Case No. 101727-8

Court of Appeals Case No: 56808-0-II

IN THE SUPREME COURT
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

PETITIONERS' REPLY TO NEW ISSUES RAISED IN ANSWER

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Pursuant to RAP 13.4(d), Petitioners Preserve Responsible Shoreline Management, Alice Tawresey, Robert Day, Bainbridge Shoreline Homeowners, Dick Haugan, Linda Young, John Rosling, Bainbridge Defense Fund, and Point Monroe Lagoon Home Owners Association, Inc. (together, "PRSM"), file this Reply addressing three new issues raised in Sections B, C, and D(2) of the Joint Answer of State of Washington Department of Ecology ("Ecology") and City of Bainbridge Island ("City") in Opposition to Petition for Review.

NEW ISSUES RAISED IN JOINT ANSWER

1. Whether RAP 10.3(c) provides an alternative basis to uphold the appellate court's decision barring Petitioners from citing certain portions of the record in support of constitutional claims that were properly raised for the first time to the trial court. (Answer Section B)

2. Whether a regulation that conditions the issuance of a land use permit upon the dedication of a buffer to a public environmental use is subject to the federal doctrine of

unconstitutional conditions as set out by *Nollan v. California Coastal Commission*, 483 U.S. 825, 107 S. Ct. 3141, 97 L. Ed. 2d 677 (1987), *and Dolan v. City of Tigard*, 512 U.S. 374, 114 S. Ct. 2309, 129 L. Ed. 2d 304 (1994), providing an alternative basis to reverse the appellate court's decision. (Answer Section C)

3. Whether the existence of a regulatory procedure for adjusting the mandatory buffer widths provides an alternative basis for showing that the SMP's buffer provisions satisfy the nexus and proportionality tests set out by *Nollan* and *Dolan* where that procedure is not intended to reduce the size of the mandatory buffers but instead demands an adjusted configuration that provides more environmental benefits than the prescribed buffer would. (Answer Section D(2))

INTRODUCTION

The joint answer of the City of Bainbridge Island and Department of Ecology raises three new issues in opposition to

review. None of these were addressed in the Court of Appeals' decision, and each has no merit. RAP 13.4(d).

First, in response to PRSM's argument that the appellate court improperly applied *administrative issue exhaustion* to a constitutional claim that was outside the Growth Board's authority, the City and Ecology cited, for the first time, to caselaw applying RAP 10.3(c), objecting to the sufficiency of PRSM's trial-court briefing. Answer at 14–17. They make this exceptionally late objection by omitting key facts of this case. *Id*. The record is clear, however. PRSM raised its constitutional challenge in its opening brief to the trial court and both respondents substantively responded to that issue without objection, to either the trial or appellate court. Thus, there is no basis for a RAP 10.3(c) objection for the first time on the *third* level of judicial review.

Second, in response to the argument that the appellate court misconstrued and misapplied the nexus and proportionality tests under the doctrine of unconstitutional conditions,

respondents argue that the lower court erred in addressing that claim on its merits because the City's buffer demand does not constitute the type of permit condition that is subject to *Nollan* and *Dolan*. Answer at 17–21. That argument is not addressed in the decision below. Decision at 27–30. And, once again, this argument is based on significant omissions. Here, respondents fail to disclose that the unpublished authority they rely on directly conflicts with published decisions of state and federal courts. What's more, this erroneous assertion constitutes a conditional cross-petition seeking reversal of the appellate court's decision. RAP 13.4(d). As such, its merits (or lack thereof) have no bearing on whether review is advisable. RAP 13.4(b).

Third, in response to the argument that the appellate court's application of the nexus and proportionality tests conflicts with precedents from other state and federal courts, the City and Ecology claim, in a single conclusory sentence, that an SMP procedure for adjusting buffer configurations (*i.e.*, the

"vegetation management plan") provides an alternative basis for upholding the appellate court's decision. Answer at 28. That same one-sentence assertion was made below (Ecology Resp. Br. at 32) but was too undeveloped to be considered in the court's discussion of nexus and proportionality. Decision at 26–30. Again, the City and Ecology's new argument is without legal or factual merit; ultimately, their argument merely begs the question presented.

Because these three issues are not addressed by the decision below, RAP 13.4(d) authorizes the filing of this reply.

ARGUMENT

I

RESPONDENTS' RAP 10.3 ARGUMENT LACKS MERIT AND PROVIDES NO BASIS FOR AVOIDING REVIEW

The City and Ecology do not meaningfully address the advisability of reviewing the Court of Appeals' conclusion that the APA's issue exhaustion provision barred PRSM from citing those portions of the record evidencing the City's reliance on the "precautionary principle" in support of the unconstitutional

conditions claim. Decision at 15–18 (citing RCW 34.05.554(1)); Petition at 16–20. That is because the court's error in this regard is obvious and highly prejudicial. Petition at 16–20. Indeed, the City and Ecology admit that PRSM properly raised its unconstitutional conditions claim before the trial court, which it also admits was the first adjudicative body with authority on that claim. Answer at 16. Thus, respondents do not contest the importance of the question presented or any of the conflicts identified in the petition. RAP 13.4(b).

Instead, the City and Ecology claim—*for the first time in this long-running case*—that PRSM did not raise its constitutional challenge to the "precautionary principle" in its opening brief to the trial court. Answer at 16. From that they argue that the appellate court's refusal to consider portions of the record could be alternatively justified under RAP 10.3(c) (a party may not raise an issue for the first time in a reply brief). Answer at 17 (citing *Matter of Rhem*, 188 Wn.2d 321, 327, 394 P.3d 367

(2017); *Bergerson v. Zurbano*, 6 Wn. App. 2d 912, 926, 432 P.3d 850 (2018)). Their argument is baseless.

PRSM's opening brief to the trial court discussed the City's reliance on the "precautionary principle" at great length and detail, addressing the policy at least 40 times across the span of 17 pages while providing numerous citations to the record and citing supporting authorities. CP 215–16, 218, 222, 225–28, 234, 249, 252, 254–56, 265–68. To be clear, PRSM's introduction and summary of the argument stated that the statutory and constitutional questions presented "all arise from a common set of facts," specifically referencing the City's reliance on the "precautionary principle." CP 215–16 ("statutory and constitutional law prohibit the government from using the 'precautionary principle' to deprive individuals of their rights"). And in the paragraph summarizing its unconstitutional conditions claim, PRSM stated that "[t]he City plainly violated this doctrine by demanding … precautionary buffers." CP 218. This alone shows that PRSM's opening brief exceeded the

threshold for presenting an issue—*i.e.*, that a filing should give more than "passing treatment of an issue or lack of reasoned argument" when presenting one's case. *Holland v. City of Tacoma*, 90 Wn. App. 533, 538, 954 P.2d 290 (1998) (interpreting RAP 10.3(c)). But there's more.

In claiming—*wrongly*—that PRSM had only presented its "precautionary principle" arguments in support of its statutory claims (Answer at 16), respondents omit the critical fact that PRSM's opening brief explained that the SMA Guidelines incorporated the constitutional nexus and proportionality standards into WAC 173-26-201(2)(e)(ii)(A) (mitigation requirements must not be "in excess of that necessary to assure that development will result in no net loss"), and WAC 173-26-186(8)(b)(i) (requiring that "regulations and mitigation standards" be designed and implemented "in a manner consistent with all relevant constitutional and other legal limitations on the regulation of private property."). CP 224, 251. Consistent with this Court's prudential doctrine, which resolves issues on

statutory grounds before reaching constitutional ones,[1] PRSM's opening brief first set out a general statement of facts showing the City's reliance on the "precautionary principle" when setting buffer widths (CP 225–28) before arguing that its precautionary buffers violated the nexus and proportionality requirements incorporated into the SMA Guidelines. CP 251–56, 265–68. Thereafter, PRSM presented the same (albeit more doctrinally focused) argument challenging "precautionary buffers" based on a direct violation of the federal constitutional doctrine. CP 218, 271–78.

The City and Ecology's trial briefs confirm that they were fully apprised of this issue and meaningfully responded to it in a manner consistent with their litigation strategy. The City, whose trial brief focused solely on the statutory claims, devoted an entire argument section to the topic, in which it admitted its partial reliance on the "precautionary principle" when it

[1] *Tunstall v. Bergeson*, 141 Wn.2d 201, 210, 5 P.3d 691 (2000).

established buffer widths. CP 533–34. Ecology, whose brief addressed only the constitutional claim, also devoted a section to that issue, further confirming the City's reliance on the "precautionary principle" as part of its statutorily required "reasoned process" when setting buffer widths. CP 304. Ecology's decision to pin the "precautionary principle" to the "reasoned process" was central to respondents' litigation strategy throughout this case. Respondents asked each of the lower courts to rule that as a matter of federal constitutional law, the nexus and proportionality tests do not apply where the buffers are adopted as part of a generally applicable legislative mandate. CP 307–08. Instead, respondents have argued that such a compelled dedication of property will automatically satisfy *Nollan* and *Dolan* if the demand was the result of a "reasoned process," without more.[2] CP 307–08; *see also* Ecology Resp. Br. at 28–29.

[2] Due to this litigation strategy, respondents chose only to mention that the "precautionary principle" was considered as part of the update process without addressing whether any specific science or policy recommendation supported the actual, selected

Thus, the government meaningfully responded to PRSM's constitutional claim, citing the same "precautionary principle" facts as PRSM, but did so in the context of its competing theory of the constitutional claim—a theory that was successful in the appellate decision below. Decision at 27–30. The government's briefing shows that their newly asserted RAP 10.3(c) objection is baseless.

Having substantively briefed this issue to the trial court, neither respondent objected to its consideration. Nor did they raise a RAP 10.3(c) objection when these issues were again briefed by all parties to the appellate court, citing the same evidence in support of their legal theory. City Resp. Br. at 38–41 (arguing only administrative issue exhaustion in regard to statutory issues); *id*. at 6, 41–42, 54–55 (presenting argument about how the "precautionary principle" was employed during the update process); Ecology Resp. Br. at 1 (incorporating City

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buffer widths. AR 2883 (councilmember noting that a justification for the buffer width "doesn't appear in the" science).

brief, re-asserting that the precautionary principle was considered as part of the City's "reasoned process"). While the undersigned counsel was unable to find a Washington decision addressing this precise circumstance, California courts hold that a party will waive any such objection by responding to the issue in a brief. *Kaney v. Custance*, 74 Cal. App. 5th 201, 213 n.12, 289 Cal. Rptr. 3d 356 (2022). The same reasoning should apply here.

Respondents' surprise RAP 10.3 objection is baseless and has no bearing on the advisability of review.

II

THE GOVERNMENT'S "NO DEDICATION" ARGUMENT RAISES AN UNDISCLOSED SPLIT OF AUTHORITY ON AN IMPORTANT QUESTION OF CONSTITUTIONAL LAW

The City and Ecology also insist that review of the appellate court's decision is not warranted because, according to them, the buffer demand should never have been subjected to the unconstitutional conditions doctrine in the first place. Answer at

17–21. Although presented as an argument in opposition to review, respondents allege a constitutional error that would require reversal of the lower court's decision. They fail to disclose that their argument, moreover, is based on a single, outlying, and unpublished appellate decision, *Common Sense Alliance v. Growth Mgmt. Hearings Bd.*, Nos. 72235-2-I & 72236-1-I, 2015 WL 4730204, at *8 (Wash. Ct. App. Aug. 10, 2015) (unpublished). Far from providing a reason for denying review, this argument *at most* provides additional grounds for granting the petition. RAP 13.4(d) (basis for cross petition include "any issue that is not raised in the petition for review, including any issues that were raised but not decided in the Court of Appeals").

Although respondents raised this same argument below, the appellate court chose not to discuss it. Decision at 27; *see* Ecology Resp. Br. at 37–40. Instead, the court followed several published opinions holding buffers subject to the doctrine of unconstitutional conditions without discussion. *See, e.g.*, *Dolan*,

512 U.S. at 393–94 (stream buffer mandated by generally applicable city code provision subject to doctrine); *Kitsap Alliance of Prop. Owners v. Cent. Puget Sound Growth Mgmt. Hearings Bd. (KAPO)*, 160 Wn. App. 250, 272, 255 P.3d 696 (2011) (shoreline buffers "must … satisfy the requirements of nexus and rough proportionality established in *Dolan* and *Nollan*."); *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) (critical area regulations "must comply with the nexus and rough proportionality limits the United States Supreme Court has placed on governmental authority to impose conditions on development applications."). Respondents' insistence that *Common Sense Alliance* was right and those several published decisions were wrong simply presumes to predict the outcome of the merits should review be granted. It does not contest any of the conflicts set out in the petition and does not comment on the advisability of this Court's granting review. RAP 13.4(b).

III

RESPONDENTS' "ALTERNATIVE CONDITION" ARGUMENT IS NOT ADDRESSED IN THE DECISION BELOW AND MERELY BEGS THE CONSTITUTIONAL QUESTION PRESENTED

In yet another argument designed to avoid review, the City and Ecology insist (in a single sentence) that the existence of an SMP procedure for adjusting a buffer's configuration (*i.e.*, the "vegetation management plan") provides an alternative basis for upholding the appellate court's decision. Answer at 28. Their claim, however, lacks reasoned argument or citation to authority. *Id*. As a result, it is not properly presented for consideration by this Court. RAP 10.3(a)(5) (appellate argument must contain "citations to legal authority and references to relevant parts of the record"); *Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 809, 828 P.2d 549 (1992) (courts will not consider arguments that are not supported by citation to authority and the record). The claim, moreover, simply presumes to predict the

outcome of this case should it be granted, providing no argument on the advisability of review.

Even if this Court considers their new argument, respondents' assertion merely begs the question presented: whether the lower court's adoption of a rule that circumvents the nexus and proportionality tests conflicts with decisions from other state courts or the U.S. Supreme Court. Petition at 2, 20–30. Again, based on their "part of a reasoned process" theory of the case, respondents offer no argument that a vegetation management plan would allow an owner to reduce the size of a mandatory buffer in a manner that satisfies nexus and proportionality—indeed, they cannot do so where the SMP states that such plans are "not intended as a means to reduce buffers," but are meant to "improve" upon the public benefits that the mandatory buffers already provide. AR 304 (the plan "shall clearly demonstrate that greater protection of the functions and values of critical areas … than can be achieved" by the mandatory buffers). Further, like the buffer provisions

themselves, the SMP's vegetation management plan provisions lack any requirement that the conservation area be limited to only that land necessary to address the impacts of a proposed development before demanding that the property be dedicated as a conservation buffer. AR 108, 304. Thus, the mere existence of an alternative buffer procedure—having gone unaddressed by the courts below—does not provide a basis for avoiding review.

CONCLUSION

For the foregoing reasons, PRSM requests that the Court grant the petition and reverse the Court of Appeals' decision in order to settle the identified splits of authority and bring Washington courts into alignment with decisions of the U.S. Supreme Court. *Chong Yim v. City of Seattle*, 194 Wn.2d 651, 658, 451 P.3d 675 (2019) (Washington courts follow federal court decisions interpreting and applying the takings clause of the Fifth Amendment).

RAP 18.17(b) CERTIFICATE OF COMPLIANCE

The undersigned certifies that the foregoing Petition complies with the rules of this Court and contains 2,701 words.

DATED: April 21, 2023.

Respectfully submitted,

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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: April 21, 2023.

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