
26th District
PO Box 40600
Olympia, WA 98504-0600

The Honorable Joel Kretz
Washington State Representative
7th District
PO Box 40600
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Dear Representatives Kretz and Angel:

Thank you for your letter of October 26, 2009 regarding shoreline guidance from the Departments of Ecology and Commerce. Your letter describes your understanding of the holding of the state Supreme Court in *Futurewise v. Western Washington Growth Management Hearings Board*, 164 Wn. 2d 242 (2008) and asks whether the Departments are deviating from that holding with respect to the guidance they are issuing.

My office's best reading of the law today is that critical areas ordinances continue to apply within shoreline areas while Ecology Shoreline Master Program (SMP) approval is pending for such areas. However, we also believe that where shoreline portions of critical areas ordinances were adopted after 2003, and Ecology has not yet approved the applicable SMP, the 60-day appeal period has not begun to run and the shoreline provisions are still open to challenge.

In this letter I will: (1) explain the unique nature of the Court's "plurality" opinion in the *Futurewise* case and discuss why it is difficult to discern a useful "holding" from the opinion, (2) identify two other appellate cases that have recently grappled with the same questions, (3) describe the current unsettled state of the law, and (4) comment on the guidance the Departments of Ecology and Commerce are currently providing.

Your letter fairly summarizes the lead opinion of the *Futurewise* Court. For reasons discussed below, however, neither this lead opinion (authored by Justice Jim Johnson) nor the dissenting opinion constitutes the "holding" of the Court in this case.

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

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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.

In the *Futurewise* case, the challengers alleged that a new critical areas ordinance adopted under the Growth Management Act (GMA) did not adequately protect critical areas in marine shorelines. The City of Anacortes responded, in part, by arguing first that ESHB 1933, enacted in 2003, immediately transferred the protection of critical areas in shorelines to shoreline master programs adopted under the Shoreline Management Act (SMA) and second, that the case should be dismissed because the time had passed for challenging the City’s existing shoreline master program. Interpreting ESHB 1933, the Growth Board ruled that the City’s new critical areas ordinance, insofar as it regulated critical areas in shorelines, should have been adopted as an amendment to the City’s shoreline master program. The Board remanded for the City to readopt those portions of the ordinance affecting shorelines as an amendment to the shoreline master program, but it did not invalidate the critical areas ordinances in the interim. The board also held that review of the shoreline protections was not ripe until Ecology had reviewed and approved those changes as required under the SMA.

The Superior Court reversed, holding that ESHB 1933 transferred the protection of shoreline critical areas to a shoreline master program as of the date Ecology approves a local government’s future comprehensive master program update. The Board and superior court thus disagreed on when the transfer of jurisdiction takes place.

When the case reached our Supreme Court, the central issue in the case was one of timing. All parties agreed that ESHB 1933 directed that critical areas in shorelines would be protected under the SMA instead of the GMA; the only question was when that transfer of protection would occur. The Legislature addressed the timing question in section 5 of ESHB 1933:

As of the date the department of ecology approves a local government’s shoreline master program ... the protection of critical areas ... within shorelines of the state shall be accomplished only through the local government’s shoreline master program

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Because the Legislature in SSB 6012 (filed only one day before ESHB 1933) had established deadlines for cities and counties to update their master programs, and because the great majority of existing shoreline master programs did not include provisions to protect critical areas, the state agencies and most local governments understood the timing language quoted above to refer to Ecology's approval of those future updates under that timeline.

The Supreme Court's lead opinion in *Futurewise*, however, relying heavily on the intent section of ESHB 1933, interpreted the above language as applying to the date of Ecology's approval of any shoreline master program, even if such approval had occurred in the past (even prior to the enactment of ESHB 1933 or the GMA itself). The lead opinion asserted that critical areas ordinances do not apply within shorelines unless adopted and approved as shoreline master program amendments.

The dissenting opinion in *Futurewise* interpreted the timing language to apply prospectively – to comprehensive shoreline master programs and updates approved by Ecology after July 27, 2003 (the effective date of ESHB 1933). The dissenting opinion understood existing critical areas ordinances to be valid and enforceable within the shorelines until such time as they are replaced by a critical areas segment of a shoreline master program approved by Ecology (which must be not later than the dates established by SSB 6012).

Neither the lead opinion nor the dissenting opinion, however, is the decision of the Court because each was signed by only four justices. The stalemate was broken by Justice Madsen who, without explaining her vote, concurred with the lead opinion in “result only.” A concurrence in “result only” generally is understood as indicating agreement with the result but not with the reasoning that lead to it. Under our system of jurisprudence, when there is a split (plurality) decision such as this, the “holding” of a court is the “position of the justice(s) concurring on the narrowest grounds.” *Davidson v. Hensen*, 135 Wn.2d 112, 128 (1998); *State v. Zakel*, 61 Wn. App. 805, 808 (1991), *aff'd*, 119 Wn.2d 563 (1992). Because Justice Madsen concurred only in the result, the “result” therefore is the narrowest position agreed to by the majority of the justices. The result in *Futurewise* was the reversal of the superior court and the reinstatement of the decision of the Board, that Anacortes' amendment of its critical areas regulations governing shorelines should indeed be governed by the SMA. Only this result can be considered the “holding” of the Court.

This narrow result answered the question for the City of Anacortes, which now knows that its planned changes to critical area protections within shorelines must be accomplished under the SMA and must be approved by Ecology. For everyone else, however, the *Futurewise* decision leaves a great deal of uncertainty.

The conflicting opinions in the *Futurewise* case and the reinstated Growth Board decision leave many questions unanswered, perhaps the most pressing of which concern the

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applicability of existing critical areas ordinances within shorelines. The lead opinion in *Futurewise* views ESHB 1933 as applying “retrospectively,” being triggered by any approved master program. The Growth Board decision (and the dissent in *Futurewise*) says exactly the opposite – that ESHB 1933 is triggered only by prospective actions of cities or counties to amend the protections afforded to critical areas within shorelines. The lead opinion contends that all critical areas protections within shorelines not adopted under the SMA were rendered invalid by ESHB 1933 and may no longer be applied or enforced. The Board decision says that critical areas ordinances remain valid and enforceable within shorelines until replaced or superseded. In short, the lead opinion in *Futurewise* appears to have reinstated a Board decision with which it did not agree analytically. This already confusing state of affairs is made even more so by the language of ESHB 1933 itself (see RCW 36.70A.480(4) and (6)), and by existing laws stating that critical areas ordinances adopted under the GMA are presumed valid if not challenged within 60 days¹.

This state of uncertainty also is apparent in two Court of Appeals cases decided since the Supreme Court issued its opinions in *Futurewise*. The two decisions disagree as to whether the Growth Board decision has precedential value. In the first case, *Kitsap Alliance of Property Owners v. Central Puget Sound Growth Management Hearings Board*², Division II of the Court of Appeals considered a challenge to Kitsap County’s critical areas ordinance, including the portions of the ordinance that apply to shorelines. The Court of Appeals observed that the Supreme Court was not able to garner a majority view to resolve the problem of GMA/SMA overlap and that the only portion of the decision agreed to by five justices was reinstatement of the Growth Board decision. The Court of Appeals therefore applied the Western Growth Board decision to Kitsap County’s ordinance and remanded to the County to plan for its shoreline regions under the SMA.

In the second case, *Kailin v. Clallam County and Ecology*³, Division I of the Court of Appeals took a different approach. Division I questioned whether there is any portion of the Growth Board decision that is precedential, noting that the Growth Board decision conflicts with both the plurality and dissenting opinions issued by the Supreme Court. Noting the lack of a majority rationale in the *Futurewise* case, the Court of Appeals declined to extend any portion of *Futurewise* to the question pending before it: whether the Shorelines Hearings Board has jurisdiction over a permit issued under a critical areas ordinance. The Court also

¹ RCW 36.70A.290(2), .320(1). See also *Futurewise v. Thurston County*, 164 Wn.2d at 344-45 (comprehensive plans and development regulations are presumed valid upon adoption and are conclusively deemed legally compliant if not challenged within 60 days); *Peste v. Mason County*, 133 Wn. App. 456, 468-69 (2006) (failure to challenge a local ordinance adopted under the GMA within 60 days waives any right to argue that it does not comply with the GMA).

² --Wn. App.--, 217 P.3d 365 (2009).

³ Slip Opinion No. 63901-3-1 (Nov. 9, 2009).

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refused to draw any conclusion from the Legislature's failure to act on HB 1653 and SB 5726 last session.

Unfortunately, there is little certainty at this point. Our Supreme Court has not yet authoritatively resolved these important issues concerning the interaction between the GMA and the SMA on critical areas within shorelines. As a consequence, local governments are unsure of how to implement the intersecting requirements of the GMA and the SMA and have asked Ecology and Commerce for guidance. The agencies' guidance that critical areas ordinances continue to apply within shoreline jurisdiction reflects the best legal interpretation based on the decisions that are currently out there. However, the shoreline portions of critical areas ordinances that were adopted after 2003⁴ are probably still subject to challenge in light of the Growth Board's determination that the 60-day appeal period for such regulations does not begin to run until Ecology has reviewed and approved them.

As described above, the *Futurewise* case presents an atypical situation where there is no portion of the court's decision that reflects a majority rationale. As such, property owners, local governments, citizen groups, state agencies, and lower courts have had to make decisions in the face of legal uncertainty. This is unfortunate in light of the strong principle of favoring certainty and finality in land use decisions.

Sincerely,



ROB MCKENNA
Attorney General

⁴ The 2003 date refers specifically to July 27, 2003, the date on which ESHB 1933 became effective. The *Futurewise* plurality as well as the underlying Board decision direct that critical areas protections adopted or amended after July 27, 2003 are subject to the SMA. A determination that pre-July 27, 2003 CAOs are effected by ESHB 1933 would require a legal conclusion that ESHB 1933 has retroactive effect – a conclusion not reached by the plurality in *Futurewise*.