

No. 72235-2-I

IN THE COURT OF APPEALS FOR
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, and SAN JUAN COUNTY,

Respondents.

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

**AMICUS BRIEF OF PACIFIC LEGAL
FOUNDATION IN SUPPORT OF APPELLANTS
COMMON SENSE ALLIANCE AND P.J. TAGGARES CO.**

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 Amicus Curiae
Pacific Legal Foundation*

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
INTRODUCTION	1
ISSUE ADDRESSED BY AMICUS BRIEF	2
SUMMARY OF SAN JUAN COUNTY’S WATER QUALITY BUFFER PROVISIONS	3
ARGUMENT	5
I. THE COUNTY’S CAO UPDATE VIOLATES THE DOCTRINE OF UNCONSTITUTIONAL CONDITIONS	5
A. The County Bears the Burden of Demonstrating That Its Buffer Program Satisfies the Nexus and Proportionality Tests	6
B. As Written, the County’s Water Quality Buffer Provisions Cannot Satisfy the Nexus and Proportionality Tests	9
C. Critical Areas Ordinances Are Not Exempt from the Constitutional Nexus and Proportionality Standards	13
II. <i>KITSAP ALLIANCE AND OLYMPIC STEWARDSHIP</i> CONFLICT WITH DECISIONS OF THE U.S. AND WASHINGTON SUPREME COURTS	16
CONCLUSION	19

TABLE OF AUTHORITIES

	Page
Cases	
<i>Armstrong v. United States</i> , 364 U.S. 40, 80 S. Ct. 1563, 4 L. Ed. 2d 1554 (1960)	18
<i>Benchmark Land Co. v. City of Battle Ground</i> , 103 Wn. App. 721, 14 P.3d 172 (2000); <i>affirmed on other grounds</i> , 146 Wn.2d 685, 49 P.3d 860 (2002)	14
<i>Burton v. Clark Cnty.</i> , 91 Wn. App. 505, 958 P.2d 343 (1998)	7, 18
<i>Casitas Mun. Water Dist. v. United States</i> , 543 F.3d 1276 (Fed. Cir. 2008)	10
<i>Citizens’ Alliance for Property Rights v. Sims</i> , 145 Wn. App. 649, 187 P.3d 786 (2008)	11
<i>City of Portsmouth v. Schlesinger</i> , 57 F.3d 12 (1st Cir. 1995)	14
<i>Curtis v. Town of South Thomaston</i> , 708 A.2d 657, 1998 ME 63 (1998)	14
<i>Dolan v. City of Tigard</i> , 512 U.S. 374, 114 S. Ct. 2309, 129 L. Ed. 2d 304 (1994)	1-2, 6-11, 14-19
<i>Friends of the San Juans, et al. v. San Juan County</i> , GMHB No. 13-2-0012c (FDO Sept. 6, 2013)	4, 12
<i>Guggenheim v. City of Goleta</i> , 638 F.3d 1111 (9th Cir. 2010)	9
<i>Home Builders Association of Dayton and the Miami Valley v. City of Beavercreek</i> , 729 N.E.2d 349, 89 Ohio St. 3d 121 (2000) ...	14
<i>Honesty in Env’tl. Analysis & Legislation v. Cent. Puget Sound Growth Mgmt. Hearings Bd.</i> , 96 Wn. App. 522, 979 P.2d 864 (1999)	5, 14

	Page
<i>Isla Verde Int'l Holdings, Inc. v. City of Camas</i> , 146 Wn.2d 740, 49 P.3d 867 (2002)	11
<i>Keystone Bituminous Coal Ass'n v. DeBenedictis</i> , 480 U.S. 470, 107 S. Ct. 1232, 94 L. Ed. 2d 472 (1987)	9
<i>Kitsap Alliance of Prop. Owners v. Cent. Puget Sound Growth Mgmt. Hearings Bd.</i> , 160 Wn. App. 250, 255 P.3d 696 (2011)	5, 14, 16-17
<i>Koontz v. St. Johns River Water Mgmt. Dist.</i> , ___ U.S. ___, 133 S. Ct. 2586, 186 L. Ed. 2d 697 (2013)	1-2, 6-8, 10, 16-18
<i>Levald, Inc. v. City of Palm Desert</i> , 998 F.2d 680 (9th Cir. 1993)	8
<i>Levin v. City & Cnty. of San Francisco</i> , No. 3:14-cv-03352-CRB, 2014 WL 5355088 (N.D. Cal. Oct. 21, 2014)	9, 14
<i>Lingle v. Chevron U.S.A. Inc.</i> , 544 U.S. 528, 125 S. Ct. 2074, 161 L. Ed. 2d 876 (2005)	2
<i>Manocherian v. Lenox Hill Hospital</i> , 643 N.E.2d 479, 618 N.Y.S. 385 (1994), <i>cert. denied</i> , 514 U.S. 1109 (1995)	14
<i>Margola Assocs. v. Seattle</i> , 121 Wn.2d 625, 854 P.2d 23 (1993)	5
<i>Nollan v. California Coastal Commission</i> , 483 U.S. 825, 107 S. Ct. 3141, 97 L. Ed. 2d 677 (1987)	1-2, 5-8, 12, 14-19
<i>Northern Illinois Home Builders Association, Inc. v. County of Du Page</i> , 649 N.E.2d 384, 208 Ill. Dec. 328 (1995)	14
<i>Orion Corp. v. State</i> , 109 Wn. 2d 621, 747 P.2d 1062 (1987)	5, 16
<i>Parking Ass'n of Georgia, Inc. v. City of Atlanta, Ga.</i> , 515 U.S. 1116, 115 S. Ct. 2268, 132 L. Ed. 2d 273 (1995)	15
<i>Pennsylvania Coal Co. v. Mahon</i> , 260 U.S. 393, 43 S. Ct. 158, 67 L. Ed. 322 (1922)	17

	Page
<i>Peste v. Mason County</i> , 133 Wn. App. 456, 136 P.3d 140 (2006)	5
<i>Presbytery of Seattle v. King Cnty.</i> , 114 Wn. 2d 320, 787 P.2d 907 (1990)	16
<i>Richardson v. Cox</i> , 108 Wn. App. 881, 26 P.3d 970 (2001)	11
<i>Sintra, Inc. v. City of Seattle</i> , 131 Wn. 2d 640, 935 P.2d 555 (1997)	16, 18
<i>Sparks v. Douglas County</i> , 127 Wn.2d 901, 904 P.2d 738 (1995)	18
<i>Suitum v. Tahoe Reg'l Planning Agency</i> , 520 U.S. 725, 117 S. Ct. 1659, 137 L. Ed. 2d 980 (1997)	5
<i>Town of Flower Mound v. Stafford Estates Ltd. P'ship</i> , 135 S.W.3d 620, 47 Tex. Sup. Ct. 497 (2004)	14

Statutes

RCW 64.04.130	10
RCW 82.02.020	2

San Juan County Codes

SJCC 18.30.150	3
SJCC 18.30.160(E)(4)	11
SJCC 18.80.020	3

Miscellaneous

Callies, David L., <i>Regulatory Takings and the Supreme Court: How Perspectives on Property Rights Have Changed from Penn Central to Dolan, and What State and Federal Courts are Doing About It</i> , 28 Stetson L. Rev. 523 (1999)	15
---	----

	Page
Pensley, D.S., <i>Real Cities, Ideal Cities: Proposing a Test of Intrinsic Fairness for Contested Development Exactions</i> , 91 Cornell L. Rev. 699 (2006)	15
Sandefur, Timothy, <i>The Timing of Facial Challenges</i> , 43 Akron L. Rev. 51 (2010)	8

INTRODUCTION

This Growth Management Act appeal highlights the conflict between a landowner's right to use his property as a traditional shoreline residence and San Juan County's desire to lock private property into "buffers" in order to provide the public with environmental benefits. The County's decision to condition approval of any new development of a shoreline property upon the dedication of a buffer subjects its Critical Areas Ordinance update to heightened scrutiny under the constitutional "essential nexus" and "rough proportionality" standards of *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). Together, the nexus and proportionality tests 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, 186 L. Ed. 2d 697 (2013).

This amicus brief focuses on the County's "water quality" buffer provisions in order to assist the Court in reviewing Common Sense Alliance's

(CSA) unconstitutional conditions claims.¹ As discussed below, the water quality buffers are designed to mitigate for *all* pollution entering and crossing over the regulated properties, including pollution/stormwater caused by neighboring land uses (including public roads). Therein lies the County's key constitutional failure: it does not limit the size of the buffers to mitigate only those negative externalities caused by the conditioned development proposal. Because the County cannot meet its burden under *Nollan* and *Dolan*, the County's water quality buffer requirements facially violate the unconstitutional conditions doctrine (and are unlawful and void under RCW 82.02.020, which incorporates the constitutional standards into state law).

ISSUE ADDRESSED BY AMICUS BRIEF

Whether the County's mandatory water quality buffers violate the "essential nexus" and "rough proportionality" requirements of *Nollan* and *Dolan* where the buffers are exacted as a mandatory condition on approval

¹ 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 (quoting *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 547, 125 S. Ct. 2074, 161 L. Ed. 2d 876 (2005)); *see also Dolan*, 512 U.S. at 385 (invoking "the well-settled doctrine of 'unconstitutional conditions'"). The doctrine of unconstitutional conditions, which has been a staple of U.S. Supreme Court case law since the late nineteenth century, "vindicates the Constitution's enumerated rights by preventing the government from coercing people into giving them up." *Id.*

of any new development of a shoreline property, without any showing that the pollution/stormwater problem is caused by the proposed development.

SUMMARY OF SAN JUAN COUNTY'S WATER QUALITY BUFFER PROVISIONS

San Juan County's 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 18.80.020; SJCC 18.30.150 (Wetlands) and Table 3.6. The purpose of the buffer is to ensure that at least 60% of the pollutants that may be suspended in stormwater entering and crossing over the property is filtered out of the water before it reaches the shoreline. *Id.* To meet its stated goal, the County developed a formula (Table 3.6) that sets the size of the mandatory buffer based on how much property would have to be set aside as a natural vegetation area to meet the County's pollution removal standard. SJCC 18.30.150 (Wetlands) and Table 3.6. The formula, which varies buffer widths based on intensity of development, does not require that the County determine the actual volume of stormwater or the presence (and type) of pollutants entering a shoreline lot. *Id.* Nor does the formula require the County to identify the source of any pollutants or stormwater. *Id.* And, most important in regard to Common Sense Alliance's constitutional challenge, 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 of the buffers to the actual impacts caused by the proposed development. *Id.*

The Growth Board's decision in this case confirms that the County's water quality buffers are not limited to mitigating that portion of the stormwater/pollution problem is attributable to any proposed development. In reviewing the regulations, the Board determined that San Juan County failed to comply with the GMA's "best available science" requirement when it set the buffer sizes based on incomplete and uncertain science. *Friends of the San Juans, et al. v. San Juan County*, GMHB No. 13-2-0012c, at 58-60 (FDO Sept. 6, 2013) (Noting that the County had not sufficiently "take[n] into account the intensity of impacts from adjacent land uses" when developing its water quality buffers and "the lack of information regarding an appropriate percentage for pollutant removal" in the county's scientific record.). But, instead of requiring the County to determine the actual pollution loads created by new development, the Board directed the County to adopt a "precautionary or no risk" approach to water quality buffer by *increasing* the burden of filtering the region's stormwater runoff on individual shoreline property owners. *Id.* at 51, 55, 58 & n.179, 59-60.

ARGUMENT

I

THE COUNTY'S CAO UPDATE VIOLATES THE DOCTRINE OF UNCONSTITUTIONAL CONDITIONS

San Juan County's water quality buffer regulations are unquestionably subject to heightened scrutiny under the unconstitutional conditions doctrine:² “[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.” *Honesty in Env'tl. Analysis & Legislation v. Cent. Puget Sound Growth Mgmt. Hearings Bd.*, 96 Wn. App. 522, 533, 979 P.2d 864 (1999); *see also Kitsap Alliance of Prop. Owners v. Cent. Puget Sound Growth Mgmt. Hearings Bd.*, 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.”).

² A facial challenge alleges that the mere enactment of a regulation violates the Takings Clause. *See Suitum v. Tahoe Reg'l Planning Agency*, 520 U.S. 725, 736 n.10, 117 S. Ct. 1659, 137 L. Ed. 2d 980 (1997); *Peste v. Mason County*, 133 Wn. App. 456, 471-72, 136 P.3d 140 (2006). A facial claim is ripe for review immediately upon the enactment of the challenged ordinance. *Suitum*, 520 U.S. at 736 n.10; *see also Margola Assocs. v. Seattle*, 121 Wn.2d 625, 647, 854 P.2d 23 (1993) (analyzing facial takings claim under *Nollan*); *Orion Corp. v. State*, 109 Wn.2d 621, 653, 747 P.2d 1062 (1987) (same).

A. The County Bears the Burden of Demonstrating That Its Buffer Program Satisfies the Nexus and Proportionality Tests

The nexus and rough proportionality tests of *Nollan* and *Dolan* are important safeguards of private property rights during the land-use permitting process. *Koontz*, 133 S. Ct. at 2594. The tests protect permit applicants by recognizing the limited circumstances in which the government may lawfully condition permit approval upon the dedication of a property interest: (1) the government *may* only require a landowner to dedicate property to a public use where the dedication is necessary to mitigate for the negative impacts of the proposed development on the public; but (2) the government *may not* use the permit process to coerce landowners into giving the public property that the government would otherwise have to pay for. *Koontz*, 133 S. Ct. at 2594-95; *see also Dolan*, 512 U.S. at 385 (“[G]overnment may not require a person to give up the constitutional right . . . to receive just compensation when property is taken for a public use—in exchange for a discretionary benefit [that] has little or no relationship to the property.”). The heightened scrutiny demanded by *Nollan* and *Dolan* is essential because landowners “are especially vulnerable to the type of coercion that the unconstitutional conditions doctrine prohibits because the government often has broad discretion to deny a permit that is worth far more than property it would like

to take.” *Koontz*, 133 S. Ct. at 2594. Thus, it is of critical importance that the burden of showing that a condition satisfies nexus and proportionality is placed on the government, not the landowner. *Dolan*, 512 U.S. at 391.

Under the nexus test, the government must show a sufficient connection between the condition imposed and the impact that a new development will have on the public. *Nollan*, 483 U.S. at 836-37. To make this showing, the government must first “identify a public problem or problems that the condition is designed to address.” *Burton v. Clark Cnty.*, 91 Wn. App. 505, 520, 958 P.2d 343 (1998). Next, the government must show that the proposed development “will create or exacerbate the identified public problem.” *Id.* at 521. And finally, the government must demonstrate that its “proposed condition or exaction (which in plain terms is just the government’s proposed solution to the identified public problem) tends to solve, or at least to alleviate, the identified public problem.” *Id.* at 522. “In other words, the government must show a relationship (‘nexus’) between the proposed solution and the identified problem, and such relationship cannot exist unless the proposed solution has a tendency to solve or alleviate the identified problem.” *Id.*; *see also id.* at 521 (An essential nexus “will not exist if the development will not adversely impact the identified public problem.”).

If an essential nexus exists, then the government must next prove that the condition is sufficiently “related . . . to the impact of the proposed development.” *Dolan*, 512 U.S. at 391-92. To satisfy the rough proportionality requirement, the government must show that the development condition is roughly proportional to that portion of the public problem that is created or exacerbated by a landowner’s development. *Dolan*, 512 U.S. at 389 (generalized connections are “too lax to adequately protect petitioner’s right to just compensation if her property is taken for a public purpose”). A condition must satisfy both the nexus and proportionality tests; otherwise, the exaction will violate the unconstitutional conditions doctrine, predicated on the protections guaranteed by the Takings Clause, and must be invalidated. *Koontz*, 133 S. Ct. at 2594.

The fact that CSA asserted facial claims does not alleviate the County’s burden under *Nollan* and *Dolan*. It is true that, generally speaking, a “plaintiff who argues that a law is facially invalid is claiming that the law is not, and never can be, applied in a way that satisfies constitutional restrictions.” Timothy Sandefur, *The Timing of Facial Challenges*, 43 Akron L. Rev. 51, 53 (2010). But challenges implicating the Takings Clause are subject to a different standard. *Levald, Inc. v. City of Palm Desert*, 998 F.2d 680, 688 (9th Cir. 1993) (“different rules adhere in the facial takings context

and other contexts”). “‘In the takings context, the basis of a facial challenge is that the very enactment of the statute has reduced the value of the [plaintiff’s] property or has effected a transfer of a property interest.’ ” *Guggenheim v. City of Goleta*, 638 F.3d 1111, 1119 (9th Cir. 2010) (en banc) (citation omitted); *see also Keystone Bituminous Coal Ass’n v. DeBenedictis*, 480 U.S. 470, 494, 107 S. Ct. 1232, 94 L. Ed. 2d 472 (1987) (The issue in a facial takings challenge is simply whether “the mere enactment of a statute constitutes a taking” of the claimant’s property.). Thus, in the context of CSA’s exactions claim, the question before the Court is whether the enactment of San Juan County’s water quality buffer regulations conditions permit approval upon the dedication of property that is not sufficiently related to an identified impact of proposed land uses. *See Levin v. City & Cnty. of San Francisco*, No. 3:14-cv-03352-CRB, 2014 WL 5355088, at *9-*12 (N.D. Cal. Oct. 21, 2014). And, according to the U.S. Supreme Court, the County bears the burden of proof on that question. *Dolan*, 512 U.S. at 391.

B. As Written, the County’s Water Quality Buffer Provisions Cannot Satisfy the Nexus and Proportionality Tests

San Juan County cannot satisfy its constitutional burden because its buffers are expressly intended to mitigate for *all* pollution entering and crossing over the regulated properties, including pollution/stormwater caused by neighboring land uses.

Neither the County nor Friends of the San Juans (FOSJ) can reasonably argue that a water quality buffer is not a protected property interest. *Koontz*, 133 S. Ct. at 2598 (“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.”). After all, one of the permit conditions invalidated in *Dolan* was the city’s demand for an oversized stream buffer (termed a “greenway”) intended to intercept stormwater runoff. *Dolan*, 512 U.S. at 378, 394-95. Washington state property law specifically recognizes that a buffer is a valuable property right belonging to the landowner:

A development right, easement, covenant, restriction, or other right, or any interest less than the fee simple, to protect, preserve, maintain, improve, restore, limit the future use of, or conserve for open space purposes, any land or improvement on the land, whether the right or interest be appurtenant or in gross, may be held or acquired by any state agency, federal agency, county, city, town, or metropolitan municipal corporation, nonprofit historic preservation corporation, or nonprofit nature conservancy corporation. *Any such right or interest shall constitute and be classified as real property.*

RCW 64.04.130 (emphasis added); *see also Casitas Mun. Water Dist. v. United States*, 543 F.3d 1276, 1292 (Fed. Cir. 2008) (“[T]here is little doubt that the preservation of the habitat of an endangered species is for government and third party use—the public—which serves a public

purpose.”). The CAO effects a public dedication of a buffer by requiring that the applicant designate the buffer on a binding public document, such as a site plan. *See* SJCC 18.30.160(E)(4); *see also Richardson v. Cox*, 108 Wn. App. 881, 884, 890-91, 26 P.3d 970 (2001) (under Washington state property law, a public dedication can be achieved via notice on a binding public document); *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).

Dolan illustrates of San Juan County’s failings. In *Dolan*, the City of Tigard had adopted comprehensive land use regulations that imposed mandatory conditions on Florence Dolan’s permit to expand her plumbing and electrical supply store. 512 U.S. at 377. Accordingly, the city conditioned permit approval upon Ms. Dolan’s agreement to dedicate some of her land as a stream buffer and a bicycle path. 512 U.S. at 377-78. Ms. Dolan refused the conditions and sued the city, alleging that the

development conditions violated the Takings Clause and should be enjoined. The U.S. Supreme Court held that the city had established a nexus under *Nollan* between both conditions and the expansion's impact, but nevertheless the conditions were still unconstitutional, because they lacked a "degree of connection between the exactions and the projected impact of the proposed development." *Id.* at 386-88. There must be "rough proportionality"—*i.e.*, "some sort of individualized determination that the required dedication is related both in nature and extent to the impact of the proposed development." *Id.* at 391. Although the city had shown that expanding the size of Ms. Dolan's parking lot could result in increased traffic and stormwater runoff, it had not shown that the city's demands for a greenway and bicycle path were calculated to mitigate for the actual impacts of her development proposal. *Id.* at 383-84, 391. The Court, therefore, invalidated the permit conditions. *Id.*

San Juan County's water quality buffer regulations fail for the same reason. In developing its buffer program, the County did nothing more than identify a public problem and propose an easy solution: forcing landowners to use private shoreline property to filter pollutants from stormwater runoff, so as to decrease the amount of pollutants reaching the shorelines. The County's regulations, however, contain no requirement that the County

identify the source of the stormwater before exacting buffers as a condition on new development. *Friends of the San Juans*, GMHB No. 13-2-0012c, at 60 (The County did not “take into account the intensity of impacts from adjacent land uses” when developing its water quality buffers.). In other words, the County failed to demonstrate that any individual property owner *caused* the problem that the County’s buffer requirement seeks to address. Consequently, it cannot demonstrate what portion of pollutant/stormwater is attributable to shoreline landowners, and cannot satisfy the requirement that the buffers are proportional to that portion of the public problem caused by new development. The County’s water quality buffer program uses the land use permit process to exact land from shoreline property owners in violation of the unconstitutional conditions doctrine and should be invalidated and stricken from the County Code.

C. Critical Areas Ordinances Are Not Exempt from the Constitutional Nexus and Proportionality Standards

FOSJ claims that the nexus and proportionality tests should only apply to permit decisions imposing conditions on new development—not to legislation mandating that permits be issued subject to a dedication of private property to the public. FOSJ Resp. Br. at 29-30. However, FOSJ cannot cite any binding authority for making such a distinction. That is because Washington Courts have repeatedly held that legislation is subject to the

nexus and proportionality standards. *See, e.g., Kitsap Alliance*, 160 Wn. App. at 273; *Honesty in Envtl. Analysis & Legislation*, 96 Wn. App. at 534; *Benchmark Land Co. v. City of Battle Ground*, 103 Wn. App. 721, 723-28, 14 P.3d 172 (2000); *affirmed on other grounds*, 146 Wn.2d 685, 49 P.3d 860 (2002). So, too, have many other federal and state courts.³ FOSJ does not provide any argument for overturning this well-settled line of precedents.

Even if this Court were to reconsider this issue, there is no principled basis for adopting a per se rule that would exclude legislative exactions from

³ *See, supra*, fn. 1 (listing cases that applied the nexus and proportionality tests to an ordinance); *see also Levin*, 2014 WL 5355088, at *9-*12 (invalidating tenant relocation fee ordinance under *Nollan* and *Dolan*); *Town of Flower Mound v. Stafford Estates Ltd. P'ship*, 135 S.W.3d 620, 635, 641-42, 47 Tex. Sup. Ct. 497 (2004) (*Dolan* applied to impact fee ordinance, refusing to adopt a bright-line adjudicative/legislative distinction); *Home Builders Association of Dayton and the Miami Valley v. City of Beavercreek*, 729 N.E.2d 349, 353-56, 89 Ohio St. 3d 121 (2000) (*Dolan* applied to impact fee ordinance because there is no reason to distinguish between adjudicative and legislatively-imposed exactions); *Curtis v. Town of South Thomaston*, 708 A.2d 657, 660, 1998 ME 63 (1998) (*Dolan* applied to fire protection ordinance requiring developers to construct fire pond); *City of Portsmouth v. Schlesinger*, 57 F.3d 12, 16 (1st Cir. 1995) (*Dolan* applied to a low-income housing impact fee that was imposed by ordinance); *Northern Illinois Home Builders Association, Inc. v. County of Du Page*, 649 N.E.2d 384, 208 Ill. Dec. 328 (1995) (*Dolan* applied to exaction imposed pursuant to transportation fee ordinance); *Manocherian v. Lenox Hill Hospital*, 643 N.E.2d 479, 483, 618 N.Y.S. 385 (1994), *cert. denied*, 514 U.S. 1109 (1995) (*Dolan* applied to rent stabilization ordinance).

the protections of *Nollan* and *Dolan*.⁴ Indeed, the conditions that the Court invalidated in *Nollan* and *Dolan* were mandated by general legislation.⁵ In both cases, just as in the present case, the government's exaction policy was to be applied in a predetermined and consistent basis. The determinative factor present in *Nollan* and *Dolan* was that a government policy was applied

⁴ See *Parking Ass'n of Georgia, Inc. v. City of Atlanta, Ga.*, 515 U.S. 1116, 1118, 115 S. Ct. 2268, 2269, 132 L. Ed. 2d 273 (1995) (Thomas, J., dissenting from denial of certiorari) (“The distinction between sweeping legislative takings and particularized administrative takings appears to be a distinction without a constitutional difference.”); David L. Callies, *Regulatory Takings and the Supreme Court: How Perspectives on Property Rights Have Changed from Penn Central to Dolan, and What State and Federal Courts are Doing About It*, 28 Stetson L. Rev. 523, 567-68 (1999) (There is “little doctrinal basis beyond blind deference to legislative decisions to limit [the] application [of *Dolan*] only to administrative or quasi-judicial acts of government regulators.”); D.S. Pensley, *Real Cities, Ideal Cities: Proposing a Test of Intrinsic Fairness for Contested Development Exactions*, 91 Cornell L. Rev. 699, 704 (2006) (No basis exists “for giving greater deference to exactions imposed through legislative enactment than to those imposed through adjudication.”).

⁵ See *Nollan*, 483 U.S. at 828, 833 n.2 (Coastal Commission applied California's Public Resources Code Section 30212(a) and applicable regulations to the Nollans' permit approval decision); *Dolan*, 512 U.S. at 377-78 (the ordinance “requires that new development facilitate this plan by dedicating land for pedestrian pathways”); *id.* at 379-80 (“The CDC establishes the following standard for site development review approval: ‘Where landfill and/or development is allowed within and adjacent to the 100-year floodplain, the City shall require the dedication of sufficient open land area for greenway adjoining and within the floodplain. This area shall include portions at a suitable elevation for the construction of a pedestrian/bicycle pathway within the floodplain in accordance with the adopted pedestrian/bicycle plan.’”(citation omitted)).

to the property owner in a manner that demanded a dedication of private property in exchange for development approval—the very same factor is presented by San Juan County’s water quality buffer regulation.

II

KITSAP ALLIANCE AND OLYMPIC STEWARDSHIP CONFLICT WITH DECISIONS OF THE U.S. AND WASHINGTON SUPREME COURTS

The County and FOSJ ask this Court to ignore binding precedent from the U.S. and Washington Supreme Courts and instead adopt the results of Division II’s decisions in *Kitsap Alliance*, 160 Wn. App. at 272-74.⁶ That case, however, erroneously read *Nollan* and *Dolan* as establishing a “due process” test. *Kitsap Alliance*, 160 Wn. App. at 272. And as a result, Division II supplanted the heightened scrutiny required by *Nollan*, *Dolan*, and *Koontz* with a “rational basis” test that simply asked whether the government engaged in a “reasoned process” when developing its buffer requirements. *Kitsap Alliance*, 160 Wn. App. at 272-74 (“If the local government used the

⁶ The County and FOSJ fail to explain why this Court should follow a conflicting appellate decision where Washington’s Supreme Court has long held that decisions of the U.S. Supreme Court interpreting the Takings Clause of the U.S. Constitution “set[] a minimum floor of protection, below which state law may not go.” *Orion Corp. v. State*, 109 Wn. 2d 621, 652, 747 P.2d 1062 (1987); *see also Presbytery of Seattle v. King Cnty.*, 114 Wn. 2d 320, 327-37, 787 P.2d 907 (1990); *Sintra, Inc. v. City of Seattle*, 131 Wn. 2d 640, 656-57, 935 P.2d 555 (1997).

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.”).

Because the Court misunderstood the doctrinal basis for the nexus and proportionality tests, its inquiry focused on a substantively different question than that answered by *Nollan* and *Dolan*. The decision asked only whether the government engaged in a “reasoned process” to determine “the necessity of protecting functions and values in the critical areas,” *i.e.*, the alleged public need. *Kitsap Alliance*, 160 Wn. App. at 272-74. But contrary to Division II’s analysis, 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. Indeed, a determination of public need, without more, has never been sufficient to justify a regulation that appropriates property for a public use. *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.”). 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 Armstrong v. United States*, 364 U.S. 40, 49, 80 S. Ct. 1563, 1569, 4 L. Ed. 2d 1554 (1960) (The fundamental purpose of the Takings Clause, which is “to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.”).

Division II’s decision to allow any scientific study, no matter how generalized or imprecise, to require the uncompensated dedication of conservation easements on all new shoreline development stands in direct conflict with *Nollan*, *Dolan*, and *Koontz*, and conflicts with decisions from Washington’s Supreme Court. *See Sintra, Inc. v. City of Seattle*, 131 Wn.2d at 670-74; *Sparks v. Douglas County*, 127 Wn.2d 901, 914-16, 904 P.2d 738 (1995); *see also Burton v. Clark Cnty.*, 91 Wn. App. at 523. This Court should adhere to its own precedents, which are consistent with those of the State and U.S. Supreme Courts.

CONCLUSION

Amicus PLF respectfully joins Petitioners Common Sense Alliance and the P.J. Taggares Company in requesting that the Court reverse the decision of the superior court, declare the regulations unconstitutional and void, and remand this matter to the County for further legislative action consistent with the requirements of *Nollan* and *Dolan*.

DATED: March 2, 2015.

Respectfully submitted,



BRIAN T. HODGES
WSBA No. 31976

*Attorney for Amicus Curiae
Pacific Legal Foundation*