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CASE NO. 95100-4

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

COURT OF APPEALS CAUSE NO. 47641-0-II

OLYMPIC STEWARDSHIP FOUNDATION; et al.; CITIZENS' ALLIANCE FOR PROPERTY RIGHTS JEFFERSON COUNTY; CITIZENS' ALLIANCE FOR PROPERTY RIGHTS LEGAL FUND; MATS MATS BAY TRUST; JESSE A. STEWART REVOCABLE TRUST; and CRAIG DURGAN and HOOD CANAL SAND & GRAVEL LLC dba THORNDYKE RESOURCE,

Petitioners,

v.

STATE OF WASHINGTON ENVIRONMENTAL AND LAND USE HEARINGS OFFICE, acting through the WESTERN WASHINGTON GROWTH MANAGEMENT HEARINGS BOARD; STATE OF WASHINGTON, DEPARTMENT OF ECOLOGY; and JEFFERSON COUNTY,

Respondents,

and

HOOD CANAL COALITION,

Respondent/Intervenor.

JEFFERSON COUNTY'S ANSWER TO PETITIONS FOR REVIEW

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I. IDENTITY OF RESPONDENT

Jefferson County is one of the Respondents in the above-referenced appeal, which concerns challenges to Jefferson County's Shoreline Master Program ("SMP"). Petitioners Olympic Stewardship Foundation, et al. ("OSF") and Citizens' Alliance for Property Rights, et al. ("CAPR") have filed petitions for review of the Court of Appeals' June 20, 2017 decision upholding the Jefferson County SMP. This brief is offered by Jefferson County in response to both of the petitions for review.

II. INTRODUCTION

Petitioners OSF and CAPR seek Supreme Court review of a 99-page decision of the Court of Appeals, Division II, No. 47641-0-II. Jefferson County submits that review by the Supreme Court is not necessary. The procedural history of this matter reveals that the Jefferson County SMP has been thoroughly reviewed, analyzed and approved by multiple entities with jurisdiction and expertise including the Washington Department of Ecology ("Ecology"); the Western Washington Growth Management Hearings Board ("Growth Board") and the Washington State Court of Appeals.

Each of the above entities came to the same conclusion, i.e., that the SMP is entirely in conformance with the Shoreline Management Act (RCW 90.58) and its guidelines (WAC 173-26), and is otherwise fully compliant with applicable law. The decisions of the Growth Board and

the Court of Appeals were unanimous. The Court of Appeals also denied OSF's Motion for Reconsideration.

Thus, while the Court of Appeals' opinion addresses issues of public importance, those issues have been exhaustively analyzed by agencies and courts with jurisdiction and expertise. The SMP has been found in full compliance with Washington caselaw and applicable statutes. Thus, it is not necessary for this Court to provide yet another review of Jefferson County's SMP.

III. COUNTER-STATEMENT OF THE CASE

A. Administrative and judicial review of the Jefferson County SMP has been exhaustive.

The Shoreline Management Act ("SMA") was enacted to facilitate the protection of the state's shorelines with state and local government regulation. Every local government which contains "shorelines of the state" within its boundaries must complete a comprehensive update to its Shoreline Master Program in accordance with a timetable set by the legislature. RCW 90.58.030(3) (c), .080. A local government has discretion to tailor its Master Program to local conditions and circumstances, but the Master Program must be compliant with Ecology's SMA guidelines. Ecology is the state agency that is tasked with evaluation of proposed local Shoreline Master Programs and ensuring their full compliance with the SMA. Changes to a Master Program are not

effective until review and approval by Ecology. RCW 90.58.080(1), .090; WAC 173-26-171(3)(a).

Jefferson County adopted an updated draft SMP after years of analysis, hearings and input from experts, stakeholders and the general public. (CP 427-454). On March 1, 2010, the County sent the locally approved SMP submittal packets to Ecology for its review. On January 26, 2011 Ecology concluded that Jefferson County had met the procedural and policy requirements of the SMA and announced its conditional approval of the local SMP, pending 26 "required changes." The letter from Ecology also included 14 "recommended changes," along with findings and conclusions to support its decision. (CP 455). After further review and extensive public dialogue between Jefferson County and Ecology, on February 7, 2014 Ecology approved the SMP with the County's revisions.

Challenges to the SMP were filed with the Growth Board by Petitioners herein, and also by Hood Canal Sand & Gravel (which has not filed a Petition for Review). The Growth Board is an entity created for the specific purpose of evaluating challenges to local enactments under the Growth Management Act ("GMA") and the Shoreline Management Act ("SMA"). Because it deals with such legislative enactments on a daily basis, it has unique background and experience which allow it to determine whether a local government has complied with applicable state

laws. The Growth Board's Final Decision and Order ("FDO") rejected all challenges and approved the SMP, in a thorough and well-reasoned 93-page decision. (CP 7451-7546).

Petitioners sought review in Jefferson County Superior Court. Because it was understood by all parties that the matter would eventually go to the Washington Court of Appeals, Ecology's motion for direct review by the Court of Appeals, Div. II was granted. On June 20, 2017 the Court of Appeals issued a thorough 99-page opinion, unanimously affirming the decision of the Growth Board and upholding the SMP in its entirety. OSF filed a Motion for Reconsideration which was denied by the Court of Appeals. OSF and CAPR have now petitioned this Court for review.

The analysis by the Growth Board and the Court of Appeals involved review of several thousand pages of administrative record and hundreds of pages of legal briefing. Although more than 20 distinct grounds for invalidation of the SMP were offered by the various Petitioners, the Growth Board affirmed the SMP on all counts. Review by the Court of Appeals was equally thorough, and the decision of the Court of Appeals was consistent with the Final Decision and Order of the Growth Board. The Court of Appeals addressed and rejected each of the grounds offered by the Petitioners for reversal of the Growth Board's decision.

In view of the unanimous decisions of Ecology, the Growth Management Hearings Board and the Court of Appeals, their harmonious conclusion does not require yet another phase of review.

B. Local shoreline conditions were thoroughly documented in the SMP.

OSF asserts in its petition that the current condition of Jefferson County's shoreline was not adequately documented. This assertion is flatly contradicted by the administrative record, and by the decisions of the Growth Board and the Court of Appeals. It is noteworthy that OSF made a similar statement in its appeal brief, which was followed by citation to portions of the record consisting of nearly 350 pages of scientific analysis. (CP 5645-5721; CP 3451-3720). As the Growth Board found, and the Court of Appeals affirmed, the County's analysis of existing shoreline conditions and its application of scientific method in its Shoreline Inventory ("SI") and its Cumulative Impacts Analysis ("CIA") was thorough and robust:

> Specifically, the Board found the County completed requirements in WAC 173-26-201(3)(c) to "inventory shoreline conditions" and in WAC 173-26-201(3)(d) to "analyze shoreline issues of concern." The Board found the SI and the CIA to be comprehensive and informative in addressing these WAC requirements.

FDO at 21. The Board further found that the County's analysis of cumulative impacts to the shoreline had been well documented and supported by science:

> Further, the County's CIA identified, inventoried and documented "current and potential ecological function provided by affected shorelines" and proposed policies and regulations to achieve no net loss of those functions as required in WAC 173-26-186(a).

FDO at 24. On the central issue of shoreline buffers, the Board characterized the SMP, the SI and the CIA as "replete with scientific evidence demonstrating how the County met legal requirements to establish buffers. . . ." (FDO, 44).

For its part, the Court of Appeals affirmed the Growth Board's decision and also stressed the extensive analysis of Jefferson County's shoreline conditions and the reasonable grounds for its regulations to protect the shorelines. (Opinion, pp. 45-50).

OSF has complained that the SMP includes the designation of approximately 41% of Jefferson County's shoreline as "natural" shoreline, which OSF believes to be excessive. The argument is curious, when one recalls the contention in OSF's appeal brief that amendment of the SMP was unnecessary because so much of the Jefferson County shoreline remains healthy and relatively undisturbed. (OSF Opening Brief, pp. 2, 13). (OSF also represents that 77% of the land in Jefferson County is in public ownership. Petition, p. 17. Of course, much of this land is relatively intact).

As the Court of Appeals noted, the Master Program guidelines provide that a shoreline area is appropriately designated as natural in order

to "protect those shoreline areas that are relatively free of human influence or that include intact or minimally degraded shoreline functions intolerant of human use." WAC 173-26-211(5)(a)(i). The Court of Appeals correctly held that OSF had failed to provide meaningful evidence that the natural areas on Jefferson County's shoreline were over-designated.

The Court of Appeals also noted that proposed shoreline designations were produced for public comment and were developed with extensive input from the Shoreline Technical Advisory Committee after review of aerial photography of the marine shoreline. (AR 6462). Significantly, OSF identified not a single property that was misidentified. The Court of Appeals properly rejected the notion that the County's analysis of current shoreline conditions and its designation of shoreline zones were unsupported or unlawful.

C. The shoreline buffers were justified by science, and were consistent with the buffers in Jefferson County's Critical Areas Ordinance.

Both OSF and CAPR have complained about the SMP's 150 foot buffers for marine shorelines. They suggest that standardized buffers for critical areas or shorelines are unlawful. They would have preferred smaller buffers and the application of an individualized buffer for each property. The argument is not well taken. Restrictions on development and disturbances in critical areas and their buffers are routinely upheld. *Presbytery of Seattle v. King County*, 114 Wn.2d 320, 325, 787 P.2d 907

(1990); *Young v. Pierce County*, 120 Wn. App. 175, 185, 84 P.3d 927 (2004).

Standard buffers around critical areas and shorelines are employed by virtually every jurisdiction in Washington state. The SMA guidelines specifically endorse the use of buffers to protect shorelines. (WAC 173-26-221(2)(c); 173-26-221(5)). No court has held that standardized shoreline setbacks are inherently unlawful. Indeed, the suggestion that a county-wide legislative enactment such as a master program should evaluate each individual parcel and develop a unique buffer for each lot—before any site-specific development proposal is submitted—is obviously impractical. Site-specific and project-specific determinations (including any adjustments in the standard buffer) can only be made at the permitting stage.

Nor is there support for the contention that a 150 foot buffer is excessive. Petitioners do not dispute the following:

- The 150 foot marine shoreline buffers are entirely consistent with the buffers in Jefferson County's Critical Areas Ordinance ("CAO") which were upheld by the Growth Board. OSF's Challenge to the CAO in the Court of Appeals was also unsuccessful. *See*, *OSF v. Western Washington Growth Management Hearings Board*, 166 Wn. App. 172, 274 P.3d 1040 (2012), *rev. denied*, 174 Wn.2d 1007.

- Jefferson County's shoreline buffers are consistent with buffers in other rural areas on Puget Sound, including Whatcom County and the non-UGA portions of King County. (CP 6463).

- The 150 foot shoreline buffer was based on an analysis of numerous factors including the documented effect of different size buffers on various types of shoreline hazards. (Court of Appeals Opinion, p. 19).

The Court of Appeals explained that the Cumulative Impact Analysis (CIA) provided detailed information about known and potential ecological harm to shorelines which can result from construction and development in the nearshore environment. The Court also pointed to evidence in the record showing that the imposition of buffers protects shoreline ecological functions and ensures compliance with "no net loss." In view of all of the above factors, the Court of Appeals affirmed the Growth Board's unanimous determination that the SMP's buffer requirements are "amply supported by the scientific evidence." (Opinion, p. 21).

Similarly, there is no factual support for the Petitioners' argument that the SMP's shoreline buffers are inflexible. As detailed in Ecology's Response Brief in the Court of Appeals, the SMP has six different options for providing relief from the buffer provisions, four of which allow a buffer to be reduced without the need for additional permitting such as a shoreline variance permit. JCC 18.25.270. (*See*, Ecology Response Brief at 25-26). The suggestion that Jefferson County has effectively precluded all uses in the shoreline jurisdiction is incorrect. The table of uses allowed in the various shoreline designations demonstrates an appropriate

balancing of policies and values in each zone. (*See*, SMP, pp. 4-6 through 4-8).

Nor is there a reasonable basis for Petitioners' argument that it was unlawful for Jefferson County and Ecology to treat marine shorelines of Jefferson County as critical areas and to incorporate the CAO by reference. RCW 36.70A.480(4) expressly provides that SMPs may incorporate existing CAO provisions, so long as the incorporated provisions meet SMA requirements.

Designation of Jefferson County shorelines as critical areas was justified because the shorelines provide habitat for listed species and therefore qualify as Fish and Wildlife Habitat Conservation Areas (FWHCA). (*See* SI, pp. 3-6 through 3-22; CP 6270-6226; SMP Article 6, p. 6-5; JCC 18.22.270). The SI reflects that "virtually all of the County's nearshore marine environment supports or has potential to support highly valuable and ecologically sensitive resources." (CP 6273). Moreover, much of the shoreline of eastern Jefferson County consists of unstable bluffs and landslide prone areas, and other categories of critical areas. (CP 6286-6287, 6298).

Further, the SMP does not simply apply the CAO's FWHCA buffers but instead independently establishes a buffer of 150 feet for marine shorelines and rivers, and 100 feet for lakes, based on analysis of the science and existing conditions. (SMP Article 6.1.D.5). Thus, even if

every stretch of Jefferson County shoreline may not qualify as a critical area, the adoption of 150 foot marine shoreline buffers was consistent with the SMA and its guidelines.

To summarize, the evaluation of the condition of Jefferson County shorelines, the incorporation of the CAO and the imposition of shoreline buffers were supported by scientific analysis, statute and caselaw. The combined judgment of the Department of Ecology, the Growth Board and the Court of Appeals should not be disturbed.

IV. ARGUMENT

A. The Court of Appeals' decision is in conformance with settled Washington caselaw.

OSF and CAPR make broad assertions that the decision of the Court of Appeals is in conflict with Washington caselaw, but they fail to demonstrate any such nonconformance. For example, OSF cites *Buechel v. Ecology*, 125 Wn.2d 196, 884 P.2d 910 (1994) for the proposition that protection of the state's shorelines is not the primary goal of the SMA. Yet this Court expressly held in *Buechel* that the SMA must be "broadly construed in order to protect the state shorelines as fully as possible." *Id.* at 203. OSF also ignores the clear language of *Samson v. City of Bainbridge Island*, 149 Wn. App. 33, 202 P.3d 334 (2009) which confirmed that protection of the shoreline environment has priority under

the SMA, even though such protection places restrictions on private property development. *Id.* at 47-49

It cannot seriously be disputed that the "primary" reason why the Washington legislature enacted the SMA was concern about threats to the ecological integrity of the state's shorelines. Along with the State Environmental Policy Act ("SEPA"- RCW 43.21C) and other environmental laws enacted in the early 1970s, the SMA reflected a recognition that unrestrained development on the state's shorelines posed a serious risk to human health and ecological integrity. RCW 90.58.020. The protection of property rights, while not the *primary goal* of the SMA, is an important matter that is to be considered and balanced along with other factors, as use and development on the state's shorelines is regulated through the SMA. It is unsurprising that the Court of Appeals in this case quoted language from the SMA and Washington caselaw recognizing the priority afforded protection of the state's shorelines under the SMA.

Contrary to Petitioner's argument, the priority given to shoreline protection is not inconsistent with the balancing of multiple goals, including private property rights. RCW 90.58.020. And the Jefferson County SMP does indeed recognize and endorse the principle of property rights protection through several provisions including: (1) designating zones for intensive residential, commercial and industrial development (SMP Article 4.2.C); (2) providing a conditional use permit process,

whereby uses not permitted outright in a given zone can nonetheless be approved, with conditions (SMP Article 2.C.17, pp. 2-10); and (3) providing for exemptions, variances, mitigation and other measures to reduce the economic impact of strict compliance (SMP Article 9, pp. 9-1 through 9-9). The Court of Appeals' determination that the Jefferson County SMP is in compliance with applicable Washington law is well supported.

OSF's reliance on *Ferry County v. Concerned Friends of Ferry County*, 155 Wn.2d 824, 123 P.3d 102 (2005) to support its "lack of scientific analysis" argument is even more farfetched. Ferry County's Critical Areas Ordinance provision identifying endangered species was found to be noncompliant with the GMA because it was based on a cursory review of "various field guides and big game texts for general information" by a single consultant from Alaska with no familiarity with Ferry County's plant and animal communities. *Id.* at 836-37. This Court agreed with the Growth Board's determination that the information relied upon by Ferry County "did not rise to the level of scientific information." *Id.* page 836.

In contrast, as the Growth Board and the Court of Appeals each found in this case, the Jefferson County SMP was "replete with scientific evidence demonstrating how the County met legal requirements..." (FDO, p. 44).

In summary, OSF and CAPR have not shown a genuine conflict between the Court of Appeals' decision and prior decisions of this Court or the Court of Appeals. There is no need for Supreme Court review.

B. The facial constitutional claims were properly rejected by the Court of Appeals.

1. Petitioners have mischaracterized the Court of Appeals' decision regarding the constitutional claims.

In its Petition for Review, OSF makes the extraordinary assertion that "the Court of Appeals *sua sponte* ruled that due process protections do not apply to the use and development of private shorelines. . . ." (PFR, p. 16). This is a transparent misstatement of what the Court of Appeals held. As the Court made clear, there is a difference between regulations which destroy or "take" property, and those which reasonably regulate the use of property:

> More to the point, we are aware of no caselaw holding that property owners have a fundamental right to do what they wish on their property *without being troubled by reasonable regulations*. Such a rule would contradict the broad and ample scope of the police power long recognized under state and federal law.

Opinion, pp. 42-43 (emphasis added).

It is true that the Due Process Clause and the Takings Clause may be invoked where a local government's unreasonable imposition of permit restrictions destroys all economic value in a landowner's property. But that issue was not before the Court in this facial challenge to the

legislative enactment of the Jefferson County SMP. There is no individual property owner in this case presenting a claim that his property value was destroyed by permit restrictions.

2. The standard for a facial challenge to a legislative enactment is a difficult one to meet.

In its Petition for Review, CAPR makes the uncontroversial claim that "there is no categorical bar to bringing a facial constitutional challenge." (PFR, p. 12). But here again, neither the Respondents nor the Court of Appeals have suggested that it is *impossible* for one to assert a facial constitutional challenge to legislation. Instead, as the Court of Appeals properly held, the challenge for a facial claimant is to satisfy an extremely high burden of proof. To make out a facial takings claim in the land use arena, a landowner must show that the mere enactment of the regulation constitutes a taking of his property. *Guimont v. Clark*, 121 Wn.2d 586, 605, 854 P.2d 1 (1993), *cert. denied*, 510 U.S. 1176 (1994). As this Court stressed in explaining this standard:

> The test for a facial challenge is a high one, in part because the landowner has not presented any evidence about the particular impact of the regulation on his or her parcel of land. Thus, to succeed in proving that a statute on its face effects a taking by regulating the uses that can be made of the property, the landowner must show that the mere enactment of the statute denies the owner of all economically viable use of the property.

121 Wn.2d at 605. Indeed, to support its facial challenge to the Jefferson County SMP, the Petitioners would have had to show beyond a reasonable

doubt that the SMP could never be applied in a constitutional manner. *State v. Alexander*, 184 Wn. App. 892, 896, 340 P.3d 247 (2014), *rev. denied*, 182 Wn.2d 1024. This strict standard applies, whether a party characterizes its claim as a "takings" claim or an "unconstitutional conditions" claim.

As the Court of Appeals properly held, OSF and CAPR failed to satisfy this threshold showing. It is indeed significant that, while arguing that a facial challenge to shoreline regulations is "justiciable," Petitioners continue to rely on three U.S. Supreme Court cases, each of which involved an "as applied" challenge arising from conditions imposed on a site-specific permit applicant. In *Dolan v. City of Tigard*, 512 U.S. 374, 114 S. Ct. 2309 (1994) the city of Tigard conditioned the expansion of Dolan's retail store by requiring a public easement for a bike path. Similarly, in *Nolan v. California Coastal Commission*, 483 U.S. 825, 107 S. Ct. 3141 (1987) the Commission imposed a permit condition requiring a public access easement in front of Nolan's house. And in *Koontz v. St. John's River Water Management District*, 133 S. Ct. 2586 (2013) the plaintiff's permit to develop his property was conditioned on dedication of a conservation easement to the District, or payment for offsite mitigation.

By contrast, in this case neither OSF nor CAPR has asserted an "as applied" challenge. Indeed, any such claim would not be ripe for determination. *Thun v. City of Bonney Lake*, 164 Wn. App. 755, 762, 265

P.3d 207 (2010). No individual permittee is a party to this case, and none has presented a ripe challenge supported by evidence that a land use permit was improperly denied or conditioned.

There is no provision in the Jefferson County SMP which would constitute a taking of property. Although CAPR repeatedly refers to a shoreline setback as a "dedication," it is no such thing. "Dedication" is a term of art which applies to an appropriation of land to government use. Unlike the situations in *Nolan* and *Dolan*, the shoreline setback provisions in the SMP do not effect a transfer of ownership from a private landowner to the County or the state. Nor is there a compromise of the individual landowner's "right to possess, to exclude others, or to dispose of property." *Guimont*, *supra*, 121 Wn.2d at 595.

It is significant that the Supreme Court made clear in *Dolan* that a regulation which merely limits development within a critical area or its buffer does not violate the constitution:

> It seems equally obvious that a nexus exists between preventing flooding along Fanno Creek and limiting development within the creek's 100 year flood plain.

512 U.S. at 387. The Supreme Court struck down the City of Tigard's permit condition in *Dolan* because it went further and required dedication of a greenway system to the public:

> But the City demanded more – it not only wanted Petitioner not to build in the flood plain, but it also wanted Petitioner's property along Fanno Creek for its greenway

> system. The City has never said why a public greenway, as opposed to a private one, was required in the interest of flood control.
>
> The difference to Petitioner, of course, is the loss of her ability to exclude others.

512 U.S. at 593.

Petitioners' reliance on two Washington appellate cases, *Citizens Alliance v. Sims*, 145 Wn. App. 649, 187 P.3d 786 (2008), and *Kitsap Alliance v. Hearings Board*, 160 Wn. App. 250, 255 P.3d 696 (2011) is similarly misplaced. In *Sims*, the facial challenge to a King County ordinance was not based on constitutional grounds but rather on an impact fee statute that applies to local land use regulations-- RCW 82.02.020. That statute is not applicable here, because the Jefferson County SMP became a state regulation when it was adopted by Ecology and therefore is not subject to RCW 82.02. *Citizens for Rational Shoreline Planning v. Whatcom County*, 172 Wn.2d 384, 393, 258 P.3d 36 (2011). Moreover, the infirmity with the King County ordinance was that it applied a mandatory restriction on development to all rural properties, whether or not they contained any critical areas. 145 Wn. App. 657-58, 662. The Court therefore held that the County could not show that the restrictions were reasonably necessary to protect critical areas.

In contrast, Jefferson County's shoreline buffers apply only to properties on the shoreline, which would satisfy any potential nexus

requirement. Further, the extensive scientific studies supporting the need for shoreline buffers satisfies the rough proportionality test. Where scientific analysis provides a reasonable basis for regulations to protect the functions of critical areas, the science ensures that nexus and proportionality tests are met. *OSF v. Western Washington Growth Management Hearings Board, supra*, 166 Wn.App at 199.

Nor is the *Kitsap Alliance* case helpful to OSF's argument. The Court in that case held that the County's standard buffers for critical areas satisfied nexus and rough proportionality considerations because there was science-based support for the buffers in the record. 160 Wn. App. at 273-74. Thus, even if nexus and proportionality could be applied to a facial takings claim, Petitioners could not satisfy their burden in this case. The Court of Appeals' treatment of the constitutional challenges was not erroneous.

V. CONCLUSION

The Court of Appeals properly affirmed the unanimous conclusion of Ecology and the Growth Board that the SMP is fully compliant with the SMA. There is no genuine need for further review. The Court should deny the petitions of OSF and CAPR for Supreme Court review.

DATED this 10th day of November, 2017.

KARR TUTTLE CAMPBELL

By: _____

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CERTIFICATE OF SERVICE

The undersigned certifies that a true and correct copy of the foregoing was served on the parties of record as stated below in the manner indicated:

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I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED at Seattle, Washington on November 10, 2017.

Sandy Watkins
Assistant to Mark R. Johnsen

KARR TUTTLE CAMPBELL

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