IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

SUPREME COURT NO. 92251-9

COMMON SENSE ALLIANCE, P.J. TAGGARES COMPANY, and FRIENDS OF THE SAN JUANS,

Appellants,

v.

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

Respondents.

SAN JUAN COUNTY'S ANSWER TO CROSS-PETITIONERS COMMON SENSE ALLIANCE AND P.J. TAGGARES COMPANY'S CROSS-PETITION FOR REVIEW

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I. INTRODUCTION

This case is an appeal of well-established legal principles in Washington State. Petitioners CSA and PJ. Taggares Company ("CSA"), without any citation to the record in *this* case, again raise issues that were decided by Division 2 in 2011 in *Kitsap Alliance of Property Owners (KAPO) v. PSGMHB.*[1] In that case the petition for review was denied by this Court and a writ of certiorari was denied by the United States Supreme Court. Since then, the law has not changed. Review should likewise be declined in this case.

Petitioners appeal a decision of the Western Washington Growth Management Hearings Board ("the Growth Board") which rejected challenges to four ordinances amending San Juan County's ("the County") critical areas regulations. The courts have recognized the discretion granted by the legislature to local governments to balance the goals and policies of its comprehensive plan, the goals of the GMA, property rights, and the need and requirement to protect the environment. *Quadrant Corp. v. State Growth Mgmt. Hearings Bd.*, 154 Wn.2d 224, 240, 110 P.3d 1132 (2005).

Every local government has many ways to achieve compliance with the GMA, but a failure to do so in the ways advocated for by the Petitioners

[1] 160 Wn. App. 250, 255 P.3d 696 (2011) *review denied* 171 Wn.2d 1030 (2011), *cert denied* 132 S.Ct 1792 (2012).

does not mean the County ordinances are invalid. Instead, the Court should follow the well-established rule that defers to the local government's choice of options that are consistent with the GMA. *Yakima County v. EWGMHB*, 168 Wn. App. 680, 691, 279 P.3d 434 (2012).

Indeed, the record shows that the County used a thorough, reasoned process and adopted development regulations which balance the rights of the citizens of San Juan County with the critical areas designation and protection requirements of the GMA.

II. ISSUE PRESENTED FOR REVIEW

Whether CSA has established a valid facial challenge to the constitutionality of San Juan County's critical area regulations given the ample evidence in the record that the critical area regulations are based on Best Available Science?

III. FACTUAL BACKGROUND

On December 3, 2012, the San Juan County Council adopted four ordinances amending the County development regulations for critical areas. These regulations were written to protect critical area functions and values while taking into account the specific characteristics of a site, the proposed development on that site, and the type of critical area. The CA Ordinances are an "ecosystem approach" or "performance approach" to land use regulations based upon best available science in contrast to classic

"Euclidean zoning."[2]

The three ordinances challenged in this proceeding are:

1) Ordinance 26-2012: regarding general regulations for critical areas (AR 5303-72);

2) Ordinance 28-2012: regarding critical area regulations for wetlands (AR 5381-5419); and

3) Ordinance 29-2012: regarding critical area regulations for fish and wildlife habitat conservation areas (AR 5420-5457).

CSA alleged violations of RCW 82.02.020 and the takings clause of the United States Constitution. U.S. Const. amend V. Because the Growth Board did not have jurisdiction to decide these issues, they were decided for the first time by San Juan County Superior Court Judge Donald E. Eaton, who ruled that CSA's constitutional claims, whether facial or "as applied," were not ripe. The superior court went on to analyze the merits of CSA's constitutional claim and determined that "the CA Ordinances do in fact incorporate best available science, thus providing a scientific basis to ensure nexus and proportionality, at least for purposes of a facial challenge." CP 915. The superior court discussed in detail the site-specific nature of the CA Ordinances and concluded "the Ordinances do not impose restrictions or conditions that apply equally to all uses or all development on all land

[2] Euclidean zoning describes the type of traditional zoning in which uses of land are regulated and restricted depending upon zoning classifications and was upheld by the United States Supreme Court in *Village of Euclid v. Amber Realty*, 272 U.S. 365 (1926).

that contains a critical area." CP 917. As such, the superior court found the CA Ordinances did not violate RCW 82.02.020.

The Court of Appeals agreed stating,

> [CSA] has not cited a case where the constitutional Nollan/Dolan test has been applied to invalidate land use ordinances of general application, as [CSA] seeks to do here. Indeed it appears that the courts have confined Nollan/Dolan analysis to land use decisions that condition approval of a specific project on a dedication of property to public use: ... This makes sense.

Court of Appeals Decision, pg. 14 (internal citations omitted). The Court of Appeals concluded that "even assuming the Nollan/Dolan test can be applied to determine whether a land use ordinance constitutes a taking [CSA] has not shown that a taking occurred by the enactment of the San Juan County critical areas ordinances." Court of Appeals Decision, pg. 15. Petitioner CSA timely filed a petition for review to this Court.

IV. ARGUMENT

CSA appears to be requesting acceptance of review under subsections (1), (2) and (3) of Rules of Appellate Procedure 13.4(b). CSA has not established good cause for the Court to continue review at this level. When examined in context, the cases cited by CSA do not fit with the record in this case and do not demonstrate any conflict with established case law.

A. Buffers are Not Dedications, Exactions or Easements.

Fundamental to CSA's argument is the notion that critical area buffers are equivalent to dedications, exactions or easements. This is incorrect.

Property subject to a buffer remains entirely under the ownership and control of the property owner. The property owner retains the right to exclude others, the right to sell the property to anyone, and the right to use the property for all authorized uses. The CA Ordinances provide a process for identifying areas of the property that have critical area functions and then requires that property owners proposing to develop within those areas seek a permit or comply with performance standards, if no permit is required. Additionally, there is considerable site-specific flexibility built into the CA Ordinances, including exemptions, buffer averaging, and the reasonable use provision, the specific purpose of which is to ensure that no taking occurs.

Ordinance 26-2012 defines "Buffer zone, strip, or area" as,

> either an area designed to separate incompatible uses or activities, or a contiguous area that helps moderate adverse impacts associated with adjacent land uses and that is necessary for the continued maintenance, function, and structural stability of the protected area. Different types of buffers perform different functions.

AR 5317. A comprehensive review of the CA Ordinances shows that the buffers function like setbacks in zoning regulations; they are areas where construction cannot occur without a variance or other authorization. They do not prevent all use, they do not authorize entry by others, and they do not allow public use of private property. As noted in the definition, different buffers perform different functions – some protect water quality and others protect wildlife habitat.

A buffer is distinctly different from a "dedication," which, in land use and property law, is a term of art that has a clear, concrete, and legally significant meaning. *Media General Cable of Fairfax, Inc. v. Sequoyah Condominium Council of Co-Owners,* 991 F.2d 1169, 1173 (4th Cir. 1993). The *Media General Cable* opinion cited with approval to the definition of "dedication" in Black's Law Dictionary:

> The appropriation of land, or an easement therein, by the owner, for the use of the public, and accepted for such use by or on behalf of the public. ... A deliberate appropriation of land by its owner for any general and public uses, reserving to himself no other rights than such as are compatible with the full exercise and enjoyment of the public uses to which the property has been devoted.

Id. (citing Black's Law Dictionary, 412 (6th ed. 1990)). This definition is consistent both in federal case law, including *Nollan* and *Dolan*, and in Washington case law. *Richardson v. Cox*, 108 Wn. App. 881, 890-91, 26 P.3d 970 (2001) ("A common law dedication is the designation of land, or

an easement on such land, by the owner, for the use of the public, which has been accepted for use by or on behalf of the public ... By dedicating the property, the owner reserves no rights that would either be incompatible or interfere with the full public use....").

No interest in land will be transferred or conveyed by the operation of the CA Ordinances. There is no requirement in the CA Ordinances that land be dedicated to the public.

The CA Ordinances use flexible limitations on proposed development adjacent to areas expressly identified for protection due to their sensitivity to the impacts resulting from such development. The County established buffers around these areas based on the intensity of development and the harm scientifically proven to occur. These buffers are the starting point for County staff to evaluate plans when a particular development proposal is submitted. There are numerous factors that take into consideration the particulars of the development and the harm to the specific critical area. For example: SJCC 18.30.150.E.(1)(a) Step 6 allows a buffer reduction in an Urban Growth Area (AR 5403); SJCC 18.30.150(E)(1)(b) Step 3 allows habitat buffer averaging (AR 5405); SJCC 18.30.160(E)(1)(b) Step 2 requires a coastal geologic buffer when applicable to the site and Step 4 requires tree protection zones in areas that

have trees (AR 5436).[3] Accordingly, buffer widths are not inflexible or generic requirements established in a vacuum or without regard to the proposed development or the property.

Buffer areas remain owned by the property owner, controlled by the property owner, and freely alienable with the rest of the property. No one is allowed to enter the property without the express permission of the owner (or court order), and no dedication or easement is granted to the County or the public.

B. The Court of Appeals Decision Does Not Conflict with State and Federal Constitutional Law.

Contrary to CSA's claim, the Court of Appeals decision specifically addresses *Nollan v. California Coastal Commission*, 483 U.S. 825, 107 S.Ct. 3141 (1987) and *Dolan v. City of Tigard*, 512 U.S. 374, 114 S.Ct. 2309 (1994). Court of Appeals Decision, pgs. 12-15.

1. *Nollan* and *Dolan* are "As Applied" Challenges.

There are two types of takings challenges to land use regulations: (1) facial challenges and (2) "as applied" challenges. *Peste v. Mason County*, 133 Wn. App. 456, 471, 136 P.3d 140 (2006). Facial challenges allege that the application of a given land use regulation to any property

[3] Since adoption in 2012, San Juan County's critical area regulations have been amended and recodified as Chapter 18.35 SJCC.

constitutes a taking. *Id.* "As applied" challenges allege that a land use regulation constitutes a taking as applied to a specific parcel of property. *Id.* CSA's argument that "the County's buffers constitute an exaction" is a facial challenge. Cross-Petition, pg. 10. CSA supports its argument with cases addressing "as applied" challenges. *See Nollan v. California Coastal Commission*, supra; *Dolan v. City of Tigard*, supra; *Isla Verde Int'l Holding v. City of Camas*, 146 Wn.2d 740, 49 P.3d 867 (2002).

CSA argues that the CA Ordinances do not use or apply rules which link conditions of development to site specific requirements of nexus and proportionality as required by *Nollan/Dolan*. Cross-Petition, pgs. 12-13. However, those cases were "as applied" challenges, not the facial challenge that is before the Court in this case. For a facial challenge, the ordinance is presumed constitutional, and the challenger bears a heavy burden to prove that a land use regulation constitutes a taking. *Peste*, at 472.

2. *KAPO* Was not Abrogated by the United States Supreme Court in *Koontz*.

In *Kitsap Alliance of Property Owners (KAPO) v. CPSGMHB*, property owners challenged the shoreline buffers in Kitsap County's critical area regulations. 160 Wn. App. 250, 273, 255 P.3d 696 (2011) *review denied* 171 Wn.2d 1030 (2011), *cert. denied* 132 S.Ct 1792 (2012). The Petitioners in *KAPO* presented virtually identical issues as the Petitioners in

this case alleging violation of RCW 82.02.020 and due process. *Id.* The *KAPO* Court conducted a nexus and proportionality analysis under *Nollan* and *Dolan* and concluded, simply stated, that regulations based upon best available science satisfy the nexus/proportionality requirement.

> '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.' If the local government used the best available science in adopting its critical areas regulations, the permit decisions it bases on those regulations will satisfy the nexus and rough proportionality rules.

KAPO, at 273 (citing *Honesty in Envtl. Analysis & Legislation (HEAL) v. CPSGMHB*, 96 Wn. App. 522, 534, 979 P.2d 864 (1999)). The conclusive and simple statement of the law in *KAPO*, which withstood judicial scrutiny to the highest Court in the United States, remains good law. No conflict exists with either Washington State or Federal Constitutional case law.

CSA mischaracterizes the Court of Appeals decision when it writes "[t]he 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." Cross-Petition, pg. 15. In fact, the Court of Appeals wrote,

> [t]he County's use of best available science establishes the reasonable necessity of buffers to protect habitat and

> demonstrates a proportional relationship between the impacts of development and the measures adopted to mitigate it.

Court of Appeals Decision, pg. 16-17.

The most recent announcement of the takings law from the United States Supreme Court was made in *Koontz v. St. Johns River Water Management District*, ___ U.S. ___, 133 S. Ct. 2586, 2603 (2013), but the holding in that case does not affect the outcome of this case or abrogate the holding in *KAPO*. In *Koontz*, the Supreme Court held that "the government's demand for property from a land-use permit applicant must satisfy the requirements of *Nollan* and *Dolan* even when the government denies the permit and even when its demand is for money." *Id.* at 2603. In *Koonzt*, a property owner wishing to develop his property was told by a water management district that his proposal would be approved only if he either reduced the size of his development and deeded to the District a conservation easement on the resulting remainder of his property, or hired contractors to make improvements to district owned wetland several miles away. *Id.* at 2593. The property owner brought an "as applied" takings claim against the district. *Id.* The decision of the Court of Appeals in this case correctly determined that the holding in *Koonzt* is no more applicable to the facts of this case than are *Nollan* or *Dolan*. *See* Court of Appeals Decision, pg. 15.

While CSA points out that the decision in *Koontz* was made after the decision in *KAPO*, it fails to explain how the *Koontz* decision would have influenced or changed the law announced in the *KAPO* decision. Certainly, *KAPO* was not abrogated directly or sub *silento*. In support of its position, CSA merely repeats the argument that is fundamentally flawed – i.e. that a critical area buffer is an "exaction." Cross-Petition, pg. 14. Due to this flaw, CSA's argument necessarily fails.

Furthermore, CSA misstates the law in *KAPO* and the Court of Appeals decision and the CA Ordinances when it asserts "the *KAPO* rule shifts the inquiry away from 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." Cross-Petition, pg. 16 (emphasis in original).

It is worth noting that CSA does not provide any citation to the CA Ordinances to support this allegation that buffers mitigate for *all* pollution regardless of source. As a starting point, water quality buffers in the CA Ordinances were designed to achieve at least 60% pollution removal.[4] AR 5404. The methodology for calculating the buffer width considers surface

[4] Since the adoption of the CA Ordinances, the County Council amended its regulations to increase the pollution removal to 70%.

type, vegetation, slope, drainage and impact to determine the specific flow path *resulting from* the proposed development. AR 5400.

C. The Court of Appeals Decision is Consistent with Case Law Interpreting RCW 82.02.020.

CSA's assertions with regard to RCW 82.02.020 likewise fail because again, CSA attempts to impose "as applied" standards to a facial challenge. The Court of Appeals correctly applied *Trimen Development Co. v. King County*, 124 Wn.2d 261, 877 P.2d 187 (1994). In *Trimen*, a King County ordinance requiring dedication of open recreational space or payment of a fee in lieu thereof for final approval of proposed subdivisions, was found lawful under RCW 82.02.020 because the amount of land to be dedicated (or fee to be paid) was based on King County's comprehensive assessment of its park needs and on its annual growth report. *Id.* at 275.

In this case, the Court of Appeals ruled that in San Juan County, as in King County in *Trimen*, buffers are based on a comprehensive study of the effect of development near critical areas which demonstrates that buffers are reasonably necessary to protect functions and values of critical areas and critical fish and wildlife habitat. Court of Appeals Decision, pg. 11. Contrary to CSA's assertions, the Court of Appeals did find that the site-specific flexibility was built into the ordinances and the use of best available science demonstrated a proportional relationship between the impacts of

development and the measures adopted to mitigate it. Court of Appeals Decision, pg. 16-17. The Court of Appeal's holding is consistent with this Court's ruling in *Trimen.*

V. CONCLUSION

There is nothing special about the procedure used by San Juan County and no development of the law since the decision in *KAPO* to justify review or to depart from precedent. For all of the above reasons, San Juan County respectfully asks this Court to deny discretionary review.

Respectfully submitted this 2nd day of November 2015.

RANDALL K. GAYLORD
PROSECUTING ATTORNEY

By: _____
Amy S. Vira, WSBA #34197
Deputy Prosecuting Attorney
Attorney for San Juan County

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

COMMON SENSE ALLIANCE, P.J. TAGGARES COMPANY, and FRIENDS OF THE SAN JUANS, Appellants, v. GROWTH MANAGEMENT HEARINGS BOARD, WESTERN WASHINGTON REGION, and SAN JUAN COUNTY, Respondents.	NO. 92251-9 CERTIFICATE OF SERVICE

Elizabeth Halsey declares and states:

That I am now, and at all times hereinafter mentioned was, a citizen of the United States and a resident of San Juan County, state of Washington, over the age of 18 years, competent to be a witness in the above-entitled proceeding and not a party thereto; that on November 2, 2015, I caused to be delivered in the manner indicated below a true and correct copy of: REPONDENT SAN JUAN COUNTY'S ANSWER TO CROSS-PETITIONERS COMMON SENSE ALLIANCE AND P.J. TAGGARES

COMPANY'S CROSS-PETITION FOR REVIEW in the above-entitled cause to:

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I make the foregoing statement under penalty of perjury of the laws of the state of Washington.

Dated this 2nd day of November, 2015, at Friday Harbor, Washington.

Elizabeth Halsey
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OFFICE RECEPTIONIST, CLERK

To: Elizabeth Halsey
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Subject: E-filing Answer to Cross-Petition in Case No. 92251-9 by San Juan County

Hello,

Please accept Electronic filing of San Juan County's Answer to Common Sense Alliance and the P.J. Taggares Company's Cross Petition for Review in *CSA et al. v. GMHB et al.,* Case No. 92251-9 for Amy S. Vira, WSBA #34197, (360) 378-4101, amyv@sanjuanco.com.

Thank you,

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