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Case No. 101727-8

Court of Appeals Case No: 56808-0-II

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

Preserve Responsible Shoreline Management, et al.,

Petitioners,

v.

City of Bainbridge Island, et al.,

Respondents.

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

PETITIONERS' ANSWER TO CLERK'S MOTION TO STRIKE

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IDENTITY OF RESPONDING PARTY

Petitioners Preserve Responsible Shoreline Management, Alice Tawresey, Robert Day, Bainbridge Shoreline Homeowners, Dick Haugan, Linda Young, John Rosling, Bainbridge Defense Fund, and Point Monroe Lagoon Home Owners Association, Inc. ("PRSM") file this Answer in Opposition to the Clerk's Motion to Strike the Reply to New Issues Raised in Answer.

STATEMENT OF RELIEF SOUGHT

PRSM requests that this Court deny the Clerk's motion to strike and accept the Reply to New Issues Raised in Answer dated April 21, 2023, as authorized by RAP 13.4(d) and RAP 1.2(a), (c). Alternatively, should the Court determine that the Joint Answer did not seek review of the new issues on the merits, then the Court should rule that Respondents the City of Bainbridge Island and Department of Ecology may not raise the alternative arguments in their supplemental brief, should review be granted. RAP 13.4(d); *Honcoop v. State*, 111 Wn.2d 182, 193,

759 P.2d 1188 (1988) (respondent's failure to assign error to a Court of Appeals holding means that the propriety of that holding is not before the Supreme Court).

BACKGROUND AND FACTS RELEVANT TO MOTION

The Clerk's motion to strike is predicated on the observation that "it does not appear that the answer seeks review of issues not raised in the petition for review." Clerk's Motion at 1. With all due respect, that observation is mistaken. The Joint Answer filed by the City and Ecology raises three new alternative arguments that, if deemed credible, would reverse the lower court's decision and secure a ruling that would be substantially more favorable to the Respondents.

A brief background is necessary to understand the difference between the questions presented in the Petition and the additional issues raised in the Joint Answer. In the decision below, the Court of Appeals held the City's buffer requirement is subject to the doctrine of unconstitutional conditions as set

forth in *Nollan v. California Coastal Commission*, 483 U.S. 825, 107 S. Ct. 3141, 97 L. Ed. 2d 677 (1987), and *Dolan v. City of Tigard*, 512 U.S. 374, 114 S. Ct. 2309, 129 L. Ed. 2d 304 (1994). Decision at 27–30. Based on that critical threshold determination,[1] the appellate court evaluated the City's mandatory buffer demand under the doctrine's nexus and proportionality tests. *Id*. But, as alleged in the Petition, the appellate court construed and applied those tests in a manner that conflicts with decisions of the U.S. Supreme Court and other courts. Petition at 20–30. Thus, the Petition presents two questions focusing on the evidence and legal standards considered by the appellate court during its merits analysis. Petition at 1–2.

[1] For *Nollan*/*Dolan* to apply, the property owner must first show that a permit condition demands that an identified property interest be put to public use. *Koontz v. St. Johns River Water Mgmt. Dist.*, 570 U.S. 595, 614, 133 S. Ct. 2586, 186 L. Ed. 2d 697 (2013); *Ballinger v. City of Oakland*, 24 F.4th 1287, 1292 (9th Cir. 2022).

The City and Ecology's Joint Answer largely avoids discussion of the conflicts identified in the Petition. *See* Answer at 14–28. Instead, the Respondents offer three alternative arguments they believe could secure a favorable outcome while avoiding the questions presented. First, the City and Ecology claim that PRSM's trial-court briefing did not satisfy RAP 10.3(c) (a party may not raise an issue for the first time in a reply brief) and therefore the appellate courts should have never addressed the doctrine of unconstitutional conditions in the first place. Answer at 14–17. Second, they argue that the appellate court erred in addressing the doctrine of unconstitutional conditions on the merits because, according to them, the City's buffer demand does not constitute the type of permit condition that is subject to *Nollan*/*Dolan*. Answer at 17–21. And third, they argue that an SMP procedure for adjusting buffer configurations (*i.e.*, the "vegetation management plan") provides an alternative basis for avoiding the merits of PRSM's unconstitutional

conditions claim, making it unnecessary for the Court to evaluate the buffer demand. Answer at 28.

None of these arguments are addressed by the Court of Appeals' decision—let alone the Petition. Indeed, the City and Ecology did not raise its RAP 10.3 objection to either the trial or appellate court. That argument is being pressed for the very first time in the Joint Answer. And although the City and Ecology argued two remaining issues (the "buffer-is-not-a-dedication" and "alternative-basis" claims) in their appellate briefs, the appellate court did not credit those arguments and did not address them in the Decision.

Critically, the Respondents do not present alternative arguments to negate or minimize the important conflicts identified in the Petition. RAP 13.4(b). Instead, the Joint Answer argues each of those new issues on their merits, insisting that a ruling in their favor on the RAP 10.3 and "no-dedication" claims would result in reversal of the Court of Appeals' conclusion that the City's buffer demand is subject to *Nolan*/*Dolan*—a

substantially different decision than was made below. Answer at 14–21. And a ruling on the merits of their "alternative-basis" claim would shield the City's buffer demand from heightened scrutiny under *Nollan/Dolan*. Answer at 28.

Thus, given the City and Ecology's demonstrated intent to advance its alternative theories to secure a more favorable ruling should review be granted, PRSM filed a reply addressing the advisability of reviewing those new issues (in addition to the issues presented by the Petition) as authorized under RAP 13.4(d) and RAP 1.2.

GROUNDS FOR RELIEF AND ARGUMENT

The Joint Answer raises three alternative arguments that were not addressed by the Decision or the Petition. At issue is whether those claims are offered in response to the Petition, or whether the City and Ecology intend to "seek review" of the new issues on the merits should review be granted. Clerk's Motion at 1; RAP 13.4. *See also Discretionary Review of Decision Terminating Review*, 3 Wash. Prac., Rules Practice (9th ed.)

(discussing the difference between an "argument" and an "issue"). Without input from Respondents clarifying whether they intend to press those issues on the merits, this Court must make such determination based solely on how the issues are argued in the Joint Answer. *Blaney v. Int'l Ass'n of Machinists and Aerospace Workers, Dist. No. 160*, 151 Wn.2d 203, 210 n.3, 87 P.3d 757 (2004) (The Rules of Appellate Procedure do not require a respondent to file a cross-petition or affirmatively seek review; they "merely require that the issue be raised."); *Gerlach v. Cove Apartments, LLC*, 196 Wn.2d 111, 119 n.4, 471 P.3d 181 (2020) (recognizing that a respondent may conditionally raise new issues in its answer to the petition for review).

The City and Ecology provide no argument whatsoever that the new issues negate or minimize the conflicts identified in the Petition, nor do they address the importance of the questions presented. Answer at 14–21, 28. Instead, the Joint Answer argues each of the new issues on its merits, insisting that if the Court were to rule in their favor on those alternative arguments, then

there would be no need to consider the questions presented in the Petition. *Id*. Such substantive arguments are considered "new issues" under RAP 13.4(d). *See* Answer of Respondent King County, *Wuthrich v. King Cnty.*, No. 91555-5, 2015 WL 5554290, at *16 (acknowledging that alternative arguments not addressed by the challenged decision are new issues); *Wuthrich v. King Cnty.*, 185 Wn.2d 19, 25, 28, 366 P.3d 926 (2016) (addressing alternative arguments raised in an answer). That alone should authorize the Reply. But there is more.

The Respondents' argument on the "no-dedication" issue plainly confirms they did not raise the new issues to comment on the advisability of review. Answer at 17–21. There, the City and Ecology present a merits argument. *Id*. As noted in the Reply, the Respondents fail to disclose that the single unpublished case they rely on to make their argument, *Common Sense Alliance v. Growth Mgmt. Hearings Bd.*, Nos. 72235-2-I & 72236-1-I, 2015 WL 4730204, at *8 (Wash. Ct. App. Aug. 10, 2015) (unpublished), conflicts with numerous published decisions of

the U.S. Supreme Court and other appellate courts. *See, e.g.*, *Dolan*, 512 U.S. at 393–94 (stream buffer mandated by generally applicable city code provision subject to doctrine); *Kitsap Alliance of Prop. Owners v. Cent. Puget Sound Growth Mgmt. Hearings Bd.* (*KAPO*), 160 Wn. App. 250, 272, 255 P.3d 696 (2011) (shoreline buffers "must … satisfy the requirements of nexus and rough proportionality established in *Dolan* and *Nollan*"); *Honesty in Envtl. Analysis and Legis. v. Cent. Puget Sound Growth Mgmt. Hearings Bd.* (*HEAL*), 96 Wn. App. 522, 533, 979 P.2d 864 (1999) (Critical area regulations "must comply with the nexus and rough proportionality limits the United States Supreme Court has placed on governmental authority to impose conditions on development applications."). Respondents' decision to omit any discussion of conflicting caselaw (conflicts that were fully briefed below) is further proof that the new issue was not presented for the purpose of addressing the grounds for granting review, RAP 13.4(b), but was offered to argue to alter the substance of the decision below.

The U.S. Supreme Court's "cross-appeal rule" confirms the longstanding rule that, although a responding party need not cross-appeal "if all it wishes to do is present alternative grounds for affirming the judgment,"[2] it may not raise alternative arguments designed to "alter a judgment to benefit a nonappealing party." *Greenlaw v. United States*, 554 U.S. 237, 244, 128 S. Ct. 2559, 171 L. Ed. 2d 399 (2008); *Morley Construction Co. v. Maryland Casualty Co.*, 300 U.S. 185, 191, 57 S. Ct. 325, 81 L. Ed. 593 (1937) (a party may not, in the absence of a cross-appeal, attack a decision "with a view of either enlarging his own rights thereunder or of lessening the rights of his adversary, whether what he seeks is to correct an error or to supplement the decree with respect to a matter not dealt with below"). Because the Joint Answer raises new arguments aimed at altering the appellate court's determination that the buffers are subject to heightened scrutiny under *Nollan/Dolan*, those

[2] *Ellis v. Salt River Project Agric. Improvement & Power Dist.*, 24 F.4th 1262, 1268 (9th Cir. 2022).

arguments can only be considered by this Court if the arguments constitute new issues under RAP 13.4(d). PRSM is, therefore, authorized to reply.

Even so, this Court has held that RAP 13.4(d) should be "liberally interpreted to promote justice and facilitate the decision of cases on the merits." *In re Recall of Bolt*, 177 Wn.2d 168, 182, 298 P.3d 710 (2013) (citing RAP 1.2(a)). Basic notions of fairness and justice insist that PRSM be provided an opportunity to respond to Respondents' RAP 10.3(c) objection, which the Joint Answer raised for the very first time despite the long history of this case. *Pub. Util. Dist. No. 2 of Grant Cnty. v. Ill. Emp. Ins. of Wausau*, 90 Wn. App. 1040 (1998) (unpublished) (allowing a surreply where necessary to respond to issues raised for the first time in a reply brief). The Court's interest in resolving cases on the merits also militates strongly in favor of allowing the Reply because the Joint Answer fails to disclose that neither Respondent raised such an objection to the courts below and failed to cite to those portions of the trial court briefing in

which all parties discuss the "precautionary principle" in great detail. *See* CP 215–16, 218, 222, 224–28, 234, 249, 251–52, 254–56, 265–68, 304, 533–34. PRSM's Reply is both warranted and necessary to accomplish the goals of RAP 1.2(a).

Finally, this Court's determination whether the Joint Answer sought conditional review of the alternative arguments will impact the parties beyond this motion. If it concludes, despite evidence to the contrary, that Respondents presented those issues only to dispute the advisability of review, then Respondents will be barred from later raising those claims on the merits should review be granted.[3] *State v. Barker*, 143 Wn.2d 915, 919–20, 25 P.3d 423 (2001) ("This court ordinarily will not

[3] While RAP 13.7(b) provides that the Court may consider all issues raised below that might support the challenged decision, that allowance must be read in conjunction with RAP 13.4(d)'s imperative that a party "must raise" the issue in its answer or else it is waived. *See* RAP 13.4, Drafter's Cmt., 2006 Amend. (noting that RAP 13.4(d) was amended to clarify that parties must raise additional issues in answers to petitions to avoid the "plausible but erroneous interpretation [of RAP 13.7(b)] ... that an issue raised but not decided in the Court of Appeals need not be raised in an answer to a petition for review").

review issues not presented in the petition for review or the answer."); *Clam Shacks of Am., Inc. v. Skagit Cnty.*, 109 Wn.2d 91, 98, 743 P.2d 265 (1987) (rejecting the argument that an appeal of part of a Court of Appeals decision amounts to a request to review every aspect of that decision).

CONCLUSION

Respondents invited a reply when they chose to assert several new alternative arguments for securing a more favorable ruling should review be granted. For that reason, this Court should deny the Clerk's motion to strike and allow PRSM's Reply. Alternatively, should this Court determine that the Joint Answer did not seek review of the new issues, it should rule that the City and Ecology cannot raise those arguments in their supplemental brief if review is granted.

RAP 18.17(b) CERTIFICATE OF COMPLIANCE

The undersigned certifies that the foregoing Answer complies with the rules of this Court and contains 2,241 words.

DATED: May 3, 2023.

Respectfully submitted,

By: s/ BRIAN T. HODGES

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DECLARATION OF ELECTRONIC SERVICE

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

DATED: May 3, 2023.

s/ BRIAN T. HODGES
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