

72235-2

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

NO. 72235-2-I

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 RESPONSE TO AMICUS BRIEF OF
PACIFIC LEGAL FOUNDATION

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I. INTRODUCTION

The issues before the Court in this case involve San Juan County's ("County") critical area regulations and compliance with the Growth Management Act (GMA). To address these issues it is necessary to relate the law to San Juan County's critical area regulations, yet the brief from Amicus Pacific Legal Foundation contains just three references to the County's regulations.¹ Two of these references are contained in the introduction and merely provide citations to the general section governing wetland regulations without any further discussion or analysis to make the brief helpful.²

Having failed to prevail with these same arguments in *Kitsap Alliance of Property Owners (KAPO) v. CPSGMHB*, 160 Wn. App. 250, 255 P.3d 696 (2011), review denied 171 Wn.2d 1030 (2011), cert denied 132 S.Ct 1792 (2012), Pacific Legal Foundation is using this nearly identical case to take "a second bite of the apple." The merits of this case, however, cannot be decided with generalizations and political rhetoric. Rather the site-specific approach used by San Juan County must be evaluated within the GMA mandate to protect critical areas while honoring property rights. San Juan County was successful because it

¹ See Amicus brief pgs 3,11.

² Amicus brief, pg. 3.

followed the lessons of the *Kitsap Alliance* case and met the requirements of the GMA.

II. ARGUMENT

A. Buffers Are Not Dedications of Land.

Pacific Legal Foundation's entire argument is premised on a fundamental mischaracterization regarding the nature of buffers. Specifically, Pacific Legal Foundation treats buffers like monetary exactions and relies on language regarding such exactions when it cites: "a predicate for any unconstitutional conditions claim is that the government could not have constitutionally ordered the person asserting the claim to do what it attempted to pressure that person into doing." *Koontz v. St. Johns River Water Mgmt. Dist.*, 133 S. Ct. 2586, 2598-99 (2013). The facts here are quite different from monetary exactions because buffers are not property interests and are not owned or acquired in any way by the County. Instead, buffers are akin to generally applicable regulations such as building setbacks.

Buffers are not "dedications." In land use and property law, "dedication" 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 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) and in Washington. See *Richardson v. Cox*, 108 Wn. App. 881, 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 critical area ordinances. There is no requirement in the ordinances that land be dedicated to the public. Any required buffer is still owned by the property owner, and 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. Critical area regulations merely require identification of areas that have critical functions and require that property owners proposing to develop those areas seek a permit or comply with performance standards if no permit is required. Furthermore, there is considerable site-specific flexibility built into the critical area 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.

Ordinance 26-2012, pg. 14 (AR 5317).

A comprehensive review of the critical area ordinances show that the buffers function like setbacks in zoning regulations; they are areas in which building 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. The buffers contained in the challenged regulations are merely a starting point for determining regulatory limitations. From there, the relevant details of the

particular development proposal are examined to determine any necessary or allowable adjustments. For example: SJCC 18.30.150.E.(1)(a) Step 6 allows a buffer reduction in an Urban Growth Area (Ordinance 28-2012 pg. 23, AR 5403); SJCC 18.30.150(E)(1)(b) Step 3 allows habitat buffer averaging (Ordinance 28-2012, pg. 25, 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 (Ordinance 29-2012, pg. 17, AR 5436). Accordingly, buffer widths are not inflexible or generic requirements established in a vacuum or without regard to the proposed development or the property.

Pacific Legal Foundation's argument that the regulations require a "public dedication" likewise fails. SJCC 18.30.160(E)(4) states, "[f]or recorded plats, short plats, and binding site plans, the applicant shall show the boundary of required buffers and tree protection zones on the face of the plat or plan." Plats and binding site plans must show contours and topography, lot sizes, and existing conditions such as land use designations, existing structures, wells drainfields, surface water features, wetlands and other environmentally sensitive areas.³ Clearly, every feature depicted on a site plan or plat is not a public dedication. This point is further demonstrated by SJCC 18.70.070(F)(2)(w) which specifically

³ See SJCC 18.70.050(C)(2)

lists dedications that are to be shown on all plats including easements, right-of-ways, and common areas. Significantly, subsection (F)(2)(w) does not list critical areas or buffers.

In sum, the County's critical area 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. 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 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 *Kitsap Alliance* Case is Controlling Law

In *Kitsap Alliance of Property Owners (KAPO) v. CPSGMHB*, a property owners group represented by Pacific Legal Foundation appealed Kitsap County's critical area ordinance which required 50 and 100 foot buffer zones in marine shoreline areas. 160 Wn. App. 250, 273, 255 P.3d

696 (2011) review denied 171 Wn.2d 1030 (2011), cert denied 132 S.Ct 1792 (2012). Virtually identical claims of nexus and proportionality were raised and briefed by appellants in the *KAPO* case. The *KAPO* Court held:

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.

Id. at 273. Not surprisingly, Pacific Legal Foundation claims the *KAPO* Court “misunderstood the doctrinal basis for the nexus and proportionality tests” and the decision “conflicts with decisions of the U.S. and Washington Supreme Courts,”⁴ yet Pacific Legal Foundation fails to mention that both the Washington Supreme Court and the United States Supreme Court denied review of the *KAPO* decision. *KAPO* is good law.

III. CONCLUSION

For the reasons described above, San Juan County respectfully requests the Court affirm the decisions below.

Respectfully submitted this 27th day of March 2015.

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⁴ Amicus brief, pgs. 16,17.

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CERTIFICATE OF
SERVICE

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Elizabeth W. 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 March 27, 2015, I caused to be delivered in the manner indicated below a true and correct copy of San Juan County's Response to Amicus Brief of Pacific Legal Fund 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 27th day of March, 2015, at Friday Harbor, Washington.



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