NO. 101727-8

SUPREME COURT OF THE STATE OF WASHINGTON

PRESERVE RESPONSIBLE SHORELINE MANAGEMENT, et al.

Petitioners,

v.

CITY OF BAINBRIDGE ISLAND, et al.

Respondents.

JOINT ANSWER OF CITY OF BAINBRIDGE ISLAND AND STATE OF WASHINGTON, DEPARTMENT OF ECOLOGY TO BUILDING INDUSTRY ASSOCIATION OF WASHINGTON'S MEMORANDUM OF AMICUS CURIAE

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I. INTRODUCTION

The Building Industry Association of Washington (BIAW) significantly misconstrues both the Court of Appeals' Opinion and Respondents' Joint Answer in Opposition to Petition for Review in its attempt to manufacture a need for this Court to grant the Petition for Review in this case. Both the Court of Appeals and Respondents properly relied on the well-established law that BIAW contends should apply here when applying the proper test for nexus and proportionality to the legislative enactment of the Bainbridge Island Shoreline Master Program (BISMP). Additionally, neither BIAW's additional argument urging review of an unpreserved issue, nor its commentary on affordable housing, an issue not raised by any party before this Court, justify this Court's review. PRSM's Petition for Review should be denied.

II. ARGUMENT

The purpose of an amicus memo is to help the court with points of law. *Ochoa Ag Unlimited, L.L.C. v. Delanoy*,

128 Wn. App. 165, 172, 114 P.3d 692 (2005). Here BIAW has submitted a memorandum in support of this Court's acceptance of PRSM's Petition for Review. BIAW gives only passing reference to the factors the Court considers regarding acceptance of a petition. In doing so, BIAW misstates Respondents' arguments. Therefore, BIAW offers no assistance to this Court in this matter.

A. BIAW Does Not Assist the Court by Properly Addressing RAP 13.4(b) and the Grounds for Review

This Court will accept review only:

> (1) If the decision of the Court of Appeals is in conflict with a decision of the Supreme Court; or (2) If the decision of the Court of Appeals is in conflict with a published decision of the Court of Appeals; or (3) If a significant question of law under the Constitution of the State of Washington or of the United States is involved; or (4) If the petition involves an issue of substantial public interest that should be determined by the Supreme Court.

RAP 13.4(b). None of these criteria are met in this case. BIAW vaguely appears to conflate RAP 13.4(b)(2), (3), and (4) when

arguing for review, but fails to meaningfully address them. BIAW Memorandum of Amicus Curiae (Amicus Memo) at 13.

B. Both the Court of Appeals and Respondents Rely on Well-Established Law Regarding Nexus and Proportionality

To manufacture a conflict of law warranting this Court's review under RAP 13.4(b), BIAW claims Respondents rely on the wrong authority for determining the test for nexus and proportionality. BIAW tells the Court that Respondents rely on the unpublished decision in *Common Sense Alliance v. Growth Mgmt. Hearings Bd.*, Nos. 72235-2-I & 72236-1-I, 2015 WL 4730204 (Wash. Ct. App. Aug. 10, 2015) (unpublished) at the expense of *Honesty in Environmental Analysis and Legislation v. Central Puget Sound Growth Management Hearings Board,* 96 Wn. App. 522, 979 P.2d 864 (1999) *(HEAL)* and *Kitsap Alliance of Property Owners v. Central Puget Sound Growth Management Hearings Board*, 160 Wn. App. 250, 255 P.3d 696 (2011) *(KAPO)*. Amicus Memo at 11–17.

This is incorrect. Respondents cited *Common Sense Alliance* solely for the unremarkable proposition that buffers are similar to zoning setbacks. Joint Answer in Opposition to Petition for Review (Joint Answer) at 18–19. And far more importantly, the Court of Appeals decision, as well as Respondents' Joint Answer, expressly rely on *HEAL* and *KAPO* to explain how the test for nexus and proportionality are met when analyzing a legislative enactment. *Preserve Resp. Shoreline Mgmt. v. City of Bainbridge Island*, No. 56808-0-II, 2022 WL 17588919, at *14–15 (Wash. Ct. App. Dec. 13, 2022) (unpublished) (*PRSM*); Joint Answer at 26–27.

The Court of Appeals relied on both *HEAL* and *KAPO* to find that the BISMP passed the nexus and proportionality tests. *PRSM,* 2022 WL 17588919, at *14–15. *HEAL* and *KAPO* were the basis for the Court's determination that the Shoreline Management Act's requirement to use a reasoned, objective evaluation of the science was analogous to the Growth Management Act's requirement for the use of best available

science. *PRSM,* 2022 WL 17588919, at *14. The Court found that the City's extensive scientific record supported the BISMP buffers, and then relied on this extensive science to hold that the nexus and proportionality tests were met. *Id.* at *14–15.

Respondents agree, and in the Joint Answer to PRSM's Petition for Review cited the Court of Appeals, *HEAL*, and *KAPO* with approval. Joint Answer at 26–29. There is no conflict of case law for this Court to resolve. PRSM's Petition for Review should be denied.

In a further effort to fabricate a conflict on this point, BIAW tries to analogize this case to several other cases "where the demand plainly appropriate[d] protected property interests." Amicus Memo at 16. BIAW cites these cases ostensibly to support its contention that a "formal easement or dedication" is not required for the doctrine of unconstitutional conditions to apply. Amicus Memo at 15. But all the cases cited by BIAW for this proposition are distinguishable on their facts because

they involved actions that forced landowners to allow public access to their lands.

In most of the cited cases, the "demand" at issue was a right-of-way to be used as a public road, path, or other public purpose. *See, e.g., Friends of N. Spokane Cnty. Parks v. Spokane Cnty.*, 184 Wn. App. 105, 336 P.3d 632 (2014); *McConiga v. Riches*, 40 Wn. App. 532, 700 P.2d 331 (1985). The same is true of the *Nollan* and *Dolan* cases that are relied on so heavily by BIAW and PRSM. *Nollan v. Cal. Coastal Comm'n,* 483 U.S. 825, 107 S. Ct. 3141, 97 L. Ed. 2d 677 (1987); *Dolan v. City of Tigard,* 512 U.S. 374, 114 S. Ct. 2309, 129 L. Ed. 2d 304 (1994). Although *Town of Moorcraft* addressed title ownership of mineral rights, it states, at the page cited by BIAW, that the dedication at issue "creates a surface easement, specifically an easement appurtenant, for the benefit of the public to use as a street for public purposes." *Town of Moorcroft v. Lang*, 779 P.2d 1180, 1183 (Wyo. 1989) (citing 2 Thompson, *Commentaries on the Modern Law of Real*

Property, § 321 (1980 Replacement)). Although *Cedar Point Nursery* did not involve creation of a public right-of-way, the requirement at issue gave members of the public the right to "take access" to private property. *Cedar Point Nursery v. Hassid*, ___, U.S. ___, 141 S. Ct. 2063, 2069, 210 L. Ed. 2d 369 (2021).

The City's buffers are a restriction on use by the landowner to protect the shoreline from the loss of ecological functions from development the land owner is undertaking on their property. No public use or appropriation is either granted or required under the BISMP buffer provisions. BIAW's reliance on easement and dedication cases, in which landowners were required to allow the public onto their land, does not create a conflict with the Court of Appeals decision addressing shoreline buffers here.

C. PRSM Failed to Preserve its Precautionary Principle Argument

BIAW's brief section regarding citation of the record in this appeal ignores the fact that PRSM failed to preserve for

review the precautionary principle issue that it now seeks to argue. The Court of Appeals did not prevent PRSM from citing to the record to argue properly preserved issues, such as the issue of whether the City complied with WAC 173-26-102(2)(a) by assembling the current scientific data and assessing its uncertainties. *PRSM,* 2022 WL 17588919, at *10. As the Court of Appeals correctly found, however, PRSM did not raise its statutory precautionary principle argument before the Growth Management Hearings Board, and therefore was precluded from raising it on appeal. RCW 34.05.554(1); *Citizens for Mount Vernon v. City of Mount Vernon*, 133 Wn.2d 861, 869, 947 P.2d 1208 (1997); *PRSM,* 2022 WL 17588919, at *8–9.

On appeal to the superior court, PRSM attempted to argue its unpreserved statutory precautionary principle argument. CP 225–28. PRSM did not, however, argue the precautionary principle on any constitutional grounds, nor link the precautionary principle to its unconstitutional conditions

doctrine argument in its opening brief before the superior court. CP 271–78. Because the superior court was the first tribunal with jurisdiction to hear a constitutional claim, PRSM thus did not preserve a constitutional precautionary principle argument for the Court of Appeals' review. PRSM waived its argument of the issue, not its ability to cite to the record.

In fact, the Court of Appeals reviewed the legislative record in depth when analyzing PRSM's unconstitutional conditions doctrine claims. *PRSM,* 2022 WL 17588919, at *13–15. The Court of Appeals properly found that the City had "assembled an extensive scientific record supporting the Master Program and the shoreline buffers." *Id.* at *14. The Court of Appeals then went on to list the science in the record, and to determine that PRSM failed to meet its burden to demonstrate that the unconstitutional conditions doctrine was violated. *Id.* at *15.

D. The Court Should Decline to Address Issues Raised Only by Amicus

BIAW posits that compliance with the SMP buffer provisions exacerbates the housing affordability crisis. Amicus Memo at 9–14. This issue is not raised by any party in this Petition and, therefore, the Court should decline to address it even if review is otherwise granted. *Citizens for Resp. Wildlife Mgmt. v. State*, 149 Wn.2d 622, 631, 71 P.3d 644 (2003) (the Court will not address arguments raised only by amicus).

III. CONCLUSION

The Court of Appeals correctly upheld the Bainbridge Island SMP based on well-settled law. There are no conflicts with other published opinions that require resolution, and no other factors this Court considers when deciding to accept review are met in this case. PRSM's Petition for Review should be denied.

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This document contains 1,608 words, excluding the parts of the document exempted from the word count by RAP 18.17(b).

RESPECTFULLY SUBMITTED this 16th day of May, 2023.

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CERTIFICATE OF SERVICE

I certify under penalty of perjury under the laws of the state of Washington that on May 16, 2023, I caused to be served the foregoing document in the above-captioned matter upon the parties hereto via the Appellate Court Portal filing system, which will send electronic notifications of such filing to all parties of record.

DATED this 16th day of May 2023, in Olympia, Washington.

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Joint Answer to Amicus Curiae Memorandum

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