

**RECENT WASHINGTON STATE RULINGS
REVERSING ACTIONS THAT UNLAWFULLY INFRINGED ON PROPERTY RIGHTS**

SWINOMISH INDIAN TRIBES AND WASHINGTON ENVIRONMENTAL COUNCIL VS SKAGIT CO.

The tribes and the WEC argued that Growth Management Act's Best Available Science requires mandatory buffers and the owners of existing farms must plant 200 ft buffers on all their streams. This would, of course, have put a lot of farmers out of business. In a Sep 17, 2007 9 to 1 decision (Susan Owens a former tribal lawyer dissented) – The Washington State Supreme Court said

- Local governments may balance the numerous goals of the GMA and have broad discretion in developing regulations tailored to local circumstances.
- Local governments may consider local circumstances and justifiably depart from best available science (BAS) when local conditions show the need to do so.
- The requirement to “include BAS” means that it must be considered and the record must show that it was considered, but there is no mandate to follow exclusively what is suggested by BAS.
- The GMA requires a local government to “protect” environmental conditions, but does not require “enhancement” of those conditions.
- The GMA does not require local governments to establish mandatory riparian buffers.

RAY and JULIE BIGGERS ET AL vs CITY OF BAINBRIDGE ISLAND

The City of Bainbridge Island had imposed a moratorium on the development of private property in shoreline areas. They kept extending this moratorium over a period of several years. Several citizens filed suit saying they had been illegally denied permits for more than three years.

In an October 11, 2007 decision, the state Supreme Court agreed – affirming both the trial court and Court of Appeals decision. In the majority opinion Jim Johnson stated that there is no state statutory authority for the City's moratoria or for their multiple extensions and that this usurpation of state powers by the local government disregards article 17, Section 1 of the State Constitution which expressly provides that shorelines are owned by the state, subject only to state regulation

FUTUREWISE ET AL vs CITY OF ANACORTES et al

The petitioners (city of Anacortes) argued that the authority to regulate shoreline critical areas has always been under the Shorelines Management Act and not under the Growth Management. In support of this, petitioners note that the Legislature passed an RCW, in 2003, that rejected a Growth Management Hearings Board decision allowing a local government to regulate shorelines under the GMA (prior to that hearing board decision, there was no legal authority to regulate shorelines under GMA). In a July 31, 2008 five to four decision, the Washington State Supreme Court held that the legislature meant what it said, Critical areas within the jurisdiction of the SMA are governed only by the SMA. On June 10, 2009 the state Supreme Court declined to reconsider their July 31, 2008 decision on *Futurewise v. Anacortes*. The Court action upheld their July 31, 2008 decision and reinstates a [2005 Western Washington Growth Management Hearings Board decision](#) interpreting a 2003 law ([ESHB 1933](#)) that amended the state Shoreline Management Act and Growth Management Acts.

CITIZENS' ALLIANCE FOR PROPERTY RIGHTS V. SIMS

Citizens' Alliance for Property Rights challenged King County Ordinance 15053 that forced all rural area property owners seeking a clearing and grading permit to set aside 50-65% of their property as a “resource area.” The purpose was to reduce sedimentation in streams and promote forest cover to protect and restore the environment. The set-aside requirement was automatically imposed on all rural lots, whether or not their development would have any effect on a stream or river environment. The trial court upheld the ordinance but the Court of Appeals, on July 7, 2008, unanimously concluded that because the set aside requirement was imposed in a uniform and present manner and without regard to the circumstances on the regulated lots, it violated State law. In August, 2008, King County filed a

petition for review to the Washington State Supreme Court. On March 3, 2009, a panel of five Justices of the Washington State Supreme Court unanimously voted to deny the County's petition. The Court of Appeals decision stands.

Olympic Stewardship Foundation v. Jefferson County (12-587)

Pacific Legal Foundation substantially prevailed in their Growth Management appeal in a 51-page decision entered by the growth management hearings board on November 19, 2008. This case involved two main issues:

The growth board agreed with PLF that after two precedent-setting Supreme Court cases (Biggers and Futurewise) that shoreline areas may only be regulated under the shoreline management act, and not the Growth Management Act.

Regarding the adoption and regulation of channel migration zones as critical areas for the most part, the board agreed with PLF and found that the CMZ maps and several of the protection regulations failed to comply with the GMA. The board remanded the ordinance to the county to bring its regulations into compliance.

The board, however, concluded that the CMZ's potential future can be regulated as a critical area subject to the GMA, arguing that ample land should be set aside and protected for its potential future value as a critical area in the event that, at some future time, a river may change its course. The result is that, in some areas, up to 4,000 feet of property on each side of a river, may be subject to no build zones. This precedent, if allowed to stand, could easily be extended to include all property as being a potential future critical area. This theory flies in the face of the earlier decisions and is ripe for appeal.

Gold Star Resorts, Inc. v. Futurewise, No. 80810-4

<http://www.courts.wa.gov/opinions/?fa=opinions.disp&filename=808104MAJ>

Futurewise, an anti-growth organization, challenged Whatcom County's adoption of a comprehensive plan update that included several rural areas that were more intensely developed than those typically found in rural areas in its rural element. These areas of more intense development included existing resort and recreation areas, suburban enclaves, and transportation corridors.

Futurewise argued for a "bright-line" maximum rural density rule only allowing densities less than one dwelling per five acres in rural areas. The problem for Futurewise was that in *Thurston County v. Western Wash. Growth Mgmt. Hearings Bd.*, 164 Wn.2d 329, 358 (2008), the State Supreme Court held that the Growth Boards lack authority to adopt and apply "bright-line" rules establishing maximum allowable densities. So, Futurewise adjusted its argument to try to skirt the *Thurston County* decision, arguing that the growth board decisions (that established the "bright-line" rules) should be considered as providing evidence that any density more intense than one dwelling per five acres is not urban in nature.

The growth board entered a decision adopting Futurewise's argument, expressly disavowing that it was applying a "bright-line" rule. The Court of Appeals affirmed the growth board's decision. Whatcom County's attorney conceded that the densities did not comply with the board's "bright-line" rule and gave up on the appeal, leaving the burden of defending existing development rights on one property owner who took the case to the state Supreme Court.

In a 9-0 decision, the Supreme Court agreed with the property owner that the growth boards lack authority to establish "bright-line" density standards, and reversed the court of appeals and growth board decisions.