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IN THE SUPREME COURT FOR  
THE STATE OF WASHINGTON

CITIZENS FOR RATIONAL SHORELINE PLANNING and  
RONALD T. JEPSON,

Appellants,

v.

WHATCOM COUNTY and  
WASHINGTON STATE DEPARTMENT OF ECOLOGY,

Respondents.

On Petition for Review from Division I of the  
Washington State Court of Appeals

BRIEF AMICUS CURIAE OF  
PACIFIC LEGAL FOUNDATION  
IN SUPPORT OF PETITION FOR REVIEW

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## INTRODUCTION

The Court of Appeals' opinion in *Citizens for Rational Shoreline Planning v. Whatcom County (CRSP)* raises two significant issues of public interest. First, the conclusion that all local shoreline master programs (SMP) constitute state law ignores recent amendments to the Shoreline Management Act (SMA) and Growth Management Act (GMA). 155 Wn. App. 937, 944-47, 950 (2010). In 1995, the Legislature amended the SMA and GMA, stating that local SMPs "shall be considered part of the county or city's development regulations." See Laws of 1995, ch. 347 § 104 (amending RCW 36.70A.480(1)). The Court of Appeals, however, relied on case law interpreting pre-1995 versions of the SMA to conclude that SMPs constitute state regulations *as a matter of law*. *CRSP*, 155 Wn. App. at 944-45.

The second significant issue of public policy is raised by the Court of Appeals' holding that, by incorporating its critical areas ordinance (CAO) into its SMP, Whatcom County transformed its local critical area regulations into state laws, which are not subject to RCW 82.02.020. *CRSP*, 155 Wn. App. at 943. RCW 82.02.020 is intended to protect property owners from local governments' imposition of unlawful conditions on development applications. Until *CRSP*, our courts applied RCW 82.02.020 to local

government actions taken under a variety of state statutes. The Court of Appeals' decision markedly departs from the Legislature's policy decision to integrate local SMPs into a local government's development regulations and the purpose of RCW 82.02.020. If not reversed, the Court of Appeals' decision will deprive the State's shoreline property owners of the ability to hold their local government accountable for imposing unlawful conditions on shoreline permits.

Amicus curiae Pacific Legal Foundation respectfully submits this brief in support of Petitioners Citizens for Rational Shoreline Planning and Ronald T. Jepson (Citizens) and requests that this Court grant Citizens' petition for review.

#### **ISSUE ADDRESSED BY AMICUS**

1. Does the Court of Appeals' conclusion that a local government's shoreline critical area regulations constitute state law raise a significant issue of public interest under RAP 13.4(b)?
2. Does the Court of Appeals' conclusion that a local government's imposition of a mandatory condition on shoreline development is not subject to the nexus and proportionality requirements of RCW 82.02.020 raise a significant issue of public interest under RAP 13.4(b)?

## ARGUMENT

### I

#### A LOCAL GOVERNMENT'S SMP CONSTITUTES PART OF THAT LOCAL GOVERNMENT'S DEVELOPMENT REGULATIONS

The Court of Appeals' conclusion that Whatcom County's SMP constituted state law is contrary to the State's modern policy regarding the regulation of shorelines. As originally adopted, the SMA created a regulatory scheme that was separate and distinct from the later-adopted GMA. *See* former Ch. 90.58 RCW (1971); former Ch. 36.70A RCW (1990). The earliest versions of the SMA required the Washington State Department of Ecology to engage in formal rulemaking to adopt the local SMPs as part of a "state master program" published in the Washington Administrative Code. *CRSP*, 155 Wn. App. at 945. But in 1995, our Legislature amended the SMA and GMA as part of an effort to better integrate the State's environmental statutes. *Id.* This amendment relieved Ecology of the formal rulemaking requirement, *id.* (citing Laws of 1995, ch. 347 § 311), authorizing Ecology to administratively approve a local government's SMP which "shall be considered part of the county or city's development regulations." Laws of 1995, ch. 347 § 104 (creating new chapter, RCW 36.70A.480(1)). In 2010,

the Legislature reiterated that “RCW 36.70A.480 governs the relationship between shoreline master programs and development regulations to protect critical areas that are adopted under RCW 36.70A.” Laws of 2010, ch.107 § 4 (creating new section to RCW 90.58).

The Court of Appeals, however, refused to give any effect to these amendments, concluding that there was no indication the Legislature intended the amendments to alter the character of local SMPs as state law. *CRSP*, 155 Wn. App. at 945. Relying on three cases decided under pre-1995 versions of the SMA, the Court of Appeals held that, as a matter of law, local SMPs constitute state regulations. *CRSP*, 155 Wn. App. at 944-45.<sup>1</sup> The Court of Appeals’ failure to give effect to the Legislature’s amendments to the SMA and GMA warrants review by this Court.

Indeed, as a practical matter, review is necessary because the Court of Appeals’ decision comes at a time when all 178 cities and counties in the State are required to update their SMPs within the next four years (RCW 90.58.080). Local governments and their citizens need guidance from this Court on how to plan for the regulation of critical areas within the shorelines. The leading cases interpreting the SMA—and relied on by the Court of

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<sup>1</sup> (Citing *Buechel v. Dep’t of Ecology*, 125 Wn.2d 196, 203-04 (1994)); *Orion Corp. v. State*, 109 Wn.2d 621, 643-44 (1987); *Harvey v. Bd. of County Comm’rs*, 90 Wn.2d 473 (1978).

Appeals—are based on versions of the SMA that are over 15 years old and are, therefore, of limited applicability. *See, e.g., Beuchel*, 125 Wn.2d at 203-04; *Orion*, 109 Wn.2d at 643-44; *Harvey*, 90 Wn.2d 473.

## II

### **RCW 82.02.020 REFLECTS A STRONG PUBLIC POLICY TO LIMIT LOCAL GOVERNMENTS' AUTHORITY TO IMPOSE CONDITIONS ON DEVELOPMENT**

The Court of Appeals' conclusion that a development condition imposed under an SMP is not subject to the nexus and rough proportionality requirements of RCW 82.02.020 also raises a significant issue of public interest. *CRSP*, 155 Wn. App. at 943. As set out in Citizens' complaint, the challenged shoreline setback provisions of the County SMP are actually critical areas provisions that the County incorporated by reference in its SMP.<sup>2</sup> CP 8; WCC 23.90.13.C (Table) (imposing setbacks "Per Whatcom County Critical Areas Ordinance, WCC 16.16 Buffers"). Both Ecology and Whatcom County admitted in their Answers that, although administered through the County's SMP, the shoreline setback buffers automatically apply

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<sup>2</sup> *See* WCC 23.10.06(A) ("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.").

to shoreline properties “depending upon the critical area classification contained in the County’s Critical Areas Ordinance.” CP 15, 23-24. And any variance of the buffer standards would require the County to apply its CAO directly to the shoreline application.<sup>3</sup> CP 23-24 (citing WCC 16.16.740). Clearly, application of the incorporated CAO provisions will require that Whatcom County make decisions based on its local development regulations.

The legislative history of RCW 82.02.020 shows an express intent to limit *all* local government actions imposing conditions on development, regardless of the source of authority—state or local—under which the conditions are imposed.<sup>4</sup> See 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 402, 407 (1989)).

The modern version of RCW 82.02.020 originated as a legislative response to *Hillis Homes, Inc. v. Snohomish County*, 97 Wn.2d 804 (1982).

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<sup>3</sup> In a separate appeal challenging the SMP, the Growth Board confirmed that Ecology *did not* review Whatcom County’s CAO when it reviewed the County’s 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 GMHB LEXIS 32, at \*24-\*25 (Apr. 20, 2009).

<sup>4</sup> The amicus brief that PLF filed with the Court of Appeals in this case provides a detailed legislative history for RCW 82.02.020. See PLF Amicus Br. at 8-12.

Snohomish and San Juan Counties, acting pursuant to RCW 58.17.110 (authorizing local governments to condition plat or subdivision approval on a mandatory dedication of land), adopted ordinances imposing mandatory fees in lieu of dedications on any new residential subdivision or housing proposal as part of a strategy to raise public funds. *Hillis Homes*, 97 Wn.2d 805-06. Several property owners challenged the mandatory fees as violating RCW 82.02.02. *Id.* Although the Supreme Court invalidated the ordinances on other grounds, it found that the ordinances escaped the narrow language of former RCW 82.02.020. *Hillis Homes*, 97 Wn.2d at 804, 810.

While *Hillis Homes* was pending, however, the Legislature amended RCW 82.02.020 to assure that development conditions like those at issue in *Hillis Homes* fell within the purview of the statute. The Legislature broadened the scope of the statute to prohibit local governments from imposing any tax, fee, or charge, whether direct or indirect, on new development. Laws of 1982, 1st Ex. Sess., ch. 49 § 5. The Legislature also limited local governments' authority to require dedications pursuant to RCW 58.17.110, allowing only dedications that local government can demonstrate are "reasonably necessary as a direct result of the proposed development[.]" *Id.* § 5. In 1990, the Legislature amended the statute again, extending its application to all development conditions by removing language that limited

its application to dedications imposed under RCW 58.17.110. Laws of 1990, 1st Ex. Sess., ch. 17 § 42.

While the interpretation of RCW 82.02.020 was evolving here in Washington, the United States Supreme Court adopted important constitutional safeguards limiting government's ability to impose exactions on development.<sup>5</sup> In *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987), and *Dolan v. City of Tigard*, 512 U.S. 374 (1994), the Court formulated a two-part essential nexus and rough proportionality test for determining whether an exaction constitutes an impermissible taking. *Nollan*, 483 U.S. at 836-37; *Dolan*, 512 U.S. at 391. Washington courts recognized that the nexus and proportionality requirements set out the same test as 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 for Property Rights v. Sims*, 145 Wn. App. 649, 669 (2008) (applying both tests). For almost two decades, our

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<sup>5</sup> 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).

courts have applied RCW 82.02.020 to local government actions taken under a variety of state statutes, holding that, while various state statutes may authorize local actions, RCW 82.02.020 places limitations on how far a local government can go when exercising its authority.<sup>6</sup> There is no “authority for the proposition that a local jurisdiction is bound by the statute *only* when adopting an ordinance on its own initiative.” *Citizens’ Alliance*, 145 Wn. App. at 663; *Isla Verde Int’l Holdings, Inc. v. City of Camas*, 146 Wn.2d 740, 761 (2002).

The Court of Appeals’ categorical characterization of a local SMP as state law not subject to RCW 82.02.020 is legally unsupportable and creates bad policy. It is undisputed that the County’s incorporated CAO provision must satisfy the nexus and rough proportionality requirements of RCW 82.02.020 if applied to property outside the shorelines. *See Citizens’ Alliance for Property Rights*, 145 Wn. App. at 663. Why, then, should landowners not

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<sup>6</sup> *See, e.g., 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.); *Trlmen Dev. Co. v. King County*, 124 Wn.2d at 269 (applying RCW 82.02.020 to development condition adopted under RCW 58.17.110); *Citizens’ Alliance*, 145 Wn. App. at 663 (Applying RCW 82.02.020 to critical area regulation adopted under the GMA here 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.”); *Castle Homes & Dev., Inc. v. City of Brier*, 76 Wn. App. 95, 105 (1994) (applying RCW 82.02.020 to traffic mitigation impact fees authorized by the State Environmental Protection Act (SEPA), Ch. 43.21C RCW).

enjoy the same statutory protections when *the exact same development standards* are applied within the shorelines? And why should RCW 82.02.020 apply to local action taken under other state environmental statutes (such as SEPA and the GMA), but not the SMA? This Court should accept review of Citizens' petition to resolve these important issues of public policy.

### CONCLUSION

For the foregoing reasons, amicus Pacific Legal Foundation respectfully requests that this Court grant Citizens' petition for review.

DATED: August 2, 2010.

Respectfully submitted,



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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 August 2, 2010, true copies of BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF PETITION FOR REVIEW were served via e-mail and placed in envelopes addressed to:

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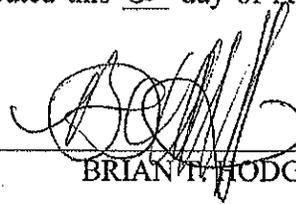
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BRIAN T. HODGES