Supreme Court No. 92251-9
Court of Appeals No. 72235-2-I, consolidated with 72236-1-I

IN THE SUPREME COURT OF
THE STATE OF WASHINGTON

COMMON SENSE ALLIANCE, P.J. TAGGARES COMPANY, et al.,

Cross-Petitioners,

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

CROSS-PETITION FOR REVIEW

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IDENTITY OF PETITIONERS

Cross-petitioner Common Sense Alliance (CSA) is a private, nonprofit corporation made up of San Juan County property owners. P.J. Taggares Co. owns land on Blakely Island and is directly and adversely impacted by San Juan County's critical areas ordinance update.

CITATION TO COURT OF APPEALS' DECISION

CSA seeks review of the Court of Appeals' August 12, 2015, decision in *Friends of the San Juans, et al. v. San Juan County* (Div. I, No. 72235-2-I, cons. with 72236-1-I,), and Order Denying Reconsideration (Sept. 3, 2015) (Cross-Petition Appendix A).

ISSUE PRESENTED FOR REVIEW

Does the existence of a generalized scientific study, concluding that preserving shorelines may protect the environment, obviate the constitutional requirement that the government demonstrate that a land use will impact the shoreline before exacting property in exchange for permit approvals, pursuant to the "essential nexus" and "rough proportionality" tests set out in *Nollan v. California Coastal Commission*, 483 U.S. 825, 107 S. Ct. 3141, 97 L. Ed. 2d 677 (1987), *Dolan v. City of Tigard*, 512 U.S. 374, 114 S. Ct. 2309, 129 L. Ed. 2d 304 (1994), and incorporated into RCW 82.02.020?

INTRODUCTION

This cross-petition seeks review of San Juan County's 2012 critical areas ordinance update, which conditions the issuance of new land-use permits on shoreline properties upon the owners' dedication of significant portions of their land as conservation areas. The County's decision to use the permit process as a tool to require land dedications subjects its ordinance to the nexus and proportionality tests as set out in *Nollan* and *Dolan*, and as incorporated by RCW 82.02.020. Together, the nexus and proportionality tests, which constitute a special application of the doctrine of unconstitutional conditions, 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, 2599, 186 L. Ed. 2d 697 (2013). The County has never made this necessary showing. Instead, it argues that the government does not have to show that a permit condition is calculated to mitigate only for the negative externalities caused by the proposed land use when the government has relied on a scientific report indicating that private property could benefit the public if dedicated to

an environmental use. The Court of Appeals decision to uphold the critical areas ordinance without a showing of nexus and proportionality raises significant questions of constitutional law upon which the lower courts are in conflict with decisions from this Court and the U.S. Supreme Court, and involves questions of significant public interest.

STATEMENT OF THE CASE

A. The Ordinance

In 2012, San Juan County adopted a series of updates to its critical areas ordinance (CAO). Pet. App. A at 2; Pet. App. C. In part, the updates require that all shoreline property owners dedicate several conservation areas—habitat, water quality, and tree protection buffers—upon the County's determination that a proposed land use will occur within 200 feet of a habitat area. San Juan County Code (SJCC) 18.30.160. Because the County has separately determined that chinook salmon habitat encompasses all shorelines, the new CAO buffers are imposed automatically on all applications for development on shoreline properties. SJCC 18.35.115.A. For the sake of economy, CSA will focus its argument on the County's water

quality buffer as being representative of the common error shared among its various buffer requirements.[1]

The 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 18.30.150; Table 3.6 (attached as Cross-Pet. App. B). The purpose of the buffer is to ensure that 60%-70% of the pollutants that may be suspended in storm water entering and crossing over the property is filtered out before the runoff reaches the shoreline. *Id.* To meet that goal, the County developed a formula that sets the size of the buffer based on how much property would have to be set aside to achieve its pollution removal standard. *Id.*

On the surface, the formula appears "site-specific," because Table 3.6 purports to vary buffer widths based on intensity of development and geographical conditions. But the appearance of tailoring disappears under any scrutiny. First, the CAO does not require that the County determine the actual volume of storm water or the presence of pollutants entering a shoreline lot. *Id.* Second, the formula does not require the County to identify

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[1] The other buffers are addressed at length in the briefing below. By focusing its petition argument on the water quality buffer, CSA does not waive its right to address the other buffer requirements on the merits.

the source of any pollutants or runoff. *Id.* And third, 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 and scope of the buffers to the actual impacts caused by the proposed development. *Id.*

B. The Rationale for the Water Quality Buffer

San Juan County's "best available science" record confirms that the water quality buffers are intended to force shoreline landowners to mitigate for pollution and runoff caused by neighboring properties. The compiled studies (summarized in the County's Synthesis of Best Available Science[2]) comment on the potential threats posed by a wide range of contaminants that can be found in storm water runoff and the range of benefits that a fully vegetated and undeveloped shoreline buffer could provide to the marine environment, including the land's potential to filter and store pollutants in soil and root systems. Synthesis at Ch. 2, p. 40. The science, however, cautions that, due to a variety of site-specific considerations, "buffers are not always the best way to protect the water quality." *Id.* at 14.

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[2] Available at http://www.co.san-juan.wa.us/cdp/docs/CAO_BASsynthesis/BAS_SYN(FINAL)_V2_Protected.docx.pdf (last visited Sept. 28, 2015).

For a water quality buffer to function as intended, the government must first determine the actual pollutant load and flow rate entering and exiting the property. *Id.* at 14-15. Then, and only then, can the government determine whether a particular development proposal will or will not have any impact on water quality. *Id.* The County, however, did not include any studies determining the volume of runoff entering and leaving the shoreline, nor did it include any studies identifying and/or measuring containment concentrations in the area:

> [P]ollutant loading and transport factors are, in some cases, left out of the procedure not only for the sake of maintaining simplicity in the regulations, but also because of the high variability of these factors within a single parcel, the need for staff with advanced geomorphic and geotechnical skills and knowledge, and the cost to analyze discharge rates, water quality, and wetland exposure to contaminants.

Cross-Pet. App. B at Finding XI(t); *see also* Synthesis at Ch. 2, pp.14-15. Instead, the County *assumed* the presence of contaminants and *assumed* an identical incoming flow rate on every shoreline property throughout the region. Then, based on those assumptions, the County developed a matrix (Table 3.6) to assure a theoretical 60%-70% filtration rate.

But, as noted in the Synthesis, setting a filtration rate without knowing the actual pollutant load and flow rate is meaningless: "A 95%

pollutant removal efficiency means nothing if the incoming runoff is severely polluted, and a 10% pollutant removal efficiency can be outstanding if the incoming runoff is polluted only minimally." *Id.* at 59. Thus, by design, the County's buffers are neither intended to mitigate for an identified environmental impact (the nexus requirement), nor are they limited to only that portion of a public problem that is caused by proposed development (the proportionality requirement). Instead, Table 3.6 operates to ensure that the buffer is large enough to filter the region's assumed runoff and pollutant loads. Synthesis at Ch. 2, pp. 44-45 (The buffers are intended to mitigate for polluted runoff originating throughout the entire "contributing area.").

C. Proceedings Below

CSA raised its unconstitutional conditions claim in appeals to the San Juan County Superior Court and Division I of Washington's Court of Appeals.[3] CSA argued that the ordinance, on its face, was invalid because it imposed an unconstitutional condition under *Nollan* and *Dolan*, and as that doctrine is incorporated into RCW 82.02.020. The County could not satisfy its burden of demonstrating that its buffer program satisfied the nexus and

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[3] RCW 34.05.570(3)(a) (A reviewing court shall invalidate an ordinance upon a showing that, "[T]he order, or the statute or rule on which the order is based, is in violation of constitutional provisions on its face or as applied[.]").

rough proportionality tests, and made no attempt to do so. *Dolan*, 512 U.S. at 391 (the burden of showing that a condition satisfies nexus and proportionality is placed on the government, not the landowner). Under the nexus test, the County was required to "show that the development . . . will create or exacerbate the identified public problem." *Burton v. Clark County*, 91 Wn. App. 505, 521, 958 P.2d 343 (1998); *see also Nollan*, 483 U.S. at 836-37. If the County was able to establish a nexus, it must next "show that its proposed solution to the identified public problem is 'roughly proportional' to that part of the problem that is created or exacerbated by the landowner's development." *Burton*, 91 Wn. App. at 523; *see also Dolan*, 512 U.S. at 391 (A condition must be "related both in nature and extent to the impact of the proposed development."). Stated another way, the "'rough proportionality' test measures the relationship between the conditions placed on the use of property and the negative impacts of that use that would justify the denial of the proposed use in the first instance." *Sintra, Inc. v. City of Seattle*, 131 Wn.2d 640, 676, 935 P.2d 555 (1997). The purpose of these tests is to determine whether the government is taking advantage of the permit to force "some people alone to bear public burdens, which in all

fairness and justice, should be borne by the public as a whole." *Armstrong v. United States*, 364 U.S. 40, 49, 80 S. Ct. 1563, 4 L. Ed. 2d 1554 (1960).

CSA explained that, by imposing a water quality buffer on permits to develop shoreline property without first identifying the presence and source of pollutants in storm water, the ordinance improperly relieved the County of its burden of demonstrating that the proposed development was the cause of such pollution—let alone the County's burden of establishing the necessary relationship between the exaction and the actual impacts of development. Appellants' Br. at 11-12, 18-22. Similar problems plagued the County's other buffer requirements. *See id.* at 14-18.

Division I, however, adopted the County's argument that the buffer dedication could be upheld without subjecting the CAO to heightened nexus and proportionality scrutiny. Thus, instead of following *Nollan* and *Dolan*, the court concluded that a local government's reliance on science when developing a mandatory dedication will automatically satisfy the nexus and proportionality tests, without engaging the required analysis: "Because the county had considered the best available science and employed a reasoned process in adopting its shoreline critical areas ordinance . . . permit decisions . . . based on those regulation would satisfy the nexus and rough

proportionality tests." Pet. App. A at 9 (internal citations omitted). CSA filed a motion for reconsideration, which was denied. This petition follows.

REASONS FOR GRANTING THE PETITION

I

THE LOWER COURT'S REFUSAL TO RECOGNIZE WELL-SETTLED PROPERTY RIGHTS RAISES A SIGNIFICANT QUESTION OF CONSTITUTIONAL LAW

The opinion below concludes, without any analysis, that the County's buffer requirement did not constitute an exaction subject to *Nollan* and *Dolan*. Pet. App. A at 15. In reaching that conclusion, however, the lower court failed to discuss—let alone distinguish—the large body of case law holding that conservation areas are property interests, including *Dolan* in which the U.S. Supreme Court invalidated a stream buffer as an unconstitutional condition and two Court of Appeals cases holding critical area buffers subject to the nexus and proportionality tests.[4] *See Dolan*, 512

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[4] *See also 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).

U.S. at 393-94; *Kitsap Alliance of Prop. Owners v. Cent. Puget Sound Growth Mgmt. Hearings Bd. (KAPO)*, 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."); *Honesty in Envtl. Analysis Legislation v. Cent. Puget Sound Growth Mgmt. Hearings Bd. (HEAL)*, 96 Wn. App. 522, 533, 979 P.2d 864 (1999) ("[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.").

The decision below also failed to acknowledge that Washington state property law expressly recognizes that a conservation buffer is a valuable interest in real property: "A development right, easement, covenant, restriction, or other right, or any interest less than the fee simple, to protect . . . or conserve for open space purposes . . . constitutes and is classified as real property." RCW 64.04.130; *see also Klickitat County v. Wash. State Dep't of Revenue*, 2002 WL 1929480, at *5-6 (Bd. Tax App. June 12, 2002) (An open space area constitutes property and the holder of the conservation interest must pay property taxes unless an exemption applies). Under both

Washington state property law and federal constitutional law, a public dedication of a property interest can be achieved via notice on a binding public document, such as a site plan, which is the method employed by the County's CAO. *See, e.g.*, *Richardson v. Cox*, 108 Wn. App. 881, 884, 890-91, 26 P.3d 970 (2001); *Nollan*, 483 U.S. at 833 n.2; *id.* at 859 (Brennan, J., dissenting) (dedication achieved via a deed restriction).

II

THE COURT OF APPEALS' DECISION CONFLICTS WITH DECISIONS OF THIS COURT AND THE U.S. SUPREME COURT BY CREATING AN EXCEPTION TO *NOLLAN* AND *DOLAN*

The decision below applied a rule that authorizes a local government to exact private property from permit applicants without limiting the size and scope of the dedication to only that which is necessary to mitigate for adverse impacts caused by the proposed development, so long as the government relied on scientific reports showing that dedications, in general, may provide benefits to the public. Pet. App. A at 9 (citing *KAPO*, 160 Wn. App. at 273-74). The decision to allow a scientific study, no matter how generalized, to dictate buffers on all new shoreline development is in direct conflict with *Nollan* and *Dolan*, which require the government to demonstrate that a

development condition is sufficiently related to an identified impact that the new development will have on the public to justify the exaction.

A. *KAPO* Was Abrogated by the U.S. Supreme Court

The decision below mistakenly relies on Division II's opinion in *KAPO* as establishing a less stringent standard of review for critical area dedications than that expressly required by *Nollan* and *Dolan*. Pet. App. A at 9. In *KAPO*, the Court of Appeals declined to apply nexus and proportionality scrutiny to a critical areas ordinance that required all shoreline property owners to dedicate a predetermined shoreline buffer as a mandatory condition on all new permit approvals, regardless of the impacts of development. 160 Wn. App. at 272-74. To do so, the court mistakenly characterized *Nollan* and *Dolan* as establishing a "due process" doctrine, under which a regulation is subject only to rational basis scrutiny. *Id.* at 272. Then, applying scrutiny appropriate for a due process challenge, the court concluded that *Nollan* and *Dolan* would be satisfied if the government engaged in a "reasoned process" to determine "the necessity of protecting functions and values in the critical areas" when adopting CAO buffers. *KAPO*, 160 Wn. App. at 272-74.

Since *KAPO* was decided, however, the U.S. Supreme Court clarified that 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. And contrary to Division II's due process-based analysis—which focuses on the reasonableness of the government's determination of need—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. 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 Sintra, Inc. v. City of Seattle*, 131 Wn.2d at 670-74; *Sparks v. Douglas Cnty*, 127 Wn.2d 901, 914-16, 904 P.2d 738 (1995).

Because Division II had based its decision on the wrong constitutional provision, it is unsurprising that the *KAPO* rule applied below focuses on a

substantively different question than that answered by *Nollan* and *Dolan*. The 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. *KAPO*, 160 Wn. App. at 272-74; Pet. App. A at 9. By contrast, the *Nollan* and *Dolan* tests require that government justify an exaction by demonstrating a sufficient relationship between the development condition and the impact caused by the proposed development. *Lingle v. Chevron USA, Inc.*, 544 U.S. 528, 546-47, 125 S. Ct. 2074, 161 L. Ed. 2d 876 (2005).

The U.S. Supreme Court explained this important distinction in *Lingle*, when it rejected the "substantially advances a legitimate government interest" test as a takings test, because it "reveal[ed] nothing about the magnitude or character of the burden a particular regulation imposes upon private property rights." 544 U.S. at 542. "A test that tells us nothing about the actual burden imposed on property rights, or how that burden is allocated, cannot tell us when justice might require that the burden be spread among taxpayers through payment of compensation." *Id.* at 543. Thus, in the context of the Takings Clause, a determination that a regulation serves a public need, without more, is not sufficient to justify a regulation that

appropriates property for a public use. *Id.* at 542-43; *see also 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."). By circumventing the analysis required by *Nollan* and *Dolan*, the *KAPO* rule shifts the inquiry away from the severity of 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.

B. *Nollan* and *Dolan* Apply to Conditions Mandated by General Land-use Regulations

Although the court ultimately addressed CSA's unconstitutional conditions challenge on the merits, the decision below suggests that exactions imposed under land-use regulations of general application may not be subject to the constitutional limitations of *Nollan* and *Dolan*. Pet. App. A at 14-15. There absolutely is no basis in the U.S. Supreme Court's case law for such a suggestion. Indeed, all three exactions cases decided by the U.S. Supreme Court involved conditions mandated by general legislation. *See Nollan*, 483 U.S. at 833 n.2; *id.* at 859 (Brennan, J., dissenting) (Pursuant to the California Coastal Act of 1972, a deed restriction granting the public an

easement for lateral beach access "had been imposed [by the Commission] since 1979 on all 43 shoreline new development projects in the Faria Family Beach Tract."); *Dolan*, 512 U.S. at 377-78 ("The City Planning Commission . . . granted petitioner's permit application subject to conditions imposed by the city's [Community Development Code]."); *Koontz*, 133 S. Ct. at 2592 (Florida's Water Resources Act and Wetland Protection Act require that permitting agencies impose conditions on any development proposal within designated wetlands.). Likewise, this Court has applied the nexus and proportionality standards to legislatively imposed conditions on development. *See, e.g., Margola Assocs. v. Seattle*, 121 Wn.2d 625, 647, 854 P.2d 23 (1993); *Orion Corp. v. State*, 109 Wn.2d 621, 653, 747 P.2d 1062 (1987).

III

THE OPINION MISAPPREHENDS CASE LAW INTERPRETING AND APPLYING RCW 82.02.020, AND ALLEVIATES THE GOVERNMENT OF ITS BURDEN OF PROOF

The decision below also misapprehended case law interpreting RCW 82.02.020, resulting in its failure to apply the required degree of scrutiny. The statute provides that local government can only impose those conditions on new development that "the county, city, town, or other municipal corporation can demonstrate are reasonably necessary as a direct result of the

proposed development or plat to which the dedication of land or easement is to apply." RCW 82.02.020. Our courts have long-interpreted this provision as incorporating the nexus and proportionality tests of *Nollan* and *Dolan*. *See, e.g.*, *Sparks v. Douglas Cnty*, 127 Wn.2d at 913; *Trimen Development Co. v. King Cnty.*, 124 Wn.2d 261, 274, 877 P.2d 187 (1994); *Citizens' Alliance*, 145 Wn. App. at 669; *Cobb v. Snohomish Cnty.*, 64 Wn. App. 451, 467-68, 829 P.2d 169 (1991) (Agid, J., concurring in part).

Essential to the nexus and proportionality tests is the requirement that the government make an "individualized determination that the required dedication is related both in nature and extent to the impact of the proposed development."[5] *Dolan*, 512 U.S. at 391. Government cannot satisfy its burden by simply relying on a "general impact assessment," such as the studies summarized in the Synthesis. *Id.*; *Sparks*, 127 Wn.2d at 915; *see also Isla Verde*, 146 Wn.2d at 761, 763 (Nexus "does not permit conditions that satisfy a 'reasonably necessary' standard for all new development

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[5] The burden of proving compliance with nexus and proportionality is on the government, not the property owner. *Dolan*, 512 U.S. at 391; *Sparks*, 127 Wn.2d at 912; *Citizens' Alliance*, 145 Wn. App. at 657 (facial challenge to ordinance); *Isla Verde*, 146 Wn.2d at 755-56 (administrative appeal); *Home Builders Ass'n of Kitsap Cnty. v. City of Bainbridge Island*, 137 Wn. App. 338, 346-47, 153 P.3d 231 (2007) (direct challenge).

collectively;" it requires that a condition be "reasonably necessary as a direct result of the proposed development or plat.").

The lower court misapprehended that rule when it read *Trimen* as having authorized local government to satisfy the site-specific requirement by referencing a generalized impact study, without more. Pet. App. A at 11. *Trimen* was not about whether such a study—standing alone—was sufficient to satisfy nexus and proportionality. Instead, *Trimen* turned on the question of whether an assessment of park needs based on projected population growth per new residential unit was sufficiently site-specific to satisfy the proportionality requirement. *Trimen*, 124 Wn.2d at 274-75 (A municipality's "assessment of fees in lieu of dedication [must be] specific to the site."). That distinction is made clear by *Trimen*'s companion case, in which this Court invalidated an open space requirement because the city relied on a generalized determination of city-wide park land needs to impose pre-set, per-lot conditions without limiting it to individual impacts. *Henderson Homes, Inc. v. Bothell*, 124 Wn.2d 240, 247-48, 877 P.2d 176 (1994); *see also Castle Homes v. City of Brier*, 76 Wn. App. 95, 882 P.2d 1172 (1994) (invalidating exactions based on a share of the "cumulative impact" of all the new development in its subdivisions).

The decision below skips the critical step of linking an impact study to the conditions on the site. Without that step—in this case, identifying the source and amount of pollutants entering the property—it is impossible for the County to assure that the dedication is limited to mitigating for that portion of the pollution attributable to the proposal. *Trimen*, 124 Wn.2d at 274-75. And it is impossible for the County to satisfy the nexus and proportionality requirements.

CONCLUSION

For the reasons stated above, CSA respectfully requests that this Court grant its cross-petition for review.

DATED: October 2, 2015.

Respectfully submitted,

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