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CASE NO. 63646-4-I

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

CITIZENS FOR RATIONAL SHORELINE PLANNING and
RONALD T. JEPSON

Appellants,

v.

WHATCOM COUNTY and
WASHINGTON STATE DEPARTMENT OF ECOLOGY

Respondents.

APPELLANTS' OPENING BRIEF

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I. INTRODUCTION

Whatcom County spent more than three years drafting and publicly vetting wholesale amendments to its local shoreline master program. During this three-year period, the County held numerous public meetings, workshops, and hearings, all relating to the shoreline master program amendments. Ultimately, the County Council adopted these amendments by ordinance.

The County's shoreline master program, as amended, constitutes part of the County's development regulations, just like its zoning ordinance, critical areas ordinance, and all other local ordinances governing land use in Whatcom County. The County is responsible for administering its shoreline master program. As such, it reviews development proposals and issues development permits for projects located within 200 feet of the County's shorelines. The County is also responsible for enforcing the provisions of its shoreline master program. In short, the County's shoreline master program has all the hallmarks of a local land use regulation.

Despite the fundamentally local nature of the County's shoreline master program, the Skagit County Superior Court concluded that these regulations actually amount to state law, thereby dismissing Appellants' claims that certain provisions of the shoreline master program violate RCW 82.02.020. (RCW 82.02.020, a state law designed to ensure fairness to property owners, prohibits counties and other local governments from charging direct or indirect taxes or fees on development unless they are

both related to and proportional to the impacts of the development.) No other court in this state has ever held that a shoreline master program is exempt from the requirements of RCW 82.02.020.

The trial court's conclusion is incorrect as a matter of law. The County's shoreline master program is a local regulation, not a state law, and its provisions are subject to the requirements of RCW 82.02.020. Accordingly, Appellants respectfully request that this Court reverse the trial court's dismissal and remand the matter for further proceedings.

II. ASSIGNMENT OF ERROR

The Skagit County Superior Court erred in ruling that Whatcom County's shoreline master program, which was developed and adopted and is administered and enforced by the County, constitutes state law and, as such, is not subject to RCW 82.02.020.

III. STATEMENT OF THE CASE

A. Statement of Facts.

1. Whatcom County spent three years developing its amended shoreline master program.

Whatcom County commenced a comprehensive update of its shoreline master program in 2004. Over the next three years, the County took numerous steps to develop and refine its shoreline master program amendments, including:

1. Appointing a technical advisory committee, which conducted 34 open public meetings between July 2004 and May 2006 concerning the shoreline master program update;

2. Appointing a citizens advisory committee, which conducted 43 open public meetings between July 2004 and May 2006 concerning the shoreline master program update;

3. Hosting shoreline master program workshops and expert panel discussions on September 30 and October 6, 2004;

4. Releasing a draft shoreline master program on June 30, 2006, for public review and comment;

5. Conducting public workshops on July 12 and 13, and August 15 and 16, 2006, to introduce and discuss important changes and additions presented in the draft shoreline master program;

6. Conducting additional shoreline master program-related outreach efforts at the 2004 Birch Bay and Bellingham Marine Shoreline Stewardship Workshops, the 2005 and 2006 Nooksack Recovery Team Annual Salmon Summits, the 2005 and 2006 Whatcom County Home & Garden Shows, and the 2005 and 2006 Drayton Harbor Shellfish District Open House events;

7. Meeting with or presenting to key stakeholder groups, including the Washington Dairy Federation, Washington Farm Bureau, Building Industry Association of Whatcom County, Nooksack Recovery Team, Whatcom County Association of Realtors, Marine Resources Committee, Whatcom County Agricultural Advisory Committee, and various environmental groups;

8. Holding a public hearing before the Planning Commission on September 28, 2006; and

9. Holding Planning Commission work sessions on September 28 and October 26, 2006.

See Whatcom County Ordinance No. 2007-017.

In 2007, after years of extensive local process, the County Council adopted Ordinance No. 2007-017, which contained wholesale amendments to its existing shoreline master program. *See id.* These amendments reflected the particular policy choices of the County's elected

officials. Among other things, the County Council determined that it would require large, uniformly sized shoreline setbacks—areas adjacent to the shoreline in which no development is permitted. *See id.* Appellants' primary substantive claim in this action is a challenge to the legality of these shoreline setbacks.

2. Ecology reviewed the County's amended shoreline master program and approved the provisions relevant to this action unchanged.

Shortly after adopting Ordinance No. 2007-017, the County forwarded the package of amendments to the State Department of Ecology ("Ecology") for review and approval. Ecology reviewed the County's shoreline master program amendments and identified a handful of minor revisions that the County would need to incorporate before Ecology would issue its formal approval. *See* Whatcom County Resolution No. 2008-056. Ecology did not identify any revisions relating to the County's large, uniformly sized shoreline setbacks. Instead, it approved these provisions without any changes. *See id.*

3. The Whatcom County Council adopted its amended shoreline master program by ordinance.

The County Council initially purported to adopt Ecology's revisions by resolution in August 2008. *See id.* Appellants challenged the County's attempt to adopt the revisions by resolution (as opposed to ordinance) as a violation of the County's code and charter. *See* CP 35–

42.[1] While this challenge was pending, but before the trial court issued a decision on the matter, the County formally adopted Ecology's revisions by ordinance.[2] *See* Whatcom County Ordinance No. 2009-013. As a result, the County's amended shoreline master program (which incorporated Ecology's requested revisions) took effect. *See* RCW 90.58.090.

B. Procedural Posture.

On October 20, 2008, Appellants filed a complaint with the Skagit County Superior Court alleging, *inter alia*, that the uniform shoreline setbacks and certain other limitations prescribed by the County's amended shoreline master program constituted a violation of RCW 82.02.020, as recently interpreted by this Court in *Citizens' Alliance for Property Rights v. Sims*, 145 Wn. App. 649, 187 P.3d 786 (2008). CP 1–10.

Shortly after the complaint was filed, Ecology sought intervention on the side of Whatcom County. Appellants agreed to Ecology's intervention by stipulation. CP 17–18.

On April 7, 2009, Respondents filed a motion with the Skagit County Superior Court seeking dismissal of Appellants' RCW 82.02.020 claims pursuant to CR 12(b)(6). CP 113–22. Respondents' motion was based on the theory that the County's shoreline master program was in

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[1] Appellants' motion was joined by Intervenor Building Industry Association of Whatcom County ("BIAW"). BIAW is not a party to this appeal.

[2] The trial court ultimately sided with Appellants, ruling that the County's attempted adoption via resolution was a violation of the County's code and charter. *See* CP 123–25.

actuality a state law, and thus not subject to the limitations set forth in RCW 82.02.020. *See id.*

On May 4, 2009, the Skagit County Superior Court heard oral argument on Respondents' motion to dismiss. Following oral argument, the court announced its decision to grant Respondents' motion. CP 165–66.

On May 14, 2009, Appellants' filed a motion for reconsideration, arguing that the court erred in concluding that a county's shoreline master program constitutes state law and erred in dismissing Appellants' RCW 82.02.020 claims. CP 167–71. The court denied Appellants' motion for reconsideration by letter dated June 26, 2009. CP 184.

On July 23, 2009, the court entered its final order and judgment on all claims. CP 185–93.

IV. ARGUMENT

A. This Court reviews the trial court's decision under the *de novo* standard of review.

The issue before this Court—whether or not Whatcom County's shoreline master program is a local regulation subject to RCW 82.02.020—is a pure question of law. Thus, it is subject to the *de novo* standard of review. *See, e.g., Atchison v. Great W. Malting Co.*, 161 Wn.2d 372, 376, 166 P.3d 662, 663 (2007). The trial court's ruling is not entitled to any deference. *Yousoufian v. Office of Sims*, 165 Wn.2d 439, 463, 200 P.3d 232, 242 (2009) ("we give no deference to lower courts on issues of law and review them de novo").

B. Shoreline master programs are local regulations, not state law.

A shoreline master program ("SMP") is developed, amended, administered, and enforced by the local government. Once adopted, an SMP becomes part of the local government's development regulations. Accordingly, an SMP is a local regulation, not state law.

1. The Shoreline Management Act vests the power to develop, amend, administer, and enforce local SMPs with the local government.

Under the state Shoreline Management Act ("SMA"), chapter 90.58 RCW, each local government is responsible for the development and subsequent amendment of its local SMP. *See* RCW 90.58.050, 070–080.[3] A local government's SMP, which is customized to local circumstances, is comprehensive in nature and supplements applicable zoning and environmental controls within jurisdictional shoreline areas. *See* RCW 90.58.030(3)(b); RCW 90.58.080; WAC 173-26-191(1)(a) ("master programs address conditions and opportunities of specific shoreline segments by classifying the shorelines into 'environment designations' as described in WAC 173-26-211"). *See also* WCC

[3] Pursuant to the SMA, Ecology does have limited authority to draft an SMP that is applicable only to "shorelines of the state." *See* RCW 90.58.070(2). This limited authority is implicated only if the local government fails to act. *See id.* ("If any local government fails to . . . adopt a master program for the shorelines of the state within its jurisdiction in accordance with the time schedule provided in this chapter, the department shall carry out the requirements of RCW 90.58.080 and adopt a master program for the shorelines of the state within the jurisdiction of the local government."). Such is not the case here. While Whatcom County failed to comply with RCW 82.02.020, it did not fail to act for purposes of RCW 90.58.070(2). *See* Whatcom County Ordinance No. 2007-017; Whatcom County Ordinance No. 2009-013.

23.100.17 (setting forth specific policies and regulations applicable to the County's Cherry Point Management Area).

Additionally, the local SMP becomes part of the local government's development code. *See* RCW 36.70A.480(1) ("All other portions of the shoreline master program for a county or city adopted under chapter 90.58 RCW, including use regulations, shall be considered a part of the county or city's development regulations." (emphasis added)); WAC 173-26-020(30) (same). *See also* WAC 173-26-020(8) (defining "development regulations" as "the controls placed on development or land uses by a county or city, including, but not limited to, zoning ordinances, critical areas ordinances, [and] all portions of a shoreline master program other than goals and policies approved or adopted under chapter 90.58 RCW.").

The local government is also responsible for the administration and enforcement of the various provisions of its SMP. *See* RCW 90.58.050 ("Local government shall have the primary responsibility for . . . administering the regulatory program consistent with the policy and provisions of [the SMA]."). These administration and enforcement responsibilities extend to shoreline permitting decisions: "The local government shall establish a program, consistent with rules adopted by the department, for the administration and enforcement of the permit system provided in this section. The administration of the system so established shall be performed exclusively by the local government." RCW 90.58.140(3) (emphasis added).

Whatcom County has enacted provisions relating to administration and enforcement of its SMP. *See* WCC 23.60.01–19 (concerning Whatcom County's administration of shoreline substantial development permits); WCC 23.80.02–04 (concerning Whatcom County's enforcement powers).

2. The Growth Management Act makes it clear that a local government's SMP is a local regulation.

In 1995, the state legislature made its first attempt at coordinating the SMA and the Growth Management Act ("GMA"), chapter 36.70A RCW. *See* Laws of 1995, ch. 347. As part of these amendments, the legislature added a section to the GMA titled "Shorelines of the state." *See id.* at § 104 (codified at RCW 36.70A.480). The first provision of this section expressly states that:

> For shorelines of the state, the goals and policies of the shoreline management act as set forth in RCW 90.58.020 are added as one of the goals of this chapter as set forth in RCW 36.70A.020 without creating an order of priority among the fourteen goals. The goals and policies of a shoreline master program for a county or city approved under chapter 90.58 RCW shall be considered an element of the county or city's comprehensive plan. All other portions of the shoreline master program for a county or city adopted under chapter 90.58 RCW, including use regulations, shall be considered a part of the county or city's development regulations.

Id. (codified at RCW 36.70A.480(1) (emphasis added)).[4]

[4] *See also* Laws of 1995, ch. 347, § 103 (amending the GMA's definition of "development regulations" to expressly include shoreline master programs) (codified at RCW 36.70A.030(7)). Ecology has also included SMPs in the guidelines' definition of

The legislature could not have been more clear: an SMP is part of a local government's development regulations. Development regulations are subject to RCW 82.02.020. *See, e.g., Isla Verde Int'l Holdings, Inc. v. City of Camas*, 146 Wn.2d 740, 763–65, 49 P.3d 867, 880–81 (2002) (invalidating a city's open space ordinance as a violation of RCW 82.02.020). Thus, SMPs are subject to RCW 82.02.020.

3. Compared to the local government, the state's role in the development, administration, and enforcement of a local government's SMP is limited.

Unlike the local government, Ecology's role in the development, administration, and enforcement of a local government's SMP is strictly limited by statute.

With respect to the development or amendment of a local government's SMP, Ecology is authorized only to review the SMP to ensure that it is consistent with the SMA. The SMA specifically states that Ecology "shall act primarily in a supportive and review capacity with an emphasis on providing assistance to local government and on insuring compliance with the policy and provisions of [the SMA]." RCW 90.58.050 (emphasis added). *See also* RCW 90.58.090.[5] Guidelines promulgated by Ecology reflect this statutory limitation:

"development regulations." *See* WAC 173-26-020(8) (defining "development regulations" to include SMPs).

[5] Before the trial court, Ecology relied on language in *Harvey v. Board of County Commissioners*, 90 Wn.2d 473, 584 P.2d 391 (1978), for the proposition that Ecology is "more than a passive approve/disapprove agency" when it comes to reviewing SMPs. CP 118. *Harvey*, however, was decided in 1978. At that time, Ecology was required to

> It should be noted [that] ecology's authority under the Shoreline Management Act is limited to review of shoreline master programs based solely on consistency with the SMA and these guidelines. It is the responsibility of the local government to assure consistency between the master program and other elements of the comprehensive plan and development regulations.

WAC 173-26-191(1)(e).

Before the trial court, Ecology argued that the SMPs developed by local governments are "merely *proposals* for shoreline use regulations and carry no legal effect until reviewed and approved or adopted by Ecology." CP 118 (emphasis in original). According to Ecology, the fact that an SMP takes effect only upon department approval means that the SMP is state law.

This line of reasoning overlooks the fact that unless an inconsistency with the SMA is discovered during said review, Ecology is obligated to approve a local government's SMP as proposed. *See* RCW 90.58.090(3)–(6). Ecology's limited review and approval powers are simply insufficient to justify the notion that an approved SMP is the product of state action.

Ecology's limited role in the development and administration of a local government's SMP is well illustrated by this case. Whatcom County spent three full years developing its amended SMP. The provisions of the

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adopt all SMPs through formal rulemaking procedures. *See* Former RCW 90.58.120 (1989), *amended by* Laws of 1995, ch. 347, § 308. As Ecology pointed out in its motion to dismiss, it is now entitled to administratively approve SMPs; formal rulemaking procedures are no longer required. *See* CP 117. *See also* RCW 90.58.090. Thus, the ongoing validity of the *Harvey* court's statement is questionable at best.

County's SMP that Appellants have challenged reflect policy choices by the County Council (choices that run afoul of RCW 82.02.020). While Ecology commented on Whatcom County's amended SMP, it did not draft, revise, or adopt the provisions at issue in this case.

With respect to permitting and enforcement, Ecology has no authority whatsoever over the issuance of shoreline substantial development permits—the permits most commonly required for development in the shoreline area. *See* RCW 90.58.140 (limiting Ecology's approval powers to conditional use permit and variance applications). Instead, Ecology has review authority only for those shoreline applications seeking conditional use permits or variances. *See* RCW 90.58.140(10). The state supreme court has recognized this statutory limitation on Ecology's permit review authority:

> RCW 90.58.140(10) does allow Ecology to review conditional use permits or variances issued by the local permitting authority. . . . However, no similar statute gives Ecology direct review authority for local government substantial development permits, and Ecology cannot issue fines for complying with a valid county shoreline permit. This marks the legislature's clear division of authority between state and local government.

Twin Bridge Marine Park, L.L.C. v. Dep't of Ecology, 162 Wn.2d 825, 835–36, 175 P.3d 1050, 1054 (2008) (emphasis added, citations omitted). *See also id.* at 836, 175 P.3d at 1055 ("In light of these statutory provisions, the SMA does not give Ecology plenary power to set aside the

County's analysis of its own SMA plan when issuing substantial development permits.").

In sum, the local government is responsible for developing, amending, administering, and enforcing its SMP. Ecology is only responsible for reviewing the local government's SMP to determine its consistency with the SMA. Ecology's argument that a local government's SMP is state law distorts these roles beyond recognition. A local government's SMP is clearly a local regulation.

4. The state regulations that guide a local government's development of its SMP expressly incorporate RCW 82.02.

Ecology has promulgated guidelines that are intended to assist local governments as they adopt and amend their shoreline master programs. *See* WAC ch. 173-26. These guidelines, which were last updated by Ecology in 2003, expressly incorporate RCW 82.02. Specifically, WAC 173-26-186(5) states in pertinent part that:

> The policy goals of the [SMA], implemented by the planning policies of master programs, may not be achievable by development regulation alone. Planning policies should be pursued through the regulation of development of private property only to an extent that is consistent with all relevant constitutional and other legal limitations (where applicable, statutory limitations such as those contained in chapter 82.02 RCW and RCW 43.21C.060) on the regulation of private property.

(emphasis added).[6]

[6] Similarly, WAC 173-26-191(2)(a)(ii)(D) provides that a local government shall, in crafting the regulatory provisions of its SMP, "[d]esign and implement regulations and

Under Washington law, courts are to interpret administrative regulations as a whole, such that no portion is rendered superfluous, void, or insignificant. *See, e.g.*, *Hayes v. Yount*, 87 Wn.2d 280, 290, 552 P.2d 1038, 1044 (1976) (holding that the principle of statutory construction whereby a statute should, whenever possible, be interpreted so that no portion of it is superfluous, void, or insignificant is equally applicable to administrative regulations, particularly where such regulations are adopted pursuant to express statutory authorization); *D.W. Close Co., Inc. v. Dep't of Labor & Indus.*, 143 Wn. App. 118, 126, 177 P.3d 143, 148 (2008) ("[R]egulations are interpreted as a whole, giving effect to all the language and harmonizing all provisions."). Were this Court to affirm the trial court's ruling—thereby holding that the a local government's SMP is state law not subject to RCW 82.02.020—it would effectively read the incorporation of RCW 82.02 out of the SMA guidelines, contrary to *Hayes* and *D.W. Close Company*.

Before the trial court, Ecology attempted to downplay the significance of this incorporation, arguing that WAC 173-26-186 is used "merely to assist in interpretation of the guidelines themselves." CP 162. That is only half true. While the prefatory language does state that the governing principles set forth in WAC 173-26-186 can be used to "assist in [the] interpretation of any ambiguous provisions" of the guidelines themselves, it goes on to expressly state that such principles are intended

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mitigation standards in a manner consistent with all relevant constitutional and other legal limitations on the regulation of private property."

to "guide the development of the . . . regulatory provisions of master programs." WAC 173-26-186. In other words, Ecology's guidelines command that the regulatory provisions of a local government's SMP (those provisions that "regulat[e the] development of private property" per WAC 173-26-186(5)) must be consistent with the legal limitations set forth in RCW 82.02.

Ecology also argued that WAC 173-26-186 was "akin to purpose or intent language and, as a result, has no substantive or operative effect." CP 162. This is not the case. The guidelines contain an express purpose and intent section, which can be found at WAC 173-26-171. WAC 173-26-186, in contrast, contains substantive guidelines.

Both of Ecology's arguments are further undermined by the fact that Whatcom County has expressly incorporated RCW 82.02 among its SMP's guiding principles. Specifically, section 23.10.03(D) of the County's SMP reads as follows:

> Regulation of private property to implement Program goals such as public access and protection of ecological functions and processes must be consistent with all relevant constitutional and other legal limitations. These include, but are not limited to civil rights guaranteed by the U.S. and State constitutions, recent federal and state case law, and state statutes, such as RCW 34.05.328, 43.21C.060 and 82.02.

(emphasis added). Whatcom County clearly understood that WAC 173-26-186(5) has real, substantive effect.

Ecology's litigation strategy has placed it in the awkward position of attempting to discredit its own guidelines. That Ecology finds itself in this position clearly demonstrates that its arguments are a byproduct of this litigation. Courts, however, give no deference to agency interpretations that are inconsistent with that agency's prior policy. *Sleasman v. City of Lacey*, 159 Wn.2d 639, 646, 151 P.3d 990, 994 (2007).

C. A local government's SMP does not become state law simply because it is developed in response to state law requirements.

Appellant anticipates that Ecology will argue that SMPs are state law because they are adopted pursuant to the SMA. Local regulations, however, do not become state law simply because they are developed in response to state law requirements.

This Court has expressly rejected the argument that local regulations are exempt from the requirements of RCW 82.02.020 by virtue of the fact that they are promulgated in response to state requirements. *See Citizens' Alliance for Property Rights*, 145 Wn. App. at 663, 187 P.3d at 793. In that case, King County argued that its clearing and grading critical areas ordinance was not subject to RCW 82.02.020 because it had adopted the ordinance pursuant to mandatory GMA requirements. *Id.* This Court rejected that argument, stating:

> Moreover, no Washington law supports the County's argument that [its clearing and grading critical areas ordinance] is exempt from the requirements of RCW

> 82.02.020 because it was adopted in response to the State's GMA requirements. Nor is there authority for the proposition that a local jurisdiction is bound by the statute only when adopting an ordinance on its own initiative.

Id. (emphasis in original).

Accordingly, the fact that a local government's SMP is developed in response to the requirements of the SMA has no bearing on whether an SMP is a local regulation or state law.[7]

D. Similarly, a local government's SMP does not become state law simply because it becomes part of the "state master program."

Appellants also anticipate that Ecology will argue that an SMP is state law by virtue of its incorporation into the "state master program." Appellants do not dispute the fact that a local government's SMP becomes part of the "state master program" once approved by Ecology. *See* RCW 90.58.030(3)(c) (defining the "state master program" as the "the cumulative total of all master programs approved or adopted by the department of ecology.").[8] This incorporation does not, however, transform an SMP into state law.

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[7] In its motion to dismiss, Ecology also relied on several decisions, including *Orion Corporation v. State*, 109 Wn.2d 621, 747 P.2d 1062 (1987), for the proposition that a local government acts as the state's agent in developing an SMP. *See* CP 119. From this, Ecology reasoned that the resulting SMP must constitute state law. *Id.* As discussed in section E, *infra*, Ecology's reliance on *Orion* is misplaced.

[8] Before the trial court, Ecology cited RCW 90.58.100(1) in further support of the notion that incorporation of a local SMP into the "state master program" gives the local SMP the force of state law. CP 155. RCW 90.58.100(1), however, simply states that "[t]he master programs provided for in this chapter, when adopted or approved by the department shall constitute use regulations for the various shorelines of the state." This has no bearing whatsoever on the question of local regulation versus state law.

The "state master program" is nothing more than a compilation (or "register," to use the parlance of the guidelines) of local SMPs. *See* RCW 90.58.030(3)(c) (defining the "state master program" as the "the cumulative total of all master programs approved or adopted by the department of ecology."); WAC 173-26-050 (identifying the "state master program" simply as a "register identifying original department adoption dates and the effective dates of subsequent amendments approved or adopted by the department for each local government shoreline master program." (emphasis added)); WAC 173-26-060 (identifying the contents of the "state master program" as nothing more than the legislative history of each local SMP). This "register" has no legal effect in and of itself. Thus, a local government's SMP is not transformed into state law simply because it is included within the "state master program."

E. Neither *Orion* nor *Buechel* stand for the proposition that an SMP is not subject to RCW 82.02.020.

The issue presented in this appeal is one of first impression. There are no recorded decisions from any Washington State appellate court addressing the question of whether or not a local government's SMP is subject to RCW 82.02.020. Nonetheless, Appellants anticipate that Ecology will claim that *Orion Corporation v. State*, 109 Wn.2d 621, 747 P.2d 1062 (1987) and *Buechel v. Department of Ecology*, 125 Wn.2d 196, 884 P.2d 910 (1994) stand for the proposition that SMPs are state law, and thus not subject to RCW 82.02.020. Such a claim would be misplaced.

1. *Orion* is inapposite to this appeal.

Orion did not involve an RCW 82.02.020 claim. Rather, it involved constitutional takings claims. *See id.* at 624–25, 747 P.2d at 1064. There, a landowner sued both Skagit County and the state, alleging that the use regulations contained within Skagit County's recently adopted SMP (which precluded the landowner's intended use of shoreline property) amounted to a taking. *Id.* Because the landowner alleged a taking by both the county and the state, the court sought to determine which government entity bore responsibility for the alleged taking and any necessary compensation. *Id.* at 643, 747 P.2d at 1074. The court ultimately dismissed the county from the action, reasoning that the county was merely acting as the state's agent in developing the use regulations at issue. As the court stated, "[b]ecause the County acted at the instance of and, in some material degree, under the direction and control of the State, an agency relationship developed between the parties. As the principal of an agent acting within its authority, the State must take full responsibility if a taking occurred." *Id.* at 644, 747 P.2d at 1074 (citations omitted).

The *Orion* court's agency analogy, on which it excused Skagit County from any potential liability, is limited to the facts of that case. The shoreline use regulations giving rise to the takings claims in *Orion* were expressly prescribed by the then-existing SMA guidelines, specifically

WAC 173-16-040(5) and WAC 173-16-050(5). *See id.* at 643, 747 P.2d at 1074. Those guidelines are no longer in effect.[9]

The uniform development regulations at the heart of this challenge, on the other hand, are not prescribed by Ecology's current guidelines. Instead, the substance of these regulations is left to the discretion of local government. *See* WAC 173-26-191(2)(a)(ii) (giving the local government broad discretion in crafting the regulatory provisions of its SMP). Accordingly, with respect to the uniform development regulations at issue, local governments do not act "at the instance of and, in some material degree, under the direction and control of the State." *See Orion Corp.*, 109 Wn.2d at 644, 747 P.2d at 1074.

Instead, under Ecology's current guidelines, a local government's development and adoption of an SMP is comparable to the development and adoption of critical areas regulations. The GMA directs local governments to designate and protect critical areas, but it does not specify the manner in which the local government accomplishes those directives. Instead, the GMA leaves those decisions to the discretion of the local government. *See* RCW 36.70A.050–060; WAC 365-190-080.

Similarly, the SMA and Ecology's implementing guidelines provide guidance to local governments as they develop and amend their local SMPs, but they do not dictate the substance of the regulatory provisions in those SMPs. *See* RCW 90.58.100; WAC 173-26-191; WAC

[9] These guidelines were repealed on November 29, 2000 and replaced with the guidelines set forth in WAC 173-26. *See* Wash. Reg. 00-24-031 (Nov. 29, 2000).

173-26-221. This Court has held that critical areas regulations are subject to RCW 82.02.020, reasoning that while they are adopted pursuant to state law, the substance of such regulations is left to the discretion of the local government. *See Citizens' Alliance for Property Rights*, 145 Wn. App. at 663, 187 P.3d at 793 (rejecting the argument that critical area regulations are exempt from RCW 82.02.020 and stating "[w]hile the GMA directs local jurisdictions to take action to protect certain functions and critical areas, it does not direct the County to take the particular action of adopting this clearing limits ordinance."). There is no reason not to extend this reasoning to SMPs.

Furthermore, the ongoing validity of the *Orion* court's holding—that the state is solely liable for any taking caused by an SMP—is questionable in light of RCW 36.70A.480(1). As discussed above, this statute, which was enacted eight years after *Orion* was decided, makes it clear that an SMP is a local regulation, not a state law.

2. *Buechel* does not address the issue before this Court.

Appellants also anticipate that Ecology will rely on *Buechel v. Department of Ecology*, 125 Wn.2d 196, 884 P.2d 910 (1994), for the proposition that an SMP constitutes state law. Like *Orion*, this case is distinguishable and does not compel such a conclusion.

Buechel involved the review of a shorelines hearing board decision upholding Ecology's decision to deny a shoreline variance application in Mason County. 125 Wn.2d at 198, 884 P.2d at 913. The lone issue before

the *Buechel* court was whether or not the board's decision was arbitrary and capricious or clearly erroneous. *Id.* at 201, 884 P.2d at 914. The court was not presented with the question of whether or not a local SMP was state law, let alone whether it was subject to RCW 82.02.020. Thus, while the court stated that Ecology had adopted Mason County's SMP "as a state regulation," *id.* at 204, 884 P.2d at 915, that statement is mere dicta.[10]

No appellate court has ever held that a local government's SMP is exempt from RCW 82.02.020. Given the fact that SMPs are developed, administered, and enforced by the local government and made part of the local government's development regulations by virtue of RCW 36.70A.480(1), such a void in the case law is not surprising. The trial court erred in ruling to the contrary. Appellants respectfully request that this Court reverse that ruling and remand for further proceedings.

F. Even if this Court were to conclude that portions of a local government's SMP are state law, Whatcom County's shoreline setbacks are subject to RCW 82.02.020.

For the reasons set forth above, this Court should hold that SMPs are local regulations, not state law. Even if the Court determines that there are some circumstances under which an SMP may be considered a state law, however, the Court should still hold that the specific provisions of Whatcom County's SMP at issue in this case (shoreline setbacks and certain other limitations) are local regulations.

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[10] Additionally, and as discussed in footnote 5, *supra*, Ecology was required to adopt SMPs through formal rulemaking procedures at the time *Buechel* was decided.

These provisions were the product of unfettered County discretion. They were neither prescribed nor drafted by the state. In fact, the SMA and Ecology's implementing guidelines are silent with respect to the specific width of shoreline setbacks.[11] (Consequently, shoreline setbacks can and do vary from jurisdiction to jurisdiction.[12])

In addition, the shoreline setbacks prescribed by the Whatcom County SMP are nothing more than a repackaging of the County's critical area buffers. *See* WCC Table 23.90.13.C (incorporating the County's critical areas buffers as shoreline setbacks).

Critical area regulations are decidedly local regulations. They are adopted pursuant to the GMA, not the SMA. *See* RCW 36.70A.170, .172. They are effective upon adoption by the county; no state review or approval is necessary to give them the force of law. This Court has held that they are subject to RCW 82.02.020. *See Citizens' Alliance for Property Rights*, 145 Wn. App. at 670, 187 P.3d at 797 (invalidating a

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[11] RCW 90.58.090(4) provides that a local government's SMP must provide "a level of protection of critical areas at least equal to that provided by the local government's critical areas ordinances." *See also* RCW 36.70A.480(4) ("Shoreline master programs shall provide a level of protection to critical areas located within shorelines of the state that is at least equal to the level of protection provided to critical areas by the local government's critical area ordinances"). The appropriate level of protection, however, is a decision that is placed squarely in the hands of the local government. *See* RCW 36.70A.172.

[12] *Compare* Pierce County Code 20.62.050 (prescribing a 50-foot setback for residential structures in all shoreline environments) *with* Snohomish County SMP (prescribing a 100-foot setback for residential structures within natural and conservancy shoreline environments, a 25-foot setback for residential structures within suburban and urban shoreline environments, and a 50-foot setback for residential structures within the rural shoreline environment), *available at* http://www.co.snohomish.wa.us/documents/Departments/PDS/Commerical_Land_Use/Shoreline/residentialdevelopment.pdf.

portion of King County's critical areas ordinance as contrary to RCW 82.02.020). Whatcom County's critical area regulations should not be shielded from scrutiny under RCW 82.02.020 simply because they have been folded into the amended SMP.

V. CONCLUSION

Local shoreline master programs are developed and amended by the local government. Additionally, they are administered and enforced by the local government. Local shoreline master programs constitute local regulations, not state law. As such, they are subject to RCW 82.02.020.

The Skagit County Superior Court's decision to grant Ecology's motion to dismiss was based on the incorrect legal conclusion that an SMP is state law. Appellants respectfully request that this Court reverse that decision and the remand the matter to the trial court for further proceedings.

DATED this 8th day of October, 2009.

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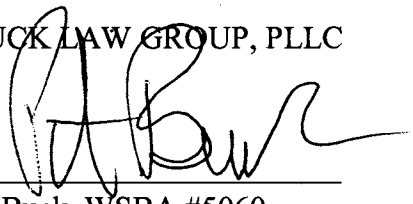

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