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The Legality of Washington Shoreline Development Moratoria in the Wake of *Biggers v. City of Bainbridge Island*

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THE LEGALITY OF WASHINGTON SHORELINE DEVELOPMENT MORATORIA IN THE WAKE OF *BIGGERS V. CITY OF BAINBRIDGE ISLAND*

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Abstract: The Washington State Supreme Court struck down the temporary shoreline development moratorium at issue in *Biggers v. City of Bainbridge Island*, 162 Wash. 2d 683, 169 P.3d 14 (2007); yet the court fragmented on the broader question of whether a local government has authority to adopt a moratorium on shoreline development during long-term land-use planning. In light of upcoming deadlines for the state's local governments to revise their shoreline-management plans, constraints on local authority to adopt shoreline moratoria during the planning process take on heightened importance for hundreds of local governments. The question highlights the tension between private property rights and government authority to regulate for the public welfare. This Note argues that, when presented with a reasonable moratorium, Washington courts should deem persuasive the agreement of the *Biggers*' concurrence and dissent, which form a majority in favor of the legality of reasonable moratoria. *Biggers* provides binding legal precedent pursuant to the narrowest-grounds rule for interpreting plurality decisions, holding only that an *unreasonable* shoreline moratorium contravenes Washington law. Courts that adopt this position will remain in harmony with the state's long history of broad local police powers while continuing the traditional requirement that land-use ordinances be reasonable. Public policy, particularly environmental imperatives, also favors upholding the reasonable shoreline moratorium. This Note proposes substantive and procedural factors, applicable in future cases, that likely fulfill the reasonableness requirement in *Biggers*.

INTRODUCTION

Puget Sound, a playground for orcas and home to an impressive number of species,[1] also provides a beautiful place to live for a large and rapidly increasing human population.[2] In addition to being precious to local communities[3] and one of the largest estuaries in the United States,

1. *See, e.g.*, PUGET SOUND ACTION TEAM, OFFICE OF THE GOVERNOR, STATE OF WASHINGTON, STATE OF THE SOUND 2007, at 15 (2007), *available at* http://www.psp.wa.gov/downloads/SOS07/2007_stateofthesound_fulldoc.pdf, *permanent copy available at* http://www.law.washington.edu/wlr/notes/84washlrev67n1.pdf ("The Puget Sound basin is home to a spectacular array of life—200 species of fish, 26 kinds of marine mammals, 100 species of sea birds and thousands of invertebrate species such as clams, oysters and shrimp.").

2. *See id.* ("Four million of us make our home here, relying on a healthy Puget Sound ecosystem to supply us with water, food and places to live. . . . The projected growth in the region is a continuing concern. As many as 1.4 million new residents are expected to move into the region by 2025.").

3. *See* PUGET SOUND PARTNERSHIP, SOUND HEALTH, SOUND FUTURE: PROTECTING AND RESTORING PUGET SOUND 19–20 (2006), *available at* http://www.psparchives.com/publications/

Puget Sound is an ecosystem of global significance.[4] Today, it faces potentially devastating challenges.[5] One of the most serious threats comes from shoreline development.

Development that landowners believe will protect their shoreline property can harm shoreline habitat: "One-third of the entire Puget Sound marine shoreline is already 'armored' with rock, cement walls, bulkheads, and other hard structures that destroy areas where native plants grow, shorebirds hunt for food, forage fish lay eggs, and young salmon hide from predators on their way to the sea."[6] Local governments' policies and regulations play a crucial role in preventing further habitat loss,[7] and measures they take to protect this public interest can clash with asserted private property rights.[8] *Biggers v. City*

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about_us/psi_reports/final/final/Final_wAPPx_lr.pdf, *permanent copy available at* http://www.law.washington.edu/wlr/notes/84washlrev67n3.pdf ("Public opinion polling shows that the people who live here place a very high value on Puget Sound. . . . People also believe that it is important to protect Puget Sound for future generations, to provide habitat for fish and wildlife, and because it is good for the economy. . . . However, the majority of residents are not greatly aware of the problems facing the Puget Sound region. . . . 97% of the residents of Puget Sound believe that: 'A healthy Puget Sound is a legacy that we must leave to our children and grandchildren.'").

4. JOHN LOMBARD, SAVING PUGET SOUND: A CONSERVATION STRATEGY FOR THE 21ST CENTURY 21 (2006) (explaining that Puget Sound's listing on World Wildlife Fund's catalog of two hundred priority ecoregions is due to "two 'globally outstanding' ecological phenomena—the world's largest remaining temperate rain forest and some of the world's largest runs of anadromous fish").

5. *See* PUGET SOUND PARTNERSHIP, *supra* note 3, *passim* (noting, for example, at page 33, that over forty species, including salmon and resident orcas, are threatened, endangered, or proposed as candidates for listing under the Endangered Species Act, thus indicating that the "overall ecosystem is stressed"). This year's loss of seven Puget Sound orcas (out of a pod of ninety) underscores the ongoing ecological problems. *See* Lynda V. Mapes, *7 Orcas, Regular Visitors to Sound, Likely Dead*, SEATTLE TIMES, Oct. 25, 2008, at A1, *available at* http://seattletimes.nwsource.com/html/nationworld/2008309284_orcas25m.html, *permanent copy available at* http://www.law.washington.edu/wlr/notes/84washlrev67n5a.pdf; Robert McClure, *Are the Orcas Starving?: As Salmon Runs Decline, Killer Whale Numbers Take Hardest Hit Since 1990s*, SEATTLE POST-INTELLIGENCER, Oct. 24, 2008, at A1, *available at* http://seattlepi.nwsource.com/local/384854_orcas25.html, *permanent copy available at* http://www.law.washington.edu/wlr/notes/84washlrev67n5b.pdf.

6. PUGET SOUND PARTNERSHIP, *supra* note 3, at 43; *see also id.* at 14 ("Puget Sound has already lost an astonishing 80% of its estuary habitat."); *id.* app. B, at 15 (describing the restorative softening of private shorelines as "a particular challenge and a significant opportunity for a sustainable Puget Sound" and recommending restrictions on construction of new bulkheads).

7. *See id.* at 44 (explaining local governments' role as an important actor in protecting habitat and adding that preventing habitat loss is more cost-effective than attempts at restoration or clean-up).

8. *See, e.g.*, LOMBARD, *supra* note 4, at 93–103 (summarizing the historical evolution of private property rights in the context of limits in favor of the public-welfare regulations and proposing possible "compensation to landowners hardest hit" by Puget Sound ecosystem management); Hannah Jacobs Wiseman, *Notice and Expectation Under Bounded Uncertainty: Defining Evolving*

of Bainbridge Island[9] involved just such a conflict, as local property owners and builders took issue with a particular kind of ordinance: the temporary moratorium, which is a tool for long-term planning that has sparked disparate reactions from courts across the nation.[10]

In *Biggers*, the Supreme Court of Washington sided with the property owners, ruling that the City of Bainbridge Island's moratorium was unlawful. The court failed, however, to reach a consensus on the circumstances under which a local government has the authority to adopt a temporary moratorium on shoreline development. Four justices argued that the Washington Constitution bars local governments from enacting shoreline moratoria under all circumstances;[11] four justices agreed with the City that the authority exists under Washington law and that the City's temporary moratorium was reasonable;[12] and one justice, in a concurring opinion ruling against the City, agreed with the dissent that local governments have the authority to enact reasonable moratoria but determined that the moratorium at issue was unreasonable and therefore unconstitutional.[13]

The court's fragmentation makes it difficult to ascertain the holding and precedential value of the decision.[14] This area of law demands clarity because of the important interests at stake. The interests include the protection of Puget Sound ecology, the need for stability in the

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Property Rights Boundaries Through Public Trust and Takings, 21 TUL. ENVTL. L.J. 233 (2008) (discussing the national, historical, and philosophical debate on private property rights and public regulation in land-use planning); Zachary C. Kleinsasser, Note, *Public and Private Property Rights: Regulatory and Physical Takings and the Public Trust Doctrine*, 32 B.C. ENVTL. AFF. L. REV. 421, 422–23 (2005) (noting that the conflict between private and public rights derives from the tension between two attitudes toward land—as a resource for human consumption or as a part of an active and interconnected ecological system).

9. 162 Wash. 2d 683, 169 P.3d 14 (2007).

10. *See* PATRICIA E. SALKIN, ANDERSON'S AMERICAN LAW OF ZONING § 6.24 n.6 and accompanying text (5th ed. 2008); *see generally* Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency, 535 U.S. 302 (2002) (rejecting the claim that two temporary moratoria, which amounted to a thirty-two-month ban on development in high-hazard areas while the planning agency created a regional plan to protect the clarity of Lake Tahoe's waters, resulted in a per se unconstitutional taking); *Biggers*, 162 Wash. 2d at 707–08, 169 P.3d at 28 (Fairhurst, J., dissenting) (listing authorities that recognize moratoria as "valid tools for local government to forestall filing of permit applications when amending land use regulations," and also noting a minority position that demands "express authority to adopt moratoria").

11. *See Biggers*, 162 Wash. 2d at 685–702, 169 P.3d at 17–25.

12. *See id.* at 706–16, 169 P.3d at 27–32 (Fairhurst, J., dissenting).

13. *See id.* at 702–07, 169 P.3d at 25–27 (Chambers, J., concurring).

14. The fragmentation may be further complicated by the subsequent retirement of Justice Bridge, who supported the lead opinion.

planning process, the costliness of litigation and liability for local governments,[15] owners' rights to use their land, and pressures to develop land in order to accommodate the region's growing population.

Some legal commentators, looking only to the lead opinion and ignoring the fact that five justices agreed that local governments have the authority to enact reasonable moratoria, have erroneously concluded that the decision prohibits *all* local shoreline moratoria.[16] This Note

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15. *See* Rachel La Corte, *Court Tosses Bainbridge Shoreline Ordinance, but Justices Say Cities Have Right to Moratoriums*, SEATTLE POST-INTELLIGENCER, Oct. 12, 2007, at B3, *available at* http://seattlepi.nwsource.com/local/335195_shorelines12.html, *permanent copy available at* http://www.law.washington.edu/wlr/notes/84washlrev67n15a.pdf (quoting an attorney for the Building Industry Association of Washington: "If I were a city or county government, I wouldn't want to risk millions of dollars and attorneys fees fighting this in court"); Rachel Pritchett & Chris Dunagan, *Bainbridge Council Decides to Pay Attorney Fees*, BAINBRIDGE ISLANDER, Oct. 25, 2007. *available at* http://www.kitsapsun.com/news/2007/oct/25/bainbridge-council-decides-to-pay-attorney-fees, *permanent copy available at* http://www.law.washington.edu/wlr/notes/84washlrev67n15b.pdf (reporting the city council's decision to pay the Biggerses' attorney fees, amounting to approximately $75,000).

16. *See* SALKIN, s*upra* note 10, at § 6:28 n.1 (stating only the lead opinion's reasoning in its summary that the case "str[uck] down a municipal moratorium on shoreline development in part because the state Shoreline Management Act contained no provision authorizing local governments to adopt moratoria and because the Act required municipalities to have methods to achieve effective and timely protection for shoreline landowners, thus showing that the city's moratorium prohibited what was permitted under state law"). The prior edition of this treatise also ignored the concurring and dissenting opinions. *See* PATRICIA E. SALKIN, ANDERSON'S AMERICAN LAW OF ZONING § 2:9 n.8 (4th ed.) ("The Supreme Court of Washington held [in *Biggers*] that neither the state constitution nor the Shoreline Management Act authorizes municipalities to impose shoreline development moratoria."); Mun. Research & Servs. Ctr. of Wash., *Washington State Court Decisions Affecting Cities, Towns and Counties*, http://www.mrsc.org/Subjects/Legal/decs.aspx (last visited Nov. 11, 2008), *permanent copy available at* http://www.law.washington.edu/wlr/notes/84washlrev67n16a.pdf (a local reference often used by practitioners) (citing the holding as consisting of the conclusions of the lead opinion, while ignoring the concurring and dissenting opinions). Local media have also privileged the lead opinion's analysis when describing the case's holding. For example, one prominent local newspaper reported that "in the high court's majority, Justice James Johnson wrote that authority to halt shoreline development under the 1971 Shoreline Management Act resides solely with the state." *Illegal for Bainbridge Island to Halt Shore Development*, SEATTLE TIMES, Oct. 12, 2007, at B5, *available at* http://seattletimes.nwsource.com/html/localnews/2003944253_dige12m.html, *permanent copy available at* http://www.law.washington.edu/wlr/notes/84washlrev67n16b.pdf. While this news article also summarized the concurrence and stated there was a dissent by four justices, it did not subsequently clarify this supposed "majority" position. *See id. But see* Rachel La Corte, *supra* note 15 (explaining that "[f]ive of the nine justices held Thursday that cities have the authority to impose such moratoriums," although Justice Chambers concurred in striking down "Bainbridge Island's freeze [as] not reasonable"). A law firm representing the plaintiffs likewise attached little importance to the majority of the justices in *Biggers* in its celebratory report on the case. *See* Davis Wright Tremaine LLP, *Bainbridge Island Couple Wins Case Before Washington State Supreme Court*, PACIFIC RIM ADVISORY COUNCIL NOVEMBER 2007 E-BULLETIN 8, http://www.prac.org/materials/2007_November_eBulletin.pdf, *permanent copy available at* http://www.law.washington.edu/

argues that courts should interpret *Biggers* as affirming a local government's power to enact *reasonable* moratoria. When read according to the narrowest-grounds rule for interpreting plurality decisions,[17] *Biggers* provides binding precedent for invalidating only an *unreasonable* shoreline moratorium. While courts should, of course, invalidate unreasonable moratoria, they should uphold reasonable moratoria as consistent with Washington's long history of vesting broad police powers in local governments so long as their regulations are local, reasonable, and not in conflict with general law.[18]

Part I of this Note introduces the constitutional and statutory law underlying the *Biggers* opinions, which involves the extent of local police powers in Washington, the state's interest in its shorelines, and interaction between the Shoreline Management Act[19] and the Growth Management Act.[20] Part II summarizes the court's three opinions in *Biggers*. Part III explains how Washington courts interpret plurality holdings and argues that the concurring and dissenting opinions in *Biggers* are persuasive authority for upholding reasonable shoreline moratoria. Part IV argues that courts should uphold reasonable moratoria because they are an important tool for protecting sensitive areas while local governments engage in long-term planning. Part IV also introduces factors Washington courts will likely apply in determining whether a particular moratorium is reasonable.

I. CONSTITUTIONAL AND STATUTORY LAWS BOTH GRANT AND LIMIT LOCAL POWERS

The state's constitutional and statutory laws involving the power of local governments over shorelines are central to understanding *Biggers*. Most important is the extent of local regulatory power under article XI, section 11 of the Washington Constitution. Second, there is the question

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wlr/notes/84washlrev67n16c.pdf (quoting counsel for the Building Industry Association of Washington: "The Court was absolutely correct in ruling that neither the laws of Washington nor the constitution grant local governments the authority to impose blanket building moratoria on shorelines"; also noting that the full ramifications of the decision were not clear).

17. *See infra* Part III.

18. *See e.g.*, Ventenbergs v. City of Seattle, 163 Wash. 2d 92, 101–02, 178 P.3d 960, 965 (2008) (reaffirming municipalities' broad police powers when exercised reasonably). *See generally* Hugh D. Spitzer, *Municipal Police Power in Washington State*, 75 WASH. L. REV. 495 (2000) (reviewing the history of local police power in the state).

19. WASH. REV. CODE § 36.70A (2008).

20. WASH. REV. CODE § 90.58 (2008).

of special limits to local power for shorelines, pursuant to the public-trust doctrine and state dominion of shorelines under article XVII, section 1 of the Washington Constitution. Finally, the Washington State Legislature has delegated specific regulatory duties to local governments through the Shoreline Management Act (SMA) and the Growth Management Act (GMA), but the interaction of these two statutes has created some confusion with respect to shoreline areas.

1. The State Constitution Grants Local Governments Regulatory Powers

Article XI, section 11 of the Washington Constitution empowers "[a]ny county, city, town or township [to] make and enforce within its limits all such local police, sanitary and other regulations as are not in conflict with general laws."[21] Adopted in 1889, when the "Dillon Rule" was in vogue nationally as limiting local government to only those powers expressly granted or necessarily implied,[22] the broad language of section 11 amounted to an *express* grant of power to local governments.[23]

Throughout the state's history, Washington courts have generally held that local governments have broad powers to enact reasonable regulations to promote the public welfare. Cases decided soon after the adoption of section 11 interpreted municipal police powers as equal within their local sphere to those enjoyed by the State Legislature.[24] For example, one early ruling upheld a municipality's authority to ban business solicitation of disembarking train passengers against the railway company's challenge.[25] Although Washington courts briefly

21. WASH. CONST. art. XI, § 11.

22. John F. Dillon, a nineteenth-century judge as well as a railroad corporate lawyer, advocated strong limits to protect private property from municipal regulation. *See* JOHN F. DILLON, TREATISE ON THE LAW OF MUNICIPAL CORPORATIONS 25 (1872) ("No small proportion of corruption and abuse in municipalities has had its source in their authority to make public and local improvements. The power is usually conferred without sufficient care, and the rights of the property owners (often made liable for the whole cost of the improvement or amount of the expenditure) not sufficiently respected or guarded."); HENRY W. SCOTT, DISTINGUISHED AMERICAN LAWYERS, WITH THEIR STRUGGLES AND TRIUMPHS IN THE FORUM 302–03 (1891); *see also* Spitzer, *supra* note 18, at 498 ("Nationally, late nineteenth century municipal powers were constrained by the 'Dillon Rule.'").

23. Spitzer, *supra* note 18, at 498.

24. *See id.*

25. *See* City of Seattle v. Hurst, 50 Wash. 424, 97 P. 454 (1908). Other early examples of a broad approach to local police powers include *Smith v. City of Spokane*, 55 Wash. 219, 104 P. 249 (1909) (upholding garbage regulations that put an existing enterprise out of business) and *Shepard v. City*

followed the U.S. Supreme Court's lead in *Lochner v. New York*[26] during the early 1900s and struck down labor and economic regulations as illegitimate uses of police powers, they did so "in a limited fashion and only when constrained to do so by the facts."[27] The demise of the *Lochner* era[28] ended Washington's foray into liberty-of-contract limits on local police powers, and "[s]ince the 1930s, the Supreme Court of Washington has generally continued the strong-police-power approach that it had begun in the late nineteenth century."[29]

Washington courts today do not generally require an explicit constitutional grant of local police power.[30] Instead, they rely on a judicially established test to ensure that local governments do not overstep their constitutional authority: the regulations must be (1) reasonable, (2) local in nature, and (3) not in conflict with general laws.[31]

2. The State Constitution, Consistent with Public-Trust Principles, Requires that the State Retain Its Interest in Shorelines

Ancient in origin, the public-trust doctrine vests states with the duty to hold certain resources in trust for public use.[32] Under this doctrine,

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of Seattle, 59 Wash. 363, 109 P. 1067 (1910) (upholding a city requirement that private hospitals and sanatoria connect to public sewers).

26. 198 U.S. 45 (1905).

27. Spitzer, *supra* note 18, at 500–02 (summarizing Washington decisions involving plumbers' licenses, the horseshoeing business, and meatpacking plants' closing hours, among other issues).

28. The Washington Supreme Court helped end *Lochner*-era limits on local police powers by upholding a state minimum-wage law despite directly adverse U.S. Supreme Court precedent. *See* Parrish v. W. Coast Hotel, 185 Wash. 581, 55 P.2d 1083 (1936), *aff'd*, 300 U.S. 379 (1937) (overruling Adkins v. Children's Hosp. 261 U.S. 525 (1923)).

29. Spitzer, *supra* note 18, at 505.

30. *Id.* at 506.

31. Petstel, Inc. v. County of King, 77 Wash.2d 144, 159, 459 P.2d 937, 945 (1969) ("We have frequently held that Const. art. 11, § 11, is a direct delegation of the police power to cities and counties, and that the power delegated is as extensive within their sphere as that possessed by the legislature. The only limitations upon municipal exercises of the police power are that the subject matter must be local and that the regulation must be reasonable and not conflict with general laws."); Spitzer, *supra* note 18, at 506 ("Despite the strong nature and expanding scope of the police power, the Supreme Court of Washington has consistently limited the power's exercise by its definition of the police power and by the inherent limits of regulatory authority—not on an explicitly constitutional basis."). *See also* Presbytery of Seattle v. King County, 114 Wash. 2d 320, 330–31, 787 P.2d 907, 912–13 (1990) (adapting a modified version of the reasonableness test to the modern land-use context).

32. *See* Kleinsasser, *supra* note 8, at 423–24 (summarizing the doctrine's origins in Roman law and English common law); *see also* Ill. Cent. R.R. Co. v. Illinois, 146 U.S. 387, 452 (1892) (holding

"partially encapsulated"[33] in article XVII, section 1 of the state constitution, Washington retains an interest in all tidelands in the state,[34] even though approximately seventy-three percent of Puget Sound shoreline is in private hands.[35] The doctrine subjects the state's "power to dispose of, and invest individuals with, ownership of tidelands and shorelands" to public-trust principles,[36] which can encompass environmental conservation and shoreline management.[37]

3. The Shoreline Management Act Protects Shorelines, and the Growth Management Act Protects Critical Areas

The Shoreline Management Act, passed by the Legislature in 1971 and adopted by public referendum the following year, made Washington one of the first states to introduce a statutory scheme guiding long-term plans for the protection of shorelines.[38] The legislative findings of the SMA note that "the shorelines of the state are among the most valuable and fragile of its natural resources," resulting in a state policy of

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that a state cannot irrevocably relinquish its interest in navigable waters and the land underneath because it holds it "in trust for the people of the state").

33. Rettkowski v. Dep't of Ecology, 122 Wash. 2d 219, 232, 858 P.2d 232, 239 (1993).

34. WASH. CONST. art. XVII, § 1 ("The state of Washington asserts its ownership to the beds and shores of all navigable waters in the state up to and including the line of ordinary high tide, in waters where the tide ebbs and flows, and up to and including the line of ordinary high water within the banks of all navigable rivers and lakes . . . .").

35. *See* Ewa M. Davison, Comment, *Enjoys Long Walks on the Beach: Washington's Public Trust Doctrine and the Right of Pedestrian Passage over Private Tidelands*, 81 WASH. L. REV. 813, 814–15 (2006) (citing THE TRUST FOR PUBLIC LAND, PUGET SOUND SHORELINE STRATEGY: A CONSERVATION VISION FOR PUGET SOUND 14 (2005), http://www.tpl.org/content_documents/puget_sound_shoreline_screen.pdf, *permanent copy available at* http://www.law.washington.edu/wlr/notes/84washlrev67n35.pdf).

36. Caminiti v. Boyle, 107 Wash. 2d 662, 667, 732 P.2d 989, 994 (1987).

37. *See, e.g.*, Ralph W. Johnson et al., *The Public Trust Doctrine and Coastal Zone Management in Washington State*, 67 WASH. L. REV. 521, 574, 578 (1992) (noting the public-trust interest in preserving the environmental integrity of trust resources and recognizing regulation under the SMA and the State Environmental Policy Act (SEPA) as forms of comprehensive planning that "bear directly on preserving elements of the public trust"); Kleinsasser, *supra* note 8, at 426–27 ("Because the public trust doctrine is infused with communal obligations—and therefore implicates the relationship between the public and the public's use and enjoyment of its land—it has been used by many states to buttress environmental protection regulations.").

38. *See* Washington State Department of Ecology, "Introduction to Washington's Shoreline Management Act (RCW 90.58)," Ecology Publ'n 99-113 (2003), *available at* http://www.ecy.wa.gov/pubs/99113.pdf, *permanent copy available at* http://www.law.washington.edu/wlr/notes/84washlrev67n38.pdf. In recent years, all states with coastal and wetland areas have increased regulation of development to protect the ecological balance of shorelines. SALKIN (4th ed.), s*upra* note 16, at § 2:9.

"protecting against adverse effects to the public health, the land and its vegetation and wildlife, and the waters of the state and their aquatic life."[39] The SMA instructs local governments to prioritize, in order, shoreline uses that:

> (1) Recognize and protect the statewide interest over local interest;
>
> (2) Preserve the natural character of the shoreline;
>
> (3) Result in long term over short term benefit;
>
> (4) Protect the resources and ecology of the shoreline;
>
> (5) Increase public access to publicly owned areas of the shorelines;
>
> (6) Increase recreational opportunities for the public in the shoreline;
>
> (7) Provide for any other element as defined in [the SMA] deemed appropriate or necessary.[40]

The SMA also recognizes limited shoreline-development needs: "Alterations of the natural condition of the shorelines of the state, in those limited instances when authorized, shall be given priority for single family residences and their appurtenant structures . . . ."[41] The statute also grants priority to several other types of developments "dependent on their location on or use of the shorelines of the state."[42] The stated objective is to "provide an opportunity for substantial numbers of the people to enjoy the shorelines of the state."[43]

The SMA operates under a centralized approach: the Department of Ecology issues rules and guidelines that local governments use to create local Shoreline Master Programs (SMPs) that are in turn subject to the review and approval of the Department of Ecology.[44]

The Legislature passed the Growth Management Act (GMA), in two bills in 1990 and 1991, because of pressure from voters concerned about the effects of sprawl, infrastructure costs for new development, and

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39. WASH. REV. CODE § 90.58.020 (2008).

40. *Id.*

41. *Id.*

42. *Id.*

43. *Id.*

44. *See id.* §§ 90.58.050–090; *see also* Henry W. McGee, *Washington's Way: Dispersed Enforcement of Growth Management Controls and the Crucial Role of NGOs*, 31 SEATTLE U. L. REV. 1, 12 (2008).

growth impacts on natural resources in the Puget Sound region.[45] The GMA has turned out to be one of the most important laws for environmental conservation in the Puget Sound,[46] despite pursuing competing goals: local governments are directed both to conserve habitat and promote development.[47]

The GMA set up a decentralized system whereby local governments enact comprehensive plans, delineate urban growth areas, and determine critical areas where ecological functions should be preserved or enhanced.[48] It requires "the best available science in developing policies and development regulations to protect the functions and values of critical areas,"[49] which is a more stringent requirement than the SMA's instruction that local governments research and conduct studies "to the extent feasible."[50] The mandate to protect critical areas and to use the best available science makes the GMA a more potent tool than the SMA for protecting ecologically fragile areas, despite the GMA's limited view of ecosystems as small elements of the landscape instead of as regional and interconnected.[51]

The Legislature failed to explain whether shorelines governed by the SMA are also subject to the additional GMA requirements, i.e., whether the two statutes overlap. State agencies charged with administering the SMA and providing guidance under the GMA have interpreted the statutes as operating together in shoreline areas, with GMA provisions

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45. *See* LOMBARD, *supra* note 4, at 213; WASH. STATE DEP'T OF CMTY., TRADE & ECON. DEV., CREATING LIVABLE COMMUNITIES: MANAGING WASHINGTON'S GROWTH FOR 15 YEARS 4–9 (2006), *available at* http://cted.wa.gov/_CTED/documents/ID_3175_Publications.pdf, *permanent copy available at* http://www.law.washington.edu/wlr/notes/84washlrev67n45.pdf (discussing the social, environmental, and other conditions that brought about Washington's Growth Management Act); McGee, *supra* note 44, at 1–2.

46. *See* LOMBARD, *supra* note 4, at 209 ("It is the primary reason the region has decreased its per capita consumption of land and increased protections for important fish and wildlife habitats since the early 1990s.").

47. WASH. REV. CODE § 36.70A.020(9)–(10) (2008); *see* LOMBARD, *supra* note 4, at 209 (pointing out that the GMA does not acknowledge that its "mandates cannot be accomplished together").

48. *See* McGee, *supra* note 44, at 8; Douglas R. Porter, *State Framework Laws for Guiding Urban Growth and Conservation in the United States*, 13 PACE ENVTL. L. REV. 547, 556 (1996).

49. WASH. REV. CODE § 36.70A.172(1) (2008).

50. *See id.* § 90.58.100(1).

51. *See id.* § 36.70A.030(5) (2008); *see also* LOMBARD, *supra* note 4, at 240 (noting that the "GMA currently defines critical areas at too small a scale" for keeping human uses "consistent with ecological goals for the land").

applying whenever they do not conflict with SMA provisions.[52] The Washington State Supreme Court recently split on the issue of SMA-GMA interaction in a four-to-four-to-one decision, in which one justice joined the plurality only in the result but did not contribute a separate opinion.[53] The lead opinion declared that GMA requirements for critical areas do not apply to shoreline management under the SMA.[54] The dissent responded by quoting a provision from the SMA stating that the part of an SMP governing critical areas shall "provide protection that is at least equal to that provided by the local government's critical areas ordinances" adopted pursuant to the GMA.[55] With neither analysis backed by a majority, SMA-GMA interaction in critical shoreline areas remains an open question.

While both the SMA and GMA prioritize environmental protection, they coexist uneasily in a tangle of the state's constitutional law, statutes, and regulations that local governments, courts, and agencies struggle to tame. Disagreement in *Biggers* as to the protections available to critical shoreline areas stems partly from this underlying confusion.

II. *BIGGERS* PRODUCED THREE OPINIONS ON THE VALIDITY OF A LOCAL SHORELINE MORATORIUM

The issue before the state's highest court in *Biggers* was whether Washington law allows a municipality to adopt a temporary shoreline moratorium. The court drew heavily on the areas of constitutional and statutory law summarized above to determine whether any shoreline moratoria would be reasonable, and it relied on factual considerations in deciding whether the particular moratorium was reasonable.

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52. Brief of Amici Curiae Wash. State Dep't of Ecology and Wash. State Dep't of Cmty., Trade & Econ. Dev., Biggers v. City of Bainbridge Island, 162 Wash. 2d 683, 169 P.3d 14 (2007) (No. 77150-2) 2006 WL 937646, at *11–15 ("The GMA further emphasizes that shoreline master programs are not the exclusive means of regulating developments in shoreline jurisdiction. Under the GMA, shoreline master programs are an element of the local comprehensive plan, and shoreline regulations are considered development regulations.").

53. *See* Futurewise v. W. Wash. Growth Mgmt. Hearings Bd., 164 Wash. 2d 242, 189 P.3d 161 (2008). Justice J.M. Johnson authored the lead opinion and was joined by Justices C.W. Johnson, Sanders, and Bridge (serving as Justice Pro Tem.). Justice Madsen concurred with the lead in the result only. Justice Chambers wrote the dissent and was joined by Chief Justice Alexander and Justices Owens and Fairhurst. *See id.*

54. *See id.* at 245, 189 P.3d at 162.

55. *Id.* at 250–51, 189 P.3d at 165 (Chambers, J., dissenting); *see also* WASH. REV. CODE 90.58.090(4).

The lead opinion, which garnered four votes, contended that the City overstepped its power under the Washington Constitution. The dissent, supported by an equal number of justices, deemed the power to implement a moratorium to be inherent among the broad local powers provided under the state's constitution. The dissent also defended the City's moratorium as reasonable. The tie-breaking concurrence explicitly agreed with the dissent's legal analysis but found the moratorium unreasonable, thus joining the lead in holding that the City's moratorium was unconstitutional.

1. Three Successive Moratorium Ordinances Ignited a Controversy

The City of Bainbridge Island, with approximately forty-eight miles of Puget Sound shoreline, adopted an ordinance in August 2001 placing a one-year moratorium on the filing of "new applications for shoreline substantial development permits, shoreline substantial development exemptions and shoreline conditional use permits."[56] The ordinance allowed applications for normal maintenance and repair as well as for emergency repair.[57] The City stated that the moratorium was necessary while the City studied the environmental impacts of shoreline development for long-term plans pursuant to the Legislature's requirement that approximately two hundred and fifty cities and counties develop or amend their SMPs within the next few years.[58] The City passed the temporary moratorium to prevent environmental damage while it collected the scientific information for revising its SMP, "during which time significant shoreline habitat that supports a species threatened with extinction could be lost or damaged" if development continued.[59] The ordinance cited two provisions of the GMA as authority for the temporary moratorium.[60]

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56. City of Bainbridge Island, Wash., Ordinance 2001-34 (Aug. 29, 2001), *available at* http://www.ci.bainbridge-isl.wa.us/documents/2001-34_Shoreline_Moratorium.pdf, *permanent copy available at* http://www.law.washington.edu/wlr/notes/84washlrev67n56.pdf; Biggers v. City of Bainbridge Island, 162 Wash. 2d. 683, 688, 169 P.3d 14, 18 (2007).

57. *See* Ordinance 2001-34, *supra* note 56.

58. *See* WASH. REV. CODE § 90.58.080(2) (2008) (providing deadlines for when each local government must finish developing or amending its SMP); *Biggers*, 162 Wash. 2d at 686–87, 169 P.3d at 17; *see also* Brief of Amici Curiae Wash. State Dep't of Ecology and Wash. State Dep't of Cmty., Trade & Econ. Dev., *Biggers*, 162 Wash. 2d 683, 169 P.3d 14 (No. 77150-2), 2006 WL 937646, at *1 n.1.

59. Ordinance 2001-34, *supra* note 56; *Biggers*, 162 Wash. 2d at 688, 169 P.3d at 18; *see id.* at 709, 169 P.3d at 28 (Fairhurst, J., dissenting).

60. *See* Ordinance 2001-34, *supra* note 56 (citing WASH. REV. CODE § 35A.63.220 and WASH.

In accordance with the ordinance and the cited statutory provisions, the City held a public hearing in October 2001 to review findings.[61] The hearing resulted in Ordinance 2001-45, limiting the scope of the original ordinance to "new overwater structures (piers, docks and floats) and new shoreline armoring (bulkheads and revetments) where none ha[d] previously existed."[62] The ordinance included the City Council's findings, "[b]ased on the public testimony and other evidence submitted at the public hearing," that these structures could significantly impact shoreline habitat.[63]

The ordinance apparently prevented Bainbridge Island residents Ray and Julie Biggers from replacing a bulkhead associated with their home.[64] Joined by the owners of bulkhead and construction businesses,[65] the Biggerses asked the Kitsap County Superior Court for a judgment declaring the moratorium illegal and void.[66] They contended that the moratorium (1) violated the Washington Constitution's police-powers provision by conflicting with the laws of the state; (2) misplaced authority under the GMA not applicable to shorelines; (3) was passed for "impermissible purposes"; and (4) resulted in an invalid amendment to the City's SMP.[67]

In August 2002, another Bainbridge Island public hearing resulted in Ordinance 2002-29, extending the moratorium for seven months.[68] In the meantime, the trial court issued a summary-judgment order ruling that

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REV. CODE § 36.70A.390).

61. *See* City of Bainbridge Island, Wash., Ordinance 2001-45 (Oct. 17, 2001), *permanent copy available at* http://www.law.washington.edu/wlr/notes/84washlrev67n61.pdf.

62. *Id.*

63. *Id.* § 1 (including among the findings the listing of the Puget Sound Chinook Salmon as a threatened species under the Endangered Species Act, the National Marine Fisheries Service's ruling designating estuarine areas accessible to the species as "critical habitat," the City's resolution recognizing critical habitat within its jurisdiction, and the damage shoreline structures pose to salmon habitat because "changing beach substrate and elevation . . . can negatively effect [sic] juvenile salmon migratory patterns" and "remov[ing] riparian and overhanging vegetation can cause changes in microclimate and water quality, . . . impact[ing] the food web critical to salmonids").

64. *See* Rachel La Corte, *supra* note 15 (reporting information provided by the Biggerses' lawyer).

65. *See* Biggers v. City of Bainbridge Island, 124 Wash. App. 858, 862–63, 103 P.3d 244, 245–46 (2004), *aff'd*, 162 Wash. 2d 683, 169 P.3d 14 (2007).

66. *See Biggers*, 162 Wash. 2d at 689, 169 P.3d at 18 (lead opinion).

67. *Id.* at 689, 169 P.3d at 18–19.

68. *See* City of Bainbridge Island, Wash., Ordinance 2002-29 § 2 (Aug. 21, 2002), *permanent copy available at* http://www.law.washington.edu/wlr/notes/84washlrev67n68.pdf (extending the moratorium to Mar. 1, 2003).

the City lacked authority to implement a shoreline moratorium.[69] While the case was on appeal, the City passed Ordinance 2003-34, extending the moratorium an additional year, but narrowing it to docks and piers in Blakely Harbor.[70]

Meanwhile, the Washington Court of Appeals affirmed the trial court, declaring that GMA moratorium procedures did not apply to shorelines and that "the SMA trumps the GMA" in governing "the unique criteria for shoreline development."[71] The Washington State Supreme Court granted the City's petition for review, prompting briefs from business associations in support of the Biggers and from state agencies, Snohomish County, and environmental groups in support of the City, reflecting what one observer called "the cacophonous meta-debate over private property rights and environmental protection in Washington."[72]

2. The Lead Opinion Declared All Shoreline Moratoria Unconstitutional in Washington

Justice J.M. Johnson, joined by Chief Justice Alexander and Justices Sanders and Bridge, declared the moratorium unconstitutional. The lead justices concluded that the moratorium violated the Washington Constitution's police-powers provision because the City's ordinances conflicted with the state constitution's declaration of state interest in

69. *See Biggers*, 162 Wash. 2d at 690, 169 P.3d at 19.

70. *See* City of Bainbridge Island, Wash., Ordinance 2003-34 (Sept. 3, 2003), *permanent copy available at* http://www.law.washington.edu/wlr/notes/84washlrev67n70a.pdf. Blakely Harbor has been of special concern in protecting habitat because, with 3.5 miles of shoreline, it is "the last harbor within Central Puget Sound that remains largely undeveloped with docks." CITY OF BAINBRIDGE ISLAND, 2006 BLAKELY HARBOR DOCK SHORELINE AMENDMENT FACT SHEET (Aug. 2006), *available at* http://www.ci.bainbridge-isl.wa.us/documents/Blakely_Dock_Fact_Sheet_Aug2006.pdf, *permanent copy available at* http://www.law.washington.edu/wlr/notes/84washlrev67n70b.pdf.

71. Biggers v. City of Bainbridge Island, 124 Wash. App. 858, 865–67, 103 P.3d 244, 247–49 (2004), *aff'd*, 162 Wash. 2d 683, 169 P.3d 14 (2007).

72. Ryan M. Carson, Note, *Chinks in the Armor: Municipal Authority to Enact Shoreline Permit Moratoria After* Biggers v. City of Bainbridge Island, 31 SEATTLE U. L. REV. 177, 178–79 (2008) ("The identity of other interested parties in this case should not go without comment. On one side are the plaintiff respondents, who are private property owners, joined by local construction industry interests. On the other side is a small municipality. As the case moved towards the Washington Supreme Court, each side's list of friends grew. The Building Industry Association of Washington, Washington Association of Realtors, and Pacific Legal Foundation filed amicus briefs on behalf of the property owners. Washington Environmental Council, Futurewise, People for Puget Sound, various state agencies, and Snohomish County filed amicus briefs on behalf of the city.").

shorelines.[73] Submitting that "local governments have no broad police power over shorelines" because of state ownership of shorelines pursuant to the public-trust doctrine and article XVII, section 1 of the Washington Constitution,[74] the lead opinion argued that unless state laws expressly delegated the power to institute a shoreline moratorium, no local authority could exist:[75] "[L]ocal governments possess only those powers expressly delegated or found by necessary implication," with any doubts resolved "against local government and against the claimed power[.]"[76]

Turning to the SMA and GMA, the lead opinion concluded that neither law empowered a municipality to adopt shoreline moratoria. The opinion described the SMA as embodying "a legislatively-determined and voter-approved balance between protection of state shorelines and development"[77] that does not expressly empower local governments to enact moratoria. The lead opinion focused on an SMA provision for protecting single-family residences from erosion.[78] Accordingly, this provision concerning erosion meant the City's moratorium "*prohibit[ed]* what state law *permits*," thus constituting a second conflict with the state's general laws.[79] Justice J.M. Johnson also attacked the City's reliance on amendments to the GMA regarding adoption of moratoria, noting that the Legislature, in adding these provisions to the GMA and other statutes in 1992, had excluded the SMA.[80] He concluded that GMA provisions did not authorize the City's moratorium because, "[a]lthough the GMA frequently mentions shoreline master programs, the GMA could not alter the provisions of the SMA without express amendment."[81]

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73. *Biggers*, 162 Wash. 2d at 688, 709, 169 P.3d at 18, 25 (citing WASH. CONST. art. XI, § 11 and art. XVII, § 1).

74. *Id.* at 694–95, 169 P.3d at 21–22.

75. *See id.* at 695–96, 169 P.3d at 22.

76. *Id.* at 699, 169 P.3d at 23. Because of its broad language about express delegation and necessary implication, one commentator has interpreted the *Biggers* lead opinion as resurrecting the Dillon Rule. *See* 1 M. DAVID GELFAND, STATE AND LOCAL GOVERNMENT DEBT FINANCING § 1:02 n.2 (Supp. 2008).

77. *Biggers*, 162 Wash. 2d at 697, 169 P.3d at 22.

78. *See id.* at 698, 169 P.3d at 23 (citing WASH. REV. CODE § 98.58.020).

79. *Id.* (emphasis in original).

80. *See id.* at 699–700, 169 P.3d at 24.

81. *Id.* at 701, 169 P.3d at 24.

Having chastised the City for its "adoption of rolling moratoria, which imposed a multi-year freeze on private property development in shoreline areas," the lead opinion voiced concern about "leav[ing] all shoreline property defenseless against erosion."[82] The opinion also deplored the City's procrastinating in fulfilling its planning duties.[83]

3. The Dissenting Opinion Deemed the Shoreline Moratorium Constitutional

Justice Fairhurst, joined by Justices C. Johnson, Owens, and Madsen, concluded in dissent that the Washington Constitution grants local governments the authority to institute shoreline moratoria.[84] "Contrary to the lead opinion's assertions," the dissent argued, "the legislature may exercise the regulatory authority arising out of its sovereignty over state shorelines through a state agency or a local subdivision of state government without violating the public trust doctrine" and the Washington Constitution's declaration of state ownership of shorelines.[85]

The dissent determined that the City also enjoyed statutory authority to pass the moratorium. The City's authority to administer permits under the SMA necessarily implied "authority to defer acceptance of permit applications as it deems necessary to ensure compliance with the SMA."[86] Obtaining scientific information for a revised SMP was consistent with the SMA's ecological priorities.[87] As "only a temporary suspension of established regulations," the moratorium did not contradict shoreline regulations.[88] Furthermore, the dissent disagreed with the lead opinion's characterization of the Legislature's 1992 amendments, arguing that the added moratoria provisions "did not contain *express grants of authority* to adopt moratoria—rather, it impose[d] limitations on *existing powers* to adopt moratoria."[89]

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82. *Id.* at 685–86, 169 P.3d at 17. Erosion in this area can be caused by seasonal storms, ferry wake, and removal of vegetation. *See, e.g.*, Kucera v. State, 140 Wash. 2d 200, 995 P.2d 63 (2000) (involving claims that high-speed ferries caused shoreline erosion).

83. *Biggers*, 162 Wash. 2d at 685–86, 169 P.3d at 17.

84. *See id.* at 706–07, 169 P.3d at 27 (Fairhurst, J., dissenting).

85. *Id.* at 713–14, 169 P.3d at 30–31.

86. *Id.*

87. *See id.* at 709, 169 P.3d at 28; *see also* WASH. REV. CODE § 90.58.020 (2008), quoted *supra* notes 39–40 and accompanying text.

88. *Biggers*, 162 Wash. 2d at 709, 169 P.3d at 28.

89. *Id.* at 709–10, 169 P.3d at 29 ("A county or city governing body *that adopts a*

The dissent found that this particular moratorium was a legitimate exercise of the City's police powers because it promoted the public interest by preventing overdevelopment of the shoreline during the planning process.[90] The moratorium was reasonable because it allowed permits for single-family residences and their normal appurtenances and only delayed "review of proposals to construct protective bulkheads and private docks—it did not prohibit them in violation of the SMA."[91]

4. The Concurring Opinion Concluded that the City's Particular Moratorium Was Unreasonable and Thus Unconstitutional

Justice Chambers' concurring opinion generally agreed with the dissent's legal analysis.[92] Interpreting article XI, section 11 as a "broad delegation of police power to the local governments," he agreed with the dissent that the appropriate test under the Washington Constitution's police-powers provision is "if (1) the matter is local and the use (2) is not in conflict with the general laws and (3) is reasonable."[93]

He also rejected the lead opinion's conclusion that the State alone can regulate the shoreline under the state constitution's public-trust provision. Declaring that the "power to regulate does not ride like a parasite on the State's title to some of the lands in the state,"[94] the concurring opinion discussed local shoreline regulation as part of the "sharing of police power" that is "a foundational principle of our State."[95] Justice Chambers deemed the power to implement a moratorium as consistent with the statute as well. His analysis emphasized the SMA goals of protecting vegetation, wildlife, waters, and aquatic life.[96] His conclusion that the Washington Constitution

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moratorium . . . without holding a public hearing *on the proposed moratorium* . . . shall hold a public hearing *on the adopted moratorium* . . . within at least sixty days of its adoption") (quoting WASH. REV. CODE § 36.70A.390) (all emphases and ellipses in opinion).

90. *See id.* at 712, 169 P.3d at 30.

91. *Id.*

92. *See id.* at 703, 169 P.3d at 25 (Chambers, J., concurring in the result).

93. *Id.* at 705, 169 P.3d at 25, 27 (adopting the reasonableness test employed in Weden v. San Juan County, 135 Wash. 2d 678, 692, 958 P.2d 273, 280 (1998)).

94. *Id.* at 704, 169 P.3d at 26.

95. *Id.* at 705, 169 P.3d at 26 (citing WASH. REV. CODE § 90.58, which "establishes a cooperative program of shoreline management between local government and the state," and Hugh D. Spitzer, *Municipal Police Power in Washington State,* 75 WASH. L. REV. 495, 497–98 (2000)).

96. *See id.* at 704, 169 P.3d at 26 (quoting Buechel v. Dep't of Ecology, 125 Wash. 2d 196, 203, 884 P.2d 910, 915 (1994)).

grants municipalities "independent authority" to manage shorelines as long as not in conflict with the SMA led to his agreement with the dissent that shoreline moratoria pose no such conflict.[97]

The concurring opinion concluded, however, that the City's moratorium failed to satisfy the reasonableness requirement.[98] Justice Chambers took issue with the City's decision to extend the moratorium: "[I]t is arrogant, high handed, and beyond the pale of any constitutional authority for a stagnant government to deny its citizens the enjoyment of their land by refusing to accept building permits year after year based on a 'rolling' moratorium."[99] According to the concurrence, the City's repeated extensions rendered the moratorium unreasonable and therefore unconstitutional.[100]

By joining the lead opinion in the judgment against the City, Justice Chambers determined the case's outcome; however, he rejected the lead opinion's stance on the relevant law, instead "largely agree[ing] with Justice Fairhurst's analysis of the law applicable to this case."[101] Part III argues that this concurring opinion holds the key to the proper interpretation of *Biggers*' holding.

III. *BIGGERS* PROVIDES PERSUASIVE PRECEDENT FOR UPHOLDING REASONABLE SHORELINE MORATORIA

Under the narrowest-grounds rule,[102] *Biggers* held that the particular moratorium at issue was unreasonable and therefore unconstitutional. The concurring opinion rejected the lead's constitutional and statutory analysis, however, and expressly embraced the dissent's. As a result, five justices agreed that a municipality possesses authority to adopt a temporary shoreline moratorium that is local in scope and reasonable in purpose and implementation. Washington courts apply the narrowest-

97. *Id.* at 706, 169 P.3d at 27.

98. *See id.*

99. *Id.*

100. *See id.* at 703, 169 P.3d at 25.

101. *Id.*

102. *See* Marks v. United States, 430 U.S. 188, 193 (1977) ("When a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, 'the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the *narrowest grounds* . . . .'" (quoting Gregg v. Georgia, 428 U.S. 153, 169 n.15 (1976))) (emphasis added).

grounds rule to discern what portion of the plurality opinion is binding precedent.[103]

In *Southcenter Joint Venture v. National Democratic Policy Committee*,[104] the Washington State Supreme Court analyzed another four-to-four-to-one decision. In *Southcenter*, the court recognized the agreement between the concurring and dissenting opinions as the majority stance. Washington courts should treat *Biggers* similarly, thus recognizing local governments' authority to enact reasonable moratoria on shoreline development.

In *Southcenter*, the court held that the Washington Constitution's free-speech provision[105] is triggered only by state action and does not prevent owners from expelling individuals from their private property.[106] The court squared this holding with its prior decision in *Alderwood Associates v. Washington Environmental Council*,[107] which had also produced three opinions, mirroring the type of fragmentation in *Biggers*. In *Alderwood*, the court had held that a large shopping mall may not exclude citizens gathering signatures for an initiative.[108] Justice Utter, joined by three other justices, wrote a lead opinion that would have broadly held that the shopping mall owner must respect a group's right to free speech.[109] Four dissenting justices argued that the Washington Constitution protects speech only against the state and not against private parties.[110] A lone justice concurred in the judgment but grounded his analysis in the Washington Constitution's initiative provision, and explicitly rejected the lead opinion's free-speech analysis.[111]

Because the *Southcenter* plaintiffs were soliciting contributions and distributing literature instead of collecting signatures for an initiative, the court described its holding as consistent with the *Alderwood* decision.[112]

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103. *See, e.g.*, W.R. Grace & Co. v. Dep't of Revenue, 137 Wash. 2d 580, 593–94, 973 P.2d 1011, 1017 (1999) (holding that a five-member decision, formed by the lead and concurring opinions, controlled on the narrow issue decided according to principles of stare decisis).

104. 113 Wash. 2d 413, 780 P.2d 1282 (1989).

105. *See* WASH. CONST. art. I, § 5.

106. *See Southcenter*, 113 Wash. 2d at 419, 780 P.2d at 1285.

107. 96 Wash. 2d 230, 635 P.2d 108 (1981).

108. *See id.* at 232–53, 635 P.2d at 110–21 (lead and concurring opinions).

109. *See id.* at 232–47, 635 P.2d at 110–18 (lead opinion).

110. *See id.* at 253–55, 635 P.2d at 121 (Stafford, J., dissenting).

111. *See id.* at 247–53, 635 P.2d at 118–21 (Dolliver, J., concurring in result).

112. *See* Southcenter Joint Venture v. Nat'l Democratic Policy Comm., 113 Wash. 2d 413, 427, 780 P.2d 1282, 1289–90 (1989).

The court distilled *Alderwood* as holding "simply that people have a right under the initiative provision of the Constitution of the State of Washington to solicit signatures for an initiative in a manner that does not violate or unreasonably restrict the rights of private property owners."[113] This distillation abides by the narrowest-grounds rule, which states that "[w]here there is no majority agreement as to the rationale for a decision, the holding of the court is the position taken by those concurring on the narrowest grounds."[114]

The court in *Southcenter* went beyond extracting the narrow holding of the plurality decision in *Alderwood*. The court also looked to the five-justice majority formed by the *Alderwood* dissent and concurrence and pointed out that "*a 5-member majority of this court rejected the argument now posited by the ND-PC* that the free speech provision of our state constitution does not require 'state action.'"[115] The agreement of five members of the bench, even when comprising the dissenting and concurring opinions, constitutes persuasive authority.

With few exceptions, Washington has adopted the narrowest-grounds rule.[116] The rule's application to *Biggers* signifies that the lead opinion

113. *See id.* at 428–29, 780 P.2d at 1290.

114. Davidson v. Hensen, 135 Wash. 2d 112, 128, 954 P.2d 1327, 1335 (1998).

115. *Southcenter*, 113 Wash. 2d at 428, 780 P.2d at 1290 (emphasis in original).

116. *See, e.g.*, *Davidson*, 135 Wash. 2d at 128, 954 P.2d at 1335 (citing several cases from Washington); State v. Zakel, 61 Wash. App. 805, 808–09, 812 P.2d 512, 514 (1991) (citing *Marks*, 430 U.S. 188, 193 (1977)), *aff'd*, 119 Wash. 2d 563, 834 P.2d 1064 (1992); State v. Dunbar, 59 Wash. App. 447, 453, 798 P.2d 306, 310 (1990) (citing *Southcenter*, 113 Wash. 2d at 427–28, 780 P.2d at 1289); Zueger v. Public Hosp. Dist. No. 2 of Snohomish County, 57 Wash. App. 584, 591, 789 P.2d 326, 329 (1990) (citing Lakewood v. Plain Dealer Pub. Co., 486 U.S. 750, 764 n.9 (1988), for the same rule). Although two recent Washington cases, *In re Isadore*, 151 Wash. 2d 294, 302, 88 P.3d 390, 393 (2004), and *Wright v. Terrell*, 135 Wash. App. 722, 735, 145 P.3d 1230, 1238 (2006), *rev'd*, 162 Wash. 2d 192, 170 P.3d 570 (2007), depart from this rule by according plurality opinions no binding power, their departure appears based on a misreading of *Zueger* found in *State v. Gonzalez*, 77 Wash. App. 479, 891 P.2d 743 (1995). Other decisions citing *Zueger* report that "the position taken by those concurring on the narrowest grounds" is binding. *Davidson*, 135 Wash. 2d at 128, 954 P.2d at 1335 (citing *Zakel*, 61 Wash. App. at 808–09, 812 P.2d at 514). In *Gonzalez*, the court likely focused too eagerly on a slight vacillation after the clear assertion of the narrowest-grounds rule in *Zueger*: "When no rationale for a decision of an appellate court receives a clear majority the holding of the court is the position taken by those concurring on the narrowest grounds. Following this principle, if *Herskovits* stands for anything beyond its result, we believe the plurality represents the law . . . ." *Zueger*, 57 Wash. App. at 591, 789 P.2d at 329 (citations omitted). In reviewing *Wright v. Terrell*, the Washington Supreme Court held that the appellate court erred by rejecting as nonbinding the point agreed upon by lead and concurring opinions. *See* Wright v. Terrell, 162 Wash. 2d 192, 195–96, 170 P.3d 570, 571 (2007). The court in *Wright* avoided taking a clear stand on the narrowest-grounds rule by concluding that the precedent at issue, consisting of opinions concurring in part and dissenting in part, did not amount to a plurality decision with respect to the point concurred upon. *See id.* at 195, 170 P.3d at 571.

has no binding legacy because only four justices accepted its constitutional and statutory interpretation. While the lead opinion broadly stated that local governments lack authority to enact moratoria on shoreline development, Justice Chambers concurred only that the City's particular moratorium was unreasonable.[117] Those who have understood the decision as barring all moratoria on shoreline development are mistaken.[118]

When interpreted according to the analysis that the *Southcenter* court applied to *Alderwood*, the *Biggers* dissent and concurrence stand for the proposition that the Washington Constitution vests authority in local governments to enact all reasonable moratoria that are local in nature and not in conflict with the general laws. Part IV argues that courts should interpret *Biggers* in precisely this way because of pressing environmental concerns that a temporary moratorium is uniquely able to address. Additionally, Part IV suggests several factors Washington courts will likely weigh when determining whether a particular moratorium is reasonable.

IV. A COMBINATION OF FACTORS MAKES A MORATORIUM REASONABLE

Courts in Washington and elsewhere have acknowledged the moratorium's utility as a planning tool, recognizing that were it not for moratoria, developers could push through projects before regulations are adopted and undermine the new plan by increasing nonconforming uses.[119] In addition to causing damage that new regulations were designed to prevent, nonconforming uses and ongoing development hinder analysis of current problems. In the case of development that threatens a region already under severe environmental stress, the gap between planning and adopting the new plan would likely result in

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117. *See* Biggers v. City of Bainbridge Island, 162 Wash. 2d 683, 703, 169 P.3d 14, 25 (2007) (Chambers, J., concurring).

118. *See supra* note 16 and accompanying text.

119. *See, e.g.*, Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency, 535 U.S. 302, 337–38 (2002) (noting that "the consensus in the planning community appears to be that moratoria, or 'interim development controls' as they are often called, are an essential tool of successful development" because, "[t]o the extent that communities are forced to abandon using moratoria, landowners will have incentives to develop their property quickly before a comprehensive plan can be enacted, thereby fostering inefficient and ill-conceived growth"); SALKIN, *supra* note 10, at § 6.24 (discussing the advantages of using moratoria for planning and the dangers of a "rush" on development during the period of planning).

irreversible damage.[120] To avoid these problems, most states, including Washington, have generally upheld the use of a moratorium as part of local zoning power.[121]

Washington's vesting rules increase the importance of moratoria. Washington freezes laws applicable to development upon application for a building permit, which is "earlier in the process than any other state in the country."[122] This early vesting "virtually invites subversion of the public interest,"[123] interests that include public services, aesthetic values, historical character, rural traditions, and other features of a community that may be threatened by development.[124] Owners and developers can "frustrate effective long-term planning" under early vesting rules because they generally need not conform to restrictions on development enacted after the filing of an application for a development project.[125] Washington's vesting rules thus create "intractable planning problems" and "a patchwork quilt of legal, nonconforming uses . . . antithetical to sound land use planning."[126] The moratorium, on the other hand, is a

120. *Cf. Tahoe*, 535 U.S. at 307–08 (describing "Lake Tahoe's exceptional clarity" and its rapid deterioration due to "[t]he upsurge of development in the area"; also noting that the increase in impervious surfaces leads to erosion and "'increased nutrient loading of the lake,'" and "'unless the process is stopped, the lake will lose its clarity and its trademark blue color, becoming green and opaque for eternity'" (quoting Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency, 34 F. Supp. 2d 1226, 1230 (D. Nev. 1999)).

121. *See, e.g.*, Jablinske v. Snohomish County, 28 Wash. App. 848, 852, 626 P.2d 543, 545 (1981) (holding that an ordinance prohibiting residential development for one year near a planned airport expansion, without public notice or hearing, was "a true interim measure" within the County's authority); *see also* DANIEL P. SELMI & JAMES A. KUSHNER, LAND USE REGULATION: CASES AND MATERIALS 485 (2d ed. 2004) ("Most courts . . . find that the general authorization to adopt zoning ordinances includes the power to adopt moratoria.").

122. LOMBARD, *supra* note 4, at 230; *see* SELMI, *supra* note 121, at 127 (reviewing vesting rules in the various states and noting that Washington has "refused to follow the general rule that building permits are not protected against revocation by subsequent zoning change," and instead follows *Hull v. Hunt*, 53 Wash. 2d 125, 130, 331 P.2d 856, 859 (1958) ("[T]he right vests when the party . . . applies for his building permit, if that permit is thereafter issued.")).

123. LOMBARD, *supra* note 4, at 230 (quoting RICHARD SETTLE ET AL., WASHINGTON LAND USE AND ENVIRONMENTAL LAW AND PRACTICE (1983)).

124. *See* Brief of the States of Vermont, Alaska, Arizona, Connecticut, Florida, Hawaii, Iowa, Louisiana, Maryland, Massachusetts, Montana, New Jersey, New York, North Carolina, Oklahoma, Oregon, Rhode Island, South Dakota, Tennessee, Texas, and Washington and the Commonwealth of Puerto Rico, as Amici Curiae in Support of Respondent, Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency, 535 U.S. 302 (2002) (No. 00-1167), 2001 WL 1597741, at *5–8 [hereinafter Brief of the States] (providing examples of harm caused by development).

125. *Jablinske*, 28 Wash. App. at 851, 626 P.2d at 545.

126. Noble Manor Co. v. Pierce County, 133 Wash. 2d 269, 287, 943 P.2d 1378, 1388 (1997) (Talmadge, J., concurring).

simple and effective planning device[127] that allows a local government to gather scientific information and public input while preventing the vesting of land-use rights that would disrupt the community's environmental goals.

Washington lacks, however, a clear definition of what makes a moratorium reasonable.[128] The court's assessment of the moratorium in *Biggers* points to duration, diligence, purpose, and procedure as key indicators of reasonableness.

Duration is crucial because moratoria rely on their temporary, short-term, interim, or emergency status for their validity.[129] The *Biggers* concurrence declared that "a reasonable moratorium must be in place no longer than necessary to accomplish the necessary planning by a body exercising diligence to accomplish that planning. Then, the moratorium must be removed."[130] Although no clearly acceptable duration emerges from *Biggers*, Washington courts would likely accept twelve months as reasonable in most cases, considering the time-consuming tasks required by proper planning.[131] Long-term shoreline planning often requires scientifically analyzing complex environmental problems, gathering public input, and waiting for the Department of Ecology's approval of the SMP.[132] The *Biggers* concurrence's criticisms of the City's "refusing to accept building permits year after year"[133] might indicate a per se rule that three years exceeds the reasonable duration of a temporary moratorium in Washington.

The U.S. Supreme Court has also spoken on the issue of duration, stating in dictum that "[i]t may well be true that any moratorium that

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127. *See* SELMI, *supra* note 121, at 481 ("The moratorium is the simplest kind of growth control device."); *see also* SALKIN, s*upra* note 10, at § 6.24 (listing alternative devices, such as administrative delay or overly restrictive interim ordinances, and their shortcomings).

128. Indeed, Washington participated in an amicus brief that argued that the reasonableness of temporary moratoria depends upon a fact-specific inquiry with multiple factors, not upon categorical rules. Brief of the States, *supra* note 124, at *13–14.

129. *See, e.g.*, *Jablinske*, 28 Wash. App. at 852, 626 P.2d at 545 (emphasizing "emergency," "interim," and "temporary" aspects of a twelve-month moratorium).

130. Biggers v. City of Bainbridge Island, 162 Wash. 2d 683, 704, 169 P.3d 14, 26 (2007) (Chambers, J., concurring).

131. *See* SALKIN, s*upra* note 10, at § 6.24 ("It is not uncommon for it to take one to three years to complete the essential studies and develop a comprehensive plan. More time is then needed to draft ordinances and regulations, conduct public hearings, and finally to adopt and publish such ordinances and regulations.").

132. *See* WASH. REV. CODE §§ 90.58.090–90.58.100 (2008).

133. *Biggers*, 162 Wash. 2d at 706, 169 P.3d at 27.

lasts for more than one year should be viewed with special skepticism."[134] Nonetheless, the Court rejected under the Federal Constitution any categorical rule on duration out of concern that "creat[ing] added pressure on decisionmakers to reach a quick resolution of land-use questions . . . would only serve to disadvantage those landowners and interest groups who are not as organized or familiar with the planning process."[135] Most state laws specifying moratoria durations vary from six to thirty-two months.[136] In those states where legislatures are silent on this question, courts usually settle on limits in approximately the same range, taking into account the complexity of the planning tasks and the "good faith and reasonable speed and efficiency" with which government addresses its tasks.[137]

Diligence is the next key indicator of reasonableness. Local governments should compile and retain documentation of every action taken in pursuing the planning process before and during a moratorium. A detailed work plan explaining why it is necessary to freeze development would build a record that demonstrates—through concrete goals, tasks, and deadlines—that the moratorium is neither "rolling" nor a sign of "stagnant" government.[138] Local governments should also anticipate possible delay in agency review and approval, and retain all communication with the Department of Ecology. Whenever a local government extends a moratorium, it should clearly explain the reasons for the extension and communicate expected SMP approval dates.

The moratorium's purpose, as articulated in the ordinance, must be legitimate and grounded in the public welfare. Moratoria that include factual findings of the dangers presented by ongoing development and address those threats in a reasonable manner will satisfy this requirement. The moratorium at issue in *Biggers* most likely satisfied this requirement because it discussed the impacts of specific types of

134. Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency, 535 U.S. 302, 341 (2002).

135. *Id.* at 340–41.

136. *See* SALKIN, s*upra* note 10, at § 6.24 (referring to CAL. GOV'T CODE § 65858 (2007), COLO. REV. STAT. § 30-28-121 (2007), and WIS. STAT. § 62.23(7) (2007), among others). *See also* Brief of the States, *supra* note 124, at *12–13 (citing statutory limits of six months to two-and-a-half years in support of the argument that "[t]emporary moratoria are already subject to reasonable limitations that protect property owners").

137. Wincamp P'ship, OTC v. Anne Arundel County, 458 F. Supp. 1009, 1030 (D. Md. 1978); s*ee also* SALKIN, s*upra* note 10, at § 6.24 (discussing additional state-court decisions on moratoria with varying circumstances and durations).

138. *See* Biggers v. City of Bainbridge Island, 162 Wash. 2d 683, 706, 169 P.3d 14, 27 (2007) (Chambers, J., concurring) (criticizing the City's conduct).

structures for certain species in distinct areas, and it limited the moratorium's scope to the listed types of structures.[139]

As a final factor, procedural safeguards must also be respected. GMA provisions already spell out procedures for adoption of moratoria, such as public notice and hearing requirements.[140] These procedures apply equally well to shoreline management moratoria.

In direct response to the *Biggers* decision,[141] the Washington State Legislature considered, but did not enact, a bill during the 2008 legislative session that would have amended the SMA to explicitly empower local governments to enact temporary moratoria.[142] The proposed bill's requirements provided guidelines similar to those advocated in this Note. The bill would have allowed local shoreline moratoria to be effective for six months and renewed repeatedly following procedural safeguards.[143] If the bill becomes law, Washington courts would still likely be called upon to determine whether a given moratorium satisfies the requirement that it be "necessary and appropriate" for implementation of the SMA.[144] This inquiry would be virtually identical to the fact-intensive reasonableness inquiry that *Biggers* requires courts to conduct. Because long-term land-use planning presents too many variables to make any bright-line limit suitable for all circumstances, leaving this inquiry to courts is appropriate; Washington courts, having conducted this type of case-by-case reasonableness inquiry to evaluate local governments' regulations since voters ratified the state's constitution in 1889, are uniquely qualified to do so.

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139. *See supra* notes 61–63 and accompanying text.

140. *See Biggers*, 162 Wash. 2d at 709–10, 169 P.3d at 29 (2007) (Fairhurst, J., dissenting) (citing the GMA moratorium provision requiring public hearings and other procedures).

141. *See* WASH. STATE HOUSE OF REPRESENTATIVES OFFICE OF PROGRAM RESEARCH, LOCAL GOVERNMENT COMMITTEE BILL ANALYSIS, H.B. 2535, 60th Leg., 2008 Reg. Sess., at 2 (2008), *available at* http://apps.leg.wa.gov/documents/billdocs/2007-08/Pdf/Bill%20Reports/House/2535.HBA%2008.pdf, *permanent copy available at* http://www.law.washington.edu/wlr/notes/84washlrev67n141.pdf.

142. *See* H.B. 2535, 60th Leg., 2008 Reg. Sess. (Wash. 2008), *available at* http://apps.leg.wa.gov/documents/billdocs/2007-08/Pdf/Bills/House%20Bills/2535-S.pdf, *permanent copy available at* http://www.law.washington.edu/wlr/notes/84washlrev69n142a.pdf; S.H.B. 2535, 60th Leg., 2008 Reg. Sess. (Wash. 2008), *available at* http://apps.leg.wa.gov/documents/billdocs/2007-08/Pdf/Bills/House%20Bills/2535-S.pdf, *permanent copy available at* http://www.law.washington.edu/wlr/notes/84washlrev67n142b.pdf.

143. *See* S.H.B. 2535(3).

144. S.H.B. 2535(1).

CONCLUSION

Recognizing the importance of creating stability in shoreline planning and the role of reasonable moratoria in protecting Puget Sound, this Note attempts to clarify the confusion surrounding *Biggers*' holding. The thicket of Washington's land-use statutes contributes to the court's fragmentation and to general confusion in this area of law.[145] Nevertheless, in *Biggers*' wake, a reasonable moratorium should survive judicial scrutiny. Local governments must take steps to ensure that their moratoria are reasonable, and courts should evaluate reasonableness by applying a case-by-case analysis based on the factors presented in this Note.

145. *See, e.g.*, Futurewise v. W. Wash. Growth Mgmt. Hearings Bd., 164 Wash. 2d 242, 248, 189 P.3d 161, 164 (2008) (Chambers, J., dissenting) ("Admittedly, harmonizing the SMA and the GMA is a challenge, both for local governments and this court."); *Biggers*, 162 Wash. 2d at 702, 169 P.3d at 25 (Chambers, J., concurring) (referring to the "desperate need" to streamline land-use law).