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SUPREME COURT OF THE STATE OF WASHINGTON

PRESERVE RESPONSIBLE SHORELINE
MANAGEMENT, et al.

Petitioners,

v.

CITY OF BAINBRIDGE ISLAND, WASHINGTON STATE
DEPARTMENT OF ECOLOGY, et al.

Respondents.

JOINT ANSWER OF STATE OF WASHINGTON, DEPARTMENT OF ECOLOGY AND CITY OF BAINBRIDGE ISLAND IN OPPOSITION TO PETITION FOR REVIEW

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I. JOINT ANSWER

The City of Bainbridge Island ("City") and the Washington State Department of Ecology ("Ecology") file this Joint Answer to the Petition for Review filed by Petitioners, Preserve Responsible Shoreline Management, et al. ("PRSM").

PRSM fails to explain which criteria, if any, under RAP 13.4(b) justify this Court's review. None of them do. PRSM suggests no conflict between the decision of the Court of Appeals and any prior decision of this Court. RAP 13.4(b)(1). They likewise suggest no conflict among decisions of the Court of Appeals. RAP 13.4(b)(2). And PRSM suggests neither any significant constitutional question nor any substantial public interest that should be determined by this Court. RAP 13.4(b)(3) and (4). Rather, PRSM presents only a garden variety application of established law to the unique facts of this case. This Court should thus deny review.

II. ISSUES FOR REVIEW

1) Did PRSM's failure to raise its precautionary principle arguments before the Growth Management Hearings Board ("Board") bar those arguments on appeal? [Yes].

2) Are the City's Shoreline Master Program ("SMP") buffer regulations valid under the "essential nexus" and "rough proportionality" tests established by the United States Supreme Court in *Nollan v. California Coastal Comm'n*, 483 U.S. 825, 836-37, 107 S. Ct. 3141, 97 L.Ed.2d 677 (1987) and *Dolan v. City of Tigard*, 512 U.S. 374, 391, 114 S. Ct. 2309, 129 L.Ed.2d 304 (1994), where the buffer regulations do not require conveyance of a real property interest? [Yes].

III. COUNTERSTATEMENT OF THE CASE

PRSM seeks discretionary review of an unpublished opinion of the Court of Appeals ("Opinion") in *Preserve Responsible Shoreline Management, et al. v. City of Bainbridge Island, et al.* (Div. II, No. 568080-II). In that Opinion, the Court of Appeals affirmed a decision of the Washington State Growth

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Management Hearings Board upholding the City's SMP buffers against PRSM's claims that the buffers were based on policy, not science, in violation of the Shoreline Management Act. The Court of Appeals also upheld the buffers against PRSM's claim that the buffers violate the doctrine of unconstitutional conditions. The Court of Appeals also rejected PRSM's attempt to argue that the City improperly relied on the "precautionary principle" in adopting the SMP buffers because PRSM failed to raise that issue before the Board. The Court of Appeals was correct, and this Court should deny review.

A. The City's Shoreline Buffers are Based on an Extensive Scientific Record.

The City conducted an extensive and robust scientific inquiry to form a basis for adopting shoreline buffers. The City commissioned and relied on numerous scientific studies, including the *Bainbridge Island Nearshore Assessment Summary of Best Available Science* (Battelle 2003), AR 3995-4148, the *Bainbridge Island Nearshore Habitat Characterization and Assessment, Management Strategy Prioritization, and*

Monitoring Recommendations (Battelle 2004), AR 3265-3514, the *Bainbridge Island Current and Historic Coastal Geomorphic/Feeder Bluff Mapping* (Coastal Geologic Services, Inc. 2010) AR 4149-4230, the *Addendum to the Summary of Science Report* (Herrera 2011) ("Addendum"), AR 4232-4354, the *Memorandum re: Documentation of Marine Shoreline Buffer Recommendation Discussions* (Herrera August 11, 2011), AR 4356-7, the *Memorandum re: Clarification on Herrera August 11, 2011 Documentation of Marine Shoreline Buffer Recommendation Discussions Memo* (Herrera August 31, 2011), AR 4374-78, and the *Cumulative Impacts Analysis for City of Bainbridge Island's Shoreline: Puget Sound* (Herrera and the Watershed Company 2012), AR 2121-2217.

These studies exhaustively documented the existing conditions and existing ecological functions of Bainbridge Island's shorelines. *See, e.g.,* AR 4031-70; AR 4160-70; AR 4243-81; AR 2129-40. These studies also exhaustively documented the impacts of anticipated development on the

existing conditions. *See, e.g.,* AR 4071-94; AR 4187; AR 4254-4313; AR 2141-61. Finally, these studies made detailed recommendations for shoreline regulations, including the shoreline buffers that were ultimately adopted by the City, to ensure that the impacts of development would be mitigated and that no net loss of shoreline ecological functions would occur, *see, e.g.,* AR 4082-83; AR 4088-91; AR 4094-95; AR 4096-4100; AR 4314-16; AR 4362-67; AR 4374-77.

Based on this scientific record and the recommendations of the City's shoreline consultant, Herrera and Associates ("Herrera"), the City's shoreline regulations offer property owners two options for meeting the City's buffer requirements: (1) make a site-specific proposal for a Vegetation Management Area with buffer dimensions that "assure[] there is no net loss of shoreline ecological functions and associated ecosystem wide processes," or (2) "as an alternative to a Site-Specific Vegetation Management Plan," maintain "a Shoreline buffer immediately landward of the [ordinary high water mark]" meeting the

standard dimensions set forth in the SMP. SMP § 4.1.3.5(3)(a) and (b), AR 108-09. By offering these two options, the City's SMP ensures that property owners can choose to have the shoreline buffer tailored to their specific property, either through the application of standard, fixed width shoreline buffers, or through a Vegetation Management Plan.

Herrera recommended a two-zone approach for the standard buffers under the second option, with differing buffer widths based on the property's shoreline designation and site characteristics. AR 4356-72; AR 4374-78. As the consultant detailed, shoreline buffers protect a wide variety of shoreline ecological functions, including water quality, fine sediment control, shade/microclimate, fish and invertebrate food from litterfall and large woody debris, and hydrology/slope stability. AR 4357-360; AR 4374-77. The buffer widths recommended by the scientific literature to protect these functions can vary considerably based on the site characteristics and the functions to be protected, e.g., necessary buffers range from 16 feet to

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1,969 feet for removing pollution from stormwater runoff, from 16 feet to 328 feet for maintaining marine food sources, and from 33 feet to 328 feet for large woody debris. AR 4358; AR 4375.

The more protective zone, Zone 1, is adjacent to the ordinary high water mark. AR 346. Within Zone 1, uses are highly restricted and existing vegetative cover must be retained, except that certain water-related structures are allowed. *See, e.g.,* SMP § 4.1.3.7(1) and (3); AR 114-15; SMP §4.1.3.8 (1) and (2), AR 116-18; SMP § 4.1.3.10, AR 118-19. Within Zone 2, which extends landward from Zone 1 to the required buffer width, uses are less restricted. Uses such as decks, gardens, and even some residential development are allowed if impacts on shoreline ecological functions are mitigated. SMP §4.1.3.11, AR 120-22.

Herrera recommended preserving existing native vegetation and significantly restricting development in Zone 1 because the ecological functions provided by native vegetation adjacent to the shoreline are "fundamental to maintaining a healthy functioning marine nearshore." AR 4362-63. Herrera

recommended that Zone 1 extend a minimum of 30 feet from the ordinary high water mark in most shoreline designations or to the limit of the area of the site having a 65% canopy of native vegetation, whichever is greater, based "on the ability to achieve 70 percent or greater effectiveness at protecting water quality, and providing shade, microclimate moderation, large woody debris, litterfall, and insect food sources." AR 4376. According to Herrera, 30 feet was the "minimum area necessary" to achieve this measure of protection. AR 4440. The second tier of the buffer, Zone 2, was to serve as additional protection for Zone 1 and to provide some additional buffer functions. AR 4362.

B. The Only Policy Choices Used to Set the City's Shoreline Buffers were the Level of Protection Provided to Ecological Functions and the Desire to Minimize the Number of Structures that Would be Made Nonconforming.

There is no question that the City's standard shoreline buffers are consistent with the science and are primarily driven by the SMA's requirement to preserve and protect shoreline ecological functions. However, as the City and Ecology have

acknowledged throughout PRSM's appeal, policy considerations also played a role in the buffer widths adopted. The consideration of policy in the adoption of shoreline regulations is proper under the SMA. WAC 173-26-110(3) *Lake Burien Neighborhood v. City of Burien*, 2014 WL 3710018 (Wash. Cent. Puget Sd. Growth Mgmt. Hrgs Bd., 2014) at 6 ("The SMA process does incorporate the use of scientific information, but it does so as part of the balancing of a range of considerations, such as public access, priority uses, and the development goals and aspirations of the community.").

In this case, the City's standard shoreline buffers are based on the scientific evidence tempered by two (and only two) policy choices. Because there was science in the record to support buffers from as little as 16 feet to as large as 1969 feet, the City's decision on the specific shoreline ecological functions to be protected and the desired degree of protection was necessarily its first policy choice. AR 2879; AR 5824-25. The City chose to adopt the two-zone system that would "achieve 70 percent or

greater effectiveness at protecting water quality, and providing shade, microclimate moderation, large woody debris, litterfall, and insect food sources." AR 4376. As Jose Carrasquero of Herrera testified before the Bainbridge Island City Council, "the specific width of [the buffer] is part of the policy recommendation" and is intended to be "within the range of buffer width[s] recommended in scientific documents." AR 2879. Thus, while the City could have chosen buffers of greater or lesser width, the City made a policy choice to achieve 70 percent or greater effectiveness in protecting the functions listed.

The City's second policy choice was based on its desire to limit the number of existing structures that would become nonconforming as the result of the newly adopted buffers. AR 5824-25; AR 2877. The City's shorelines are 82% developed, thus limiting the City's ability to adopt wide buffers without making a significant number of structures nonconforming. AR 4362. The buffers recommended by Herrera and adopted by the City are therefore "based on existing distances to residential

structures from the shoreline in addition to science-based recommendations for shoreline and nearshore protection." AR 4366, Table 1, footnote a; AR 2877 (the buffers are intended to "[m]eet the ecological protection requirements under the WAC guidelines" while "consider[ing] the land use patterns and minimiz[ing] the number of existing structures [that would be made nonconforming]").

PRSM's petition for review ignores the evidence regarding these policy choices, which the Board upheld. AR 5824-25. Instead, PRSM repeatedly states that the City's buffers were based on the "precautionary principle," which generally holds that "the less known about existing resources, the more protective shoreline master program provisions should be." WAC 173-26-201(3)(g). The record does not support PRSM's contention.

PRSM has cited to no evidence in the record that the precautionary principle was used to establish the buffer widths. Rather, the SMP refers to the precautionary principle as general

"guidance" in its development. SMP § 1.2.3, AR 42. AR 1285 and 1291, cited on page 7 of PRSM's petition for review, are an email exchange regarding the use of the precautionary principle in general and the complaint by one of the individual petitioners in this case about using the principle in regulating docks and bulkheads. AR 4314, cited on page 7 of PRSM's petition, is a page in Herrera's 2011 *Addendum*, in which Herrera notes that some scientific literature recommends buffers that are larger than necessary as a means of addressing the worst-case scenario, but Herrera did not recommend this. AR 2400, cited on page 7 of PRSM's petition, is a memo from the City's Environmental Technical Advisory Committee (ETAC) in which ETAC noted that "a good argument can be made" for buffers that go beyond the absolute minimum, but went on to conclude that the City "must still depend on the [buffer] ranges cited in the [scientific] literature for guidance." And finally, AR 4307-08, cited on page 7 of PRSM's petition, is a page from Herrera's 2011 *Addendum*, which makes no reference to the precautionary principle. None

of this cited material is "evidence" that the precautionary principle was used in adopting the standard buffers and PRSM's statements to the contrary are incorrect.

As the Board recognized, the City's policy choices resulted in buffers that were narrower than what science alone would have justified. AR 5824 ("If the buffers were driven solely by science, the buffers could be much greater"). PRSM has not challenged the incorporation of the two policy choices that the City actually made into the buffer requirements, opting instead to assert a reliance on the precautionary principle that is not demonstrated by the record. PRSM's Statement of the Case misstates the record before this Court.

IV. ARGUMENT

A. PRSM has Failed to Address Three of the Four Grounds for Review Set Forth in RAP 13.4(b).

This Court grants review only if the criteria set forth in RAP 13.4(b) are met:

> A petition for review will be accepted by the Supreme Court only (1) If the decision of the Court of Appeals is in conflict with a decision of the

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> Supreme Court; or (2) If the decision of the Court of Appeals is in conflict with a published decision of the Court of Appeals; or (3) if a significant question of law under the Constitution of the State of Washington or of the United States is involved; or (4) If the petition involves an issue of substantial public interest that should be determined by the Supreme Court.

PRSM's petition for review fails to so much as mention these criteria, much less purport to satisfy them. The petition contains no argument whatsoever regarding RAP 13.4(b)(1), (2), or (4). At most, a generous reading of the petition might suggest that PRSM believes it raises a significant constitutional question. RAP 13.4(b)(3). All PRSM suggests, however, is a dispute over the application of well-developed constitutional principles to the unique facts of this case, presenting no significant question for review.

B. The Court of Appeals Correctly Held that PRSM Failed to Preserve its Precautionary Principle Argument for Appeal.

The Administrative Procedures Act ("APA") governs appeals from the Board's decisions. RCW 36.70A.300(5); RCW 34.05.570(3); *Quadrant Corp. v. Cent. Puget Sound Growth*

Mgmt. Hrgs Bd., 154 Wn.2d 224, 233, 110 P.3d 1152 (2003); *Olympic Stewardship Foundation v. State Env'tl and Land Use Hrgs Office*, 199 Wn. App. 668, 685, 399 P.3d 562 (2017). Under the APA, issues that were not raised before the Board may not be raised for the first time on appeal. RCW 34.05.554(1); *Kitsap Alliance of Property Owners (KAPO) v. Cent. Puget Sound Growth Mgmt. Hrgs. Bd.*, 160 Wn. App. 250, 271-72, 255 P.3d 696 (2011); *Motley-Motley, Inc. v. State*, 127 Wn. App. 62, 72, 110 P.3d 812 (2005) . The prohibition on raising new issues "serves the important policy purpose of protecting the integrity of administrative decision making." *Motley-Motley*, 127 Wn. App. at 73; *King County v. Wash. State Boundary Review Bd.* 122 Wn.2d 648, 668, 860 P.2d 1024 (1993).

The Court of Appeals properly found that PRSM failed to raise any argument concerning the precautionary principle before the Board and that this failure precluded PRSM from raising that argument on appeal. Opinion at 15-17. PRSM concedes the validity of this ruling as to its argument below regarding the

precautionary principle and the City's compliance with the SMA, because PRSM has not sought review of that ruling. Instead, PRSM now attempts to make its argument regarding the precautionary principle by grafting it onto its unconstitutional conditions claim. The Court of Appeals properly rejected this attempt when PRSM raised it in a motion for reconsideration of the Opinion, and this Court should do likewise in deciding PRSM's petition for review.

PRSM did not raise its constitutional argument regarding the precautionary principle before the Board or in its opening brief before the Kitsap County Superior Court, which was the first tribunal with jurisdiction to hear constitutional issues. AR 5824-25 (Board decision); CP 271-28 (PRSM's opening brief in the superior court). Instead, PRSM argued that the City relied on general assumptions and therefore did not meet the constitutional requirements for nexus and proportionality. *Id.* PRSM included only a passing reference to the precautionary principle in its constitutional argument in its reply brief in the superior court (CP

585, 587-88). But issues raised for the first time in a reply brief are generally not considered on appeal. *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). Moreover, a mere passing reference to an issue is insufficient to preserve it. *Olympic Stewardship Foundation, supra,* 199 Wn. App. at 687 (citing *Holland v. City of Tacoma*, 90 Wn. App. 533, 538, 954 P.2d 290 (1998)). Therefore, PRSM did not preserve its precautionary principle argument as part of its unconstitutional conditions claim and the Court of Appeals properly excluded that argument on appeal.

C. The City's Standard Buffers Do Not Require Shoreline Owners to Give Up any Property Rights and the Unconstitutional Conditions Doctrine Does Not Apply.

In the context of land use, the doctrine of unconstitutional conditions states that "the government may not require a person to give up a constitutional right in exchange for a discretionary benefit conferred by the government where the benefit sought has little or no relationship to the property." *Dolan v. City of*

Tigard, 512 U.S. 374, 385, 114 S. Ct. 2309, 129 L.Ed.2d 304 (1994). Here, the SMP buffer provisions do not require shoreline property owners to give up any constitutional right.

As noted above, property owners are given two choices for establishing shoreline buffers on their properties that preserve shoreline ecological functions: (1) a site-specific Vegetation Management Area, or (2) the City's two-tiered shoreline buffers set forth in the SMP. Neither the Vegetation Management Area nor the standard shoreline buffer require the owner to give up any fundamental attribute of ownership under either choice. The SMP buffer provisions do not require the owner to transfer any interest in the property to the City, do not take away the owner's right to exclude others (including the City), and do not take away the right of the owner to dispose of the property. *See*, *Guimont v. Clarke*, 121 Wn.2d 586, 595, 854 P.2d 1 (1993) (listing these fundamental attributes of property ownership). Buffers are simply use restrictions similar to common zoning setbacks – they are not dedications for public use or public access easements.

Common Sense Alliance v. Growth Mgmt. Hearings Bd., No. 72235-2—I & 72236-I, 2015 WL 4730204, at *8 (Wash. Ct. App. Aug. 10, 2015) (unpublished).

PRSM falsely asserts that the SMP requires owners to dedicate a portion of their property to public use. PRSM's Pet. for Review at 8-9, but none of the SMP provisions cited by PRSM contain any language requiring dedication or conveyance of any interest in the land to the City or the public. SMP §§ 4.1.2.4(2), AR 101; 4.1.3.1, AR 105-06; 4.1.3.2, AR 106; 4.1.3.5(4), AR 108-09; or Table 4-3, AR 96. Instead, these sections merely restrict uses in certain areas to protect shoreline ecological functions when the owner undertakes development. The owner retains all fundamental attributes of ownership, and no such attribute is conveyed to the public.

The cases and statutes PRSM cites in support of its dedication argument do not support its position. *City of Tacoma v. Welcker*, 65 Wn.2d 677, 683, 399 P.2d 330 (1965) did not hold that every "acquisition of a buffer to protect water quality

constitutes an exercise of eminent domain;" the case holds only that a city may validly exercise the power of eminent domain to acquire such easements. *Richardson v. Cox*, 108 Wn. App. 881, 890-91, 26 P.3d 970 (2001), did not hold that "dedication of a property interest can be achieved via notice on a binding public document;" the case held only that a quit claim deed and a later declaration of covenants did not dedicate a roadway easement for public use absent an explicit statement to that effect. Footnote 2 to Justice Brennan's dissenting opinion in *Nollan v. California Coastal Comm'n*, 483 U.S. 825, 833, 107 S.Ct. 3141, 97 L.Ed.2d 677 (1987) does not address a "dedication achieved via a deed restriction." It instead quotes from the Court's previous decision in *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 127, 106 S.Ct. 455, 88 L.Ed.2d 419 (1985), in which the Court stated, in part, that "a requirement that a person obtain a permit before engaging in a certain use of his or her property does not itself 'take' the property in any sense." And RCW 64.04.130 merely states that the state and other public entities may acquire

interests in real property for conservation purposes and that, when they do, such interests are considered real property. Thus, despite PRSM's best attempts to distort these cases and statutes, nothing in them supports PRSM's assertion that the City's SMP buffer provisions "compel the dedication of real property to public use" as PRSM claims.

A party asserting that a dedication exists has the burden to establish that the elements of a dedication are present. *Richardson*, 108 Wn. App. at 891. PRSM has wholly failed to meet this burden. PRSM's attempt to create a dedication requirement out of whole cloth to support its unconstitutional conditions argument must be rejected and its petition for review must be denied on this basis.

D. The Court of Appeals Properly Held that PRSM Had Not Met its Burden to Show that the SMP Buffers Violate the Doctrine of Unconstitutional Conditions.

PRSM claims that the Court of Appeals' Opinion conflicts with the decisions of the U.S. Supreme Court in *Nollan* and *Dolan* by setting up a "rule" that allows the City to demand any

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width of buffer within the range of buffers found in the literature. Pet. At 29. The Opinion sets up no such rule, finding instead that the City successfully met the test for nexus and proportionality in adopting the SMP because it employed the use of a reasoned, objective analysis of the science.

1. The City employed a reasoned analysis of the extensive scientific record to develop the buffer conditions.

As discussed above, PRSM's contention that City's buffer decision was made solely on policy grounds ignores the record containing the extensive scientific information the City assembled and considered in developing the SMP. The Board's finding with regard to the City's buffer decision was that the City incorporated "policy as well as science into its buffer width determination." AR 5825. The Court of Appeals affirmed, concluding that the City "relied on extensive scientific research" and that that reliance meant the City "used a reasoned, objective analysis" to create the SMP. Opinion at 29.

PRSM's claim that the City only relied on generalized statements about conditions on shoreline property is refuted by the record. Pet. at 26. The Opinion meticulously documents the scientific record the City considered. Opinion at 2-6, 28-29.

As the Court of Appeals found, the City's consultant provided recommendations for the buffer widths based on the scientific literature. Opinion at 3-5, 29. The City did not simply, as PRSM contends, base the buffer provisions on a generalized public need within a broad range of possible widths. Pet. at 26. Rather, the City determined what future development might occur, what ecological functions might be impacted by that development, and what buffer widths would protect ecological function against such impact.

The record demonstrates that the City based its buffer decisions on a sound analysis of the science, as well as on policies taking into account the goals and aspirations of the community. PRSM's contention that buffer widths were set on generalized analysis and policy fails.

2. The Court of Appeals properly found that the City's process satisfied nexus and proportionality as those tests apply to enacted ordinances.

PRSM incorrectly asserts that buffers are an exaction demanded of landowners to address a public need. Pet. at 28-29. They are not. Both SMPs and Critical Area Ordinances commonly use buffers, which both the SMA and the Growth Management Act (GMA), RCW 36.70A, permit. *See, e.g.*, *OSF*, 199 Wn. App. 668; *Kitsap Alliance of Prop. Owners v. Cent. Puget Sound Growth Mgmt. Hearings Bd.*, 160 Wn. App. 250, 273, 255 P.3d 696 (2011).

The SMP Guidelines state that SMPs "shall include policies and regulations that assure no net loss of shoreline ecological functions will result from residential development. Such provisions should include specific regulations for setbacks and buffer areas . . . . " WAC 173-26-241(3)(j)(ii). "The imposition of buffers protects the shoreline ecological functions, processes, and habitat." *OSF*, 199 Wn. App. 699; AR 4341. The buffer provisions protect shoreline ecological function that may

be impacted by specific development proposed on that shoreline. They are not directed at a generalized public need.

PRSM claims the Opinion undermines *Nollan* and *Dolan*, both of which are as-applied challenges to conditions imposed on development permits. In *Nollan*, owners challenged a building permit that required them to provide a public access easement across their property. *Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825, 107 S. Ct. 3141, 97 L. Ed. 2d 677 (1987). The Supreme Court invalidated the requirement, because the access provision did not have a governmental purpose, or "nexus," to the construction of the home. *Dolan* involved a challenge to a building permit approval for a store expansion and parking lot that required a dedication of open space to the public in an adjacent floodplain. *Dolan v. City of Tigard,* 512 U.S. 374, 385, 114 S. Ct. 2309, 129 L. Ed. 2d 304 (1994). The dedication requirement was invalidated because the amount of land required to be dedicated was not proportional to the impact of the proposed construction. *Dolan*, 512 U.S. 374. The nexus and

proportionality analyses in these as-applied cases were specific to the easements required by specific permit approvals.

In this facial challenge to the SMP, no individual project has yet been proposed, and there are no site-specific project factors to be analyzed for compliance with nexus and proportionality in the same manner as there would be in an as-applied challenge. Because of this, the Court of Appeals correctly relied on *Honesty in Environmental Analysis and Legislation v. Central Puget Sound Growth Management Hearings Board,* 96 Wn. App. 522, 979 P.2d 864 (1999) *(HEAL)* and *Kitsap Alliance of Property Owners v. Central Puget Sound Growth Management Hearings Board*, 160 Wn. App. 250, 255 P.3d 696 (2011) *(KAPO),* to determine that, in a facial challenge, demonstration of a reasoned, objective evaluation of the science was the analysis required to satisfy the nexus and proportionality tests. Opinion at 27-28.

The Court of Appeals correctly relied on *HEAL* and *KAPO* in holding that the Bainbridge Island SMP's shoreline buffers

met the nexus and proportionality test. In *HEAL*, Division I of the Court of Appeals held that where a local government fails to incorporate that science, or otherwise ignores it, permit decisions could result in unconstitutional conditions. 96 Wn. App. at 533–34. In *KAPO*, Division II held that where a local government "consider[s] the best available science and employ[s] a reasoned process in adopting its shoreline critical areas ordinance, including the buffers for urban, semirural, and rural shorelines," it "[does] not engage in an unconstitutional taking and satisfie[s] the nexus and rough proportionality tests . . . ." 160 Wn. App. at 273–74.

The City did not ignore, nor did it fail to incorporate, the science when developing the SMP. The City's buffer provisions accordingly do not "serve as the basis for conditions and denials that are constitutionally prohibited." *HEAL*, 96 Wn. App. at 533. The Court of Appeals held that the City relied on valid scientific information because it implemented buffers based on the science and within the range of protective widths found in the literature.

Opinion at 29. At the level of a facial review of an ordinance, and absent the specificity of a particular type of development on a particular parcel, the City's buffer provisions are individualized by taking into account the environmental use designation, the morphology of the property, and the extent of the existing vegetative cover. AR 96. The environmental use designation, in turn, has already incorporated the consideration of the ecological characteristics and the stage of development of that particular stretch of shoreline. Additionally, the landowner has the ability to further customize vegetation requirements through an individual Vegetation Management Plan if a more tailored solution is needed. Thus the City's reasoned approach in developing the buffer provisions meets the test for nexus and proportionality.

V. CONCLUSION

For all of the reasons set forth above, the Court of Appeals correctly decided this matter and PRSM's petition for review should be denied.

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RESPECTFULLY SUBMITTED this 7th day of April, 2023.

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CERTIFICATE OF SERVICE

I certify under penalty of perjury under the laws of the state of Washington that on the 7th day of April, 2023, I caused to be served the foregoing document upon the parties hereto via the Supreme Court Portal efiling system, which will send electronic notifications of such filing to all parties of record.

Dated this 7th day of April, 2023, in Seattle, Washington.

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