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**SUPREME COURT OF THE STATE OF WASHINGTON**

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

Petitioners,

v.

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

Respondents.

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**RESPONDENT STATE OF WASHINGTON'S ANSWER IN  
OPPOSITION TO PETITION FOR REVIEW**

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**FILED AS  
ATTACHMENT TO EMAIL**

**ORIGINAL**

**FILED**  
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## I. INTRODUCTION

The question presented in this case is whether the state's approval of a shoreline master program under the Shoreline Management Act (SMA) is subject to review under RCW 82.02.020. By its plain terms, that statute prohibits a "county, city, town, or other municipal corporation" from imposing taxes on development. The statute does not apply to the state's approval of a shoreline master program because the state is not a "county, city, town, or other municipal corporation." The Court of Appeals correctly so held.

Petitioner Citizens For Rational Shoreline Planning (CRSP) argues that this case warrants review because it presents an issue of substantial public importance that should be decided by this Court. In fact, the issue is not of substantial public importance, and it does not need to be decided by this Court. The question was correctly answered by the Court of Appeals. CRSP does not even argue, much less demonstrate, any error by the lower court. CRSP simply makes a policy argument that this Court should accept review so as to prevent what it views as "cavalier" approaches to shoreline management. Petition for Review (Petition) at 5. However, policy questions are for the Legislature, not this Court. The Court of Appeals' decision below is plainly correct, follows the language

of the statute, and is consistent with other decisions of this Court and with other appellate decisions. Therefore, review should be denied.

## **II. STATEMENT OF THE ISSUE**

Does RCW 82.02.020 apply to the state's approval of a shoreline master program under the SMA, when that statute by its plain terms applies only to local governments?

## **III. STATEMENT OF THE CASE**

### **A. Factual Background**

Pursuant to RCW 90.58.080 and RCW 90.58.090, Whatcom County developed, with state funding, a shoreline master program for regulation of uses and developments on the shorelines of the state within its jurisdiction. CP at 67–72. As required by those statutes, Whatcom County developed the program in close consultation with the state Department of Ecology (Ecology), and it was bound by Ecology's mandatory shoreline guidelines, WAC 173–27. *See, e.g.*, CP at 69. At the conclusion of the local process, Whatcom County sent the master program to Ecology for its review and approval. CP at 3. Under the SMA, a shoreline master program must be approved by the state, and it does not take effect until such approval occurs. RCW 90.58.090(1).

Pursuant to RCW 90.58.090(2), Ecology held a public comment period and hearing on the proposed master program. Ultimately, Ecology

issued written findings and conclusions finding the master program largely consistent with the SMA and Ecology's guidelines and requiring that certain changes be made before final approval. Under RCW 90.58.090(2)(d), Ecology may require any changes to a proposed master program that it deems necessary to make the program consistent with the SMA or the guidelines. In the case of Whatcom County, Ecology required 13 pages of mandatory changes, in underline and strikeout format, and recommended several others. *See* CP at 77-90. Thereafter, Whatcom County agreed to the changes as provided for in RCW 90.58.090(2)(e)(i), and Ecology's receipt of the County's agreement "constitute[d] final action by the department approving [the master program]." CP at 76.

Following approval, the Whatcom County shoreline master program, like all other master programs, became a part of the "state master program"<sup>1</sup> that "constitute [the] use regulations for the various shorelines of the state." *Samuel's Furniture, Inc. v. Dep't of Ecology*, 147 Wn.2d 440, 448, 54 P.3d 1194 (2002), (quoting RCW 90.58.100(1)).

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<sup>1</sup> The SMA defines the "state master program" as "the cumulative total of all master programs approved or adopted by the department of ecology." RCW 90.58.030(3)(c).

**B. Procedural History**

CRSP filed suit in Skagit County Superior Court in 2008, alleging that the master program violated RCW 82.02.020. CP at 1–10. That statute provides generally that “the state preempts the field” of certain kinds of taxation and it prohibits any “county, city, town, or other municipal corporation” from imposing taxes on new development. *See generally, Isla Verde Intern. Holdings, Inc. v. City of Camas*, 146 Wn.2d 740, 49 P.3d 867 (2002). The statute has never been applied to the state and by its plain terms applies only to local governments. *Humbert/Birch Creek Constr. v. Walla Walla County*, 145 Wn. App. 185, 193, 185 P.3d 660 (2008).

The State moved for dismissal of CRSP’s RCW 82.02.020 claims on the grounds that master programs are state—not just local—regulations and, as a result, are not subject to RCW 82.02.020. CP at 113–22. Following oral argument, the superior court granted the State’s motion and dismissed CRSP’s RCW 82.02.020 claims pursuant to CR 12(b)(6). CP at 165–66.

CRSP moved for reconsideration, asserting that the court failed to adequately consider a 1995 amendment to the Growth Management Act. CP at 167–71. The court denied the motion, noting that CRSP’s arguments were “overshadowed by the pervasive level of state

involvement in and control over the entire [master program] process.”  
CP at 184.

**C. The Court Of Appeals’ Decision**

CRSP appealed the superior court decision to the Court of Appeals. CRSP raised various theories on appeal; however, the primary thrust of CRSP’s argument was that the state’s role in shoreline regulation is limited and that, as a result, master programs are local enactments subject to RCW 82.02.020. The Court of Appeals rejected this argument, finding instead that the state’s pervasive and considerable involvement in the master program development process was determinative:

Although the SMA directs each local government to develop and administer its [master program], the state has an extensive, statutorily-mandated role in the development and administration of [master programs].

Most significantly, a [master program] becomes effective only upon approval by Ecology. Moreover, Ecology is to approve a [master program] only if it determines the [master program] to be consistent with both the SMA and certain guidelines developed by Ecology. In the event that a local government declines, refuses, or fails to develop an adequate [master program], Ecology is authorized to develop and impose a [master program] in the local government’s stead.

*Citizens for Rational Shoreline Planning (CRSP) v. Whatcom County*,  
155 Wn. App. 937, 230 P.3d 1074 (2010) (citations omitted).

In reaching its decision, the Court of Appeals followed this Court’s holding in *Orion Corp. v. State*, 109 Wn.2d 621, 644, 747 P.2d 1062

(1987), that local governments adopt shoreline master programs “under the direction and control of the State.” The Court of Appeals also followed this Court’s pronouncements in *Biggers v. City of Bainbridge Island*, 162 Wn.2d 683, 169 P.3d 14 (2007), where “the [C]ourt was unanimous in its agreement that the SMA continued to be properly viewed as a statutory scheme providing for coordinated authority between the state and local government, *with the state reserving ultimate control unto itself.*” *CRSP*, 230 P.3d at 1078 (emphasis added).

Finally, the Court of Appeals distinguished its prior holding in *Citizens’ Alliance for Property Rights v. Sims*, 145 Wn. App. 649, 187 P.3d 786 (2008), contrasting local government actions pursuant to the Growth Management Act with the “distinct . . . circumstances [in this case] where the county’s adoption of its [master program] was contingent upon obtaining approval from the state.” *CRSP*, 230 P.3d at 1080.

#### IV. AUTHORITY AND ARGUMENT

##### A. **The Court Of Appeals Correctly Applied The Plain Language Of The Statute And Its Decision Is Consistent With Existing Case Law**

*CRSP* offers no analysis or argument to show that the Court of Appeals committed any legal error. RCW 82.02.020 by its own terms applies only to local governments—it does not apply to the state:

[N]o county, city, town, or other municipal corporation shall impose any tax, fee, or charge, either direct or indirect on the . . . development, subdivision, classification or reclassification of land.

The Court of Appeals simply followed this plain language and correctly held that the state is not a “county, city, town, or municipal corporation.” The Court further correctly held that master program adoption is a state action due to the state’s pervasive control over the entire process, including the state’s final approval, which is the final and critical act that makes a shoreline master program take effect. RCW 90.58.090(7) (“a master program or amendment to a master program takes effect *when and in such form as approved or adopted by [Ecology]*” (emphasis added)). Merely because the Legislature has chosen not to apply this statute to the state does not mean this case presents an issue of substantial public importance that warrants review.

The Court of Appeals cited and followed this Court’s prior decisions in *Orion* and *Biggers*. In *Orion*, the Court considered a takings claim brought by a developer against the state and Skagit County allegedly caused by the shoreline master program. The Court dismissed Skagit County based on its conclusion that the state was solely responsible for any taking, if one were proved. *Orion*, 109 Wn.2d at 644. The Court stated that the County adopted the master program “in some material

degree, under the direction and control of the State” such that “the State must take full responsibility if a taking occurred.” *Id.* Similarly, in *Biggers*, the Court considered whether the City of Bainbridge Island had authority to adopt a moratorium on certain kinds of shoreline development. The Court, in a split opinion, concluded the City did have such authority, but that the moratorium at issue was unreasonable. As the Court of Appeals correctly noted, all the *Biggers*’ opinions cited the State’s special interest and control over state shorelines, exemplified by the SMA. *CRSP*, 230 P.3d at 1078.

*CRSP* attempts to create an issue for review by citing a law review article written by Geoffrey Crooks. Petition at 8, (citing Geoffrey Crooks, *The Washington Shoreline Management Act of 1971*, 49 Wash. L. Rev. 423 (1974)). This article recounts the history of the SMA’s adoption and notes that the version of the SMA approved by voters favored more local control than the alternative version. This difference, however—between the version of the SMA approved by voters and the alternate version—is irrelevant to this case. The version of the SMA adopted by voters, and codified in RCW 90.58, is all that is relevant. The Court of Appeals correctly applied the SMA’s provisions that require state supervision, control, and approval of, local shoreline master programs. If *CRSP* means to imply that the Court of Appeals somehow applied the unapproved

alternate version of the SMA referred to in the article, its contention is without foundation.

CRSP also argues that the Court of Appeals erred because the shoreline setbacks it objects to “started and finished” as a local government decision. Petition at 3. This claim is inaccurate. The shoreline setbacks, and all other provisions of the master program, were not “finished” until they were approved by the state. The state would not have, and could not have, approved any provision of the master program unless it concluded it was consistent with the SMA and the guidelines. RCW 90.58.090(3) (“The department shall approve the segment of a master program relating to shorelines unless it determines that the submitted segments are not consistent with the policy of RCW 90.58.020 and the applicable guidelines.”). The Court of Appeals properly concluded that the state’s “pervasive” oversight and control of the process renders RCW 82.02.020 inapplicable. *CRSP*, 230 P.3d at 1080. Therefore, there is no basis for review by this Court.

**B. CRSP’s Argument In Favor Of Review Is Based On Public Policy Grounds That Are The Province Of The Legislature**

CRSP’s argument in favor of review is based not on any legal error by the Court of Appeals, but instead is based entirely on public policy. In essence, CRSP asks this Court to accept review in order to rewrite

RCW 82.02.020 so as to apply it to the state. This is not the proper function of judicial review.

To support its argument, CRSP paints a picture of unfettered shoreline regulation by “one size fits all” buffers affecting numerous property owners statewide. *See* Petition at 5. Not only is this picture irrelevant to any legal issue in this case, and not based on any evidence in the record, it is distorted and inaccurate. The Whatcom County shoreline master program allows development within the buffers it establishes, subject to some conditions. *See, e.g.*, CP at 77–78 (allowing expansion of nonconforming structures). It contains various provisions allowing property owners to seek exceptions to and reductions of the buffer requirements. *E.g.*, CP at 88–89 (allowing reduction of buffer for single family residences). Far from being an example of unreasonable regulation, the Whatcom County shoreline master program is a model of balance, allowing reasonable levels of development while preserving shoreline ecological functions. *See* CP at 152 (as of March 2009, every residential permit application under the new program had been approved). CRSP’s disagreement with the balance struck by the master program does not make RCW 82.02.020 applicable, nor does it provide a basis for review by this Court.

CRSP also implies that the Court of Appeals decision leaves property owners without any ability to challenge shoreline master programs. This implication is unfounded. The law provides for several avenues of review of shoreline master programs. These include review by the Growth Management Hearings Board or Shorelines Hearings Board under RCW 90.58.190(2)(a) or (3)(a), and review under both the state and federal constitutions. See *Orion Corp.*, 109 Wn.2d at 644 (takings); *Guilmont v. Clarke*, 121 Wn.2d 586, 608, 854 P.2d 1 (1993) (substantive due process). In addition, as CRSP itself points out, landowners may challenge shoreline permit conditions under *Nollan v. Calif. Coastal Comm'n*, 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). Petition at 9. Nothing in the Court of Appeals' decision suggests that these cases, and the tests they establish, are inapplicable in the shoreline context.

CRSP claims that a substantial public interest is implicated here because local governments may be subjected to "alternate . . . actions" (presumably regulatory takings claims) that are likely to include attorneys' fees and damages awards. Petition at 10. However, this Court has already held that local governments are not liable for takings claims arising out of master program adoption because master programs are the product of state

action. *Orion*, 109 Wn.2d at 643. Thus, CRSP's claim of increased local government costs is inaccurate. CRSP's argument fails to demonstrate a substantial issue warranting review by this Court.

Finally, CRSP claims this case presents a good case for review because it presents a purely legal issue. Petition at 11. However, not every case that presents a legal issue warrants review by this Court. CRSP must demonstrate that the issue is one of "substantial public importance that should be determined by the supreme court." RAP 13.4(b)(4). Because the issue was correctly decided by the Court of Appeals, CRSP fails to make this demonstration.

#### V. CONCLUSION

For the reasons stated above, CRSP's Petition for Review should be denied.

RESPECTFULLY SUBMITTED this 7 day of July, 2010.

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NO. 84675-8

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WHATCOM COUNTY, a municipal  
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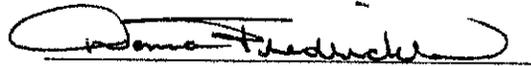
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DONNA FREDRICKS, Legal Assistant

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Dear Clerk:

Attached for filing in *Citizens for Rational Shoreline Planning, et al. v. Whatcom County, et al.*, Supreme Court Case No. 84675-8, is the State of Washington's Answer in Opposition to Petition for Review and Certificate of Service.

Thank you for your assistance.

<<State's Answer in Opposition to Petition for Review.pdf>>    <<Certificate of Service.pdf>>

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