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SUPREME COURT OF THE STATE OF WASHINGTON

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.

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

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I. INTRODUCTION

Pacific Legal Foundation (PLF) raises essentially three arguments to support its assertion that the Court of Appeals' decision below constitutes a substantial issue of public importance warranting review by this Court. PLF fails to establish a substantial issue on all counts.

PLF first argues that the Court of Appeals incorrectly relied on pre-1995 cases because 1995 amendments to the Growth Management Act (GMA) and the Shoreline Management Act (SMA) changed the nature of state oversight of shoreline master programs. This argument is incorrect. The 1995 amendments did nothing to alter the pervasive level of state involvement in, and control over, master program adoption. These amendments similarly did not alter the fact that the state, not local government, has final approval over master programs and that, once approved, master programs become part of the state's overall shoreline regulations. Because the amendments did not alter the state's role in master program development and adoption, the Court of Appeals' reliance on pre-amendment cases was proper.

PLF's second argument encourages the Court to second guess the legislature's policy judgment that RCW 82.02.020's restrictions apply only to local, not state, action. PLF's arguments in this vein are unavailing. The fact that the County looked to its Critical Areas

Ordinance (CAO) as the source of its proposed shoreline setbacks does not change the fact that the setbacks were just that: *mere proposals*. The level of state involvement both prior to, and following, the County's proposal remained the same, and the state was still required to take a hard look at the setbacks and determine whether they should be enacted. Furthermore, PLF's assertion that the County's ability to modify critical areas buffers will impact shoreline permitting is meritless.

Finally, PLF argues that the Court of Appeals' decision deprives shoreline property owners of the ability to challenge unlawful conditions placed on shoreline permits. In fact, the Court of Appeals' decision leaves such challenges essentially intact. Permitting decisions made pursuant to master programs remain subject to the constitutional nexus and rough proportionality tests. Additionally, Division One of the Court of Appeals concluded that CAOs may be challenged under RCW 82.02.020. Thus, the deprivation alleged by PLF is merely illusory.

As with Citizens for Rational Shoreline Planning (CRSP), PLF fails to establish a substantial issue of public importance as required by Rules of Appellate Procedure (RAP) 13.4(b), and the State respectfully requests that this Court deny the Petition.

II. AUTHORITY AND ARGUMENT

A. SMA Amendments Have Not Substantively Modified The State's Role And Do Not Place State-Approved Master Programs Within The Ambit Of RCW 82.02.020

In its brief in support of CRSP's Petition for Review¹, PLF rehashes an argument squarely rejected by both the Superior Court and Court of Appeals in this case. PLF asserts that 1995 amendments to the GMA and SMA operate as a tacit move by the legislature to place state-approved master programs within the reach of RCW 82.02.020 and invalidate numerous decisions of this Court relating to the SMA. PLF is incorrect.²

First, there is no evidence to suggest that, in allowing Ecology to administratively approve master programs, the 1995 amendments evince any motive other than one of increased governmental efficiency. In fact, except for eliminating a largely duplicative and time-consuming formal rulemaking process, the 1995 amendments made no substantive changes to the master program adoption process.³ *See* S.B. Rep. on Engrossed Substitute H.B. 1724, at 2, 54th Leg., Reg. Sess. (Wash. 1995); *see also*

¹ Brief Amicus Curiae of Pacific Legal Foundation in Support of Petition for Review (PLF's Brief).

² Notably, the language in RCW 36.70A.480(1), relied upon here by PLF and below by CRSP, applies only to local governments planning under the GMA. If PLF's argument was correct, master programs developed in GMA jurisdictions would be subject to RCW 82.02.020 while all other jurisdictions' master programs (10 counties and their respective cities) would not. The legislature did not intend this absurd result.

³ The changes made by the 1995 amendments make sense in light of the fact that they were part of a broad effort to implement regulatory reform task force recommendations designed specifically to make state rules and regulations simpler and more cost-effective. *See Citizens for Rational Shoreline Planning (CRSP) v. Whatcom Co.*, 155 Wn. App. 937, 945, 230 P.3d 1074 (2010); *see also* Executive Order 93-06 (Aug. 9, 1993).

Laws of 1995, ch. 347, § 308. As with CRSP before it, PLF's attempts to inflate this limited alteration into something more is unsupported.

Next, language added to the GMA in 1995 to clarify the interaction between the SMA and GMA does not place master programs within the purview of RCW 82.02.020. A comprehensive discussion of the 1995 amendments can be found in the State's Response Brief⁴ at the Court of Appeals. In short, these amendments made the goals and policies of the SMA a fourteenth planning goal under the GMA to ensure consistency between planning under the GMA and the SMA and reinforce that the SMA governs land use within the shoreline jurisdiction. Laws of 1995, ch. 347, § 104(1)-(2) (*codified as* RCW 36.70A.480(1)-(2)). The language cited by PLF merely reflects this change; master programs were required to become part of local governments' comprehensive plans and development regulations because the 1995 amendments imposed the SMA upon the GMA planning process.⁵ *See id.*

PLF's citation to the 2010 SMA/GMA amendments is misleading. While amendments made this year reiterate that RCW 36.70A.480 governs the relationship between the SMA and the GMA, PLF omits the fact that the

⁴ Response Brief of Respondent State of Washington, Department of Ecology, at 19-23, *CRSP*, 155 Wn. App. 937 (State's Response Brief).

⁵ This imposition is made clear in the section immediately following the language cited by PLF (also adopted as part of the 1995 amendments) by firmly establishing that the SMA—not the GMA—is still to govern master program development and adoption. *See* Laws of 1995, ch. 347, § 104(2) (*codified as* RCW 36.70A.480(2)).

relationship being reiterated is unquestionably one where state-approved master programs trump local GMA enactments. The 2010 amendments (Engrossed H.B. 1653) clarify that protections of critical areas within shoreline jurisdiction remain in effect until the state can approve master programs compliant with Ecology's 2004 master program guidelines, but re-asserts that state-approved master programs, and the SMA, govern areas within shoreline jurisdiction. *See* Laws of 2010, ch. 107 § 2 (amending RCW 36.70A.480).

In sum, PLF's broad reading of these amendments is unsupported by either the plain language of the SMA, the amendments themselves, or the legislative history. Despite numerous amendments to the SMA over the years, the legislature has never substantively altered the state's pervasive role in master program enactment.⁶ Because the state's role has remained constant, the Court of Appeals correctly concluded that pre-1995 cases interpreting this role continue to have validity. As a result, the Court of Appeals' reliance on pre-1995 case law was proper, and further clarification

⁶ Pursuant to this role, the state: (1) sets the parameters and deadlines for master program adoption and amendment, RCW 90.58.060, .080; (2) is substantially and directly involved with the local government during the planning and drafting phase, WAC 173-26-100; (3) is given sole discretion and final authority regarding whether to approve, modify, or reject a local government proposal, RCW 90.58.090; (4) may bypass local governments if necessary and enact master programs unilaterally, RCW 90.58.070(2); (5) adopts approved master programs as state regulations, *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)) (alteration in original); and (6) plays a significant role in implementation of the state's collective master programs once approved, RCW 90.58.210(2)-(3).

from this Court is unnecessary.

B. The Court Of Appeals' Decision Leaves Property Protections Intact And Is Consistent With Established Law

PLF argues that the Court of Appeals erred in finding that shoreline setbacks contained in the County's Master Program are not subject to RCW 82.02.020. Its arguments are underpinned with assertions that the shoreline setbacks should be viewed—in isolation—as purely local action, and that failure to do so deprives property owners an opportunity to challenge the setbacks under nexus and rough proportionality standards. PLF's arguments are unpersuasive.

First, while the shoreline setbacks were incorporated from the County's CAO, that incorporation did not change the level of state involvement in enacting the setbacks as part of the Master Program. Pursuant to this involvement, the state was required to take a hard look at the setbacks and ultimately determine whether they were adequately protective of the shoreline environment and compliant with the SMA and Ecology's guidelines. *See* RCW 90.58.090(4). Before the Master Program—or the setbacks—could go into effect, the state was required to take the affirmative step of approving the Master Program and adopting it as its own as part of the “state master program.”⁷ RCW 90.58.090; *Samuel's*

⁷ In a footnote, PLF cites a Growth Board decision on the County's Master Program to assert that Ecology did not review the CAO provisions that it incorporated into the Master

Furniture, Inc. v. Dep't of Ecology, 147 Wn.2d 440, 448, 54 P.3d 1194 (2002) (quoting RCW 90.58.100(1)) (alteration in original). Furthermore, while this case happens to present a situation where Ecology agreed that the setback provisions were adequately protective of the shoreline environment, it is undisputed that Ecology could have mandated different or greater protections. RCW 90.58.090(2)(d)-(e). As a result, and as properly found by the Court of Appeals, the source of master program provisions is immaterial given the "pervasive" oversight and control the state wields over the entire master program process. *Citizens for Rational Shoreline Planning (CRSP) v. Whatcom Cy.*, 155 Wn. App. 937, 950, 230 P.3d 1074 (2010).

Next, PLF infers that the County, in approving case-by-case variances to its critical areas buffers, will somehow also be applying CAO standards directly to applications for shoreline development. PLF's Brief at 5-6. This inference is false.

Whatcom County regulations (Whatcom County Code (WCC) 16.16.740(D)) do permit the County to reduce CAO buffer widths; however, such variances have no impact on applications for development

Program. PLF's Brief at 6 n.3. This assertion is incorrect and misrepresents the Growth Board findings. The specific question presented to the Growth Board was whether CRSP's challenge to designations of areas as critical areas in the CAO was timely because Ecology did not review the designations *at the time the CAO was adopted by the County*. *Citizens for Rational Shoreline Planning v. Whatcom Cy.*, WGMHB No. 08-2-0031 (Apr. 20, 2009), available at <http://www.gmhb.wa.gov/LoadDocument.aspx?did=118> (last visited Aug. 27, 2010). However, there is no question that Ecology evaluated provisions of the CAO incorporated into the Whatcom County Master Program as part of its approval and adoption of the proposed master program. See WAC 173-26-191(2)(b).

within shoreline jurisdiction because the Master Program specifically provides that such changes have no effect on shoreline permits. See WCC 23.60.03(H) (“[p]ermits and/or variances applied for or approved under other county codes ... shall not be construed as shoreline permits under [the Master Program]”). Moreover, the SMP specifically excludes the CAO variance and reasonable use provisions from the CAO provisions incorporated into the SMP. WCC 23.10.06(A). The SMA also mandates that any variance granted in the shoreline jurisdiction must meet certain criteria and be submitted to the state for approval or disapproval. RCW 90.58.100(5), .140(10). As a result, decisions on development in shoreline jurisdiction are made based upon state-approved master programs, using criteria from the SMA, not local government CAOs. And, the decision of whether to permit any deviations from an approved master program rests ultimately with the state.

PLF's assertions regarding the loss of property protections similarly lacks merit. To begin with, the law provides for numerous avenues of master program review, including challenges under both state and federal constitutions. See *Orion Corp. v. State*, 109 Wn.2d 621, 644, 747 P.2d 1062 (1987) (takings); *Guimont v. Clarke*, 121 Wn.2d 586, 608, 854 P.2d 1 (1993) (substantive due process). Most pertinent here, landowners may challenge shoreline permit conditions under *Nollan v. Cal. 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). As a result, PLF's concerns that development conditions will somehow be insulated from nexus and rough proportionality requirements is unfounded. Additionally, Division One of the Court of Appeals concluded that CAOs may be challenged under RCW 82.02.020.⁸ See *Citizens' Alliance for Property Rights (CAPR) v. Sims*, 145 Wn. App. 649, 653, 187 P.3d 786 (2008). The fact that CRSP failed to do so here does not lessen other property owners' abilities to make such challenges in the future. Thus, PLF is unpersuasive when it argues that the Court of Appeals' decision will "deprive" shoreline property owners of the ability to challenge unlawful conditions.

Finally, PLF's characterization of the Court of Appeals' decision as a departure from prior decisions regarding RCW 82.02.020 and the source of local government authority is unpersuasive. While PLF correctly points out that courts have applied RCW 82.02.020 to local government actions authorized by state statute, PLF fails to recognize the obvious distinction between an activity authorized or required by the state (as with statutes such as RCW 58.17 or the GMA) and an activity *engaged in* by the state (as with

⁸ The State does not concede that *Citizens' Alliance for Property Rights (CAPR) v. Sims*, 145 Wn. App. 649, 187 P.3d 786 (2008), was properly decided. However, *CAPR* is not directly relevant to the present case because it involved a challenge to purely local, not state, regulations.

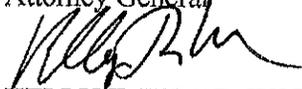
master program adoption under the SMA).⁹ Because this case involves the latter, RCW 82.02.020 does not apply, and the Court of Appeals' decision is consistent with both its own, and this Court's, prior decisions. Whether the legislature's choice to exclude state action from the statute's reach is "bad policy" is a matter for the legislature, not this Court.

III. CONCLUSION

For the reasons stated above, the State respectfully requests that the Court deny CRSP's Petition for Review.

RESPECTFULLY SUBMITTED this 1st day of September, 2010.

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⁹ As noted in the State's Response Brief before the Court of Appeals, there can be no serious comparison—from the perspective of overall structure and state involvement—between local governments adopting regulations under the GMA and local governments *proposing* master programs for Ecology approval under the SMA. While the state, through the Department of Commerce, provides guidelines and procedural criteria for GMA planning, local governments are under no obligation to follow the guidelines or criteria. *See generally* RCW 36.70A.050, .170(2), .190(4)(b). In fact, apart from a limited opportunity to appeal local enactments, the GMA does not provide for *any* state oversight of local development regulations, much less final state review, modification, and approval, as is the case with master programs adopted under the SMA.

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16.16.740 Standards – Habitat conservation area buffers.

The technical administrator shall have the authority to require buffers from the edges of all habitat conservation areas in accordance with the following:

A. Buffers shall be established for activities adjacent to habitat conservation areas as necessary to protect the integrity, functions and values of the resource. Buffer widths shall reflect the sensitivity of the species or habitat present and the type and intensity of the proposed adjacent human use or activity. Buffers shall not include areas that are functionally and effectively disconnected from the habitat area by a road or other substantial developed surface.

B. Stream Buffers. The standard buffer widths required by this article are considered to be the minimum required and presume the existence of a dense vegetation community in the buffer zone adequate to protect the stream functions and values at the time of the proposed activity. When a buffer lacks adequate vegetation to protect critical area functions, the technical administrator may increase the standard buffer, require buffer planting or enhancement, and/or deny a proposal for buffer reduction or buffer averaging.

The standard buffer shall be measured landward horizontally on both sides of the stream from the ordinary high water mark as identified in the field; provided, that for streams with identified channel migration zones, the buffer shall extend outward horizontally from the outer edge of the channel migration zone on both sides. The required buffer shall be extended to include any adjacent regulated wetland(s), landslide hazard areas and/or erosion hazard areas and required buffers, but shall not be extended across roads or other lawfully established structures or hardened surfaces. The following standard buffer width requirements are established; provided, that portions of streams that flow underground may be exempt from these buffer standards at the technical administrator's discretion when it can be demonstrated that no adverse effects on aquatic species will occur:

1. Shoreline streams: 150 feet;
2. Fish-bearing streams: 100 feet;
3. Non-fish-bearing streams: 50 feet.

C. Buffers for Other Habitat Conservation Areas. The technical administrator shall determine appropriate buffer widths for other habitat conservation areas based on the best available information. Buffer widths for nonstream habitat conservation areas shall be as follows:

Habitat Conservation Area	Buffer Requirement
Areas with which federally listed species have a primary association	Buffers shall be based on recommendations provided by the Washington State Department of Fish and Wildlife PHS Program; provided, that local and site-specific factors shall be

State priority habitats and areas with which priority species have a primary association	taken into consideration and the buffer width based on the best available information concerning the species/habitat(s) in question and/or the opinions and recommendations of a qualified professional with appropriate expertise.
Commercial and recreational shellfish areas	Buffers shall extend 150 feet landward from ordinary high water mark of the marine shore. Buffers shall not be required adjacent to shellfish protection districts, but only in nearshore areas where shellfish reside.
Kelp and eelgrass beds	Buffers shall extend 150 feet landward from ordinary high water mark of the marine shore.
Surf smelt, Pacific herring, and Pacific sand lance spawning areas	Buffers shall extend 150 feet landward from ordinary high water mark of the marine shore.
Natural ponds and lakes	Ponds under 20 acres – buffers shall extend 50 feet from the ordinary high water mark; lakes 20 acres and larger – buffers shall extend 100 feet from the ordinary high water mark; provided, that where vegetated wetlands are associated with the shoreline, the buffer shall be based on the wetland buffer requirements in WCC <u>16.16.630</u> .
Natural area preserves and natural resource conservation areas	Buffers shall not be required adjacent to these areas. These areas are assumed to encompass the land required for species preservation.
Locally important habitat areas	The buffer for marine nearshore habitats shall extend landward 150 feet from the ordinary high water mark. The need for and dimensions of buffers for other locally important species or habitats shall be determined on a case-by-case basis, according to the needs of the specific species or habitat area of concern. Buffers shall not be required adjacent to the Chuckanut wildlife corridor. The technical administrator shall coordinate with the Washington State Department of Fish and Wildlife and other state, federal or tribal experts in these instances, and may use WDFW PHS management recommendations when available.

D. The technical administrator shall have the authority to reduce buffer widths on a case-by-case basis; provided, that the general standards for avoidance and minimization per WCC 16.16.260(A)(1)(a) and (b) shall apply, and when the applicant demonstrates to the satisfaction of the technical administrator that all of the following criteria are met:

1. The buffer reduction shall not adversely affect the habitat functions and values of the adjacent habitat conservation area or other critical area.

2. The buffer shall not be reduced to less than 75 percent of the standard buffer as defined in subsection C of this section.
3. The slopes adjacent to the habitat conservation area within the buffer area are stable and the gradient does not exceed 30 percent.

E. The technical administrator shall have the authority to average buffer widths on a case-by-case basis; provided, that the general standards for avoidance and minimization per WCC 16.16.260(A)(1)(a) and (b) shall apply, and when the applicant demonstrates to the satisfaction of the technical administrator that all of the following criteria are met:

1. The total area contained in the buffer area after averaging is no less than that which would be contained within the standard buffer and all increases in buffer dimension are parallel to the habitat conservation area.
2. The buffer averaging does not reduce the functions or values of the habitat conservation area or riparian habitat, or the buffer averaging, in conjunction with vegetation enhancement, increases the habitat function.
3. The buffer averaging is necessary due to site constraints caused by existing physical characteristics such as slope, soils, or vegetation.
4. The buffer width is not reduced to less than 75 percent of the standard width as defined in subsection C of this section.
5. The slopes adjacent to the habitat conservation area within the buffer area are stable and the gradient does not exceed 30 percent.
6. Buffer averaging shall not be allowed if habitat conservation area buffers are reduced pursuant to subsection D of this section.

F. The technical administrator shall have the authority to increase the width of a habitat conservation area buffer on a case-by-case basis when there is clear evidence that such increase is necessary to achieve any of the following:

1. Comply with the requirements of a habitat management plan prepared pursuant to WCC 16.16.750.
2. Protect fish and wildlife habitat, maintain water quality, ensure adequate flow conveyance, provide adequate recruitment for large woody debris, maintain adequate stream temperatures, or maintain in-stream conditions.
3. Compensate for degraded vegetation communities or steep slopes adjacent to the habitat conservation area.
4. Maintain areas for channel migration.
5. Protect adjacent or downstream areas from erosion, landslides, or other hazards.

CHAPTER 1 -- PURPOSE AND INTENT

- G. The policies and regulations established by the Program must be integrated and coordinated with those policies and rules of the Whatcom County Comprehensive Plan and development regulations adopted under the Growth Management Act (GMA) and RCW 34.05.328.
- H. Consistent with the policy and use preferences of RCW 90.58.020, Whatcom County should balance the various policy goals of this Program giving consideration to other relevant local, state, and federal regulatory and non-regulatory programs.

23.10.04 Title

This document shall be known and may be cited as "The Whatcom County Shoreline Management Program."

23.10.05 Short Title

This document may be referred to herein as the "SMP," or the "Program."

23.10.06 References to Plans, Regulations or Information Sources

- 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. All references to the Critical Area Ordinance WCC 16.16 (CAO) are for this specific version.
- B. Where this Program makes reference to any RCW, WAC, or other state, or federal law or regulation, the most recent amendment or current edition shall apply.
- C. Stipulated Judgment No. 93-2-02447-6 between Governor's Point Development Company and Whatcom County, the State of Washington, and the Department of Ecology is incorporated by reference into Whatcom County's Shoreline Management Program. A copy of the Judgment is on file with the Whatcom County Planning and Development Services Department.

23.10.07 Liberal Construction

As provided for in RCW 90.58.900, the Act is exempted from the rule of strict construction; the Act and this Program shall therefore be liberally construed to give full effect to the purposes, goals, objectives, and policies for which the Act and this Program were enacted and adopted, respectively.

23.10.08 Severability

The Act and this Program adopted pursuant thereto comprise the basic state and County law regulating use of shorelines in the county. In the event provisions of this Program conflict with other applicable county policies or regulations, the more restrictive shall prevail. Should any section or provision of this Program be declared invalid, such decision shall not affect the validity of this Program as a whole.

- free-standing signs, or any development within an Aquatic or Natural shoreline designation; provided that no separate written statement of exemption is required for the construction of a single family residence when a County building permit application has been reviewed and approved by the Administrator; provided further, that no statement of exemption is required for emergency development pursuant to WAC 173-27-040(2)(d).
- C. No statement of exemption shall be required for other uses or developments exempt pursuant to SMP 23.60.02.2 unless the Administrator has cause to believe a substantial question exists as to qualifications of the specific use or development for the exemption or the Administrator determines there is a likelihood of adverse impacts to shoreline ecological functions.
- D. Whether or not a written statement of exemption is issued, all permits issued within the area of shorelines shall include a record of review actions prepared by the Administrator, including compliance with bulk and dimensional standards and policies and regulations of this Program. The Administrator may attach conditions to the approval of exempted developments and/or uses as necessary to assure consistency of the project with the Act and this Program.
- E. A notice of decision for shoreline statements of exemption shall be provided to the applicant/proponent and any party of record. Such notices shall also be filed with the Department of Ecology, pursuant to the requirements of WAC 173-27-050 when the project is subject to one or more of the following Federal Permitting requirements:
1. A U.S. Army Corps of Engineers section 10 permit under the Rivers and Harbors Act of 1899; (The provisions of section 10 of the Rivers and Harbors Act generally apply to any project occurring on or over navigable waters. Specific applicability information should be obtained from the Corps of Engineers.); or
 2. A section 404 permit under the Federal Water Pollution Control Act of 1972. (The provisions of section 404 of the Federal Water Pollution Control Act generally apply to any project that may involve discharge of dredge or fill material to any water or wetland area. Specific applicability information should be obtained from the Corps of Engineers.)
- F. Whenever the exempt activity also requires a U.S. Army Corps of Engineers Section 10 permit under the Rivers and Harbors Act of 1899 or a Section 404 permit under the Federal Water Pollution Control Act of 1972, a copy of the written statement of exemption shall be sent to the applicant/proponent and Ecology pursuant to WAC 173-27-050.

23.60.03 Variance Permit Criteria

- A. The purpose of a variance is to grant relief to specific bulk or dimensional requirements set forth in this Program and any associated standards appended to this Program such as critical areas buffer requirements where there are extraordinary or unique circumstances relating to the property such that the strict implementation of this Program would impose unnecessary hardships on the applicant/proponent or thwart the policy set forth in RCW 90.58.020. Use restrictions may not be varied.

WHATCOM COUNTY SHORELINE MANAGEMENT PROGRAM

- B. Variances will be granted in any circumstance where denial would result in a thwarting of the policy enumerated in RCW 90.58.020. In all instances extraordinary circumstances shall be shown and the public interest shall suffer no substantial detrimental effect.
- C. Proposals that would otherwise qualify as a reasonable use pursuant to WCC 16.16.270A shall require a shoreline variance and shall meet the variance criteria in this section.
- D. Variances may be authorized, provided the applicant/proponent can demonstrate all of the following:
1. That the strict application of the bulk or dimensional criteria set forth in this Program precludes or significantly interferes with reasonable permitted use of the property;
 2. That the hardship described in SMP 23.60.03.A above is specifically related to the property, and is the result of conditions such as irregular lot shape, size, or natural features and the application of this Program, and not, for example, from deed restrictions or the applicant's/proponent's own actions;
 3. That the design of the project will be compatible with other permitted activities in the area and will not cause adverse effects on adjacent properties or the shoreline environment;
 4. That the variance authorized does not constitute a grant of special privilege not enjoyed by the other properties in the area, and will be the minimum necessary to afford relief;
 5. That the public interest will suffer no substantial detrimental effect;
 6. That the public rights of navigation and use of the shorelines will not be materially interfered with by the granting of the variance; and
 7. Mitigation is provided to offset unavoidable adverse impacts caused by the proposed development or use.
- E. Variance permits for development and/or uses that will be located waterward of the ordinary high water mark (OHWM), as defined herein, or within any wetland as defined herein, may be authorized provided the applicant can demonstrate all of the following:
1. That the strict application of the bulk, dimensional or performance standards set forth in this Program precludes all reasonable use of the property; and
 2. That the proposal is consistent with the criteria established under SMP 23.60.03.D.1 through 7 of this section; and
 3. That the public rights of navigation and use of the shorelines will not be adversely affected.
- F. Other factors that may be considered in the review of variance requests include the conservation of valuable natural resources and the protection of views from nearby roads, surrounding properties and public areas; provided, the criteria of SMP 23.60.03.D

are first met. In addition, variance requests based on the applicant's/proponent's desire to enhance the view from the subject development may be granted where there are no likely detrimental effects to existing or future users, other features or shoreline ecological functions and/or processes, and where reasonable alternatives of equal or greater consistency with this Program are not available. In platted residential areas, variances shall not be granted that allow a greater height or lesser shore setback than what is typical for the immediate block or area.

- G. In the granting of all variances, consideration shall be given to the cumulative environmental impact of additional requests for like actions in the area. For example, if variances were granted to other developments in the area where similar circumstances exist, the total of the variances should also remain consistent with the policy of RCW 90.58.020 and should not produce significant adverse effects to the shoreline ecological functions and processes or other users.
- H. Permits and/or variances applied for or approved under other county codes such as WCC Title 20 or WCC Title 21 shall not be construed as shoreline permits under this Program.

23.60.04 Conditional Use Permit Criteria

- A. The purpose of a conditional use permit is to allow greater flexibility in administering the use regulations of this Program in a manner consistent with the policy of RCW 90.58.020. In authorizing a conditional use, special conditions may be attached to the permit by the County or the Department of Ecology to control any undesirable effects of the proposed use.
- B. Uses specifically classified or set forth in this Program as conditional uses and unlisted uses may be authorized provided the applicant/proponent can demonstrate all of the following:
 - 1. That the proposed use will be consistent with the policy of RCW 90.58.020 and this Program.
 - 2. That the proposed use will not interfere with normal public use of public shorelines.
 - 3. That the proposed use of the site and design of the project will be compatible with other permitted uses within the area.
 - 4. That the proposed use will not cause adverse effects to the shoreline environment in which it is to be located.
 - 5. That the public interest suffers no substantial detrimental effect.
- C. Other uses not specifically classified or set forth in this Program, including the expansion or resumption of a non-conforming use pursuant to SMP 23.50.07, may be authorized as conditional uses provided the applicant/proponent can demonstrate that the proposal will satisfy the criteria set forth in SMP 23.60.04.B above, and that the use clearly requires a specific site location on the shoreline not provided for under the Program, and extraordinary circumstances preclude reasonable use of the property in a manner

NO. 84675-8

SUPREME COURT OF THE STATE OF WASHINGTON

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.

**CERTIFICATE OF
SERVICE**

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Pursuant to RCW 9A.72.085, I certify that on the 1st day of September, 2010, I caused to be served Respondent State of Washington's Answer to Brief of Amicus Curiae Pacific Legal Foundation in the above-captioned matter upon the parties herein as indicated below:

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THE BUCK LAW GROUP
2030 FIRST AVENUE, SUITE 201
SEATTLE, WA 98121-2183

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the foregoing being the last known address.

I certify under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

DATED this 1st day of September, 2010, in Olympia, Washington.



DANIELLE E. FRENCH
Legal Assistant

OFFICE RECEPTIONIST, CLERK

To: French, Danielle (ATG)
Cc: Wood, Kelly (ATG); Shirey, Kay (ATG)
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Rec. 9-1-10

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From: French, Danielle (ATG) [mailto:DanielleF@ATG.WA.GOV]
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Cc: Wood, Kelly (ATG); Shirey, Kay (ATG)
Subject: E-filing in Citizens for Rational Shoreline Planning, et al. v. Whatcom County, et al., No. 84675-8

Dear Clerk,

Attached for filing in *Citizens for Rational Shoreline Planning, et al. v. Whatcom County, et al.*, Supreme Court No. 84675-8, is Respondent State of Washington's Answer to Brief of Amicus Curiae Pacific Legal Foundation and Certificate of Service. Thank you for your assistance.

Sincerely,

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Legal Assistant to Kelly Wood, Assistant
Attorney General, WSBA #40067
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