☐ Expedite
☐ No hearing set
■ Hearing is set
Date: November 20, 2009
Time: 1:30 p.m.
Judge: Hon. Richard D. Hicks

Noted for Oral Argument

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON

FOR THURSTON COUNTY

OLYMPIC STEWARDSHIP FOUNDATION, Petitioner, v. WESTERN WASHINGTON GROWTH MANAGEMENT HEARINGS BOARD, Agency Respondent.	No. 08-2-02852-3, consolidated with 09-2-01897-6 **PETITIONER'S REPLY BRIEF**

BRIAN T. HODGES
Pacific Legal Foundation
10940 NE 33rd Place, Suite 210
Bellevue, Washington 98004
(425) 576-0484 FAX: (425) 576-9565

TABLE OF CONTENTS

BRIAN T. HODGES
Pacific Legal Foundation
10940 NE 33rd Place, Suite 210
Bellevue, Washington 98004
(425) 576-0484 FAX: (425) 576-9565

TABLE OF AUTHORITIES

Page

Cases

BRIAN T. HODGES
Pacific Legal Foundation
10940 NE 33rd Place, Suite 210
Bellevue, Washington 98004
(425) 576-0484 FAX: (425) 576-9565

BRIAN T. HODGES
Pacific Legal Foundation
10940 NE 33rd Place, Suite 210
Bellevue, Washington 98004
(425) 576-0484 FAX: (425) 576-9565

BRIAN T. HODGES
Pacific Legal Foundation
10940 NE 33rd Place, Suite 210
Bellevue, Washington 98004
(425) 576-0484 FAX: (425) 576-9565

BRIAN T. HODGES
Pacific Legal Foundation
10940 NE 33rd Place, Suite 210
Bellevue, Washington 98004
(425) 576-0484 FAX: (425) 576-9565

Jefferson County's channel migration zone (CMZ) provisions of its critical area ordinance are invalid because they do not comply with the Growth Management Act (GMA) and violate RCW 82.02.020. The County acknowledges that its CMZ regulations fail to comply with the GMA mandate that the "protection of critical areas . . . within shorelines of the state *shall* be accomplished *only* through the local government's shoreline master program." RCW 36.70A.480(3)(a) (emphasis added); County Resp. Br. at 9. This alone warrants reversal. But there is more. Neither the County nor its amici satisfy the burden to demonstrate that the scientific record supports the County's decision to adopt a 100% vegetation retention standard on all property in "high risk" CMZs. Olympic Stewardship Foundation (OSF) requests that the Court rule that the County's CMZ regulations are unlawful, and reverse the Growth Board's decision.

STATEMENT OF ADDITIONAL FACTS

Jefferson County attempts to justify its CMZ regulations by portraying them as typical and widely accepted in Washington. But the truth is that only ten other counties address CMZs in their critical areas regulations—a fraction of Washington's 39 counties. AR 1 at 609. Six of these counties expressly permit new development within "high risk" CMZ areas, subject to certain restrictions:

> King County Code §§ 21A.24.275(A); 21A.24.365(D); 21A.24.045 (permitting development of construction of new dwelling units, nonresidential structures, and expansion of existing structures in severe risk CMZs subject to restrictions);
>
> Pierce County Code §§ 18E.10.140(H)(4); 18E70.040.B (discouraging new development within floodway, unless the property is designated to be in a floodway because it is in a CMZ in which case the property owner retains their development and use rights subject to restrictions);
>
> Snohomish County Code § 30.62B.330 (allowing new development within a CMZ if a property owner installs fish friendly shoreline and bank stabilization);
>
> Kitsap County Code §§ 19.150.180; 19.300.315 (imposing buffers on CMZs but allowing for a 50% reduction of buffer size to allow for construction of a single-family residence, and a 25% reduction for other uses);
>
> Clark County Code § 40.240.880 (imposing a buffer on CMZs, but development can occur in the buffer if necessitated by the proposed use); and

BRIAN T. HODGES
Pacific Legal Foundation
10940 NE 33rd Place, Suite 210
Bellevue, Washington 98004
(425) 576-0484 FAX: (425) 576-9565

Whatcom County Code §§ 16.16.310(c)(5)(b); 16.16.355 (designating CMZs as erosion hazard, but permitting some development and shoreline protection within CMZ).

While the other four counties either substantially limit the size of CMZs, or adopt no regulations restricting the use of property within a CMZ:

Thurston County Code § 17.15.935 (limiting size of CMZ vegetated buffers to between 25 to 100 feet from the ordinary high water mark);

Clallam County Code §§ 27.12.410(1)(a)(X); 27.12.415 (limiting CMZ to the meander hazard area and imposing a 50 foot buffer (reduceable to 30-feet) on the CMZ);

Mason County Code §§ 17.01.110(D)(1); 17.01.240 (limiting CMZs to the historic channel migration area); and

Lewis County Code § 17.35A.121 (adopting definition for CMZs, but no regulations).

Like the majority of counties regulating CMZs, the Department of Ecology's guidelines for the development of shoreline master programs limit the definition of CMZs to active historic channel beds, and recognize the need to manage (not prohibit) shoreline development within CMZs (including regulations providing for shoreline stabilization, and providing incentives to enhance the environment). WAC 173-26-221(2)(c)(iv); WAC 173-26-221(3)(b). The Forest Practices Act, the only state law that prohibits the use of property within a CMZ, requires the state to compensate owners of private forestry lands for the lost value of timber. RCW 76.09.040(3); WAC 222-23-010-030.

ARGUMENT AND AUTHORITIES

I
OSF'S CHALLENGE TO CMZ CRITICAL AREA REGULATIONS IN THE SHORELINE AREA IS NOT MOOT

A challenge alleging that the Growth Board incorrectly applied the GMA is generally not subject to the mootness doctrine because questions regarding compliance with the GMA raise issues that are public in nature and likely to recur, and an authoritative determination is desirable to provide further guidance to the public. *Wells v. W. Wash. Growth Mgmt. Hearings Bd.*, 100 Wn. Ct. App. 657, 667

BRIAN T. HODGES
Pacific Legal Foundation
10940 NE 33rd Place, Suite 210
Bellevue, Washington 98004
(425) 576-0484 FAX: (425) 576-9565

n.10 (2000).[1] Here, the Growth Board determined that the County lacked authority to adopt the CMZ critical area regulations on its shorelines, but failed to conclude that the regulations did not comply with RCW 36.70A.480(3)(a).[2] Opening Br. App. 2 at 16-17, 49. Without this determination, Jefferson County was under no legal obligation to repeal or amend the noncomplying portions of its critical areas regulations, and declined to do so. The plain language of the CMZ regulations still state that the critical area restrictions apply to any application for development or use of shoreline property in a "high risk" CMZ will be subject to a 100% vegetation retention condition. JCC 18.22.030; JCC 18.22.170(4)(d). The County admits that the Growth Board erred by failing to decide whether the County's CMZ regulations comply with the GMA, but urges this Court to find the issue moot. *See* County Resp. Br. at 9; RCW 36.70A.300(1), (3) (The GMA mandates that the Growth Board issue a final order determining whether or not the County's CAO complies with the GMA.).

An issue that has never been decided is not moot. *King County v. Cent. Puget Sound Growth Mgmt. Hearings Bd.*, 138 Wn. 2d 161, 177-78 (1999); *Orwick v. City of Seattle*, 103 Wn. 2d 249, 253 (1984) (An issue will only be deemed moot if the court can no longer provide effective relief.). The County argues that its non-compliance with the GMA was effectively resolved by a code interpretation decision directing its planning department not to enforce critical area regulations on shoreline properties. County Resp. Br. at 9. But a code interpretation cannot moot OSF's challenge because it does not constitute an amendment to the critical areas ordinance

---

[1] Recent legislation and appellate decisions concerning the interplay between the GMA and SMA provide further evidence that this is an issue of public importance. *E.g.*, Engrossed Substitute H.B. 1933, 58th Leg., Reg. Sess. § 1(1) (Wash. 2003); *Futurewise v. W. Wash. Growth Mgmt. Hearings Bd.*, 164 Wn. 2d 242 (2008); *Biggers v. City of Bainbridge Island*, 162 Wn. 2d 683 (2007); *Kitsap Alliance of Property Owners v. Cent. Puget Sound Growth Mgmt. Hearings Bd. (KAPO)*, – Wn. App. –, 2009 WL 2877934 (slip op., No. 38017-0-II, Sept. 9, 2009); *Samson v. City of Bainbridge Island*, 149 Wn. Ct. App. 33 (2009).

[2] Had the Board ruled on this issue, it would have been required to remand the CMZ regulations for actions to bring the provisions into compliance with the GMA. RCW 36.70A.300(1), (3). This, in turn, would have required the County to reevaluate its "best available science" to determine if there is support in the record to impose its CMZ regulations outside of the shorelines. RCW 36.70A.172(1).

BRIAN T. HODGES
Pacific Legal Foundation
10940 NE 33rd Place, Suite 210
Bellevue, Washington 98004
(425) 576-0484 FAX: (425) 576-9565

and can be withdrawn at any time. JCC 18.40.350-.380. *Cf. Manke Lumber Co., Inc. v. Cent. Puget Sound Growth Mgmt. Hearings Bd.*, 113 Wn. Ct. App. 615, 621 n.5 (2002) (an issue was determined to be moot where County repealed the challenged ordinance while appeal was pending). The code interpretation delays rather than resolves OSF's challenge to the County's invalid regulation of shorelines. If not decided now, the issue will recur when the County adopts its updated shoreline master program, which proposes to incorporate the CMZ critical area regulations by reference.[3] *See* County Resp. Br. at 9; *see Citizens for Rational Shoreline Planning v. Whatcom County*, WWGMHB No. 08-2-0031, at 14 (Final Decision and Order, April 20, 2009) (Ecology does not review the substance of critical area regulations that are incorporated by reference in an SMP update.). The Board's failure to determine noncompliance, if not reversed, will result in more litigation on the same issue.[4] Jefferson County and its amici do not dispute that the CMZ regulations failed to comply with RCW 36.70A.480(3)(a); this Court should reverse the Growth Board's decision. RCW 34.05.570(3)(d).

II
THE CMZ REGULATIONS FAIL TO COMPLY WITH THE GMA'S "BEST AVAILABLE SCIENCE" REQUIREMENT

The Growth Board's failure to rule on OSF's RCW 36.70A.480(3)(a) challenge also impacts this Court's review of whether the County's CMZ regulations comply with the GMA's "best available science" requirement. The Board concluded that the County lacked authority to regulate its shorelines as critical areas. Opening Br. App. 2 at 16-17, 49; Opening Br. App. 3 at 3-4. The County's code interpretation concluded that it could only lawfully apply its 100% vegetation retention condition to property located in a "high risk" CMZ more than 200-feet from a river. AR 2 at 140-42. Thus, all property within 200 feet of a river is unaffected by the CMZ regulations, and can be developed. AR 2 at 141.

---

[3] Article 6(D) of the County's proposed SMP. The proposed SMP update is available at www.co.jefferson.wa.us/commdevelopment/Shoreline_PCFinalDraft.htm.

[4] The effect of incorporating a critical area regulation by reference in a County's SMP is currently on appeal in *Citizens for Rational Shoreline Planning v. Whatcom County*, Wash. State Court of Appeals, Division I, No. 63646-4-I.

BRIAN T. HODGES
Pacific Legal Foundation
10940 NE 33rd Place, Suite 210
Bellevue, Washington 98004
(425) 576-0484 FAX: (425) 576-9565

Neither Jefferson County nor its amici address the CMZ regulations as altered by the Growth Board's decision and the code interpretation. *See* County Resp. Br. at 19-23; Amicus Br. at 6-10. Instead, they rely on selections from the "best available science" record that comment on the general relationship between large trees located adjacent to a river and the condition of river banks and channels. *See* County Resp. Br. at 21-23 (citing AR 1 at 356 (role of vegetation in stabilizing river banks)); AR 1 at 358 (effect of removing fallen trees along river bank on river channel); AR 1 at 371 (effect of removing trees along river bank on erosion); AR 1 at 407 (downstream effect of removing trees along river bank)); Amicus Br. at 9 (citing AR 1 at 260-61 (discussing role of vegetation along the river's bank)); AR 1 at 630 (role of log jams in the channel); AR 1 at 241 (role of woody debris in the channel). Without support in the scientific record for the County's decision to impose a 100% vegetation retention condition only on property located more than 200-feet from a river bank, the Growth Board's decision was clearly erroneous and should be reversed. RCW 36.70A.172; *Ferry County v. Concerned Friends of Ferry County*, 155 Wn. 2d 824, 837-38 (2005); *Honesty in Envtl. Analysis & Legislation v. Cent. Puget Sound Growth Mgmt. Hearings Bd.*, 96 Wn. Ct. App. 522, 532 (1999) (*HEAL*).

A. The County Fails To Demonstrate That It Evaluated Contrary Scientific Conclusions and Recommendations in the Record

The GMA requires the County to create a record demonstrating that, when developing its critical area regulations, it considered all of the contrary scientific conclusions and recommendations contained in the "best available science." *Ferry County*, 155 Wn. 2d at 834-38. In its opening brief, OSF cited portions of the scientific record that demonstrate the hazards of the County's policy choice. In regard to the delineation CMZ areas, the science concluded that the "high risk" delineation included: (1) data errors and/or assumptions; (2) land that will probably not be affected by channel migration; (3) land that is protected from channel migration by bank armoring or other structures; and (4) land that is at increased risk due to public works projects. Opening Br. at 10-12. In regard to riparian vegetation, the science concluded that, while vegetation may provide some local benefits (such as protection of the immediate adjacent bank), log jams caused by large woody debris actually accelerate erosion, avulsion, and channel migration. Opening Br. at

BRIAN T. HODGES
Pacific Legal Foundation
10940 NE 33rd Place, Suite 210
Bellevue, Washington 98004
(425) 576-0484 FAX: (425) 576-9565

13-14. In regard to the County's decision to impose a uniform 100% vegetation retention requirement, the science proposed multiple alternative solutions that would have a less drastic impact on private property rights. Opening Br. at 13. Neither Jefferson County nor its amici respond to any of these scientific conclusions or recommendations. Instead, the County and its amici argue that the County has broad discretion to adopt whatever policy it chooses without regard for the competing scientific opinions in the record. RCW 36.70A.3201; *HEAL*, 96 Wn. App. at 530-31. This is incorrect. While the GMA grants local government discretion in making planning decisions, the County cannot ignore the contrary scientific opinions and recommendations contained in the "best available science" record. *Ferry County*, 155 Wn. 2d at 837-38; *HEAL*, 96 Wn. App. at 532. The County is required to demonstrate that it engaged in a reasoned process of evaluating *all of the scientific conclusions and recommendations* when it developed its CMZ regulations. *Ferry County*, 155 Wn. 2d at 834-38. The County's failure to consider the contrary scientific conclusions and recommendations in the "best available science" violates the GMA, and the Growth Board's decision should be reversed. RCW 34.05.570(3)(d), (e).

B. The County Fails To Demonstrate a Scientific Basis for a Uniform and Preset 100% Vegetation Retention Condition on All Potential Uses of Property

OSF also challenged the County's CMZ regulations because there is nothing in the "best available science" record supporting the County's decision to impose a 100% vegetation retention standard on all potential uses of property in a "high risk" CMZ. Opening Br. at 13-14. The County ignores this argument because there is no science on point.[5]

---

[5] Instead, Jefferson County argues that its 100% vegetation retention condition is justifiable as a *de facto* prohibition on development under its general police powers. Resp. Br. at 18-19 (citing *Maple Leaf Investors, Inc. v. State Dep't of Ecology*, 88 Wn. 2d 726, 730 (1977)). There is a thin line between the exercise of the police power to prohibit a property owner from using his or her land and condemnation. *Id.* A regulation depriving a landowner of his or her development rights must be supported by evidence that the restriction is necessary. *Id.* That is precisely what is required by the GMA's "best available science" and RCW 82.02.020. *HEAL*, 96 Wn. App. at 532-

(continued...)

BRIAN T. HODGES
Pacific Legal Foundation
10940 NE 33rd Place, Suite 210
Bellevue, Washington 98004
(425) 576-0484 FAX: (425) 576-9565

The County's amici acknowledge that the scientific record "has not specified the precise percentage of vegetation that must be retained." Amicus Br. at 9. Amici suggest that the County is not required to include any science supporting its decision to adopt a 100% vegetation retention standard because it is "logical" to assume that if *some* retention of riparian vegetation is beneficial, then a 100% removal restriction would be even better. Amicus Br. at 9. But unsupported opinions and arguments about the potential effects of a proposed land use do not constitute substantial evidence. *Omnipoint Corp. v. Zoning Hearing Bd. of Pine Grove Twp.*, 181 F.3d 403, 408-09 (3d Cir. 1999); *Clements v. Blue Cross of Washington & Alaska, Inc.*, 37 Wn. App. 544, 550 (1984) (speculation and conjecture cannot constitute substantial evidence). The GMA does not permit this type of "speculation and surmise." *Ferry County*, 155 Wn. 2d at 837-38; *HEAL*, 96 Wn. App. at 532. In fact, the "best available science" record refutes amici's assumption, concluding that vegetation retention can have both beneficial and adverse impacts on channel migration, in some circumstances accelerating erosion and placing people's lives and homes at risk. *See* AR 1 at 409. These sorts of conclusions demonstrate why our courts require local government to follow an analytic process of evaluating all of the "best available science" in the record. *Ferry County*, 155 Wn. 2d at 837-38; *HEAL*, 96 Wn. App. at 532-34. The County's 100% vegetation retention standard is unsupported by science, and the Board's decision concluding that it complied with the GMA should be reversed.

The County and its amici argue that the CMZ regulations could be justified as a type of flood hazard or fish habitat buffer[6] (*see* County Resp. Br. at 10, 18-19, 22; Amicus Br. at 4-5, 9-10), but the County already regulates those critical areas with

---

[5] (...continued)
34. Whether characterized as a critical area restriction or a "blanket prohibition on development," the County must demonstrate that the method it chose to restrict development (a 100% vegetation retention standard) is supported by "best available science."

[6] When the County designated CMZs as a type of geologically hazardous critical area, it limited its "best available science" record to five studies listed in its critical areas ordinance. AR 2 at 20 (Ordinance 06-0511-09 at Exhibit A). In making these arguments, the County and its amici rely on documents not included in the "best available science" record. County Resp. Br. at 10, 18-19, 22 (citing AR 1 at 715-16); Amicus Br. at 4-5, 9-10 (citing AR 1 at 629-32).

BRIAN T. HODGES
Pacific Legal Foundation
10940 NE 33rd Place, Suite 210
Bellevue, Washington 98004
(425) 576-0484 FAX: (425) 576-9565

much less restrictive regulations. The flood hazard area regulations permit new development within the floodplain if the proposed structure is raised one foot higher than the anticipated flood elevation (JCC 18.22.140), and the fish habitat regulations impose a maximum 150-foot buffer on its most sensitive rivers. *See* JCC 18.22.200. Neither the County nor its amici demonstrate that the flood hazard or fish habitat concerns would support a 100% vegetation retention condition on property more than 200-feet from the river.

III
JEFFERSON COUNTY'S 100% VEGETATION RETENTION STANDARD VIOLATES RCW 82.02.020

Jefferson County's response brief does not discuss how the record satisfied nexus and rough proportionality. Instead, the County asserts that a decision by this Court that the County complied with the GMA's "best available science" requirement would dictate the conclusion that it satisfied nexus and rough proportionality. County Resp. Br. at 27. The County is wrong because compliance with the GMA's "best available science" provision is a substantively different question than whether a condition satisfies nexus and rough proportionality. In *Citizens' Alliance for Property Rights v. Sims*, 145 Wn. Ct. App. 649 (2009), there was a prior Growth Board determination that King County's 50% - 65% vegetation retention condition complied with the GMA's "best available science" requirement. *See Keesling v. King County*, Central Puget Sound Growth Management Hearings Board, No. 05-3-001 (Final Decision and Order, July 5, 2005). Despite this determination, the Court of Appeals held that King County bore the burden of proving that its 50%-65% vegetation retention standard strictly complied with the nexus and rough proportionality requirements of RCW 82.02.020. *Citizens' Alliance*, 145 Wn. App. at 657. Jefferson County must do more than just say that its "best available science" satisfies nexus and rough proportionality.

A. The County Fails To Satisfy Its Burden of Demonstrating Compliance with the Nexus and Rough Proportionality Requirements of RCW 82.02.020

In order to establish nexus, the County must demonstrate "a close *causal* nexus between the burdens imposed by the regulations and the social costs that

BRIAN T. HODGES
Pacific Legal Foundation
10940 NE 33rd Place, Suite 210
Bellevue, Washington 98004
(425) 576-0484 FAX: (425) 576-9565

would otherwise be imposed by the property's unregulated use."[7] The County argues that its CMZ regulations are designed to serve two governmental purposes: (1) protect the natural, vegetated conditions from the impacts of development and use of private property so that a river will have a buffer in the event it migrates; and (2) protect new development from the risk of flood damage. *See* Tr. 1 at 29 ("The object of identifying CMZ is to ensure that the stream [has] a protective buffer in the future."); County Resp. Br. at 18, 22-23. But the County has not shown the required causal relationship between its 100% vegetation retention condition and any potential use of property within a "high risk" CMZ.[8] *See* 2 Rathkopf's Law of Zoning and Planning § 20:67(4) at 20-90 (2002) (Absent specific environmental supporting documents, a mandatory vegetation retention requirement will "raise some significant legal questions under the . . . nexus test.").

The County cannot establish an essential nexus because it did not take into consideration existing conditions within the "high risk" CMZ areas. For example, the "high risk" CMZ delineation includes property that has already been cleared and developed.[9] *See* AR 2 at 40-44. The County cannot show that all of the regulated property exists in the natural, undeveloped, vegetated condition which is necessary to find a nexus exists between its uniform 100% vegetation retention condition and its interest in preserving potential stream buffers if the stream moves in the future. Nor can the County demonstrate a nexus between the existing condition and its

---

[7] R. S. Radford, *Of Course a Land Use Regulation That Fails To Substantially Advance Legitimate State Interests Results in a Regulatory Taking*, 15 Fordham Envtl. L. Rev. 353, 390 (2004) (citing *Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825, 838-39 (1984)); *Burton v. Clark County*, 91 Wn. Ct. App. 505, 521-22 (1998) (To establish nexus, the County "must show that the development . . . will create or exacerbate the identified public problem" and that its proposed condition "tends to solve, or at least to alleviate, the identified public problem.").

[8] It is this causal connection, "not an ends-means fit, that offers real protection against the imposition of unjustified or disproportionate burdens on individual property owners." Radford, 15 Fordham Envtl. L. Rev. at 391.

[9] There are at least thirteen lots with existing single family residences that fall completely within the "high risk" CMZ area of the Duckabush River (Parcel Nos. 502171006, 502172016, 502172020, 502172019, 982201830, 982201826, 982201824, 982201823, 981901419, 981901410, 981002223, 981002226, 502172007). AR 2 at 40.

BRIAN T. HODGES
Pacific Legal Foundation
10940 NE 33rd Place, Suite 210
Bellevue, Washington 98004
(425) 576-0484 FAX: (425) 576-9565

interest in protecting new development from the risk of erosion or flooding.[10] The "best available science" concluded that the presence of housing and other infrastructure will *decrease* the risk of channel migration, and existing structures throughout the County were not accounted for in the delineation process. *See* AR 1 at 366, 423, 425.

Nor can the County show rough proportionality. "RCW 82.02.020 does not permit conditions that satisfy a 'reasonably necessary' standard for *all* new development collectively; it specifically requires that a condition be 'reasonably necessary as a direct result of the proposed development or plat.'" *Isla Verde Int'l Holdings, Inc. v. City of Camas*, 146 Wn. 2d 740, 761 (2002) (citations omitted). Rough proportionality prohibits the County from imposing a condition on development that is "uniformly applied, in the preset amount, regardless of the specific needs created by a given development." *Isla Verde*, 146 Wn. 2d at 763; *see also Citizens' Alliance*, 145 Wn. App. at 665 ("The plain language of the statute does not permit conditions that are reasonably necessary for *all* development, or *any potential* development."); *Castle Homes & Dev., Inc. v. City of Brier*, 76 Wn. Ct. App. 95, 109 (1994) ("[W]hen exacted without limitation to the direct impact, they are not appropriate and are in derogation of the law."). The County attempts to avoid the clear rule of *Isla Verde* and *Citizens' Alliance* by pointing out that the conditions at issue in those cases applied to all property, whereas Jefferson County's vegetation retention condition only applies within a critical area. County Resp. Br. at 24. This is a distinction without a difference because our courts have long held that a critical area restriction will be subject to review under the nexus and rough proportionality tests if it imposes a condition on development.[11]

---

[10] As stated above, the County separately regulates flood risk in its flood hazard area regulations, which permit new development within the floodplain if the proposed structure is raised one foot higher than the anticipated flood elevation. JCC 18.22.140.

[11] The County's argument that nexus and rough proportionality can never apply to a condition required by a critical area regulation invokes the refuted *pre-Lucas* belief that any government action designed to prevent environmental harm will not be subject to a takings claim. *See Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1028 (1992); James S. Burling, *Private Property Rights and the Environment After Palazzolo*, 30 B.C. Envtl. Aff. L. Rev. 1, 13 (2002) (continued...)

BRIAN T. HODGES
Pacific Legal Foundation
10940 NE 33rd Place, Suite 210
Bellevue, Washington 98004
(425) 576-0484 FAX: (425) 576-9565

In *HEAL*, the Court of Appeals held that critical area regulations adopted under the GMA must comply with the constitutional nexus and rough proportionality limits that have been incorporated into RCW 82.02:

> *[T]he policies and regulations adopted under GMA must comply with nexus and rough proportionality limits the United States Supreme Court has placed on governmental authority to impose conditions on development applications* . . . . Simply put, the nexus rule permits only those conditions necessary to mitigate a specific adverse impact of a proposal. The rough proportionality requirement limits the extent of the mitigation measures, including denial, to those which are roughly proportional to the impact they are designed to mitigate. *Both requirements have also been incorporated into the GMA amendments to RCW 82.02 authorizing development conditions.*

HEAL, 96 Wn. App. at 533-34 (emphasis added). The *Citizens' Alliance* Court similarly concluded that "no Washington law supports the County's argument" that critical area regulations adopted under the GMA were "exempt from the requirements of RCW 82.02.020." *Citizens' Alliance*, 145 Wn. App. at 663. And in *Dolan*, the U.S. Supreme Court held that a condition on development is subject to nexus and rough proportionality, regardless of its purpose:

> The city's goals of reducing flooding hazards and traffic congestion, and providing for public greenways, are laudable, but there are outer limits to how this may be done. "A strong public desire to improve the public conditions [will not] warrant achieving the desire by a shorter cut than the constitutional way of paying for the change."

Dolan v. City of Tigard, 512 U.S. 374, 396 (1994) (alteration in original) (quoting *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 416 (1992)); *see also Isla Verde*, 146 Wn. 2d at 752-54 (invalidating open space requirement intended to protect the environment and provide critical habitat); *Citizens' Alliance*, 145 Wn. App. at 661-64 (invalidating vegetation retention requirement intended to protect streams against channelization due to stormwater runoff); *Grogan v. Zoning Bd. of Appeals of Town of East Hampton*, 221 A.D.2d 441, 442 (N.Y. App. Div. 1995) (applying nexus and

---

[11] (...continued)
(The *Lucas* Court has "refuted the notion that a regulation designed to protect the public interest by preventing harm is automatically immune from takings liability.").

BRIAN T. HODGES
Pacific Legal Foundation
10940 NE 33rd Place, Suite 210
Bellevue, Washington 98004
(425) 576-0484 FAX: (425) 576-9565

rough proportionality test to local government's imposition of conservation easement designed to protect wetlands in environmentally sensitive area).

The U.S. Supreme Court explained that the application of the nexus and rough proportionality tests *is not* a judicial check on the reason for the government's decision to regulate private property. *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 547-48 (2005). The nexus and rough proportionality tests are applied to prevent an unlawful application of government regulation. *Id*; *see also* Mark W. Cordes, *Legal Limits on Development Exactions: Responding to Nollan and Dolan*, 15 N. Ill. U. L. Rev. 513, 550 (1995) ("[O]ne clear principle that does emerge from *Dolan* is that most at risk will be those exactions that are imposed because the local government has already decided that it wants the land in question and uses the development approval process as a means to get it."). The County has failed to satisfy its burden of showing how the County arrived at its uniform 100% vegetation retention standard. The vegetation retention condition violates RCW 82.02.020 and is unlawful.

B. A Vegetation Retention Condition Is Subject to RCW 82.02.020

Jefferson County also argues in passing that its CMZ regulations should not be subject to RCW 82.02.020, because its 100% vegetation retention condition does not require the property owner to dedicate his or her land to public use. County Resp. Br. at 26. But "Washington case law is clear that RCW 82.02.020 applies to ordinances that may require developers to set aside land as a condition of development." *Citizens' Alliance*, 145 Wn. App. at 663. Our courts have repeatedly rejected the argument a condition must require a formal dedication to be subject to RCW 82.02.020. *See, e.g., Citizens' Alliance*, 145 Wn. App. at 670 (rejecting argument that RCW 82.02.020 required a dedication of property); *Isla Verde*, 146 Wn. 2d at 757-58 (2002) (rejecting argument that RCW 82.02.020 required a dedication of property); *Benchmark Land Co. v. City of Battle Ground*, 103 Wn. App. 721, 723-28 (2000) (rejecting argument because the U.S. Supreme Court has extended nexus and rough proportionality to circumstances not involving a dedication of land); *affirmed on other grounds*, 146 Wn. 2d 685 (2002); *HEAL*, 96 Wn. App. at 534 (rejecting argument seeking to limit nexus and rough proportionality to dedications of land). Jefferson County offers no reason for this Court to revisit this well-settled issue.

BRIAN T. HODGES
Pacific Legal Foundation
10940 NE 33rd Place, Suite 210
Bellevue, Washington 98004
(425) 576-0484 FAX: (425) 576-9565

C. RCW 82.02.020 Requires That a Condition Be Specific to an Identified Impact of the Proposed Development

Jefferson County argues that government can never adopt standards prohibiting development in critical areas if it has to consider the impact of each and every proposed development before requiring a vegetation retention zone. County Resp. Br. at 25. *Citizens' Alliance* rejected that argument, holding that *Trimen Dev. Co. v. King County*, 124 Wn. 2d 261 (1994), requires that a "condition must relate to the impact of the proposed development to satisfy the statute." *Citizens' Alliance*, 145 Wn. App. at 671. Decided immediately after *Dolan*, *Trimen* is the first in a line of cases incorporating the nexus and rough proportionality requirements into RCW 82.02.020. *Trimen* stands for the very proposition the County seeks to avoid: a condition on development must be "specific to the site." *Trimen*, 124 Wn. 2d at 275.

In *Trimen*, King County adopted an ordinance that required developers to either set aside land or pay an in-lieu fee as a condition of new development. The county based its ordinance on a study identifying the general deficit of parks within narrowly defined "park service areas" and the projected park use based on new residential development. *Trimen*, 124 Wn. 2d at 264-65. Unlike Jefferson County, King County did not simply impose a uniform and pre-set condition on all new development. Instead, the county took the additional step of developing a methodology whereby it took into account several site-specific criteria, including location and zoning of the proposed development, need within the relevant "park service area," number of new residential units, projected population increase, and the value of the regulated property. *See Trimen*, 124 Wn. 2d at 264-65, 274-75. The methodology calculated a park fee based on criteria that were "specific to the site," led the Supreme Court to find the proportionality required by RCW 82.02.020. *Trimen*, 124 Wn. 2d at 275. Such an impact-specific implementing methodology is missing from Jefferson County's CMZ regulations. There is nothing in the record or ordinance to connect the County's desire to preserve vegetated conditions on private property to ensure future protective buffers for streams and the need for the protection on individual properties.

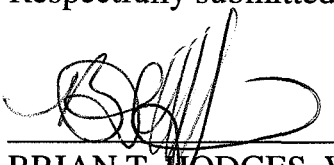
BRIAN T. HODGES
Pacific Legal Foundation
10940 NE 33rd Place, Suite 210
Bellevue, Washington 98004
(425) 576-0484 FAX: (425) 576-9565

CONCLUSION

For the foregoing reasons, OSF respectfully requests that this Court determine that the County's CMZ regulations are invalid and unlawful and reverse the Board's decisions below.

DATED: November 9, 2009.

Respectfully submitted,



BRIAN T. HODGES, WSBA No. 31976
Pacific Legal Foundation
10940 NE 33rd Place, Suite 210
Bellevue, Washington 98004
Telephone: (425) 576-0484
Facsimile: (425) 576-9565

Attorney for Petitioner

BRIAN T. HODGES
Pacific Legal Foundation
10940 NE 33rd Place, Suite 210
Bellevue, Washington 98004
(425) 576-0484 FAX: (425) 576-9565

DECLARATION OF SERVICE

BRIAN T. HODGES declares as follows:

I am a resident of the State of Washington, employed at 10940 NE 33rd Place, Suite 210, Bellevue, Washington 98004. I am over the age of 18 years and am not a party to this action. On the below date, true copies of the *Petitioner's Reply Brief* were served to the following as indicated:

Bruce Turcott *(Via Fed. Ex)*
Assistant Attorney General
Licensing & Admin Law Division
1125 Washington Street SE
P.O. Box 40110
Olympia, WA 98504-0110
Attorney for Western Washington Growth Management Hearings Board

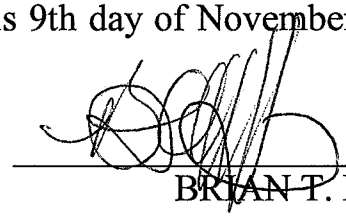
Mark R. Johnsen *(Via Fed. Ex.)*
Karr Tuttle Campbell
1201 Third Avenue, Suite 2900
Seattle, WA 98101-3028
Attorney for Jefferson County

David Alvarez *(Via Fed. Ex.)*
Jefferson County Prosecuting Attorney
P.O. Box 1220
Port Townsend, WA 98368
Attorney for Jefferson County

Robert Beattey *(Via Fed. Ex.)*
Robert Hatfield
Futurewise
814 Second Avenue, Suite 500
Seattle, WA 98104
Attorney for Amicus Futurewise

Lauren Rasmussen *(Via Fed. Ex.)*
Law Offices of Lauren Rasmussen
1904 3rd Avenue, Suite 1030
Seattle, WA 98101
Attorney for Port Gamble S'Klallam and Jamestown S'Klallam Tribes

I declare under penalty of perjury that the foregoing is true and correct and that this declaration was executed this 9th day of November, 2009, at Bellevue, Washington.



BRIAN T. HODGES

BRIAN T. HODGES
Pacific Legal Foundation
10940 NE 33rd Place, Suite 210
Bellevue, Washington 98004
(425) 576-0484 FAX: (425) 576-9565

PACIFIC LEGAL FOUNDATION

November 9, 2009

Thurston County Superior Court Clerk
Building Two, Thurston County Courthouse
2000 Lakeridge Drive SW
Olympia, WA 98502

Re: *Olympic Stewardship Foundation et al. v. Jefferson County,* No. 08-2-02852-3, consolidated with 09-2-01897-6
Petitioner's Reply Brief

Dear Clerk:

Enclosed for filing in the above captioned matter, please find one original and a Judge's Working Copy of Olympic Stewardship Foundation's *Petitioner's Reply Brief* for filing with this Court. I have also provided a copy of the front page of the brief for confirmation as well as a self-addressed, stamped envelope for return of same.

If you have any questions, please do not hesitate to contact me. Thank you.

Sincerely,

Brian T. Hodges
Attorney

cc: all parties

Headquarters: 3900 Lennane Drive, Suite 200 • Sacramento, CA 95834 • (916) 419-7111 • Fax: (916) 419-7747
Alaska: 121 West Fireweed Lane, Suite 250 • Anchorage, AK 99503 • (907) 278-1731 • Fax: (907) 276-3887
Atlantic: 1002 SE Monterey Commons Blvd., Suite 102 • Stuart, FL 34996 • (772) 781-7787 • Fax: (772) 781-7785
Hawaii: P.O. Box 3619 • Honolulu, HI 96811 • (808) 733-3373 • Fax: (808) 733-3374 • Oregon: (503) 241-8179
Washington: 10940 NE 33rd Place, Suite 210 • Bellevue, WA 98004 • (425) 576-0484 • Fax: (425) 576-9565
E-mail: plf@pacificlegal.org • Web Site: www.pacificlegal.org