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No. 84675-8

IN THE SUPREME COURT FOR  
THE STATE OF WASHINGTON

CITIZENS FOR RATIONAL SHORELINE PLANNING  
and RONALD T. JEPSON,

Appellants,

and

BUILDING INDUSTRY ASSOCIATION OF WHATCOM COUNTY,

Intervenor-Plaintiff,

v.

WHATCOM COUNTY and  
WASHINGTON STATE DEPARTMENT OF ECOLOGY,

Respondents.

**SUPPLEMENTAL BRIEF OF INTERVENOR-PLAINTIFF  
BUILDING INDUSTRY ASSOCIATION OF WHATCOM COUNTY**

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## INTRODUCTION

RCW 82.02.020 incorporates constitutional standards that prohibit local governments from imposing conditions on new development that are unrelated to adverse effects of the development on the public. *See Citizens' Alliance for Property Rights v. Sims*, 145 Wn. App. 649, 669 (2008) (citing *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987); *Dolan v. City of Tigard*, 512 U.S. 374 (1994)). The Court of Appeals' conclusion that a local government is not subject to RCW 82.02.020 when applying its Shoreline Master Program (SMP) to impose mandatory permit conditions is inconsistent with the Shoreline Management Act (SMA), RCW 82.02.020, and nearly two decades of appellate and Supreme Court decisions. *Citizens for Rational Shoreline Planning v. Whatcom County*, 155 Wn. App. 937, 950 (2010). Intervenor-Plaintiff Building Industry Association of Whatcom County (BIAWC) respectfully submits this brief in support of Petitioners Citizens for Rational Shoreline Planning and Ronald T. Jepson (Citizens), and requests that this Court reverse the Court of Appeals' decision and remand the case for further proceedings on the merits.

## ISSUES PRESENTED FOR REVIEW

1. Whether a local government's Shoreline Master Program constitutes a local development regulation.
2. Whether a local government's imposition of a mandatory condition on shoreline development is subject to the nexus and proportionality requirements of RCW 82.02.020.

## BRIEF SUMMARY OF THE FACTS<sup>1</sup>

Whatcom County has two regulatory schemes restricting the development and use of shoreline property. First, in 2007, the County adopted a critical areas ordinance (CAO) under the Growth Management Act (GMA) that 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 a permit to develop shoreline areas. WCC 16.16.710; WCC 16.16.740. Then, in 2008, the County adopted an updated shoreline master program (SMP) as required by the SMA. In lieu of developing new regulatory controls for shoreline critical areas, the County simply incorporated its CAO buffers by reference. CP 4 (Complaint); CP 15, 23-24 (Ecology/Whatcom County Answers); WCC 23.90.130(C) (Table) (imposing setbacks "Per Whatcom County Critical Areas Ordinance, Chapter 16.16 WCC, Buffers"). Thus, when any property owner files a shoreline

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<sup>1</sup> BIAWC adopts the statement of facts as set out in Citizens' Opening Brief.

development application, the County will apply its CAO to determine the property's critical area classification. CP 4, 15, 23-24; WCC 23.10.060(A). Based on the classification, the County will apply preset buffer conditions on any new development. WCC 23.10.060(A). And any existing structures or uses within the buffer will be deemed nonconforming, resulting in additional restrictions on the proposed development. WCC 23.50.070.

Citizens and BIAWC challenged the SMP, alleging that the buffer and nonconforming use provisions violate RCW 82.02.020 by imposing uniform conditions on any new application for shoreline development. CP 7-9; 32-34. The trial court, however, concluded that Whatcom County's SMP constituted state law and was not subject to RCW 82.02.020. CP 165-66; CP 184. The Court of Appeals agreed, and affirmed the trial court's decision dismissing the complaint under CR 12(b)(6). *Citizens for Rational Shoreline Planning*, 155 Wn. App. at 950.

#### **STANDARD OF REVIEW**

This appeal seeks reversal of a Court of Appeals' decision affirming dismissal of Citizens and BIAWC's complaint. CP 165-66; CP 184. Under CR 12(b)(6), dismissal is only appropriate if "it appears beyond doubt that the plaintiff cannot prove any set of facts which would justify recovery."

*Tenore v. AT&T Wireless Servs.*, 136 Wn.2d 322, 329-30 (1998). On review, “a plaintiff’s allegations are presumed to be true[.]” *Id.* Whether dismissal was appropriate is a question of law that is reviewed de novo. *Atchison v. Great Western Malting Co.*, 161 Wn.2d 372, 376 (2007).

### ARGUMENT

Case law is clear that RCW 82.02.020 only applies to local government actions; the statute does not limit the State’s authority to impose conditions on development.<sup>2</sup> *See, e.g., R/L Assocs., Inc. v. City of Seattle*, 113 Wn.2d 402, 407 n.2 (1989); *Humbert v. Walla Walla County*, 145 Wn. App. 185, 193 (2008). Whatcom County’s decision to incorporate its CAO by reference in its SMP does not mean that the CAO provisions lose their status as local land use regulations subject to RCW 82.02.020. *See Citizens’ Alliance*, 145 Wn. App. at 663. As Ecology recognized in its guidelines, shoreline regulations adopted under the SMA must be “consistent with all relevant constitutional and other legal limitations (where applicable, statutory limitations such as those contained in chapter 82.02 RCW [. . .]) on the regulation of private property.” WAC 173-26-186(5). Nonetheless, the

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<sup>2</sup> Development conditions imposed by state government must still comply with the nexus and proportionality tests, but are actionable as a violation of the Takings Clauses of the State and Federal Constitutions. *See Ecology Answer to Pet. Rev.* at 11-12; Wash. Const. art I, § 16; U.S. Const. amend. V.

appellate court mischaracterized the County's SMP as state law, and by so doing ruled that the critical area regulations challenged in this case will be subject to RCW 82.02.020 only when applied under the County's CAO; they will not be subject to RCW 82.02.020 when the provisions are applied under the County's SMP. *Citizens for Rational Shoreline Planning*, 155 Wn. App. at 950. This rule departs from the plain language of the SMA and well-settled case law establishing that a local government decision to impose uniform conditions on all new development permits is subject to RCW 82.02.020.

## I

### WHATCOM COUNTY'S SMP IS A LOCAL DEVELOPMENT REGULATION

#### A. Whatcom County's Shoreline Regulations Are Not State Laws

Whatcom County's SMP does not constitute state law. *Citizens for Rational Shoreline Planning*, 155 Wn. App. at 950. The plain language of the SMA and GMA establish that Whatcom County's SMP is a local development regulation, that is exclusively administered by the County. *See* RCW 90.58.140(3); RCW 36.70A.480(1).

The Court of Appeals' confusion arises from the fact that, when originally enacted in 1971, the SMA required the State Department of Ecology (Ecology) to formally make rules incorporating each local government's SMP into a "state master program," which was published in the state register. *Citizens for Rational Shoreline Planning*, 155 Wn. App. at 945 (citing Laws of 1995, ch. 347 § 311). But that degree of state control over local SMPs ended in 1995 when our Legislature overhauled the SMA as part of an effort to integrate the State's environmental statutes. Laws of 1995, ch. 347 ("Integration of Growth Management Planning and Environmental Review"). The 1995 legislation replaced the formal rulemaking procedure with a provision authorizing Ecology to administratively approve a local government's SMP. RCW 90.58.090. Once approved, "the shoreline master program for a county or city adopted under chapter 90.58 RCW, including use regulations, *shall be considered part of the county or city's development regulations.*"<sup>3</sup> RCW 36.70A.480(1) (emphasis added). Following approval

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<sup>3</sup> All three Growth Boards have interpreted RCW 36.70A.480(1) to incorporate each local government's SMP into its comprehensive plan and development regulations. See *Concerned Friends of Ferry County v. Ferry County*, EWGMHB No. 97-1-0018, 1998 GMHB LEXIS 279, at \*7-\*8 (July 31, 1998); *Samson v. City of Bainbridge Island*, CPSGMHB No. 04-3-0013, 2005 GMHB LEXIS 11, at \*8-\*9 (Jan. 19, 2005); *J.L. Storedahl & Sons, Inc. v. Clark County*, WWGMHB No. 96-2-0016, 1997 GMHB LEXIS (continued...)

of the shoreline master program local government has *exclusive* authority to apply its shoreline regulations to shoreline substantial development permit applications. *See* RCW 90.58.140(3) (“The administration of the [permit] system so established shall be performed exclusively by the local government.”).

Under the modern SMA, Citizens’ and BIAWC’s complaint properly stated a claim challenging Whatcom County’s application of its development regulations in a manner that will impose mandatory and uniform conditions on all new shoreline applications. CP 7-9. The Court of Appeals’ conclusion that a local government’s SMP constitutes state law should be reversed because it relied entirely on cases citing outdated (pre-1995) versions of the SMA. *See Citizens for Rational Shoreline Planning*, 155 Wn. App. at 944-45 (citing *Buechel v. Dep’t of Ecology*, 125 Wn.2d 196, 203-04 (1994); *Harvey v. Bd. of County Comm’rs*, 90 Wn.2d 473 (1978)).

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<sup>3</sup> (...continued)  
406, at \*5-\*6 (July 31, 1997). Ecology has similarly recognized that “the local shoreline master program, including the use regulations, [is] considered a part of the local development regulations required by the Growth Management Act.” WAC 173-26-010.

**B. Whatcom County Did Not Act as an Agent of Ecology  
Because Ecology Played No Role in Developing  
Whatcom County's Critical Area Regulations**

The Court of Appeals interpreted the decision in *Orion Corp. v. State of Washington* to mean that any provision contained in a local government's SMP is state law. See *Citizens for Rational Shoreline Planning*, 155 Wn. App. at 944-45 (citing *Orion*, 109 Wn.2d 621, 643-44 (1987)). But *Orion* did not create a *per se* rule that local SMPs are state laws. Instead, *Orion* reviewed the facts in the record to determine whether the specific, challenged provision of Skagit County's SMP was the product of an agency relationship.<sup>4</sup> *Orion*, 109 Wn.2d at 644 (citing *Hewson Constr., Inc. v. Reintree Corp.*, 101 Wn.2d 819, 823 (1984)). The Court of Appeals did not analyze the SMP provisions challenged by Citizens and BIAWC. If it had done so, it would not have found an agency relationship.

In *Orion*, a property owner purchased thousands of acres of tidelands on which it planned to develop a residential community. *Orion*, 109 Wn.2d

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<sup>4</sup> The existence of an agent/principal relationship between Whatcom County and Ecology requires proof that the challenged provisions were developed, adopted, and will be applied to all shoreline permit applicants "at the insistence of, and in some material degree, under the direction and control of [the State]." *Hewson*, 101 Wn.2d at 823; *State v. Garcia*, 146 Wn. App. 821, 827-28 (2008) (demonstrating the existence of a right to control the purported agent's performance is essential to prove agency).

at 626-29. As the property owner set out to develop plans, Skagit County adopted an SMP that contained a provision prohibiting the development of tideland property. *Id.* at 629. The property owner brought an inverse condemnation claim against both the County and State, alleging that Skagit County's provision prohibiting tideland development deprived Orion of all economically viable use of its property. *Id.* at 630. The County moved for dismissal from the lawsuit, arguing that under agency law it could not be held liable for any taking because the challenged SMP provision was mandated by a state regulation. *Id.* at 643. The Court found that Ecology's regulatory 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 challenged SMP provision "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 must take responsibility for actions that the County took while acting as an agent of the State, and dismissed the County from the lawsuit. *Id.*

The facts of this case do not give rise to the same agency relationship found in *Orion*. Ecology played no role in developing the challenged

provisions of the SMP. The County's critical area classifications and buffer standards were developed as part of the County's CAO and were incorporated by reference into the SMP.<sup>5</sup> See WCC 23.90.130(C) (Table) (imposing setbacks "Per Whatcom County Critical Areas Ordinance, Chapter 16.16 WCC, Buffers"); WCC 16.16.710; WCC 16.16.740. Both Ecology and Whatcom County admitted that, although *administrated* through the County's SMP, the critical area buffers will be applied to shoreline development applications "depending upon the critical area classification contained in the County's Critical Areas Ordinance." CP 15, 23-24. And in a separate Growth Management Hearings Board proceeding, the Growth 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 GMHB LEXIS 32, at \*24 (Apr. 20, 2009);

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<sup>5</sup> WCC 23.10.060(A) ("The Whatcom County Critical Areas Ordinance, Chapter 16.16 WCC (Ordinance No. 2005-068, dated September 30, 2005, and as amended on February 27, 2007) is hereby adopted in whole as a part of [the SMP], except that the permit, non-conforming use, appeal and enforcement provisions of the critical areas ordinance (WCC 16.16.270 through 16.16.285) shall not apply within shoreline jurisdiction.").

*see also Schwickerath v. City of Westport*, Shoreline Hearings Board No. 05-023, 2006 WA ENV LEXIS 5, at \*8-\*9 (Jan. 5, 2006) (Where a SMP makes reference to another law that was not reviewed by Ecology, the SMP will be interpreted to require “simultaneous governance of one project by several bodies of law.”).

There is no agency relationship between Whatcom County and Ecology in relation to the incorporated CAO provisions. And nothing in the SMA that gives Ecology control over a local government’s decision of how to apply its SMP to a substantial shoreline development permit. RCW 90.58.140(3); *Samuel’s Furniture, Inc. v. Dep’t of Ecology*, 147 Wn.2d 440, 454-55 (2002) (Holding that Ecology must file a petition for review with the Shoreline Hearings Board if it disagrees with a local government’s substantial development permit decision.). The County’s adoption and administration of the critical area provisions through its SMP unquestionably constitutes a local action that is subject to RCW 82.02.020. *Citizens’ Alliance*, 145 Wn. App. at 663.

## 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 Abuse of Local Governments' Authority To Impose Conditions on Development

The Court of Appeals' 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 without demonstrating that the condition is reasonably necessary to mitigate a direct impact of the proposed development. Nothing in this statute exempts local government actions that are taken under the authority of a state statute. *Id.* 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, over time the Legislature amended RCW 82.02.020 to place strict limits on local

government's authority to impose conditions on new development.<sup>6</sup> These changes were adopted in response to a high-profile case where two counties used the permit process to force property owners to pay significant fees in exchange for permit approvals. Martha Lester, *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). 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. Lester, 59 Wash. L. Rev. at 295. This new grant of authority led Snohomish County and San Juan County to adopt 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, Inc. v. Snohomish County*, 97 Wn.2d 804, 805-06 (1982), *superceded by statute R/L Assocs.*, 113 Wn.2d at 408-09;

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<sup>6</sup> 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 next 15 years. The Legislature adopted minor amendments to RCW 82.02.020 in 1970 and again in 1979.

Lester, 59 Wash. L. Rev. at 289-90. Property owners challenged the mandatory fees in a consolidated appeal to this Court.<sup>7</sup> *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.<sup>8</sup> The Legislature also limited local governments' authority to require dedications pursuant to RCW 58.17.110 allowing only those dedications that local government can demonstrate are "reasonably necessary as a direct result of the proposed development."<sup>9</sup> In 1990, the Legislature amended the statute again, removing language that limited its application to dedications imposed pursuant to the 1969 statute, RCW 58.17.110.<sup>10</sup>

In the years following these amendments, the United States Supreme Court adopted important safeguards limiting the authority of government to

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<sup>7</sup> In *Hillis Homes*, this 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.

<sup>8</sup> Laws of 1982, 1st Ex. Sess., ch. 49 § 5.

<sup>9</sup> Laws of 1982, 1st Ex. Sess., ch. 49 § 5.

<sup>10</sup> Laws of 1990, 1st Ex. Sess., ch. 17 § 42.

impose exactions on development.<sup>11</sup> *Nollan* and *Dolan* formulated the essential nexus and rough proportionality standards for use in deciding if an exaction constitutes an impermissible taking. Under these tests, the court must first determine whether there is a connection between an exaction and an identified impact of new development. *Nollan*, 483 U.S. at 836-37. If the required nexus exists, the court next must 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 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 a similar test as that in RCW 82.02.020, and held that

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<sup>11</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).

the statute incorporated the constitutional test.<sup>12</sup> This Court has ruled 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). Nothing in RCW 82.02.020 exempts local government actions pursued 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.

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

There is no authority for the Court of Appeals' conclusion that a local government's application of SMP provisions is exempt from RCW 82.02.020. Our Courts have never considered the source of local government

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<sup>12</sup> *See, e.g., Sparks v. Douglas County*, 127 Wn.2d 901, 913 (1995) (adopting the *Dolan* rough proportionality test); *Trimen Dev. Co. v. King County*, 124 Wn.2d 261, 274 (1994) (same); *Cobb v. Snohomish County*, 64 Wn. App. 451, 467-68 (1991) (adopting *Nollan* nexus test); *Citizens' Alliance*, 145 Wn. App. at 669 (recognizing that RCW 82.02.020 incorporates the standards set out in *Nollan* and *Dolan*).

decision-making authority when applying RCW 82.02.020 to a development condition. To do so would render the statute superfluous, because all local land use authority is ultimately delegated by the state. *See, e.g.*, Wash. Const. art. XI, § 11 (delegating police powers to local governments); *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);<sup>13</sup> *Snohomish County v. Anderson*, 123 Wn.2d 151, 156 (1994) (The GMA delegated the State’s legislative authority to adopt land use regulations to local governments.).

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 and Development, Inc. v. City of Brier*, 76 Wn. App. 95, 105 (1994), a developer challenged the city’s decision to impose traffic mitigation impact fees authorized by the State Environmental Policy Act (SEPA), Ch.

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<sup>13</sup> *W.R. Grace & Co. v. Dep’t of Revenue*, 137 Wn.2d 580, 593-94 (1999) (Under the principles of *stare decisis*, a decision that garners the support of a five Justices constitutes controlling authority.).

43.21 RCW.<sup>14</sup> Analyzing the interplay between the different state statutes, the court explained that SEPA provided the city authority to exact fees, but RCW 82.02.020 placed limits on that authority. *Id.* 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.*

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

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<sup>14</sup> 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); *West 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.

development. 124 Wn.2d at 264-65, 268-69. This 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 alleged that a provision of King County's critical areas ordinance that imposed a mandatory 35% to 50% clearing restriction on all rural residential lots violated RCW 82.02.020. 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. *Citizens' Alliance*, 145 Wn. App. at 663. The county argued that RCW 82.02.020 should only apply where a local government acts of its own initiative, without clear and direct state authority. *Id.* The Court of Appeals 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.*

The Court of Appeals' conclusion that a local government's application of CAO provisions are exempt from RCW 82.02.020 when applied under its SMP ignores the precedent described above. Citizens' and BIAWC's complaint properly asserted a facial challenge under the statute, alleging that any application of the County's SMP to a shoreline development permit will violate RCW 82.02.020, because the SMP imposed mandatory and preset development conditions on any new use of shoreline property. CP 7-9; 32-34.

#### **CONCLUSION**

A local government's administration of its SMP to impose uniform conditions on all new shoreline development permits is unquestionably a local act that is subject to RCW 82.02.020. The Court of Appeals' decision to treat local development regulations adopted under the SMA differently from local development regulations adopted under the GMA creates bad policy and should be reversed. For these reasons, BIAWC respectfully requests that this Court reverse the trial court's order dismissing Citizens' complaint and remand the matter for further proceedings on the merits.

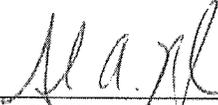
DATED: January 31, 2011.

Respectfully submitted,



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BRIAN T. HODGES  
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*Attorneys for Intervenor-Plaintiff  
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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 31, 2011, true copies of the SUPPLEMENTAL BRIEF OF INTERVENOR-PLAINTIFF BUILDING INDUSTRY ASSOCIATION OF WHATCOM COUNTY were placed in envelopes addressed to:

Peter L. Buck  
Matthew J. Stock  
The Buck Law Group, PLLC  
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*Attorneys for Appellants Citizens  
For Rational Shoreline Planning  
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Whatcom County*

which envelopes, with postage thereon fully prepaid, were then sealed and deposited in a mailbox regularly maintained by the United States Postal Service in Bellevue, Washington.

I declare under penalty of perjury that the foregoing is true and correct and that this declaration was executed this 31st day of January, 2011, at Bellevue, Washington.



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BRIAN T. HODGES

No. 84675-8

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IN THE SUPREME COURT FOR  
THE STATE OF WASHINGTON

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CITIZENS FOR RATIONAL SHORELINE PLANNING  
and RONALD T. JEPSON,

Appellants,

and

BUILDING INDUSTRY ASSOCIATION OF WHATCOM COUNTY,

Intervenor-Plaintiff,

v.

WHATCOM COUNTY and  
WASHINGTON STATE DEPARTMENT OF ECOLOGY,

Respondents.

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**NOTICE OF ASSOCIATION OF COUNSEL**

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Please take notice that BRIAN T. HODGES of Pacific Legal Foundation is associating with SAMUEL A. RODABOUGH and CHARLES A. KLINGE as counsel of record for Intervenor-Plaintiff Building Industry Association of Whatcom County in the above-titled matter. You are requested to serve all future pleadings on BRIAN T. HODGES in addition to SAMUEL A. RODABOUGH and CHARLES A. KLINGE. For all electronically filed documents, please send to [bth@pacificlegal.org](mailto:bth@pacificlegal.org).

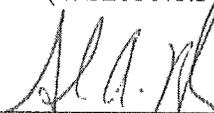
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BY RONALD R. CARPENTER

DECLARATION OF SERVICE BY MAIL

CLERK 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 31, 2011, true copies of the NOTICE OF ASSOCIATION OF COUNSEL were placed in envelopes addressed to:

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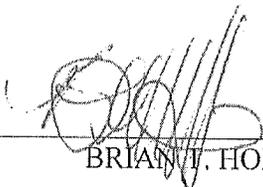
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which envelopes, with postage thereon fully prepaid, were then sealed and deposited in a mailbox regularly maintained by the United States Postal Service in Bellevue, Washington.

I declare under penalty of perjury that the foregoing is true and correct and that this declaration was executed this 31st day of January, 2011, at Bellevue, Washington.

  
\_\_\_\_\_  
BRIAN T. HODGES