FILED
Court of Appeals
Division II
State of Washington
2/16/2023 3:43 PM

FILED
SUPREME COURT
STATE OF WASHINGTON
2/17/2023
BY ERIN L. LENNON
CLERK

Case No: 568080-II

101727-8

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON

Preserve Responsible Shoreline Management, et al.,

Petitioners,

v.

City of Bainbridge Island, et al.,

Respondents.

On appeal of an order of the Kitsap County Superior Court,
the Honorable Tina Robinson, Case No. 15-2-00904-6

PETITION FOR REVIEW

RICHARD M. STEPHENS
WSBA #21776
Stephens & Klinge LLP
10900 NE 4th Street,
Suite 2300
Bellevue, Washington 98004
Telephone: (425) 429-2532
stephens@sklegal.pro

BRIAN T. HODGES
WSBA #31976
Pacific Legal Foundation
555 Capitol Mall, Suite 1290
Sacramento, California 95814
Telephone: (916) 419-7111
BHodges@pacificlegal.org

Attorneys for Petitioners PRSM, et al.

TABLE OF CONTENTS

TABLE OF AUTHORITIES iii

IDENTITY OF PETITIONERS 1

CITATION TO COURT OF APPEALS' DECISION 1

ISSUES PRESENTED FOR REVIEW 1

STATEMENT OF THE CASE 2

A. The City Set Its Buffer Widths Based on Policy, Not Science 3

B. The Policy-Based Buffer Regulations Demand a Dedication of Property to a Public Use 8

C. Growth Board Proceedings: Buffer Widths Set by Policy, Not Science 9

D. Trial Court Proceedings: City and Ecology Admit that the Buffers Were Driven, in Part, by Policy 11

E. Appellate Proceedings: City and Ecology Claim That Buffer Widths Were Set by Science, Not Policy 12

REASONS FOR GRANTING THE PETITION 16

I. THE COURT'S CONCLUSION THAT PRSM WAS BARRED FROM CITING EVIDENCE IN THE RECORD DEPRIVED PETITIONERS OF DUE PROCESS AND CONFLICTS WITH OTHER PRECEDENTS 16

II. THE DECISION ADOPTS A RULE OF FEDERAL CONSTITITONAL LAW THAT IS CONTRARY TO DECISIONS OF THE U.S. SUPREME COURT 20

A. The Court's "Consideration-of-Science" Rule Is Based on Legal Error 24

B. The Court Placed Dispositive Value on Studies That Cannot Meet Nexus and Proportionality Requirements 26

C. The Decision Threatens to Undermine *Nollan* and *Dolan* 27

CONCLUSION 30

RAP 18.17(b) CERTIFICATE OF COMPLIANCE 30

TABLE OF AUTHORITIES

Page(s)

Cases

Aho Constr. I, Inc. v. City of Moxee,
6 Wn. App. 2d 441, 430 P.3d 1131 (2018) 9

Bozeman v. McDonald,
814 F.3d 1354 (Fed. Cir. 2016) 18

Church of Divine Earth v. City of Tacoma,
194 Wn.2d 132, 449 P.3d 269 (2019) 20

Citizens' All. for Prop. Rts. v. Sims,
145 Wn. App. 649, 187 P.3d 786 (2008) 26

City of Chicago v. Int'l Coll. of Surgeons,
522 U.S. 156, 118 S. Ct. 523, 139 L. Ed. 2d 525
(1997) 17

City of Tacoma v. Welcker,
65 Wn.2d 677, 399 P.2d 330 (1965) 9, 27

Dolan v. City of Tigard,
512 U.S. 374, 114 S. Ct. 2309,
129 L. Ed. 2d 304 (1994) 2, 21–23, 26–27, 29

Frost v. R.R. Comm'n of State of Cal.,
271 U.S. 583, 46 S. Ct. 605, 70 L. Ed. 1101
(1926) 22

Honesty in Env't Analysis and Legislation v. Cent. Puget Sound Growth Mgmt. Hearings Bd. (HEAL), 96 Wn. App. 522, 979 P.2d 864
(1999) 4, 14

Jenkins v. McKeithen, 395 U.S. 411, 89 S. Ct.
1843, 23 L. Ed. 2d 404 (1969) 16

Kitsap Alliance of Prop. Owners v. Cent. Puget Sound Growth Mgmt. Hearings Bd. v. Cent. Puget Sound Growth Mgmt Hearings Bd., 160 Wn. App. 250, 255 P.3d 696 (2011) 24, 25

Koontz v. St. Johns River Water Management District, 570 U.S. 595, 133 S. Ct. 2586, 186 L. Ed. 2d 697 (2013) 22, 23

Lake Burien Neighborhood v. City of Burien & Dep't of Ecology, 2014 WL 3710018 (Final Decision, June 16, 2014) 10

Lingle v. Chevron USA, Inc., 544 U.S. 528, 125 S. Ct. 2074, 161 L. Ed. 2d 876 (2005) 28

Motley-Motley, Inc. v. State, 127 Wn. App. 62, 110 P.3d 812 (2005) 18

Nollan v. California Coastal Commission, 483 U.S. 825, 107 S. Ct. 3141, 97 L. Ed. 2d 677 (1987) 2, 9, 29

Olympic Stewardship Found. v. State Env't & Land Use Hearings Off. through W. Wash. Growth Mgmt. Hearings Bd., 199 Wn. App. 668, 399 P.3d 562 (2017) (unpublished).. 19

Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 43 S. Ct. 158, 67 L. Ed. 322 (1922) 29

Plantier v. Ramona Mun. Water Dist., 7 Cal. 5th 372, 441 P.3d 870 (2019) 18

Port of Tacoma v. Sacks, 19 Wn. App. 2d 295, 495 P.3d 866 (2021) 19

State ex rel. Puget Sound Navigation Co. v. Dep't of Transp., 33 Wn.2d 448, 206 P.2d 456 (1949) 16

Richardson v. Cox, 108 Wn. App. 881,
26 P.3d 970 (2001) 9

Roller v. Dep't of Labor & Indus.,
128 Wn. App. 922, 117 P.3d 385 (2005) 20

Sims v. Apfel, 530 U.S. 103, 120 S. Ct. 2080,
147 L. Ed. 2d 80 (2000) 18

Yakima Cnty. v. E. Wash. Growth Mgmt. Hearings Bd., 168 Wn. App. 680, 279 P.3d 434 (2012) 7

Statutes

RCW 34.05.554(1) 13, 16, 19

RCW 34.05.558 19

RCW 64.04.130 9

RCW 90.58.010–.920 (Shoreline Management Act) 3

Other Authorities

WAC 173-26-201(2) 4

WAC 173-26-201(2)(c) 4

WAC 173-26-201(2)(e)(ii)(A) 4, 23

WAC 173-26-201(3)(g) 7

IDENTITY OF PETITIONERS

Petitioners are Preserve Responsible Shoreline Management, Alice Tawresey, Robert Day, Bainbridge Shoreline Homeowners, Dick Haugan, Linda Young, Don Flora, John Rosling, Bainbridge Defense Fund, and Point Monroe Lagoon Home Owners Association, Inc. ("PRSM").

CITATION TO COURT OF APPEALS' DECISION

PRSM seeks 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) (Appendix A). The court's January 19, 2023, Order Denying Reconsideration is attached as Appendix B.

ISSUES PRESENTED FOR REVIEW

1. Whether a party to an administrative appeal under Washington's Administrative Procedures Act ("APA"), Ch. 34.05 RCW, has a right to cite evidence needed to establish a federal constitutional violation when that claim is properly raised in the first court with jurisdiction over the claim.

2. Whether the Court of Appeals erred by concluding that a municipality's consideration of science when developing new buffer regulations will automatically satisfy the "essential nexus" and "rough proportionality" tests of *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), without any requirement that the government show that the buffers demand no more property than necessary to mitigate for the impacts of a proposed development and where the Growth Board determined that the buffers' widths were "set by city policy, not science-based information." AR 5824.

STATEMENT OF THE CASE

This Petition arises from Bainbridge Island's decision to set its shoreline buffer widths based on its policy preferences—including the "precautionary principle" (AR 42 (SMP § 1.2.3))—rather than science. AR 5824 (Growth Board finding "Buffer widths [were] set by city policy, not science-based

information.”). But the Court of Appeals, for reasons discussed below, refused to consider those portions of the record memorializing the City’s non-scientific reasoning for setting its mandatory buffer widths by adopting rules that allowed it to (1) ignore the administrative record and (2) determine the unconstitutional conditions claim without addressing *Nollan* and *Dolan*’s “essential nexus” and “rough proportionality” tests.

A. The City Set Its Buffer Widths Based on Policy, Not Science

Washington’s Shoreline Management Act (“SMA”) directs each city and county to enact and periodically update its Shoreline Master Program (“SMP”), which constitutes the local development and use regulations for property adjacent to shorelines. RCW 90.58.010–.920. As part of this process, the SMA and its guidelines direct each local government to create a record showing that it engaged in a reasoned analysis of “the most current, accurate, and complete scientific and technical information available that is applicable to the issues of concern.”

WAC 173-26-201(2). The purpose of this is to ensure that the SMP addresses shoreline conditions "as they currently exist" (WAC 173-26-201(2)(c)) and that mitigation requirement efforts are not "in excess of that necessary to assure that development will result in no net loss of shoreline ecological functions . . . ." WAC 173-26-201(2)(e)(ii)(A); *see also Honesty in Env't Analysis and Legislation v. Cent. Puget Sound Growth Mgmt. Hearings Bd. (HEAL)*, 96 Wn. App. 522, 533, 979 P.2d 864 (1999) (concluding that science is essential "to an accurate decision about what policies and regulations are necessary to mitigate and will in fact mitigate the environmental effects of new development"). The City, however, did not follow this science-focused process.

When the City began the process of updating its SMP in 2010, its existing scientific record was "dated and lacked accuracy." *See, e.g.*, AR 4097; *see also* AR 2868 (councilmember noting that the science-based buffer recommendations were "poorly understood," "inconsistently

applied," and riddled with "uncertainties"). The studies were extremely generalized, so the City could only suggest buffers "ranging from as little as 16 feet to as much as 1,969 feet," with the caveat that the necessity and effectiveness of a buffer within that range would depend on multiple factors not addressed by the studies. AR 3968; AR 4307–08 (noting that the studies had been based on the preliminary assumption that all properties are fully forested and free of conditions that limit the effectiveness of buffers). Without additional studies addressing those factors, the City's science consultant could not arrive at any science-based, site-appropriate recommendations for buffer widths. AR 4314.

The science consultant recommended that the City engage in "site-specific" studies "to . . . understand . . . the potential direct, indirect and cumulative impacts" of existing and future development, AR 4100, and determine the width necessary for a buffer to protect existing shoreline conditions. AR 4310 (warning that, on marine shorelines, site-specific information is "more important" for determining effectiveness of buffers). The

consultant explained that additional studies were needed to identify the sources of environmental stressors (such as stormwater runoff from public roads, ditches, and upland development), and the actual range of impacts that residential development may have on shoreline conditions, as they currently exist. AR 4097–4100; AR 4299–4302. Although this should have spurred additional inquiry (and there is no indication that such studies would be infeasible), the City chose not to do so. AR 2882 (consultant testifying that he was not asked to scientifically justify the buffer widths).

Instead, the City decided to set buffer widths based on its policy preferences. AR 5824. Indeed, at an early "visioning" meeting, a City representative stated that it "must" follow the "precautionary principle" when updating its SMP. AR 1285; AR 1291. The "precautionary principle," however, is intended to be limited in application, urging the government to take a "better-safe-than-sorry" approach by demanding more protective measures than necessary only when faced with uncertain or

incomplete science.[1] *See* WAC 173-26-201(3)(g) ("[T]he less known about existing resources, the more protective shoreline master program provisions should be to avoid unanticipated impacts to shoreline resources."). Proceeding under that policy, City consultants and committeepersons proposed buffers that are "larger than the bare minimum needed for protection" to avoid a "worst case scenario" and "ensure [ecological] success in the face of uncertainty about site-specific conditions." AR 4314; *see also* AR 2400, 4307–08.

That the City set buffer widths based on *policy*, not science, is beyond dispute. The City's science consultant testified that the "specific width . . . is part of the policy recommendation." AR 2879; *see also* AR 2883 (councilmember

[1] The only decision to address this policy limited its application to where (1) the regulated activity poses a significant risk of irreversible, (2) there is an "absence of relevant scientific information," and (3) the measures will only last "until the uncertainty is sufficiently resolved." *Yakima Cnty. v. E. Wash. Growth Mgmt. Hearings Bd.*, 168 Wn. App. 680, 693, 279 P.3d 434 (2012).

noting that a scientific justification for the buffer width "doesn't appear in the" science). Despite numerous public comments objecting to the City's reliance on the "precautionary principle,"[2] the City's updated SMP became effective in July 2014. *See* AR 5661 (voting to include "precautionary principle" in the SMP despite constitutional concerns).

B. The Policy-Based Buffer Regulations Demand a Dedication of Property to a Public Use

The SMP requires that, as a mandatory condition on any new "development, use, or activities regardless of whether a permit is required" (AR 70 (SMP § 4.1.2.4(2))), the owner must dedicate a conservation area of 50 to 200 feet of private shoreline, depending on its use designation and other criteria unrelated to the impacts of proposed development.[3] AR 96 (SMP Table 4-3). To enforce the buffer, the SMP requires that all current and future owners maintain the conservation area "in a

---

[2] *See, e.g.*, AR 876, 1638, 1790, 3574, 3623.
[3] For more discussion, *see* PRSM Opening Br. at 18–24, 61–64; PRSM Reply Br. at 22–28.

predominantly natural, undisturbed and vegetated condition." AR 105–06, 109 (SMP §§ 4.1.3.1, 4.1.3.2, 4.1.3.5(4)). These provisions compel the dedication of real property to public use.[4] *City of Tacoma v. Welcker*, 65 Wn.2d 677, 683, 399 P.2d 330 (1965) (the acquisition of a buffer to protect water quality constitutes an exercise of eminent domain).

C. Growth Board Proceedings: Buffer Widths Set by Policy, Not Science

PRSM timely appealed the City's SMP to the Growth Board, alleging the SMP "violates state law and regulations" and specifically reserving its constitutional claims for the trial court. AR 2–3; *see also Aho Constr. I, Inc. v. City of Moxee*, 6 Wn. App. 2d 441, 462, 430 P.3d 1131 (2018) (The Growth Board "lack[s] jurisdiction to resolve constitutional challenges.").

[4] RCW 64.04.130 ("A development right, easement, covenant, restriction, or other right, or any interest less than the fee simple, to protect . . . or conserve for open space purposes . . . constitutes and is classified as real property."); *Richardson v. Cox*, 108 Wn. App. 881, 884, 890–91, 26 P.3d 970 (2001) (dedication of a property interest can be achieved via notice on a binding public document); *Nollan*, 483 U.S. at 833 n.2; *id*. at 859 (Brennan, J., dissenting) (dedication achieved via a deed restriction).

On its statutory claims, PRSM argued that the City had failed to comply with the SMA's science requirements where "the buffers selected were not driven by science-based information but City policy unrelated to science." AR 580–81; AR 599–600. In response, the City admitted that its buffer widths were set based on its policy preferences, arguing that it was allowed to do so under a Growth Board decision interpreting the SMA's science requirement to be procedural—not substantive—in nature. AR 3967–68. Citing *Lake Burien Neighborhood v. City of Burien & Dep't of Ecology*, 2014 WL 3710018, at *6 (Final Decision, June 16, 2014), the City explained that science played a "more limited role" in its update process. *Id*. Thus, it explained that it had relied on science only insofar as it recognized the value of buffers in protecting sensitive areas. *Id*. But because the scientific recommendations regarding buffer widths varied widely based on a host of site-specific characteristics, it chose instead to adopt a single default buffer width for each use designation based on policy considerations. AR 3968–69.

Resultantly, the Growth Board dismissed PRSM's science-based challenge: "Buffer widths [are] set by city policy, not science-based information." AR 5824. None of the parties appealed that finding.

D. Trial Court Proceedings: City and Ecology Admit That the Buffers Were Driven, in Part, by Policy

PRSM timely petitioned the superior court for judicial review of the Board's decision, properly raising its unconstitutional conditions challenge to the first adjudicative body with jurisdiction. CP 1–166; CP 183–200. The claim alleged that the City's decision to rely on the "precautionary principle" and other policy grounds to set buffer widths violated the doctrine of unconstitutional conditions as set out in *Nollan* and *Dolan* because there is no record that the selected widths satisfy nexus and proportionality. CP 252–56, 265–78, 570–91. PRSM's trial brief supported this claim with on-record proof that the City relied on the "precautionary principle" and other burden-shifting policies when setting buffer widths. *Id*. In response, the

City and Ecology admitted reliance on the "precautionary principle" and other policy bases. *See* CP 528–29, 533 (City Br.); CP 304 (Ecology Br.). The trial court, however, dismissed PRSM's claim as nonjusticiable without addressing the "precautionary principle" or any of the other policy bases considered by the City when setting their widths. CP 639–46.

E. Appellate Proceedings: City and Ecology Claim That Buffer Widths Were Set by Science, Not Policy

PRSM, thereafter, raised the federal constitutional claim to the Court of Appeals, citing the record once again as proof that the widths were based on policy preferences. PRSM Opening Br. at 64–70; PRSM Reply Br. at 29–36. This time, however, the City and Ecology radically changed their tune on the facts, claiming for the first time that the City had based the widths entirely on science, and had not considered the "precautionary principle." City Resp. Br. at 54, *see also id.* at 6, 41; Ecology Resp. Br. at 2, 24, 27–28. The City then moved to bar PRSM from citing those portions of the record evidencing the

government's reliance on the "precautionary principle." City Resp. Br. at 38–42. Citing the APA's issue exhaustion provision (RCW 34.05.554(1)), the City argued that because PRSM did not mention the "precautionary principle" when arguing statutory issues before the Growth Board, it should be barred from citing that record evidence in support of the issues on appeal, including the unconstitutional conditions claim—a claim that can only be raised to the courts. *See* PRSM Reply Br. at 12–13. Despite concluding that PRSM had properly raised its constitutional claim to the first court with jurisdiction (Decision at 26 n.10), the court agreed with the City and applied administrative-issue exhaustion to disregard those portions of the record regarding the "precautionary principle" when considering all issues on appeal, including the unconstitutional conditions claim. Decision at 15–18; 26–30.

Despite this limitation on the evidence, the Court of Appeals correctly concluded that the City's buffer demand constituted a permit condition subject to *Nollan* and *Dolan*.

Decision at 27. The court also concluded that PRSM's facial challenge is justiciable. Decision at 28; *see also* Ecology Resp. Br. at 28 (conceding that point). The court additionally determined that "[i]n the context of a facial challenge to a land use ordinance, the ordinance 'must comply with the nexus and rough proportionality limits . . . placed on governmental authority to impose conditions on development applications.'" Decision at 27 (quoting *HEAL*, 96 Wn. App. at 533); *see also* Decision at 28 (noting that the parties "agree that the nexus and proportionality tests apply to this facial challenge of the Master Program").

The court's decision to declare portions of the record "off limits," however, significantly affected its consideration of the merits. Without the record of the City's actual reasoning, the court ignored PRSM's arguments about the role policy played in setting buffer widths and adopted the City's revisionist claim that the buffers were based on science. Decision at 28–30. And because the only study commenting on buffer widths had

observed that buffers ranging between 16 and 1,969 feet may be effective, the court treated that as a firm scientific conclusion. *Id*. at 5 (omitting the caveat that the appropriate width will depend on site-specific factors (AR 3968)).

Based on those determinations, the court found the City had "relied on the valid scientific information to establish the shoreline buffers" and further that the science "made detailed recommendations for shoreline regulations." *Id*. at 29. From that, the court reasoned that any buffer between 16 and 1,969 feet would be justified. *Id*. at 29 n.11. The court deemed these new findings "fatal" to the unconstitutional conditions claim (*id*. at 29), concluding that a government's reliance on science in setting buffer widths will satisfy *Nollan* and *Dolan*, without need to engage in the nexus and proportionality analysis. *Id*. at 28–29. Under that reasoning, the Court of Appeals explained the City could only have transgressed if it had demanded buffers exceeding 1,969 feet. *Id*. at 29 n.11. PRSM moved for

reconsideration, which the Court denied. App. B. This Petition follows.

REASONS FOR GRANTING THE PETITION

I.

THE COURT'S CONCLUSION THAT PRSM WAS BARRED FROM CITING EVIDENCE IN THE RECORD DEPRIVED PETITIONERS OF DUE PROCESS AND CONFLICTS WITH OTHER PRECEDENTS

Review by this Court is necessary to correct an error that deprived PRSM of its due-process right to cite portions of the record memorializing the City's reliance on the "precautionary principle." Decision at 15–18; *State ex rel. Puget Sound Navigation Co. v. Dep't of Transp.*, 33 Wn.2d 448, 495, 206 P.2d 456 (1949) (due process ensures each litigant has a right to present evidence in support of their claims); *Jenkins v. McKeithen*, 395 U.S. 411, 429, 89 S. Ct. 1843, 23 L. Ed. 2d 404 (1969) ("The right to present evidence is . . . essential to fair hearing[s]" as due process requires.).

The court's error is obvious. It misconstrued the APA's administrative-issue-exhaustion provision, RCW 34.05.554(1),

to bar PRSM from citing portions of the record in support of *any* argument on appeal.[5] *See* Decision at 15–18. In doing so, the court wrongly applied administrative exhaustion to a constitutional claim that was outside the Growth Board's authority (and properly raised first before the trial court). Decision at 26 n.10; *see also City of Chicago v. Int'l Coll. of Surgeons*, 522 U.S. 156, 164, 118 S. Ct. 523, 139 L. Ed. 2d 525 (1997) (facial constitutional claims are independent of an administrative proceeding even where the "constitutional claims were raised by way of a cause of action created by [the state's administrative appeal] law").

For administrative-issue exhaustion to apply, a claim must have been subject to agency authority and the proceeding must have provided the parties the opportunity to litigate claims on

---

[5] PRSM's appeal presented two statutory challenges that could be subject to administrative exhaustion. PRSM Opening Br. at 7–8. But the appeal also alleged a violation of the unconstitutional conditions doctrine, which was not subject to exhaustion. PRSM Opening Br. at 8; PRSM Reply Br. at 12–13, 18.

merit. *Sims v. Apfel*, 530 U.S. 103, 112, 120 S. Ct. 2080, 147 L. Ed. 2d 80 (2000). In this way, issue-exhaustion is a shield "protect[ing] the integrity of administrative decision making." *Motley-Motley, Inc. v. State*, 127 Wn. App. 62, 73, 110 P.3d 812 (2005). It cannot be made a sword to keep legitimate claims from the courts.[6] *Plantier v. Ramona Mun. Water Dist.*, 7 Cal. 5th 372, 390, 441 P.3d 870 (2019).

The Court also erred by using issue-exhaustion to bar citation to on-record facts. The "mere citation of evidence already contained in the record to further support [a] claim is not a new legal argument for purposes of issue exhaustion." *Bozeman v. McDonald*, 814 F.3d 1354, 1358 (Fed. Cir. 2016). Indeed, Division II has elsewhere confirmed that issue-

---

[6] As stated above, all parties presented arguments pertaining to the constitutionality of the "precautionary principle" at every opportunity, including public comments (AR 771–72, 1284–90, 2544, 3102), the City's legislative record (AR 42, 2400, 4308-08, 4314), and trial court pleadings. *See* CP 225–28, 568–69, 571–74 (PRSM Opening and Reply Briefs); *see also* CP 528–29, 533 (City Br.); CP 304 (Ecology Br.).

exhaustion applies only to *issues* raised for the first time on appeal—it cannot prevent new citations to the record supporting issues properly preserved for appeal. *Port of Tacoma v. Sacks*, 19 Wn. App. 2d 295, 313, 495 P.3d 866 (2021); *Olympic Stewardship Found. v. State Env't & Land Use Hearings Off. through W. Wash. Growth Mgmt. Hearings Bd.*, 199 Wn. App. 668, ¶¶ 248–49, 399 P.3d 562 (2017) (unpublished). That is because APA's issue-exhaustion provision speaks only to "issues not raised before the agency." RCW 34.05.554(1). It does not speak to citable evidence, which is addressed by RCW 34.05.558 (confining review "to the agency record" without limitation). The Decision creates uncertainty in the law that should be settled by this Court.

The court's errors, moreover, resulted in a manifest injustice. The court's refusal to consider the City's policy-based reasoning resulted in a decision rooted solely in post-hoc renditions of "facts" that are contrary to the record, contrary to the City's prior representations, and contrary to the Growth

Board's unchallenged finding that "city policy, not science-based information" dictated the buffer widths. AR 5824. PRSM was entitled to rely on those record facts on appeal. *Roller v. Dep't of Labor & Indus.*, 128 Wn. App. 922, 927, 117 P.3d 385 (2005) (a reviewing court must accept an agency's unchallenged findings of fact as true on appeal and may not substitute its own view on those matters); *Church of Divine Earth v. City of Tacoma*, 194 Wn.2d 132, 138, 449 P.3d 269 (2019) (when evaluating whether a property dedication satisfies the nexus and proportionality tests, the court must look only to the justifications made in the record). Review is warranted.

II.

THE DECISION ADOPTS A RULE OF FEDERAL CONSTITUTIONAL LAW THAT IS CONTRARY TO DECISIONS OF THE U.S. SUPREME COURT

The Court of Appeals' resolution of the unconstitutional conditions claims turned on a legal conclusion that directly conflicts with *Nollan* and *Dolan*. Specifically, the Court ruled that the City's consideration of studies—including those

observing that buffers ranging from 16 feet to as much as 1,969 feet may protect the shoreline—was conclusive of the nexus and proportionality tests. Decision at 5, 26–30. From that, the Court determined that "[t]o fail the nexus and proportionality tests, the . . . widths would need to be in excess of what the science would allow." Decision at 29 n.11. Because the City's buffers fell within that exceptional range, the Court held that it satisfied the doctrine of unconstitutional conditions (without engaging in the analysis *Nollan* and *Dolan* demand).

The conflict is plain. Where *Nollan* and *Dolan* limit government's exaction authority to impact mitigation, the Decision authorizes government to demand any amount of land that it can claim provides public benefit. As such, the Decision directly contradicts unconstitutional-conditions doctrine, which is designed to uphold federal constitutional supremacy by imposing limits on state and local authority—it is *not* a doctrine designed to adjudge an exercise of discretionary authority. *Dolan*, 512 U.S. at 391 n.8 (government is not entitled to

deference in unconstitutional-conditions claims); *see also Frost v. R.R. Comm'n of State of Cal.*, 271 U.S. 583, 593–94, 46 S. Ct. 605, 70 L. Ed. 1101 (1926) ("[T]he power of the state is not unlimited; . . . one . . . limitation[] is . . . it may not impose conditions which require the relinquishment of constitutional rights.").

Nollan and *Dolan* established a "special application" of the unconstitutional-conditions doctrine designed to protect landowners' constitutional rights in property while concurrently recognizing government authority to facilitate appropriate community development. *Koontz v. St. Johns River Water Management District*, 570 U.S. 595, 604–06, 133 S. Ct. 2586, 186 L. Ed. 2d 697 (2013). Instead of the strict scrutiny typically applied in unconstitutional-conditions cases, *Nollan* and *Dolan* used the nexus and proportionality tests to define the limited circumstances in which government may lawfully condition permit approval: (1) the government may require a landowner dedicate property to a public use where dedication is necessary

to mitigate negative external impacts the development will cause, but (2) the government may not use the permitting process to coerce landowners into giving property to the public that the government would otherwise have to justly compensate.[7] *Koontz*, 570 U.S. at 604–06.

By circumventing the nexus and proportionality analyses, the Court of Appeals' "consideration-of-science" rule reveals nothing about the relationship between the buffer and any impacts of proposed development. Nor can the rule determine whether the burden of protecting the shoreline is properly placed only on owners who apply for permits, rather than spread among the public. *Dolan*, 512 U.S. at 384 (One of the "principal purposes" of the nexus and proportionality tests is "to bar Government from forcing some people alone to bear public

---

[7] This test places no special burden on the City, which was required to create a record showing that its mitigation requirements do not demand land "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).

burdens which, in all fairness and justice, should be borne by the public as a whole.") (citation omitted). Without answering these questions, the Court cannot determine whether City demands were unconstitutional conditions and cannot, as a result, determine whether its actions exceeded its limited authority under the federal Constitution. Review is warranted.

A. The Court's "Consideration-of-Science" Rule Is Based on Legal Error

The Court of Appeals' "consideration-of-science" is, moreover, predicated on plain error. It created that rule by reading a single sentence from *Kitsap Alliance of Prop. Owners v. Cent. Puget Sound Growth Mgmt. Hearings Bd. (KAPO) v. Cent. Puget Sound Growth Mgmt Hearings Bd.*, 160 Wn. App. 250, 272, 255 P.3d 696 (2011), to hold that, when demanding buffers, government automatically satisfies nexus and proportionality when it undertakes "a reasoned, objective analysis of the science." Decision at 29. But when read in its entirety, it is clear *KAPO* did *not* create such a rule excusing the

government of its burden to demonstrate nexus and proportionality.

KAPO stands for the unremarkable proposition that government must create a record sufficient to show critical area buffers "comply with the nexus and rough proportionality tests." 160 Wn. App. at 272–73. After restating that rule, *KAPO* reviewed the record, concluding the government satisfied those requirements by specifically "link[ing] its buffer widths to the functions and values" of the regulated properties as determined by science. *Id*. at 268–69. Contrary to the Decision here, *KAPO* addressed the nexus and proportionality tests by evaluating the justifications *as memorialized in the record. Id*. at 268–70. Here, the City did not engage in this inquiry because it set the mandatory buffer widths based on its policy preferences, not science. *KAPO* cannot absolve the City of its obligation to satisfy nexus and proportionality.

B. The Court Placed Dispositive Value on Studies That Cannot Meet Nexus and Proportionality Requirements

Based on its "consideration-of-science" rule and its refusal to consider the entire record, the Court treated as dispositive (Decision at 5, 29) a study that was so generalized and inconclusive that the City itself refused to base width determinations on it. AR 4314. That conclusion of the Court further militates in favor of review because it fails to heed the U.S. Supreme Court's admonition that "generalized statements" about the conditions that may be present on shoreline property are "too lax to adequately protect" constitutional rights. *Dolan*, 512 U.S. at 389. Instead, government must provide for a sufficiently "individualized determination that the required dedication is related both in nature and extent to the impact of the proposed development" before imposing exactions. *Id*. at 391; *see also Citizens' All. for Prop. Rts. v. Sims*, 145 Wn. App. 649, 668–69, 187 P.3d 786 (2008) (a regulation imposing

uniform buffer requirements, "unrelated to any evaluation of . . . demonstrated impact," violates *Dolan*).

C. The Decision Threatens to Undermine *Nollan* and *Dolan*

The need for this Court's review is heightened by the threat the Decision poses to the nexus and proportionality tests. *Dolan* explained that nexus and proportionality analysis is necessary to determine whether a condition is "merely being used as an excuse for taking property simply because at that particular moment the landowner is asking the city for some license or permit." *Dolan*, 512 U.S. at 390 (citation omitted).

This is precisely the issue here. The City made a policy-based determination that the shoreline environment would benefit from larger buffers. There is no question that the City could have implemented its policy by condemning the targeted properties. *See Welcker*, 65 Wn.2d at 683. Instead, it chose to do so by taking a shortcut that is offensive to the federal Constitution. Rather than engage in the required analysis to

ensure that the buffers mitigated only for an owner's impacts, the City chose to use the permitting process as an opportunity to grab predetermined sums of property for public use.

The Decision endorsed this shortcut by focusing solely on an alleged public need, rather than the relationship between the exaction and a proposed development. In this way, the only limit that the Court placed on the City's authority to take private property without compensation is that the City must consider (but not necessarily rely on) science when deciding how much land to take. But the fact that Bainbridge Island considered generalized studies during the update process tells the Court nothing about the impact the buffer dedication has on individual owners' rights, or who should bear the cost of conservation buffers.[8] *Lingle v. Chevron USA, Inc.*, 544 U.S. 528, 542–43, 125

[8] By adopting a "consideration-of-science" exception to *Nollan*/*Dolan* analysis, the Decision precludes a permit applicant from asking why, say, a proposal for a 120 square-foot patio addition on a developed lot should require the same sized buffer as would the construction of a 3,500 square-foot house on a fully forested property. AR 373–74.

S. Ct. 2074, 161 L. Ed. 2d 876 (2005). And, therefore, it is not a proper consideration when evaluating the rights secured by the Fifth Amendment. *Id*.

Under the Court's rule, moreover, the City would have *carte blanche* to demand buffers anywhere between 16 and 1,969 feet simply because studies observed that buffers within this range *may* benefit the shoreline environment. The Fifth Amendment, however, demands more than a bare determination of public need to take property without compensation. *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 416, 43 S. Ct. 158, 67 L. Ed. 322 (1922) ("[A] strong public desire to improve the public condition is not enough to warrant achieving that desire by a shorter cut than the constitutional way of paying for the change."). Indeed, both *Nollan* and *Dolan* invalidated development conditions mandated by legislation intended to address public needs. *Nollan*, 483 U.S. at 828–29 (beach access); *Dolan*, 512 U.S. at 378 (stream buffer and traffic infrastructure). Yet neither case turned on an evaluation of what the government

considered when determining public need. Instead, they asked whether the property demands were sufficiently justified under the nexus and proportionality tests. The Decision operates as an exception that effectively swallows those rules. This Court should not let this troubling and highly consequential decision stand unreviewed.

CONCLUSION

For the foregoing reasons, PRSM requests that the Court grant the Petition.

RAP 18.17(b) CERTIFICATE OF COMPLIANCE

The undersigned certifies that the foregoing Petition complies with the rules of this Court and contains 4,949 words.

DATED: February 16, 2023.

Respectfully submitted,

By: s/ BRIAN T. HODGES

BRIAN T. HODGES, WSBA #31976
Pacific Legal Foundation
555 Capitol Mall, Suite 1290
Sacramento, California 95814
Telephone: (916) 419-7111
Email: BHodges@pacificlegal.org

RICHARD M. STEPHENS,
WSBA #21776
Stephens & Klinge LLP
10900 NE 4th Street, Suite 2300
Bellevue, Washington 98004
Telephone: (425) 429-2532
stephens@sklegal.pro

Attorneys for Petitioners PRSM, et al.

DECLARATION OF ELECTRONIC SERVICE

The undersigned declares that all parties' counsel will receive electronic notice of the filing of this document at the Washington State Appellate Courts' Portal.

DATED: February 16, 2023.

s/ BRIAN T. HODGES
BRIAN T. HODGES, WSBA #31976

APPENDIX A

Filed
Washington State
Court of Appeals
Division Two

December 13, 2022

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

PRESERVE RESPONSIBLE SHORELINE MANAGEMENT, Alice Tawresey, Robert Day, Bainbridge Shoreline Homeowners, Dick Haugan, Linda Young, Don Flora, John Rosling, Bainbridge Defense Fund, Gary Tripp, and Point Monroe Lagoon Home Owners Association, Inc., Appellants, v. CITY OF BAINBRIDGE ISLAND, Washington State Department of Ecology, Environmental Land Use Hearing Office and Growth Management Hearings Board Central Puget Sound Region, Respondents, and Kitsap County Association of Realtors, Intervenor Below.	No. 56808-0-II UNPUBLISHED OPINION

PRICE, J. — Preserve Responsible Shoreline Management (PRSM) appeals the Growth Management Hearing Board's (Board) order upholding the City of Bainbridge Island's (City) shoreline master program (Master Program). PRSM asserts the following grounds for relief under the Administrative Procedure Act (APA):[1] the Board erroneously interpreted or applied the law,

---

[1] Ch. 34.05 RCW.

the Board's order was not supported by substantial evidence, and the Board's order was arbitrary or capricious. PRSM also asserts that the Master Program was unconstitutional. We determine that PRSM fails to meet its burden for relief and affirm.

FACTS

I. BAINBRIDGE ISLAND MASTER PROGRAM UPDATE

In 2010, the City began updating its Master Program. The City commissioned several scientific studies to help determine how to protect the shoreline and received public comments on the update to the Master Program.

A. SCIENTIFIC STUDIES

One study, commissioned by the City in 2003, was the Bainbridge Island Nearshore Assessment. The study summarized the then-available science applicable to the shorelines in Bainbridge Island. The study discussed various aspects of the shoreline ecosystem, including discussion of nearshore animal species, nearshore habitats and ecological functions, nearshore physical processes such as erosion and tides, and impacts of human shoreline modifications like bulkheads on nearshore habitats. The study made several recommendations, including that the City produce an inventory of the Bainbridge Island shoreline where the marine habitats meet land.

The second study, commissioned by the City in 2004, was the Bainbridge Island Nearshore Habitat Characterization & Assessment, Management Strategy Prioritization, and Monitoring Recommendations (Nearshore Habitat Characterization). The study separated the 53 miles of shoreline into 9 management areas, comprised of 201 individual shoreline reaches. Each shoreline reach was given an individual ecological function score based in its geomorphology, habitat structure, habitat processes, and other controlling factors.

In 2010, the City commissioned Coastal Geologic Services Inc. to prepare the Bainbridge Island Current and Historic Coastal Geomorphic/Feeder Bluff Mapping. The purpose of the study was to "to map coastal geomorphic shoretypes (such as 'feeder bluffs') and prioritize restoration and conservation sites along the marine shores of Bainbridge Island nearshore . . . ." Administrative Record (AR) at 4152. The study divided the shoreline into 32 areas called "drift cells" and assessed their ability to serve as "functioning sediment sources and transport pathways" necessary to maintain intact coastal geomorphic processes. AR at 4153, 4160. The study addressed the negative impacts of shoreline modifications, such as bulkheads and other forms of shore armoring. The study stated that "sediment impoundment is probably the most significant negative impact" of shore armoring, that "[s]everal habitats of particular value to the nearshore ecosystem rely on intact geomorphic processes and are commonly impacted by shore armor," and that shoreline armoring "can have substantial negative impacts on nearshore habitats" through the loss of marine vegetation, the loss of nearshore large woody debris, and the "partial or major loss of spits that form estuaries and embayments." AR at 4154-55.

In 2011, the City also commissioned an update to the 2003 and 2004 studies, the Addendum to the Summary of the Science Report (Addendum) by Herrera Environmental Consultants Inc. (Herrera). The Addendum relied on more than 250 sources, including studies and reports specific to the Puget Sound. The purpose of the Addendum was to provide "updated information on shoreline and nearshore ecology, physical processes, habitats, and biological resources of Bainbridge Island" and make recommendations for implementation of the "no net loss" standard and for "marine shoreline protective buffers considering geomorphic conditions and shoreline vegetation." AR at 4240-41. Specific to the buffers, the Addendum stated that "[b]uffers can be

important to the protection of the functions and processes of the nearshore environments along marine coastlines," and suggested different approaches to shoreline buffers. AR at 4306. The two suggestions for shoreline buffers included fixed-width buffers based on typical conditions present on Bainbridge Island and variable-width buffers, which could result from the different site conditions and resources to be protected. The Addendum stated:

> Approaches to establishing buffers vary between fixed or variable width, with the former generally being the most common (Haberstock et al. 2000). To be effective under a worst-case scenario, and to ensure success in the face of uncertainty about specific site conditions, May (2000) and Haberstock (2000) suggest that fixed-width buffers should be designed conservatively (i.e., larger than the bare minimum needed for protection).

AR at 4314.

Based on the Addendum, the City requested that Herrera make specific recommendations for shoreline buffers to be incorporated into the Master Program. Herrera created two memoranda: August 11, 2011, Memorandum re: Documentation of Marine Shoreline Buffer Recommendation Discussions and August 31, 2011, Memorandum re: Clarification on Herrera August 11, 2011, Documentation of Marine Shoreline Buffer Recommendation Discussions Memo. The memoranda explained that shoreline buffers protect a wide variety of ecological functions, including water quality and mineralization, fine sediment control, shade/microclimate, fish and invertebrate food from litterfall and large woody debris, and hydrology/slope stability. The memoranda summarized the buffer width recommendations made throughout relevant scientific literature and how the buffer widths widely vary based on the protection goal of the buffer. Buffer

width recommendations mostly ranged from 16 to 328 feet, with the buffers width recommendation for removing pollution from stormwater runoff reaching 1,969 feet. The buffers in the scientific research were what the literature stated was necessary to achieve at least 80 percent buffer effectivity.

Herrera recommended that the City establish a two-tiered buffer system. Herrera recommended that "Zone 1" be established as a "riparian protection zone" in which existing native vegetation would be preserved and development would be significantly restricted. AR at 4362. This recommendation was based on the ecological functions provided by native vegetation close to the shoreline that is fundamental to maintaining a healthy functioning marine nearshore. Herrera recommended that Zone 1 extend a minimum of 30 feet from the high water mark, or to the limit of the area of the shoreline that had a 65 percent canopy of native vegetation, whichever was greater, in order to achieve 70 percent or greater effectiveness at protecting water quality. The memorandum stated that 30 foot buffers were the minimum to achieve that 70 percent effectiveness level.

Herrera recommended that "Zone 2," the second tier of the buffer, be comprised of variable-width buffers depending on the shoreline designation of a specific site. Herrera recommended that Zone 2 be located immediately landward of Zone 1 and serve to provide additional protection to the riparian protection zone and other protection functions. Herrera's recommendations included the consideration that Bainbridge Island's shorelines were 82 percent developed, and the City desired to limit the number of existing structures that would be nonconforming with wide shoreline buffers under the proposed Master Program update.

The final item commissioned by the City was the Cumulative Impacts Analysis for City of Bainbridge Island's Shoreline: Puget Sound, prepared by Herrera. This analysis considered whether the Master Program's provisions would ensure no net loss of shoreline ecological functions and fairly allocate the burden of addressing cumulative impacts. This analysis summarized the shoreline's existing conditions based on the previous studies, considered the development that was anticipated on the shoreline, considered the likely impacts of the development on shoreline ecological functions, and considered how implementation of the proposed Master Program would affect those functions. The analysis concluded that "implementation of the proposed [Master Program] is anticipated to achieve no net loss of ecological functions in the City of Bainbridge Island's shorelines." AR at 2206.

B. Public Comments and Communication

When the City opened public comments on the Master Program update, it received over 1,600 comments. The City individually responded to almost all of the comments submitted to it, although some of the City's responses only stated, "Comment noted." *E.g.,* AR at 2773. The Department of Ecology (Ecology) received at least 111 comments on the proposed Master Program update, and the City categorized and then responded to the Ecology comments in groups. Some comments did not receive a response from the City.

II. The Master Program

On July 14, 2014, at the conclusion of the update process, the City approved the proposed Master Program. Following the local government's approval, the Shoreline Management Act of

1971 (SMA)[2] required Ecology to determine if the Master Program comports with state law.[3] RCW 90.58.050. In this case, Ecology approved the City's Master Program on July 16. The Master Program went into effect on July 30, 2014.

A. GOALS AND STANDARDS IN THE MASTER PROGRAM

The Master Program's "Master Goal" contained in section 1.5 stated, "An over-arching goal of this master program is to ensure that future use and development of the City's shoreline maintain a balance between competing uses, results in no net loss of shoreline ecological functions, and achieves a net ecosystem improvement over time." AR at 50.

The Master Program stated that "[t]he 'precautionary principle' was employed as guidance in updating the policies and regulations of this [Master Program]." AR at 42. The Master Program cited WAC 173-26-201(3)(g)[4] as authority for the precautionary principle.

B. SHORELINE BUFFERS

Chapter four of the Master Program imposed shoreline buffers and dictated their widths. The Master Program defines a "buffer" as:

> An area of land that is designed and designated to permanently remain vegetated in a predominantly undisturbed and natural condition and/or an area that may need to be enhanced to support ecological processes, or ecosystem-wide functions and to

---

[2] Ch. 90.58 RCW.

[3] "Local government shall have the primary responsibility for initiating the planning required by this chapter and administering the regulatory program consistent with the policy and provisions of this chapter. The department 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 this chapter*." RCW 90.58.050 (emphasis added).

[4] "As a general rule, the less known about existing resources, the more protective shoreline master program provisions should be to avoid unanticipated impacts to shoreline resources." WAC 173-26-201(3)(g).

> protect an adjacent aquatic or wetland area from upland impacts and to provide habitat for wildlife.

AR at 260.

Under section 4.1.3.5(3) of the Master Program, property owners must meet the City's vegetation management requirements through the use of buffers. The standardized shoreline buffers are separated into two zones. Consistent with the recommendations from Herrera in its scientific study, Zone 1 extends landward from the ordinary high water point a minimum of 30 feet or to the limit of the 65 percent native vegetation canopy, whichever is greater, as described in "Table 4-3." Within Zone 1, existing vegetative cover must remain.

Zone 2 extends landward from the landward boundary of Zone 1 to the outer edge of the total shoreline buffer set forth in Table 4-3. Table 4-3 identifies five land designations and the buffer widths for the different shoreline categories. Activities are less restricted in Zone 2, and property owners may develop and utilize decks, gardens, and some other residential uses, as long as impacts on shoreline ecological function are mitigated.

III. PRSM'S PETITION FOR REVIEW TO THE BOARD

In October 2014, PRSM filed a petition for review with the Board, asserting that the City's Master Program violated the SMA. PRSM amended its petition in November 2014. PRSM named the City and Ecology as respondents.

In its amended petition to the Board, PRSM raised the issues of:

> 24. Whether the City is not in compliance with RCW 90.58.130 and WAC 173-26-090 by failing to encourage public participation by not responding to public comments.
>
> . . . .
>
> 60. Whether the City is not in compliance with RCW 90.58.100(1) and WAC 173-26-201 in failing to identify and assemble the most current, accurate,

> and complete scientific and technical information available, failing to consider the context, scope, magnitude, significance, and potential limitations of the scientific information, and make use of and incorporate all available scientific information. In particular, the City's failures in regard to technical and scientific information are evident in regard to:
>
> . . . .
>
> c. The fact that the buffers selected were not driven by science-based information but City policy unrelated to science;
>
> . . . .
>
> e. The master program provisions are not based on a reasoned, objective evaluation of the relative merits of the conflicting scientific data.

AR at 572, 580-81.

In its prehearing brief for the Board, PRSM argued that the City erred when it relied on "policy, rather than science" when it established the shoreline buffers. AR at 3708. PRSM identified that the specific policy consideration to which it was referring was the City's consideration of the number of existing structures that would not conform to the Master Program's shoreline buffers. PRSM asserted that "the suggested minimum buffer was based on ensuring that residential structures would be nonconforming." AR at 3708. In other words, PRSM believed the City increased the size of the buffers, not because the science required it, but because the City simply wanted to cast as wide of a net as possible to increase the number of structures that would be considered nonconforming.

PRSM also argued in its prehearing brief that the buffers were oversized to excessively improve the "ecological functions" beyond what the SMA allows and the City deviated from the no net loss standard. AR at 3708. PRSM stated that the shoreline buffers "must be used to achieve the goal of 'no net loss,' not improvement which would be a benefit to the public at large." AR at 3708.

IV. THE BOARD'S DECISION

In April 2015, the Board issued its 119 page final decision and order concluding that PRSM failed to demonstrate that the Master Program violated the SMA.

With respect to the City's responses to public comments, the Board found that PRSM failed to meet its burden establishing that the City's failure to answer all public comments violated RCW 36.70A.140 and WAC 173-26-090. The Board stated that while the statute and rule required the City to participate and respond to comments, they did not require personal responses to every individual comment. The Board determined that a "response" to a public comment requires only that the City take that comment into consideration. AR at 5804. The Board also stated that if it was error for the City to fail to answer every individual comment, exacting compliance was not required to uphold the Master Program, citing to RCW 36.70A.140. That statute provides:

> Errors in exact compliance with the established program and procedures shall not render the comprehensive land use plan or development regulations invalid if the spirit of the program and procedures is observed.

RCW 36.70A.140.

Next, the Board determined that PRSM failed to carry its burden to show the City did not adequately justify its decision with scientific support in violation of RCW 90.58.100(1) and WAC 173-26-201. The Board discussed the studies that the City commissioned, including stating that the Herrera documents cited current Pacific Northwest marine shoreline analyses.

When analyzing whether the City's reliance on policy considerations was appropriate, the Board quoted one of Herrera's 2011 memoranda that stated, "[I]ts buffer width recommendations are informed by the City's desire to limit the number of non-conforming structures therefore, existing distances to residential structure from the shoreline are considered." AR at 5824

(emphasis omitted) (internal quotation marks omitted). But the Board suggested the City's use of this policy actually benefited PRSM's desire for smaller buffers. The Board said, "If the buffer width decision were to be driven solely by science, the buffers could be much greater." AR at 5824. The Board also recognized "there is credible evidence in the record that science would not support a vegetative buffer of less than 50 feet, the minimum required in the Native Vegetation Zones of the [former Master Program] for residential designations." AR at 5824-25.

The Board acknowledged that use of policy considerations was not impermissible under the SMA, quoting *Lake Burien Neighborhood v. City of Burien*, which stated, "The SMA process does incorporate the use of scientific information, but it does so as part of the balancing of a range of considerations, such as public access, priority uses, and the development goals and aspirations of the community." AR at 5825 (quoting No. 13-3-0012, at 11 (Wash. Cent. Puget Sound Growth Mgmt. Hr'gs Bd. June 16, 2014) (Final Decision & Order)).[5] The Board stated that when the City identifies conflicting science on the range of buffer width recommendations in accordance with the WAC, buffer widths are a policy decision. The Board found that "the City's incorporation of policy as well as science into its buffer width determination does not per se violate the SMA or the guidelines." AR at 5825 (emphasis omitted).

In response to PRSM's argument that the Master Program was not based on reasoned objective evaluation of the merits of the conflicting scientific data, the Board stated that the City gave reasoned consideration to opposing science, while building the Master Program around the consensus science incorporated on the requirements of the guidelines.

[5] https://eluho.wa.gov/api/document/file/3568.

In considering whether the City specifically violated WAC 173-26-201(2)(a), which requires governments to use scientific and technical information in the program development process, the Board observed that the City had "certainly" identified "assumptions made concerning, and data gaps in, the scientific information" when the City received a memo from an advisory committee acknowledging scientific uncertainties, and the Addendum by Herrera also expressed the limitations of existing research. AR at 5828 (internal quotation marks omitted). But the Board determined that the City assembled current scientific data and considered the gaps in scientific data and uncertainties. The Board concluded that PRSM failed to meet its burden of proof to establish a violation of WAC 173-26-201(2)(a), and that the City had assembled and utilized scientific and technical information.

In the end, the Board rejected all of PRSM's arguments and denied PRSM's petition.

V. PRSM'S APPEAL

PRSM filed a petition for review of the Board's final decision and order with the superior court. In addition to arguing the Board erred, PRSM also argued that the Master Program violated the unconstitutional conditions doctrine, and was therefore unconstitutional. The superior court denied PRSM's petition.

PRSM appeals.

ANALYSIS

PRSM challenges the City's Master Program and the Board's decision to uphold it with two main arguments. First, PRSM challenges the Master Program's shoreline buffers by arguing the City wrongfully used the "precautionary principle" without first making the required record, the City based the buffers on a net improvement standard without making the required record, and

the City failed to respond to public comments about the buffers. Second, PRSM makes a facial constitutional challenge to the shoreline buffers. We reject both arguments.

I. LEGAL PRINCIPLES

On a petition for judicial review of a growth board decision, we apply the standards of the APA. *King County v. Cent. Puget Sound Growth Mgmt. Hr'gs Bd. (King County 1)*, 142 Wn.2d 543, 552, 14 P.3d 133 (2000). We review the board's decision, not the decision of the superior court. *Id.* at 553. Under the APA, we will only grant relief from an agency's adjudicative order if it fails to meet any of the nine standards from RCW 34.05.570(3). *Lewis County. v. W. Wash. Growth Mgmt. Hr'gs Bd.*, 157 Wn.2d 488, 498, 139 P.3d 1096 (2006).

Here, PRSM asserts that five of the nine standards of RCW 34.05.570(3) apply:

> (a) The order, or the statute or rule on which the order is based, is in violation of constitutional provisions on its face or as applied;
>
> (b) The order is outside the statutory authority or jurisdiction of the agency conferred by any provision of law;[6]
>
> . . . .
>
> (d) The agency has erroneously interpreted or applied the law;
>
> (e) The order is not supported by evidence that is substantial when viewed in light of the whole record before the court, which includes the agency record for judicial review, supplemented by any additional evidence received by the court under this chapter;

[6] Although PRSM lists RCW 34.05.570(3)(b) (order is outside the statutory authority or jurisdiction of the agency) as a ground for relief in this case, it does not offer any citations to authority or the record to show that this ground for relief applies. PRSM additionally fails to mention RCW 34.05.570(3)(b) or explain how it applies after initially mentioning that it is one of the five grounds for relief that are applicable in this case. We do not consider arguments that are unsupported by citations to authority or the record. *Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 809, 828 P.2d 549 (1992) (failure to provide argument and citation to authority in support of an assignment of error precludes appellate consideration under RAP 10.3(a)). We do not further consider this ground.

. . . .

(i) The order is arbitrary or capricious.

RCW 34.05.570(3). Under the APA, the party asserting invalidity of a growth board decision has the burden of proving the invalidity. RCW 34.05.570(1)(a); *King County 1*, 142 Wn.2d at 553.

Invalidity challenges under RCW 34.05.570(3)(d) regarding whether the agency erroneously interpreted or applied the law are reviewed de novo. *City of Redmond v. Cent. Puget Sound Growth Mgmt. Hr'gs Bd.*, 136 Wn.2d 38, 46, 959 P.2d 1091 (1998). Deference is given to the agency's interpretation of the law "where the agency has specialized expertise in dealing with such issues, but we are not bound by an agency's interpretation of a statute." *Id*. at 46.

"In reviewing agency findings under RCW 34.05.570(3)(e), substantial evidence is 'a sufficient quantity of evidence to persuade a fair-minded person of the truth or correctness of the order.' " *Id.* (quoting *Callecod v. Wash. State Patrol,* 84 Wn. App. 663, 673, 929 P.2d 510, *review denied,* 132 Wn.2d 1004 (1997)). We view the evidence in the light most favorable to the party who prevailed before the board, and give deference to the board's factual findings. *Olympic Stewardship Found. v. Env't. & Land Use Hr'gs Office ex rel. W. Wash. Growth Mgmt. Hr'gs Bd. (OSF)*, 199 Wn. App. 668, 710, 399 P.3d 562 (2017), *review denied*, 189 Wn.2d 1040, *cert. denied*, 139 S. Ct. 81 (2018).

For challenges under RCW 34.05.570(3)(i), "arbitrary and capricious" means " 'willful and unreasoning action, taken without regard to or consideration of the facts and circumstances surrounding the action.' " *City of Redmond*, 136 Wn.2d at 46-47 (quoting *Kendall v. Douglas, Grant, Lincoln & Okanogan Counties Pub. Hosp. Dist. No. 6*, 118 Wn.2d 1, 14, 820 P.2d 497 (1991)). " 'Where there is room for two opinions, an action taken after due consideration is not

arbitrary and capricious even though a reviewing court may believe it to be erroneous.' " *Id.* at 47 (quoting *Kendall*, 118 Wn.2d at 14).

II. PRECAUTIONARY PRINCIPLE

PRSM argues that the City failed to create a record sufficient to support the City's alleged use of the precautionary principle. The City responds that PRSM did not sufficiently raise this issue related to the precautionary principle below and is now precluded from raising the issue on appeal. We agree with the City.

The "precautionary principle" originates from WAC 173-26-201(3)(g), which states:

> As a general rule, the less known about existing resources, the more protective shoreline master program provisions should be to avoid unanticipated impacts to shoreline resources. If there is a question about the extent or condition of an existing ecological resource, then the master program provisions shall be sufficient to reasonably assure that the resource is protected in a manner consistent with the policies of these guidelines.

Under the APA, issues not raised to the Board may generally not be raised for the first time on appeal. RCW 34.05.554(1); *see also Kitsap All. of Prop. Owners v. Cent. Puget Sound Growth Mgmt. Hr'gs Bd. (KAPO)*, 160 Wn. App. 250, 271-72, 255 P.3d 696, *review denie*d, 171 Wn.2d 1030 (2011), *cert. denied*, 566 U.S. 904 (2012). New issues may only be raised if they fall under a statutory exception. RCW 34.05.554; *see also US W. Commc'ns, Inc. v. Wash. Utils. & Transp. Comm'n*, 134 Wn.2d 48, 72, 949 P.2d 1321 (1997).

"In order for an issue to be properly raised before an administrative agency, there must be more than simply a hint or a slight reference to the issue in the record." *King County v. Boundary Rev. Bd. for King County (King County 2)*, 122 Wn.2d 648, 670, 860 P.2d 1024 (1993).

The City argues that PRSM did not argue to the Board below that the City improperly relied on the precautionary principle as part of PRSM's insufficient record argument to establish shoreline buffers, and therefore cannot do so now. PRSM responds, essentially, that it got close enough; PRSM asserts that it argued below that the City relied on "policy unrelated to science" and that this argument sufficiently covers the precautionary principle. Appellant's Reply Br. at 8.

Here, neither the phrase "precautionary principle" nor WAC 173-26-201(3)(g) ever appear in PRSM's petition for review, amended petition for review, or prehearing brief to the Board. PRSM, however, argues this omission is not dispositive. It asserts its arguments below were sufficiently linked to the precautionary principle, pointing to its allegations that the City did not

> identify and assemble the most current, accurate, and complete scientific and technical information available . . . . In particular, the City's failure in regard to technical and scientific information are evident in regard to:
>
> . . . .
>
> c. The fact that the buffers selected were not driven by science-based information but *the City policy unrelated to science*.

AR at 580 (emphasis added). PRSM also argues that its prehearing brief to the Board sufficiently described the City's reliance on the precautionary principle in several places. PRSM asserts that its brief "argued that the City had imposed oversized buffers based, not on science, but on its preference for providing more protection to the shoreline than is strictly necessary to mitigate for the minimal impacts of residential use." Appellant's Reply Br. at 9. Additionally, PRSM argued in its prehearing brief to the Board that the buffers were oversized to excessively improve the ecological functions and "did not appear to have any scientific basis." AR at 3708. These arguments, according to PRSM, focus on the legal standards for invoking the precautionary principle.

PRSM's position is unpersuasive. At no point did PRSM's "policy" argument below resemble a complaint related to the precautionary principle. The policy PRSM identified below was the City's basing buffer widths on "existing distances to residential structures from the shoreline . . . ." AR at 3708. The City's improper policy was that the buffers were "based on ensuring that residential structures would be nonconforming." AR at 3708.

Any argument to the Board about the precautionary principle would have required PRSM to allege some iteration of an argument related to insufficient science—essentially that the City was overly conservative with its shoreline buffers because of the absence of sufficient science or, perhaps, that the City made long-term buffer decisions based on the temporary insufficiency of the science without committing to updating the science. But these were not the arguments PRSM made below. Whether or not structures that existed on the shoreline would conform to the Master Program requirements is not a consideration related to the precautionary principle.

Simply put, because PRSM's prehearing brief to the Board argued that the improper policy consideration was one unrelated to the precautionary principle, PRSM's reference to the use of "policy unrelated to science" falls short of even hinting to, or slightly referencing, the precautionary principle. Arguing that the buffers were based on policy, not science, is not the same as arguing that the buffers were implemented because the City either had, or disingenuously blamed, *insufficient* science. Even aside from the fact that words "precautionary principle" did not appear in PRSM's briefs to the Board, PRSM never made arguments that describe the precautionary principle generally.

To preserve an argument for appeal to this court, PRSM was required to raise the argument to the Board or fit into a statutory exception (and PRSM does not argue that the City's alleged use

of the precautionary principle may be challenged under a statutory exception). Accordingly, because PRSM did not argue that the City improperly relied on the precautionary principle to the Board, it is precluded from making this argument now. *See* RCW 34.05.554(1).

III. NO NET LOSS

PRSM also argues that the City did not create the required record to justify departing from the "no net loss" standard to instead achieve "net ecosystem improvement." Appellant's Opening Br. at 47. PRSM argues the City cannot justify its focus on shoreline improvement at the expense of development because that would violate the SMA's more modest goal of prevention of net ecological loss.[7] PRSM appears to challenge the Board's decisions on this issue by alleging invalidity through RCW 34.05.570(3)(d), (e), and (i). We affirm the Board's decisions on this issue.

The concept of "no net loss" is found throughout the SMA; one representative reference is found in WAC 173-26-201(2)(c). This section states, "Master programs shall contain policies and regulations that assure, at minimum, *no net loss of ecological functions* necessary to sustain shoreline natural resources." WAC 173-26-201(2)(c) (emphasis added). WAC 173-26-201(2)(f) further states, "[M]aster program provisions should be designed to achieve overall *improvements*

---

[7] Like the precautionary principle, the City argues PRSM did not preserve this issue before the Board by alleging a departure from a no net loss standard below. However, unlike the precautionary principle, PRSM did make reference to this issue below. It argued in its prehearing brief to the Board that, in establishing shoreline buffer widths, "the City's strategy [was] to improve the ecological functions within the current residential development pattern." AR at 3708 (emphasis omitted) (internal quotation marks omitted). PRSM further stated that the shoreline buffers "must be used to achieve the goal of 'no net loss,' not improvement which would be a benefit to the public at large." AR at 3708. PRSM's statements in its brief are more than a hint or slight reference to the City's alleged departure from the no net loss standard, thereby preserving this issue for appeal. *King County 2*, 122 Wn.2d at 670.

in shoreline ecological functions over time, when compared to the status upon adoption of the master program." (Emphasis added).

The no net loss concept implicates the process for using scientific and technical information during the development of a master program. A description of this process is found in WAC 173-26-201(2)(a), which requires the local government to:

> First, identify and assemble the most current, accurate, and complete scientific and technical information available that is applicable to the issues of concern. The context, scope, magnitude, significance, and potential limitations of the scientific information should be considered. At a minimum, make use of and, where applicable, incorporate all available scientific information, aerial photography, inventory data, technical assistance materials, manuals and services from reliable sources of science. . . .
>
> . . . .
>
> Second, base master program provisions on an analysis incorporating the most current, accurate, and complete scientific or technical information available. Local governments should be prepared to identify the following:
>
> (i) Scientific information and management recommendations on which the master program provisions are based;
>
> (ii) Assumptions made concerning, and data gaps in, the scientific information; and
>
> (iii) Risks to ecological functions associated with master program provisions. Address potential risks as described in WAC 173-26-201 (3)(d). . . .
>
> . . . Where information collected by or provided to local governments conflicts or is inconsistent, the local government shall base master program provisions on a reasoned, objective evaluation of the relative merits of the conflicting data.

A. RCW 34.05.570(3)(d)—ERRONEOUS INTERPRETATION OR APPLICATION OF THE LAW

PRSM argues that we should grant relief under RCW 35.05.570(3)(d) because the Board erred when it affirmed the City's implementation of shoreline buffer widths that would improve the shoreline without first creating the necessary record. In its prehearing brief to the Board, PRSM argued that Zone 2 of the shoreline was unsupported by science, and the City implemented a net improvement standard in establishing the Zone 2 buffers.

In its order, the Board generally determined that the City fulfilled the requirements of WAC 173-26-102(2)(a) that the City assemble the current scientific data and assess its uncertainties. In another part of its analysis, the Board stated the City properly relied on both science and policy when establishing the shoreline buffers. Because the rule fundamentally requires that the City "[f]irst[] identify and assemble the most current, accurate, and complete scientific . . . information available," and second "base [the] master program" on that scientific information, the Board did not err in its interpretation of WAC 173-26-201(2)(a).

While the Board did not specifically address the alleged application of a net improvement standard, the Board did recognize that the science would have supported larger buffers, up to 1,969 feet in width.[8] The science that guided the creation of the buffer widths included recommended buffer widths for at least 80 percent buffer effectiveness, with one suggestion reaching 1,969 feet. The City's buffers for both Zones 1 and 2 were within the recommendations

---

[8] Following our questioning at oral argument about the Board's statements regarding the scientific support for the size of the buffers, PRSM moved to provide supplemental briefing, claiming that these statements were not argued by either party in their initial briefing and unfairly constitute a new issue. PRSM appears to be concerned that this language from the Board raises the question of whether the existing required widths of the buffers satisfy the no net loss requirements of the SMA—an issue PRSM claims was not raised by the parties in this appeal. We agree that whether the current size of the buffers satisfy the no net loss requirements of the SMA is not before us. Therefore, we had no need for additional briefing from the parties.

But we disagree that the Board's statements are not relevant to our present analysis. PRSM argued to the Board that the City's alleged failure to sufficiently develop its record was because the City used policy instead of science. This argument is the foundation of PRSM's current challenge of whether the record supports the alleged implementation of a net improvement standard. The evidentiary record and the Board's related discussion, which prompted our questions at oral argument, are therefore, clearly relevant to PRSM's arguments in this appeal.

of the scientific literature, and the Board stated that the buffers were reduced to smaller than the science would have supported.

If the buffers were smaller than the science would have supported to maintain the ecological functions at 2011 standards, it follows that the buffers were not designed to overly improve the shoreline, meaning a net improvement standard was not implemented as PRSM suggests. Because the City did not improperly apply the net improvement standard, the Board could not have erred in its application of the law on the basis PRSM asserts when the Board determined the City did not violate the law. PRSM fails to meet its burden under RCW 34.05.570(3)(d).

B. RCW 34.05.570(3)(e)—SUPPORTED BY SUBSTANTIAL EVIDENCE

PRSM also asserts that it may be granted relief under RCW 34.05.570(3)(e) because the Board's order was not supported by substantial evidence. The Board identified that the City appropriately relied on the science from its multiple studies in making its determinations about the size and scope of the buffers. Herrera specifically suggested the shoreline buffers that the City adopted, and the Board identified that the scientific literature would have supported larger buffers than the Master Program includes. Because Herrera compiled literature that suggested buffers larger than the existing buffers to achieve at least 80 percent buffer effectivity, the bulk of the evidence disproves PRSM's allegation that the City applied a net improvement standard. When viewed in the light most favorable to the City as the prevailing party, the Board's order is supported by substantial evidence. PRSM fails to meet its burden that the Board's order was not supported by substantial evidence.

C. RCW 34.05.570(3)(i)—ARBITRARY OR CAPRICIOUS

PRSM also argues that they may be granted relief because the Board's order was arbitrary and capricious under RCW 34.05.570(3)(i). The analysis above shows that the Board relied on evidence in the record and applied that evidence to the law. Because the Board relied on evidence in the record to make its decision and issue its order, the Board did not act willful and unreasoned without regard to, or consideration of, the facts and circumstances surrounding the action. Its order was therefore not arbitrary and capricious.

IV. RESPONSE TO PUBLIC COMMENTS

PRSM next complains about the City's alleged failure to respond to public comments about the precautionary principle. Below, the Board determined that the City did not violate the SMA when it did not answer all of the public comments. Like its other challenges to the Board's decision, PRSM appears to argue that this decision from Board's order violates RCW 34.05.570(3)(d), (e), and (i). The City responds that the Board accurately determined that the City was not required to answer all public comments individually.[9] We agree with the City.

The SMA imposes an obligation to involve the pubic in the development of a shorelines master program. RCW 90.58.130 states:

> To insure that all persons and entities having an interest in the guidelines and master programs developed under this chapter are provided with a full opportunity for involvement in both their development and implementation, the department and **local governments shall**:
>
> (1) Make reasonable efforts to inform the people of the state about the shoreline management program of this chapter and in the performance of the responsibilities provided in this chapter, shall not only invite but actively encourage participation

---

[9] The City also responds that while PRSM did argue to the Board that the City failed to adequately respond to comments, PRSM never tied this argument to the precautionary principle.

> by all persons and private groups and entities showing an interest in shoreline management programs of this chapter; and
>
> (2) Invite and encourage participation by all agencies of federal, state, and local government, including municipal and public corporations, having interests or responsibilities relating to the shorelines of the state. State and local agencies are directed to participate fully to insure that their interests are fully considered by the department and local governments.

RCW 90.58.130 (emphasis added).

This obligation for local governments to engage and encourage public participation in the SMA process is further explained in WAC 173-26-090(3)(a), which states:

> (i) In conducting the periodic review, the department and local governments, pursuant to RCW 90.58.130, shall make all reasonable efforts to inform, fully involve and encourage participation of all interested persons and private entities, tribes, and agencies of the federal, state or local government having interests and responsibilities relating to shorelines of the state and the local master program. . . .
>
> (ii) Counties and cities shall establish and broadly disseminate to the public a public participation program identifying procedures whereby review of the shoreline master program will be considered by the local governing body consistent with RCW 36.70A.140. **Such procedures shall provide for** early and continuous public participation through broad dissemination of informative materials, proposals and alternatives, opportunity for written comments, public meetings after effective notice, provision for open discussion, and **consideration of and response to public comments.**

(Emphasis added).

A. RCW 34.05.570(3)(d)—ERRONEOUS INTERPRETATION OR APPLICATION OF THE LAW

PRSM asserts that we should grant relief under RCW 34.05.570(3)(d) because the Board misinterpreted and misapplied these public participation obligations when it decided the City did not need to answer every public comment. The Board determined that PRSM "failed to carry its burden of demonstrating the City's 'consideration of and response to public comments' violated SMA or GMA requirements." AR at 5805 (quoting WAC 173-26-090(3)). The Board determined

that the City did not violate RCW 90.58.130 or WAC 173-26-090 because neither required that the City *answer* every individual public comment, they only require the City to *respond* to comments. The Board recognized that a response to a comment "does not require accepting or agreeing with them — only taking them into consideration." AR at 5804. Further, the City actually answered the majority of comments it received.

RCW 90.58.130, on its face, does not require the City to respond to comments. It requires only that the City make reasonable efforts to inform the public and invite and encourage participation. The Board did not err in its interpretation of this statute because it correctly determined that the statute did not require individual answers to every public comment.

WAC 173-26-090(3)(a), however, does require that the City consider and respond to public comments when it states, "Such procedures shall provide for . . . response to public comments." While this creates a general obligation for the City to respond to comments, the rule stops short of requiring the City to provide an answer to every individual comment. The Board determined that reacting in response to a comment meant that the City consider the argument, and it may choose to answer the comment. We determine this is a reasonable construction of the rule. It recognizes the importance the legislature placed upon public participation, but it does not impose an unreasonably onerous obligation to individually answer, as in this case, over 1,600 comments. The Board did not err in its application of this rule because it correctly determined that the rule does not require the City to answer every comment and a response by the City does not specifically require an answer. PRSM fails to meet its burden to show the Board erred in its interpretation or application of the law.

B. RCW 34.05.570(3)(e)—SUPPORTED BY SUBSTANTIAL EVIDENCE

PRSM also asserts that we should grant relief because the Board's order was not supported by substantial evidence when it determined the City did not violate the relevant statutes. As stated above, the record shows that the City answered the vast majority of comments submitted to both it and Ecology. The City received over 1,600 individual comments and answered almost all of them, even when comments were duplicative. The City also answered the comments made to Ecology. Moreover, as noted above, the City was not required to answer every comment. Because the City responded to nearly all of the comments with answers when they were not required to answer every individual comment, there is substantial evidence to support the Board's order on this issue. PRSM fails to meet its burden to show that the Board's order was not supported by substantial evidence.

C. RCW 34.05.570(3)(i)—ARBITRARY OR CAPRICIOUS

Additionally, the PRSM argues that the Board's order was arbitrary or capricious when it determined the City's failure to answer all comments did not violate the relevant laws. Because the Board considered that the City responded to comments and was not required to answer each one, the Board considered the facts of this case and did not act willful and unreasoned in disregard of these facts. Therefore, the Board's order was not arbitrary and capricious, and PRSM fails to meet its burden for us to grant relief.

V. UNCONSTITUTIONAL CONDITIONS

Outside of its challenge to the Board's order, PRSM makes a constitutional challenge to the shoreline buffers in the City's Master Program.[10] PRSM argues that the shoreline buffers in the Master Program violate the doctrine of unconstitutional conditions because they do not pass the nexus and proportionality tests. Ecology and the City argue that the Master Program passes the nexus and proportionality tests when the City relied on the best available science. We agree with the City.

Constitutional challenges are questions of law that are reviewed de novo. *OSF*, 199 Wn. App. at 710. We have previously determined that for constitutional challenges to a master program under the SMA, the party asserting invalidity "bears the burden of proving its unconstitutionality beyond a reasonable doubt." *Id.*

Under the doctrine of unconstitutional conditions, "the government may not require a person to give up a constitutional right . . . in exchange for a discretionary benefit . . . ." *Dolan v. City of Tigard*, 512 U.S. 374, 385, 114 S. Ct. 2309, 129 L. Ed. 2d 304 (1994). The *Dolan* and *Nollan* cases involve a specific application of the unconstitutional conditions doctrine. *Dolan*, 512 U.S. 374; *Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825, 107 S. Ct. 3141, 97 L. Ed. 2d 677 (1987). *Dolan* and *Nollan* stand for the proposition that the government may not condition approval of a land-use permit on the owner's relinquishment of a portion of his property unless there is a nexus and rough proportionality between the government's demand and the effects of the proposed land

---

[10] PRSM's unconstitutional conditions argument is outside of its challenge of the Board's order because the Board did not have the authority to decide constitutional issues and did not decide the issue. *Bayfield Res. Co. v. W. Wash. Growth Mgmt. Hr'gs Bd.*, 158 Wn. App. 866, 880-81, 244 P.3d 412 (2010).

use. *Koontz v. St. Johns River Water Mgmt. Dist.*, 570 U.S. 595, 599, 133 S. Ct. 2586, 186 L. Ed. 2d 697 (2013).

Nollan and *Dolan* set forth the nexus and rough proportionality tests that the regulation must pass to be constitutional under the unconstitutional conditions doctrine. *Nollan*, 483 U.S. at 837; *Dolan*, 512 U.S. at 391. The nexus test permits only those conditions necessary to mitigate a specific adverse impact of a proposal. *KAPO*, 160 Wn. App. at 272 (citing *Nollan*, 483 U.S. 825). The rough proportionality test limits the extent of required mitigation measures to those that are roughly proportional to the impact they are designed to mitigate. *KAPO*, 160 Wn. App. at 272-73 (citing *Dolan*, 512 U.S. 374).

However, *Nollan* and *Dolan* involved as-applied challenges to regulations that implemented conditional requirements for permit approvals. *See Nollan*, 483 U.S. at 831-32; *Dolan*, 512 U.S. at 391. In the context of a facial challenge to a land use ordinance, the ordinance "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." *Honesty in Env't. Analysis & Legis. v. Cent. Puget Sound Growth Mgmt. Hr'gs Bd. (HEAL)*, 96 Wn. App. 522, 533, 979 P.2d 864 (1999) (plaintiffs made a facial challenge to the Growth Management Act (GMA)) (footnotes omitted).

The SMA requires the use of a "reasoned, objective evaluation" of the scientific and technical information when creating master programs. WAC 173-26-201(2)(a). This is analogous to the requirement found in the GMA to use the "best available science" to set the general requirements in land use ordinances. RCW 36.70A.172(1). When it is shown that the local government meets this standard, the nexus and rough proportionality tests are generally satisfied.

KAPO, 160 Wn. App. at 273. "If a local government fails to incorporate, or otherwise ignores the best available science, its policies and regulations may well serve as the basis for conditions and denials that are constitutionally prohibited." *HEAL*, 96 Wn. App. at 533. Use of the best available science is "generally interpreted to require local governments to analyze valid scientific information in a reasoned process." *KAPO*, 160 Wn. App. at 267. "If the local government used the best available science in adopting its critical areas regulations [under the GMA], the permit decisions it bases on those regulations will satisfy the nexus and rough proportionality rules." *Id.* at 273. Similarly, we determine that meeting the SMA's requirement for a reasoned, objective evaluation of the scientific and technical information satisfies the nexus and proportionality tests.

PRSM is making a facial challenge to the Master Program specific to the shoreline buffers. The parties appear to agree that the nexus and proportionality tests apply to this facial challenge of the Master Program. PRSM argues that the Master Program does not meet the nexus and proportionality tests because the Master Program does not require identification of anticipated development impacts of ecological conditions and the City set general default buffers based on mere assumptions of shoreline conditions.

Here, the City assembled an extensive scientific record supporting the Master Program and the shoreline buffers. This record included the following items: Bainbridge Island Nearshore Assessment; Nearshore Habitat Characterization; the Bainbridge Island Current and Historic Coastal Geomorphic/Feeder Bluff Mapping; the Addendum; Memorandum re: Documentation of Marine Shoreline Buffer Recommendation Discussions; Memorandum re: Clarification on Herrera August 11, 2011 Documentation of Marine Shoreline Buffer Recommendation Discussions

Memo; and the Cumulative Impacts Analysis for City of Bainbridge Island's Shoreline: Puget Sound.

The studies cited by the City documented the conditions and ecological functions of the Bainbridge Island shoreline. The studies also showed the anticipated impacts of anticipated development on the existing conditions of the shoreline. The studies additionally made detailed recommendations for shoreline regulations, including the shoreline buffers that were adopted by the City, to ensure that the impacts of development would be mitigated and no net loss of shoreline ecological functions would occur.

The City has shown that the Master Program relied on the valid scientific information to establish the shoreline buffers because it implemented the buffers suggested by Herrera and the buffers were based on the science.[11] Because the City relied on extensive scientific research, we conclude that it used a reasoned, objective analysis of the science to create the Master Program. *See KAPO*, 160 Wn. App. at 270.

This is fatal to PRSM's facial challenge. Just like using the best available science satisfies the nexus and rough proportionality tests in GMA cases, the use of a reasoned, objective analysis of the science is sufficient to pass the nexus and rough proportionality tests in SMA cases. The Master Program passes these nexus and proportionality tests because the City relied on multiple

[11] The determination that the Master Program was based on science does not conflict with the Board's conclusion that the City appropriately used both science and policy to create the shoreline buffers. To fail the nexus and proportionality tests, the buffer widths would need to be in excess of what the science would allow. Because the Board determined that the science alone would have supported larger buffers, the Board's analysis does not contradict our determination that the City used a reasoned, objective analysis.

scientific studies when establishing the shoreline buffer widths. *See KAPO*, 160 Wn. App. at 273-74.

Because the Master Program passes the nexus and proportionality tests, PRSM has not met its burden to show that the Master Program's shoreline buffers violate the doctrine of unconstitutional conditions.

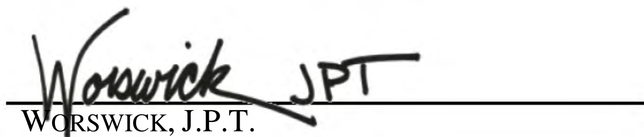
CONCLUSION

We affirm the superior court's order determining that the City's Master Program comports with the SMA.

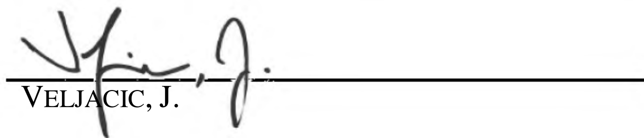
A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.

PRICE, J.

We concur:



WORSWICK, J.P.T.



VELJACIC, J.

APPENDIX B

Filed
Washington State
Court of Appeals
Division Two

January 19, 2023

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

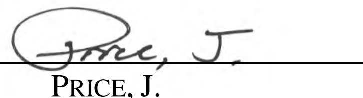
PRESERVE RESPONSIBLE SHORELINE MANAGEMENT, Alice Tawresey, Robert Day, Bainbridge Shoreline Homeowners, Dick Haugan, Linda Young, Don Flora, John Rosling, Bainbridge Defense Fund, Gary Tripp, and Point Monroe Lagoon Home Owners Association, Inc.,	No. 56808-0-II
Appellants,	
v.	ORDER DENYING MOTION FOR RECONSIDERATION
CITY OF BAINBRIDGE ISLAND, Washington State Department of Ecology, Environmental Land Use Hearing Office and Growth Management Hearings Board Central Puget Sound Region,	
Respondents,	
and	
Kitsap County Association of Realtors,	
Intervenor Below.	

Appellants move for reconsideration of the opinion filed December 13, 2022, in the above entitled matter. Upon consideration, the Court denies the motion. Accordingly, it is

SO ORDERED.

PANEL: Jj. WORSWICK, VELJACIC, PRICE

FOR THE COURT:



PRICE, J.

PACIFIC LEGAL FOUNDATION

February 16, 2023 - 3:43 PM

Transmittal Information

Filed with Court:	Court of Appeals Division II
Appellate Court Case Number:	56808-0
Appellate Court Case Title:	Preserve Responsible Shoreline, Appellant v. City of Bainbridge Island, Respondent
Superior Court Case Number:	15-2-00904-6

The following documents have been uploaded:

- 568080_Petition_for_Review_20230216154035D2640401_0921.pdf
  This File Contains:
  Petition for Review
  The Original File Name was PRSM Pet for Rev.pdf

A copy of the uploaded files will be sent to:

- Lisa.Petersen@atg.wa.gov
- Phyllis.Barney@atg.wa.gov
- ecyolyef@atg.wa.gov
- incominglit@pacificlegal.org
- jhaney@omwlaw.com
- lalseaef@atg.wa.gov
- stephens@sklegal.pro

Comments:

Sender Name: Brien Bartels - Email: bbartels@pacificlegal.org
Filing on Behalf of: Brian Trevor Hodges - Email: bth@pacificlegal.org (Alternate Email:)

Address:
555 Capitol Mall, Suite 1290
Sacramento, CA, 95814
Phone: (916) 419-7111 EXT 3521

Note: The Filing Id is 20230216154035D2640401