Case No: 95100-4

Court of Appeal Cause No. 47641-0-II

**IN THE SUPREME COURT**
**OF THE STATE OF WASHINGTON**

OLYMPIC STEWARDSHIP FOUNDATION, et al.,

Petitioners,

v.

STATE OF WASHINGTON ENVIRONMENTAL AND LAND USE HEARINGS OFFICE, et al.,

Respondents.

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# AMICUS BRIEF OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF PETITIONS FOR REVIEW

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## ISSUES ADDRESSED BY AMICUS BRIEF

1. Whether the Court of Appeals' conclusion that the Shoreline Management Act (SMA) rendered private property rights "secondary" to the public's interest in the environment conflicts with the plain language of the Act and decisions of this Court where the Act specifically directs local governments to recognize and protect property rights and this Court has held that the SMA embodies a policy of balancing use and protection.

2. Whether the Court of Appeals' decision conflicts with *Nollan v. California Coastal Commission*, 483 U.S. 825, 107 S. Ct. 3141, 97 L. Ed. 2d 677 (1987), and *Dolan v. City of Tigard*, 512 U.S. 374, 114 S. Ct. 2309, 129 L. Ed. 2d 304 (1994), where the challenged ordinance requires that property owners dedicate a uniform, 150-foot buffer and/or a public access easement as a mandatory condition on new development, without requiring that the County demonstrate that the conditions are necessary to mitigate an impact caused by the proposed development.

## INTRODUCTION

This SMA case raises several important questions of law that will affect shoreline landowners throughout the State. Specifically, it asks whether the Court of Appeals erred when it concluded that the SMA rendered private property rights "secondary" to the "primary" goal of protecting and enhancing the shoreline environment. Decision at 10-13

(CAPR Petition at App. B). Based on that conclusion, the lower court held that property owners have no fundamental right to make an economically viable use of their land, due to the fact that shoreline property is subject to regulation. Decision at 42-43. Thus, the Court ruled that local governments do not need to show evidence that a development will result in any actual impacts (let alone, the extent of those impacts) before demanding that landowners dedicate a conservation buffer or a public access easement as a mandatory condition of permit approval. Decision at 36. The decision below warrants review by this Court because it directly conflicts with decisions of this Court and the U.S. Supreme Court and frustrates the policy and plain language of the SMA and the Guidelines.

## REASONS WHY REVIEW SHOULD BE GRANTED

## I

## THE LOWER COURTS' INTERPRETATION OF SMA POLICY CONFLICTS WITH STATUTORY LANGUAGE AND DECISIONS OF THIS COURT

### A. The Legislature Enacted the SMA as a Compromise Between Environmental and Private Property Interests

The Court of Appeals' interpretation of the SMA's policy ignored the Act's plain language which evinces an intent to coordinate development and environmental protection. RCW 90.58.020 (The purpose of the Act is "to provide for the management of the shorelines of the state by planning

for and fostering all reasonable and appropriate uses."); *see also* PLF Amicus Curiae Brief, at 3-9 (March 18, 2016) (Discussing the Act's legislative history). The SMA's policy statement explains that "coordinated planning is necessary in order to protect the public interest associated with the shorelines of the state while, at the same time, recognizing and protecting private property rights consistent with the public interest." RCW 90.58.020. Accordingly, this Court has repeatedly interpreted the SMA as establishing a policy of "balancing use and protection," compromising between the interests of government, environmentalists, business, and property owners.[1] *See Futurewise v. W. Washington Growth Mgmt. Hearings Bd.*, 164 Wn.2d 242, 244, 189 P.3d 161 (2008); *Nisqually Delta Ass'n v. City of DuPont*, 103 Wn.2d 720, 726, 696 P.2d 1222 (1985).

The SMA did not establish an environment-first policy. Indeed, when given that option, Washington voters soundly rejected an alternative shoreline management proposal that would have prioritized environmental

[1] *See also* R.L. Bish, *Governing Puget Sound* (Puget Sound Books 1982); Geoffrey Crooks, *The Washington Shoreline Management Act of 1971*, 49 Wash. L. Rev. 423, 423-24 (1974).

protection by creating a "public[] right to an unpolluted and tranquil environment."[2]

There is more. Consistent with the Act's policy of coordinated development, the SMA Guidelines adopted the phrase, "no net loss of shoreline ecological functions," as a guiding principle when considering whether or not to approve local government shoreline regulations. WAC 173-26-186. The Guidelines explain that "[t]he concept of 'net' recognizes that any development has potential for actual, short-term or long-term impacts" and that mitigation can "assure that the end result will not diminish the shoreline resources and values as they currently exist." WAC 173-26-201(2)(c). Importantly, the Guidelines state that "regulations and mitigation standards" be designed "in a manner consistent with all relevant constitutional and other legal limitations on the regulation of private property." WAC 173-26-186(8)(b)(i); *see also Orion Corp. v. State*, 109 Wn.2d 621, 659, 747 P.2d 1062 (1987) (A shoreline property owner has a right "to make a profitable use of its land;" thus, development restrictions adopted under the SMA must comply with the Takings and Due Process Clauses of the Washington and U.S. Constitutions). Clearly, the Legislature

[2] James C. Barron, *Shoreline Management – What are the Choices?* Wash. State Univ., Ext. Mimeograph 3524, p.2-3, 7 (Dec. 1971).

and people of Washington intended that the SMA would recognize and protect property rights—not extinguish them.

### B. The Court of Appeals' Decision Frustrates the Purpose of the SMA and Undermines the Guidelines

The Court's interpretation of SMA policy substantially impacted its analysis below. Most notably, the Court upheld the Growth Board's conclusion that the SMA and the Guidelines do not require that local governments develop an accurate scientific baseline before imposing buffers and other restrictions on shoreline properties. Decision at 17-23. The Court upheld the Board's conclusion that local governments are not required to show that new land use restrictions are necessary or effective. Decision at 21-22. The Court also upheld the SMP despite the fact that the record contained no evidence that the County engaged in a reasoned analysis of the contrary scientific evidence provided during the legislative process. Decision at 17-23.

Those conclusions directly conflict with the basic requirement that the local government develop a scientific record that identifies the ecological functions actually present on the shoreline, from which baseline it can determine, in a transparent and consistent manner, the extent of mitigation that may be required. WAC 173-26-201(3)(d)(i)(E); *see also* WAC 173-26-201(3)(d). Indeed, the Guidelines demand that the

government engage in a "reasoned, objective evaluation of the relative merits of the conflicting data,"[3] to ensure that its shoreline regulations will "not result in required mitigation in excess of that necessary to assure that development will result in no net loss of shoreline ecological functions and not have a significant adverse impact on other shoreline functions fostered by the policy of the act." WAC 173-26-201(2)(a), .201(2)(e)(ii)(A).

Without that required baseline analysis, the government cannot determine whether a proposed development will or will not result in a net loss of ecological functions. *See Stacey E. Fawell, Implementing No Net Loss for Washington State Shoreline Management*, at 64-65, 69, 75 (University of Wash. School of Maritime Affairs, 2004). And when the existing conditions (whether pristine or already degraded) remain unknown, a local government can only protect against harm by imposing buffers and other mitigation in excess of what is actually required, which is contrary to the Act's plain command. *See, e.g.*, *Swinomish*, 161 Wn.2d at 431 (A "requirement to protect does not impose a corresponding requirement to . . . replant or to allow the natural recovery of what was long ago plucked up.").

[3] This analysis must be in the record because the "critical review" standard does not allow reviewing courts to rely on government assurances that the appropriate analysis occurred. *Swinomish Indian Tribal Cmty. v. W. Washington Growth Mgmt. Hearings Bd.*, 161 Wn.2d 415, 435 n.8, 166 P.3d 1198 (2007).

### C. There Is Significant Confusion In the Lower Courts Regarding the SMA's Statement of Policy

Review by this Court is additionally warranted because there is significant confusion among the lower courts over whether the SMA is intended to "balanc[e] use and protection" or elevate the environment above property rights. Indeed, two other decisions from Division II of the Court of Appeals have opined that property interests should be treated as "secondary" to the Act's preservation goals. *Samson v. City of Bainbridge Island*, 149 Wn. App. 33, 49, 202 P.3d 334 (2009); *Lund v. Dep't of Ecology*, 93 Wn. App. 329, 336-37, 969 P.2d 1072 (1998). In *Samson*, the court narrowly construed the SMA to only allow development if it is specifically enumerated as a priority use of the shoreline. 149 Wn. App. at 50-51. Similarly, in *Lund*, the court rejected the landowner's argument that the Act's prioritization of single-family residential use should be broadly construed to include overwater construction. 93 Wn. App. at 336-37. In the decisions below, the Court and Growth Board extended *Samson* and *Lund* to support the conclusion that property rights are "secondary" to the environment in every application.

## II

## AN SMP MUST COMPLY WITH THE DOCTRINE OF UNCONSTITUTIONAL CONDITIONS

The lower court's interpretation of the SMA and Guidelines warrants review because it violates fundamental principles of takings law, including the doctrine of unconstitutional conditions as set out by *Nollan* and *Dolan*. Indeed, the very proposition that property rights are "secondary" to the public's interest in the environment has been flatly refuted by this Court and the U.S. Supreme Court. *See*, *e.g.*, *Orion*, 109 Wn.2d at 659; *Dolan*, 512 U.S. at 392 (Property rights are not "poor relations" of other rights.).

The fact that the SMP's generic 150-foot buffers are intended to protect environmentally sensitive areas does not mean that the Constitution's requirements are automatically satisfied. To the contrary, one of the most basic lessons of Takings Clause jurisprudence is that public need, without more, is insufficient to justify a regulation that appropriates property for a public use. *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 416, 43 S. Ct. 158, 67 L. Ed. 322 (1922) ("[A] strong public desire to improve the public condition is not enough to warrant achieving that desire by a shorter cut than the constitutional way of paying for the change."). Indeed, all three of the U.S. Supreme Court's exactions cases invalidated development conditions intended to address alleged public needs. In *Nollan*,

the California Coastal Commission determined that the public needed access to the beach. *Nollan*, 483 U.S. at 828-29. In *Dolan*, the City of Tigard determined that the public needed storm water buffers on area streams and for additional transportation infrastructure. *Dolan*, 512 U.S. at 378. And in *Koontz*, the Florida legislature determined that developers must provide mitigation in excess of any impacts to designated wetlands. *Koontz v. St. Johns River Water Mgmt. Dist.*, __ U.S. __, 133 S. Ct. 2586, 2592, 186 L. Ed. 2d 697 (2013). None of those cases turned on the legitimacy of the government's need for the land.

Instead, the government's ability to condition development permits is limited by the nexus and rough proportionality tests of *Nollan* and *Dolan*. Together, those tests hold that the government cannot condition approval of a land-use permit on a requirement that the owner dedicate private property to the public, unless the government can show that the dedication is necessary to mitigate impacts caused by the proposed development. *Koontz*, 133 S. Ct. at 2594-95. In other words, the constitution—like the SMA Guidelines—requires that the government establish an accurate baseline from which it can measure development impacts and determine a proportionate measure of mitigation. That burden cannot be satisfied by reference to general area studies, nor can the burden be shifted onto landowners. *Dolan*, 512 U.S. at 391. The lower court's decision to affirm

the SMP without holding the County to the baseline requirement set out in the Guidelines violates this constitutional principle and warrants review.

## CONCLUSION

The Court of Appeals' conclusion that the SMA rendered property rights "secondary" to the public's "primary" interest in the environment undermines the Act's policy of coordinating use and development and is harmful to the State's shoreline property owners. This Court's review is both warranted and necessary to ensure that the SMA remains an effective and lawful regulation of property.

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Respectfully submitted,

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