Supreme Court Case No. 101727-8

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

Preserve Responsible Shoreline Management, et al.,
Petitioners,

v.

City of Bainbridge Island, et al.,
Respondents.

MEMORANDUM OF AMICUS CURIAE THE BUILDING INDUSTRY ASSOCIATION OF WASHINGTON

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I. INTRODUCTION

Petitioners have asked this Court to grant review of the Court of Appeals' December 13, 2022, decision in *Preserve Responsible Shoreline Management, et al. v. City of Bainbridge Island, et al.* (Div. II, No. 568080-II) (Petition Appendix A). This Court should grant review because: 1) the City of Bainbridge ("the City") failed to justify its precautionary buffers in the legislative record as required by the doctrine of unconstitutional conditions, as incorporated into the Shoreline Management Act ("SMA"); 2) caselaw has set precedent that buffers are conditions subject to the requirements of nexus and rough proportionality; and 3) allowing jurisdictions to arbitrarily rely on the precautionary principle to set buffers will exacerbate the housing affordability crisis in Washington State.

The Building Industry Association of Washington ("BIAW") is comprised of builder members that work to alleviate the housing affordability crisis by engaging in residential construction statewide. However, overregulation of

the building industry counteracts the common goal of providing more housing inventory and drives up the cost of those homes that do get built. *See White House*, *Report of the President's Commission on Housing* at 177–80 (1982), https://www.huduser.gov/portal/Publications/pdf/HUD-2460.pdf (several administrations have noted the dramatic effect of zoning and land use regulation on escalating home prices). *Id*. at 180–82 (discussing the significant costs that regulation places on the production of housing). *See also 2016 Housing Development Toolkit* at 4–9, https://obamawhitehouse.archives.gov/sites/whitehouse.gov/files/images/Housing_Development_Toolkit%20f.2.pdf (noting that restrictive zoning has resulted in home prices far higher than the costs of construction).

Here, the City's Shoreline Master Program ("SMP") increases costs because builders are burdened by the requirements of applying for Substantial Development Permits. The privilege of having the City review a permit application costs

upwards of $8,000 – a cost which will certainly be borne by homebuyers. For these reasons, as well as those stated by Petitioners, this Court should reverse the trial court's ruling in this matter.

II. FACTUAL AND PROCEDURAL BACKGROUND

In the interest of judicial economy, this memorandum defers to the thorough recitation of the facts and procedural background of this case given by Petitioners.

III. IDENTITY AND INTEREST OF AMICUS

BIAW represents over 8,000 members of the home building industry. BIAW is made up of 14 affiliated local associations from every part of the state and BIAW's members are engaged in every aspect of the residential construction industry. The economic benefit of residential construction includes jobs, income for thousands of working families, and continued tax revenue for state and local governments. Nonetheless, Washington State is experiencing a severe shortage of homes, an

issue further exacerbated by unlawful conservation buffers that unnecessarily raise the costs of housing production.

IV. ISSUES OF INTEREST TO AMICUS CURIAE

A. Whether, under RCW 34.05, citation to record evidence is permissible upon judicial review when a constitutional challenge is filed before the first court with authority to hear the claim?

B. Whether the City's buffers are conditions subject to the requirements of nexus and rough proportionality as set out by *Nollan v. California Coastal Commission*, 483 U.S. 825, 836–37, 107 S. Ct. 3141, 97 L. Ed. 2d 677 (1987), and *Dolan v. City of Tigard*, 512 U.S. 374, 391, 114 S. Ct. 2309, 129 L. Ed. 2d 304 (1994)?

C. Whether requiring builders and property owners to maintain buffers will exacerbate Washington State's housing supply shortage and affordability crisis?

V. ARGUMENT

A. **This Court should allow citation to evidence contained in the legislative record because it is necessary to determine whether the City's SMP violates the doctrine of unconstitutional conditions.**

Parties should not be expected to create a costly and time-consuming record only to have the court refuse to address its facts on appeal. Limiting a party's right to cite record evidence undermines procedural due process and the notion of a trial on

the merits. In this case, Petitioners should be able to cite the legislative record in its entirety because facts from the record (or lack thereof) are necessary to demonstrate that the City failed to show that its buffer widths are not "in excess of that necessary to assure that development will result in no net loss of shoreline ecological functions and not have a significant adverse impact on other shoreline functions." WAC 173-26-201(2)(e)(ii)(A). Thus, this Court should grant review to ensure that the entire legislative record is available for consideration on judicial review when determining whether the City violated the doctrine of unconstitutional conditions.

B. Respondents ignore that courts have consistently held that buffers are conditions that must satisfy the requirements of nexus and rough proportionality.

Respondents seek to avoid review of the unconstitutional conditions question by arguing that the City's buffer demand does not constitute a permit condition subject to *Nollan* and *Dolan*. This argument, however, overlooks a large body of contrary caselaw, relying instead on a single unpublished

decision from Division I of the Court of Appeals. Resp. Answer at 18-19 (citing *Common Sense Alliance v. Growth Mgmt. Hearings Bd.*, Nos. 72235-2-I & 72236-1-I, 2015 WL 4730204, at *8 (Wash. Ct. App. Aug. 10, 2015) (unpublished)).

Common Sense Alliance is in direct conflict with the published decision in *Kitsap Alliance of Prop. Owners v. Cent. Puget Sound Growth Mgmt. Hearings Bd. ("KAPO")*, in which the court held that buffers "must … satisfy the requirements of nexus and rough proportionality established in *Dolan* and *Nollan*." 160 Wn. App. 250, 272, 255 P.3d 696 (2011). It also conflicts with the published decision in *Honesty in Envtl. Analysis and Legislation v. Cent. Puget Sound Growth Mgmt. Hearings Bd. ("HEAL")*, which similarly concluded that critical area regulations "must comply with the nexus and rough proportionality limits the United States Supreme Court has placed on governmental authority to impose conditions on development applications." 96 Wn. App. 522, 533, 979 P.2d 864 (1999).

Common Sense Alliance also conflicts with *Dolan*, in which the U.S. Supreme Court held a stream buffer—one that was mandated by a generally applicable city regulation—subject to the doctrine of unconstitutional conditions. 512 U.S. at 393-94. Thus, Respondents' reliance on *Common Sense Alliance* presents, at most, a split of authority on an important question of constitutional law, warranting review, not avoidance. RAP 13.4(b).

Review of this issue raises a significant question of public importance because the decision in *Common Sense Alliance* was doctrinally incorrect. Where *Nollan* and *Dolan* ask only whether a permit condition demands that a specific, identified property interest be put to public use (*Koontz v. St. Johns River Water Mgmt. Dist.*, 570 U.S. 595, 614, 133 S.Ct. 2586, 186 L. Ed. 2d 697 (2013)), the unpublished decision asked the very different question of whether the buffer affected a total *regulatory* taking of all economically viable use. *Common Sense Alliance*, 2015 WL 4730204, at *8.

Expanding on *Common Sense Alliance*'s faulty reasoning, the City and Ecology suggest that a buffer must take away the fundamental rights to exclude or dispose of property in order to constitute a condition subject to *Nollan* and *Dolan*. Resp. Answer at 18. However, as clarified in *Cedar Point Nursery v. Hassid*, those are distinct inquiries arising from different takings doctrines.[1] 141 S.Ct. 2063, 2071, 210 L. Ed. 2d 369 (2021); *see also Chong Yim v. City of Seattle*, 194 Wn.2d 651, 660-61, 451 P.3d 675 (2019) (recognizing that the physical and total takings theories are distinct tests). Thus, while the unpublished decision (and Respondents' arguments based thereon) are mistaken and provide no basis to depart from the holdings of *Dolan*, *KAPO*, and *HEAL*, the continuing confusion evidenced by Respondents' argument in this case and the unpublished decision in *Common*

[1] A regulation taking the right to exclude is subject to categorical treatment under the U.S. Supreme Court's physical takings test, *Cedar Point Nursery*, 141 S.Ct at 2071, and a regulation denying all economically viable use is subject to the per se total taking test of *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1017, 112 S. Ct. 2886, 120 L. Ed. 2d 798 (1992). *See Chong Yim*, 194 Wn.2d at 661.

Sense Alliance show that this issue raises a matter of significant public importance.

Similarly, Respondents' claim that the government may evade the doctrine of unconstitutional conditions by demanding the property be put to a public environmental use without requiring a formal easement or dedication is also without merit. First, it should be noted that the record in this case confirms that both Ecology and the Growth Board characterized the buffer requirement as a "conservation easement" throughout the administrative proceedings. AR 5849-52 (Growth Board's decision generally referring to the buffers required by SMP 4.1.2 and 4.1.3 as "conservation easements"); AR 3847 (Ecology prehearing brief, repeating "conservation easement" characterization without objection). Respondents offer no explanation as to why their early judicial statements characterizing the buffer demand should not be binding on appeal.

Second, the constitution is made of sturdier material than Respondents would have the Court believe. Indeed, rejecting a nearly identical argument in *Cedar Point Nursery*, the U.S. Supreme Court held that the formal characterization of a property demand does not matter where the demand plainly appropriates protected property interests. 141 S. Ct. at 2067 (the classification of an interest in property need not match precisely the statutory definition of an easement for the Takings Clause to apply; "[u]nder the Constitution, property rights 'cannot be so easily manipulated.'"). Moreover, Respondents fail to acknowledge that the common law of property places no formalities on dedications, requiring only that the owner assent to put land to a public use. *City of Cincinnati v. White's Lessee*, 31 U.S. 431, 440, 8 L. Ed. 452 (1832); *see also Friends of N. Spokane Cnty. Parks v. Spokane Cnty.*, 184 Wn. App. 105, 129, 336 P.3d 632 (2014) (same); *Town of Moorcraft v. Lang*, 779 P.2d 1180, 1183 (Wyo. 1989) (while a dedication does not transfer title, it does reduce an owner's rights by creating enforceable public rights in

the dedicated land). Thus, courts have widely held permit conditions are subject to the doctrine of unconstitutional conditions where the dedication is enforceable, as is the case here. *See*, *e.g.*, *McConiga v. Riches*, 40 Wn. App. 532, 537, 700 P.2d 331 (1985) (the government's issuance of a conditioned permit creates a dedication); *Farrell v. Board of Comm'rs, Lemhi County*, 138 Idaho 378, 64 P.3d 304 (2002) (the government's approval of a conditioned permit created a dedication), *overruled on other grounds by City of Osburn v. Randel*, 152 Idaho 906, 277 P.3d 353 (2012).

C. Washington State is in the midst of a housing affordability crisis that will only become worse as jurisdictions are permitted to set buffers based on the precautionary principle and not the most current and accurate science.

1. Prior to building new residential construction on Bainbridge Island, a builder is first required to apply for a Substantial Development Permit, which hinders the state's goal of providing more affordable housing options.

All development within 200-feet of ordinary high water requires the submittal of a Shoreline Substantial Development

Exemption prior to the submission of a building permit.[2] Further, "Substantial development shall not be undertaken within the jurisdiction of the [SMA] and [the City's] Master Program unless a Substantial Development Permit has been obtained, the appeal period has been completed, and any appeals have been resolved and/or the project proponent is allowed to proceed under the provisions of the Act or by court order." *See* WAC 173-27-040. Shoreline administrative review for substantial development incurs a $8,470 surcharge.[3] Then, a building permit charge can cost upwards of $7,000 depending on valuation of the home.[4] In addition, the significant cost to adjust the default configuration of the buffers, often necessary to allow for residential development, must be borne by the property owner. AR 108, 304.

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[2] https://www.bainbridgewa.gov/DocumentCenter/View/67/B001-Residential-Building-Permit-Guidelines-PDF?bidId

[3] https://www.bainbridgewa.gov/DocumentCenter/View/16337/2022-Building-and-Development-Fee-Summary---effective-09012022

[4] *Id.*

Ultimately, buffer compliance costs BIAW members substantial money and time, which unfortunately, will be passed on to future homebuyers. That's if the Substantial Development Permit is even granted after members jump through the hoops of the permit application process, which means builders may consider refraining from building on Bainbridge Island altogether.

2. **Land use regulation, like setting buffers, increases fees and costs and limits construction, thereby increasing the cost of housing or discouraging building altogether.**

From 2000 to 2015, Washington's housing supply failed to keep pace with growth by approximately 225,000 units.[5] In Washington, the median home price is $522,023, requiring a minimum income of $112,295 just to qualify for a mortgage.[6] At that price point, more than 72% of Washington's roughly three million households are priced out already. Specifically, in the

[5] https://www.governor.wa.gov/sites/default/files/Middle_Housing_onepager.pdf

[6] https://www.biaw.com/wp-content/uploads/2021/03/Affordability-Pyramid-WA_2021.pdf

Bainbridge Island area, the median home price as of 2021 was $482,511, requiring a minimum income of $103,296 to qualify for a mortgage.[7] At that time, 72,526 households were priced out of ownership, and that number grew by 116 for every $1,000 increase.[8]

At the core of Washington's housing affordability crisis is reduced supply and heightened demand. Members of BIAW work to alleviate this crisis by building diverse housing options, from accessory dwelling units to condos to single-family homes. In the end, more building will lead to more affordable housing options, but government and environmental policy activists continue to hinder the effort of our industry. That will only worsen if they are allowed to burden development with regulations imposed under the non-scientific precautionary principle and without reasoned justification.

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[7] https://www.biaw.com/first-time-home-buyers-increasingly-priced-out-of-washington-housing-market-2/

[8] *Id.*

Studies have shown that areas with more regulation have higher house prices and less construction, which is exactly the outcome BIAW foresees on Bainbridge Island.[9] For example, one study revealed that in the San Francisco area, house prices are at least seventeen percent higher in jurisdictions with at least one formal growth management program.[10] To illustrate the severity of this statistic, a 2021 study by the National Association of Homebuilders found that just a $1,000 increase would price 153,967 households out of homeownership.[11] Thus, the GMA, SMA, and SMPs have a significant impact on the price of homes, which in turn, means that jurisdictions should be considering the increasing cost of homes when implementing ecological regulations.

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[9] https://faculty.wharton.upenn.edu/wp-content/uploads/2017/05/Regulation-and-Housing-Supply-1.pdf

[10] *Id.*

[11] https://www.nahb.org/media/BEB45F8305C44CF8B2D0F3DC7B451658.ashx

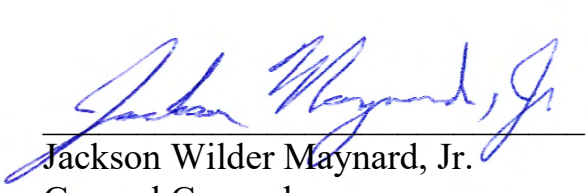
VI. CONCLUSION

For the foregoing reasons, this Court should issue an order reversing the Growth Board's final decision and order, and declare that the SMP, as adopted, violates the SMA and the doctrine of unconstitutional conditions.

RAP 18.17(b) CERTIFICATE OF COMPLIANCE

This document contains 2,445 words, excluding the parts of the document exempted from the word count by RAP 18.17.

Respectfully submitted this 1st day of May, 2023.

By: 

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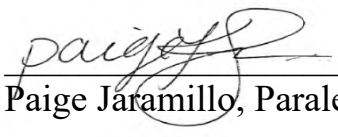
DECLARATION OF SERVICE

I, Paige Jaramillo, hereby declare under penalty of perjury under the laws of the State of Washington, that on April 18, 2023, I electronically filed the foregoing document via the Washington State Appellate Court's Secure Portal which will send e-mail notifications of such filing to all parties of record.

Signed in Tumwater, Washington, this 1st day of May, 2023.



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BUILDING INDUSTRY ASSOCIATION OF WASHINGTON

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