No. ____

In the
Supreme Court of the United States

Preserve Responsible Shoreline Management, et al,

Petitioners,

v.

City of Bainbridge Island, et al,

Respondents.

On Petition for Writ of Certiorari to the Washington Court of Appeals

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

To allocate the burden of mitigating regional development impacts, a City of Bainbridge Island ordinance requires shoreline property owners to dedicate large portions of their residentially zoned property as a condition on any new development, use, or activity. Although the City considered scientific studies during the legislative process, it chose to adopt a standardized schedule of buffer widths—unrelated to proposed uses or impact—based on its policy preference to gain as much waterfront property as feasible from new permit applicants to make up for lost opportunities to exact land from earlier-issued permits. Landowners challenged the City's exaction as violating the nexus and proportionality standards of *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987), and *Dolan v. City of Tigard*, 512 U.S. 374 (1994), on its face. The court below held that the government automatically satisfies *Nollan* and *Dolan* if it *considers* scientific studies as part of a legislative process, even when it does not rely on scientific data when demanding a dedication of property through legislation.

The questions presented are:

1. Whether the government may avoid the nexus and proportionality standards by asserting that an exaction resulted from a legislative procedure that involved consideration of science.

2. Whether legislative permit conditions are exempt from the heightened scrutiny nexus and rough proportionality tests (a question currently on review in *Sheetz v. County of El Dorado*, No. 22-1047 (cert. granted Sept. 29, 2023)).

PARTIES TO THE PROCEEDINGS AND RULE 29.6 STATEMENT

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. were the petitioners-appellants in all proceedings below.

Respondents City of Bainbridge Island and Washington State Department of Ecology were the respondents in all proceedings below. Respondents Environmental Land Use Hearing Office and Growth Management Hearings Board Central Puget Sound Region are also named as respondents but did not participate in the proceedings below.

CORPORATE DISCLOSURE STATEMENT

All Petitioners are listed in the caption. The Petitioners that are not individuals have no parent corporations and no publicly held companies own 10% or more of their stock.

RULE 14.1(b)(iii) STATEMENT

The proceedings in the trial and appellate courts identified below are directly related to the above-captioned case in this Court.

Preserve Responsible Shoreline Management v. City of Bainbridge Island, Washington Court of Appeals, No. 80092-2-I, 11 Wash. App. 2d 1040 (Dec. 9, 2019).

Preserve Responsible Shoreline Management v. City of Bainbridge Island, Washington Supreme Court, No. 98365-8, 195 Wash. 2d 1029 (July 8, 2020).

Preserve Responsible Shoreline Management v. City of Bainbridge Island, Kitsap County Superior Court, No. 15-2-00904-6 (final decision dated Dec. 3, 2021).

Preserve Responsible Shoreline Management v. City of Bainbridge Island, Washington Court of Appeals, 24 Wash. App. 2d 1047 (Dec. 13, 2022) (unpublished).

Preserve Responsible Shoreline Management v. City of Bainbridge Island, Washington Supreme Court, 1 Wash. 3d 1014 (June 7, 2023).

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PETITION FOR WRIT OF CERTIORARI

Preserve Responsible Shoreline Management (PRSM), Alice Tawresey, Robert Day, Bainbridge Shoreline Homeowners, Dick Haugan, Linda Young, John Rosling, Bainbridge Defense Fund, and Point Monroe Lagoon Home Owners Association, Inc. petition for a writ of certiorari to review the judgment of the Washington Court of Appeals.

OPINIONS BELOW

The unpublished decision of the Washington Court of Appeals is available at *Preserve Responsible Shoreline Management v. City of Bainbridge Island* (Div. II, No. 568080-II), reprinted at Appendix (App.) 1a. The court's January 19, 2023, Order Denying Reconsideration is reprinted at App.49a. The Washington Supreme Court's order denying the petition for review is available at 195 Wash. 2d 1029 (2023) and reprinted at App.47a.

The unpublished decision of the Superior Court for Kitsap County is reprinted at App.39a.

JURISDICTION

The decision of the Washington Court of Appeals sought to be reviewed was issued on December 13, 2022, and denied reconsideration of that decision on January 19, 2023. On July 7, 2023, the Washington Supreme Court denied discretionary review. On June 28, 2023, this Court granted an application for an extension of time to file a petition for writ of certiorari, to and including October 16, 2023. This Court has jurisdiction under 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND REGULATORY PROVISIONS INVOLVED

The Takings Clause of the United States Constitution provides that "private property [shall not] be taken for public use without just compensation." U.S. Const. amend. V. This guarantee is made applicable to the states by the Fourteenth Amendment, which provides, in relevant part, that no state shall "deprive any person of life, liberty, or property, without due process of law." U.S. Const. amend. XIV, § 1. The "Shoreline Master Program" ordinance at the center of the case is City of Bainbridge Island City Code Ch. 16.12, excerpts of which are reproduced at App.51a–71a.

INTRODUCTION AND SUMMARY OF REASONS TO GRANT THE PETITION

Government may not condition a land-use permit application on a public dedication of private property without compensation unless the demand mitigates a proportionate adverse public impact of the property's use. *Koontz v. St. Johns River Water Mgmt. Dist.*, 570 U.S. 595, 604–05 (2013). Protection against such extortionate demands is secured by the "essential nexus" and "rough proportionality" tests set out in *Nollan v. California Coastal Commission*, 483 U.S. 825, 836–37 (1987), and *Dolan v. City of Tigard*, 512 U.S. 374, 391 (1994). These tests require the government to show that a permit condition is tailored to mitigate *only* those public impacts caused by a proposed land use. *Dolan*, 512 U.S. at 391. The government's failure to prove sufficient tailoring violates the doctrine of unconstitutional conditions, rendering the government's demand invalid as a taking without just compensation. *Id.*

But that constitutional guarantee is not enforced in a uniform and predictable manner across the nation. For decades, some lower courts have distinguished between exactions imposed on an *ad hoc* adjudicative basis (in which case they apply the *Nollan* and *Dolan* tests) and permit exactions authorized by legislation (in which case they do not). This Court recently granted certiorari to resolve this longstanding and entrenched split of authority in *Sheetz v. County of El Dorado*, No. 22-1074 (Order granting certiorari, Sept. 29, 2023).

This Petition presents a further aspect of the legislative versus adjudicative exactions controversy that warrants review—one that is being advanced by the government respondent in *Sheetz*—that compliance with a statute can automatically satisfy the *Nollan* and *Dolan* tests.[1] The court below held that regulations demanding land dedications purporting to "allocate the burden" of addressing regional impacts to the shoreline, App.7a, automatically satisfied the heighted scrutiny required by *Nollan*/*Dolan* because the City engaged in the standard legislative procedure of considering scientific studies prior to issuing the regulations. The court accepted the City's legislative process in lieu of any site-specific findings as to how individual properties affected the environment to justify its across-the-board, "standardized" buffer dedication requirements. App.9a, 35a. Had the

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[1] *See* Opposition to Petition for Writ of Certiorari, *Sheetz v. County of El Dorado*, No. 22-1074, at 7–19 (July 5, 2023) (arguing that the County's compliance with "the procedures and processes set forth in California's legislatively enacted [Mitigation Fee Act]" should automatically satisfy *Nollan* and *Dolan*).

dedications been imposed as permit conditions by executive officials, without express legislative authority, there would be no question that *Nollan* and *Dolan* apply. But because the City imposed the dedication by general ordinance (its Shoreline Management Program (Program)), the court rubber-stamped across-the-board exactions of large conservation buffers that clearly violate the nexus and proportionality tests. The City shifts the burden of addressing offsite and historic impacts onto new development through buffers that are bigger than necessary to mitigate anticipated project impacts because the size of the dedication is based solely on "city policy, *not* science-based information." Administrative Record (AR).5824 (conclusion of adjudicative agency) (emphasis added).

Although the Washington state court nominally held the City's buffer condition subject to *Nollan* and *Dolan*, App.34a, it avoided the substance of the nexus and proportionality tests entirely. It adopted a rule that a local government *automatically* satisfies *Nollan* and *Dolan* if it engages in "a reasoned, objective analysis of the science" when it legislates a land-use law mandating the dedication of property—even if the government doesn't rely on scientific data when restricting property rights. App.35a, 37a. This new rule adds to a growing body of Washington caselaw holding legislative exactions subject either to a lesser standard of constitutional protection, *see Kitsap All. of Prop. Owners (KAPO) v. Cent. Puget Sound Growth Mgmt. Hearings Bd.*, 160 Wash. App. 250, 272 (2011) (concluding that *Nollan* and *Dolan* establishes a "due process argument that the [buffers] must be reasonably necessary to achieve a legitimate government objective" and that when "the local

government use[s] 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"), or to no protection at all. *See Douglass Props. II, LLC v. City of Olympia*, 16 Wash. App. 2d 158, 172 (2021) ("We hold that the *Nollan/Dolan* test does not apply to . . . legislatively prescribed generally applicable fees . . . .").

The lower court's reasoning wrongly conflates the purpose and function of ordinary legislative procedures (reviewing and synthesizing often incomplete and contradictory information) with the purpose and function of the nexus and proportionality tests (rough mathematical calculation based on actual data). The court below did not understand that "consideration of science" is a process, *Brooks Mfg. Co. v. Nw. Clean Air Agency*, 14 Wash. App. 2d 1, 9 (2019) ("science" is "a method, study, or a process"); *In re Coles*, 839 F. App'x 455, 457 (Fed. Cir. 2020) ("'science' refers generally to 'a systematic method or body of knowledge in a given area'"), and "relevant scientific data" are the results of the process. *See GenOn REMA, LLC v. U.S. E.P.A.*, 722 F.3d 513, 526 (3d Cir. 2013) (agency "examined the relevant scientific data and clearly articulated a 'satisfactory explanation for its action, including a rational connection between the facts found and the choice made'") (citation omitted). A rule that requires only that the City consider "science" allows it to engage in an incomplete process with no consideration of how the City weighed the resulting data (i.e., facts) under the nexus and proportionality tests. Consequently, the court improperly filled the gaps in the actual data and supplied its own reasons for the property exactions.

See Sec. & Exch. Comm'n v. Chenery Corp., 318 U.S. 80, 88 (1943) (an appellate court cannot substitute its reasons in place of those given by the agency). Even these court-generated reasons cannot justify the dedications under the nexus and proportionality tests, leaving property owners subject to the very type of predetermined and coercive land demands that *Nollan* and *Dolan* forbid.

The Court, which is set to determine whether legislative exactions are subject to *Nollan* and *Dolan*, should grant this petition to provide nationwide uniformity on the critically important and related question whether legislative exactions are reviewed subject to the same heightened nexus and proportionality standard as adjudicative exactions, or whether the existence of a legislative process alone satisfies those tests. In the alternative, it should consider holding the petition until *Sheetz* is decided to consider whether it is appropriate to grant the petition, vacate the lower court decision, and remand for further consideration in light of any judgment in *Sheetz* that is contrary to the judgment below.

STATEMENT OF THE CASE

A. The Parties and Context of the Case

The City of Bainbridge Island is a bedroom community of more than 25,000 residents located a short eight-mile ferry ride across Puget Sound from Seattle. The island is approximately twelve miles long and five miles wide. The geography of the island's 53-mile shoreline varies widely—from sandy beaches and tideflats to rocky outcrops and cliffs. AR.4001.

The City's shoreline is zoned primarily for single-family residential use. By 2012, approximately 82% of

the island's 2,262 shoreline lots were fully developed with single-family homes, housing roughly one-third of the City's residents. AR.4074. In addition to homes and apartment buildings, the historic development of bulkheads, docks, public roads, and drainage ditches along the shoreline removed much of the native vegetation and altered the natural ecological functions of the area, such that only a tiny percentage of the island's shoreline property warrants a "natural" designation. AR.4011, 4096 ("Only two areas [of the island] . . . are relatively unmodified."). The following map shows the land use designations on the City shoreline:[2]

[2] Reprinted from the City's website at https://www.bainbridgewa.gov/DocumentCenter/View/4352/Official-Shoreline-Designations-Nov-18-2014c?bidId=. *Cf.* AR.42 (same map with different legends and legibility).

In 2014, when beginning the process of updating its Program, the City sought to drastically expand the size and scope of its conservation buffers, within which property owners cannot develop or use their land, with very limited exceptions. AR.109, 114–16. To do so under Washington's Shoreline Management Act ("Act"), cities must collect and consider "the most

current, accurate, and complete scientific and technical information available." Wash. Rev. Code § 90.58.020; Wash. Admin. Code § 173-26-201. The Act ties mitigation requirements such as conservation buffers to the actual conditions of area shorelines by directing the city to develop a scientific record establishing the shorelines' conditions "as they currently exist." Wash. Admin. Code § 173-26-201(2)(c). The Act thus appears to incorporate pre-existing caselaw holding that sufficiently site-specific scientific data is essential "to an accurate decision about what policies and regulations are necessary to mitigate and will in fact mitigate the environmental effects of new development." *Honesty in Env't. Analysis and Legis. (HEAL) v. Cent. Puget Sound Growth Mgmt. Hearings Bd.*, 96 Wash. App. 522, 531–33 (1999) (citing *Bennett v. Spear*, 520 U.S. 154 (1997) (the science requirement ensures that regulations are not based on "speculation and surmise" or the result of overzealous ambitions)).

But a change in Washington law carved a massive loophole into the Act's original science-focused process, undercutting *HEAL*, and setting the stage for the decision in this case. First, the Growth Management Hearings Board ("Growth Board")—a "quasi-judicial agency" charged with interpreting the Act[3]—construed the Act's science provisions to be only procedural in nature. *Lake Burien Neighborhood v. City of Burien & Dep't of Ecology*, No. 13-3-0012, 2014 WL 3710018, at *6 (Wash. Cent. Puget Sd. Growth Mgmt. Hrgs. Bd., June 16, 2014). According to the Growth Board, the Act requires only that a local

[3] *Thurston Cnty. v. W. Wash. Growth Mgmt. Hrgs. Bd.*, 164 Wash. 2d 329, 358 (2008).

government collect and consider the required studies during the update process. There is no requirement, however, that the science be sufficient to address the necessity for a buffer. App.15a (acknowledging that the required record contained "gaps in scientific data and uncertainties"). Nor is there any requirement that a Program's mitigation measures be based on those studies. Instead, once the local government collects a folio of studies and "considers" them, it may freely ignore any reported data gaps or conflicts, and set conservation buffer sizes to achieve its policy goals. *Id.* Second, an appellate court compounded the effect of the Growth Board's ruling by holding that "private property rights are secondary to the SMA's primary purpose, which is to protect the state shorelines as fully as possible." *Olympic Stewardship Found. v. State Env't & Land Use Hrgs. Off. through W. Wash. Growth Mgmt. Hrgs. Bd.*, 199 Wash. App. 668, 690 (2017).

These rulings gave the City of Bainbridge Island the green light to collect and consider—then ignore—scientific evidence in favor of policy-based buffers that significantly restrict property rights.

B. The City Set Its Buffer Widths Based on Policy, Not Science

When the City began updating its Program in 2010, it wanted to increase the size of its "standardized shoreline buffer" dedication, App.9a, in order to "allocate the burden of these cumulative impacts among development opportunities." Ecology Resp. Br. at 32. Pursuant to the Act, the City commissioned studies documenting the ecological conditions of its shoreline and the potential impacts of new and existing land uses along with a variety of

potential mitigation strategies, including buffers. AR.348–59.

But the City's science consultant warned that the scientific record was "dated and lacked accuracy" and identified significant "data gaps." AR.4097. Moreover, a councilmember observed that the science regarding buffers was "inconsistently applied" and riddled with "uncertainties." AR.2868. The City's consultant documented that the only available studies were so generalized that they could suggest buffers ranging "from as little as 16 feet to as large as 1,969 feet." AR.359. He explained that the existing studies could not justify the necessity and effectiveness of *any* buffer within that exceptionally broad range without data on multiple, *unaddressed* factors such as whether portions of shoreline were forested or already cleared or developed. AR.3968. Indeed, the City's consultant noted that the studies were based on a false *assumption* that all shoreline properties are fully forested and free of conditions that limit the effectiveness of buffers. AR.4307–08. On that point, a City councilmember acknowledged that "[m]ost of the properties that this [buffer] would apply to would be those that have lawn up to the beach." AR.2883.

In light of these inadequacies, the City's consultant recommended that, to develop scientifically supportable buffers, the City must engage in "site-specific" studies "to . . . understand . . . the potential direct, indirect and cumulative impacts" of existing and future development, AR.4100, which would provide the data necessary to determine the width necessary for a buffer to mitigate the impacts of proposed development. AR.4310 (warning that, on marine shorelines, site-specific information is "more

important" for determining effectiveness of buffers). The consultant further advised the City to identify the sources of existing environmental stressors (such as stormwater runoff from public roads, ditches, and other upland uses) and the currently existing range of impacts that neighboring development may have on shoreline conditions. AR.4097–4100; AR.4299–4302. Without new studies addressing those factors, the consultant could not recommend any science-based, site-appropriate buffers consistent with the City's desire to increase the Program's mandatory buffer widths. AR.4314.

The City ignored its consultant's warnings and calls for additional scientific data prior to making buffer recommendations. AR.2882. Instead, the City forged ahead and established a table of "standardized" buffer widths, App.9a, based on its policy preferences. AR.5824 (agency finding); AR.2879 (consultant testifying that the "specific width . . . is part of the policy recommendation").

The City's key policy demanded "as much protection as feasible" from new development because of its "severely limited" ability to address the preexisting impacts of historic development. AR.3969–70; *see also* App.7a (the City chose to target only new "development opportunities" to achieve these goals). That is, rather than paying for conservation easements to address the unmitigated shoreline impacts of existing development, the City chose to target only property owners seeking new uses to bear the burden of mitigating preexisting damage to the shoreline ecology. It made no effort to establish mitigation requirements on a parcel-by-parcel basis. AR.4285–86. According to the City's consultant, the

City chose "to focus its buffer efforts" on new uses because it could use the permitting process to force the owner, via the buffer dedication, to replant previously cleared portions of the waterfront in order to create "intact marine riparian areas" sufficient in size to meet its goal of protecting the shoreline against all existing and future impacts. AR.3969, AR.2878–79. This reasoning resulted in buffers up to 100% larger than those it had previously demanded from the majority of the island's established shoreline residential property owners. AR.96, 364.

C. The City's Buffer Requirement Demands Dedication of Private Property

As a mandatory condition on any new "development, use, or activities" on shoreline property, the owner must dedicate a perpetual conservation area encompassing between 50–200 feet of private shoreline property. App.53a. The Program divides the conservation buffer into two zones. App.9a–10a. The more restrictive area—Zone 1—extends from a minimum of 30 feet from the shoreline or to the limit of any existing native vegetation on the lot, whichever is greater. App.61a–62a. Zone 1 expands automatically based solely on the presence of a native plant, whether it is a stand of mature cedar trees or a single sword fern. *Id.*; AR.388–401. Within Zone 1, the City does not consider the specific land-use proposal or its anticipated impacts. The Program flatly bans nearly all residential structures, uses, and activities in order to separate and maintain the property "in a predominantly natural, undisturbed and vegetated condition." App.59a; AR.115–16 (the three structures that may be permitted within Zone 1 are a boathouse, a permeable deck/patio, or a

staircase); App.63a–64a (requiring a permit to engage in routine "activities" like landscape maintenance and minor pruning within the buffer zone).

"Zone 2" is the area landward of Zone 1 and covers the remainder of the prescribed conservation area, App.9a–10a, the size of which is established based on the property's zoning designation and its primary geographic characteristics—again, the width of the buffer is "standardized," App.9a, and determined with no consideration of project-specific impacts. App.62a. While less highly restrictive than Zone 1, the Zone 2 buffer still operates as a presumptive restriction on structures, uses, and even the types of plants that an owner can put in his or her garden. *Id.* Because, like Zone 1, it restricts property without regard to any specific land use proposal, owners must dedicate the same buffer area to build a small 120-square-foot patio extension or a new 3,500-square-foot home. App.53a; AR.373–74.

To ensure that property owners will maintain the most restrictive portion of the buffer in perpetuity, the Program was crafted to "set that [land] aside" from the owner. AR.2889–90. Indeed, the "fundamental thought" behind the "Zone 1" buffer was the City's recognition that "we need to have this area" to meet its goal of improving areawide conditions. AR.2885 (City consultant's testimony). The City also demanded buffers that are "larger than the bare minimum needed for protection" to implement a policy to avoid a "worst case scenario" and "ensure [ecological] success in the face of uncertainty about site-specific conditions." AR.4314; *see also* AR.42 (City relied on the "precautionary principle . . . as guidance in updating the policies and regulations of this

[Program]." App.51a. The City's buffers were thus designed to "allocate the burden of addressing cumulative impacts" onto only those landowners who seek permission to make a new use of their property. App.7a; City Resp. Br. at 24.

To implement the City's burden-shifting policy, the Program requires all current and future owners to perpetually maintain and manage the conservation area "in a predominantly natural, undisturbed and vegetated condition" in order to "protect," "enhance," and "restore" the marine shoreline.[4] App.56a; AR.106. The Growth Board appropriately characterized the

[4] The lower court's decision to hold the Program's buffer provisions subject to *Nollan* and *Dolan*, App.33a—37a, is consistent with Washington property law, which recognizes that a buffer area represents an independent property interest that may be taken in the public interest and holds that shoreline buffers "must . . . satisfy the requirements of nexus and rough proportionality established in *Dolan* and *Nollan*." *KAPO*, 160 Wash. App. at 272; *see also City of Tacoma v. Welcker*, 65 Wash. 2d 677, 683 (1965) (the acquisition of a riparian buffer to protect water quality constitutes an exercise of eminent domain); *Klickitat Cnty. v. Wash. State Dep't of Revenue*, No. 01-070, 2002 WL 1929480, at *5–6 (Bd. Tax App., June 12, 2002) (a buffer area is a separate interest from the lot; the holder of the conservation interest owns that interest); Wash. Rev. Code § 64.04.130 ("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."). Washington property law imposes no formal requirements on how a dedication may be achieved, recognizing that an owner need only show an intent to bind his property. *Richardson v. Cox*, 108 Wash. App. 881, 884, 890–91 (2001); *see also* Wash. Rev. Code § 58.17.020(3) (defining a dedication as "the deliberate appropriation of land by an owner for any general public uses, reserving to himself or herself 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").

buffer dedications as "conservation easements." AR.5849–52; AR.3847 (Department of Ecology adopting the Board's "conservation easement" characterization).

Critically, the Program provides no mechanism to reduce the size of the standardized conservation buffer to an area necessary only to mitigate for the impacts of their proposed property use. Property owners must either accept the City's default easement requirement, App.53a–54a, or, at their own expense, prepare a "site-specific analysis of potential impacts and a mitigation plan," AR.101, to justify a differently configured conservation area of equal or greater size. App.57a–61a. The Program includes no option for reducing the size of the easement. The reconfiguration option does not address the constitutional inadequacies of the standardized buffer demand because it requires the owner—not the government—to bear the cost of preparing a site-specific study based only on the same science the City found inadequate and using only City-approved experts. App.58a–59a; AR.306–07. It also requires that the buffer go beyond *Nollan* and *Dolan*'s mitigated-development standards by demanding that the owner "clearly demonstrate" that the reconfigured buffer will provide environmental benefits "*greater than* would be provided by the prescribed . . . buffers." App.71a (emphasis added). Altered buffers must also mitigate "effects that may occur off-site," App.54a, and account for "cumulative impacts of similar developments over time." App.55a.

An owner who fails to comply with the City's buffer requirements is subject to civil and criminal penalties, including fines of up to $1,000 per day and jail time if

an owner commits two or more violations within any 12-month period. App.67a.

D. Procedural History

Petitioners are homeowners and associations on Bainbridge Island who formed Preserve Responsible Shoreline Management (PRSM). PRSM's mission is to protect landowners' rights by advocating for a balanced and scientifically supportable approach to land use laws. It engages in education and outreach, and provides public comment on proposed land use regulations. PRSM is the primary local association in the City representing the interests of landowners faced with increasing regulation of their property. PRSM represents the interests of landowners who wish to develop their residential properties and who are subject to the Program's preset buffer dedication demands. AR.6–7.

As required by state law, PRSM challenged the City's Program by petitioning the Growth Board, which upheld the buffers even though the "[b]uffer widths [are] set by city policy, not science-based information," AR.5824, and may not, therefore, meet any of the recommendations contained in the incomplete scientific record. AR.5825 n.77. PRSM timely petitioned a Washington state court for judicial review of the Board's decision. Clerk's Papers (CP).1–166; CP.183–200. PRSM alleged that the City's decision to rely on burden-shifting policy grounds to set buffer widths facially violated the doctrine of unconstitutional conditions because it is undisputed that the standardized buffers are larger than necessary to mitigate only the impacts of new residential use, and that they improperly address both the preexisting impacts of historic uses and the

potential impacts of future uses.[5] *See Dolan*, 512 U.S. at 384 ("One of the principal purposes of the Takings Clause 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.'") (quoting *Armstrong v. United States*, 364 U.S. 40, 49 (1960)).

PRSM's claim relied on state and federal decisions holding that a legislatively mandated exaction facially violates the nexus and proportionality tests where it "imposes a uniform requirement . . . on each lot, unrelated to any evaluation of the demonstrated impact of proposed development." *Citizens' All. for Prop. Rts. v. Sims*, 145 Wash. App. 649, 668 (2008) (applying *Nollan* and *Dolan*); *Levin v. City & Cnty. of San Francisco*, 71 F. Supp. 3d 1072, 1084–85 (N.D. Cal. 2014), *appeal dismissed and remanded*, 680 F. App'x 610 (9th Cir. 2017) (ordinance that set a predetermined tenant relocation fee schedule without any requirement that the government tailor its fees to the actual impacts of an owner's use of his property facially violated the Takings Clause); *see also Beck v. City of Whitefish*, No. CV 22-44-M-KLD, 2023 WL 6379334, at *11 (D. Mont. Sept. 29, 2023) (certifying class upon conclusion that there is no barrier to a facial *Nollan/Dolan* claim). The trial court, however, never addressed the merits of this argument, dismissing the constitutional claim as nonjusticiable. CP.639–46.

PRSM appealed, reasserting its unconstitutional conditions claim and relying on record evidence that proved that the preset buffer widths were based on

[5] CP.252–56, 265–78, 570–91; AR.3708.

policy preferences that make no attempt to satisfy nexus and proportionality. The appellate court agreed that the homeowners' facial unconstitutional conditions claim was justiciable, reversing the trial court on that threshold question. App.34a ("In the context of a facial challenge to a land use ordinance, the ordinance '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.'") (citation omitted). The court also agreed that the buffers are imposed on any new development, use, or activity in a "standardized" manner, App.9a, and held the demand subject to *Nollan* and *Dolan*.[6] App.34a.

But on the merits, the state appellate court did not analyze the dedication requirements under the nexus and proportionality test. Instead, the court followed a state court-created rule that the government *automatically* satisfies the doctrine of unconstitutional conditions if it engages in "a reasoned, objective analysis of the science" when developing regulations that exact a mandatory dedication of property. App.35a (citing *KAPO*, 160 Wash. App. at 273 (ruling that legislatively mandated

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[6] Washington law holds that buffer demands are exactions subject to *Nollan* and *Dolan* and must satisfy the nexus and proportionality test in both as-applied and facial challenges. *KAPO*, 160 Wash. App. at 272; *HEAL*, 96 Wash. App. at 533; *see also Ballinger v. City of Oakland*, 24 F.4th 1287, 1299 (9th Cir. 2022) (a facial unconstitutional conditions challenge asks whether the enactment of the statute demands a transfer of a property interest that is not sufficiently related to the impacts of a proposed property use); *Levald, Inc. v. City of Palm Desert*, 998 F.2d 680, 688 (9th Cir. 1993) (applying the same standard in a facial takings claim).

buffers will automatically satisfy *Nollan* and *Dolan* if the government considers science when developing the law)).

Applying that rule, the court noted that the City *knew* that the scientific record contained "assumptions made concerning, and data gaps in, the scientific information" and "uncertainties" regarding the buffers. App.14a–15a. But the court believed that the City did everything it was constitutionally required to do when it considered the limited scientific evidence available and, having done so, held that the City could choose buffer widths based on its preferred burden-shifting policy. App.37a n.11. Thus, the court ruled that the City's exaction "passe[d] these nexus and proportionality tests" simply because the City considered generalized "science" during its update process, App.37a, and further suggested that the only way it could violate *Nollan* and *Dolan*'s tests would be "if the buffer widths [were] in excess of what the [concededly uncertain and incomplete] science would allow," *id.* at n.11, dicta that, taken at face value, authorizes the government to demand buffers of up to nearly a half mile (1,969 feet) without ever demonstrating nexus and proportionality and without paying just compensation.

PRSM moved for reconsideration, which was denied. App.49a. The Washington State Supreme Court thereafter denied PRSM's petition for review. App.47a. This petition follows.

REASONS TO GRANT THE PETITION

I.

THE WASHINGTON COURT'S "CONSIDERATION OF SCIENCE" RULE CONFLICTS WITH DECISIONS OF THIS COURT

The Washington Court of Appeals adopted a rule that a local government satisfies *Nollan* and *Dolan* if it engages in "a reasoned, objective analysis of the science" when developing regulations that demand a dedication of property for a public environmental use. App.35a. This rule operates categorically, allowing the government to disregard the "considered" science when regulating the size of the dedication. App.37 n.11. A showing the government considered science, alone, cannot satisfy the nexus and proportionality requirements. *See Group of Institutional Investors v. Chicago, M., St. P. & P.R. Co.*, 318 U.S. 523, 570 (1943) ("lip service" cannot replace adherence to legal principles). Indeed, the lower court's ruling conflicts with *Nollan*, *Dolan*, and *Koontz* by elevating an ordinary legislative procedure—the same procedure the government followed when developing the conditions at issue in *Nollan*, *Dolan*, and *Koontz*—over the substance of the nexus and proportionality tests. It operates as a rubber stamp because, so long as the government follows a statutory process, courts may ignore the lack of actual scientific data necessary to evaluate easement dedications under the nexus and proportionality tests. *Id*. This rule renders *Nollan* and *Dolan* dead letters in Washington, at least with regard to legislative exactions.

The nexus and proportionality tests exist to protect property owners' *constitutional* right to just compensation when the government takes property for a public use. The Court designed the *Nollan* and *Dolan* tests to ensure that individual landowners are not singled out during the permitting process to bear the burdens of public policies—like reversing historic damage to shoreline vegetation—that should be distributed among the public as a whole. *Dolan*, 512 U.S. at 84 (quoting *Armstrong*, 364 U.S. at 49). Faithful application of those tests is essential because landowners "are especially vulnerable to the type of [impermissible burden shifting] 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,* 570 U.S. at 605. Together, therefore, the nexus and proportionality tests ensure that: (1) the government may require a landowner to dedicate property to a public use *only* when necessary to mitigate adverse impacts of proposed development, *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."); and (2) the government may not use the permit process to coerce landowners into giving property to the public that the government would otherwise have to pay for. *Koontz*, 570 U.S. at 604–06.

This Court's exactions trilogy shows that mere procedural consideration of "science" prior to adopting regulations cannot alone satisfy the constitutional concerns addressed by *Nollan* and *Dolan*. Instead, *Nollan* and *Dolan* require a complete record

memorializing a local government's use of scientific data and other information as necessary evidence of the decision-making process, allowing the court to evaluate whether a property demand satisfies the nexus and proportionality standards. *See Atchison v. Career Service Council of Wyo.*, 664 P.2d 18, 25 (Wyo. 1983) (Thomas, J., dissenting) (in unconstitutional conditions case, noting that "[t]he majority of the court choose to treat this as an issue with respect to whether the agency observed the procedure required by law, [but] [f]or me this disposition simply fails to recognize the more significant question as to whether this is agency action 'contrary to constitutional right'").

In *Nollan*, this Court emphasized that a showing of rationality alone cannot satisfy the doctrine of unconstitutional conditions. *Nollan*, 483 U.S. at 840–41. There, the California Coastal Commission, acting pursuant to state legislation,[7] required Patrick Nollan to dedicate an easement over a strip of his private beachfront property as a condition for obtaining a permit to rebuild his home. 483 U.S. at 827–28. The Commission justified the condition on the grounds that "the new house would increase blockage of the view of the ocean, thus contributing to the development of 'a "wall" of residential structures' that would prevent the public 'psychologically . . . from realizing a stretch of coastline exists nearby that they

[7] *Nollan*, 483 U.S. at 828–30 (citing California Coastal Act and California Public Residential Code); *see also id.* at 858 (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").

have every right to visit,'" and would "increase private use of the shorefront." *Id.* at 828–29 (quoting Commission staff report). Nollan refused to accept the condition and brought a federal takings claim against the Commission in state court, arguing that the condition was a taking because it bore no logical connection to the impact of his proposed development.

The California Court of Appeal upheld the condition, specifically noting that the Commission had relied on multiple studies when fashioning the permit condition. *Nollan v. California Coastal Comm'n*, 177 Cal. App. 3d 719, 722 (1986). This Court nonetheless reversed because, even crediting those studies, the permit condition still lacked an "essential nexus" to the alleged public impacts that would result from the Nollans' project. *Nollan*, 483 U.S. at 837. Because rebuilding the Nollans' home could have no impact on public-beach access, the Commission could not justify a permit condition requiring them to dedicate an uncompensated easement over their property. *Id.* at 838–39. Without a sufficient nexus between a permit condition and a project's alleged impact, the easement condition was "not a valid regulation of land use but 'an out-and-out plan of extortion.'" *Id.* at 837 (citations omitted). In reaching this conclusion, this Court explained that the various studies showing that the dedication would serve the public interest cannot satisfy the nexus test; instead, such studies indicate that the Commission should pay for the property. *Id.* at 841–42.

Dolan, too, refused to give determinative significance to the government's consideration of science when developing its permit conditions. There, acting pursuant to the City of Tigard's development

code,[8] the city imposed two conditions on Florence Dolan's permit to expand her plumbing and electrical supply store: to dedicate approximately 10 percent of her land as a stream buffer and for a bicycle path. 512 U.S. at 377, 380. Dolan refused to comply with the conditions and sued the city in state court on a federal takings claim. This Court held that although the city established a nexus between both conditions and Dolan's proposed expansion, the conditions nevertheless effected an unconstitutional taking because they lacked a "degree of connection between the exactions and the projected impact of the proposed development." *Id.* at 386. Looking to the justifications memorialized in the city's record, *Dolan* held that the city had not demonstrated that the conditions were roughly proportional to the impact of Dolan's change in land use. Thus, the permit conditions unconstitutionally took Dolan's property without just compensation. *Id.* at 379–80, 391.

Like *Nollan*, this Court acknowledged that the City of Tigard had relied on valid studies showing the beneficial effects of dedications to mitigate traffic and stormwater impacts when enacting its development code. *Dolan* held, once again, that this consideration and reliance is *not enough* to satisfy the doctrine of unconstitutional conditions. *Id.* at 392, 395. The rough proportionality test requires the government to engage in an individualized, site-specific determination of impacts requiring mitigation because "generalized statements as to the necessary connection between the required dedication and the proposed development [are] too lax to adequately

[8] *Dolan*, 512 U.S. at 379–80.

protect petitioner's right to just compensation if her property is taken for a public purpose." *Id.* at 389. The bicycle path condition failed the test because the city made no showing that a bicycle path could offset any of the increased traffic resulting from a plumbing store expansion. *Id.* at 395–96. The stream buffer condition similarly lacked rough proportionality because lesser regulatory restrictions (such as setbacks and open space requirements) could sufficiently mitigate the project's increased stormwater flow. *Id.* at 393–95 ("The city has never said why a public greenway, as opposed to a private one, was required in the interest of flood control.").

Koontz also involved a legislatively mandated exaction that set in-lieu impact fees based on a state agency's schedule of wetland mitigation ratios. 570 U.S. at 600. Like *Nollan* and *Dolan*, the state had considered extensive ecological data when developing its wetland protection laws. Brief of Respondent, *Koontz v. St. Johns River Water Mgmt. Dist.*, No. 11-1447, 2012 WL 6694053, at *4–*13 (U.S. June 20, 1988) (citing Fla. Dep't of Env. Reg., Policy for "Wetlands Preservation-as-Mitigation"). Once again, the government's consideration and reliance on scientific studies did not deter this Court from ruling that the impact fee must still satisfy the questions asked by the nexus and proportionality tests. *Koontz*, 570 U.S. at 616. Thus, this Court remanded to the Florida courts to assess whether the record showed that the exaction passed those tests. *Id.* at 619.

Applying the nexus and proportionality tests on remand, the Florida Court of Appeals held that the exaction was an unconstitutional taking. *St. Johns River Water Mgmt. Dist. v. Koontz*, 183 So. 3d 396, 398

(Fla. App. 2014), adopting rationale and holding of *St. Johns River Water Mgmt. Dist. v. Koontz*, 5 So. 3d 8, 10 (Fla. App. 2009) (affirming trial court that applied the constitutional standards of *Nollan* and *Dolan*, heard conflicting evidence, ruled that the District effected a taking of Koontz's property, and awarded damages).

The Washington court's ruling below conflicts with this Court's precedent in three ways.

1. First, the "consideration of science" rule assumes that the City's compliance with a procedural requirement to collect and consider "science" prior to mandating a buffer dedication necessarily satisfies *Nollan* and *Dolan*. App.35a. That reasoning, however, wrongly conflates the purpose of the Shoreline Management Act—"to protect the state shorelines as fully as possible," *Olympic Stewardship Found.*, 199 Wash. App. at 690—with the purpose of the nexus and proportionality tests—to protect private property rights from uncompensated takings. The Act explicitly downgrades property rights in the service of its primary goal by directing local governments to assess the maximum amount of land to fully protect the entire shoreline from existing and future impacts. *Id.* "Considering science," moreover, is part of a legislative body's standard investigative process. *See Pegram v. Herdrich*, 530 U.S. 211, 221 (2000) (legislative process includes "comprehensive investigations and judgments of social value"). In contrast, the nexus and proportionality tests protect landowners from unconstitutional takings by limiting exactions to only those necessary to mitigate a proposed use of the land. Merging these disparate legal analyses results in incoherence. *Cf. Concrete*

Pipe and Products of Cal., Inc. v. Construction Laborers Pension Trust for S. Cal., 508 U.S. 602, 628 (1993) (describing "incoherence" wrought by combining terms describing the burden of proof with terms describing a standard of review).

2. Second, the "consideration of science" rule cannot protect property owners against unfair and unconstitutional burden-shifting. *Dolan*, 512 U.S. at 384. After considering its incomplete scientific studies, the City enacted preexisting policy preferences for the largest possible undevelopable buffer zone dedications. AR.5824 (buffer widths based on "city policy, not science-based information"). Incomplete data sets and inadequate studies—which are expressly allowed by the Act—are not grounds for reliable assessments; they are reasons to impeach it. *Watson v. Ft. Worth Bank and Trust*, 487 U.S. 977, 996 (1988). Here, the preset buffer zones reflect the City's refusal to address the "wide variations in the width of recommended buffers based on the characteristics of the particular site involved," AR.3968, the precise information needed to address nexus and proportionality. Far from obviating the need for nexus and proportionality scrutiny, a policy-based exaction amplifies the risks of gimmickry and coercion that the unconstitutional conditions doctrine is intended to curtail. *Dolan*, 512 U.S. at 387; Mark W. Cordes, *Legal Limits on Development Exactions: Responding to* Nollan *and* Dolan, 15 N. Ill. U. L. Rev. 513, 551 (1995) (the nexus and proportionality tests were intended to stop the "common municipal practice of using the development exaction process as a means to capture already targeted tracts of land without paying just compensation").

The court below acknowledged that the City developed the Program to comply with the Act's directive to "allocate the burden of addressing cumulative impacts" to the shoreline environment. App.7a. The City's preferred allocation demands "as much [land] as feasible" from new development because of its "severely limited" ability to address the preexisting impacts of historic development (such as stormwater runoff from public roads, ditches, and upland development) through prospective regulation. AR.3969–70. The City recognized that existing homes might be rendered nonconforming by failure to mitigate historic and cumulative development impacts. AR.3969. To protect existing homeowners (at the expense of new owners/developers), the City "focus[ed] its buffer efforts" on new uses to force the owners to replant previously cleared portions of the waterfront and create new, "intact marine riparian areas" to protect the shoreline against all existing and future impacts. AR.3969; AR.2878–79; *see also* AR.2883 ("[m]ost of the properties that this [buffer] would apply to would be those that have lawn up to the beach"). In sum, the City's policy requires landowners seeking new or expanded uses of their property to remedy environmental harm caused by public roads, drainage ditches, and also both their longer-established and future neighbors, a goal flatly prohibited by this Court for decades. *Armstrong*, 364 U.S. at 49; *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 416 (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.").

3. Third, the "consideration of science" rule is so lax that it permits courts to replace the City's analysis

of the studies with new judicial speculation contrary to the findings entered by the quasi-judicial agency below. *Compare* AR.5824 (Growth Board found that "[b]uffer widths [were] set by city policy, not science-based information."), *with* App.36a–37a (Washington appellate court stating that the City had "relied on the valid scientific information to establish the shoreline buffers" and this new conclusion is "fatal"). In this way, the decision below replaced the nexus and proportionality test with one that is indistinguishable from Washington's exceptionally lax rational basis standard, which allows courts to "assume the existence of any necessary state of facts which it can reasonably conceive in determining whether a rational relationship exists between the challenged law and a legitimate state interest." *See Chong Yim v. City of Seattle*, 194 Wash. 2d 651, 675 (2019). Such a freewheeling standard has no place in the law. *See Bostock v. Clayton Cnty.*, 140 S. Ct. 1731, 1738 (2020) ("If judges could add to, remodel, update, or detract from old statutory terms inspired only by extratextual sources and our own imaginations, we would risk amending statutes outside the legislative process reserved for the people's representatives."); *see also Chenery Corp.*, 318 U.S. at 87 ("The grounds upon which an administrative order must be judged are those upon which the record discloses that its action was based.").

A rule that looks only to the *procedure* by which the government enacts a law demanding a dedication of property cannot address *substantive* constitutional concerns that arise under the Takings Clause and unconstitutional conditions doctrine. Such a rule, moreover, would wrongly empower local governments to veto the Fifth Amendment through a mere

ordinance. *Frost v. Railroad Comm'n of Cal.*, 271 U.S. 583, 593–94 (1926) ("It is inconceivable that guarantees embedded in the Constitution of the United States may thus [by regulation] be manipulated out of existence."). This Court should grant the petition to enforce the constitutional limitation that the doctrine places on local government, requiring courts to evaluate the government's stated reasoning for imposing exactions under the nexus and proportionality standards.

II.

COURTS ARE DIVIDED ON WHETHER AND HOW *NOLLAN* AND *DOLAN* APPLY TO EXACTIONS MANDATED BY LEGISLATION

The decision below adds a new dimension to a longstanding and well-documented split among state and lower federal courts as to whether the nexus and proportionality test applies to legislatively imposed permit conditions as well as to conditions placed on an individual permit applicant. *Cal. Bldg. Indus. Ass'n v. City of San Jose*, 577 U.S. 1179 (2016) (Thomas, J., concurring in denial of certiorari) (recognizing a decades-old, nationwide split of authority). It does so by adopting a rule that substantially changes how those tests are applied when evaluating a legislative exaction. As discussed above, the Washington court held that a local government's compliance with an ordinary legislative procedure *itself* satisfies nexus and proportionality scrutiny without any further inquiry to determine if the ordinance demands more land than is allowed by *Nollan* and *Dolan*. App.35a. In this way, Washington's "consideration of science" rule insulates *all* exactions mandated by local land use and environmental ordinances from the doctrine of

unconstitutional conditions—a result that raises the same conflicts as a rule that explicitly exempts legislative exactions from the nexus and proportionality standards.

Like California's categorical legislative exactions rule at issue in *Sheetz*, the Washington rule wrongly emphasizes the identity of the body that is demanding property, rather than the substance of its decision and the nature of the property demand itself. *See Common Sense Alliance v. Growth Mgmt. Hearings Bd.*, Nos. 72235-2-I & 72236-1-I, 2015 WL 4730204, at *7 (Wash. Ct. App. Aug. 10, 2015) ("An ordinance requiring a buffer zone is a legislative act, [and] legislative determinations do not present the same risk of coercion as adjudicative decisions."); *see also Sheetz v. Cnty. of El Dorado*, 84 Cal. App. 5th 394, 409 (2022), *cert. granted* (U.S. Sept. 29, 2023) (No. 22-1047) ("While legislatively mandated fees do present some danger of improper leveraging, such generally applicable legislation is subject to the ordinary restraints of the democratic political process. A city council that charged extortionate fees for all property development, unjustifiable by mitigation needs, would likely face widespread and well-financed opposition at the next election.").

That diminished concern for legislative exactions' coercive effect, or outright dismissal as something to be remedied in the political realm, conflicts with this Court's insistence that a taking may occur "[w]hen the government conditions the grant of a benefit such as a permit, license, or registration" regardless of "whether the government action at issue comes garbed as regulation." *Cedar Point Nursery v. Hassid*, 141 S. Ct. 2063, 2072 (2021); *see also Parking Ass'n v. City of*

Atlanta, 515 U.S. 1116, 1118 (1995) ("A city council can take property just as well as a planning commission can.") (Thomas, J., dissenting from denial of certiorari); *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1014 (1992) ("If . . . the uses of private property were subject to unbridled, uncompensated qualification under the police power, the 'natural tendency of human nature [would be] to extend the qualification more and more until at last private property disappeared.'") (quoting *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922). Indeed, resort to the political process will not cure a taking caused by laws that shift the cost of solving preexisting public burdens onto future development because *future* residents have no voice in local politics. Ronald H. Rosenberg, *The Changing Culture of American Land Use Regulation: Paying for Growth with Impact Fees*, 59 S.M.U. L. Rev. 177, 206, 262 (2006) ("Without having to face the opposition of future residents who do not currently live or vote in the locality, [municipalities] find [legislative exactions] an irresistible policy option.").

The Washington rule, moreover, directly conflicts with recent, notable decisions refusing to give legislative exactions special treatment under the Constitution. The Ninth Circuit in *Ballinger* overruled a past Circuit precedent holding legislative exactions categorically exempt from the nexus and proportionality test: "any government action, including administrative and legislative, that conditionally grants a benefit, such as a permit, can supply the basis for an exaction claim rather than a basic takings claim." *Ballinger*, 24 F.4th at 1299 (overruling *McClung v. City of Sumner*, 548 F.3d 1219 (9th Cir. 2008), in light of *Cedar Point*, 141 S. Ct. at

2022). "What matters for purposes of *Nollan* and *Dolan* is not *who* imposes an exaction, but *what* the exaction does, and the fact that the [dedication] comes from a city ordinance is irrelevant." *Id.* (cleaned up). Insofar as the Washington court's decision also relied on an assumption that a local government's compliance with an ordinary legislative process ensures constitutional results, that assumption conflicts with the North Carolina Supreme Court decision in *Anderson Creek Partners, L.P. v. County of Harnett*, 382 N.C. 1, 34 (2022). There, the court held that *Nollan* and *Dolan* apply to legislative action that conditions use of property even when the ordinance "more likely represent[s] a carefully crafted determination of need tempered by the political and legislative process." *Id.* This is because the nexus and proportionality tests are "designed to address the *risk* that local governments might use their permitting power to coerce landowners into relinquishing property," *id.* at 32, and legislative bodies as well as adjudicative agencies are equally prone to such risks. *Id.* at 33–34 (noting that this Court "consistently describe[s] the 'unconstitutional conditions' doctrine as 'preventing the *government* from coercing people into giving up' a constitutional right rather than preventing a particular branch of government from acting in a particular manner") (citing *Koontz*, 570 U.S. at 604, and *Dolan*, 512 U.S. at 385).

Until this Court resolves the question, "property owners and local governments are left uncertain about what legal standard governs legislative ordinances and whether cities can legislatively impose exactions that would not pass muster if done administratively." *CBIA*, 577 U.S. at 1179 (Thomas, J., concurring in denial of certiorari); *see also Washington Townhomes,*

LLC v. Washington Cnty. Water Conservancy Dist., 388 P.3d 753, 758 n.3 (Utah 2016) ("The difficulty in answering this question stems in part from the Supreme Court's lack of clear guidance."). Such uncertainty harms tens of millions of property owners nationwide, who are regularly compelled to bear unfair public burdens as a condition of homeownership. *See, e.g.*, *Anderson Creek*, 382 N.C. at 43 (the cost of exactions is often passed along to the purchaser of new homes).

This petition provides the Court with an excellent opportunity to stem new iterations of a legislative exactions rule like the one adopted below.

CONCLUSION

The petition for a writ of certiorari should be granted. Or in the alternative, the Court should consider holding the petition until *Sheetz* is decided to consider whether to grant the petition, vacate the lower court decision, and remand for further consideration in light of any judgment in *Sheetz* that is contrary to the judgment below.

DATED: October 2023.

Respectfully submitted,

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No. ____

In the
Supreme Court of the United States

Preserve Responsible Shoreline Management, et al,

Petitioners,

v.

City of Bainbridge Island, et al,

Respondents.

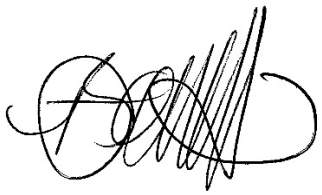
On Petition for Writ of Certiorari to the Washington Court of Appeals

CERTIFICATE OF COMPLIANCE

As required by Supreme Court Rule 33.1(h), I certify that the PETITION FOR WRIT OF CERTIORARI contains 8,650 words, excluding the parts of the document that are exempted by Supreme Court Rule 33.1(d).

I declare under penalty of perjury that the foregoing is true and correct.

Executed on October 11, 2023.



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Preserve Responsible Shoreline Management, et al,
Petitioners,
v.
City of Bainbridge Island, et al,
Respondents.

AFFIDAVIT OF SERVICE

I, Renee Goss, of lawful age, being duly sworn, upon my oath state that I did, on the 12th day of October, 2023, send out from Omaha, NE 3 package(s) containing * copies of the PETITION FOR WRIT OF CERTIORARI in the above entitled case. All parties required to be served have been served by Priority Mail. Packages were plainly addressed to the following:

SEE ATTACHED

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Subscribed and sworn to before me this 12th day of October, 2023.
I am duly authorized under the laws of the State of Nebraska to administer oaths.

State of Nebraska – General Notary
ANDREW COCKLE
My Commission Expires
April 9, 2026

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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

PRESERVE RESPONSIBLE SHORELINE MANAGEMENT, Alice Tawresey, Robert Day, Bainbridge Shoreline Homeowners, Dick Haugan, Linda Young, Don Flora, John Rosling, Bainbridge Defense Fund, Gary Tripp, and Point Monroe Lagoon Home Owners Association, Inc., Appellants, v. CITY OF BAINBRIDGE ISLAND, Washington State Department of Ecology, Environmental Land Use Hearing Office and Growth	No. 56808-0-II UNPUBLISHED OPINION

Management Hearings Board Central Puget Sound Region, Respondents,

and

Kitsap County Association of Realtors,

Intervenor Below.

PRICE, J. — Preserve Responsible Shoreline Management (PRSM) appeals the Growth Management Hearing Board's (Board) order upholding the City of Bainbridge Island's (City) shoreline master program (Master Program). PRSM asserts the following grounds for relief under the Administrative Procedure Act (APA):[1] the Board erroneously interpreted or applied the law, the Board's order was not supported by substantial evidence, and the Board's order was arbitrary or capricious. PRSM also asserts that the Master Program was unconstitutional. We determine that PRSM fails to meet its burden for relief and affirm.

FACTS

I. BAINBRIDGE ISLAND MASTER PROGRAM UPDATE

In 2010, the City began updating its Master Program. The City commissioned several scientific studies to help determine how to protect the shoreline

[1] Ch. 34.05 RCW.

and received public comments on the update to the Master Program.

A. SCIENTIFIC STUDIES

One study, commissioned by the City in 2003, was the Bainbridge Island Nearshore Assessment. The study summarized the then-available science applicable to the shorelines in Bainbridge Island. The study discussed various aspects of the shoreline ecosystem, including discussion of nearshore animal species, nearshore habitats and ecological functions, nearshore physical processes such as erosion and tides, and impacts of human shoreline modifications like bulkheads on nearshore habitats. The study made several recommendations, including that the City produce an inventory of the Bainbridge Island shoreline where the marine habitats meet land.

The second study, commissioned by the City in 2004, was the Bainbridge Island Nearshore Habitat Characterization & Assessment, Management Strategy Prioritization, and Monitoring Recommendations (Nearshore Habitat Characterization). The study separated the 53 miles of shoreline into 9 management areas, comprised of 201 individual shoreline reaches. Each shoreline reach was given an individual ecological function score based in its geomorphology, habitat structure, habitat processes, and other controlling factors.

In 2010, the City commissioned Coastal Geologic Services Inc. to prepare the Bainbridge Island Current and Historic Coastal Geomorphic/Feeder Bluff Mapping. The purpose of the study was to "to map coastal geomorphic shoretypes (such as 'feeder bluffs') and prioritize restoration and conservation

sites along the marine shores of Bainbridge Island nearshore . . . .” Administrative Record (AR) at 4152. The study divided the shoreline into 32 areas called “drift cells” and assessed their ability to serve as “functioning sediment sources and transport pathways” necessary to maintain intact coastal geomorphic processes. AR at 4153, 4160. The study addressed the negative impacts of shoreline modifications, such as bulkheads and other forms of shore armoring. The study stated that “sediment impoundment is probably the most significant negative impact” of shore armoring, that “[s]everal habitats of particular value to the nearshore ecosystem rely on intact geomorphic processes and are commonly impacted by shore armor,” and that shoreline armoring “can have substantial negative impacts on nearshore habitats” through the loss of marine vegetation, the loss of nearshore large woody debris, and the “partial or major loss of spits that form estuaries and embayments.” AR at 4154–55.

In 2011, the City also commissioned an update to the 2003 and 2004 studies, the Addendum to the Summary of the Science Report (Addendum) by Herrera Environmental Consultants Inc. (Herrera). The Addendum relied on more than 250 sources, including studies and reports specific to the Puget Sound. The purpose of the Addendum was to provide “updated information on shoreline and nearshore ecology, physical processes, habitats, and biological resources of Bainbridge Island” and make recommendations for implementation of the “no net loss” standard and for “marine shoreline protective buffers considering geomorphic conditions and shoreline vegetation.” AR at 4240–41. Specific to the buffers, the Addendum stated that “[b]uffers can be

important to the protection of the functions and processes of the nearshore environments along marine coastlines," and suggested different approaches to shoreline buffers. AR at 4306. The two suggestions for shoreline buffers included fixed-width buffers based on typical conditions present on Bainbridge Island and variable-width buffers, which could result from the different site conditions and resources to be protected. The Addendum stated:

> Approaches to establishing buffers vary between fixed or variable width, with the former generally being the most common (Haberstock et al. 2000). To be effective under a worst-case scenario, and to ensure success in the face of uncertainty about specific site conditions, May (2000) and Haberstock (2000) suggest that fixed-width buffers should be designed conservatively (i.e., larger than the bare minimum needed for protection).

AR at 4314.

Based on the Addendum, the City requested that Herrera make specific recommendations for shoreline buffers to be incorporated into the Master Program. Herrera created two memoranda: August 11, 2011, Memorandum re: Documentation of Marine Shoreline Buffer Recommendation Discussions and August 31, 2011, Memorandum re: Clarification on Herrera August 11, 2011, Documentation of Marine Shoreline Buffer Recommendation Discussions Memo. The memoranda explained that shoreline buffers protect a wide variety of ecological functions, including water quality and mineralization, fine sediment control, shade/microclimate, fish and invertebrate food from

litterfall and large woody debris, and hydrology/slope stability. The memoranda summarized the buffer width recommendations made throughout relevant scientific literature and how the buffer widths widely vary based on the protection goal of the buffer. Buffer width recommendations mostly ranged from 16 to 328 feet, with the buffers width recommendation for removing pollution from stormwater runoff reaching 1,969 feet. The buffers in the scientific research were what the literature stated was necessary to achieve at least 80 percent buffer effectivity.

Herrera recommended that the City establish a two-tiered buffer system. Herrera recommended that "Zone 1" be established as a "riparian protection zone" in which existing native vegetation would be preserved and development would be significantly restricted. AR at 4362. This recommendation was based on the ecological functions provided by native vegetation close to the shoreline that is fundamental to maintaining a healthy functioning marine nearshore. Herrera recommended that Zone 1 extend a minimum of 30 feet from the high water mark, or to the limit of the area of the shoreline that had a 65 percent canopy of native vegetation, whichever was greater, in order to achieve 70 percent or greater effectiveness at protecting water quality. The memorandum stated that 30 foot buffers were the minimum to achieve that 70 percent effectiveness level.

Herrera recommended that "Zone 2," the second tier of the buffer, be comprised of variable-width buffers depending on the shoreline designation of a specific site. Herrera recommended that Zone 2 be located immediately landward of Zone 1 and serve to

provide additional protection to the riparian protection zone and other protection functions. Herrera's recommendations included the consideration that Bainbridge Island's shorelines were 82 percent developed, and the City desired to limit the number of existing structures that would be nonconforming with wide shoreline buffers under the proposed Master Program update.

The final item commissioned by the City was the Cumulative Impacts Analysis for City of Bainbridge Island's Shoreline: Puget Sound, prepared by Herrera. This analysis considered whether the Master Program's provisions would ensure no net loss of shoreline ecological functions and fairly allocate the burden of addressing cumulative impacts. This analysis summarized the shoreline's existing conditions based on the previous studies, considered the development that was anticipated on the shoreline, considered the likely impacts of the development on shoreline ecological functions, and considered how implementation of the proposed Master Program would affect those functions. The analysis concluded that "implementation of the proposed [Master Program] is anticipated to achieve no net loss of ecological functions in the City of Bainbridge Island's shorelines." AR at 2206.

B. PUBLIC COMMENTS AND COMMUNICATION

When the City opened public comments on the Master Program update, it received over 1,600 comments. The City individually responded to almost all of the comments submitted to it, although some of the City's responses only stated, "Comment noted." *E.g.,* AR at 2773. The Department of Ecology (Ecology) received at least 111 comments on the proposed

Master Program update, and the City categorized and then responded to the Ecology comments in groups. Some comments did not receive a response from the City.

II. THE MASTER PROGRAM

On July 14, 2014, at the conclusion of the update process, the City approved the proposed Master Program. Following the local government's approval, the Shoreline Management Act of 1971 (SMA)[2] required Ecology to determine if the Master Program comports with state law.[3] RCW 90.58.050. In this case, Ecology approved the City's Master Program on July 16. The Master Program went into effect on July 30, 2014.

A. GOALS AND STANDARDS IN THE MASTER PROGRAM

The Master Program's "Master Goal" contained in section 1.5 stated, "An over-arching goal of this master program is to ensure that future use and development of the City's shoreline maintain a balance between competing uses, results in no net loss of shoreline ecological functions, and achieves a net ecosystem improvement over time." AR at 50.

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[2] Ch. 90.58 RCW.

[3] "Local government shall have the primary responsibility for initiating the planning required by this chapter and administering the regulatory program consistent with the policy and provisions of this chapter. The department shall act primarily in a supportive and *review capacity* with an emphasis on providing assistance to local government and on *insuring compliance with the policy and provisions of this chapter*." RCW 90.58.050 (emphasis added).

The Master Program stated that "[t]he 'precautionary principle' was employed as guidance in updating the policies and regulations of this [Master Program]." AR at 42. The Master Program cited WAC 173-26-201(3)(g)[4] as authority for the precautionary principle.

B. SHORELINE BUFFERS

Chapter four of the Master Program imposed shoreline buffers and dictated their widths. The Master Program defines a "buffer" as:

> An area of land that is designed and designated to permanently remain vegetated in a predominantly undisturbed and natural condition and/or an area that may need to be enhanced to support ecological processes, or ecosystem-wide functions and to protect an adjacent aquatic or wetland area from upland impacts and to provide habitat for wildlife.

AR at 260.

Under section 4.1.3.5(3) of the Master Program, property owners must meet the City's vegetation management requirements through the use of buffers. The standardized shoreline buffers are separated into two zones. Consistent with the recommendations from Herrera in its scientific study, Zone 1 extends landward from the ordinary high water point a minimum of 30 feet or to the limit of the 65 percent

[4] "As a general rule, the less known about existing resources, the more protective shoreline master program provisions should be to avoid unanticipated impacts to shoreline resources." WAC 173-26-201(3)(g).

native vegetation canopy, whichever is greater, as described in "Table 4-3." Within Zone 1, existing vegetative cover must remain.

Zone 2 extends landward from the landward boundary of Zone 1 to the outer edge of the total shoreline buffer set forth in Table 4-3. Table 4-3 identifies five land designations and the buffer widths for the different shoreline categories. Activities are less restricted in Zone 2, and property owners may develop and utilize decks, gardens, and some other residential uses, as long as impacts on shoreline ecological function are mitigated.

III. PRSM'S PETITION FOR REVIEW TO THE BOARD

In October 2014, PRSM filed a petition for review with the Board, asserting that the City's Master Program violated the SMA. PRSM amended its petition in November 2014. PRSM named the City and Ecology as respondents.

In its amended petition to the Board, PRSM raised the issues of:

> 24. Whether the City is not in compliance with RCW 90.58.130 and WAC 173-26-090 by failing to encourage public participation by not responding to public comments.
>
> . . . .
>
> 60. Whether the City is not in compliance with RCW 90.58.100(1) and WAC 173-26-201 in failing to identify and assemble the most current, accurate, and complete scientific and technical

> information available, failing to consider the context, scope, magnitude, significance, and potential limitations of the scientific information, and make use of and incorporate all available scientific information. In particular, the City's failures in regard to technical and scientific information are evident in regard to:
>
> . . . .
>
> c. The fact that the buffers selected were not driven by science-based information but City policy unrelated to science;
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> . . . .
>
> e. The master program provisions are not based on a reasoned, objective evaluation of the relative merits of the conflicting scientific data.

AR at 572, 580–81.

In its prehearing brief for the Board, PRSM argued that the City erred when it relied on "policy, rather than science" when it established the shoreline buffers. AR at 3708. PRSM identified that the specific policy consideration to which it was referring was the City's consideration of the number of existing structures that would not conform to the Master Program's shoreline buffers. PRSM asserted that "the suggested minimum buffer was based on ensuring that residential structures would be nonconforming." AR at 3708. In other words, PRSM believed the City increased the size of the buffers, not because the science required it, but because the City simply

wanted to cast as wide of a net as possible to increase the number of structures that would be considered nonconforming.

PRSM also argued in its prehearing brief that the buffers were oversized to excessively improve the "ecological functions" beyond what the SMA allows and the City deviated from the no net loss standard. AR at 3708. PRSM stated that the shoreline buffers "must be used to achieve the goal of 'no net loss,' not improvement which would be a benefit to the public at large." AR at 3708.

IV. THE BOARD'S DECISION

In April 2015, the Board issued its 119 page final decision and order concluding that PRSM failed to demonstrate that the Master Program violated the SMA.

With respect to the City's responses to public comments, the Board found that PRSM failed to meet its burden establishing that the City's failure to answer all public comments violated RCW 36.70A.140 and WAC 173-26-090. The Board stated that while the statute and rule required the City to participate and respond to comments, they did not require personal responses to every individual comment. The Board determined that a "response" to a public comment requires only that the City take that comment into consideration. AR at 5804. The Board also stated that if it was error for the City to fail to answer every individual comment, exacting compliance was not required to uphold the Master Program, citing to RCW 36.70A.140. That statute provides:

> Errors in exact compliance with the established program and procedures

> shall not render the comprehensive land use plan or development regulations invalid if the spirit of the program and procedures is observed.

RCW 36.70A.140.

Next, the Board determined that PRSM failed to carry its burden to show the City did not adequately justify its decision with scientific support in violation of RCW 90.58.100(1) and WAC 173-26-201. The Board discussed the studies that the City commissioned, including stating that the Herrera documents cited current Pacific Northwest marine shoreline analyses.

When analyzing whether the City's reliance on policy considerations was appropriate, the Board quoted one of Herrera's 2011 memoranda that stated, "[I]ts buffer width recommendations are informed by the City's desire to limit the number of non-conforming structures therefore, existing distances to residential structure from the shoreline are considered." AR at 5824 (emphasis omitted) (internal quotation marks omitted). But the Board suggested the City's use of this policy actually benefited PRSM's desire for smaller buffers. The Board said, "If the buffer width decision were to be driven solely by science, the buffers could be much greater." AR at 5824. The Board also recognized "there is credible evidence in the record that science would not support a vegetative buffer of less than 50 feet, the minimum required in the Native Vegetation Zones of the [former Master Program] for residential designations." AR at 5824–25.

The Board acknowledged that use of policy considerations was not impermissible under the SMA,

quoting *Lake Burien Neighborhood v. City of Burien*, which stated, "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." AR at 5825 (quoting No. 13-3-0012, at 11 (Wash. Cent. Puget Sound Growth Mgmt. Hr'gs Bd. June 16, 2014) (Final Decision & Order)).[5] The Board stated that when the City identifies conflicting science on the range of buffer width recommendations in accordance with the WAC, buffer widths are a policy decision. The Board found that "the City's incorporation of policy as well as science into its buffer width determination does not per se violate the SMA or the guidelines." AR at 5825 (emphasis omitted).

In response to PRSM's argument that the Master Program was not based on reasoned objective evaluation of the merits of the conflicting scientific data, the Board stated that the City gave reasoned consideration to opposing science, while building the Master Program around the consensus science incorporated on the requirements of the guidelines.

In considering whether the City specifically violated WAC 173-26-201(2)(a), which requires governments to use scientific and technical information in the program development process, the Board observed that the City had "certainly" identified "assumptions made concerning, and data gaps in, the scientific information" when the City received a memo from an advisory committee acknowledging scientific uncertainties, and the

[5] https://eluho.wa.gov/api/document/file/3568.

Addendum by Herrera also expressed the limitations of existing research. AR at 5828 (internal quotation marks omitted). But the Board determined that the City assembled current scientific data and considered the gaps in scientific data and uncertainties. The Board concluded that PRSM failed to meet its burden of proof to establish a violation of WAC 173-26-201(2)(a), and that the City had assembled and utilized scientific and technical information.

In the end, the Board rejected all of PRSM's arguments and denied PRSM's petition.

V. PRSM'S APPEAL

PRSM filed a petition for review of the Board's final decision and order with the superior court. In addition to arguing the Board erred, PRSM also argued that the Master Program violated the unconstitutional conditions doctrine, and was therefore unconstitutional. The superior court denied PRSM's petition.

PRSM appeals.

ANALYSIS

PRSM challenges the City's Master Program and the Board's decision to uphold it with two main arguments. First, PRSM challenges the Master Program's shoreline buffers by arguing the City wrongfully used the "precautionary principle" without first making the required record, the City based the buffers on a net improvement standard without making the required record, and the City failed to respond to public comments about the buffers. Second, PRSM makes a facial constitutional challenge to the shoreline buffers. We reject both arguments.

I. LEGAL PRINCIPLES

On a petition for judicial review of a growth board decision, we apply the standards of the APA. *King County v. Cent. Puget Sound Growth Mgmt. Hr'gs Bd. (King County 1)*, 142 Wn.2d 543, 552, 14 P.3d 133 (2000). We review the board's decision, not the decision of the superior court. *Id.* at 553. Under the APA, we will only grant relief from an agency's adjudicative order if it fails to meet any of the nine standards from RCW 34.05.570(3). *Lewis County. v. W. Wash. Growth Mgmt. Hr'gs Bd.*, 157 Wn.2d 488, 498, 139 P.3d 1096 (2006).

Here, PRSM asserts that five of the nine standards of RCW 34.05.570(3) apply:

> (a) The order, or the statute or rule on which the order is based, is in violation of constitutional provisions on its face or as applied;
>
> (b) The order is outside the statutory authority or jurisdiction of the agency conferred by any provision of law;[6]

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[6] Although PRSM lists RCW 34.05.570(3)(b) (order is outside the statutory authority or jurisdiction of the agency) as a ground for relief in this case, it does not offer any citations to authority or the record to show that this ground for relief applies. PRSM additionally fails to mention RCW 34.05.570(3)(b) or explain how it applies after initially mentioning that it is one of the five grounds for relief that are applicable in this case. We do not consider arguments that are unsupported by citations to authority or the record. *Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 809, 828 P.2d 549 (1992) (failure to provide argument and citation to authority in support of an assignment of error precludes appellate consideration under RAP 10.3(a)). We do not further consider this ground.

> . . . .
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> (d) The agency has erroneously interpreted or applied the law;
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> (e) The order is not supported by evidence that is substantial when viewed in light of the whole record before the court, which includes the agency record for judicial review, supplemented by any additional evidence received by the court under this chapter;
>
> . . . .
>
> (i) The order is arbitrary or capricious.

RCW 34.05.570(3). Under the APA, the party asserting invalidity of a growth board decision has the burden of proving the invalidity. RCW 34.05.570(1)(a); *King County 1*, 142 Wn.2d at 553.

Invalidity challenges under RCW 34.05.570(3)(d) regarding whether the agency erroneously interpreted or applied the law are reviewed de novo. *City of Redmond v. Cent. Puget Sound Growth Mgmt. Hr'gs Bd.*, 136 Wn.2d 38, 46, 959 P.2d 1091 (1998). Deference is given to the agency's interpretation of the law "where the agency has specialized expertise in dealing with such issues, but we are not bound by an agency's interpretation of a statute." *Id.* at 46.

"In reviewing agency findings under RCW 34.05.570(3)(e), substantial evidence is 'a sufficient quantity of evidence to persuade a fair-minded person of the truth or correctness of the order.'" *Id.* (quoting *Callecod v. Wash. State Patrol,* 84 Wn. App. 663, 673, 929 P.2d 510, *review denied,* 132 Wn.2d 1004 (1997)). We view the evidence in the light most favorable to

the party who prevailed before the board, and give deference to the board's factual findings. *Olympic Stewardship Found. v. Env't. & Land Use Hr'gs Office ex rel. W. Wash. Growth Mgmt. Hr'gs Bd. (OSF)*, 199 Wn. App. 668, 710, 399 P.3d 562 (2017), *review denied*, 189 Wn.2d 1040, *cert. denied*, 139 S. Ct. 81 (2018).

For challenges under RCW 34.05.570(3)(i), "arbitrary and capricious" means "'willful and unreasoning action, taken without regard to or consideration of the facts and circumstances surrounding the action.'" *City of Redmond*, 136 Wn.2d at 46–47 (quoting *Kendall v. Douglas, Grant, Lincoln & Okanogan Counties Pub. Hosp. Dist. No. 6*, 118 Wn.2d 1, 14, 820 P.2d 497 (1991)). "'Where there is room for two opinions, an action taken after due consideration is not arbitrary and capricious even though a reviewing court may believe it to be erroneous.'" *Id.* at 47 (quoting *Kendall*, 118 Wn.2d at 14).

II. PRECAUTIONARY PRINCIPLE

PRSM argues that the City failed to create a record sufficient to support the City's alleged use of the precautionary principle. The City responds that PRSM did not sufficiently raise this issue related to the precautionary principle below and is now precluded from raising the issue on appeal. We agree with the City.

The "precautionary principle" originates from WAC 173-26-201(3)(g), which states:

> As a general rule, the less known about existing resources, the more protective shoreline master program provisions should be to avoid unanticipated impacts

> to shoreline resources. If there is a question about the extent or condition of an existing ecological resource, then the master program provisions shall be sufficient to reasonably assure that the resource is protected in a manner consistent with the policies of these guidelines.

Under the APA, issues not raised to the Board may generally not be raised for the first time on appeal. RCW 34.05.554(1); *see also Kitsap All. of Prop. Owners v. Cent. Puget Sound Growth Mgmt. Hr'gs Bd. (KAPO)*, 160 Wn. App. 250, 271–72, 255 P.3d 696, *review denie*d, 171 Wn.2d 1030 (2011), *cert. denied*, 566 U.S. 904 (2012). New issues may only be raised if they fall under a statutory exception. RCW 34.05.554; *see also US W. Commc'ns, Inc. v. Wash. Utils. & Transp. Comm'n*, 134 Wn.2d 48, 72, 949 P.2d 1321 (1997).

"In order for an issue to be properly raised before an administrative agency, there must be more than simply a hint or a slight reference to the issue in the record." *King County v. Boundary Rev. Bd. for King County (King County 2)*, 122 Wn.2d 648, 670, 860 P.2d 1024 (1993).

The City argues that PRSM did not argue to the Board below that the City improperly relied on the precautionary principle as part of PRSM's insufficient record argument to establish shoreline buffers, and therefore cannot do so now. PRSM responds, essentially, that it got close enough; PRSM asserts that it argued below that the City relied on "policy unrelated to science" and that this argument

sufficiently covers the precautionary principle. Appellant's Reply Br. at 8.

Here, neither the phrase "precautionary principle" nor WAC 173-26-201(3)(g) ever appear in PRSM's petition for review, amended petition for review, or prehearing brief to the Board. PRSM, however, argues this omission is not dispositive. It asserts its arguments below were sufficiently linked to the precautionary principle, pointing to its allegations that the City did not

> identify and assemble the most current, accurate, and complete scientific and technical information available . . . . In particular, the City's failure in regard to technical and scientific information are evident in regard to:
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> . . . .
>
> c. The fact that the buffers selected were not driven by science-based information but *the City policy unrelated to science*.

AR at 580 (emphasis added). PRSM also argues that its prehearing brief to the Board sufficiently described the City's reliance on the precautionary principle in several places. PRSM asserts that its brief "argued that the City had imposed oversized buffers based, not on science, but on its preference for providing more protection to the shoreline than is strictly necessary to mitigate for the minimal impacts of residential use." Appellant's Reply Br. at 9. Additionally, PRSM argued in its prehearing brief to the Board that the buffers were oversized to excessively improve the ecological functions and "did not appear to have any scientific basis." AR at 3708. These arguments,

according to PRSM, focus on the legal standards for invoking the precautionary principle.

PRSM's position is unpersuasive. At no point did PRSM's "policy" argument below resemble a complaint related to the precautionary principle. The policy PRSM identified below was the City's basing buffer widths on "existing distances to residential structures from the shoreline . . . ." AR at 3708. The City's improper policy was that the buffers were "based on ensuring that residential structures would be nonconforming." AR at 3708.

Any argument to the Board about the precautionary principle would have required PRSM to allege some iteration of an argument related to insufficient science—essentially that the City was overly conservative with its shoreline buffers because of the absence of sufficient science or, perhaps, that the City made long-term buffer decisions based on the temporary insufficiency of the science without committing to updating the science. But these were not the arguments PRSM made below. Whether or not structures that existed on the shoreline would conform to the Master Program requirements is not a consideration related to the precautionary principle.

Simply put, because PRSM's prehearing brief to the Board argued that the improper policy consideration was one unrelated to the precautionary principle, PRSM's reference to the use of "policy unrelated to science" falls short of even hinting to, or slightly referencing, the precautionary principle. Arguing that the buffers were based on policy, not science, is not the same as arguing that the buffers were implemented because the City either had, or disingenuously blamed, *insufficient* science. Even

aside from the fact that words "precautionary principle" did not appear in PRSM's briefs to the Board, PRSM never made arguments that describe the precautionary principle generally.

To preserve an argument for appeal to this court, PRSM was required to raise the argument to the Board or fit into a statutory exception (and PRSM does not argue that the City's alleged use of the precautionary principle may be challenged under a statutory exception). Accordingly, because PRSM did not argue that the City improperly relied on the precautionary principle to the Board, it is precluded from making this argument now. *See* RCW 34.05.554(1).

III. NO NET LOSS

PRSM also argues that the City did not create the required record to justify departing from the "no net loss" standard to instead achieve "net ecosystem improvement." Appellant's Opening Br. at 47. PRSM argues the City cannot justify its focus on shoreline improvement at the expense of development because that would violate the SMA's more modest goal of prevention of net ecological loss.[7] PRSM appears to

[7] Like the precautionary principle, the City argues PRSM did not preserve this issue before the Board by alleging a departure from a no net loss standard below. However, unlike the precautionary principle, PRSM did make reference to this issue below. It argued in its prehearing brief to the Board that, in establishing shoreline buffer widths, "the City's strategy [was] to improve the ecological functions within the current residential development pattern." AR at 3708 (emphasis omitted) (internal quotation marks omitted). PRSM further stated that the shoreline buffers "must be used to achieve the goal of 'no net loss,' not improvement which would be a benefit to the public at large." AR at 3708. PRSM's statements in its brief are more than a hint or slight

challenge the Board's decisions on this issue by alleging invalidity through RCW 34.05.570(3)(d), (e), and (i). We affirm the Board's decisions on this issue.

The concept of "no net loss" is found throughout the SMA; one representative reference is found in WAC 173-26-201(2)(c). This section states, "Master programs shall contain policies and regulations that assure, at minimum, *no net loss of ecological functions* necessary to sustain shoreline natural resources." WAC 173-26-201(2)(c) (emphasis added). WAC 173-26-201(2)(f) further states, "[M]aster program provisions should be designed to achieve overall *improvements in shoreline ecological functions* over time, when compared to the status upon adoption of the master program." (Emphasis added).

The no net loss concept implicates the process for using scientific and technical information during the development of a master program. A description of this process is found in WAC 173-26-201(2)(a), which requires the local government to:

> First, identify and assemble the most current, accurate, and complete scientific and technical information available that is applicable to the issues of concern. The context, scope, magnitude, significance, and potential limitations of the scientific information should be considered. At a minimum, make use of and, where applicable, incorporate all available scientific

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reference to the City's alleged departure from the no net loss standard, thereby preserving this issue for appeal. *King County 2*, 122 Wn.2d at 670.

information, aerial photography, inventory data, technical assistance materials, manuals and services from reliable sources of science. . . .

. . . .

Second, base master program provisions on an analysis incorporating the most current, accurate, and complete scientific or technical information available. Local governments should be prepared to identify the following:

(i) Scientific information and management recommendations on which the master program provisions are based;

(ii) Assumptions made concerning, and data gaps in, the scientific information; and

(iii) Risks to ecological functions associated with master program provisions. Address potential risks as described in WAC 173-26-201 (3)(d). . . .

. . . Where information collected by or provided to local governments conflicts or is inconsistent, the local government shall base master program provisions on a reasoned, objective evaluation of the relative merits of the conflicting data.

A. RCW 34.05.570(3)(d)—ERRONEOUS INTERPRETATION OR APPLICATION OF THE LAW

PRSM argues that we should grant relief under RCW 35.05.570(3)(d) because the Board erred when it affirmed the City's implementation of shoreline buffer widths that would improve the shoreline without first creating the necessary record. In its prehearing brief to the Board, PRSM argued that Zone 2 of the shoreline was unsupported by science, and the City implemented a net improvement standard in establishing the Zone 2 buffers.

In its order, the Board generally determined that the City fulfilled the requirements of WAC 173-26-102(2)(a) that the City assemble the current scientific data and assess its uncertainties. In another part of its analysis, the Board stated the City properly relied on both science and policy when establishing the shoreline buffers. Because the rule fundamentally requires that the City "[f]irst[] identify and assemble the most current, accurate, and complete scientific . . . information available," and second "base [the] master program" on that scientific information, the Board did not err in its interpretation of WAC 173-26-201(2)(a).

While the Board did not specifically address the alleged application of a net improvement standard, the Board did recognize that the science would have supported larger buffers, up to 1,969 feet in width.[8]

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[8] Following our questioning at oral argument about the Board's statements regarding the scientific support for the size of the buffers, PRSM moved to provide supplemental briefing, claiming that these statements were not argued by either party in their initial briefing and unfairly constitute a new issue. PRSM appears to be concerned that this language from the Board raises

The science that guided the creation of the buffer widths included recommended buffer widths for at least 80 percent buffer effectiveness, with one suggestion reaching 1,969 feet. The City's buffers for both Zones 1 and 2 were within the recommendations of the scientific literature, and the Board stated that the buffers were reduced to smaller than the science would have supported.

If the buffers were smaller than the science would have supported to maintain the ecological functions at 2011 standards, it follows that the buffers were not designed to overly improve the shoreline, meaning a net improvement standard was not implemented as PRSM suggests. Because the City did not improperly apply the net improvement standard, the Board could not have erred in its application of the law on the basis PRSM asserts when the Board determined the City did not violate the law. PRSM fails to meet its burden under RCW 34.05.570(3)(d).

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the question of whether the existing required widths of the buffers satisfy the no net loss requirements of the SMA—an issue PRSM claims was not raised by the parties in this appeal. We agree that whether the current size of the buffers satisfy the no net loss requirements of the SMA is not before us. Therefore, we had no need for additional briefing from the parties.

But we disagree that the Board's statements are not relevant to our present analysis. PRSM argued to the Board that the City's alleged failure to sufficiently develop its record was because the City used policy instead of science. This argument is the foundation of PRSM's current challenge of whether the record supports the alleged implementation of a net improvement standard. The evidentiary record and the Board's related discussion, which prompted our questions at oral argument, are therefore, clearly relevant to PRSM's arguments in this appeal.

B. RCW 34.05.570(3)(e)—SUPPORTED BY SUBSTANTIAL EVIDENCE

PRSM also asserts that it may be granted relief under RCW 34.05.570(3)(e) because the Board's order was not supported by substantial evidence. The Board identified that the City appropriately relied on the science from its multiple studies in making its determinations about the size and scope of the buffers. Herrera specifically suggested the shoreline buffers that the City adopted, and the Board identified that the scientific literature would have supported larger buffers than the Master Program includes. Because Herrera compiled literature that suggested buffers larger than the existing buffers to achieve at least 80 percent buffer effectivity, the bulk of the evidence disproves PRSM's allegation that the City applied a net improvement standard. When viewed in the light most favorable to the City as the prevailing party, the Board's order is supported by substantial evidence. PRSM fails to meet its burden that the Board's order was not supported by substantial evidence.

C. RCW 34.05.570(3)(i)—ARBITRARY OR CAPRICIOUS

PRSM also argues that they may be granted relief because the Board's order was arbitrary and capricious under RCW 34.05.570(3)(i). The analysis above shows that the Board relied on evidence in the record and applied that evidence to the law. Because the Board relied on evidence in the record to make its decision and issue its order, the Board did not act willful and unreasoned without regard to, or consideration of, the facts and circumstances surrounding the action. Its order was therefore not arbitrary and capricious.

IV. RESPONSE TO PUBLIC COMMENTS

PRSM next complains about the City's alleged failure to respond to public comments about the precautionary principle. Below, the Board determined that the City did not violate the SMA when it did not answer all of the public comments. Like its other challenges to the Board's decision, PRSM appears to argue that this decision from Board's order violates RCW 34.05.570(3)(d), (e), and (i). The City responds that the Board accurately determined that the City was not required to answer all public comments individually.[9] We agree with the City.

The SMA imposes an obligation to involve the public in the development of a shorelines master program. RCW 90.58.130 states:

> To insure that all persons and entities having an interest in the guidelines and master programs developed under this chapter are provided with a full opportunity for involvement in both their development and implementation, the department and **local governments shall**:
>
> (1) Make reasonable efforts to inform the people of the state about the shoreline management program of this chapter and in the performance of the responsibilities provided in this chapter, shall not only invite but actively encourage participation by all

[9] The City also responds that while PRSM did argue to the Board that the City failed to adequately respond to comments, PRSM never tied this argument to the precautionary principle.

> persons and private groups and entities showing an interest in shoreline management programs of this chapter; and
>
> (2) Invite and encourage participation by all agencies of federal, state, and local government, including municipal and public corporations, having interests or responsibilities relating to the shorelines of the state. State and local agencies are directed to participate fully to insure that their interests are fully considered by the department and local governments.

RCW 90.58.130 (emphasis added).

This obligation for local governments to engage and encourage public participation in the SMA process is further explained in WAC 173-26-090(3)(a), which states:

> (i) In conducting the periodic review, the department and local governments, pursuant to RCW 90.58.130, shall make all reasonable efforts to inform, fully involve and encourage participation of all interested persons and private entities, tribes, and agencies of the federal, state or local government having interests and responsibilities relating to shorelines of the state and the local master program. . . .
>
> (ii) Counties and cities shall establish and broadly disseminate to the public a

> public participation program identifying procedures whereby review of the shoreline master program will be considered by the local governing body consistent with RCW 36.70A.140. **Such procedures shall provide for** early and continuous public participation through broad dissemination of informative materials, proposals and alternatives, opportunity for written comments, public meetings after effective notice, provision for open discussion, and **consideration of and response to public comments.**

(Emphasis added).

A. RCW 34.05.570(3)(d)—ERRONEOUS INTERPRETATION OR APPLICATION OF THE LAW

PRSM asserts that we should grant relief under RCW 34.05.570(3)(d) because the Board misinterpreted and misapplied these public participation obligations when it decided the City did not need to answer every public comment. The Board determined that PRSM "failed to carry its burden of demonstrating the City's 'consideration of and response to public comments' violated SMA or GMA requirements." AR at 5805 (quoting WAC 173-26-090(3)). The Board determined that the City did not violate RCW 90.58.130 or WAC 173-26-090 because neither required that the City *answer* every individual public comment, they only require the City to *respond* to comments. The Board recognized that a response to a comment "does not require accepting or agreeing

with them — only taking them into consideration." AR at 5804. Further, the City actually answered the majority of comments it received.

RCW 90.58.130, on its face, does not require the City to respond to comments. It requires only that the City make reasonable efforts to inform the public and invite and encourage participation. The Board did not err in its interpretation of this statute because it correctly determined that the statute did not require individual answers to every public comment.

WAC 173-26-090(3)(a), however, does require that the City consider and respond to public comments when it states, "Such procedures shall provide for . . . response to public comments." While this creates a general obligation for the City to respond to comments, the rule stops short of requiring the City to provide an answer to every individual comment. The Board determined that reacting in response to a comment meant that the City consider the argument, and it may choose to answer the comment. We determine this is a reasonable construction of the rule. It recognizes the importance the legislature placed upon public participation, but it does not impose an unreasonably onerous obligation to individually answer, as in this case, over 1,600 comments. The Board did not err in its application of this rule because it correctly determined that the rule does not require the City to answer every comment and a response by the City does not specifically require an answer. PRSM fails to meet its burden to show the Board erred in its interpretation or application of the law.

B. RCW 34.05.570(3)(e)—SUPPORTED BY SUBSTANTIAL EVIDENCE

PRSM also asserts that we should grant relief because the Board's order was not supported by substantial evidence when it determined the City did not violate the relevant statutes. As stated above, the record shows that the City answered the vast majority of comments submitted to both it and Ecology. The City received over 1,600 individual comments and answered almost all of them, even when comments were duplicative. The City also answered the comments made to Ecology. Moreover, as noted above, the City was not required to answer every comment. Because the City responded to nearly all of the comments with answers when they were not required to answer every individual comment, there is substantial evidence to support the Board's order on this issue. PRSM fails to meet its burden to show that the Board's order was not supported by substantial evidence.

C. RCW 34.05.570(3)(i)—ARBITRARY OR CAPRICIOUS

Additionally, the PRSM argues that the Board's order was arbitrary or capricious when it determined the City's failure to answer all comments did not violate the relevant laws. Because the Board considered that the City responded to comments and was not required to answer each one, the Board considered the facts of this case and did not act willful and unreasoned in disregard of these facts. Therefore, the Board's order was not arbitrary and capricious, and PRSM fails to meet its burden for us to grant relief.

V. UNCONSTITUTIONAL CONDITIONS

Outside of its challenge to the Board's order, PRSM makes a constitutional challenge to the shoreline buffers in the City's Master Program.[10] PRSM argues that the shoreline buffers in the Master Program violate the doctrine of unconstitutional conditions because they do not pass the nexus and proportionality tests. Ecology and the City argue that the Master Program passes the nexus and proportionality tests when the City relied on the best available science. We agree with the City.

Constitutional challenges are questions of law that are reviewed de novo. *OSF*, 199 Wn. App. at 710. We have previously determined that for constitutional challenges to a master program under the SMA, the party asserting invalidity "bears the burden of proving its unconstitutionality beyond a reasonable doubt." *Id.*

Under the doctrine of unconstitutional conditions, "the government may not require a person to give up a constitutional right . . . in exchange for a discretionary benefit . . . ." *Dolan v. City of Tigard*, 512 U.S. 374, 385, 114 S. Ct. 2309, 129 L. Ed. 2d 304 (1994). The *Dolan* and *Nollan* cases involve a specific application of the unconstitutional conditions doctrine. *Dolan*, 512 U.S. 374; *Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825, 107 S. Ct. 3141, 97 L. Ed. 2d 677 (1987). *Dolan* and *Nollan* stand for the proposition that the government may not condition

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[10] PRSM's unconstitutional conditions argument is outside of its challenge of the Board's order because the Board did not have the authority to decide constitutional issues and did not decide the issue. *Bayfield Res. Co. v. W. Wash. Growth Mgmt. Hr'gs Bd.*, 158 Wn. App. 866, 880–81, 244 P.3d 412 (2010).

approval of a land-use permit on the owner's relinquishment of a portion of his property unless there is a nexus and rough proportionality between the government's demand and the effects of the proposed land use. *Koontz v. St. Johns River Water Mgmt. Dist.*, 570 U.S. 595, 599, 133 S. Ct. 2586, 186 L. Ed. 2d 697 (2013).

Nollan and *Dolan* set forth the nexus and rough proportionality tests that the regulation must pass to be constitutional under the unconstitutional conditions doctrine. *Nollan*, 483 U.S. at 837; *Dolan*, 512 U.S. at 391. The nexus test permits only those conditions necessary to mitigate a specific adverse impact of a proposal. *KAPO*, 160 Wn. App. at 272 (citing *Nollan*, 483 U.S. 825). The rough proportionality test limits the extent of required mitigation measures to those that are roughly proportional to the impact they are designed to mitigate. *KAPO*, 160 Wn. App. at 272–73 (citing *Dolan*, 512 U.S. 374).

However, *Nollan* and *Dolan* involved as-applied challenges to regulations that implemented conditional requirements for permit approvals. *See Nollan*, 483 U.S. at 831–32; *Dolan*, 512 U.S. at 391. In the context of a facial challenge to a land use ordinance, the ordinance "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." *Honesty in Env't. Analysis & Legis. v. Cent. Puget Sound Growth Mgmt. Hr'gs Bd. (HEAL)*, 96 Wn. App. 522, 533, 979 P.2d 864 (1999) (plaintiffs made a facial challenge to the Growth Management Act (GMA)) (footnotes omitted).

The SMA requires the use of a "reasoned, objective evaluation" of the scientific and technical information when creating master programs. WAC 173-26-201(2)(a). This is analogous to the requirement found in the GMA to use the "best available science" to set the general requirements in land use ordinances. RCW 36.70A.172(1). When it is shown that the local government meets this standard, the nexus and rough proportionality tests are generally satisfied. *KAPO*, 160 Wn. App. at 273. "If a local government fails to incorporate, or otherwise ignores the best available science, its policies and regulations may well serve as the basis for conditions and denials that are constitutionally prohibited." *HEAL*, 96 Wn. App. at 533. Use of the best available science is "generally interpreted to require local governments to analyze valid scientific information in a reasoned process." *KAPO*, 160 Wn. App. at 267. "If the local government used the best available science in adopting its critical areas regulations [under the GMA], the permit decisions it bases on those regulations will satisfy the nexus and rough proportionality rules." *Id.* at 273. Similarly, we determine that meeting the SMA's requirement for a reasoned, objective evaluation of the scientific and technical information satisfies the nexus and proportionality tests.

PRSM is making a facial challenge to the Master Program specific to the shoreline buffers. The parties appear to agree that the nexus and proportionality tests apply to this facial challenge of the Master Program. PRSM argues that the Master Program does not meet the nexus and proportionality tests because the Master Program does not require identification of anticipated development impacts of ecological

conditions and the City set general default buffers based on mere assumptions of shoreline conditions.

Here, the City assembled an extensive scientific record supporting the Master Program and the shoreline buffers. This record included the following items: Bainbridge Island Nearshore Assessment; Nearshore Habitat Characterization; the Bainbridge Island Current and Historic Coastal Geomorphic/Feeder Bluff Mapping; the Addendum; Memorandum re: Documentation of Marine Shoreline Buffer Recommendation Discussions; Memorandum re: Clarification on Herrera August 11, 2011 Documentation of Marine Shoreline Buffer Recommendation Discussions Memo; and the Cumulative Impacts Analysis for City of Bainbridge Island's Shoreline: Puget Sound.

The studies cited by the City documented the conditions and ecological functions of the Bainbridge Island shoreline. The studies also showed the anticipated impacts of anticipated development on the existing conditions of the shoreline. The studies additionally made detailed recommendations for shoreline regulations, including the shoreline buffers that were adopted by the City, to ensure that the impacts of development would be mitigated and no net loss of shoreline ecological functions would occur.

The City has shown that the Master Program relied on the valid scientific information to establish the shoreline buffers because it implemented the buffers suggested by Herrera and the buffers were based on the science.[11] Because the City relied on

[11] The determination that the Master Program was based on science does not conflict with the Board's conclusion that the City

extensive scientific research, we conclude that it used a reasoned, objective analysis of the science to create the Master Program. *See KAPO*, 160 Wn. App. at 270.

This is fatal to PRSM's facial challenge. Just like using the best available science satisfies the nexus and rough proportionality tests in GMA cases, the use of a reasoned, objective analysis of the science is sufficient to pass the nexus and rough proportionality tests in SMA cases. The Master Program passes these nexus and proportionality tests because the City relied on multiple scientific studies when establishing the shoreline buffer widths. *See KAPO*, 160 Wn. App. at 273–74.

Because the Master Program passes the nexus and proportionality tests, PRSM has not met its burden to show that the Master Program's shoreline buffers violate the doctrine of unconstitutional conditions.

CONCLUSION

We affirm the superior court's order determining that the City's Master Program comports with the SMA.

A majority of the panel having determined that this opinion will not be printed in the Washington

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appropriately used both science and policy to create the shoreline buffers. To fail the nexus and proportionality tests, the buffer widths would need to be in excess of what the science would allow. Because the Board determined that the science alone would have supported larger buffers, the Board's analysis does not contradict our determination that the City used a reasoned, objective analysis.

Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.

s/ Price, J.
Price, J.

We concur:

s/ Worswick, JPT
Worswick, J.P.T.

s/ Veljacic, J.
Veljacic, J.

RECEIVED FOR FILING
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DAVID T. LEWIS III

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR KITSAP COUNTY

PRESERVE RESPONSIBLE SHORELINE MANAGEMENT, Alice Tawresey, Robert Day, Bainbridge Shoreline Homeowners, Dick Haugan, Linda Young, Don Flora, John Rosling, Bainbridge Defense Fund, Gary Tripp, and Point Monroe Lagoon Homeowners Association, Inc. Petitioners, and KITSAP COUNTY ASSOCIATION OF REALTORS, Intervenor Below and Petitioner. v. CITY OF BAINBRIDGE ISLAND, Washington State Department of	NO. 15-2-00904-6 MEMORANDUM OPINION AND ORDER

Ecology, Environmental Land Use Hearings Office and Growth Management Hearings Board Central Puget Sound Region,

Respondents.

This matter is before the Court on judicial review under the Administrative Procedure Act, RCW 34.05, of a Final Decision and Order (Final Order) of the Growth Management Hearings Board which affirmed the City of Bainbridge Island's Shoreline Master Program. In making its decision, the Court considered the following documents:

1. Petitioners' Opening Brief;

2. Respondent City of Bainbridge Island's Response Brief;

3. Washington State Department of Ecology's Hearing Brief;

4. Petitioners' Reply Brief;

5. The administrative record from the Growth Management Hearings Board certified and filed with this Court on December 7, 2016;

6. Petitioner's Notice of Supplemental Authority;

7. Respondents' Statement of Additional Authority.

8. The pleadings and documents filed with this Court in this matter.

The Court heard oral argument on behalf of the parties on September 20, 2021, and being fully apprised of the circumstances of the case, enters the following:

ISSUES

The issues presented in this matter are:

I. Whether the Growth Management Hearings Board (Board) erred in affirming the Shoreline Master Program (SMP) because the buffer provisions violate the Shoreline Management Act (SMA) and Guidelines (WAC 173-26).

II. Whether the buffer provisions of the SMP violate the doctrine of unconstitutional conditions.

III. Whether the SMP's definition of "activity" is unconstitutionally vague.

IV. Whether the SMP's monitoring and inspection conditions violate the U.S. and Washington constitutions.

V. Whether the Board erred in affirming the SMP because the City of Bainbridge Island's ("City") public participation process violated the SMA and Guidelines.

VI. Whether the City's public participation process violated constitutional due process.

VII. Whether the Board erred in affirming the SMP because the City failed to meet the requirements of the SMA and Guidelines with regard to science.

The Court heard oral argument on behalf of the parties on September 20, 2021, and being fully apprised of the circumstances of the case, enters the following:

FINDINGS AND CONCLUSIONS

1. The Court incorporates by reference and adopts the facts found by the Board in its Final Order, as supplemented herein.

2. The Court concludes that Petitioners' challenges to the SMP are properly reviewed under RCW 34.05.570(3). Issues on which no argument was presented are deemed waived. *Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 809, 828 P.2d 549 (1992).

3. This Court views the evidence in the light most favorable to the party who prevailed in the highest forum that exercised fact-finding authority, in this case the Growth Management Hearings Board. *Olympic Stewardship Found. v. Env't and Land Use Hearing Off.*, 199 Wn. App. 668, 696, 399 P.3d 562 (2017).

4. The standard of review of the Board's legal conclusions is *de novo*. The Court grants the Board and Ecology due deference on their expertise in interpreting the SMA and Guidelines. *Port of Seattle v. Pollution Control Hearings Bd.*, 151 Wn.2d 568, 593–95, 600, 90 P.3d 659 (2004).

5. "The party challenging a statute's or regulation's constitutionality bears the burden of proving its unconstitutionality beyond a reasonable doubt." *Olympic Stewardship Found. v. State Envtl. & Land Use Hearings Office through W. Washington Growth Mgmt. Hearings Bd.*, 199 Wn. App. 668, 710, 399 P.3d 562 (2017). Petitioners argue that where a party brings a facial challenge under the doctrine of unconstitutional conditions the burden is on the government to prove its constitutionality by showing

both nexus and proportionality. The cases cited by Petitioner in support of this argument are all "as-applied" cases, not facial challenges, as is the case here. As this is a facial constitutional challenge, Petitioners bear the burden of proving the unconstitutionality of the SMP beyond a reasonable doubt.

6. The Court finds and concludes that the City properly utilized a systematic interdisciplinary approach that insured the use of natural and social sciences when it set the 2-tiered buffer system in each shoreline designation. RCW 90.58.100(1)(a). The Court finds that the SMP and SMP buffer provisions are consistent with the SMA's No Net Loss of Ecological Functions standard and are not improperly based on "net gain" as contended by Petitioner. RCW 90.58.020; RCW 90.58.620(1)(b); WAC 173-26-186(8)(b); WAC 173-26-201(2)(c). The Court affirms the Board's findings that Petitioners have not met their burden to demonstrate that the SMP buffer provisions violate the SMA and Guidelines. Issue I is dismissed.

7. The Court finds and concludes that the City compiled appropriate science and applied a reasoned process when setting shoreline buffers consistent with that science. The authority cited by Petitioners sets out the test for as-applied challenges to buffers, not facial challenges as Petitioners assert here. The Court finds and concludes that the SMP buffer provisions, as legislative enactments and not individual project permits suited for as-applied challenges, meet nexus and proportionality by 1) providing a multi-tiered system of buffers that are keyed to the shoreline environmental designation, and also to the

characteristics of individual lots within the environmental designations, 2) providing buffers that are within the range of buffer widths that the science shows protects the various ecological functions of shorelines, and 3) providing alternatives to buffers that include development of individual Vegetation Management Areas, and process for obtaining a variance from the buffer provisions. The buffers do not impose unconstitutional conditions and the Court finds and concludes that Petitioners have not met their burden to prove that the SMP buffer provisions are unconstitutional beyond a reasonable doubt. Issue II is dismissed.

8. The Court takes judicial notice of Bainbridge Ordinance No. 2020-17. Ordinance No. 2020-17 modified several definitions contained in the SMP, including the definition of "activity" and of "existing development." Petitioners did not appeal Ordinance No. 2020-17, and the new definitions are not before this Court. The Court concludes that Petitioners' arguments regarding the older, and now superseded, definitions are moot, and dismisses Issue III.

9. The Court finds and concludes that neither the SMP nor the Bainbridge Island Municipal Code authorize warrantless searches of private property without the owner's consent. The SMP's monitoring provisions do not authorize the City or any other person to enter onto private property without a warrant and require only that the property owner submit monitoring reports prepared by a qualified professional chosen by the property owner. The City's code enforcement provisions in BIMC 1.16 require that the City obtain consent or a warrant prior to entering private property, except where the City has

a written easement or where exigent circumstances exist. The Court finds and concludes that Petitioners have not met their burden to prove that the SMP enforcement and monitoring provisions are unconstitutional beyond a reasonable doubt. Issue IV is dismissed.

10. The Court finds and concludes that the City provided multiple opportunities for the public to participate in the SMP adoption process. The public's opportunity consisted of participation on committees, multiple opportunities to participate in public meetings, and multiple opportunities to review and comment on draft SMP language prior to the City's final approval of the SMP on July 14, 2014. The Court affirms the Board's findings and conclusions that Petitioners failed to carry their burden that the City's public participation process did not comply with the SMA and Guidelines. The Court dismisses Issue V.

11. The Court finds and concludes that Petitioners had notice and a meaningful opportunity to be heard regarding the City's legislative proposals at many stages of the SMP's development. The City conducted four public hearings on the SMP, the Washington State Department of Ecology conducted one public hearing on the SMP, the City conducted numerous public meetings on the SMP at which public comment was taken, and written public comment was received throughout the public process. The Court finds and concludes that the City timely made public and accessible the relevant documents and provided the opportunity for public comment on those documents in testimony and in written form, including the opportunity to comment on Section 7 of the SMP relating to enforcement, Appendix C of the SMP

relating to buffers, and the definition of existing development. The Court finds and concludes that Petitioners failed to meet their burden to prove that the City's public participation process violated the SMA, violated due process, or was unconstitutional beyond a reasonable doubt. The Court dismisses Issue VI.

12. The Court finds and concludes that the City collected current scientific information regarding the City's shoreline conditions and ecological function, indicated where data gaps and uncertainties exist, and conducted a reasoned evaluation of the relative merits of conflicting data. The Court also finds and concludes that the City considered current science related to marine shorelines and the protection that buffers provide for specific ecological functions. The Court affirms the Board's findings and conclusions that Petitioners have not met their burden to show that the City violated the SMA and the Guidelines with regard to the science that supports the SMP. Issue VII is dismissed.

ORDER

The decision of the Board is affirmed, and the Petition for Review is dismissed with prejudice.

Dated this 3rd day of December 2021.

s/ Tina Robinson
TINA ROBINSON
Kitsap County Superior Court Judge

FILED
SUPREME COURT
STATE OF WASHINGTON
6/7/2023
BY ERIN L. LENNON
CLERK

THE SUPREME COURT OF WASHINGTON

PRESERVE RESPONSIBLE SHORELINE MANAGEMENT, et al., Petitioners, v. CITY OF BAINBRIDGE ISLAND, et al., Respondents.	No. 101727-8 **O R D E R** Court of Appeals No. 56808-0-II

Department II of the Court, composed of Chief Justice González and Justices Madsen, Stephens, Yu, and Whitener (Justice Johnson sat for Justice Whitener), considered at its June 6, 2023, Motion Calendar whether review should be granted pursuant to RAP 13.4(b) and unanimously agreed that the following order be entered.

IT IS ORDERED:

That the Deputy Clerk's motion to strike the Petitioner's reply to the answer to the petition for review is granted. The petition for review is denied.

DATED at Olympia, Washington, this 7th day of June, 2023.

For the Court

s/ González, C.J.
CHIEF JUSTICE

Filed
Washington State
Court of Appeals
Division Two
January 19, 2023

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

PRESERVE RESPONSIBLE SHORELINE MANAGEMENT, Alice Tawresey, Robert Day, Bainbridge Shoreline Homeowners, Dick Haugan, Linda Young, Don Flora, John Rosling, Bainbridge Defense Fund, Gary Tripp, and Point Monroe Lagoon Home Owners Association, Inc.,

Appellants,

v.

CITY OF BAINBRIDGE ISLAND, Washington State Department of Ecology, Environmental Land Use Hearing Office and Growth Management Hearings

No. 56808-0-II

ORDER DENYING MOTION FOR RECONSIDERATION

Board Central Puget Sound Region,

Respondents,

and

Kitsap County Association of Realtors,

Intervenor Below.

Appellants move for reconsideration of the opinion filed December 13, 2022, in the above entitled matter. Upon consideration, the Court denies the motion. Accordingly, it is

SO ORDERED.

PANEL: JJ. WORSWICK, VELJACIC, PRICE

FOR THE COURT:

s/ Price, J.
Price, J.

ORDINANCE NO. 2014-04
(formerly Ordinance No. 2013-34)

AN ORDINANCE of the City of Bainbridge Island, Washington, adopting the City of Bainbridge Island Shoreline Master Program Update, including adopting the new shoreline designations map and amending goals, policies and regulations; . . . .

* * * * *

1.2.3 Development of the City's Shoreline Master Program

* * * * *

The "precautionary principle" was employed as guidance in updating the policies and regulations of this SMP. The "precautionary principle" is cited in the State Shoreline Guidelines under WAC 173-26-201(3)(g) and states, in part that "as a general rule, the less known about existing resources, the more protective shoreline master program provisions should be to avoid unanticipated impacts to shoreline resources."

* * * * *

1.5 Master Goal

The City's shorelines are among the most valuable and fragile of our natural resources and their use, protection, restoration, and preservation is of public interest to all residents of the City. The Island shorelines provide for a significant part of our way of life as a place of residence, recreational enjoyment, and occupation. It is the intent of this program to manage the shorelines of Bainbridge Island consistent with the requirements of the Shoreline Management

Act, the Shoreline Master Program Guidelines, and the Growth Management Act, giving preference to water-dependent and water-related uses, and to encourage all reasonable and appropriate development and other activities to occur in a manner which will promote and enhance the public interest and protect environmental resources. An over-arching goal of this master program is to ensure that future use and development of the City's shoreline maintain a balance between competing uses, results in no net loss of shoreline ecological functions, and achieves a net ecosystem improvement over time.

* * * * *

Table 4-3

Table 4-3 Shoreline Buffer Standards Table

Additional Use restrictions for BIMC Titles 17 and 18 may apply

SHORELINE USE	UPLAND DESIGNATION				
	Natural	**Island Conservancy**	**Shoreline Residential Conservancy**	**Shoreline Residential**	**Urban**
The shoreline buffer consists of two management areas Zone 1 and Zone 2. Zone 1 is located closest to the water; it is a minimum of 30 feet in all designations, except in Natural and Island Conservancy the minimum is 50' and expands to include existing native vegetation. Zone 2 is the remaining area of the shoreline buffer. See figure XXX					
Category A: Low bank lots with 65% Canopy Area in Zone 1, OR spit/barrier/backshore, marsh lagoon, or rocky shores. Category B: Low bank with less than 65% Canopy Area in Zone 1, or lots with a depth < 200' or High Bluff. *Geomorphic Class (i.e. low bank, High Bluff) shall be determined by Battelle 2004 Nearshore Characterization and Inventory.*					
Developed lots					
Category A	200'	150'	115'	75'	30'
Category B	200'	100'[1]	75'[1]	50'[1]	30 [1]
Undeveloped lots					
	200'	150'	150'	75/150'[2]	30'
1. For High bluff properties the greater distance of 50' from the top of the bluff or the standard shoreline buffer. 2. If adjacent to the Priority Aquatic designation then 150' is required.					

4.1 Environmental Quality and Conservation

* * * * *

4.1.1.2 Applicability

Within the City's jurisdiction all those areas lying waterward from the line of extreme low tide are shorelines of state-wide significance. [RCW 90.58.030(2)(f)(iii) or its successor]. Development, use, or activities located within shorelines of statewide significance shall follow all the provisions of this program. Proposed development, use, and activity within shorelines of statewide significance shall be reviewed in accordance with preferred policies listed in 4.1.1.3. The Administrator may reduce, alter, or deny proposed development, use, or activity to satisfy the preferred policy.

* * * * *

4.1.2 Environmental Impacts

* * * * *

4.1.2.3 Policies

* * * * *

4. In assessing the potential for new uses, activities and developments to cause adverse impacts, take into account all of the following:

* * * * *

   b. Effects that occur on-site and effects that may occur off-site; and

   c. Direct and indirect effects and long-term effects of the project; and

   d. Effects of the project and the incremental or cumulative effects resulting from the project

added to other past, present, and reasonably foreseeable future actions;

* * * * *

4.1.2.4 Regulations-Impact Analysis and No Net Loss Standard

1. All shoreline development, use and activities, including preferred uses, and uses that are exempt from a shoreline substantial permit, shall be located, designed, constructed, and maintained in a manner that protects ecological functions and ecosystem-wide processes. All proposed shoreline development, uses and activities shall:

* * * * *

g. Result in no net loss of ecological functions and processes necessary to sustain shoreline resources, including loss that may result from the cumulative impacts of similar developments over time.

* * * * *

4.1.2.5 Regulations – Revegetation Standards

1. Vegetation replanting is required for all development, uses or activities within the 200-foot shoreline jurisdiction that either alters existing native vegetation or any vegetation in the required Shoreline Buffer or Vegetation Management Areas, either a permit is required or not. This includes invasive species removal.

* * * * *

3. If the Shoreline Buffer is altered or reduced pursuant to provisions of Section 4.1.3, Vegetation Management or Section 4.2.1, Nonconforming

Uses, Non-Conforming Lots, and Existing Development, the following shall occur in Zone 1:

a. Retain existing native vegetation; and

b. Plant the entire area of Zone 1. Obtain 65% vegetation canopy coverage within 10 years.

* * * * *

4.1.3 Vegetation Management

4.1.3.1 Applicability

Vegetation management is required for protection and conservation within the shoreline jurisdiction. Dimensional and other development standards, including buffers, are established based on site-specific development and conditions or as specified for that particular shoreline designation . . . .

* * * * *

Vegetation management includes conservation activities to protect and restore vegetation along or near marine and freshwater shorelines that contribute to the ecological functions and processes of shoreline areas. Vegetation management provisions include vegetation restoration, the prevention or restriction of plant clearing and earth grading, and the control of invasive weeds and nonnative vegetation species.

The Vegetation Management provisions apply to all shoreline development, and regulated uses and activities, including those that do not require a shoreline permit. Similar to other master program provisions, vegetation standards do not apply retroactively to existing uses and structures unless changes or alterations are proposed. Standards for

vegetation management are established using current scientific and technical information pursuant to WAC 173-26-221(5)(b) and 173-26-201(2)(a), and are based on the use category, shoreline characterization and the designation. Standards are provided in Section 4.0, and Tables 4-2 and 4-3.

* * * * *

4.1.3.5 Regulations – General

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3. Two alternative methods may be used to meet the goals and policies of the Vegetation Management Section, as provided below, …

    a. Site-Specific Vegetation Management Areas

        i. As an alternative to the Shoreline Buffer dimensions provided in subsection b, below, an applicant may propose specific dimensional standards that meet the Vegetation Management goals and policies as determined through a Habitat Management Plan prescribed in Appendix B, Section B-4, provided that the plan demonstrates the following:

            A. The proposed development is for a residential use.

            B. The site-specific proposal assures there is no net loss of the property's specific shoreline ecological functions and associated ecosystem-wide processes pursuant to Section 4.1.2, Impact Analysis and No Net Loss; and

C. The site-specific proposal uses the scientific and technical information* compiled to support the Shoreline Buffer standards of Section 4.1.3.5(3)(b), and /or other appropriate technical information which, as determined by a qualified professional, demonstrates how the proposal protects ecological functions and processes and how it meets the goals and policies of this Section.

ii. The Habitat Management Plan shall be reviewed by the Administrator in accordance with provisions in Appendix B. The Administrator may approve, approve with conditions, or deny the request. The Administrator shall have the Habitat Management Plan reviewed by an independent third party, the cost of which will be borne by the applicant.

iii. If the Site-specific Vegetation Management Area is approved, prior to permit issuance the applicant shall record with the County Auditor a notice on title, or other similar document subject to the approval of the Administrator.

* * * * *

b. As an alternative to a Site-specific Vegetation Management Area, a Shoreline Buffer shall be maintained immediately landward of the OHWM and managed according to provisions of this section. The Shoreline Buffer shall meet the location and design standards of Section 4.1.3.6, Regulations – Shoreline Buffer – Location and

Design Standard. The Shoreline Buffer shall be composed of two zones:

i. Zone 1, an inner protective buffer area located immediately abutting the OHWM; and

ii. Zone 2, the remaining portion of the Shoreline Buffer located immediately abutting Zone 1.

4. The Shoreline Buffer or Site-specific Vegetation Management Area shall be maintained in a predominantly natural, undisturbed and vegetated condition. Unless specifically allowed by this program, the following standards shall apply:

   a. All existing native groundcover, shrubs and significant trees located within the Shoreline Buffer or Site-specific Vegetation Management Area shall be retained.

   b. All activities shall be performed in compliance with the applicable standards contained in the Vegetation Management Section, unless the applicant demonstrates that alternate measure or procedures are equal or superior in accomplishing the purpose and intent of the Vegetation Management Section, including no net loss of ecological functions and ecosystem-wide processes.

   c. The use of pesticides are prohibited unless specifically allowed in Section 4.1.6, Water Quality and Stormwater Management.

5. New vegetation planted in the Shoreline Buffer or Site-specific Vegetation Management Area, unless

otherwise provided for in zone-specific requirements Section 4.1.3.6 (6), shall be:

a. Native species using a native plant-community approach of multi-storied, diverse plant species that are native to the Central Puget Lowland marine riparian zone.

b. Other plant species may be approved that are similar to the associated native species in diversity, type, density, wildlife habitat value, water quality characteristics, and slope stabilizing qualities, excluding noxious/invasive species provided that, as submitted by a qualified professional, it is demonstrated to the satisfaction of the Administrator that the selected ornamental plants can serve the same ecological function as native plant species.

* * * * *

4.1.3.6 Regulations – Shoreline Buffer – Location and Design Standard

1. The total depth of the Shoreline Buffer is based on the shoreline designation and the physical and most predominant geomorphic characteristics of the property. The depth of the Shoreline Buffer will be determined by the Administrator according to criteria below:

   a. Property-specific physical and geomorphic characteristics of the particular lot will determine the maximum width (Category A) or minimum width (Category B) of the Shoreline Buffer, as follows:

i. Shoreline Buffer Category A: The property contains or abuts a spit/barrier/backshore, or marsh, or lagoon; or

The property contains or abuts a low bank and the existing native tree and shrub vegetation cover is at least 65% of the area of Shoreline Buffer Zone 1.

ii. Shoreline Buffer Category B: The property is shallow (200 feet in depth or less, as measured landward), or located on a high bluff, or does not meet any of the characteristics of Category A.

b. Shoreline Buffer standard depth in Table 4-3.

c. As determined by the Administrator, buffers do not extend beyond an existing public paved street or an area which is determined by the Administrator to be functionally isolated from the shoreline or critical area. In these limited instances the no net loss of shoreline ecological function and processes still apply to properties within the shoreline jurisdiction.

2. The total area of the Shoreline Buffer shall be the equivalent of the length of the property along the shoreline, multiplied by the required buffer depth as prescribed for the specific shoreline designation in which the property is located. See Figure 4-1.

3. The Shoreline Buffer consists of two zones. The depth of each of the two zones within the Shoreline Buffer is determined as follows:

a. Zone 1 shall extend from the ordinary high water mark (OHWM) a minimum of 30 feet, or

to the limit of existing native vegetation whichever is greater. The native vegetation limit is determined through a site-specific analysis of existing conditions, and in no case shall Zone 1 be greater than the depth of the Shoreline Buffer.

b. Zone 2 shall be established immediately landward of the Zone 1 and extend no further than the depth of the Shoreline Buffer.

4. The following zone specific planting regulations apply to the Shoreline Buffer:

   a. New lawns are not permitted in Zone 1.

   b. In Zone 2, one-third (1/3) of the area may be planted in a combination of grass lawns and approved structures provided:

      i. Significant native trees are not removed to establish such use, or

      ii. The buffer has been reduced through view provisions of Section 4.1.3.11.

   c. The remaining two-thirds (2/3) of Zone 2 shall be maintained in a native vegetative state.

   d. Planted areas in which fertilizers might be applied shall be located as far landward of Zone 1, as feasible.

* * * * *

4.1.3.7 Regulations – General Vegetation Alterations in Shoreline Buffers or Site-specific Vegetation Management Areas

1. The following activities are allowed within the Shoreline Buffer and Site-specific Vegetation Management Area with an approved clearing permit. Such activities shall meet the standards of Section 4.1.4, Land Modification.

    a. Existing landscape areas may be retained within the Shoreline Buffer or Site-specific Vegetation Management Area. However, any changes from the existing landscape to a different landscaping use or activity will require that the modified area comply with the provisions of 4.1.3, Vegetation Management, and the intent of providing native vegetation to maintain ecological functions and processes.

    b. Minor Pruning. Tree pruning, including thinning of lateral branches to enhance views, or trimming, shaping, thinning or pruning necessary for plant health and growth and which does not harm the plant, is allowed consistent with the following standards:

        i. All pruning shall meet the American National Standard Institute (ANSI) tree pruning standards;

        ii. In no circumstance shall removal of more than one-fourth (1/4) of the original crown be permitted within a three year period;

        iii. Pruning shall not include topping, stripping of branches or creation of an imbalanced canopy; and

        iv. Pruning shall retain branches that overhang the water.

c. Vegetation Removal Related to Construction. Tree or vegetation removal within the Shoreline Buffer or Site-Specific Vegetation Management Area that is associated with new construction may be allowed, but must retain significant trees and shall meet the requirements of Section 4.1.2, Environmental Impacts, including replanting provisions.

d. Vegetation Removal Related to Public Facility Maintenance. Tree or vegetation removal within the Shoreline Buffer or Site-specific Vegetation Management Area that is associated with maintenance of existing public facilities (including: roads, paths, bicycle ways, trails, bridges, sewer infrastructure facilities, storm drainage facilities, fire hydrants, water meters, pumping stations, street furniture, potable water facilities, and other similar public infrastructure), may be approved by the Administrator if no significant trees are removed, the requirements of Section 4.1.2, Environmental Impacts are met, and the maintenance is measures meet the goals and policies of Section 4.1.3, Vegetation Management, or as approved in a SOP manual as provided in Section 4.1.3.5(7). The following activities are exempt from this requirement:

    i. Removal of vegetative obstructions required for sight distance and visual clearance at street intersections provided in the Public Works Design and Construction Standards and Specifications.

e. Underground Utilities. Utilities that run approximately perpendicular to the buffer (for

example, a stormwater tightline to the water to protect a slope or a sewer line to a marina), may be allowed within the Shoreline Buffer or Site-specific Vegetation Management Area, provided that disturbance is minimized and the disturbed area is revegetated after construction; and

f. Other Approved Development in the Shoreline Buffer or Site-specific Vegetation Management Area.

i. Potable water wells; and

ii. Approved shoreline stabilization;

2. Shoreline Buffer Reductions.

a. When the prescriptive buffer depth is reduced or dimensions altered through provisions of this Program, the applicant shall record a notice on title, or other similar document with the County Auditor prior to permit issuance, subject to the approval of the Administrator.

b. If the required depth of a Shoreline Buffer for a single-family residential property is reduced in accordance with the Shoreline Structure Setback provisions of Section 4.1.3.11 or other reductions allowed through this Program, Zone 1 must be restored in accordance with provisions of Section 4.1.2.5.

* * * * *

7.2 Regulations

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7.2.3 Violations – Specific

It is unlawful for any person to:

1. Initiate or maintain, or cause to be initiated or maintained, the use, construction, placement, removal, alteration, or demolition of any structure, land, vegetation or property within the city without first obtaining permits or authorizations required by this Master Program, or in a manner that violates the terms or conditions of such permits or authorizations.
2. Misrepresent any material fact in any application, plans or other information submitted to obtain permits or authorizations under this Master Program.

* * * * *

7.2.7 Civil Infraction

Except as provided in subsection 7.2.8, Misdemeanor, conduct made unlawful by the city under this Master Program shall constitute a civil infraction and is subject to enforcement and fines as provided in BIMC 1.26.035. A civil infraction under this section shall be processed in the manner set forth in BIMC Chapter 1.26, Code Enforcement and in compliance with WAC 173-27-280.

7.2.8 Misdemeanor

Any person who again violates this Master Program within 12 months after having been found by the Bainbridge Island Municipal Court to be in violation of this Program, commits a misdemeanor and any person who is convicted of that violation shall be punished as provided in BIMC 1.24.010.A.

7.2.9 Civil Penalty

In addition to any civil infraction fine, criminal penalty, and/ or other available sanction or remedial procedure, any person who shall fail to conform to the terms of a permit or exemption issued under this shoreline master program or who shall undertake development on the shorelines of the state without first obtaining any permit or exemption required under this shoreline master program shall also be subject to a civil penalty in the amount not to exceed $1,000 per day for each violation, each permit violation or each day of continued development without a required permit shall constitute a separate violation [RCW 90.58.210 or successor]; from the date set for compliance until the date of compliance. Any such civil penalty shall be collected in accordance with BIMC 1.26.090

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8.0 DEFINITIONS

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Activity – Human activity associated with the use of land or resources.

* * * * *

Buffer – An area of land that is designed and designated to permanently remain vegetated in a predominantly undisturbed and natural condition and/or an area that may need to be enhanced to support ecological processes, or ecosystem-wide functions and to protect an adjacent aquatic or wetland area from upland impacts and to provide habitat for wildlife. Buffer widths vary depending on the relative quality and sensitivity of the area being protected….

* * * * *

Cumulative Effects – The combined environmental impacts that accrue over time and space from a series of similar or related individual actions, contaminants, or projects....

* * * * *

Water-oriented Use – Refers to any combination of water-dependent, water-related and/or water-enjoyment uses and serves as an all-encompassing definition for priority uses under the Shoreline Management Act.

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Appendix B
Critical Areas

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B-3. Prescriptive buffers variations.

A. Intent. The City recognizes that in some cases it may not be possible to provide a critical area buffer that meets the dimensions prescribed by this ordinance, due to land area or other constraints. The City further recognizes that in some cases the desired or better critical area protection can be achieved through alternative approaches.

   This section provides alternatives that can be pursued in lieu of the prescribed buffers when warranted by site-specific conditions. In considering an application for any of these alternatives, it shall always be the primary intent of the City to protect the functions and values of the critical areas. It is further the intent of the City to ensure that the application of the provisions of

this chapter does not deprive an owner from reasonable use of their property.

Any proposed use of the following alternatives shall be supported by analysis utilizing appropriate science, to determine and minimize the impacts of the alternative:

B. Buffer Averaging. If characteristics of the property do not allow reasonable use with prescribed buffers, the Director may allow wetland and/or fish and wildlife conservation area buffer widths to be averaged. It is intended that the process for reviewing a buffer averaging proposal be as simple as possible, while ensuring that the following criteria are met:

1. The total area contained within the buffer after averaging shall be no less than that contained within the standard buffer prior to averaging;

2. The applicant demonstrates that such averaging will clearly provide greater protection of the functions and values of critical areas than would be provided by the prescribed habitat buffers.

3. The averaging will not result in reduced buffers next to highly sensitive habitat areas; and

4. The applicant demonstrates one or more of the following:

a. That the wetland contains variations in sensitivity due to existing physical characteristics;

b. That only low intensity uses would be located within 200 feet of areas where the buffer width is reduced, and that such low intensity uses restrictions are guaranteed in perpetuity by

covenant, deed restriction, easement, or other legally binding mechanism; or

c. That buffer averaging is necessary to avoid an extraordinary hardship to the applicant caused by circumstances peculiar to the property.

C. Habitat Management Plan. A Habitat Management Plan may be prepared pursuant to subsection B-4 when it can clearly be demonstrated that greater protection of the functions and values of critical areas can be achieved through the HMP than could be achieved through providing the prescribed habitat buffers. A Habitat Management Plan may be used as a means to protect wetland and/or fish and wildlife habitat conservation area buffers. Habitat Management Plans may not be used to reduce the water quality buffers for wetlands and/or fish and wildlife habitat conservation areas.

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B-4. Habitat management plan.

A. General. A Habitat Management Plan shall comply with the requirements of this Section, and shall clearly demonstrate that greater protection of the functions and values of critical areas can be achieved through the HMP than could be achieved through providing the prescribed habitat buffers. The Director shall prepare performance standards and monitoring guidelines for Habitat Management Plans, including a program for City oversight of such plans. Once the standards and guidelines are in place, an applicant may propose to implement an HMP as a means to protect

habitat buffers associated with wetlands and/or fish and wildlife conservation areas.

B. Intent. HMPs are primarily intended as a means to restore or improve buffers that have been degraded by past activity, and should preserve, and not reduce, existing high quality habitat buffers. While not primarily intended as a means to reduce buffers, the HMP may propose a reduction of the habitat buffer width where it is shown that the HMP will comply with the other requirements of this Section. An HMP shall not reduce the prescribed water quality buffer width as listed in B-8 and B-10 under any circumstance.

C. Effect of buffers. An HMP shall provide habitat functions and values that are greater than would be provided by the prescribed habitat buffers. . . .