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No. 63646-4-I

IN THE COURT OF APPEALS FOR
THE STATE OF WASHINGTON
DIVISION I

CITIZENS FOR RATIONAL SHORELINE PLANNING
and RONALD T. JEPSON,

Appellants,

v.

WHATCOM COUNTY and
WASHINGTON STATE DEPARTMENT OF ECOLOGY,

Respondents.

On Appeal from the Superior Court of the
State of Washington for Skagit County

BRIEF AMICUS CURIAE OF
PACIFIC LEGAL FOUNDATION
IN SUPPORT OF APPELLANTS

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INTRODUCTION

Pacific Legal Foundation respectfully submits this amicus brief in support of Appellants Citizens For Rational Shoreline Planning and Ronald T. Jepson (Citizens). This appeal seeks reversal of a trial court order concluding that a local government, applying provisions of state law, is not subject to the nexus and proportionality limitations of RCW 82.02.020. CP 165-66; CP 184. The trial court's ruling is inconsistent with the plain language of RCW 82.02.020 and nearly two decades of appellate and Supreme Court decisions applying RCW 82.02.020 to local government actions regardless of whether the government was acting pursuant to a local ordinance or a state statute. This Court should reverse the trial court's order dismissing Citizens' complaint and remand the matter for further proceedings on the merits.

ISSUE ADDRESSED BY AMICUS

1. Whether a local government's administration of its shoreline master program is subject to RCW 82.02.020?

ARGUMENT

Citizens' complaint alleged that, in any application, the County Shoreline Master Program's (SMP) bulk area and shoreline setback provisions (which incorporate the County's critical areas ordinance (CAO)

by reference) violate the nexus and rough proportionality requirements of RCW 82.02.020. CP 7-9. It is undisputed that Whatcom County's CAO constitutes a local land use regulation that is subject to RCW 82.02.020. *See Citizens' Alliance for Property Rights v. Sims*, 145 Wn. App. 649, 663 (2008). The present controversy arises because RCW 82.02.020 only applies to local government actions; the statute does not limit the State's authority to impose conditions on development.[1] *R/L Assocs., Inc. v. City of Seattle*, 113 Wn.2d 402, 407 n.2 (1989). Ecology argues that a local government acting under state authority, such as the Shoreline Management Act (SMA), is exempt from RCW 82.02.020. But this argument is neither supported by the plain language of the statute nor well-established case law.

The question whether RCW 82.02.020 applies does not turn on the source of a local government's authority. If that were the case, the statute would be rendered superfluous because all local land use authority is ultimately delegated by the state. RCW 82.02.020 applies when local government imposes a condition on development, notwithstanding the origin

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[1] A state action that imposes an unlawful condition on development remains subject to the nexus and rough proportionality limitations, but any claims must be brought under the takings clauses of the State and Federal constitutions. *Honesty in Envtl. Analysis & Legislation v. Cent. Puget Sound Growth Mgmt. Hearings Bd.*, 96 Wn. App. 522, 533-34 (1999)

of its authority to act. Because a local government's administration of its SMP is a local act, Citizens' complaint properly alleged a cause of action under RCW 82.02.020.

I

WHATCOM COUNTY IS NOT A STATE AGENT WHEN IT ADMINISTRATES ITS SHORELINE REGULATIONS

Relying on *Orion Corp. v. State*, 109 Wn.2d 621, 643-44 (1987), Ecology contends that because Whatcom County is acting pursuant to a state directive (the SMA) when it administrates its SMP, the County becomes a state agent and is not subject to RCW 82.02.020. In *Orion*, a property owner purchased thousands of acres of tidelands on which it planned to develop a residential, Venetian-style community. *Id.* at 626-29. But while the property owner developed plans, Skagit County adopted an SMP that restricted the use of tideland property so severely as to prohibit the planned development. *Id.* at 629. The land owner brought an inverse condemnation claim against both the County and State, alleging that the County's adoption of its SMP constituted a taking. *Id.* at 643. The Court noted that Ecology's guidelines required the County to adopt regulations preserving tidelands in their natural state. *Id.* (citing former WAC 173-16-040(5); WAC 173-16-050(5)). The

Court concluded that because the County adopted the prohibition against development in tidelands "at the instance of and, in some material degree, under the direction and control of the State, an agency relationship developed between the parties." *Id.* at 644. The Court then concluded that the State/principal must take full responsibility for actions taken by the County/agent acting within its authority, and dismissed the County from the lawsuit. *Id.* No such agency relationship arose in this case.

Citizens' complaint alleged that, in any application, Whatcom County's administration of the bulk area and shoreline setback provisions of its SMP would violate the nexus and rough proportionality limitations of RCW 82.02.020. CP 7-9. This allegation challenges a purely local action taken pursuant to the County's exclusive authority. *See* RCW 90.58.140(3) ("The administration of the [permit system] shall be performed exclusively by the local government."); *Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 812 (1992) (Local government has jurisdiction to administer its SMP when reviewing permit applications.); *see also Biggers v. City of Bainbridge Island*, 162 Wn.2d 683, 713 (2007) (Fairhurst, J., dissenting, joined by three other justices) (In enacting the SMA, the Legislature "expressly delegated exclusive authority to local governments to administer

the [shoreline] permit system."); *Id.* at 704-05 (Chambers, J., concurring in result, the state has "chosen to share" authority over the shorelines with local governments).[2]

Moreover, the challenged setback provisions are the product of the local GMA update process because they incorporate the buffer standards from the County's CAO (imposing setbacks "Per Whatcom County Critical Areas Ordinance, WCC 16.16 Buffers") as conditions on any potential development of shoreline property. CP 8; WCC 23.90.13.C (Table); WCC 16.16.710; WCC 16.16.740. The shoreline setbacks apply in a pre-set manner "depending upon the critical area classification contained in the County's Critical Areas Ordinance." CP 13, 15 (Answer at 3, 5). The only reason these development restrictions are administrated under the SMP is because the County incorporated its CAO into its SMP to comply with recent amendments to the SMA and GMA:[3]

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[2] *W.R. Grace & Co.-Conn. v. State Dep't of Revenue*, 137 Wn.2d 580, 593-94 (1999) (Under the principles of *stare decisis*, a decision that garners the support of five Justices constitutes controlling authority.).

[3] In 2007, the County adopted an updated CAO where it designated all shorelines as critical areas for fish and wildlife habitat, and required shoreline property owners to set aside up to 150 feet of their property as a buffer in exchange for permit to develop shoreline areas. WCC 16.16.710; WCC 16.16.740. But in 2008, our Supreme Court reinstated a Growth Board

> The Whatcom County Critical Areas Ordinance, WCC 16.16 (Ordinance No. 2005-00068, dated Sept 30, 2005, and as amended on February 27, 2007) is hereby adopted in whole as a part of this Program, except that the permit, non-conforming use, appeal and enforcement provisions of the Critical Areas Ordinance (WCC 16.16.270-285) shall not apply within shoreline jurisdiction.

WCC 23.10.06(A).

In a separate Growth Management Hearings Board proceeding, the Board confirmed that Ecology did not review Whatcom County's critical area designations when it reviewed the proposed SMP: "There is no evidence that the County sent Ordinance 2005-068 [the CAO] to Ecology for its review. This reinforces the conclusion that Ecology did not review the shoreline designations[.]" *Citizens For Rational Shoreline Planning v. Whatcom County*, WWGMHB No. 08-2-0031, 2009 WL 1420895, at *9 (Apr. 20, 2009). According to the SMA and Ecology's guidelines, other laws referenced in a proposed SMP will only become part of the final SMP if the

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decision concluding that, after the Legislature's adoption of Engrossed Substitute H.B. 1933, 58th Leg., Reg. Sess. § 1(1) (Wash. 2003), a critical area ordinance that applies within the shoreline jurisdiction "must meet the requirements for a segment of a master program relating to critical areas in the shorelines . . . [and] must be submitted to Ecology for review and approval." *Evergreen Islands v. City of Anacortes*, WWGMHB No. 05-2-0016, at 29 (FDO Dec. 27, 2005), *affirmed and reinstated by Futurewise v. W. Wash. Growth Mgmt. Hearings Bd.*, 164 Wn.2d 242 (2008).

specifically incorporated provisions are actually reviewed and approved by Ecology.[4] RCW 90.58.090(1); WAC 173-26-191(2)(b); *McQuarrie v. City of Seattle*, Shoreline Hearings Board No. 08-033, 2009 WL 1169254, at *8 (Apr. 27, 2009). In circumstances where a SMP makes reference to another law that was not actually reviewed by Ecology, the SMP will be interpreted to require "simultaneous governance of one project by several bodies of law." *Schwickerath v. City of Westport*, Shoreline Hearings Board No. 05-023, 2006 WL 77735, at *3 (Jan. 5, 2006). The Growth Board's unappealed finding reinforces the fact that the County's administration of the shoreline setback provisions of its SMP constitutes a local decision subject to RCW 82.02.020. *Citizens' Alliance*, 145 Wn. App. at 663.

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[4] Ecology's guidelines require as follows: "In the approval process the department will review the referenced regulations as part of the master program. A copy of the referenced regulations shall be submitted to the department with the proposed master program amendment." WAC 173-26-191(2)(b); *see also Faben Point Neighbors v. City of Mercer Island*, Shoreline Hearings Board No. 98-63, 1999 WL 394737, at *7 (May 5, 1999) (Ecology's duty to review and approve provisions incorporated by reference into an SMP update is "a duty to approve knowingly.").

II

A LOCAL GOVERNMENT'S ACTION IS NOT EXEMPT FROM THE REQUIREMENTS OF RCW 82.02.020 SIMPLY BECAUSE IT IS MANDATED BY THE STATE

A. The Legislature Amended RCW 82.02.020 To Stop Local Government's Abuse of Its Authority To Impose Conditions on Development

Ecology's characterization of Whatcom County's SMP as a "state law" is irrelevant to the question whether the County's administration of that law is subject to RCW 82.02.020. Section 82.02.020 prohibits local government from imposing conditions on development unless it can demonstrate that the condition is reasonably necessary to mitigate a direct impact of the proposed development:

> Except as provided in . . . RCW 82.02.050 through 82.02.090, no county, city, town, or other municipal corporation shall impose any tax, fee, or charge, either direct or indirect, on the construction or reconstruction of residential buildings . . . or on the development, subdivision, classification, or reclassification of land. However, this section does not preclude dedications of land or easements within the proposed development or plat which the county, city, town, or other municipal corporation can demonstrate are reasonably necessary as a direct result of the proposed development or plat to which the dedication of land or easement is to apply.

RCW 82.02.020. Nothing in this statute exempts local government actions that are taken under the authority of a state statute. To the contrary, the

legislative history shows an express intent to limit *all* local government actions imposing conditions on development, whether taken under local police powers or under the authority of a state statute.

Although originally adopted as a tax preemption statute, the Legislature amended RCW 82.02.020 to prohibit local governments' abuse of their authority to impose land dedications.[5] In 1969, the Legislature enacted RCW 58.17.110, which authorized local government to condition plat or subdivision approval on a mandatory dedication of land without statutory limitation. RCW 58.17.110; Martha S. Lester, Comment, *Subdivision Exactions in Washington: The Controversy Over Imposing Fees on Developers*, 59 Wash. L. Rev. 289, 295 (1984) (favorably cited by *R/L Assocs., Inc. v. City of Seattle*, 113 Wn.2d at 407). This new grant of authority resulted in Snohomish County and San Juan County adopting ordinances that imposed mandatory fees in lieu of dedications on any new

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[5] As originally adopted in 1935, RCW 82.02.020 provided for state preemption in the field of imposing taxes on the sale or use of personal property. Laws of 1935, ch. 180 § 29, *recodified* in Laws of 1961, ch. 15. In 1967, the Legislature amended the statute to allow limited exceptions under which local government could impose taxes on the sale of personal property. Laws of 1967, ch. 236 § 16. RCW 82.02.020 remained largely unchanged for the following 15 years. The Legislature adopted minor amendments to RCW 82.02.020 in 1970 and again in 1979.

residential subdivision or housing proposal as part of a strategy to raise public funds. *Hillis Homes, Inc. v. Snohomish County*, 97 Wn.2d 804, 805-06 (1982), *superceded by statute R/L Assocs.*, 113 Wn.2d at 408-09; Lester, 59 Wash. L. Rev. at 289-90. Property owners challenged the mandatory fees in a consolidated appeal to the State Supreme Court.[6] *Hillis Homes*, 97 Wn.2d 804.

While *Hillis Homes* was pending, the Legislature amended RCW 82.02.020 in 1982 to prohibit local governments from imposing any tax, fee, or charge, whether direct or indirect, on new development.[7] The Legislature also limited local governments' authority to require dedications pursuant to RCW 58.17.110 to only allow those that the city or county can demonstrate are "reasonably necessary as a direct result of the proposed development[.]"[8]

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[6] In *Hillis Homes*, our Supreme Court concluded that the fees constituted taxes and because the broad delegation of police powers to local government did not include the power to tax, the fees were unauthorized and illegal. *Hillis Homes*, 97 Wn.2d at 810.

[7] Laws of 1982, 1st Ex. Sess., ch. 49 § 5.

[8] Laws of 1982, 1st Ex. Sess., ch. 49 § 5.

In 1990, the Legislature amended the statute again, removing language that limited its application to dedications imposed pursuant to RCW 58.17.110.[9]

In the years following these amendments, the United States Supreme Court adopted important constitutional safeguards limiting the authority of government to impose exactions on development in *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987), and *Dolan v. City of Tigard*, 512 U.S. 374 (1994).[10] Together these decisions formulated the two-part essential nexus and rough proportionality test for use in determining whether an exaction constitutes an impermissible taking. Under these tests, the court must first determine whether there is a connection between the exaction and the impact resulting from the unregulated use of the owner's property. *Nollan*, 483 U.S. at 836-37. If the required nexus exists, the court must next decide whether the required exaction "is related both in nature and extent to the impact of the proposed development." *Dolan*, 512 U.S. at 391. An exaction that is not supported by nexus and proportionality is "not a valid

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[9] Laws of 1990, 1st Ex. Sess., ch. 17 § 42.

[10] An exaction is a requirement that a property owner provide a benefit to the government in return for receiving permission to use land. Exactions can take any form including dedications of land and cash payments. Steven A. Haskins, *Closing the Dolan Deal—Bridging the Legislative/Adjudicative Divide*, 38 Urb. Law. 487, 490-91 (2006).

regulation of land use but 'an out-and-out plan of extortion.'" *Nollan*, 483 U.S. at 837 (citations omitted).

Washington's courts recognized that the nexus and proportionality requirements set out the same test as that in RCW 82.02.020, and held that the statute incorporated the constitutional test. *See, e.g.*, *Sparks v. Douglas County*, 127 Wn.2d 901, 913 (1995) (incorporating *Nollan* essential nexus test); *Trimen Dev. Co. v. King County*, 124 Wn.2d 261, 274 (1994) (incorporating *Dolan* rough proportionality test); *Citizens' Alliance*, 145 Wn. App. at 669 (applying both tests). And as a result, our Supreme Court held that RCW 82.02.020 provides a statutory basis for invalidating an unlawful condition, thereby shielding local government from constitutional liability. *See Isla Verde Int'l Holdings, Inc. v. City of Camas*, 146 Wn.2d 740, 752-53 (2002) (reversing Court of Appeals' conclusion that the city's mandatory set aside condition was an unconstitutional taking, concluding instead the condition violated RCW 82.02.020). There is no basis in the plain language of RCW 82.02.020 to exempt local government actions taken under state law from its requirements.

B. Local Government Actions Taken under State Statutes Are Subject to RCW 82.02.020

For almost two decades, our courts have applied RCW 82.02.020 to local government actions taken under a variety of state statutes. For example, in *Castle Homes*, a developer challenged the city's decision to impose traffic mitigation impact fees authorized by the State Environmental Protection Act (SEPA), Ch. 43.21C RCW.[11] *Castle Homes & Dev., Inc. v. City of Brier*, 76 Wn. App. 95, 105 (1994). In analyzing the interplay between the different state statutes, the Court explained that SEPA provided the city with the authority to exact fees, but RCW 82.02.020 placed limits on the city's authority. *Castle Homes*, 76 Wn. App. at 106. Despite SEPA's direct grant of state authority, the city was required to demonstrate that its impact fees complied with RCW 82.02.020. *Id.* The city failed to do so, and the Court held that the SEPA conditions were invalid. *Id.*

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[11] SEPA is a state law that delegates substantive legislative and quasi-judicial authority to local government officials to implement state environmental policies. *Polygon Corp. v. City of Seattle*, 90 Wn.2d 59, 65 (1978); *W. Main Assocs. v. City of Bellevue*, 49 Wn. App. 513, 527 (1987); *see also Citizens Alliance To Protect Our Wetlands v. City of Auburn*, 126 Wn.2d 356, 367-68 (1995). In relevant part, SEPA provides that "[a]ny governmental action may be conditioned or denied pursuant to this chapter" subject to certain requirements. RCW 43.21C.060.

The State's subdivision statute similarly "*requires* local governments to insure that proposed plats make appropriate provisions for the public health, safety, and general welfare, and for such open spaces such as parks, playgrounds, and sites for schools." *Trimen Dev. Co. v. King County*, 124 Wn.2d at 269 (citing RCW 58.17.110). The statute authorizes local government to meet this State mandate by imposing conditions on development approvals. RCW 58.17.110. In *Trimen*, a property owner challenged a King County ordinance that required developers to either dedicate park land or pay fees in-lieu of such dedication as a condition on development. 124 Wn.2d at 264-65, 268-69. Our Supreme Court acknowledged that King County was acting under a state mandate, but nonetheless analyzed and upheld the County's ordinance under RCW 82.02.020. *Id.* at 270-71, 273-75; *see also Isla Verde*, 146 Wn.2d at 764-65 (Regardless of the fact that the city was acting under state authority, the city was still required to comply with the nexus and proportionality requirements of RCW 82.02.020.).

The most recent case to address this issue is *Citizens' Alliance*. There, county residents challenged a provision from King County's critical areas ordinance that imposed a mandatory 35% to 50% clearing restriction on

all rural residential lots as violating RCW 82.02.020. As one of its defenses, the county argued that its critical areas ordinance was not subject to RCW 82.02.020, because the critical area regulations were enacted pursuant to a state GMA requirement. *Id.* at 663. The county argued that RCW 82.02.020 should apply to only those circumstances where a local government acts of its own initiative, without clear and direct state authority. *Citizens' Alliance*, 145 Wn. App. at 663. This Court rejected the county's argument, concluding that there is no authority "for the proposition that a local jurisdiction is bound by [RCW 82.02.020] *only* when adopting an ordinance on its own initiative." *Id.*

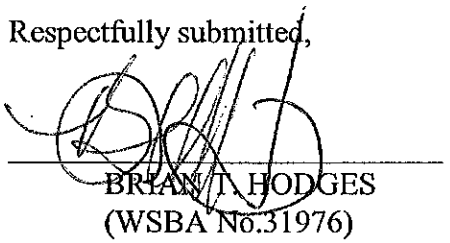
There is no authority for Ecology's contention that a local government's administration of its SMP is exempt from the requirements of RCW 82.02.020.

CONCLUSION

For the foregoing reasons, amicus Pacific Legal Foundation respectfully requests that this Court reverse the trial court's decision dismissing Citizens' complaint.

DATED: January 29 2010.

Respectfully submitted,



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DECLARATION OF SERVICE BY MAIL

I, Brian T. Hodges, declare as follows:

I am a resident of the State of Washington, residing or employed in Bellevue, Washington. I am over the age of 18 years and am not a party to the above-entitled action. My business address is 10940 NE 33rd Place, Suite 210, Bellevue, Washington 98004. On January 29, 2010, true copies of BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF APPELLANTS were placed in envelopes addressed to:

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I declare under penalty of perjury that the foregoing is true and correct and that this declaration was executed this 29th day of January, 2010, at Bellevue, Washington.

BRIAN T. HODGES