Case No: 568080-II

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON

Preserve Responsible Shoreline Management, et al,

Appellants,

v.

City of Bainbridge Island, et al,

Respondents,

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

APPELLANTS' OPENING BRIEF

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INTRODUCTION

This Shoreline Management Act (SMA) case raises several important questions of statutory and federal constitutional law arising from the City of Bainbridge Island's 2014 Shoreline Master Program Update (SMP). At issue is the City's decision to rely on the so-called "precautionary principle" to require that shoreline homeowners dedicate and perpetually maintain large tracts of their land as conservation areas in order to mitigate for potential onsite development impacts, and also to mitigate the presumed impacts of existing and future offsite land uses.[1] Administrative Record (AR) 42 (SMP § 1.2.3) ("The 'precautionary principle' was employed as guidance in updating the policies and regulations of this SMP."). A failure to comply with the SMP's conservation area management requirements

[1] The "precautionary principle" suggests that, when faced with scientific uncertainty on a matter that poses a significant risk of irreversible harm, the government should take temporary steps to avoid that risk. WAC 173-26-201(3)(g); *Yakima Cty. v. E. Wash. Growth Mgmt. Hearings Bd.*, 168 Wn. App. 680, 693, 279 P.3d 434 (2012).

exposes the homeowner to civil and criminal penalties. AR 251–52 (SMP § 7.2.8).

Although "conservation buffers" are a common tool for containing and mitigating development impacts, statutory and constitutional law limit the circumstances in which local governments can lawfully require such a property dedication. Here, the City's SMP pushes this regulatory tool far beyond its ordinary application by exacting a perpetual dedication of land and labor as a mandatory condition on any development, use, or "human activity associated with the use of land or resources" occurring within 200 feet of the shoreline, "whether a permit is required or not,"[2] and by doing so based on the "precautionary principle," rather than basing the buffer on a determination of whether the proposed use will have adverse impacts on existing shoreline ecological conditions.

[2] AR 48 (SMP § 1.3.5.2); AR 100–01 (SMP §§ 4.1.2.4(2); 4.1.2.5(1)); AR 224 (SMP § 8, Definitions).

The City's precautionary demands violate the law in three key ways. First, the "precautionary principle" cannot be invoked to bypass the SMA's mandate that the City engage in a reasoned process, on the record, of considering science and other relevant information when developing an SMP update. RCW 90.58.100(1); WAC 173-26-201(2). Second, caselaw strictly limits a city's authority to invoke the "precautionary principle," requiring the government to create a record showing that (1) the regulated activity poses a significant risk of irreversible harm to the environment, (2) there is an "absence of relevant scientific information" on the topic, and (3) the precautionary measures will only last "until the uncertainty is sufficiently resolved." *Yakima Cty.*, 168 Wn. App. at 693. And third, the United States Constitution limits a local government's authority to demand that individuals surrender a fundamental right in exchange for a permit, license, or other government benefit. This federal constitutional doctrine requires that a government-imposed condition demanding that the owner surrender an interest in real

or personal property be directly and proportionately related to the impact of the desired property use.[3] *See Nollan v. California Coastal Commission*, 483 U.S. 825, 836–37, 107 S. Ct. 3141, 97 L. Ed. 2d 677 (1987); *Dolan v. City of Tigard*, 512 U.S. 374, 391, 114 S. Ct. 2309, 129 L. Ed. 2d 304 (1994); *Koontz v. St. Johns River Water Mgmt. Dist.*, 570 U.S. 595, 604–05, 133 S. Ct. 2586, 186 L. Ed. 2d 697 (2013).

The City's failure to create a record showing that the conservation areas are appropriately limited in size, therefore, also violates the doctrine of unconstitutional conditions as predicated on the Just Compensation Clause of the U.S. Constitution, which is made applicable to state and local government via the Fourteenth Amendment.

For these reasons, Appellants Preserve Responsible Shoreline Management, Alice Tawresey, Robert Day,

[3] WAC 173-26-186(8)(b)(i) (requiring that "regulations and mitigation standards" be designed and implemented "in a manner consistent with all relevant constitutional and other legal limitations on the regulation of private property").

Bainbridge Shoreline Homeowners, Dick Haugan, Linda Young, John Rosling, Bainbridge Defense Fund, and Point Monroe Lagoon Home Owners Association, Inc. ("PRSM") request that this Court reverse the trial court's decision, reverse the Growth Management Hearings Board's Final Decision and Order, and issue an order invalidating the challenged conservation buffer provisions.

ASSIGNMENTS OF ERROR AND ISSUES PERTAINING THERETO

I. PRSM assigns error to the Kitsap County Superior Court's December 3, 2021, Memorandum Opinion and Order upholding the Growth Management Hearings Board's April 6, 2015, Final Decision and Order issued in *Preserve Responsible Shoreline Management v. City of Bainbridge Island*, Case No. 14-3-0012.

II. PRSM also assigns error to the Growth Board's underlying Final Decision and Order. The following issues pertain to that decision:

A. Whether the Board erred in approving the City's SMP, and Ecology's approval of the SMP, when:

1. The City failed to justify in the record that its conservation easement requirement is not "in excess of that necessary to assure that development will result in no net loss of shoreline ecological

functions and not have a significant adverse impact on other shoreline functions." WAC 173-26-201(2)(e)(ii)(A);

2. The City failed to justify in the record its decision to invoke the "precautionary principle" as required by RCW 90.58.100(1) and WAC 173-26-201(3)(g);

3. The City failed to justify in the record its decision to depart from the "no net loss" standard required by WAC 173-26-201(2)(e)(ii)(A); and

4. The City failed to respond to public comments seeking an explanation how, why, and where the City applied the "precautionary principle" as required by RCW 90.58.130 and WAC 173-26-090.

B. Whether the Board erred in approving the City's SMP and Ecology's approval of the SMP, because the SMP violates the doctrine of unconstitutional conditions, as predicated on the Fifth Amendment to the U.S. Constitution, by mandating that homeowners dedicate conservation easements designed to mitigate for preexisting impacts such as those caused by neighboring property uses, public roads, ditches, and sewer outflow.

STATEMENT OF THE CASE

A. Legal Background: The Shoreline Management Act and the "No Net Loss" Mitigated Development Standard

Washington's SMA directs each city and county to enact and periodically update its SMP, which constitutes the local development and use regulations for property adjacent to shorelines of the state. RCW 90.58.010–.920. In enacting the SMA, the Legislature readily acknowledged that basic societal needs—such as housing and public infrastructure—will result in alterations to the natural shoreline environment; thus, the Act directs local governments to develop regulations designed to "foster[]" priority shoreline uses, like the development of single-family homes on residentially zoned lots, while mitigating adverse impacts through appropriate planning. RCW 90.58.020 ("[C]oordinated planning is necessary in order to protect the [environment] while, at the same time, recognizing and protecting private property rights[.]").

To carry out the Act's policy of balancing property rights and the environment, the SMA Guidelines (Ch. 173-26 WAC) require that SMPs "shall include policies and regulations that assure no net loss of shoreline ecological functions will result from residential development." WAC 173-26-241(3)(j). Critically, the "no net loss" standard does not impose an environment-first requirement on shoreline regulations. Instead, "no net loss," which originates in the field of environmental economics,[4] is the product of compromise among government, environmentalists, tribes, property owners, and builders. Thus, "no net loss" is based on the understanding that development and use of private property will occur and that any unavoidable impacts to ecological function can be offset by mitigation,

[4] J.B. Ruhl & James Salzman, *Gaming the Past: The Theory and Practice of Historic Baselines in the Administrative State*, 64 Vand. L. Rev. 1, 29–35 (2011).

thereby ensuring "no net loss" of overall environmental conditions.[5]

The "no net loss" concept is focused on protecting *existing* conditions, whether pristine or developed, from new development impacts. AR 2127 ("No net loss" requires that "projects that result in degradation of ecological functions … must at minimum return the resultant ecological function back to the baseline."); AR 4282 ("The [SMA] defines the baseline for measuring no net loss to be 'existing shoreline conditions[.]'"). To establish a baseline of actual ecological conditions, the Act requires that (1) the government create a record showing the local government engaged in a reasoned and objective analysis of "the

[5] *See* WAC 173-26-201(2)(c) ("The concept of 'net' recognizes that any development has potential for actual, short-term or long-term impacts" and that mitigation can "assure that the end result will not diminish the shoreline resources and values as they currently exist."); Department of Ecology, Shoreline Master Programs Handbook, at Ch. 4-2 (2010) ("[F]uture development will occur [and] is basic to the no net loss standard. The challenge is in maintaining shoreline ecological functions while allowing appropriate new development[.]").

most current, accurate, and complete scientific and technical information available that is applicable to the issues of concern" (WAC 173-26-201(2)), (2) the scientific record demonstrate the conditions of area shorelines "as they currently exist" (WAC 173-26-201(2)(c)), and (3) the record demonstrate that mitigation requirements are not "in excess of that necessary to assure that development will result in no net loss of shoreline ecological functions and not have a significant adverse impact on other shoreline functions."[6] WAC 173-26-201(2)(e)(ii)(A).

As part of this baseline analysis, the Act requires the local government to identify the source of "adverse cumulative impacts" and "fairly allocate the burden of addressing cumulative impacts among development opportunities." WAC

[6] The "no net loss" standard is different from the common environmental protection standard, which seek to ensure that ecological gains exceed any losses. AR 2128 (Figure 1-2); *Swinomish Indian Tribal Cmty. v. W. Washington Growth Mgmt. Hearings Bd.*, 161 Wn.2d 415, 435, 166 P.3d 1198 (2007) (discussing the distinction between a "no new harm" and a "no harm" standard).

173-26-186(8)(d). This mandate is essential to the Act's constitutional integrity. WAC 173-26-186(8)(b)(i) ("regulations and mitigation standards" must be designed "in a manner consistent with all relevant constitutional and other legal limitations on the regulation of private property"). After all, one of the primary purposes of the Fifth Amendment is to prevent "[g]overnment from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Armstrong v. United States*, 364 U.S. 40, 49, 80 S. Ct. 1563, 4 L. Ed. 2d 1554 (1960).

B. Bainbridge Island's Precautionary SMP Update

The City of Bainbridge Island's 53 miles of shoreline is zoned primarily for single-family residential use and is almost entirely developed with single-family homes and apartment buildings, providing housing for roughly one-third of the island's residents. AR 4001; AR 4074. In addition to homes and apartments, the prevalence of lawns, bulkheads, public roads, and other development adjacent to the shoreline has removed

much of the native vegetation on the shoreline, such that only a small percentage of waterfront property contains untouched shorelines warranting a "natural" designation. AR 4096 ("Only two areas [of the island] ... are relatively unmodified."); *see also* AR 4074 (approximately 4 percent of the City's shoreline falls within a "park" or "island conservancy" designation).

When the City began the process of updating the SMP in 2010, its existing scientific record was "dated and lacked accuracy." *See, e.g.*, AR 4097. Because of this, the City's scientific consultants urged it to conduct new "site-specific" studies "to fully understand and document the potential direct, indirect and cumulative impacts" of existing and future development. AR 4100. The consultants explained that additional studies were needed to identify the baseline conditions on the shoreline from which "no net loss" must be measured, the source of existing environmental stressors (such as stormwater runoff from public roads, ditches, and upland development), and the actual range of impacts that residential development may

have on existing shoreline conditions. AR 4097–4100; AR 4299–4302; *see also* AR 4310 (warning that, on marine shorelines, site-specific information is "more important" for determining effectiveness of buffers).

The additional proposed studies were required by the SMA, which directs the City to create a record showing that it based its Update upon a reasoned and objective analysis of "the most current, accurate, and complete scientific and technical information available that is applicable to the issues of concern." WAC 173-26-201(2)(a); RCW 90.58.100(1); *Swinomish Indian Tribal Cmty.*, 161 Wn.2d at 429 (evidence of a reasoned process must be included in the record); *Ferry County v. Concerned Friends of Ferry County*, 155 Wn.2d 824, 835, 123 P.3d 102 (2005) (failure to memorialize the reasoned process in the record is reversible error).

Such additional studies are also critically important to the public's interest in protecting both shoreline ecology and property rights. This concern is not conjecture. Indeed, one study

in the record concluded that residential use of private shoreline property is only responsible for a tiny fraction of the pollutants reaching the Puget Sound—road runoff and leaks in the City's sewer system remain the most significant contributors to that problem.[7] Thus, the study concluded that the actual benefits of buffers would be "trivial" where streams and stormwater systems continue to pipe "billion-plus gallons of nutrient-laden sewer discharges […] into the Sound daily." AR 3594.

Although these warnings should have spurred additional inquiry to fairly allocate the burden of mitigating existing and future ecological impacts, the City chose not to do so. Instead, at the very outset of the four-year update process, the City announced its intention to rely on the "precautionary principle," (AR 1291 (City/Ecology emails)), and ultimately chose to

[7] *See* Brennan, et al., *Protection of Marine Riparian Functions in Puget Sound, Washington* at 111 (2009) (the majority of contaminants reach the Sound via streams, drainage networks, and wastewater treatment plants), *cited at* AR 349 (SMP Appendix C); *see also* AR 2912–13.

burden individual homeowners with the obligation to mitigate for preexisting offsite impacts via the dedication and maintenance of mandatory conservation areas rather than developing regulations designed to achieve the Act's more balanced and limited "no net loss" mitigated development standard.[8] AR 50 (SMP § 1.5) ("Master Goal").

This early decision by the City to invoke the "precautionary principle" was extremely consequential. Without the necessary studies, the City's Addendum to Summary of Science Report explained that it could not arrive at any site-appropriate recommendations for the size of conservation areas. AR 4314. It further noted a lack of studies addressing the effectiveness of buffers since a variety of site-specific factors (such as existing roads and development that alters natural

[8] *See* AR 98–99 (SMP § 4.1.2.1 (the conservation buffer is intended to protect against "loss that may result from cumulative impacts of similar developments over time")); AR 100 (SMP § 4.1.2.4(1)(g) (same)); AR 99 (SMP § 4.1.2.3(4)(c) (buffer must mitigate for "effects that may occur off-site")).

processes) were not addressed in the record. AR 4307–09. Although Ecology cautioned at the outset that the SMA only allows a local government to invoke the "precautionary principle" when faced with "uncertainty" in the science (AR 1291), there is nothing in the record indicating that any of the recommended additional studies were infeasible or based on uncertain science. AR 1291 (Ecology email discussing limited availability of the "precautionary principle"). The City simply chose not to do the additional work.

Critical to this appeal, the City's reliance on the "precautionary principle" resulted in a decision to adopt perpetual conservation easements that its consultants and committee members acknowledged are "larger than the bare minimum needed for protection" in order to avoid a speculative "worst case scenario" and "ensure [ecological] success in the face of uncertainty about site-specific conditions." AR 4314 (Addendum); *see also* AR 2400 (CETAC memorandum suggesting that government invoke the precautionary principle to

go "beyond the absolute minimum buffers to protect ecological functions"); AR 4307–08 (recommending that the City base its default buffers on the precautionary assumptions about development impacts).

The City's early decision to invoke the "precautionary principle" also resulted in a record that does not address the difficult, science-based requirement that it demonstrate the conditions of area shorelines "as they currently exist" (WAC 173-26-201(2)(c)) and show that its mitigation requirements are not "in excess of that necessary to assure that development will result in no net loss of shoreline ecological functions and not have a significant adverse impact on other shoreline functions." WAC 173-26-201(2)(e)(ii)(A). Instead of addressing those statutory requirements, the "precautionary principle" allowed the City to base its default conservation easement demand upon the counter-factual assumptions that each shoreline property (1) is predominately covered with mature native vegetation, (2) provides all potential ecological functions, and (3) is

functionally connected to the shoreline (*i.e.*, free of legally established bulkheads and other structures like that limit the effectiveness of conservation easements). AR 4307–08.

Despite numerous public comments objecting to these obvious flaws, the lack of direct science, and the City's invocation of the "precautionary principle," the City's updated SMP became effective when Ecology approved it in July 2014.

C. The Conservation Buffer Dedication Requirement

Chapter 4 of the SMP requires that, as a mandatory condition on any new "development, use, or activities regardless of whether a permit is required" (AR 70 (SMP § 4.1.2.4(2))), the owner must dedicate a perpetual conservation area encompassing between 50–200 feet of private shoreline property, AR 96 (SMP Table 4-3). The SMP defines "activities" as any "human activity associated with the use of land or resources." AR 224 (SMP § 8, Definitions).

The SMP requires that shoreline property owners make the property dedication permanent and enforceable by demanding

that the owner file a legal document binding 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. AR 105–06, 109 (SMP §§ 4.1.3.1, 4.1.3.2, 4.1.3.5(4)). These provisions compel the dedication of valuable interests in property to a public use.[9] RCW 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."). So, too, does the requirement that current and future owners dedicate their labor to maintaining the property as a conservation area.[10] *Horne v. Dep't of Agric.*, 576 U.S. 350,

[9] *Richardson v. Cox*, 108 Wn. App. 881, 884, 890–91, 26 P.3d 970 (2001) (dedication of a property interest can be achieved via notice on a binding public document); *Nollan*, 483 U.S. at 833 n.2; *id*. at 859 (Brennan, J., dissenting) (dedication achieved via a deed restriction).

[10] The maintenance requirement is not a passive burden. The SMP requires that the homeowner allow the City to monitor maintenance of the conservation buffer for a period of at least

367, 135 S. Ct. 2419, 192 L. Ed. 2d 388 (2015) (individuals have a property right in the fruits of their labor; a regulation that appropriates the benefits of one's labor effects a per se taking).

The SMP provides no mechanism to reduce the size of the conservation buffer to only that which is necessary to mitigate for the impacts of the proposed property use. Instead, the SMP directs the property owner to either accept the City's default easement requirement (AR 101 (SMP § 4.1.2.4(4)) or, if the owner wants to adjust the configuration of the conservation area, he must, at his own expense, prepare a "site-specific analysis of potential impacts and a mitigation plan." AR 101 (SMP § 4.1.2.4(3)); AR 108–09 (SMP § 4.1.3.5(3)(a)). But even that option requires that the buffer go beyond a mitigated development standard by demanding that the altered buffer be large enough to ensure mitigation for "effects that may occur off-

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five years, with no outer limit. AR 104–05 (SMP § 4.1.5.4(2); SMP § 4.1.2). The failure by an owner to maintain a buffer to the City's standards can result in civil and criminal sanctions. AR 503–53 (SMP § 7).

site" (AR 99 (SMP § 4.1.2.3(4)(c))) and for "cumulative impacts of similar developments over time." AR 100 (SMP § 4.1.2.4(1)(g)); AR 108 (SMP § 4.1.3.5(3)(a)(i)(B)).

The SMP divides the conservation buffer area into two "zones." The more restrictive area—"Zone 1"—extends a minimum of 30 feet from the ordinary high water mark (OHWM) or to the limit of any existing native vegetation on the lot, whichever is greater. AR 112 (SMP § 4.1.3.6); AR 96 (Table 4-3). An expansion of Zone 1 is automatic and based on the presence of native vegetation, whether it is a stand of mature cedar trees, an ornamental Oregon grape, or a single sword fern (AR 388–401 (SMP Exhibit A (listing native species)))—there is no requirement that the City first show that the plant is functionally connected to the shoreline or provides any measurable benefits to the shoreline ecology. "Zone 2" is the area landward of Zone 1 and extends to the outer limit of the prescribed conservation area as established by the property's use designation. AR 112 (SMP § 4.1.3.6(3)).

Within Zone 1, the owner retains severely limited rights. Most notably, an owner of a residential zoned lot cannot build a house or any outbuildings, or even remodel existing structures, if they overlap Zone 1. The SMP also impacts owners of existing homes by requiring that they secure a permit before engaging in ordinary residential activities like maintaining an established beach access trail or doing yardwork.[11] And securing such a permit has severe consequences: if, during the course of ordinary maintenance, the owner removes any vegetation (whether native or not) in the conservation area, the owner will be required to plant new native vegetation in Zone 1 to achieve 65 percent vegetation canopy coverage within 10 years—even if there was no vegetation there prior to doing yardwork—(AR 102 (SMP § 4.1.2.5(3)(b)), increase the canopy in Zone 2 to be contiguous

[11] "[M]aintenance of existing residential landscaping is allowed subject to Sections 4.1.3.5(8) [requiring a clearing permit for 'minor vegetation removal'] and 4.1.3.7(2) [requiring dedication of an easement if vegetation within the conservation area is disturbed]." AR 116 (SMP § 4.1.3.8(1)).

with Zone 1 (AR 102 (SMP § 4.1.2.5(4)(b)), and even outside the conservation area the owner must "plant in a manner that promotes a contiguous native vegetated corridor to the shoreline." AR 102 (SMP § 4.1.2.5(4)(d)); *see also* AR 116 (SMP § 4.1.3.5.8 (Even "[m]inor vegetation removal outside the shoreline buffer" requires "replanting . . . pursuant to Section 4.1.2.5.")); AR 117 (SMP § 4.1.3.8(4) (prohibiting any vegetation removal—including noxious weeds—that could "reduce the vegetation canopy to less than 65%.")).

While Zone 2 also places restrictions on ordinary residential uses, it primarily operates as a presumptive restriction on development and the types of plants one can install in one's garden. Zone 2 is intended to be more malleable than Zone 1, allowing owners to reconfigure Zone 2's boundaries if the owner can show that it is necessary to allow for residential development and use. But even that allowance comes with a hefty price: if an owner successfully varies the dimensions of the conservation area, he must execute a perpetual conservation easement

expressly limiting all activities and uses allowed on his property. AR 303 (SMP App. B-3).

D. PRSM Timely Challenged the SMP

1. Scientific, Statutory, and Constitutional Infirmities Raised in Public Comments

During the public comment process, PRSM members commented on various SMP proposals and suggested ways to secure the rights of existing homeowners while also protecting the shoreline environment. *See, e.g.*, AR 742–44, 2510–11, 2539–40, 2567, 2767, 2821. The comments largely focused on addressing statutory standards and provided public comments that suggested ways to avoid potential constitutional conflicts. *Id*. Key to this line of commentary, PRSM and its members objected to the City's early decision to invoke the "precautionary principle," the resulting incomplete and inconclusive scientific record, and its failure to satisfy the SMA's "no net loss" mitigated development standard. *See, e.g.*, AR 876, 1638, 1790, 3574, 3623. The comments demanded that the City conduct the studies that its own scientists had concluded were needed to

address the identified gaps in the record before demanding precautionary conservation buffers from shoreline residents. *Id*.

2. PRSM Raised the Science and Policy Issues to the Growth Board

PRSM timely appealed the City's SMP to the Growth Board, alleging that the SMP "violates state law and regulations" and "also violates numerous constitutional provisions," while acknowledging that constitutional claims are "outside the scope of this Board's jurisdiction and will be addressed in another forum."[12] AR 2–3.

Pertinent to this appeal, PRSM argued that the City had failed to comply with the SMA's requirement to create a record of its rationale for departing from the recommendations of science where "the buffers selected were not driven by science-based information but City policy unrelated to science"—*i.e.*, the "precautionary principle" and the "net ecological gain" policy.

[12] *See also Aho Constr. I, Inc. v. City of Moxee*, 6 Wn. App. 2d 441, 462, 430 P.3d 1131 (2018) (The Growth Board "lack[s] jurisdiction to resolve constitutional challenges.").

AR 580–81; AR 599–600. PRSM also alleged that the City failed to create a record discussing the impacts of residential use on existing shoreline ecology and failed to explain how it arrived at its decision to exact buffers designed to "improve the ecological functions within the current residential development pattern." AR 3706; *see also* AR 5820 (Growth Board acknowledging petitioner's policy arguments). In support of this argument, the intervenors below added that the SMA's "no net loss" requirement must be construed in a manner consistent with the Act's express policy of protecting the rights of shoreline homeowners and cannot be construed to undermine its express "allowance of impacts to ecosystems 'necessary to achieve other objectives of RCW 90.58.020,'" which includes the development of single-family residences. AR 2114–15 (quoting WAC 173-26-201(2)(c)).

In April 2015, the Growth Board issued a Final Decision upholding the City's SMP,[13] dismissing the policy arguments without discussion of the policy grounds argued by PRSM and intervenors, and without considering the statutory and regulatory provisions requiring the City to address specific topics on the record. AR 5824–25 (discussing only the policy bases argued by the City and Ecology).

3. The Trial Court Affirmed

PRSM timely sought judicial review of the Growth Board decision and—as authorized by the Administrative Procedure Act (APA)—raised their constitutional claims by filing a combined complaint and petition for judicial review. CP 1–166; CP 183–200 (Amended Petition). In pertinent part, the complaint named the City and Ecology as defendants and alleges violations of the federal doctrine of unconstitutional conditions. *Citizens for Rational Shoreline Planning v. Whatcom Cty.*, 172 Wn.2d 384,

[13] Final Decision & Order, *Preserve Responsible Shoreline Management v. City of Bainbridge Island*, Case No. 14-3-0012, 2015 WL 1911229 (Apr. 6, 2015) (AR 5787–5905).

393, 258 P.3d 36 (2011) ("[T]he State must take responsibility for any taking that occurs as a result of the regulations contained in the county's SMP."). After a lengthy interlocutory appeal concerning issues not raised here,[14] the trial court held the hearing on the merits on September 20, 2021, and issued an order upholding the Growth Board decision on December 3, 2021. CP 639–46. Like the Growth Board, however, the trial court did not address how the City's invocation of the "precautionary principle" resulted in a statutorily deficient record and dismissed PRSM's remaining claims with minimal analysis. *Id*. PRSM timely appealed. CP 647–57

STANDARD OF REVIEW

On a petition for judicial review of a Growth Board decision, this Court reviews the Board's conclusions *de novo* and applies the standards of the APA (RCW 34.05, *et seq.*) directly

[14] *See Preserve Responsible Shoreline Mgmt. v. City of Bainbridge Island*, 11 Wn. App. 2d 1040 (2019) (unpublished), *rev. denied by* 195 Wn.2d 1029 (2020), *cert. denied by* 141 S. Ct. 1380 (2021).

to the record before the Board "without regard to the superior court decision." *Goldsmith v. Dep't of Soc. & Health Servs.*, 169 Wash. App. 573, 584, 280 P.3d 1173 (2012); *King County v. Cent. Puget Sound Growth Mgmt. Hearings Bd.*, 142 Wn.2d 543, 553, 14 P.3d 133 (2000). Under the APA, "a court shall grant relief from an agency's adjudicative order if it fails to meet any of nine standards delineated in RCW 34.05.570(3)." *Lewis County v. W. Wash. Growth Mgmt. Hearings Bd.*, 157 Wn.2d 488, 498, 139 P.3d 1096 (2006). Of the possible grounds for relief under the APA, five apply here:

> (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;
> ...
> (d) The agency has erroneously interpreted or applied the law;
> (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; [and]

…

(i) The order is arbitrary or capricious.

RCW 34.05.570(3).

Challenges under subsections (a) and (d) are reviewed *de novo*. *City of Redmond v. Cent. Puget Sound Growth Mgmt. Hearings Bd.*, 136 Wn.2d 38, 45, 959 P.2d 1091 (1998). Subsection (e) directs the Court to grant relief when the Board's order is not supported by substantial evidence. *Ferry County*, 155 Wn.2d at 833. The Court "may also grant relief from an agency order that is arbitrary and capricious, meaning that 'the decision is the result of willful and unreasoning disregard of the facts and circumstances.'" *King Cty. Pub. Hosp. Dist. No. 2 v. Washington State Dep't of Health*, 178 Wn.2d 363, 372, 309 P.3d 416 (2013). While the enactment of an ordinance under the SMA is generally presumed valid, this deference ends when it is shown that the government's actions are clearly erroneous. *See Quadrant Corp. v. State Growth Mgmt. Hearings Bd.*, 154 Wn.2d 224, 238, 110 P.3d 1132 (2005).

The Washington Supreme Court has held that the government's consideration of science when developing critical area regulations is subject to a more intense, "critical review" application of the clearly erroneous standard. *Swinomish Indian Tribal Cmty.*, 161 Wn.2d at 435 n.8 (citing *Cougar Mountain Assocs. v. King County*, 111 Wn.2d 742, 749, 765 P.2d 264 (1988)). The Court explained that subjecting the record to meaningful scrutiny is required for several reasons. First, close review is necessary to ensure that the SMA's policy of balancing property rights and the environment are in fact incorporated into an SMP update. *Cougar Mountain*, 111 Wn.2d at 749. Second, "the major basis for judicial deference to administrative decisions—the expertise of the particular agency—does not apply when the agency is acting outside the area of that expertise," as is the case when a city council is making decisions based on scientific reports. *Id*. Third, the nature of the public and private rights involved "makes a more intense standard of review appropriate." *Id*. And fourth, because the Legislature made the

SMA the State's policy on shoreline development, critical review of local government decisions "is necessary to ensure that the statewide policy [including the protection of property rights] is not undermined by inappropriate political or economic pressures at the local level." *Id*.

ARGUMENT

I.

THE CITY'S PRECAUTIONARY CONSERVATION AREA CONDITION IS UNLAWFUL AND CONTRARY TO PUBLIC POLICY

The Growth Board's decision in regard to the conservation buffers was arbitrary, premised on reversible error, and unsupported by substantial evidence. RCW 34.05.570(3)(d), (e), (i). Specifically, the Growth Board committed an obvious error when it concluded that the City complied with the Act's science requirement (AR 5820–30) without addressing the City's failure to create a record showing a reasoned and objective analysis of all science (WAC 173-26-201(2)), and its failure to create a record justifying its decision to invoke the "precautionary

principle" and the "net ecological gain" policy. WAC 173-26-201(3)(g); AR 3705–08, 3725–28.

This failure by the Board was extremely consequential because it resulted in an arbitrary decision to "disregard" meritorious arguments challenging the City's adoption of a precautionary standard in lieu of the Act's more balanced "no net loss" requirement. *See* AR 5793, 5764, 5769–71; *Karanjah v. Dep't of Soc. & Health Servs.*, 199 Wn. App. 903, 925, 401 P.3d 381 (2017) ("A decision is arbitrary and capricious if it is willful and unreasoning and disregards or does not consider the facts and circumstances underlying the decision."); *see also Swinomish Indian Tribal Cmty.*, 161 Wn.2d at 430 (recognizing that a statutory obligation to enact regulations designed to protect existing conditions from new harm is legally distinct from a requirement to enhance environmental conditions). As a result, the Board failed to hold the City and Ecology to the Act's mandatory prerequisites for enacting provisions that demand perpetual conservation easements from shoreline owners. *Id*.

And the Board, furthermore, failed to hold the City to the requirements for invoking the "precautionary principle."

A. The City Failed to Create the Statutorily Required Record Showing that Its Buffers Do Not Demand More Land Than Necessary to Mitigate for Onsite Development Impacts

Although buffers and conservation easements are a common tool for minimizing the impacts of development on environmentally sensitive areas,[15] a local government's authority to make such a demand is limited by statute and caselaw. At the most basic level, the SMA demands that a local government create a record showing that it based its decision to impose the regulations upon a reasoned and objective analysis of "the most current, accurate, and complete scientific and technical information available that is applicable to the issues of concern." WAC 173-26-201(2)(a); RCW 90.58.100(1).

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[15] A.J. Castelle, et al., *Wetland and Stream Buffer Size Requirements – A Review*, 23 J. Envtl. Qual. 878, 878 (1994) (A buffer separates development from a sensitive area, allowing it to mitigate for impacts, such as storm water runoff.); *see also* Alan Desbonnet, et al., *Development of Coastal Vegetated Buffer Programs*, 23 Coastal Mgmt. 91, 93–95 (1995) (same).

To ensure that this requirement is satisfied, our courts have held that the decision to require a dedication of private property as a conservation area must, at bare minimum, be supported by a legislative record showing that the government considered science and employed a reasoned process when updating its SMP.[16] *Swinomish Indian Tribal Cmty.*, 161 Wn.2d at 429 (evidence of a reasoned process must be included in the record); *Ferry Cty.*, 155 Wn.2d at 835 (a failure to memorialize the reasoned process in the record is reversible error). As part of this record mandate, the SMA's Guidelines specifically require a record that is sufficient to show that mitigation measures, like conservation buffers, do not demand more land than is necessary

[16] *See also Bennett v. Spears*, 520 U.S. 154, 176–77, 117 S. Ct. 1154, 137 L. Ed. 2d 281 (1997) (The record requirement is necessary to ensure that regulations are not "needless" or "implemented haphazardly, on the basis of speculation or surmise" due to "official[s] zealously but unintelligently pursuing their environmental objectives.") (reasoning adopted in *Honesty in Envtl. Analysis and Legislation v. Cent. Puget Sound Growth Mgmt. Hearings Bd. (HEAL)*, 96 Wn. App. 522, 531, 979 P.2d 864 (1999)).

to mitigate for impacts of the proposed development. WAC 173-26-201(2)(e)(ii)(A); *HEAL*, 96 Wn. App. at 533 ("[S]cience 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.").

The City's failure to create the required record is extremely consequential. It is well-settled that the effectiveness of buffers (and the appropriate size thereof) will vary depending on several factors, including soil type, vegetation type, slope, annual rainfall, type and level of pollution, and surrounding land uses. *See, e.g.*, AR 4314 (noting that "the City could use available scientific guidance to develop variable buffers for the different site conditions and the resources to be protected"); AR 4307–09 (discussing the range of site-specific conditions that can vary the need for and effectiveness of a buffer); AR 4310 (warning that, on marine shorelines, site specific information is even "more important" for determining the effectiveness of a proposed buffer). Yet the City's record is devoid of any analysis showing

that it took this crucial information into account when setting the size of its mandatory conservation area dedication.

Indeed, it was for that reason that the City's scientific consultants cautioned that additional studies were necessary. The City, nonetheless, chose to forego the site-specific studies, adopting instead a default conservation area based on the counterfactual assumptions that each shoreline property (1) is predominately covered with mature native vegetation, (2) provides all potential ecological functions, and (3) is fully functionally connected to the shoreline (*i.e.*, free of legally established bulkheads and other like structures that limit the effectiveness of conservation easements). AR 4307–08; *see also* AR 2187 (Cumulative Impacts Analysis, explaining that the City's buffers were developed based on "the average existing conditions in each environmental designation"); AR 4307 (Addendum, explaining that the conservation area recommendations "plot the relationship between the effectiveness of a mature forested buffer at providing an

ecosystem function at various buffer widths"—conditions that do not exist on the vast majority of the Island).

As a result, the City's default buffer widths are determined based on the land's general use designation and the furthest landward native plant (whether a stand of mature cedars or a single fern). AR 112 (SMP § 4.1.3.6); AR 96 (Table 4-3); AR 388–401 (SMP Exhibit A (listing native species)). The determination does not take into account the property's existing development condition and does not consider the size or impact of the proposed development, use, and/or activity. *Id*.; AR 112 (SMP § 4.1.3.6(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."). And the SMP provides no after-the-fact opportunity for the City to satisfy its statutory burden of showing that the buffers are limited in size to mitigate only for onsite project impacts. WAC 173-26-201(2)(e)(ii)(A).

Because the City failed to create a record satisfying these statutory requirements, the Growth Board's decision should be reversed, and the SMP's conservation easement provisions invalidated.

B. The City's Reliance on the "Precautionary Principle" Violates the SMA's Science and Reasoned Process Requirements

1. The City Failed to Create the Required Record

The City additionally violated the Act by (1) failing to create the record required to invoke the "precautionary principle," (2) failing to identify which policies and provisions were guided by the principle, and (3) failing to make those provisions temporary. A local government's authority to enact precautionary land regulations is limited by the SMA and caselaw. WAC 173-26-201(3)(g) (allowing precautionary measures when faced with scientific uncertainty and a real risk of ecological harm). Thus, our courts have held that the "precautionary principle" is only available where the local government can show in the record that (1) the regulated activity

poses a risk of irreversible harm to the environment, (2) there is an "absence of relevant scientific information" on the topic, and (3) the precautionary measures will only last "until the uncertainty is sufficiently resolved." *Yakima Cty.*, 168 Wn. App. at 693 (interpreting the GMA's similar "precautionary principle" provision) (agreed with by Division II in *Whidbey Envtl. Action Network v. Growth Mgmt. Hearings Bd.*, 14 Wn. App. 2d 514, 531–32, 471 P.3d 960 (2020)); *see also Taylor Shellfish Company, Inc. v. Pierce County and Ecology*, GMHB No. 18-3-0013c, 2019 WL 5088376, at *4 (Order on Reconsideration, Aug. 7, 2019) (concluding that "citing environmental concerns not supported by scientific or technical information" cannot justify the precautionary principle cannot "justify[] the enactment of burdensome regulations" based on the "precautionary principle").

The City cannot satisfy these basic requirements. The City's record contains no indication that any new development, use, or human activity on residential shoreline property will pose

a risk of irreversible harm to the environment. *See, e.g.*, AR 4098 (concluding that most residential impacts can be minimized or avoided through mitigation); AR 2206 (concluding that incremental and unavoidable impacts of residential use "are likely to be offset by [the City's] ongoing and planned restoration actions over time").

Nor can the City or Ecology show that the relevant science is uncertain or unavailable. AR 4314 (Addendum to the Summary of Science concluding that sufficient scientific information was available to develop site-appropriate buffers).

More critically, the City's decision to make the buffer dedication perpetual in duration is fatal to its invocation of the "precautionary principle." The principle, after all, authorizes only a temporary strategy designed to protect against a perceived threat until such time as the science can ensure that its regulatory restrictions are properly keyed to actual development risks. *Yakima Cty.*, 168 Wn. App. at 693.

In their briefing below, the City and Ecology sought to downplay the significance of the "precautionary principle" by asserting that the City did not *solely* rely on that principle when developing its buffer regulations. CP 304; CP 528. That argument, however, relies on a legal (and logical) impossibility. The City cannot, as a matter of law, rely on the "precautionary principle" at the same time as it relies on direct science because the "precautionary principle" is, by definition, applicable only where there is an "absence of relevant scientific information" on a topic. *Yakima Cty.*, 168 Wn. App. at 693. This type of argument is precisely why a record of the City's reasoned process is required. *Id*.; *Ferry Cty.*, 155 Wn.2d at 835.

Furthermore, Respondents' assurance that the City did not rely on the "precautionary principle" when developing buffer widths cannot be squared with what little evidence there is in the record. Indeed, the only references to the "precautionary principle" in the record support the conclusion that the City, in fact, considered a "better safe than sorry" approach to buffer

sizes. AR 2400, 4307–08, 4314. But ultimately, no one knows where, why, and how the "precautionary principle" was followed because the City failed to create the required record. The Board's decision should be reversed and remanded to the City for compliance with the law, and the challenged SMP provisions should be invalidated. *Ferry Cty.*, 155 Wn.2d at 835.

2. The City Failed to Respond to Public Comments

The City's failure to memorialize its application of the "precautionary principle" on the record is inexcusable in light of numerous public comments asking for such disclosure, establishing yet another basis for reversal. The SMA mandates that cities seek out and encourage public participation in all stages of the SMP update process. RCW 90.58.130. To implement this mandate, the Guidelines required the City to "make all reasonable efforts to inform" interested persons of important decisions involved in the update process and the Guidelines further insisted that the City "consider[] and respon[d] to public comments." WAC 173-26-090. It is

uncontested, however, that this did not occur with regard to public comments relating to the "precautionary principle."

The City first announced its intention to rely on the "precautionary principle" in 2010 (AR 1285–92)—at the very outset of the four-year update process and well before the scientific record had been completed. Numerous Bainbridge Island residents, including PRSM members, submitted public comments seeking clarification of where, why, and how the City intended to employ the "precautionary principle." AR 771–72, 1284–90, 2544, 3102. The City provided no response to those questions, ignoring all but one such comment to which it simply said: "comment noted." AR 2544.

The Growth Board committed plain error when it concluded that the Guidelines do not require that the City actually "respond" to public comments, but only to "tak[e] them into consideration"—particularly here where there is no record of response or consideration. AR 5804 (AR 5799–5805, 5810–11). That conclusion, moreover, is contrary to both the text and

policy of the public comment requirements. As the Supreme Court of Washington recognized in *Mahoney v. Shinpoch*:

> Full consideration of public comment prior to agency action is both a statutory and constitutional imperative. … The opportunity for public comment is essential to agency rulemaking, not because public comment is invariably helpful in discerning legislative intent but because the agency's authority to act is premised on the functioning of such procedural safeguards.

107 Wn.2d 679, 691, 732 P.2d 510 (1987) (citations omitted); *see also City of Burien v. Cent. Puget Sound Growth Mgmt. Hearings Bd.*, 113 Wn. App. 375, 387, 53 P.3d 1028 (2002) (Cities are allowed "inexact compliance" with the response requirement only if they can otherwise show that "the spirit of the program and procedures is observed.").

Mahoney's point about public participation being necessary to protect procedural safeguards is critical to this case. The public comments asked the City to carry out its legal duty to create a record explaining where, why, and how it relied on the "precautionary principle" when enacting an SMP update that

significantly burdens the protected property rights of shoreline homeowners. In order to construe the Act's public comment provisions consistently with the Due Process Clause—as is required by RCW 34.05.020 ("Nothing in [the APA] may be held to diminish the constitutional rights of any person[.]")—the government's response must evidence actual consideration of the public's comments. The City's failure to do so not only violates the SMA, but it also hides its actual reasons for invoking the "precautionary principle" from public oversight and judicial review. *ALLTEL Corp. v. FCC*, 838 F.2d 551, 562 (D.C. Cir. 1988) (Not even the most deferential standard of review can save a government action for which it has articulated no reasoned basis.). The Growth Board's failure to give effect to the plain text of WAC 173-26-090 was arbitrary, clearly erroneous, and warrants invalidation.

C. The Record Fails to Demonstrate That the City Engaged in a Reasoned Process Justifying Its Decision to Depart from the SMA's "No Net Loss" Standard

The Growth Board also wrongly disregarded PRSM's argument that the City had failed to create the required record of a reasoned process explaining why it departed from the SMA's "no net loss" standard to adopt a precautionary and "net ecological gain" standard. AR 50 (SMP § 1.5 (the master goal of the program is to achieve a "net ecosystem improvement"); *see also Swinomish Indian Tribal Cmty.*, 161 Wn.2d at 430 (recognizing legal distinction between the "no new harm" and "ecological gain" standards). While the SMA and its Guidelines afford substantial discretion to local governments to adopt SMPs that reflect local circumstances (WAC 173-26-171(3)(a)), an SMP update must still comply with the Act's mandatory requirements. *Olympic Stewardship Found. v. State Envtl. and Land Use Hrgs. Off.*, 199 Wn. App. 668, 680, 684, 399 P.3d 562 (2017). This includes the requirement that an SMP adhere to the State's carefully constructed "no net loss" standard (*id*. at 689),

which is essential to both the Act's science requirements and the Legislature's policy of promoting appropriate residential development and use of private shoreline property.[17] RCW 90.58.020.

Key to the "no net loss" strategy is the requirement that the City establish a scientific baseline from which development impacts can be measured and mitigated by identifying the ecological conditions of area shorelines "as they currently exist." WAC 173-26-201(2)(c). Without satisfying that initial step, a city cannot ensure that existing shoreline resources will be protected from new development impacts, and likewise cannot show that its mitigation demands will be limited to only that which is necessary to offset development impacts. WAC 173-26-201(2)(e)(ii)(A); Stacey E. Fawell, *Implementing No Net Loss*

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[17] *See Futurewise v. W. Washington Growth Mgmt. Hearings Bd.*, 164 Wn.2d 242, 243, 189 P.3d 161 (2008) (J.M. Johnson, J., lead opinion) (The Act "strik[es] a balance among private ownership, public access, and public protection of the State's shorelines."); *Overlake Fund v. Shoreline Hearings Board*, 90 Wn. App. 746, 761, 954 P.2d 304 (1998) (same).

for Washington State Shoreline Management at 33, 44 (University of Wash. School of Maritime Affairs, 2004) ("No net loss" provides a meaningful standard for balancing "environmental protection and economic development."); *id*. at 33, 64–65, 69, 75 (government must develop an accurate baseline of existing conditions).

A "net gain" approach, by contrast, is unpredictable and ultimately standardless because the only requirement is that the owner provide environmental benefits in an amount that exceeds project impacts, with no limit on how much benefit may be required of a permit applicant. AR 2400 (City memorandum suggesting that government go "beyond the absolute minimum buffers to protect ecological functions"); AR 4314 (study concluding that precautionary buffers should be "larger than the bare minimum needed for protection" to avoid a "worst case scenario"). Thus, when applied to a demand for property, a "net gain" standard would allow the government to enact the type of

oversized conservation easements that are expressly prohibited by the SMA and the Federal Constitution, as discussed below.

Despite the differences between these two standards, the City's record contains no reasoned justification for its decision to adopt a "net ecological gain" standard when that "gain" is achieved on the backs of individuals instead of the public as a whole. As a result, the SMP lacks any discussion regarding the Act's limits on how much mitigation can be imposed on a project, opting instead to adopt a policy of demanding more than necessary to mitigate the impacts of proposed development. SMP § 4.1.3.3(2) (conservation areas are designed to "mitigate the direct, indirect, and/or cumulative impacts of shoreline development, uses and activities"); *see also* AR 50 (SMP § 1.5) (the Program's "master goal" is to ensure "a net ecosystem improvement over time"); SMP § 4.1.2.1 (the purpose of the conservation area dedication is to protect against "loss that may result from cumulative impacts of similar developments over time"); SMP § 4.1.2.2(4)(b) (in assessing an application for new

development, use, and/or activities, the City will take into account "effects that may occur offsite"). The City's departure from the "no net loss" standard is not justified in the record and violates the SMA.

II.

THE CITY'S CONSERVATION EASEMENT CONDITION VIOLATES THE FEDERAL DOCTRINE OF UNCONSTITUTIONAL CONDITIONS

The Growth Board's decision should also be reversed because the City's demand that homeowners dedicate buffers that are large enough to mitigate for offsite impacts violates a Guideline provision requiring that "regulations and mitigation standards" be designed and implemented "in a manner consistent with all relevant constitutional and other legal limitations on the regulation of private property." WAC 173-26-186(8)(b)(i).

In *Nollan*, 483 U.S. at 837, and *Dolan*, 512 U.S. at 391, the U.S. Supreme Court held that the federal doctrine of unconstitutional conditions, as specially applied to land-use permitting, requires that a permit condition demanding

dedication of a landowner's property to a public use (also known as an exaction) must be directly and proportionately related to the impact of the desired property. *Koontz*, 570 U.S. at 604–05. A permit condition that does not satisfy the Court's two-part "essential nexus" and "rough proportionality" test is unconstitutional and invalid. *Id*.

Despite confusion in two recent appellate opinions,[18] decisions from the U.S. Supreme Court and the U.S. Court of Appeals for the Ninth Circuit confirm that this federal constitutional limitation on state and local authority applies to generally applicable regulatory conditions, like the City's conservation buffer dedication, and allows for facial review. *Cedar Point Nursery v. Hassid*, 141 S. Ct. 2063, 2072, 2079, 210 L. Ed. 2d 369 (2021) (observing that the tests apply "[w]hen the government conditions the grant of a benefit such as a permit,

[18] *Douglass Properties II, LLC v. City of Olympia*, 16 Wn. App. 2d 158, 172, 479 P.3d 1200 (2021); *Common Sense All. v. Growth Mgmt. Hearings Bd.*, 189 Wn. App. 1026 (2015) (unpublished).

license, or registration" regardless of "whether the government action at issue comes garbed as regulation"); *see also Ballinger v. City of Oakland*, __ F.3d __, 2022 WL 289180, at *8–*9 (9th Cir. Feb. 1, 2022) (concluding in a case involving both facial and as-applied claims that "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"); *id*. at *9 ("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.") (cleaned up).

These decisions of the federal courts, interpreting a federal constitutional doctrine, are consistent with *Kitsap Alliance of Prop. Owners v. Cent. Puget Sound Growth Mgmt. Hearings Bd. (KAPO)*, in which this Court held that the buffers exacted by critical area regulations "must satisfy the requirements of nexus and rough proportionality established in *Dolan* and *Nollan*." 160 Wn. App. 250, 272, 255 P.3d 696 (2011) (cleaned up). They are

also consistent with Division I's decision in *HEAL*, 96 Wn. App. at 533 (concluding that shoreline buffers must comply with *Nollan* and *Dolan*); *see also League to Save Lake Tahoe Mountain Area Pres. Found. v. Cty. of Placer*, __ Cal. Rptr. 3d __, 2022 WL 442815, at *59 (Cal. Ct. App. Feb. 14, 2022) ("a mitigation measure cannot violate state or federal constitutional limitations" as set out by *Nollan* and *Dolan*). Thus, there is no basis to avoid the merits of PRSM's unconstitutional conditions claim—particularly where compliance with this doctrine is incorporated into the Guidelines. WAC 173-26-186(8)(b)(i).

A. Application of the Doctrine to Generally Applicable Regulatory Conditions

The doctrine of unconstitutional conditions is legally distinct from the takings and due process tests. *Cedar Point*, 141 S. Ct. at 2079; *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 547, 125 S. Ct. 2074, 161 L. Ed. 2d 876 (2005) (same). In its most general sense, the doctrine enforces federal constitutional limitations on state and local power by forbidding the government from doing indirectly, via conditions on private

activity, what it is constitutionally prohibited from doing directly. *Koontz*, 570 U.S. at 606. As the U.S. Supreme Court explained nearly a century ago,

> the power of the state . . . is not unlimited, and one of the limitations is that it may not impose conditions which require the relinquishment of constitutional rights. . . . It is inconceivable that guarantees embedded in the Constitution . . . may thus be manipulated out of existence.

Frost v. R.R. Comm'n of Cal., 271 U.S. 583, 593–94, 46 S. Ct. 605, 70 L. Ed. 1101 (1926).

The U.S. Supreme Court has explained that *Nollan* and *Dolan* serve as a "special application" of the unconstitutional conditions doctrine in the property rights context, one requiring that exactions imposed on the use of private property must be directly and proportionately related to the impact of a proposed use. *Koontz*, 570 U.S. at 604–05. The *Nollan* and *Dolan* framework operates as a balanced and fair method for gauging the constitutionality of conditions on the exercise of property rights: While government may impose conditions that mitigate

the negative externalities of a proposed property use, it may not use such conditions as a vehicle to coerce owners into surrendering real or personal property for a public use. 570 U.S. at 604–05.

Thus understood, the U.S. Supreme Court's exactions precedent conceives of the *Nollan/Dolan* tests as a broadly applicable means to enforce the principles of fairness and justice—a central purpose of the Fifth Amendment's Takings Clause—in the context of land use regulation that conditions basic uses of private property. *Cedar Point Nursery*, 141 S. Ct. at 2080 ("basic and familiar uses of property" are not a special benefit that "the Government may hold hostage, to be ransomed by the waiver of constitutional protection") (quoting *Horne*, 576 U.S. at 366); *see also Nollan*, 483 U.S. at 836 n.4 (One of the principal reasons why the Supreme Court established the nexus and proportionality tests 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*, 364 U.S. at 49).

Consistent with this view, the U.S. Supreme Court has repeatedly turned back attempts to limit the *Nollan* and *Dolan* tests to only certain kinds of conditions or government actions. For instance, in *Dolan*, the Court applied the doctrine to invalidate two conditions (including a stream buffer) on the proposed expansion of a hardware store. 512 U.S. at 377–78. The conditions were required by a generally applicable regulatory scheme. *Id*. at 377–79. In applying the nexus test, the Supreme Court rejected the dissent's insistence that application of the *Nollan* and *Dolan* tests to the ordinance-required conditions on the hardware store would interfere with the "necessary and traditional breadth of municipalities' power to regulate property development[.]" *Id.* at 407 n.12 (Stevens, J., dissenting); *id.* at 390 (quoting *Simpson v. North Platte*, 206 Neb. 240, 245, 292 N.W.2d 297 (1980)). The Court also rejected the dissent's insistence that local government should be allowed to exact land

as a precautionary measure, free from the limitations of the Constitution. *Id*. at 396; *see also id*. at 411 (Stevens, J., dissenting) (suggesting that the protections provided to private property rights should be diminished "[w]hen there is doubt concerning the magnitude of [environmental] impacts"). Thus, there is no basis in the U.S. Supreme Court's unconstitutional conditions precedent to exclude the City's buffer dedication from the doctrine's application.

B. The Doctrine Is Applicable to Facial Claims Challenging a Regulatory Program That Requires a Dedication of Property as a Condition Precedent on Any New Permit Approval

In its decision below, the trial court dismissed PRSM's unconstitutional conditions claim based on its conclusion that the nexus and proportionality tests do not apply in facial challenges. CP 642. That conclusion, however, is contrary to several federal decisions, which have applied the doctrine to facial claims.[19] *See*

[19] The U.S. Supreme Court has generally rejected the argument that constitutional rights may not be enforced via facial litigation. *See City of Los Angeles v. Patel*, 576 U.S. 409, 418, 135 S. Ct. 2443, 192 L. Ed. 2d 435 (2015).

Ballinger, __ F.3d __, 2022 WL 289180, at *8–*9; *Horne v. U.S. Dep't of Agric.*, 750 F.3d 1128, 1144 (9th Cir. 2014), *rev'd on other grounds*, 576 U.S. 350; *Levin v. City & Cty. of San Francisco*, 71 F. Supp. 3d 1072, 1086 (N.D. Cal. 2014), *appeal dismissed and remanded*, 680 F. App'x 610 (9th Cir. 2017). And contrary to decisions of Washington courts too. *KAPO*, 160 Wn. App. at 272–73; *see also Citizens' All. for Prop. Rts. v. Sims (CAPR)*, 145 Wn. App. 649, 668–69, 187 P.3d 786 (2008) (facially applying *Nollan* and *Dolan*, as incorporated by a state statute). Thus, the bare fact that PRSM asserted facial claims does not alleviate the City of its constitutional burden under *Nollan* and *Dolan*.

Nor is there any basis in the scope of facial review to adopt a different substantive test. While it is generally true that a "plaintiff who argues that a law is facially invalid is claiming that the law is not, and never can be, applied in a way that satisfies constitutional restrictions," challenges implicating rights guaranteed by the Takings Clause are subject to a more focused

standard. *Levald, Inc. v. City of Palm Desert*, 998 F.2d 680, 688 (9th Cir. 1993). In that context, the basis of a facial challenge is that the very enactment of the statute demands a transfer of a property interest that is not sufficiently related to the impacts of a proposed property use. *See Ballinger*, __ F.3d __, 2022 WL 289180, at *8–*9; *Levin*, 71 F. Supp. 3d at 1086 (holding in a facial claim that a showing by the plaintiff that the permit condition took a protected interest in property is "a predicate" to the heightened-scrutiny nexus and proportionality tests).

The threshold question before the Court, therefore, is whether the enactment of the SMP update conditions permit approval upon a demand that owners dedicate property to a public purpose. *Ballinger*, __ F.3d __, 2022 WL 289180, at *8–*9; *Levin*, 71 F. Supp. 3d at 1086. If the answer to that question is yes, the inquiry proceeds to the nexus and proportionality tests under which the facial plaintiff must "demonstrate the challenged portion [of the regulation] will result in legally impermissible outcomes in the generality or great majority of cases." *Alliance*

for Responsible Plan. v. Taylor, 63 Cal. App. 5th 1072, 278 Cal. Rptr. 3d 376 (2021) (citations omitted); *Levin*, 71 F. Supp. 3d at 1086.

C. As Written, the City's Conservation Easement Provisions Violate the Nexus and Proportionality Tests

1. PRSM Satisfied Its Threshold Burden on Facial Review; the Burden of Showing Nexus and Proportionality Is on the Government

PRSM has met its threshold burden. Binding precedent holds that a regulatory requirement compelling the dedication of a conservation buffer qualifies as an "exaction" and is subject to heightened scrutiny under the doctrine of unconstitutional conditions. CP at 315 (conceding that the buffer demand is subject to *Nollan/Dolan* after *Cedar Point*); *see also Koontz*, 570 U.S. at 601–02 (fee in lieu of a conservation easement); *Dolan*, 512 U.S. at 393–94 (stream buffer); *KAPO*, 160 Wn. App. at 273 (shoreline buffer); *HEAL*, 96 Wn. App. at 533 (critical area buffers); *Isla Verde Int'l Holdings, Inc. v. City of Camas*, 146 Wn.2d 740, 758–59, 49 P.3d 867 (2002) (conservation set aside).

To be clear, the SMP's conservation buffer provisions require owners to dedicate property to a perpetual public environmental use and also to commit all current and future owners to manage and maintain the buffer in a manner required by the City. RCW 58.17.020(3) (defining a dedication as "the deliberate appropriation of land by an owner for any general and 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"). The SMP makes these conditions binding against current and future owners by requiring that the dedications be memorialized in a legal document, such as a deed restriction. *Richardson*, 108 Wn. App. at 884, 890–91 (dedication of a property interest can be achieved via notice on a binding public document); *Nollan*, 483 U.S. at 833 n.2; *id*. at 859 (Brennan, J., dissenting) (dedication achieved via a deed restriction).

These provisions plainly compel the dedication of a valuable interest in real property to a public purpose without

compensation. RCW 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."). So, too, does the requirement that owners bind all current and future owners to dedicate their labor to maintaining the property as a conservation area. *Horne*, 576 U.S. at 367 (concluding that individuals have a protected property right in the fruits of their labor; a regulation that appropriates the benefits of one's labor constitutes a per se physical taking).

Having established that the SMP compels a dedication of property, the burden shifts to the City and Ecology to show that the compelled dedication of property and labor complies with the nexus and proportionality standards.[20] *Dolan*, 512 U.S. at 391;

[20] Even if *arguendo* this burden could lawfully be shifted to PRSM, it has satisfied that burden. PRSM has demonstrated that the City failed to create a record sufficient to show nexus and proportionality. A party seeking to establish that a required act did not occur must only provide proof "sufficient to render the existence of the negative probable, or to create a fair and

see also id. n.8 (explaining that, under the doctrine of unconstitutional conditions, the government is not entitled to deference); *KAPO*, 160 Wn. App. at 273 (holding, on facial review, that the government must create a record sufficient to show that critical area buffers "comply with the nexus and rough proportionality tests").

2. The City and Ecology Cannot Satisfy Nexus and Proportionality

For the reasons discussed above, the U.S. Supreme Court placed a heightened burden of establishing nexus and proportionality on the government, not property owners. *Dolan*, 512 U.S. at 391; *see also Ralph v. Wenatchee*, 34 Wn.2d 638, 642–44, 209 P.2d 270 (1949) (proof of actual harm is necessary because any law that undertakes to limit the exercise of rights, beyond what is necessary to provide for the public welfare, cannot be included in the police power of the government). As

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reasonable presumption of the negative until the contrary is shown." *Higgins v. Salewsky*, 17 Wn. App. 207, 210–11, 562 P.2d 655 (1977).

recently summarized by Washington's Supreme Court, these tests require:

> **First**, the government must show the development will create or exacerbate an identified public problem. **Second**, the government must show the proposed condition will tend to solve or alleviate the public problem. **Finally**, the government must show that the condition is roughly proportional to the development's anticipated impact. In fulfilling these requirements, the government must, to some degree, quantify its findings, and cannot rely on speculation regarding the impacts or mitigation of them.

Church of Divine Earth v. City of Tacoma, 194 Wn.2d 132, 138, 449 P.3d 269 (2019) (citations fixed, emphasis added).

The City and Ecology cannot satisfy any of these inquiries because the SMP exacts a preset conservation buffer keyed only to the land's use designation and the furthest upland location of native vegetation—the demand is not based on the type or intensity of the development (*see* AR 373–74 (requiring the same size buffer dedication for a 120-foot patio as a new home)) or the existing development and ecological conditions. *See, e.g.*, AR 2185 (concluding that "the impacts of development will vary

depending on the type of shoreline habitat"); AR 4306 ("One size does not necessarily fit all, especially when considering local (i.e., specific) historical and future land uses, property rights, and social values supported by marine riparian areas[.]"). The City's failure to include a provision requiring that it identify the anticipated impacts of a proposed use on the actual development and ecological conditions of the shoreline is fatal to its default conservation easement demand. *CAPR*, 145 Wn. App. at 668–69 (a regulation that imposes a uniform buffer requirement, "unrelated to any evaluation of the demonstrated impact of proposed development," violates *Nollan* and *Dolan* on its face).

But even if Respondents could show that a sufficient nexus exists, they cannot "show that [the City's] proposed solution to the identified public problem is 'roughly proportional' to that part of the problem that is created or exacerbated by the landowner's development." *Church of Divine Earth*, 194 Wn.2d at 138. This is because the City exacts a default conservation buffer based solely on general assumptions about shoreline

conditions and does not, therefore, provide any opportunity to limit the buffer size based on site specific development and ecological conditions. AR 2187 (Cumulative Impacts Analysis, explaining that the City's buffers were developed based on "the average existing conditions in each environmental designation"); AR 4307 (Addendum, explaining that the conservation area recommendations "plot the relationship between the effectiveness of a mature forested buffer at providing an ecosystem function at various buffer widths").

The proportionality test cannot be satisfied by "generalized statements" about land and development conditions, which the U.S. Supreme Court has concluded are "too lax to adequately protect" constitutional rights. *Dolan*, 512 U.S. at 389. Instead, the government must make a sufficiently "individualized determination that the required dedication is related both in nature and extent to the impact of the proposed development." *Dolan*, 512 U.S. at 391; *see also* AR 4308 (Addendum, concluding that to develop appropriate and

effective buffers based on the generalized buffer science, the City must conduct for "more focused studies ... specific to shoreline conditions and typical land uses found in the City of Bainbridge Island[.]"). Again, the City's failure to include a provision allowing for buffers to be keyed to the actual impacts of a proposed use on the existing development and ecological conditions is fatal to the buffer demand. *CAPR*, 145 Wn. App. at 668–69. That alone warrants invalidation.

But the City and Ecology cannot satisfy proportionality either because, as written, the conservation easements are intended to go "beyond the absolute minimum buffers to protect ecological functions" (AR 2400) by mitigating preexisting impacts resulting from neighboring and upland property uses, including public roads and drainage ditches. SMP § 4.1.3.3(2) (conservation easements are designed to "mitigate the direct, indirect, and/or cumulative impacts of shoreline development, uses and activities"); SMP § 4.1.2.1 (The purpose of the easement requirement is to protect against "loss that may result

from cumulative impacts of similar developments over time."); SMP § 4.1.2.2(4)(b) (City will consider "effects that may occur offsite"); AR 50 (SMP § 1.5) (SMP is designed to ensure "a net ecosystem improvement over time."); *see also* AR 4311 (Conservation areas are designed to mitigate for "road runoff."). Even the provisions allowing owners to reconfigure the dimensions of the buffer require the owner to show that the altered buffer will mitigate for offsite impacts. AR 99 (SMP § 4.1.2.3(4)(c)); AR 100 (SMP § 4.1.2.4(1)(g)); AR 108 (SMP § 4.1.3.5(3)(a)(i)(B)). And the SMP's vegetation standards force landowners to maintain their property in "a predominantly natural, undisturbed and vegetated condition" in order to not only "protect" existing conditions, but also to "enhance," and "restore" the marine shoreline. AR 105–06, 109 (SMP §§ 4.1.3.1, 4.1.3.2, 4.1.3.5(4)). This is a plain violation of the proportionality rule. *All. for Responsible Plan.*, 63 Cal. App. 5th 1072 (invalidating a traffic impact fee that conditioned new residential development upon payment of a fee based on existing traffic

"plus traffic generated from the development, plus forecasted traffic growth at 10-years from project submittal").

The government's insistence that buffers are necessary to protect the Puget Sound merely begs the questions asked by nexus and proportionality. CP 294, 299–300. It remains black letter law that identifying a public problem, alone, cannot establish nexus and proportionality. *Dolan*, 512 U.S. at 396 (However laudable a goal may be, "there are outer limits to how this may be done."); *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 416, 43 S. Ct. 158, 67 L. Ed. 322 (1922) ("[A] strong public desire to improve the public condition is not enough to warrant achieving that desire by a shorter cut than the constitutional way of paying for the change."). *Nollan* and *Dolan* do not allow the government to circumvent this burden by invoking the "precautionary principle," or by resting on a generalized assumption that all development is presumed to have some impact. *Dolan*, 512 U.S. at 389; *United States v. Raines*, 362 U.S. 17, 23, 80 S. Ct. 519, 4 L. Ed. 2d 524 (1960) (A regulation must

be evaluated on its facts and effects, not on fortuitous circumstances.).

The requirement that the government establish nexus and proportionality through sufficiently direct evidence is particularly important here where its record concludes that impacts of residential use of private shoreline property is only responsible for a tiny fraction of the pollutants reaching the Puget Sound (AR 349; AR 2912-13), and even those "trivial" impacts "are likely to be offset by [the City's] ongoing and planned restoration actions over time." AR 4098; *see also* AR 2206, 3594. The SMP's mandatory conservation area dedication violates the doctrine of unconstitutional conditions on its face and must be invalidated and stricken from the Program.

CONCLUSION

For the foregoing reasons, PRSM respectfully requests that this Court issue an order reversing the Growth Board's final decision and order and declaring that the SMP, as adopted, violates the SMA and further violates the doctrine of

unconstitutional conditions as predicated on the Fifth Amendment to the United States Constitution.

RAP 18.17(b) CERTIFICATE OF COMPLIANCE

The undersigned certifies that the foregoing brief complies with the rules of this Court and contains 11,943 words.

DATED: March 7, 2022.

Respectfully submitted,

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