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**COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON**

CITIZENS FOR RATIONAL SHORELINE PLANNING, a Washington
Nonprofit Corporation, and RONALD T. JEPSON, an individual,

Appellants,

v.

WHATCOM COUNTY, a municipal corporation of the State of
Washington, the WHATCOM COUNTY COUNCIL, and the STATE OF
WASHINGTON, DEPARTMENT OF ECOLOGY,

Respondents.

**RESPONDENT STATE OF WASHINGTON
DEPARTMENT OF ECOLOGY'S ANSWER TO BRIEF OF
AMICUS CURIAE PACIFIC LEGAL FOUNDATION**

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ORIGINAL

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I. INTRODUCTION

The issue identified by amicus curiae Pacific Legal Foundation is “Whether a local government’s administration of its shoreline master program is subject to RCW 82.02.020?” Pacific Legal Foundation’s Brief (PLF’s Br.) at 1. Pacific Legal Foundation’s entire brief addresses aspects of this issue. The court should decline to address this issue, as it is not the issue before the court. The issue before the court is whether or not the development and adoption of the Whatcom County Shoreline Master Program violates RCW 82.02.020.

Even if the court finds that Pacific Legal Foundation’s brief does relate to issues currently before the Court, their arguments are unpersuasive. Pacific Legal Foundation claims that the trial court’s ruling in this case is inconsistent with two decades of appellate and Supreme Court decisions applying RCW 82.02.020. In fact, the issue in front of this court is an issue of first impression. None of the cases that have so far analyzed RCW 82.02.020 have applied it to the Shoreline Management Act (SMA), which mandates State involvement to such a degree that a local government implementing that law is deemed to be acting as an agent of the state. *Orion Corp. v. State*, 109 Wn.2d 621, 747 P.2d 1062 (1987).

II. ARGUMENT

A. **The Court Should Decline To Address The Issue Raised By Pacific Legal Foundation Because It Is Not The Issue Before This Court.**

“It is a well-established rule that new issues may not be raised for the first time on appeal by amici curiae.” *Gallo v. Dep’t of Labor & Indus.*, 155 Wn.2d 470, 495 n.12, 120 P.3d 564 (2005). Pacific Legal Foundation’s amicus brief consists entirely of arguments related to whether or not a local government’s administration of its shoreline master program is subject to RCW 82.02.020. Indeed, these are the words Pacific Legal Foundation uses to identify the issue. PLF’s Br. at 1. No such issue is presented by this case. The issue argued in superior court and appealed to this court is whether or not the development and adoption of the Whatcom County Shoreline Master Program is subject to RCW 82.02.020. *See Clerk’s Papers (CP) at 120 (Ecology’s Motion to Dismiss at 8).* Because Pacific Legal Foundation’s issue is raised for the first time by amicus curiae, the court should not consider it.

In the superior court proceeding that gave rise to this appeal, Ecology and Whatcom County argued that shoreline master programs constitute state regulations that are not subject to RCW 82.02.020. CP at 116. Citizens for Rational Shoreline Planning argued that master programs are local regulations subject to RCW 82.02.020. CP at 127.

The court agreed with Ecology and the County. CP at 184. Now for the first time, Pacific Legal Foundation is raising the argument that, not the shoreline master program itself, but a local government's administration of its shoreline master program, is subject to RCW 82.02.020. A local government's administration of its shoreline master program consists of processing permit applications and approving or denying permits.¹ RCW 90.58.140(3). *See also* PLF's Br. at 4. These actions are taken on a case-by-case basis in response to specific situations. At this point, there is no permit approval or denial before the court. Nor is there any particular situation in front of the court in which to evaluate whether or not the administration of the Whatcom County Shoreline Master Program violates RCW 82.02.020.

The superior court's ruling challenged in this appeal dismissed the Fourth Cause of Action in Citizens for Rational Shoreline Planning's original complaint, which alleged that certain provisions of Whatcom County's Shoreline Master Program violated RCW 82.02.020. CP at 7-9. The question is whether or not the provisions themselves violate RCW 82.02.020, not whether or not a local government's implementation

¹ Although Pacific Legal Foundation argues that administration of the permit program is purely local and up to the exclusive authority of the local government, even this statement is not entirely correct. The SMA provides for three types of permits: substantial development permits, conditional use permits, and variance permits. The SMA provides that two of these types of permits, conditional use permits and variance permits, cannot issue unless approved by Ecology. RCW 90.58.140(10).

of the provisions violate RCW 82.02.020. Because Pacific Legal Foundation's issue is raised for the first time on appeal by amicus curiae, the court should not consider it.

B. *Orion* Is Not Distinguishable Because It Applies To Both The Development Of A Master Program And To The Local Government's Administration Of A Master Program.

Even if the court does decide to reach the issues raised in Pacific Legal Foundation's amicus brief, the *Orion* case controls the outcome in this case.

In the *Orion* decision, the Washington State Supreme Court determined that, in developing and adopting a shoreline master program, a local government acts as an agent of the State. *Orion*, 109 Wn.2d at 643-44. Pacific Legal Foundation attempts to distinguish this ruling by claiming that no agency relationship exists when a local government is administering its shoreline master program. This argument fails for two reasons.

First, and as noted above, the question of local government administration of the requirements of a shoreline master program is not before the court. The issue before the court is whether or not the development and adoption of the Whatcom County Shoreline Master Program violates RCW 82.02.020. In a context directly analogous to the current appeal, the *Orion* court found that an agency relationship arose

between the County and the State during the development and adoption of the Skagit County Master Program because, “[i]n developing the [Skagit County Shoreline Master Program], the County acted under the direction and control of the State. ... Moreover, the [Skagit County Shoreline Master Program] became effective only when adopted or approved by the State Department of Ecology.” *Orion*, 109 Wn.2d at 643-44. Here, as in *Orion*, the County acted under the direction and control of the State in developing the County’s master program. Here, as in *Orion*, the County’s master program became effective only when adopted or approved by the State Department of Ecology.

Second, even if the current appeal did involve a challenge to the administration of a master program, Pacific Legal Foundation’s claim that *Orion* does not apply to a local government’s administration of its master program fails. The developer in *Orion* claimed that the application of Skagit County’s master program prevented development of Orion’s property. Because Orion had not applied for a permit, much less had a permit denied, the State and County moved to dismiss the case on the grounds that Orion had failed to exhaust necessary administrative remedies. *Id.* at 625; *see also Orion Corp. v. State*, 103 Wn.2d 441, 456, 693 P.2d 1369 (1985) (*Orion I*). The court denied the motion, finding that

the administrative process would have been futile as a permit would inevitably have been denied. *Orion*, 109 Wn.2d at 625; *Orion I*, 103 Wn.2d at 460. Thus, the issue before the *Orion* court was tantamount to a challenge to the County's denial of a permit. The court found an agency relationship between the State and Skagit County did indeed exist under the circumstances because the master program provisions applicable to Orion's property were provisions required by the State.² *Orion*, 109 Wn.2d at 643-44. Thus, in addition to the agency relationship arising from the State's control of the master program adoption process, an agency relationship between the State and a local government can exist even when a local government is administering its master program. However, the court does not need to reach that issue in this case.

C. The Setbacks In The County's Master Program Are The Result Of State Action Under The SMA, Not Local Action Under The GMA.

Pacific Legal Foundation claims that the setback provisions in Whatcom County's master program are the product of local government action rather than State action because these setback provisions incorporate the buffer provisions in Whatcom County's critical areas

² It is worthwhile noting that the Ecology guidelines concerning the setbacks in the Whatcom County master program are at least as prescriptive as the Ecology guidelines at play in the provisions of Skagit County's master program at issue in *Orion*. CP at 158-60.

regulations. Pacific Legal Foundation is correct that the setbacks in Whatcom County's master program are derived from the buffers in Whatcom County's critical areas regulations. However, Pacific Legal Foundation's claim fails because the setback provisions in the master program are the result of State action. The adoption of critical area buffers and the approval of setback provisions in a master program are two separate, fundamentally different events. Regardless of the origin of the buffers in Whatcom County's critical areas regulations, pervasive State involvement in the development and adoption of Whatcom County's master program make the setback provisions in the master program the result of State action.

The Growth Management Act (GMA) requires local governments to designate certain areas within their jurisdiction as "critical areas." RCW 36.70A.170(1)(d).³ Local governments must also adopt regulations that protect the designated critical areas. RCW 36.70A.060(2). A shoreline master program must contain provisions that protect critical areas in shoreline jurisdiction at least as much as the local government's

³ Critical areas include wetlands, critical aquifer recharge areas, fish and wildlife habitat conservation areas, frequently flooded areas, and geologically hazardous areas. RCW 36.70A.030(5).

critical areas regulations protect critical areas not located in shoreline jurisdiction.⁴ RCW 36.70A.480(4); RCW 90.58.090(4).⁵

Whatcom County designated all of its “shorelines of the state” (and some other shorelines as well) as critical fresh water habitat or critical salt water habitat. Whatcom County Code (WCC) 16.16.710.⁶ Those designations were upheld by the Growth Management Hearings Board. *Citizens for Rational Shoreline Planning v. Whatcom County*, Western Washington Growth Management Hearings Board No. 08-2-0031 (April 20, 2009). Whatcom County’s critical areas regulations require buffers of various widths for activities adjacent to critical fresh water habitat and critical salt water habitat. WCC 16.16.740.

As noted above, the SMA and the GMA required Whatcom County to include provisions in its master program at least as protective of critical fresh water habitat and critical salt water habitat as the buffers required for those habitats in the County’s critical areas regulations. RCW 36.70A.480(4); RCW 90.58.090(4). Because the County designated

⁴ Shoreline jurisdiction is generally defined as the area along a shoreline of the state that extends 200 feet landward from the ordinary high water mark. RCW 90.58.030(2)(f).

⁵ Once a shoreline master program protecting critical areas in shoreline jurisdiction is adopted under Ecology’s 2003 guidelines, the local government’s critical areas regulations no longer apply in shoreline jurisdiction. RCW 36.70A.480(3)(a).

⁶ Pacific Legal Foundation argues that Ecology did not review Whatcom County’s critical area designations. What Pacific Legal Foundation fails to acknowledge is that Ecology extensively reviewed the master program provisions that protect critical areas.

all of its shorelines of the state as critical habitat, the master program was required to provide this protection to all of the shorelines governed by the master program.

The SMA establishes a unique framework for the governance of shoreline development that recognizes the value and vulnerability of shorelines of the state. RCW 90.58.020. This framework requires the State to participate in, approve, and generally oversee the development of shoreline master programs. The SMA requires Ecology to adopt development guidelines for shoreline master programs. RCW 90.58.060. Ecology's guidelines require shoreline setbacks.⁷ WAC 173-26-241(3)(j). Local governments are required to follow the State's guidelines. RCW 90.58.080(1). Ecology is required to review and approve master programs before they become law. RCW 90.58.090(7). Ecology may approve a master program only if it finds the master program to be fully consistent with the SMA and Ecology's shoreline development guidelines. RCW 90.58.090(3). If a local government does not comply with the SMA, Ecology is authorized to develop the master program on its own.

⁷ The guidelines provide: "Master programs shall include policies and regulations that assure no net loss of shoreline ecological functions will result from residential development. Such provisions should include specific regulations for setbacks and buffer areas" WAC 173-26-241(3)(j). When used in the guidelines, "should" means "that the particular action is required unless there is a demonstrated, compelling reason, based on policy of the Shoreline Management Act and this chapter, against taking the action." WAC 173-26-020(32).

RCW 90.58.070(2). Once approved by Ecology, a master program becomes state law. RCW 90.58.100(1).

The SMA therefore required Ecology to review and approve the setback provisions in Whatcom County's master program before they could become law. RCW 90.58.090(7). As part of Ecology's review of Whatcom County's master program, Ecology was required to ensure that the shoreline setbacks in the master program were as protective of critical habitat as the habitat buffers in Whatcom County's critical areas regulations. Ecology was also required to ensure that the setback provisions complied with the requirement of Ecology's guidelines that development in critical areas result in no net loss of ecological functions. WAC 173-26-201(2)(c); WAC 173-26-221(2)(c)(iii)(C); WAC 173-26-221(2)(c)(iv)(C)(I).

It is beyond dispute that, had Ecology determined that the setbacks in Whatcom County's master program did not adequately protect shorelines, Ecology could have required the County to increase the setback sizes. Ecology approved Whatcom County's master program only after determining that the shoreline setbacks in the shoreline master program provided the required protection. And, as noted above, the master program (and thus the setback provisions) took effect *only* after Ecology's approval. Therefore, the shoreline setbacks in Whatcom

County's Shoreline Master Program are the product of State action, and are not subject to RCW 82.02.020.

D. Local Regulations Implementing SEPA, The GMA, And The Subdivision Statute Are Distinguishable Because They Do Not Require State Approval And Do Not Become State Law.

Pacific Legal Foundation cites three cases (*Castle Homes & Dev., Inc. v. City of Brier*, 76 Wn. App. 95, 882 P.2d 1172 (1994); *Trimen Dev. Co. v. King County*, 124 Wn.2d 261, 877 P.2d 187 (1994); and *Citizens' Alliance for Property Rights v. Sims*, 145 Wn. App. 649, 187 P.3d 786 (2008) (CAPR)) to support its claim that, "Nothing in [RCW 82.02.020] exempts local government actions that are taken under the authority of a state statute." PLF's Br. at 8. However, the issue in this case is not whether RCW 82.02.020 applies to actions that are taken pursuant to a state statute. The issue is whether or not RCW 82.02.020 applies to shoreline master programs, which are not only authorized by state statute, but also require significant, affirmative action by the State before they become law. Because none of the cases Pacific Legal Foundation cites involved actions with this additional state overlay, these cases are inapposite in the present context.

1. Castle Homes: State Environmental Policy Act.

In *Castle Homes*, the City of Brier imposed fees on a developer to help mitigate the effects of additional traffic that would result from the

developer's proposed plat. *Castle Homes*, 76 Wn. App. at 97-99. The court determined that the mitigation fees were invalid because they did not relate to the direct impacts of the proposed development as required by RCW 82.02.020. *Id.* at 108. The court further determined that the authority to require mitigation came from the State Environmental Policy Act (SEPA). *Id.* at 105-06.

Pacific Legal Foundation claims that the analysis of the *Castle Homes* court applies in this case. Pacific Legal Foundation is incorrect. *Castle Homes* involved the application of a local government's SEPA regulations, which, although adopted pursuant to authorization by state law, differ from a local government's SMA regulations in that they need not be reviewed and approved by the State before becoming law. As described in section II.C above and in Ecology's Response Brief in this case, the State plays a pervasive oversight role in the development and approval of master program regulations. This extensive oversight role is absent in the SEPA context, including in the context of the local traffic mitigation requirements at issue in *Castle Homes*. Indeed, SEPA emphasizes the need for local governments to develop their own regulations for conditioning or denying permits. *See, e.g.*, RCW 43.21C.060 ("Any governmental action may be conditioned or denied pursuant to this chapter: PROVIDED, that such conditions or

denials shall be based upon policies identified by the appropriate governmental authority and incorporated into regulations, plans, or codes which are formally designated by the agency ... as possible bases for the exercise of authority pursuant to this chapter.”). Nowhere does SEPA require the State to review these local regulations or approve them before they become law. Nor do local regulations implementing SEPA become state law when they go into effect.

2. *Trimen*: Subdivision Statute.

In *Trimen*, the state Supreme Court validated King County’s imposition of a park development fee in lieu of dedication of land pursuant to a King County ordinance. *Trimen*, 124 Wn.2d at 275. The Court found that the King County ordinance was authorized by the state subdivision statute, RCW 58.17.110, and did not contravene RCW 82.02.020. *Id.* at 269-70.

As in *Castle Homes*, *Trimen* involved an as-applied challenge to the application of local regulations to a specific permitting situation rather than the facial challenge in front of this court. Also as in *Castle Homes*, the local regulations at issue in *Trimen*, while authorized by state statute, did not require state review and approval before becoming law. Nothing in Chapter 58.17 RCW requires the State to review and approve local regulations governing plats, subdivisions, or dedications. While such

regulations must undergo review and approval prior to becoming law, that review and approval must be performed by other local government agencies (local health department; local planning agency; city, town or county engineer), not the State. RCW 58.17.150.

3. *Citizens' Alliance for Property Rights: Growth Management Act.*

In *Citizens' Alliance for Property Rights*, the Court of Appeals invalidated a provision of King County's critical areas regulations, adopted pursuant to the GMA, that limited the amount of property that owners of land zoned rural area residential could clear. *CAPR*, 145 Wn. App. at 668-69. The court found that the provision violated RCW 82.02.020 because it did not relate the clearing limit to the nature and extent of the proposed development on the lot. *Id.*

The *Citizens' Alliance for Property Rights* case is inapposite here. Although, as here, *Citizens' Alliance for Property Rights* involved a facial challenge to a local regulation authorized by state law, the local ordinance at issue in that case was not subject to the type of state oversight required by the SMA. The state was not required to approve the ordinance before it became law. Nor was King County acting as an agent of the State when it enacted the clearing limit.

As described in Section II.C above, the SMA requires pervasive State participation and oversight in the development of a local government's master program. Nothing in the GMA requires local critical areas regulations to undergo this type of State oversight. For example, while the GMA requires the State to develop guidelines to aid local governments in designating critical areas, the statute makes it clear that local governments are not required to follow those guidelines. RCW 36.70A.050; RCW 36.70A.170(2) ("In making the designations required by this section, counties and cities shall consider the guidelines established pursuant to RCW 36.70A.050.").

In its ruling, the *Citizens' Alliance for Property Rights* court noted that state law did not direct King County to take the particular action of adopting the clearing limits ordinance at issue in that case. *CAPR*, 145 Wn. App. at 663. Here, by contrast, state law did direct Whatcom County to take the particular actions disputed in this case by mandating that all provisions in a master program be reviewed and approved by the State, and that all provisions of a master program become state law.

E. Constitutional Nexus And Proportionality Takings Analysis Is Not Before This Court.

Pacific Legal Foundation goes to some length to discuss the nexus and proportionality analysis that forms part of the determination of

whether or not an exaction required by a local government constitutes a taking of private property for public use requiring just compensation. *See, e.g.,* PLF's Br. at 11-12.

The constitutionality of Whatcom County's master program provisions, and the accompanying nexus and proportionality takings analysis, are not before this court. The issue in front of this court is whether or not adoption of a master program is a state action not subject to RCW 82.02.020. Nowhere do Appellants claim that Whatcom County's master program violates the United States Constitution or the Washington State Constitution. A court will not consider new issues raised for the first time by amici curiae. *Gallo*, 155 Wn.2d at 495 n.12. Therefore, this court should not consider Pacific Legal Foundation's constitutional nexus and proportionality arguments.

Pacific Legal Foundation points out that state courts have found that "RCW 82.02.020 provides a statutory basis for invalidating an unlawful condition, thereby shielding local government from constitutional liability." PLF's Br. at 12. By its terms, RCW 82.02.020 does not apply to state actions. Therefore, to the extent RCW 82.02.020 protects local governments from constitutional liability, it does not protect the *state* from such liability. As the state Supreme Court noted in *Orion*, if a property owner alleges that a provision in a master program constitutes a

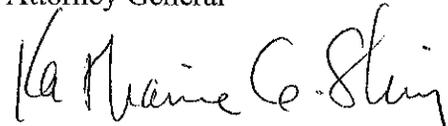
taking of private property for public use in violation of the United States Constitution or the Washington State Constitution, the property owner's remedy is to pursue a takings claim against the State. *Orion*, 109 Wn.2d at 643. RCW 82.02.020 does not provide any recourse for property owners who allege that state regulations go too far in regulating property.

III. CONCLUSION

Amicus curiae Pacific Legal Foundation raises new issues for the first time in this appeal. The court should follow the well-established rule that new issues may not be raised for the first time on appeal by amici curiae, and decline to consider these issues. To the extent the court does consider the issues, Ecology asks the court to find them without merit.

RESPECTFULLY SUBMITTED this 18th day of February, 2010.

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