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Supreme Court No. 92251-9
Court of Appeals No. 72235-2-I, consolidated with 72236-1-I

IN THE SUPREME COURT OF
THE STATE OF WASHINGTON

COMMON SENSE ALLIANCE, P.J. TAGGARES COMPANY, et al.,

Cross-Petitioners,

v.

GROWTH MANAGEMENT HEARINGS BOARD, WESTERN
WASHINGTON REGION, and SAN JUAN COUNTY,

Respondents.

On Appeal from the Superior Court of the
State of Washington for San Juan County

CROSS-PETITION FOR REVIEW

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IDENTITY OF PETITIONERS

Cross-petitioner Common Sense Alliance (CSA) is a private, nonprofit corporation made up of San Juan County property owners. P.J. Taggares Co. owns land on Blakely Island and is directly and adversely impacted by San Juan County's critical areas ordinance update.

CITATION TO COURT OF APPEALS' DECISION

CSA seeks review of the Court of Appeals' August 12, 2015, decision in *Friends of the San Juans, et al. v. San Juan County* (Div. I, No. 72235-2-I, cons. with 72236-1-I), and Order Denying Reconsideration (Sept. 3, 2015) (Cross-Petition Appendix A).

ISSUE PRESENTED FOR REVIEW

Does the existence of a generalized scientific study, concluding that preserving shorelines may protect the environment, obviate the constitutional requirement that the government demonstrate that a land use will impact the shoreline before exacting property in exchange for permit approvals, pursuant to the "essential nexus" and "rough proportionality" tests set out in *Nollan v. California Coastal Commission*, 483 U.S. 825, 107 S. Ct. 3141, 97 L. Ed. 2d 677 (1987), *Dolan v. City of Tigard*, 512 U.S. 374, 114 S. Ct. 2309, 129 L. Ed. 2d 304 (1994), and incorporated into RCW 82.02.020?

INTRODUCTION

This cross-petition seeks review of San Juan County's 2012 critical areas ordinance update, which conditions the issuance of new land-use permits on shoreline properties upon the owners' dedication of significant portions of their land as conservation areas. The County's decision to use the permit process as a tool to require land dedications subjects its ordinance to the nexus and proportionality tests as set out in *Nollan* and *Dolan*, and as incorporated by RCW 82.02.020. Together, the nexus and proportionality tests, which constitute a special application of the doctrine of unconstitutional conditions, hold that the government cannot condition approval of a land-use permit on a requirement that the owner dedicate private property to the public, unless the government can show that the dedication is necessary to mitigate impacts caused by the proposed development. *Koontz v. St. Johns River Water Mgmt. Dist.*, ___ U.S. ___, 133 S. Ct. 2586, 2594-95, 2599, 186 L. Ed. 2d 697 (2013). The County has never made this necessary showing. Instead, it argues that the government does not have to show that a permit condition is calculated to mitigate only for the negative externalities caused by the proposed land use when the government has relied on a scientific report indicating that private property could benefit the public if dedicated to

an environmental use. The Court of Appeals decision to uphold the critical areas ordinance without a showing of nexus and proportionality raises significant questions of constitutional law upon which the lower courts are in conflict with decisions from this Court and the U.S. Supreme Court, and involves questions of significant public interest.

STATEMENT OF THE CASE

A. The Ordinance

In 2012, San Juan County adopted a series of updates to its critical areas ordinance (CAO). Pet. App. A at 2; Pet. App. C. In part, the updates require that all shoreline property owners dedicate several conservation areas—habitat, water quality, and tree protection buffers—upon the County’s determination that a proposed land use will occur within 200 feet of a habitat area. San Juan County Code (SJCC) 18.30.160. Because the County has separately determined that chinook salmon habitat encompasses all shorelines, the new CAO buffers are imposed automatically on all applications for development on shoreline properties. SJCC 18.35.115.A. For the sake of economy, CSA will focus its argument on the County’s water

quality buffer as being representative of the common error shared among its various buffer requirements.¹

The water quality buffer provisions require that every shoreline property owner dedicate a buffer of between 35 and 205 feet wide as a mandatory condition for approval of any new land use permit. SJCC 18.30.150; Table 3.6 (attached as Cross-Pet. App. B). The purpose of the buffer is to ensure that 60%-70% of the pollutants that may be suspended in storm water entering and crossing over the property is filtered out before the runoff reaches the shoreline. *Id.* To meet that goal, the County developed a formula that sets the size of the buffer based on how much property would have to be set aside to achieve its pollution removal standard. *Id.*

On the surface, the formula appears “site-specific,” because Table 3.6 purports to vary buffer widths based on intensity of development and geographical conditions. But the appearance of tailoring disappears under any scrutiny. First, the CAO does not require that the County determine the actual volume of storm water or the presence of pollutants entering a shoreline lot. *Id.* Second, the formula does not require the County to identify

¹ The other buffers are addressed at length in the briefing below. By focusing its petition argument on the water quality buffer, CSA does not waive its right to address the other buffer requirements on the merits.

the source of any pollutants or runoff. *Id.* And third, the formula does not identify what part of the pollutant load is directly attributable to the landowner's proposed use of his or her property, and, as a result, the formula does not limit the size and scope of the buffers to the actual impacts caused by the proposed development. *Id.*

B. The Rationale for the Water Quality Buffer

San Juan County's "best available science" record confirms that the water quality buffers are intended to force shoreline landowners to mitigate for pollution and runoff caused by neighboring properties. The compiled studies (summarized in the County's Synthesis of Best Available Science²) comment on the potential threats posed by a wide range of contaminants that can be found in storm water runoff and the range of benefits that a fully vegetated and undeveloped shoreline buffer could provide to the marine environment, including the land's potential to filter and store pollutants in soil and root systems. Synthesis at Ch. 2, p. 40. The science, however, cautions that, due to a variety of site-specific considerations, "buffers are not always the best way to protect the water quality." *Id.* at 14.

² Available at [http://www.co.san-juan.wa.us/cdp/docs/CAO_BASsynthesis/BAS_SYN\(FINAL\)_V2_Protected.docx.pdf](http://www.co.san-juan.wa.us/cdp/docs/CAO_BASsynthesis/BAS_SYN(FINAL)_V2_Protected.docx.pdf) (last visited Sept. 28, 2015).

For a water quality buffer to function as intended, the government must first determine the actual pollutant load and flow rate entering and exiting the property. *Id.* at 14-15. Then, and only then, can the government determine whether a particular development proposal will or will not have any impact on water quality. *Id.* The County, however, did not include any studies determining the volume of runoff entering and leaving the shoreline, nor did it include any studies identifying and/or measuring containment concentrations in the area:

[P]ollutant loading and transport factors are, in some cases, left out of the procedure not only for the sake of maintaining simplicity in the regulations, but also because of the high variability of these factors within a single parcel, the need for staff with advanced geomorphic and geotechnical skills and knowledge, and the cost to analyze discharge rates, water quality, and wetland exposure to contaminants.

Cross-Pet. App. B at Finding XI(t); *see also* Synthesis at Ch. 2, pp.14-15. Instead, the County *assumed* the presence of contaminants and *assumed* an identical incoming flow rate on every shoreline property throughout the region. Then, based on those assumptions, the County developed a matrix (Table 3.6) to assure a theoretical 60%-70% filtration rate.

But, as noted in the Synthesis, setting a filtration rate without knowing the actual pollutant load and flow rate is meaningless: “A 95%

pollutant removal efficiency means nothing if the incoming runoff is severely polluted, and a 10% pollutant removal efficiency can be outstanding if the incoming runoff is polluted only minimally.” *Id.* at 59. Thus, by design, the County’s buffers are neither intended to mitigate for an identified environmental impact (the nexus requirement), nor are they limited to only that portion of a public problem that is caused by proposed development (the proportionality requirement). Instead, Table 3.6 operates to ensure that the buffer is large enough to filter the region’s assumed runoff and pollutant loads. Synthesis at Ch. 2, pp. 44-45 (The buffers are intended to mitigate for polluted runoff originating throughout the entire “contributing area.”).

C. Proceedings Below

CSA raised its unconstitutional conditions claim in appeals to the San Juan County Superior Court and Division I of Washington’s Court of Appeals.³ CSA argued that the ordinance, on its face, was invalid because it imposed an unconstitutional condition under *Nollan* and *Dolan*, and as that doctrine is incorporated into RCW 82.02.020. The County could not satisfy its burden of demonstrating that its buffer program satisfied the nexus and

³ RCW 34.05.570(3)(a) (A reviewing court shall invalidate an ordinance upon a showing that, “[T]he order, or the statute or rule on which the order is based, is in violation of constitutional provisions on its face or as applied[.]”).

rough proportionality tests, and made no attempt to do so. *Dolan*, 512 U.S. at 391 (the burden of showing that a condition satisfies nexus and proportionality is placed on the government, not the landowner). Under the nexus test, the County was required to “show that the development . . . will create or exacerbate the identified public problem.” *Burton v. Clark County*, 91 Wn. App. 505, 521, 958 P.2d 343 (1998); *see also Nollan*, 483 U.S. at 836-37. If the County was able to establish a nexus, it must next “show that its proposed solution to the identified public problem is ‘roughly proportional’ to that part of the problem that is created or exacerbated by the landowner’s development.” *Burton*, 91 Wn. App. at 523; *see also Dolan*, 512 U.S. at 391 (A condition must be “related both in nature and extent to the impact of the proposed development.”). Stated another way, the “‘rough proportionality’ test measures the relationship between the conditions placed on the use of property and the negative impacts of that use that would justify the denial of the proposed use in the first instance.” *Sintra, Inc. v. City of Seattle*, 131 Wn.2d 640, 676, 935 P.2d 555 (1997). The purpose of these tests is to determine whether the government is taking advantage of the permit to force “some people alone to bear public burdens, which in all

fairness and justice, should be borne by the public as a whole.” *Armstrong v. United States*, 364 U.S. 40, 49, 80 S. Ct. 1563, 4 L. Ed. 2d 1554 (1960).

CSA explained that, by imposing a water quality buffer on permits to develop shoreline property without first identifying the presence and source of pollutants in storm water, the ordinance improperly relieved the County of its burden of demonstrating that the proposed development was the cause of such pollution—let alone the County’s burden of establishing the necessary relationship between the exaction and the actual impacts of development. Appellants’ Br. at 11-12, 18-22. Similar problems plagued the County’s other buffer requirements. *See id.* at 14-18.

Division I, however, adopted the County’s argument that the buffer dedication could be upheld without subjecting the CAO to heightened nexus and proportionality scrutiny. Thus, instead of following *Nollan* and *Dolan*, the court concluded that a local government’s reliance on science when developing a mandatory dedication will automatically satisfy the nexus and proportionality tests, without engaging the required analysis: “Because the county had considered the best available science and employed a reasoned process in adopting its shoreline critical areas ordinance . . . permit decisions . . . based on those regulation would satisfy the nexus and rough

proportionality tests.” Pet. App. A at 9 (internal citations omitted). CSA filed a motion for reconsideration, which was denied. This petition follows.

REASONS FOR GRANTING THE PETITION

I

THE LOWER COURT’S REFUSAL TO RECOGNIZE WELL-SETTLED PROPERTY RIGHTS RAISES A SIGNIFICANT QUESTION OF CONSTITUTIONAL LAW

The opinion below concludes, without any analysis, that the County’s buffer requirement did not constitute an exaction subject to *Nollan* and *Dolan*. Pet. App. A at 15. In reaching that conclusion, however, the lower court failed to discuss—let alone distinguish—the large body of case law holding that conservation areas are property interests, including *Dolan* in which the U.S. Supreme Court invalidated a stream buffer as an unconstitutional condition and two Court of Appeals cases holding critical area buffers subject to the nexus and proportionality tests.⁴ See *Dolan*, 512

⁴ See also *Isla Verde Int’l Holdings, Inc. v. City of Camas*, 146 Wn.2d 740, 758-59, 49 P.3d 867 (2002) (a code provision requiring “reservation of open space” as a condition of permit approval is the equivalent of a dedication); *Citizens’ Alliance for Property Rights v. Sims*, 145 Wn. App. 649, 661, 187 P.3d 786 (2008) (a code provision that prohibited rural property owners from clearing vegetation retention areas as a condition of permit approval constituted a dedication and was subject to nexus and proportionality requirements).

U.S. at 393-94; *Kitsap Alliance of Prop. Owners v. Cent. Puget Sound Growth Mgmt. Hearings Bd. (KAPO)*, 160 Wn. App. 250, 273, 255 P.3d 696 (2011) (“Regulations adopted under the GMA that impose conditions on development applications must comply with the nexus and rough proportionality tests.”); *Honesty in Env'tl. Analysis Legislation v. Cent. Puget Sound Growth Mgmt. Hearings Bd. (HEAL)*, 96 Wn. App. 522, 533, 979 P.2d 864 (1999) (“[P]olicies and regulations adopted under GMA must comply with nexus and rough proportionality limits the United States Supreme Court has placed on governmental authority to impose conditions on development applications.”).

The decision below also failed to acknowledge that Washington state property law expressly recognizes that a conservation buffer is a valuable interest in real property: “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.” RCW 64.04.130; *see also Klickitat County v. Wash. State Dep't of Revenue*, 2002 WL 1929480, at *5-6 (Bd. Tax App. June 12, 2002) (An open space area constitutes property and the holder of the conservation interest must pay property taxes unless an exemption applies). Under both

Washington state property law and federal constitutional law, a public dedication of a property interest can be achieved via notice on a binding public document, such as a site plan, which is the method employed by the County's CAO. *See, e.g., Richardson v. Cox*, 108 Wn. App. 881, 884, 890-91, 26 P.3d 970 (2001); *Nollan*, 483 U.S. at 833 n.2; *id.* at 859 (Brennan, J., dissenting) (dedication achieved via a deed restriction).

II

THE COURT OF APPEALS' DECISION CONFLICTS WITH DECISIONS OF THIS COURT AND THE U.S. SUPREME COURT BY CREATING AN EXCEPTION TO *NOLLAN AND DOLAN*

The decision below applied a rule that authorizes a local government to exact private property from permit applicants without limiting the size and scope of the dedication to only that which is necessary to mitigate for adverse impacts caused by the proposed development, so long as the government relied on scientific reports showing that dedications, in general, may provide benefits to the public. Pet. App. A at 9 (citing *KAPO*, 160 Wn. App. at 273-74). The decision to allow a scientific study, no matter how generalized, to dictate buffers on all new shoreline development is in direct conflict with *Nollan* and *Dolan*, which require the government to demonstrate that a

development condition is sufficiently related to an identified impact that the new development will have on the public to justify the exaction.

A. *KAPO* Was Abrogated by the U.S. Supreme Court

The decision below mistakenly relies on Division II's opinion in *KAPO* as establishing a less stringent standard of review for critical area dedications than that expressly required by *Nollan* and *Dolan*. Pet. App. A at 9. In *KAPO*, the Court of Appeals declined to apply nexus and proportionality scrutiny to a critical areas ordinance that required all shoreline property owners to dedicate a predetermined shoreline buffer as a mandatory condition on all new permit approvals, regardless of the impacts of development. 160 Wn. App. at 272-74. To do so, the court mistakenly characterized *Nollan* and *Dolan* as establishing a "due process" doctrine, under which a regulation is subject only to rational basis scrutiny. *Id.* at 272. Then, applying scrutiny appropriate for a due process challenge, the court concluded that *Nollan* and *Dolan* would be satisfied if the government engaged in a "reasoned process" to determine "the necessity of protecting functions and values in the critical areas" when adopting CAO buffers. *KAPO*, 160 Wn. App. at 272-74.

Since *KAPO* was decided, however, the U.S. Supreme Court clarified that the nexus and proportionality tests constitute “‘a special application’ of the [unconstitutional conditions] doctrine that protects the Fifth Amendment right to just compensation for property that the government takes when owners apply for land-use permits.” *Koontz*, 133 S. Ct. at 2594. And contrary to Division II’s due process-based analysis—which focuses on the reasonableness of the government’s determination of need—the unconstitutional conditions doctrine “does not implicate normative considerations about the wisdom of government decisions,” nor posit whether the exaction is “arbitrary or unfair.” *Koontz*, 133 S. Ct. at 2600. Instead, the Court’s task is to determine whether the exaction demanded by the County as a condition on any new use of shoreline property bears the “required degree of connection between the exactions imposed by the [county] and the projected impacts” of the property owner’s proposed change in land use. *See Dolan*, 512 U.S. at 377; *see also Sintra, Inc. v. City of Seattle*, 131 Wn.2d at 670-74; *Sparks v. Douglas Cnty*, 127 Wn.2d 901, 914-16, 904 P.2d 738 (1995).

Because Division II had based its decision on the wrong constitutional provision, it is unsurprising that the *KAPO* rule applied below focuses on a

substantively different question than that answered by *Nollan* and *Dolan*. The decision below asks only whether the government relied on a scientific document to determine “the necessity of protecting functions and values in the critical areas,” *i.e.*, the alleged public need. *KAPO*, 160 Wn. App. at 272-74; Pet. App. A at 9. By contrast, the *Nollan* and *Dolan* tests require that government justify an exaction by demonstrating a sufficient relationship between the development condition and the impact caused by the proposed development. *Lingle v. Chevron USA, Inc.*, 544 U.S. 528, 546-47, 125 S. Ct. 2074, 161 L. Ed. 2d 876 (2005).

The U.S. Supreme Court explained this important distinction in *Lingle*, when it rejected the “substantially advances a legitimate government interest” test as a takings test, because it “reveal[ed] nothing about the magnitude or character of the burden a particular regulation imposes upon private property rights.” 544 U.S. at 542. “A test that tells us nothing about the actual burden imposed on property rights, or how that burden is allocated, cannot tell us when justice might require that the burden be spread among taxpayers through payment of compensation.” *Id.* at 543. Thus, in the context of the Takings Clause, a determination that a regulation serves a public need, without more, is not sufficient to justify a regulation that

appropriates property for a public use. *Id.* at 542-43; *see also 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.”). By circumventing the analysis required by *Nollan* and *Dolan*, the *KAPO* rule shifts the inquiry away from the severity of the burden imposed, and upholds water quality buffers that are specifically designed to mitigate for *all* pollution entering and crossing over the regulated properties, including pollution/storm water caused by neighboring land uses.

B. *Nollan* and *Dolan* Apply to Conditions Mandated by General Land-use Regulations

Although the court ultimately addressed CSA’s unconstitutional conditions challenge on the merits, the decision below suggests that exactions imposed under land-use regulations of general application may not be subject to the constitutional limitations of *Nollan* and *Dolan*. Pet. App. A at 14-15. There absolutely is no basis in the U.S. Supreme Court’s case law for such a suggestion. Indeed, all three exactions cases decided by the U.S. Supreme Court involved conditions mandated by general legislation. *See Nollan*, 483 U.S. at 833 n.2; *id.* at 859 (Brennan, J., dissenting) (Pursuant to the California Coastal Act of 1972, a deed restriction granting the public an

easement for lateral beach access “had been imposed [by the Commission] since 1979 on all 43 shoreline new development projects in the Faria Family Beach Tract.”); *Dolan*, 512 U.S. at 377-78 (“The City Planning Commission . . . granted petitioner’s permit application subject to conditions imposed by the city’s [Community Development Code].”); *Koontz*, 133 S. Ct. at 2592 (Florida’s Water Resources Act and Wetland Protection Act require that permitting agencies impose conditions on any development proposal within designated wetlands.). Likewise, this Court has applied the nexus and proportionality standards to legislatively imposed conditions on development. *See, e.g., Margola Assocs. v. Seattle*, 121 Wn.2d 625, 647, 854 P.2d 23 (1993); *Orion Corp. v. State*, 109 Wn.2d 621, 653, 747 P.2d 1062 (1987).

III

THE OPINION MISAPPREHENDS CASE LAW INTERPRETING AND APPLYING RCW 82.02.020, AND ALLEVIATES THE GOVERNMENT OF ITS BURDEN OF PROOF

The decision below also misapprehended case law interpreting RCW 82.02.020, resulting in its failure to apply the required degree of scrutiny. The statute provides that local government can only impose those conditions on new development that “the county, city, town, or other municipal corporation can demonstrate are reasonably necessary as a direct result of the

proposed development or plat to which the dedication of land or easement is to apply.” RCW 82.02.020. Our courts have long-interpreted this provision as incorporating the nexus and proportionality tests of *Nollan* and *Dolan*. See, e.g., *Sparks v. Douglas Cnty*, 127 Wn.2d at 913; *Trimen Development Co. v. King Cnty.*, 124 Wn.2d 261, 274, 877 P.2d 187 (1994); *Citizens’ Alliance*, 145 Wn. App. at 669; *Cobb v. Snohomish Cnty.*, 64 Wn. App. 451, 467-68, 829 P.2d 169 (1991) (Agid, J., concurring in part).

Essential to the nexus and proportionality tests is the requirement that the government make an “individualized determination that the required dedication is related both in nature and extent to the impact of the proposed development.”⁵ *Dolan*, 512 U.S. at 391. Government cannot satisfy its burden by simply relying on a “general impact assessment,” such as the studies summarized in the Synthesis. *Id.*; *Sparks*, 127 Wn.2d at 915; see also *Isla Verde*, 146 Wn.2d at 761, 763 (Nexus “does not permit conditions that satisfy a ‘reasonably necessary’ standard for all new development

⁵ The burden of proving compliance with nexus and proportionality is on the government, not the property owner. *Dolan*, 512 U.S. at 391; *Sparks*, 127 Wn.2d at 912; *Citizens’ Alliance*, 145 Wn. App. at 657 (facial challenge to ordinance); *Isla Verde*, 146 Wn.2d at 755-56 (administrative appeal); *Home Builders Ass’n of Kitsap Cnty. v. City of Bainbridge Island*, 137 Wn. App. 338, 346-47, 153 P.3d 231 (2007) (direct challenge).

collectively;” it requires that a condition be “reasonably necessary as a direct result of the proposed development or plat.”).

The lower court misapprehended that rule when it read *Trimen* as having authorized local government to satisfy the site-specific requirement by referencing a generalized impact study, without more. Pet. App. A at 11. *Trimen* was not about whether such a study—standing alone—was sufficient to satisfy nexus and proportionality. Instead, *Trimen* turned on the question of whether an assessment of park needs based on projected population growth per new residential unit was sufficiently site-specific to satisfy the proportionality requirement. *Trimen*, 124 Wn.2d at 274-75 (A municipality’s “assessment of fees in lieu of dedication [must be] specific to the site.”). That distinction is made clear by *Trimen*’s companion case, in which this Court invalidated an open space requirement because the city relied on a generalized determination of city-wide park land needs to impose pre-set, per-lot conditions without limiting it to individual impacts. *Henderson Homes, Inc. v. Bothell*, 124 Wn.2d 240, 247-48, 877 P.2d 176 (1994); see also *Castle Homes v. City of Brier*, 76 Wn. App. 95, 882 P.2d 1172 (1994) (invalidating exactions based on a share of the “cumulative impact” of all the new development in its subdivisions).

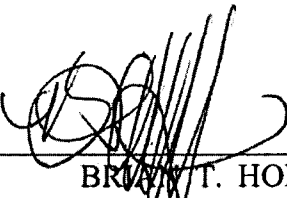
The decision below skips the critical step of linking an impact study to the conditions on the site. Without that step—in this case, identifying the source and amount of pollutants entering the property—it is impossible for the County to assure that the dedication is limited to mitigating for that portion of the pollution attributable to the proposal. *Trimen*, 124 Wn.2d at 274-75. And it is impossible for the County to satisfy the nexus and proportionality requirements.

CONCLUSION

For the reasons stated above, CSA respectfully requests that this Court grant its cross-petition for review.

DATED: October 2, 2015.

Respectfully submitted,

By 
BRENT T. HODGES
(WSBA No. 31976)

*Attorney for Common Sense Alliance
and the P.J. Taggares Co.*

**CROSS-PETITIONER
APPENDIX A**

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

COMMON SENSE ALLIANCE,)
P.J. TAGGARES COMPANY, and)
FRIENDS OF THE SAN JUANS,)
Appellants,)
v.)
GROWTH MANAGEMENT HEARINGS)
BOARD, WESTERN WASHINGTON)
REGION,)
Defendant,)
and)
SAN JUAN COUNTY,)
Respondent.)

No. 72235-2-1
(consolidated w/72236-1-1)

ORDER DENYING MOTION
FOR RECONSIDERATION

2015 SEP -3 AM 9:46

COURT OF APPEALS DIV 1
STATE OF WASHINGTON

Appellants Common Sense Alliance and P.J. Taggares Company have filed a motion for reconsideration of the opinion filed on August 10, 2015, and the court has determined that said motion should be denied. Now, therefore, it is hereby

ORDERED that appellants' motion for reconsideration of the opinion filed on August 10, 2015, is denied.

DATED this 3rd day of September, 2015.

FOR THE COURT:

Becker, J.
Judge

**CROSS-PETITIONER
APPENDIX B**

Ordinance No. 28 - 2012

**AN ORDINANCE REGARDING CRITICAL AREA REGULATIONS FOR WETLANDS; AMENDING
SAN JUAN COUNTY CODE SECTIONS 18.30.150 and 18.60.170; AND REPEALING APPENDICES
A-C OF SJCC 18.30.150**

BACKGROUND

- A. The County was scheduled to review and, where necessary, update its development regulations regarding critical areas by December 1, 2006, to ensure consistency with RCW 36.70A (the Growth Management Act, or GMA). A review of the County's critical areas regulations, including regulations regarding Wetlands, was adopted in Resolution 98-2005. Although some updates to critical areas regulations were adopted in Ordinance 15-2005, further action was reserved for a later time.
- B. Wetlands are defined in RCW 36.70A.030 and WAC 365-190-090 and are further described in WAC 365-190-130.
- C. San Juan County adopted a public participation plan for the revision of its development regulations regarding critical areas in Resolution 56-2006; the plan was most recently updated in Resolution 32-2011.
- D. The applicable science related to Wetlands and stormwater management was reviewed and is summarized in the *Best Available Science Synthesis for San Juan County, May 2011 (BAS Synthesis)*, which was adopted in Resolution 22-2011.
- E. Additional review of the County's critical areas regulations was undertaken and is described in the documents "Analysis of Existing San Juan County Regulations Pertaining to Wetlands" prepared by Dr. Paul Adamus, and letters provided by the Washington State Department of Ecology on June 9, 2011 and September 14, 2011. The review was discussed and public comment heard at a County Council workshop held on June 13 and 14, 2011.
- F. The 60-day notice on the amendments to the Wetland protection regulations, as required by RCW 36.70A.106, was provided to the Washington State Department of Commerce on August 24, 2011, and was assigned Material ID No. 17298.
- G. An environmental checklist was prepared evaluating potential effects of the amendments and a notice of Determination of Non-significance was issued on August 30, 2011 and published on August 31, 2011. The notice was provided to federal, state and local agencies in accordance with San Juan County Code 18.80.050 and WAC 197-11-340.
- H. Efforts to involve and inform the public included:
 - I. A public workshop held in March of 2006.
 - II. County Council appointment of a citizens committee in 2007, which reviewed the GMA requirements, the applicable science and the existing regulations, and developed a draft set of amendments.
 - III. Public meetings held in June of 2009.
 - IV. A public workshop held in August 2009.
 - V. Request for Best Available Science (BAS) submittals from the public in June-July 2010.
 - VI. Public workshops on San Juan Island, Orcas Island, and Lopez Island in September 2010, to address "hot button" issues.

XI. Following is a discussion of the scientific principles associated with the regulations. Additional discussion can be found in the *BAS Synthesis* and the underlying references adopted to guide this review and update.

a. Wetlands are complex biological systems that support important ecological processes and many different habitats and species. Wetlands are often connected to streams, which eventually discharge into marine waters. In addition to directly supporting species that live in or near wetlands, they can also be an important source of organic material, food, and nutrients which support the stream and marine food webs upon which salmon, rockfish, marbled murrelet, orca, and other listed species depend. Vegetative buffers adjacent to wetlands are a recognized means of protecting water quality, quantity and habitat functions within wetlands, as well as in down gradient streams, lakes, ponds, and marine waters.

b. The proposed approach to sizing wetland buffers is intended to protect wetland functions and values consistent with the requirements of the GMA without creating the need for monitoring and adaptive management programs. None-the-less, the County is undertaking a water quality monitoring program.

c. For situations with little land development and no drainageways, most runoff flows below the ground surface and within the root zone.

d. For situations with high intensity development and drainageways connecting the development to the wetland, a significant portion of the runoff flows above-ground.

e. As discussed in the *BAS Synthesis*, runoff from areas influenced by human development is well characterized (National Research Council, 2008) and is often contaminated with an array of pollutants, including: those from lawn and garden chemicals (containing both active ingredients and surfactants that can negatively affect aquatic species); building materials including pressure treated lumber (containing copper chromated arsenate), zinc and copper impregnated shingles and roofing strips, and roofing materials containing phthalates (plastic gutters and downspouts, roofing felt, roof membranes); fertilizers; rodent poisons; termite spray and other insecticides; moss control products; deicers; contaminants associated with automobiles, including oil, antifreeze, rubber and metals from the wear of tires, brakes and other parts; and sediment from dirt and gravel driveways. Many of these contaminants are directly associated with the choices and practices of the property owner and are difficult or impossible to regulate. If they are allowed to enter surface water bodies, these pollutants can contaminate and become concentrated in the food web, negatively affecting aquatic habitats and species.

f. The quantity of pollutants exported from a site is based on the concentration of those pollutants multiplied by the total quantity of runoff. As the volume of surface runoff from a site increases, so does the total amount of pollutants washed away from the site. The concentration of a pollutant in runoff varies depending on a number of factors, including: the intensity and type of development; the period of time since the last rainfall/ runoff event (i.e., allowing more contaminants to build up on hard surfaces); the temporal relationship between the application of the pollutant and irrigation or a rainfall event (e.g., the rainfall occurs within a few days of application, with pollutants applied/ present during the fall, winter, and spring being most likely to end up in runoff); the quantity and type of pollutant present and/or applied; how the pollutant is applied (e.g., fertilizer falling onto walkways and hard surfaces); the intensity, duration, and total amount of irrigation or rainfall/ runoff during a storm; and, if samples are obtained for analysis, the point during the runoff event when the sample is collected.

g. Dissolved contaminants and those associated with fine sediment (which often contains adsorbed contaminants) are the most difficult constituents to remove from runoff. Under ideal conditions, buffers of only a few feet can remove coarse sediment carried by diffuse sheet flow. But buffers must be larger to remove fine sediment and dissolved contaminants, which are commonly found in runoff from developed areas.

h. The factors influencing the efficacy of buffers where flow is primarily subsurface are more complex than those for surface flow on gentle slopes. In addition to buffer size, these factors include: soil texture, permeability, and chemical composition; carbon content; depth of root zone; saturated vs. unsaturated soils; type of chemical pollutants that are present; and whether pollutants are in a dissolved or particulate state. In general, vegetative buffers are more effective at removing contaminants in runoff when the flow is primarily below the ground surface and within the root zone. Saturated soils with healthy soil bacteria are better at removing some contaminants such as nitrogen. Unsaturated soils are better at removing other contaminants, such as the break down products associated with surfactants. Soils in buffers will experience both saturated and unsaturated conditions, resulting in varying levels of treatment, depending on the pollutant and time of year.

i. In addition to actively removing stormwater contaminants, vegetative buffers also exclude pollutant sources from wet-soil areas where pollutants are more likely to be transported to wetlands. Excluding development from those areas also helps the buffer infiltrate runoff, which helps recharge groundwater and maintain normal hydrologic functions.

j. While they cannot completely replicate the complex biological and hydrological processes occurring in undisturbed watersheds, engineered storm water systems (particularly those that mimic natural biological processes such as rain gardens and constructed wetlands) can help.

k. High intensity development with more smooth, graded, compacted, and impervious surfaces and fewer trees provides poorer quality habitat for pond breeding amphibians, more runoff, and higher export of pollutants. References that discuss these principles include Booth et al. (2002), National Research Council (2008), and Semlitsch et al. (2009).

l. In general, surfaces with severely limited permeability (paved or unpaved), generate more surface runoff and pollutants than vegetated gardens and lawns, and vegetated gardens and lawns generate more surface runoff and pollutants than areas with undisturbed soils and vegetation. This can, however, vary greatly depending on soil type, management practices, and other site-specific factors.

m. The water quality buffer sizing procedure assumes that most of a development's potential for generating surface runoff and associated pollutants can be represented by the "flow path," a single line running down the slope, passing through the area with the most concentrated development to the wetland. This line is assumed to represent the path where the greatest quantity of runoff and pollutants will collect and flow downhill.

n. The buffer sizing procedure uses "Rational Method" runoff coefficients that are described in civil engineering and hydrology texts and manuals and is discussed in *Urban Stormwater Management in the United States* (National Research Council, 2008), which was cited as a BAS document adopted by the County Council. The coefficients listed in the buffer sizing procedure for coniferous forest are reduced from published coefficients for vegetated areas, based on the conclusion from Booth et al. (2002) that published Rational Method runoff coefficients are too high for forested areas of Puget Sound.

o. The buffer sizing procedure includes two components: a Water Quality Buffer and a Habitat Buffer. The Water Quality Buffer sizing procedure uses Rational Method runoff coefficients to predict whether runoff will flow primarily above or below ground, and then using Figure 1 of the Mayer et al. (2007) meta-analysis to determine appropriate buffer sizes for a given level of pollutant removal. Figure 1 is based on a compilation of data from many buffer studies and, though it is focused on nitrogen removal and does not provide detailed information on all factors that affect pollutant retention in vegetative buffers, it can be used as a general guide for sizing buffers. (Note: On page 46 of *BAS Synthesis* Chapter 2, fourth paragraph, there are errors in the stated buffer sizes. Mayer et al. 2007, Figure 1 should be referenced for the correct values).

The pollutant removal capabilities of the proposed buffers range from 60% to 70%, which is similar to the treatment levels for water quality buffers supported by the Dept. of Ecology (Wetlands in Washington State, Vol. 2, Appendix 8E, Section 8E.2.3.1, page 5). For situations with low runoff and pollutant transport potential (i.e., low runoff coefficients and no drainageways present), the buffers are approximately based on the "subsurface" line on Figure 1 of the Mayer study and those with high runoff coefficients and drainageways present are approximately based on the "surface" line of that figure, with intermediate values distributed between these two points.

Finally, some additional adjustments were incorporated into Table 3.6 (the table depicting required Water Quality Buffer sizes):

- i. To minimize the risk to wetlands, the smallest allowable buffer is 30 ft.
- ii. To prevent over-regulation of land use activities, the maximum discharge factor shown is .80, representing a situation where approximately 80% of a flow path is impervious, something that is unlikely to be encountered in San Juan County.
- iii. All values are rounded to increments of 5.

p. The Water Quality Buffer sizing procedure includes adjustments for drainageways. The presence of a drainageway connecting a development with a wetland increases the likelihood that runoff will be above-ground and accelerates the transport of pollutants from the development area to the wetland, making the removal of pollutants more difficult (Wigington et al. 2003, Baker et al. 2006, Walsh and Kunapo 2009). The magnitude of this effect depends on several site-specific factors, such as slope.

q. The Water Quality Buffer sizing procedure includes a slope adjustment. Adjustment of the composite runoff coefficient (in this ordinance referred to as the "stormwater discharge factor") is largely based on Table 4-11 of the October 2011 Hydraulic Design Manual produced by the Texas Department of Transportation.

r. The Water Quality Buffer sizing procedure includes a Green Development option. The buffers for this option are reduced based on an incoming pollutant load that is approximately 20 % lower than that from normal development, resulting in the same pollutant load entering the buffer. This option is focused on achieving the 20% reductions through regulation of construction materials and development components that can be observed, rather than the regulation of day to day activities such as the application of pesticides.

s. To help support other GMA goals and facilitate the concentration of development within Urban Growth Areas, the Water Quality Buffer sizing procedure includes a reduced buffer option in conjunction with mitigation of adverse impacts.

t. Factors not included in some options of the Water Quality Buffer procedure can also influence runoff, pollutant loads, and the transport of pollutants to wetlands. Pollutant loads can be affected by the types of building materials and products people use on their property; the effectiveness of

on-site stormwater management practices and other BMPs; the number of people, pets, and livestock per unit area; adequacy of septic system design and maintenance; number of facilities on other parcels that potentially contribute runoff to the same wetland and the adequacy of their buffers, septic systems, stormwater management practices and BMPs; type of land use activities; season, and other factors.

Transport is affected by the type of pollutant, its ambient state (dissolved or particulate), how it is introduced (above- or below-ground), amount of irrigation, annual precipitation amount and intensity, subsurface geology, soil chemical composition and organic content, and other factors.

The above-listed pollutant loading and transport factors are, in some cases, left out of the procedure not only for the sake of maintaining simplicity in the regulations, but also because of the high variability of these factors within a single parcel, the need for staff with advanced geomorphic and geochemical skills and knowledge, and the cost to analyze discharge rates, water quality, and wetland exposure to contaminants. To a large degree, major differences in pollutant transport can be accounted for by slope and vegetative cover and the presence of drainageways – which are all included in the procedure, and are easier for the non-specialist to evaluate consistently.

u. In San Juan County, true Bogs are rare (perhaps only four) and they are highly sensitive to slight changes in water quality and hydrology. For this reason, they require a minimum Water Quality Buffer of 200 feet, which is anticipated to remove 80% of incoming contaminants.

v. The habitat component of buffers is based on consideration of habitat needs that are addressed within the Habitat Importance-Sensitivity ratings and the associated Habitat Buffers. Additional protection measures are included for wetlands containing clusters of trees, in order to protect those trees from excessive blow down and to minimize other microclimate-related impacts to wetland vegetation and wildlife. Figure 6.2 of Murphy (1995) illustrates the functions of forested buffers compared to tree height. Six tenths (0.6) of a site's potential tree height (SPTH) is a common buffer recommendation to protect basic functions associated with forested riparian areas.

w. Although vegetative buffers are beneficial to most wetland species, there are few scientific studies from the Pacific Northwest that define specific buffer sizes that are biologically advisable. Thus, it is not possible to provide the same specificity of buffer sizes that would be essential to sustain viable populations of San Juan County plant or animal species, therefore guidance was provided by the County's wetland consultant.

x. Based on a review of the related science and the professional opinion of San Juan County's consultant, a wildlife scientist with many years of field experience, to protect habitat functions and values the entire circumference of a wetland should retain a Habitat Buffer. The purpose of this buffer is to protect the area surrounding the wetland from modifications and from the intrusion of humans and domestic animals that would adversely affect wetland species.

y. For habitat purposes, some wetland animals prefer dense vegetation around wetlands, while others prefer more open vegetation with sunnier/warmer microclimates and better visibility of predators.

z. Wetland trees attract wildlife species not found in herbaceous wetland vegetation. Although wetland trees grow more slowly than upland trees and may die sooner, they provide foraging and nest sites for many wetland-dependent birds and mammals, as well as supporting distinctive lichens and mosses that thrive in the moist microclimate associated with wetlands. In San Juan County, common trees that grow in wetlands include red alder, western red cedar, western hemlock, Sitka spruce, lodgepole pine, quaking aspen, and black cottonwood.

XVIII. After considering the evidence in the record, and adopting an evaluation of consistency with the Comprehensive Plan, the County Council approved this ordinance. Changes from the version recommended by the Planning Commission are included in this ordinance for the reasons described above and to improve clarity and consistency with other laws and regulations.

SECTION 1. SJCC Section 18.30.150; Ord. 7-2005 §§ 6, 7, and 8; Ord. 14-2000 § 7 (CCC); Ord. 11-2000 § 4; and Ord. 2-1998, Exh. B § 3.6.8 are each amended to read as follows:

18.30.150 Wetlands.

~~A. **Wetland Rating.** The San Juan County wetland rating system (on file with the administrator) is designed to differentiate between wetlands based on their sensitivity to disturbance, rarity, irreplaceability, and the functions and values they provide. Rating categories apply to the regulated wetland as it exists on the effective date of this code, as the regulated wetland may naturally change thereafter, and as the regulated wetland may change in accordance with permitted activities. Ratings shall not be based on illegal modifications to a wetland. The categories are summarized in subsections (A)(1) through (A)(4) of this section.~~

- ~~1. **Category I.** These wetlands are the "best of the best." These are wetlands that:

 - a. Contain a particular rare species;
 - b. Represent a high quality example of a rare wetland type as defined in Appendix A*;
 - c. Are regionally rare; or
 - d. Provide irreplaceable functions and values.~~
- ~~2. **Category II.** These are wetlands that:

 - a. Contain very sensitive or important wildlife or plants on a seasonal or annual basis;
 - b. Are difficult to replace, as defined in Appendix A*;
 - c. Provide very high functions and values, particularly for wildlife habitat.~~
- ~~3. **Category III.** These wetlands provide important functions and values. They provide habitat for a variety of flora and fauna and occur more commonly throughout the County than either Category I or II wetlands.~~
- ~~4. **Category IV.** These are wetlands that are smaller, isolated, and have less diverse vegetation than Categories I, II, and III but still provide important functions and values.~~

A. Applicability. Unless exempted or allowed under SJCC 18.30.110, the provisions of this section apply to areas in or within 205 feet of wetlands as defined in SJCC 18.20.230. Many wetlands are depicted on various maps developed by the County and natural resource agencies. These maps are, however, only a guide and in all cases conditions in the field shall control. In order to protect their functions and values, development activities, removal of vegetation and other site modifications are limited or prohibited within wetlands and their buffers. Any use or structure legally located within shorelines of the state that was established or vested on or before the effective date of the County's development regulations to protect critical areas, shall be regulated consistent with RCW 36.70A.480(3)(c). Such uses or structures may continue as a conforming use and may be redeveloped or modified if the redevelopment or modification is consistent with SJCC Chapter 18.50 and either: (1) the proposed redevelopment or modification will result in no net loss of shoreline ecological functions; or (2) the redevelopment or modification is consistent with SJCC 18.30.110-160. If the applicant chooses to pursue option (1), the application materials for required project or development permits must include information sufficient to demonstrate no net loss of shoreline ecological functions. For purposes of this subsection, an agricultural activity that does not expand the area being used for the agricultural activity is not a redevelopment or modification. For purposes of this paragraph "Agricultural activity" has the same meaning as defined in RCW 90.58.065.

1. **Site-Specific Buffer Sizing Procedure.** The following is a site-specific procedure for determining the size of vegetative buffers and Tree Protection Zones necessary to protect the water quality, water quantity, and habitat functions of wetlands. Two separate buffer components, a water quality component, and habitat component, are considered in the procedure, and for some types of wetlands there is also a Tree Protection Zone. When determining the required buffer and Tree Protection Zone for a wetland, the stricter (i.e., wider) applies except where otherwise noted.

Required buffers and Tree Protection Zones apply regardless of whether the wetland is on the same parcel or another parcel that may be under different ownership. If the wetland is under different ownership and is not accessible, then the wetland type and boundaries are established using available maps and information, including a visual assessment if possible. The Water Quality Buffer is determined first based on the characteristics of the site and the proposed development, vegetation removal or other site modification; whether runoff water will be primarily above or below ground; and the wetland type. This involves working through a procedure to determine the buffer size for each area that will be developed or modified. The Habitat Buffer, and where applicable, the Tree Protection Zone is then determined based on the Habitat Importance-Sensitivity Rating and wetland type. In all cases, conditions on the ground shall control.

a. Determine the Water Quality Buffer.

Step 1. Location relative to wetlands. Is the proposed development, vegetation removal or other site modification located within 205 feet of a wetland? If so, proceed to the next step. In some cases, to answer this question, it may be necessary to have the wetland edge facing the area that will be developed or modified delineated in accordance with subsection (F) of this section. In many cases, this can be based on a wetland reconnaissance rather than a full delineation. Although maps and other imagery can be used to help with this determination, conditions on the ground shall control. If the proposed development, vegetation removal, and other modifications are more than 205 feet from the wetland, no further action is needed for compliance with wetland critical area regulations. (Note: If proposed activities do not require development or project permits, and activities are consistent with the requirements outlined in Table 3.8 and subsections E.6 and E.7 of this section, it may not be necessary to identify the edge of the wetland and the size of the water quality buffer.)

Step 2. Drainage Direction. Does the area proposed to be developed or modified drain to the wetland? If the area proposed to be developed or modified drains to the wetland, delineate the wetland in accordance with subsection (F) of this section and proceed to steps 3-7 to determine the required Water Quality Buffer.

If the area proposed to be developed or modified does not drain to the wetland, a Water Quality Buffer is not required and only a Habitat Buffer applies. Proceed to the Habitat Buffer sizing procedure in subsection (E.1.b) of this section.

Step 3. Wetland Type and Water Quality-Sensitivity Rating. Determine the wetland type using the above descriptions in subsection (B). This may require the assistance of a qualified professional, particularly for wetlands that may be a bog. After the wetland type is determined, use subsection (C.1) above to determine the Water Quality-Sensitivity Rating for the wetland. (Note: If the wetland contains particular plants or animals protected as Fish and Wildlife Habitat Conservation Areas, a higher rating may apply. See SJCC 18.30.160.B and F).

Step 4. Composite Stormwater Discharge Factor. Use the following procedure to determine the Composite Stormwater Discharge Factor for the area or areas that are being developed or modified. This is determined by completing the following steps and using Tables 3.3 and 3.4 to complete Table 3.5.

(Note: The information needed for items i., v., and vi. can be obtained through maps and other existing documents and imagery or through field investigation):

i. Identify the flow path. Using the most accurate topographic map available (i.e. with the greatest vertical resolution) and a properly scaled drawing of the area, draw a line representing the flow path through the portion of the site that includes the proposed development or modification, starting with the area that will have the most impervious surfaces. If there are no impervious surfaces, draw the line through the area that will have the most grading and vegetation removal. The flow path line begins at the top of the nearest rise or the parcel boundary, whichever is closest, and ends at the edge of the wetland. This path runs down the fall line, intersecting the contour of the land and the contour lines of the map at perpendicular angles. (Note: Maps with 5-foot contours are available for most islands through the County Geographic Information System.)

The flow path can also be determined in the field by standing in the middle of the area that will have the most impervious surfaces (or if there will be no impervious surfaces, the area that will have the most grading and vegetation removal), visually identifying the path runoff will take from that area to the wetland, and then turning around and visually identifying where the runoff is coming from.

ii. Break the flow path line into segments based on proposed surface types. Surface types are listed in Table 3.3. List these segments in column 1 of Table 3.5.

Segments that do not drain to the wetland may be omitted from the calculations (e.g. If roof runoff is tight lined to a location that does not drain to the wetland, then the area covered by the roof may be excluded from the calculation).

iii. Along the flow path line, mark where surface types change. Measure the length of each surface type and enter these lengths in column 6 of Table 3.5.

iv. For each surface type enter a Base Stormwater Discharge Factor into column 2 of Table 3.5. Some Base Stormwater Discharge Factors are shown in Table 3.3. For surface types not listed, discharge factors (which are Rational Method runoff coefficients) shall be based on BAS such as hydrology texts or guidance manuals, using the lower end of ranges because the factors will be adjusted upward to account for slopes and the presence of drainageways.

Base Stormwater Discharge Factors may be modified in conjunction with the installation of stormwater management measures that facilitate below ground flow of runoff, including those required by other sections of the San Juan County Code. Examples include using the discharge factor for lawn when roof runoff is disposed of in an infiltration trench constructed in a lawn area. Applicants should submit proposals for base stormwater discharge factor reductions to the Department for approval.

v. Slope adjustment. For vegetated surfaces, determine the approximate slope of each segment along the flow path (as a percentage), multiply it by 0.01, and enter the product in column 3 of Table 3.5. (e.g. for 8% slope enter 0.08). If the slope exceeds 30%, enter 0.3.

vi. Drainageway and stream adjustment. If a drainageway or stream connects any portion of the development to the wetland (including existing and proposed lawn, gardens and impervious areas), select the appropriate factor from Table 3.4 and enter it in column 4 of Table 3.5. (Note: This applies to the impervious areas, lawn, and garden throughout the development area being evaluated, not just the portion along the flow path.)

vii. For each row in Table 3.5 (i.e. each segment along the flow path), add the values in columns 2,

3, and 4 and enter the sum in column 5.

viii. For each row in Table 3.5 (i.e., each segment along the flow path), multiply the value in column 5 by the value in column 6 and enter the resulting product in column 7.

ix. Add all the values in column 6 of table 3.5. Add all the values in column 7. Divide the total of column 7 by the total of column 6. This is the Composite Stormwater Discharge Factor.

x. If desired, repeat to determine buffers for other, less intensely developed portions of the site.

Table 3.3

Base Stormwater Discharge Factor¹ by Surface Type	
Surface Type	Stormwater Discharge Factor
<u>Coniferous forest with >65% canopy cover, rough ground surface, and undisturbed soils and duff layer</u>	<u>.02</u>
<u>Other heavily vegetated areas with rough ground surface and undisturbed soils and duff layer</u>	<u>.05</u>
<u>Pasture</u>	<u>.07</u>
<u>Lawn or garden</u>	<u>.09</u>
<u>Green roof</u>	
<u>slope ≤ 5°</u>	
<u>< 4" thick</u>	<u>.50</u>
<u>4-10" thick</u>	<u>.30</u>
<u>8-20" thick</u>	<u>.20</u>
<u>> 20" thick</u>	<u>.10</u>
<u>Slope > 5°</u>	<u>.70</u>
<u>Permeable pavement or permeable concrete</u>	<u>.35</u>
<u>Undisturbed, natural bedrock areas</u>	<u>.35</u>
<u>Gravel driveway</u>	<u>.40</u>
<u>Asphalt</u>	<u>.85</u>
<u>Concrete</u>	<u>.90</u>
<u>Brick</u>	<u>.70</u>
<u>Roof</u>	<u>.75</u>

¹ Stormwater discharge factors are based on runoff coefficients used with the "Rational Method", which is a hydrologic model that estimates peak stormwater discharge from a drainage area. The factors represent the approximate percentage of runoff for a given amount of precipitation, and generally represent the low end of published values, with separate upward adjustments made for vegetated areas on slopes, and for the presence of drainageways. A value of 1.00 indicates that a surface is entirely impervious and that all precipitation will result in surface runoff.

Table 3.4

Stormwater Discharge Factor Adjustments for Drainageways and Streams	
Drainageway or Stream Characteristics	Stormwater Discharge Factor
A. The drainageway(s) or stream(s) is not well defined (i.e., there is no bare soil, sand, or gravel, or discernible thinning of the vegetation in the drainageway).	0.06
B. The drainageway(s) or stream(s) is well-defined (e.g., there is discernible thinning of the vegetation and/or bare soil, sand, or gravel in the drainageway).	0.10

Table 3.5

Composite Stormwater Discharge Factor						
Column 1	Column 2	Column 3	Column 4	Column 5	Column 6	Column 7
Surface Type (by segment along the flow path)	Base Stormwater Discharge Factor	Slope Adjustment (0.01 per % slope, maximum of .30, 12% slope = .12)	Drainageway and Stream Adjustment	Sum of Columns 2, 3, & 4	Length of Segment (in feet)	Col. 5 x Col. 6
Total for Column 6 (add all rows)						X
Total for Column 7 (add all rows)						
Divide the total of Col. 7 by the total of Col. 6; this is the Composite Stormwater Discharge Factor:						

Step 5. Green Development Option. A buffer adjustment is available to property owners who commit to using green development practices as outlined below.

i. The Green Development option only applies to buffers for proposed buildings and associated infrastructure and cannot be used to reduce buffers for lawns and landscaped areas.

ii. To use the Green Development option, as part of the permit approval the property owner must agree to the County recording a Notice to Title describing the requirements associated with the Green Development option.

iii. All of the following must be implemented and maintained while the Green Development remains on the property:

(A) Roof materials for proposed buildings must consist of product that are not known to release chemicals that are harmful to wetland plants or animals (e.g. enamel coated metal, tile without moss prevention products, sod if membrane does not contain fire retardant, phthalates etc.); and

(B) The disposal area for any on-site sewage systems associated with proposed buildings must meet current standards and, in addition, must be no closer to the wetland than the specified edge of the water quality buffer for "normal" development; and

(C) The driveway serving proposed buildings must be designed and built to direct runoff into vegetated areas. Options include crowning or insloping with properly spaced relief culverts; outsloping; and installing trench drains or flexible water diverters; and

(D) The portions of the driveway that drain to the wetland must be covered with gravel, permeable pavement, permeable concrete, or other suitable material that will minimize erosion, rutting, and tracking of mud.

Step 6. Urban Growth Area Option. A buffer adjustment is available within the Eastsound and Lopez Village Urban Growth Areas as shown in Table 3.6. Within these areas, a reduced buffer may be used if adverse impacts to the functions and values of the wetland are identified and mitigated in accordance with SJCC 18.30.110.

Step 7. Determine Water Quality Buffer from Table 3.6. For all wetland types apply the Composite Stormwater Discharge Factor from Table 3.5, to the Water Quality Buffer Table 3.6, to determine the required size of the Water Quality Buffer. If the wetland type is a bog, use the greater of this value or 200 feet. (If the bog is located within another wetland type the 200 foot buffer only applies to the area immediately adjacent to the bog, and not to the surrounding wetland). Buffers are measured horizontally from the edge of the wetland.

Table 3.6

Composite Storm-water Discharge Factor for Flow Path	Water Quality Buffer (feet)					Lopez Village and Eastsound UGA With Mitigation¹
	Low Water Quality-Sensitivity Rating	Medium Water Quality-Sensitivity Rating		High Water Quality-Sensitivity Rating		
	Normal Development (60% Pollutant Removal)	Normal Development (65% Pollutant Removal)	Green Development Option (60% Pollutant Removal)	Normal Development (70% Pollutant Removal)	Green Development Option (65% Pollutant Removal)	
< 0.10	30	30	30	30	30	30
0.10- <.20	30	30	30	50	30	30
0.20- <0.30	30	50	30	70	50	30
0.30- <0.40	45	65	45	95	65	30
0.40- <0.50	65	85	65	115	85	35
0.50- <0.60	80	105	80	140	105	40
0.60- <0.70	95	125	95	160	125	50
0.70- <0.80	110	140	110	185	140	55
≥.80	125	160	125	205	160	65

¹ Use of this option requires the mitigation of adverse impacts in accordance with SJCC 18.30.110.

b. Determine the Habitat Buffer.

Step 1. Determine Habitat Importance-Sensitivity Rating for the wetland.

Using subsection (C.2) above, determine the Habitat Importance-Sensitivity Rating for the wetland, then proceed to Step 2. (Note: If the wetland contains particular plants or animals protected as Fish and Wildlife Habitat Conservation Areas, a higher rating may apply. See SJCC 18.30.160. B and F).

Step 2. Determine Habitat Buffer from Table 3.7.

Using the wetland type and Habitat Importance-Sensitivity Rating, determine the required size of the Habitat Buffer from Table 3.7. If the Water Quality Buffer required for the area draining to the wetland is wider than the Habitat Buffer, the stricter (i.e., wider) applies. Unlike the Water Quality Buffer, the Habitat Buffer must completely surround the wetland. Buffers and where applicable Tree Protection Zones are measured horizontally from the edge of the wetland. Proceed to Step 3 if desired. (Note: If no trees are being removed, proposed activities do not require development or project permits, and

Supreme Court No. 92251-9
Court of Appeals No. 72235-2-I, consolidated with 72236-1-I

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IN THE SUPREME COURT OF
THE STATE OF WASHINGTON

COMMON SENSE ALLIANCE, P.J. TAGGARES COMPANY, et al.,

Cross-Petitioners,

v.

GROWTH MANAGEMENT HEARINGS BOARD, WESTERN
WASHINGTON REGION, and SAN JUAN COUNTY,

Respondents.

On Appeal from the Superior Court of the
State of Washington for San Juan County

DECLARATION OF SERVICE

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

*Attorney for Common Sense Alliance
and the P.J. Taggares Co.*

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DECLARATION OF SERVICE

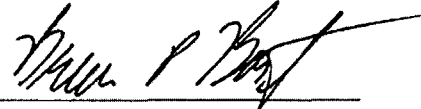
I, Brien P. Bartels, declare as follows:

I am a resident of the State of Washington, employed in Bellevue, Washington. I am over the age of 18 years and am not a party to the above-entitled action. My business address is 10940 NE 33rd Place, Suite 210, Bellevue, Washington.

On October 2, 2015, true copies of CROSS-PETITION FOR REVIEW were served to the following parties as indicated:

Amy S. Vira San Juan Prosecutors Office 350 Court Street P.O. Box 760 Friday Harbor, WA 98250 Counsel for Respondent	<input checked="" type="checkbox"/> E-Mail <input checked="" type="checkbox"/> U.S. First Class <input type="checkbox"/> Legal Messenger <input type="checkbox"/> Other
Kyle A. Loring Friends of the San Juans P.O. Box 1344 Friday Harbor, WA 98250 Counsel for Petitioner	<input checked="" type="checkbox"/> E-Mail <input checked="" type="checkbox"/> U.S. First Class <input type="checkbox"/> Legal Messenger <input type="checkbox"/> Other
Diane L. McDaniel Senior Assistant Attorney General Office of the Attorney General P.O. Box 40100 Olympia, WA 98504-0100 Counsel for Respondent	<input checked="" type="checkbox"/> E-Mail <input checked="" type="checkbox"/> U.S. First Class <input type="checkbox"/> Legal Messenger <input type="checkbox"/> Other

I declare under penalty of perjury that the foregoing is true and correct
and that this declaration was executed this 2 day of October, 2015, at
Bellevue, Washington.



BRIEN P. BARTELS
Legal Secretary

OFFICE RECEPTIONIST, CLERK

To: Brian T. Hodges
Cc: DionneP@atg.wa.gov; dianem@atg.wa.gov; amackie@perkinscoie.com; AGoldsby@perkinscoie.com; pgraves@perkinscoie.com; kyle@sanjuans.org; amyv@sanjuanco.com; Div-1 Front Desk; LALOlYEF@atg.wa.gov
Subject: RE: Common Sense Alliance et al v. GMHB (No. 92251-9) - Cross-Petition for Review

Received on 10-02-2015

Supreme Court Clerk's Office

Please note that any pleading filed as an attachment to e-mail will be treated as the original. Therefore, if a filing is by e-mail attachment, it is not necessary to mail to the court the original of the document.

From: Brian T. Hodges [mailto:bth@pacificlegal.org]
Sent: Friday, October 02, 2015 10:55 AM
To: OFFICE RECEPTIONIST, CLERK <SUPREME@COURTS.WA.GOV>
Cc: DionneP@atg.wa.gov; dianem@atg.wa.gov; amackie@perkinscoie.com; AGoldsby@perkinscoie.com; pgraves@perkinscoie.com; kyle@sanjuans.org; amyv@sanjuanco.com; Div-1 Front Desk <Div-1FrontDesk@courts.wa.gov>; LALOlYEF@atg.wa.gov
Subject: Common Sense Alliance et al v. GMHB (No. 92251-9) - Cross-Petition for Review

Dear Clerk of Court:

Attached for filing with in *Common Sense Alliance et al. v. Growth Management Hearings Bd.* (No. 92251-9), are copies of the following documents:

- Cross-Petition for Review
- Cross-Petition Appendix A
- Cross-Petition Appendix B
- Notice of Substitution and Withdrawal
- Declaration of Service

Please Let me know if you have any difficulty opening the attachments.

Thank you,

Brian T. Hodges

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