No. 15-1366

In The
Supreme Court of the United States

COMMON SENSE ALLIANCE,

Petitioner,

v.

SAN JUAN COUNTY, WASHINGTON,

Respondent.

On Petition For Writ Of Certiorari To The Court Of Appeals Of Washington, Division 1

BRIEF IN OPPOSITION

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RESTATEMENT OF THE QUESTIONS PRESENTED

The questions presented to the Court by Petitioner Common Sense Alliance (CSA) are not based upon the actual facts in this case. CSA first states that property owners in San Juan County, Washington must "permanently dedicate" a portion of property to a conservation area to "filter pollutants from stormwater that flows from other properties and crosses the shoreline lot." Petition at i. This is not correct. As required by state law, the challenged ordinance protects environmentally sensitive areas known as "critical areas," by regulating and limiting the type of development and activity that can occur in and adjacent to critical areas. No dedication is required. No public use of private property is required. Ownership and control of the property remains with the property owner. Based on the actual facts of this case, the proper questions presented should be:

1. Whether the unconstitutional conditions doctrine as set out in *Nollan* v. *California Coastal Commission*, *Dolan* v. *City of Tigard*, and *Koontz* v. *St. Johns River Water Management District* makes an ordinance facially invalid when the ordinance requires neither a dedication to the public nor a permit condition requiring any dedication or exaction.

2. Whether the "essential nexus" and "rough proportionality" tests in *Nollan* v. *California Coastal Commission*, *Dolan* v. *City of Tigard*, and *Koontz* v. *St. Johns River Water Management District* apply to the

RESTATEMENT OF THE QUESTIONS PRESENTED – Continued

adoption of an ordinance that requires neither dedication to the public nor a permit condition requiring any dedication or exaction.

LIST OF ALL PARTIES

Common Sense Alliance was one of the petitioners before the Washington State Court of Appeals and the Washington State Supreme Court and is the Petitioner herein.

San Juan County, Washington is the municipal Respondent.

Friends of the San Juans was a petitioner and cross-respondent before the Washington State Court of Appeals and the Washington State Supreme Court. Friends of the San Juans was not named or served by the Petitioner Common Sense Alliance in this appeal. Friends of the San Juans supports San Juan County in opposition to the Petition.

The Growth Management Hearings Board is the state administrative appeal tribunal and was the non-participating agency respondent in the appeals below.

The P.J. Taggares Co. was a petitioner before the Washington State Court of Appeals and the Washington State Supreme Court but is not participating in this appeal.

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Common Sense Alliance et al. v. *Growth Management Hearings Board*, San Juan County Superior Court Cause No. 13-2-05190-8 (consolidated), Letter Opinion (June 19, 2014).

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JURISDICTION

San Juan County's Brief in Opposition to Petitioner Common Sense Alliance's Petition for Writ of Certiorari is being filed on August 3, 2016 as authorized by Court order of July 5, 2016.

PROVISIONS AT ISSUE

CSA challenges certain provisions of San Juan County's Ordinance 28-2012, an Ordinance Regarding Critical Area Regulations for Wetlands. This ordinance

was adopted together with Ordinance 26-2012 Regarding General Regulations for Critical Areas and Ordinance 29-2012 Regarding Critical Area Regulations for Fish and Wildlife Habitat Conservation Areas. All three ordinances were challenged at the original appeal before the Growth Management Hearings Board.

Relevant sections of Ordinance 28-2012 are reproduced in San Juan County's Appendix (Resp. App. A), together with relevant portions of Ordinance 26-2012 (Resp. App. B).

INTRODUCTION

Despite CSA's repeated assertions, the challenged ordinance does not require any exaction of private property. The ordinance contains ordinary development regulations which may restrict certain types of development and activities within a specified area (the buffer) adjacent to identified environmentally sensitive areas (critical areas), to mitigate the impact of the *proposed* development or activity. Contrary to the Petition, the restrictions are not intended to mitigate the impacts of *existing* development or activities. The challenged ordinance does *not* require any dedication of property or authorize any public use of private property. In short, the Petition reflects an inaccurate understanding of the implementation of San Juan County's critical area regulations.

In the Questions Presented, the Petition states that the challenged ordinance "requires that every

shoreline property owner applying for a development permit agree to permanently dedicate a portion of the property as a conservation area to filter pollutants from stormwater that flows from other properties and crosses the shoreline lot." Petition at i. This statement is simply incorrect. The ordinance imposes buffers, not conservation areas. Buffers are required only on those properties containing or adjacent to critical areas. The ordinance provides for tailoring those buffers to account for impacts resulting from the proposed development on the property. The record and decision below do not support CSA's theory that buffers are intended to address pollutants from other properties. Most importantly, the ordinance requires no dedication of any portion of any property. The property owner retains ownership and control over private property.

In its Statement of the Case CSA argues that, "[t]he County's decision to use the permit process as a tool to require land dedications subjects its ordinance to the nexus and proportionality test as set out in *Nollan* and *Dolan*." Petition at 2. This argument is irreconcilable with the text of the ordinance. The ordinance requires no dedication of land. Rather, the ordinance regulates the use of property to protect critical areas as required by Washington State law.

Though development and activities in buffers are regulated by the ordinance, numerous activities are allowed within buffers. For example, the ordinance contains three pages of allowed activities in or adjacent to wetland buffers, including: agricultural activities; the construction of trails, stairs or raised walkways; the

construction of fences; and the establishment or expansion of orchards and gardens. In addition, San Juan County regulations contain a "reasonable use exception" which allows development within the buffer if the regulations would otherwise deny the land owner of all economic or beneficial use of the property. Ordinance 26-2012, Resp. App. B at 23.

Because this is a facial challenge of San Juan County's ordinance and there has been no development proposed and no permit application submitted, none of the exemptions and exceptions in the ordinances have been explored. For that reason, the *Nollan* and *Dolan* tests do not apply. To assess whether a taking may occur under the ordinance, the Court would need to apply the ordinance to a hypothetical proposed development on hypothetical property adjacent to a hypothetical critical area. This would result in an advisory opinion from the Court.

Furthermore, the majority of the challenged regulations addressed by the lower court never became effective in San Juan County. The challenged ordinance, Ordinance 28-2012, which was to take effect on March 31, 2014, was in large part repealed and replaced by Ordinance 2-2014, which was adopted on March 5, 2014. As a result, the rights of the litigants in this case will not be affected by the Court's decision. Consequently, this case is moot.

CSA's Petition should be denied.

STATEMENT OF THE CASE

Petitioner CSA misstates the factual basis of its federal takings and due process claims and the effects of the challenged Ordinance.

A. The Washington Growth Management Act.

The Washington State Growth Management Act (GMA), Ch. 36.70A of the Revised Code of Washington, requires that all counties and cities in the state designate and protect critical areas. Wash. Rev. Code § 36.70A.170(1)(d), and § 36.70A.060(2).

The state GMA defines "critical areas" to include the following five areas and ecosystems: (1) wetlands; (2) areas with a critical recharging effect on aquifers used for potable water; (3) fish and wildlife habitat conservation areas; (4) frequently flooded areas; and (5) geologically hazardous areas. Wash. Rev. Code § 36.70A.060(5). Under the GMA, "counties and cities shall include the best available science in developing policies and development regulations to protect the functions and values of critical areas." Wash. Rev. Code § 36.70A.172.

Washington Courts have explained that, "[w]here 'best available science' provides a scientific basis for restricting development and disturbance within a critical area, the science ensures that the nexus and proportionality tests are met." *Olympic Stewardship*

Foundation v. *Western Washington Growth Management Hearings Board*, 166 Wash. App. 172, 199, 274 P.3d 1040, review denied, 174 Wash. 2d 1007 (2012).

B. The Challenged Ordinance.

1. Ordinance 28-2012.

As required by the GMA, San Juan County updated its critical area regulations in 2012 through the adoption of four ordinances: Ordinance 26-2012 Regarding General Regulations for Critical Areas; Ordinance 27-2012 Regarding Critical Area Regulations for Geologically Hazardous Areas and Frequently Flooded Areas; Ordinance 28-2012 Regarding Critical Area Regulations for Wetlands; and Ordinance 29-2012 Regarding Critical Area Regulations for Fish and Wildlife Habitat Conservation Areas.

Counties face a difficult task when they balance local planning goals and policies, the goals of the GMA, property rights, and the need and requirement to protect the environment. San Juan County utilized a three-step process to update its critical area regulations: (1) best available science related to the different types of critical areas was identified and compiled; (2) County staff received recommendations from scientists for revising the existing regulations in consideration of the best available science, and (3) the San Juan County Council considered and adopted regulations to designate and protect critical areas. San Juan County's critical area ordinances are an "ecosystem approach" or "performance approach" to land use regulations

based upon best available science in contrast to classic "Euclidean zoning" – the separation of property into specific districts with allowable and prohibited uses.

In this case, as in *Olympic Stewardship Foundation* v. *Western Washington Growth Management Hearings Board*, *supra*, there is a scientific basis for restricting development and disturbance within and adjacent to critical areas that ensures that there is a scientific nexus and proportionality between the regulations and the variety of critical areas addressed. The site-specific nature of the challenged ordinance ensures that restrictions on development only apply to those areas that contain or are adjacent to critical areas and have not been previously developed.

For example, the challenged ordinance takes into account: (1) the critical area being protected; (2) the characteristics of the particular property being developed; and (3) the impact of the proposed development. Ordinance 26-2012. The width of the buffers vary based on site-specific conditions such as surface type, drainage direction, wetland type and water quality sensitivity, stormwater discharge factor, drainageways, the option to use certain materials and practices known as "the green development option," rural or urban location, and the presence of trees. Ordinance 28-2012, Table 3.6, Resp. App. A at 22.

2. The buffers required by the ordinance are not exactions, dedications or easements.

CSA's petition hinges on the mistaken assertion that critical area buffers are equivalent to dedications, exactions or easements. This is incorrect.

Property subject to a buffer required by the ordinance remains entirely under the ownership and control of the property owner. The property owner retains the right to exclude others, the uninhibited right to sell the property, and the right to use the property for all authorized uses. Court of Appeals Decision, Pet. App. A at 17. The ordinance contains no provision requiring transfer of property to the County.[1]

Contrary to the Petition, the challenged ordinance merely provides a process for identifying areas of the property that have critical area functions. It then requires that property owners proposing to develop within those areas comply with certain performance standards. There is considerable site-specific flexibility built into the regulations, including exemptions, buffer averaging, and a reasonable use provision, the specific purpose of which is to provide development alternatives to ensure that no taking occurs. Ordinance 26-2012, Resp. App. B at 23.

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[1] Though CSA claims a "public dedication" is achieved via notice on a site plan (Petition at 26, fn. 4), CSA fails to identify where in the ordinance this provision is contained. No such provision exists.

The San Juan County Code defines "Buffer zone, strip, or area" as

> either an area designed to separate incompatible uses or activities, or a contiguous area that helps moderate adverse impacts associated with adjacent land uses and that is necessary for the continued maintenance, function, and structural stability of the protected area. Different types of buffers perform different functions.

San Juan County, Wash. Code § 18.20.020. Buffers function like setbacks in other zoning regulations. Buffers do not prevent all use, they do not authorize entry by others, and they do not allow public use of private property.

Furthermore, the challenged ordinance provides flexible limitations on proposed development adjacent to areas expressly identified for protection due to their sensitivity to the impacts resulting from the proposed development. Buffers are based on the intensity of the proposed development and the harm expected to occur as documented by the best available science. Many factors are considered regarding the particulars of the development and the harm to the specific critical area. For example, Ordinance 28-2012, Step 6 allows a buffer reduction in an Urban Growth Area (Resp. App. A at 20) and Ordinance 29-2012 contains a seven-step, site-specific procedure for sizing buffers. Accordingly, even the buffer widths are not inflexible or generic requirements established in a vacuum without regard to the

proposed development or the characteristics of the property.

CSA misstates Washington state property law when it asserts that "a conservation buffer is a valuable interest in real property." Petition at 26. The statute cited by CSA does not concern or address buffers, rather it addresses the requirements for transfers of interest in real property "held or acquired by any state agency, federal agency, county, city town,. . . ." Wash. Rev. Code § 64.04.130. No requirement for the transfer of any interest in real property is contemplated by the challenged ordinance.

Similarly, CSA incorrectly states that San Juan County's ordinance requires "that all shoreline property owners dedicate on-site conservation areas – including a water quality buffer – upon the county's determination that a proposed land use will occur within 200 feet of a shoreline." Petition at 4.[2] CSA provides no explanation for its repeated assertions that the ordinance requires dedication or exaction of property. This confirms that CSA's Petition is based on a premise that does not exist in the record.

In short, the ordinance in the record is a regulatory mechanism with flexible, site-specific rules for proposed development adjacent to and within wetland

[2] CSA repeatedly refers to "shorelines" yet its only reference to the regulations is to San Juan County Code § 18.35.100 which is the codification of Ordinance 2-2014 replacing Ordinance 28-2012. These regulations pertain to wetlands, not shorelines.

areas and other critical areas expressly identified for protection due to their sensitivity to the impacts resulting from such development. Buffers are established around wetlands based on the anticipated harm documented in the best available science. The buffers are a starting point for County staff to evaluate a proposed development or activity when an application is submitted. The regulations allow for numerous adjustments that can be made based on the particulars of the proposed development or activity and the harm to the specific critical area. Buffer areas remain owned by the property owner, controlled by the property owner, and freely alienable with the rest of the property. The challenged ordinance does not authorize public entry onto private property; nor does it require the granting of a dedication or easement to San Juan County or the public.

C. The regulations and buffers in the challenged ordinance are not the regulations and buffers in effect in San Juan County.

Ordinance 28-2012 was adopted in December 2012. Numerous parties, including Petitioner CSA, appealed the ordinance to the state Growth Management Hearings Board for administrative review. The effective date of Ordinance 28-2012 was postponed pending the outcome of the Growth Management Hearings Board appeal. The Board's September 6, 2013 Final Decision and Order remanded the ordinance back to San Juan County for additional legislative action to comply with the requirements of the GMA as set forth

in the order. In response to the Board's order and before Ordinance 28-2012 ever took effect, San Juan County adopted Ordinance 2-2014.

CSA refers to only one San Juan County regulation, 18.35.100. Petition at 4-6. This regulation is titled "Wetlands – Protection standards" and reflects the changes adopted in Ordinance 2-2014, not the ordinance reviewed by the court of appeals.

Ordinance 2-2014 amended Section 1 of Ordinance 28-2012 (Resp. App. A). The amendment included the elimination of the requirement to use the County's wetland typing system and the wetland buffer sizing methodology and replaced it with the Washington State Department of Ecology's Wetland rating system. The new regulations contained in Ordinance 2-2014 went into effect on March 31, 2014. Consequently, the provisions of Ordinance 28-2012 which CSA cites in the Petition, never became effective in San Juan County and are not the regulations applicable to property owners today.

D. The Washington State Court of Appeals decision.

The Washington State Court of Appeals decision below affirmed a superior court decision and Growth Management Hearings Board decision which upheld the challenged ordinance. *Common Sense Alliance, P.J. Taggares Company, and Friends of the San Juans* v. *Growth Management Hearings Board, Western Washington Region and San Juan County*, 189 Wash. App.

1026 (2015) (review denied in unpublished decision, Pet. App. C).

At the court of appeals, all three appellants raised numerous issues regarding the requirements of the GMA. These state law claims are not germane to the issues presented in CSA's Petition.

CSA raised "takings" claims before the court of appeals which are relevant to the Petition. These claims challenging the agency decision upholding the ordinance were raised through a state law that limits local government land use regulations, fees, and taxes (Wash. Rev. Code § 82.02.020) and through citing the Fifth Amendment of the United States Constitution.

The court of appeals rejected CSA's constitutional challenges. The court found that the constitutional *Nollan/Dolan* analysis is confined to land use decisions that condition approval of a specific project on a dedication of property to public use. Pet. App. A at 16 (quoting *City of Monterey* v. *Del Monte Dunes at Monterey Ltd*., 526 U.S. 687, 702 (1999)). The court of appeals went on to state that, even assuming the *Nollan/Dolan* test can be applied to determine whether a land use ordinance constitutes a taking, CSA has not shown that a taking occurred. *Id*. This is because the requirement for buffers is not an exaction or dedication.

> No interest in land will be transferred or conveyed by the operation of the San Juan County ordinances. The property owner can use the buffer for all authorized uses and can

> exclude others. In this respect, the buffers are like setbacks in zoning regulations.

Court of Appeals Decision, Pet. App. A at 17. Further,

> site-specific flexibility was built into the ordinance through exemptions, buffer averaging, and the reasonable use exception. The County's use of the best available science establishes the reasonable necessity of buffers to protect habitat and demonstrates a proportional relationship between the impacts of development and the measures adopted to mitigate it.

Id., at 18.

The Petition misstates the court of appeals decision when it asserts the court relied on the dissenting opinion in *Koontz*. Petition at 8. The portion of the *Koontz* decision relied on by the court of appeals is the majority decision. Court of Appeals Decision, Pet. App. A at 16 (citing *Koontz* at 2594-96). The Petition then states that "citing no authority, the lower court concluded that a government demand that a property owner dedicate a conservation buffer to a public environmental use would not qualify as a taking if imposed directly." Petition at 9. The court of appeals decision does not say this, to the contrary, it states:

> If the exaction does not constitute a taking, the condition is not unconstitutional and inquiry ends. First, we are unpersuaded that the requirement for buffers is an exaction or a dedication. . . . Second, the United States Supreme Court has recognized three types of

> regulatory takings under the Fifth Amendment to the United States Constitution: (1) appropriation of land through physical occupation, (2) the deprivation of all economically viable uses, and (3) those that fail the three-part test of *Penn Central Transportation Co*. v. *City of New York*, 428 U.S. 104, 124, 98 S. Ct. 2646, 57 L. Ed. 2d 631 (1978). [CSA] does not allege that the ordinances are any of these three types of takings.

Court of Appeals Decision, Pet. App. A at 17 (internal citations omitted). The court then goes on to analyze San Juan County's regulations as to each of the three types of regulatory takings and concludes that CSA's facial challenge fails. *Id.*, at 17-18.

The Washington State Supreme Court denied CSA's petition for review of the unpublished court of appeals decision. Pet. App. C.

REASONS FOR DENYING THE PETITION

A. The arguments raised by the Petition are not presented in this case because there is no dedication, thus *Nollan*, *Dolan*, and *Koontz* are inapplicable.

A reading of the challenged ordinance clearly demonstrates that the regulations contain no requirement for dedication of any private property. As quoted above, the court of appeals fully addressed and analyzed federal jurisprudence regarding takings and the

unconstitutional conditions doctrine. The court of appeals decision does not conflict with the decisions of this Court. CSA's entire argument is based on numerous misstatements regarding the challenged ordinance and its theory that regulation of a buffer for critical areas involves a dedication of property. See for example, Petition at 4-5. But there is no dedication. As a result, the arguments the Petition purports to make would not be presented by this case or reached if review was granted.

The Petition also mischaracterizes the decision by the court of appeal. For example, CSA asserts that the court of appeals decision unconstitutionally focuses solely on whether the exaction advanced a public need, rather than evaluating the relationship between the exaction and the proposed development. Petition at 24, citing Pet. App. A at 16-17. But the citation CSA provides to the court of appeals decision does not support CSA's statement or even address this issue, rather it determines that the requirement for buffers is not an exaction nor a dedication. Court of Appeals Decision, Pet. App. A at 16-17. The record shows that buffers are specifically sized to account only for pollutants resulting from the proposed development or activity. The methodology for calculating the buffer width considers surface type, vegetation, slope, drainage and impact to determine the specific flow path resulting from the proposed development. Ordinance 28-2012, Resp. App. A, at 12-15.

CSA's attempt to apply *Nollan* and *Dolan* to this case is equally flawed. In *Nollan*, the Court held that

the United States Constitution's Fifth Amendment "takings clause" requires an "essential nexus" between the negative impacts that a private property use generates and the conditions or prohibitions imposed to restrict that use of private property. *Nollan* v. *California Coastal Comm'n*, 483 U.S. 825, 837 (1987). It reached this decision in the context of a specific permit that was conditioned on the exaction of a public easement across private property. Seven years later, this Court clarified in *Dolan* that the "takings clause" contains a "rough proportionality" test requiring the government to "make some sort of individualized determination that the required dedication [of private land] is related both in nature and extent to the impact of the proposed development." *Dolan* v. *City of Tigard*, 512 U.S. 374, 391 (1994).

This Court later recognized, the *Nollan* and *Dolan* analysis "involve[s] a special application of the doctrine of unconstitutional conditions," required "in exchange for a discretionary benefit conferred by the government," such as a permit. *Lingle* v. *Chevron U.S.A. Inc.*, 544 U.S. 528, 547 (2005) (internal quotations omitted). *Lingle* confirms the limitation that the examination of nexus and rough proportionality only apply in rare and "special" circumstances, and further states, "*Nollan* and *Dolan* both involved dedications of property so onerous that, outside the exactions context, they would be deemed *per se* physical takings." *Id*. This Court has not extended the rough proportionality test of *Dolan* beyond the special context of exactions.

City of Monterey v. *Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687, 702 (1999).

The Petition does not raise an issue that invokes the *Nollan/Dolan* test. This case does not involve any development proposal and thus no condition of permit approval. Furthermore, no exaction is present. The challenged ordinance does not condition approval of development on dedication of property to public use. The federal jurisprudence of *Nollan* and *Dolan* does not apply.

CSA may contend that buffers should be equated with dedications, but a buffer is distinctly different from a "dedication," which, in land use and property law, is a term of art that has a clear, concrete, and legally significant meaning. *Media General Cable of Fairfax, Inc.* v. S*equoyah Condominium Council of Co-Owners*, 991 F.2d 1169, 1173 (4th Cir. 1993). The *Media General Cable* opinion cited with approval to the definition of "dedication" in Black's Law Dictionary:

> The appropriation of land, or an easement therein, by the owner, for the use of the public, and accepted for such use by or on behalf of the public. . . . A deliberate appropriation of land by its owner for any general and public uses, reserving to himself no other rights than such as are compatible with the full exercise and enjoyment of the public uses to which the property has been devoted.

Id. (citing Black's Law Dictionary, 412 (6th ed. 1990)). This definition is consistent both in Washington case

law and in federal case law, including *Nollan* and *Dolan*. *Richardson* v. *Cox*, 108 Wash. App. 881, 890-91, 26 P.3d 970 (2001) ("A common law dedication is the designation of land, or an easement on such land, by the owner, for the use of the public, which has been accepted for use by or on behalf of the public. . . . By dedicating the property, the owner reserves no rights that would either be incompatible or interfere with the full public use. . . ."). This is a substantive distinction that fully explains the court of appeal's decision and demonstrates why the Petition does not present an argument for expansion of *Nollan* and *Dolan* that warrants this Court's grant of certiorari.

Similarly, the most recent announcement on takings law in *Koontz* v. *St. Johns River Water Management District*, 570 U.S. ___, 133 S. Ct. 2586 (2013), does not provide any reason for granting the Petition. In *Koontz*, this Court held that "the government's demand for property from a land-use permit applicant must satisfy the requirements of *Nollan* and *Dolan* even when the government denies the permit and even when its demand is for money." *Koontz* v. *St. Johns River Water Management District*, 570 U.S. ___, ___,133 S. Ct. 2586, 2603 (2013). In *Koontz*, a property owner wishing to develop his property was told by a water management district that his proposal would be approved only if he either reduced the size of his development and deeded to the district a conservation easement on the resulting remainder of his property, or hired contractors to make improvements to district-owned wetland several miles away. *Id*., at 2593. The

property owner brought an "as applied" takings claim against the district. *Id*. The decision of the court of appeals in this case correctly determined that the holding in *Koontz* is no more applicable to the facts of this case than are *Nollan* or *Dolan*. This is because "an ordinance requiring a buffer zone is a legislative act, not a land use decision. Legislative determinations do not present the same risk of coercion as adjudicative decisions." Court of Appeals Decision, Pet. App. A at 16. For this reason courts have confined the *Nollan/Dolan* analysis to land use decisions that condition approval of a *specific* project on the dedication of property to public use. *Id*.

Given the vast difference between these cases and the record in this case, the issues as set forth in the Petition are not present. The Petition should be denied.

B. No conflict exists among the courts.

CSA asserts that a 2011 Washington state case "hindered" adjudication of this claim at the state level. Petition at 8 referring to *Kitsap Alliance of Property Owners (KAPO)* v. *Central Puget Sound Growth Management Hearings Board*. Contrary to CSA's assertions, no conflict exists between the state rule established in *KAPO* and applied in this case, and constitutional case law.

In *Kitsap Alliance of Property Owners (KAPO)* v. *Central Puget Sound Growth Management Hearings Board*, property owners challenged the shoreline buffers in Kitsap County's critical area regulations. 160

Wash. App. 250, 273, 255 P.3d 696 (2011), review denied, 171 Wash. 2d 1030 (2011), cert. denied, 132 S. Ct. 1792 (2012). The petitioners in *KAPO* presented issues virtually identical to those raised here by CSA. The *KAPO* court conducted a nexus and proportionality analysis under *Nollan* and *Dolan* and concluded that regulations based upon best available science satisfy the nexus/proportionality requirement. The court wrote:

> '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.' If the local government used the best available science in adopting its critical areas regulations, the permit decisions it bases on those regulations will satisfy the nexus and rough proportionality rules.

KAPO, at 273 (citing *Honesty in Environmental Analysis & Legislation* v. *Central Puget Sound Growth Management Hearings Board*, 96 Wash. App. 522, 534, 979 P.2d 864 (1999)). The *KAPO* decision does not conflict with either Washington State or Federal Constitutional case law.

CSA misstates the law when it writes "the Washington rule shifts the taking inquiry away from the severity of the burden imposed, and focuses instead on the manner by which it has been imposed." Petition at 22. Equally inaccurate is CSA's statement that the Washington rule designates "public need as the sole

determinative factor when a legislative exaction is challenged." Because there is no exaction, the takings analysis of *Nollan*, *Dolan* and *Koontz* is not applicable. However, even were it applicable, the scientific basis in the record ensures that the nexus and proportionality tests are met. *KAPO*, at 534.

Finally, CSA commits a large portion of its petition to the argument that a conflict exists regarding the level of scrutiny that should be applied to "legislatively mandated exaction" as opposed to an exaction imposed through the permit process. Petition at 11-17. Even were this argument valid, this is not the case to resolve such conflict because the record demonstrates that the challenged ordinance does not contain any mandated exactions. CSA claims this case "presents the issue as a pure question of law." Petition at 18. The question presented by CSA, however, is also a purely hypothetical one, unsupported by the facts of this case.

C. The case is not ripe for review, thus any decision by this Court would merely be an advisory opinion.

CSA's takings claim is a facial challenge of San Juan County's critical area ordinances. There is no evidence that economically viable use of property has been denied by the ordinance. The rule for facial takings challenges is described in *Hodel* v. *Virginia Surface Min. & Reclamation Ass'n, Inc*. as follows:

> Because appellees' taking claim arose in the context of a facial challenge, it presented no

> concrete controversy concerning either application of the Act to particular surface mining operations or its effect on specific parcels of land. Thus, the only issue properly before the District Court and, in turn, this Court, is whether the 'mere enactment' of the Surface Mining Act constitutes a taking. The test to be applied in considering this facial challenge is fairly straightforward. A statute regulating the uses that can be made of property effects a taking if it 'denies an owner economically viable use of his land . . . '

Hodel v. *Virginia Surface Min. & Reclamation Ass'n, Inc*., 452 U.S. 264, 295-96 (1981) (internal citations omitted). The fact that a legislative act might operate unconstitutionally under some conceivable set of circumstances is insufficient to render it wholly invalid. *United States* v. *Salerno*, 481 U.S. 739, 745 (1987).

CSA argues that the regulations do not use or apply rules which link conditions of development to site specific requirements of nexus and proportionality as required by *Nollan/Dolan*. However, *Nollan* and *Dolan* involved "as applied" challenges, not a facial challenge as is before the Court in this case. The court of appeals agreed, stating:

> [CSA] has not cited a case where the constitutional *Nollan/Dolan* test has been applied to invalidate land use ordinances of general application, as [CSA] seeks to do here. Indeed it appears that the courts have confined *Nollan/Dolan* analysis to land use decisions that condition approval of a specific project on a

> dedication of property to public use . . . This makes sense.

Court of Appeals Decision, Pet. App. A. at 16 (internal citations omitted).

This Court has described advisory decisions as "advance expressions of legal judgment upon issues which remain unfocused because they are not pressed before the Court with that clear concreteness provided when a question emerges precisely framed and necessary for decision from a clash of adversary argument exploring every aspect of a multifaceted situation embracing conflicting and demanding interests" and has consistently refused to issue such opinion. *United States* v. *Fruehauf*, 365 U.S. 146, 157 (1961).

> To be cognizable in a federal court, a suit 'must be definite and concrete, touching the legal relations of parties having adverse legal interests. * * * It must be a real and substantial controversy admitting of specific relief through a decree of a conclusive character, as distinguished from an opinion advising what the law would be upon a hypothetical state of facts.'

North Carolina v. *Rice*, 404 U.S. 244, 246 (1971). CSA's constitutional claims do not meet even the most liberal interpretation of the ripeness standard. CSA's arguments are supported *only* by hypothetical facts. The challenged ordinance sets out standards that are site-specific and are applied when a development or use is proposed on a parcel of property. Until that time, the parties and the courts are unable to accurately assess

the effect, if any, the regulations have on that property. Indeed, this Court has stated:

> [u]nder our ripeness rules a takings claim based on a law or regulation which is alleged to go too far in burdening property depends upon the landowner's first having followed reasonable and necessary steps to allow regulatory agencies to exercise their full discretion in considering development plans for the property, including the opportunity to grant any variances or waivers allowed by law. As a general rule, until these ordinary processes have been followed the extent of the restriction on property is not known and a regulatory taking has not yet been established.

Palazzolo v. *Rhode Island*, 533 U.S. 606, 620-21 (2001). These ordinary processes have not been followed in this case, and thus the extent of the restrictions on any property is not known. Any decision by this Court would be a prohibited advisory opinion. The Petition should be denied.

D. The case is moot.

It is a basic principle of Article III that a justiciable case or controversy must remain "extant at all stages of review, not merely at the time the complaint is filed." *Arizonans for Official English* v. *Arizona*, 520 U.S. 43, 45 (1997) (internal citations omitted). Thus, under Article III, federal courts may adjudicate only actual, ongoing cases or controversies and are denied the power "to decide questions that cannot affect the

rights of litigants in the case before them." *Lewis* v. *Continental Bank Corp.*, 494 U.S. 472, 477 (1990).

The critical area ordinances adopted by San Juan County in 2012 were replaced by Ordinance 2-2014 before they ever took effect. Any decision from this Court on the constitutionality of San Juan County Ordinance 28-2012 as it relates to the water quality buffer calculations and applicability is moot. Any such decision will have no effect on the rights of the parties to this case and will be advisory only. Accordingly, the Petition should be denied.

E. The court of appeals decision below is correct.

Though CSA and *Amici* attempt to construct an unconstitutional takings claim out of this case, the decision of the court of appeals was a routine judicial review of an administrative board decision adjudicating a challenge to local legislation. The decision was made in the context of the well-established Washington rule that under the GMA counties and cities have broad discretion in adopting development regulations to protect critical areas tailored to local circumstances. *Swinomish Indian Tribal Community* v. *Western Washington Growth Management Hearings Board*, 161 Wash. 2d 415, 430, 166 P.3d 1198 (2007).

In the courts below, the Growth Management Hearings Board's decision was reviewed for substantial evidence under the state Administrative Procedure Act, Ch. 34.05 of the Revised Code of Washington

(APA). Under the APA, the test of substantial evidence is whether there is "sufficient quantity of evidence to persuade a fair-minded person of the truth or correctness of the order." *City of Redmond* v. *Central Puget Sound Growth Management Hearings Board*, 136 Wash. 2d 38, 46, 959 P.2d 1091 (1998). The court of appeals found this test was satisfied by compliance with the GMA's statutory requirement that each local government is required to compile, review and include best available science when adopting or revising a critical area ordinance. The court of appeals specifically rejected CSA's claim that "a comprehensive study cannot support the imposition of development regulations unless it looks at a specific development proposed." Court of Appeals Decision, Pet. App. A at 13 (citations omitted). The court of appeals was equally unpersuaded that a requirement for buffers is an exaction or a dedication. *Id*., at 17.

The court concluded its constitutional analysis as follows:

> In summary, [CSA's] facial challenge fails. Site-specific flexibility was built into the ordinances through exemptions, buffer averaging, and the reasonable use exemption. The County's use of best available science establishes the reasonable necessity of buffers to protect habitat and demonstrates a proportional relationship between the impacts of development and the measures adopted to

> mitigate it. The ordinances do not violate the unconstitutional conditions doctrine.

Id., at 18.

The County has complied with state law. No conflict exists with federal jurisprudence. The decision of the court of appeals was correct and should be upheld. The Petition should be denied.

CONCLUSION

CSA's Petition should be denied because the challenged ordinance requires no dedication of land. The ordinance merely regulates the use of property to protect critical areas as required by state law. In this facial challenge of regulations that never went into effect, there is no proposed development, no permit condition imposed, and no opportunity for San Juan County to explore exceptions and exemptions that may apply.

For these reasons and those set forth above, CSA's Petition for Writ of Certiorari should be denied.

DATED: August 3, 2016

Respectfully submitted,

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APPENDIX A

Excerpts from Ordinance 28-2012, an Ordinance Regarding Critical Area Regulations for Wetlands (shown without underline/strikeout formatting of original)

Ordinance No. 28-2012

AN ORDINANCE REGARDING CRITICAL AREA REGULATIONS FOR WETLANDS; AMENDING SAN JUAN COUNTY CODE SECTIONS 18.30.150 and 18.60.170; AND REPEALING APPENDICES A-C OF SJCC 18.30.150

BACKGROUND

A. The County was scheduled to review and, where necessary, update its development regulations regarding critical areas by December 1, 2006, to ensure consistency with RCW 36.70A (the Growth Management Act, or GMA). A review of the County's critical areas regulations, including regulations regarding Wetlands, was adopted in Resolution 98-2005. Although some updates to critical areas regulations were adopted in Ordinance 15-2005, further action was reserved for a later time.

* * *

D. The applicable science related to Wetlands and stormwater management was reviewed and is summarized in the *Best Available Science Synthesis for San Juan County, May 2011 (BAS Synthesis),* which was adopted in Resolution 22-2011.

E. Additional review of the County's critical areas regulations was undertaken and is described in

the documents "Analysis of Existing San Juan County Regulations Pertaining to Wetlands" prepared by Dr. Paul Adamus, and letters provided by the Washington State Department of Ecology on June 9, 2011 and September 14, 2011. The review was discussed and public comment heard at a County Council workshop held on June 13 and 14, 2011.

* * *

K. The County Council makes the following findings:

I. The Best Available Science was included in developing the amendments, which will protect Wetlands in conformance with the requirements of the Growth Management Act.

II. Implementing a site-specific approach to sizing wetland buffers will effectively protect wetlands, while minimizing costs and maximizing the allowable use of property, which supports other goals found in the San Juan County Comprehensive Plan and the Washington Growth Management Act.

* * *

V. This ordinance will replace the existing rating and prescriptive buffer system (which was modeled after the Washington State Dept. of Ecology's previous rating system) with a site-specific buffer sizing procedure that factors in both the natural characteristics of the site and the characteristics of the development. The ordinance also: increases the minimum sizes of regulated wetlands; allows for the reduction of some buffers for areas that do not

drain to a wetland; allows some reduction in buffer size in conjunction with low impact and green development practices; outlines activities that are allowed and prohibited in wetlands and their buffers; and establishes requirements for the delineation of wetlands and for the content of wetland reports. Compensatory mitigation procedures have been relocated to the General section (SJCC 18.30.110). Additionally, changes have been made to the County's lighting standards to ensure consistency within the regulations.

VI. The functions and values of wetlands include benefits to people such as providing aesthetically pleasing views; decreasing contamination of ground and surface water and fish and shellfish that may be consumed by people; reducing flooding, erosion, and siltation; increasing wildlife viewing opportunities; and maintaining the desirability of properties adjacent to wetlands.

* * *

SECTION 1. SJCC Section 18.30.150; Ord. 7-2005 §§ 6, 7, and 8; Ord. 14-2000 § 7 (CCC); Ord. 11-2000 § 4; and Ord. 2-1998, Exh. B § 3.6.8 are each amended to read as follows:

18.30.150 Wetlands.

A. Applicability. Unless exempted or allowed under SJCC 18.30.110, the provisions of this section apply to areas in or within 205 feet of wetlands as defined in

SJCC 18.20.230. Many wetlands are depicted on various maps developed by the County and natural resource agencies. These maps are, however, only a guide and in all cases conditions in the field shall control. In order to protect their functions and values, development activities, removal of vegetation and other site modifications are limited or prohibited within wetlands and their buffers. Any use or structure legally located within shorelines of the state that was established or vested on or before the effective date of the County's development regulations to protect critical areas, shall be regulated consistent with RCW 36.70A.480(3)(c). Such uses or structures may continue as a conforming use and may be redeveloped or modified if the redevelopment or modification is consistent with SJCC Chapter 18.50 and either: (1) the proposed redevelopment or modification will result in no net loss of shoreline ecological functions; or (2) the redevelopment or modification is consistent with SJCC 18.30.110-160. If the applicant chooses to pursue option (1), the application materials for required project or development permits must include information sufficient to demonstrate no net loss of shoreline ecological functions. For purposes of this subsection, an agricultural activity that does not expand the area being used for the agricultural activity is not a redevelopment or modification. For purposes of this paragraph "Agricultural activity" has the same meaning as defined in RCW 90.58.065.

In addition to County regulations, in some cases wetlands may be regulated under the federal Clean Water

Act administered by the U.S. Army Corps of Engineers, or by the Washington State Water Pollution Control Act and/or Shoreline Management Act, administered by the Washington State Department of Ecology. Compliance with County regulations does not relieve the property owner of the responsibility to comply with state and federal requirements.

B. Wetland Type. San Juan County wetlands are classified by their type as described below. These wetland types are also discussed in the *Best Available Science Synthesis, San Juan County, May 2011 (BAS Synthesis)*. In some cases, the wetland type may need to be determined by a qualified wetlands professional. In classifying a wetland that has been illegally modified (e.g. modified since 1991 and not as permitted by County regulations then in effect), the type that existed prior to the modification shall be used. In classifying a wetland that has been voluntarily enhanced (i.e. not enhanced to offset adverse impacts associated with new development), the wetland type that existed prior to the modification shall be used.

* * *

C. Wetland Rating. Wetland ratings are based on their hydrologic, water quality, and habitat characteristics and functions. The Water Quality-Sensitivity rating considers adverse impacts associated with changes in water quality, while the Habitat Importance-Sensitivity rating considers adverse impacts associated with changes to habitat structure or function.

1. **Water Quality-Sensitivity Rating.** Wetland types are organized into three groups for this rating. For wetlands comprised of two or more types, the higher rating shall apply.

   a. **High** (Based on sensitivity to water contaminants, magnitude of impacts, and/or water used for human consumption. Includes wetlands with plants or animals that may be very sensitive to contaminants):

      i. All sizes of tidal and tidally contiguous wetlands

      ii. Bog

      iii. Lakeside wetland

      iv. Salmonid wetland

      v. Large pond wetland

   b. **Medium**

      i. Salmonid watershed wetland

      ii. Wetland that has no surface water outflow (during most years)

   c. **Low** (Based on sensitivity to water contaminants. Includes wetlands where runoff is expected to receive additional treatment in the wetland without adversely impacting wetland functions):

      All other wetland types not listed above.

2. **Habitat Importance-Sensitivity Rating.** Wetland types are organized into three groups

based on the wetland's importance and the sensitivity of the plants and animals to disturbances. For wetlands that include two or more wetland types, the higher rating shall apply.

a. **High Habitat Importance-Sensitivity.**

   i. Tidal wetland – Large

   ii. Bog

   iii. Mature forested wetland

   iv. Aspen/cottonwood wetland

   v. Lakeside wetland

   vi. Salmonid wetland

   vii. Large pond wetland

b. **Medium Habitat Importance-Sensitivity.**

   i. Tidal wetland – Small and Tidally Contiguous Wetland

   ii. Structurally diverse wetland

   iii. Wetland with high natural connectivity

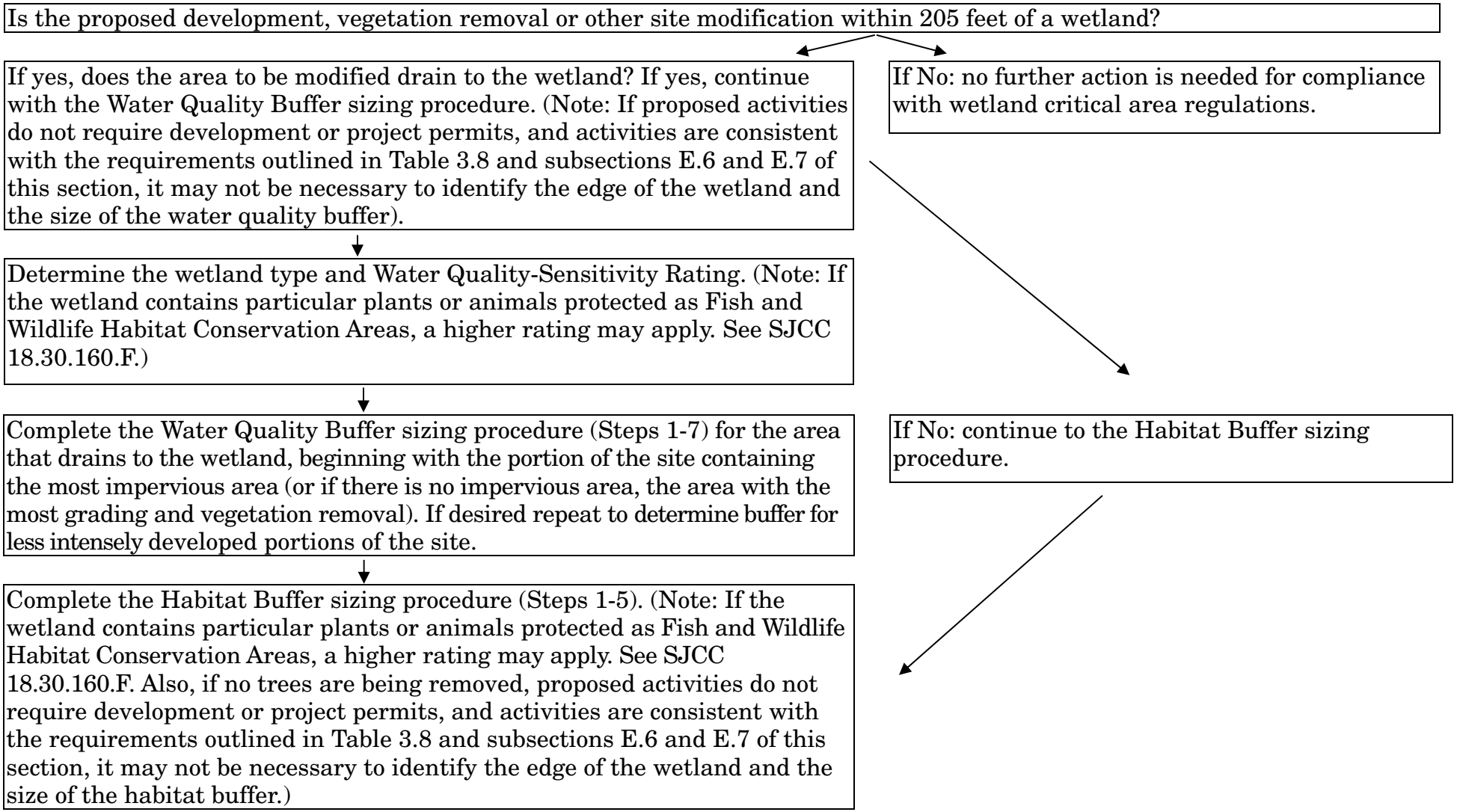
   iv. Salmonid watershed wetland

c. **Low Habitat Importance-Sensitivity:** All other wetland types not listed above.

This subsection establishes protection standards for wetlands, including a site-specific procedure for sizing wetland buffers and Tree Protection Zones, along with

standards for activities in wetlands and their buffers and Tree Protection Zones. This procedure is illustrated in the following flow chart:

Figure 3.1
Procedure for Determining Site Specific Wetland Buffers



1. **Site-Specific Buffer Sizing Procedure.** The following is a site-specific procedure for determining the size of vegetative buffers and Tree Protection Zones necessary to protect the water quality, water quantity, and habitat functions of wetlands. Two separate buffer components, a water quality component, and habitat component, are considered in the procedure, and for some types of wetlands there is also a Tree Protection Zone. When determining the required buffer and Tree Protection Zone for a wetland, the stricter (i.e., wider) applies except where otherwise noted.

   Required buffers and Tree Protection Zones apply regardless of whether the wetland is on the same parcel or another parcel that may be under different ownership. If the wetland is under different ownership and is not accessible, then the wetland type and boundaries are established using available maps and information, including a visual assessment if possible. The Water Quality Buffer is determined first based on the characteristics of the site and the proposed development, vegetation removal or other site modification; whether runoff water will be primarily above or below ground; and the wetland type. This involves working through a procedure to determine the buffer size for each area that will be developed or modified. The Habitat Buffer, and where applicable, the Tree Protection Zone is then determined based on the Habitat Importance-Sensitivity Rating and wetland type. In all cases, conditions on the ground shall control.

a. Determine the Water Quality Buffer.

Step 1. Location relative to wetlands. Is the proposed development, vegetation removal or other site modification located within 205 feet of a wetland? If so, proceed to the next step. In some cases, to answer this question, it may be necessary to have the wetland edge facing the area that will be developed or modified delineated in accordance with subsection (F) of this section. In many cases, this can be based on a wetland reconnaissance rather than a full delineation. Although maps and other imagery can be used to help with this determination, conditions on the ground shall control. If the proposed development, vegetation removal, and other modifications are more than 205 feet from the wetland, no further action is needed for compliance with wetland critical area regulations. (Note: If proposed activities do not require development or project permits, and activities are consistent with the requirements outlined in Table 3.8 and subsections E.6 and E.7 of this section, it may not be necessary to identify the edge of the wetland and the size of the water quality buffer.)

Step 2. Drainage Direction. Does the area proposed to be developed or modified drain to the wetland? If the area proposed to be developed or modified drains to the wetland, delineate the wetland in accordance with subsection (F) of this section and proceed to steps 3-7 to determine the required Water Quality Buffer.

If the area proposed to be developed or modified does not drain to the wetland, a Water Quality Buffer is not required and only a Habitat Buffer

applies. Proceed to the Habitat Buffer sizing procedure in subsection (E.1.b) of this section.

Step 3. Wetland Type and Water Quality-Sensitivity Rating. Determine the wetland type using the above descriptions in subsection B. This may require the assistance of a qualified professional particularly for wetlands that may be a bog. After the wetland type is determined, use subsection (C.1) above to determine the Water Quality-Sensitivity Rating for the wetland. (Note: If the wetland contains particular plants or animals protected as Fish and Wildlife Habitat Conservation Areas, a higher rating may apply. See SJCC 18.30.160.B and F).

Step 4. Composite Stormwater Discharge Factor. Use the following procedure to determine the Composite Stormwater Discharge Factor for the area or areas that are being developed or modified. This is determined by completing the following steps and using Tables 3.3 and 3.4 to complete Table 3.5.

(Note: The information needed for items i., v., and vi. can be obtained through maps and other existing documents and imagery or through field investigation):

i. Identify the flow path. Using the most accurate topographic map available (i.e. with the greatest vertical resolution) and a properly scaled drawing of the area, draw a line representing the flow path through the portion of the site that includes the proposed development or modification, starting with the

area that will have the most impervious surfaces. If there are no impervious surfaces, draw the line through the area that will have the most grading and vegetation removal. The flow path line begins at the top of the nearest rise or the parcel boundary, whichever is closest, and ends at the edge of the wetland. This path runs down the fall line, intersecting the contour of the land and the contour lines of the map at perpendicular angles. (Note: Maps with 5-foot contours are available for most islands through the County Geographic Information System.)

The flow path can also be determined in the field by standing in the middle of the area that will have the most impervious surfaces (or if there will be no impervious surfaces, the area that will have the most grading and vegetation removal), visually identifying the path runoff will take from that area to the wetland, and then turning around and visually identifying where the runoff is coming from.

ii. Break the flow path line into segments based on proposed surface types. Surface types are listed in Table 3.3. List these segments in column 1 of Table 3.5.

Segments that do not drain to the wetland may be omitted from the calculations (e.g. If roof runoff is tight lined to a location that does not drain to the wetland, then the area covered by the roof may be excluded from the calculation).

iii. Along the flow path line, mark where surface types change. Measure the length of each surface type and enter these lengths in column 6 of Table 3.5.

iv. For each surface type enter a Base Stormwater Discharge Factor into column 2 of Table 3.5. Some Base Stormwater Discharge Factors are shown in Table 3.3. For surface types not listed, discharge factors (which are Rational Method runoff coefficients) shall be based on BAS such as hydrology texts or guidance manuals, using the lower end of ranges because the factors will be adjusted upward to account for slopes and the presence of drainageways.

Base Stormwater Discharge Factors may be modified in conjunction with the installation of stormwater management measures that facilitate below ground flow of runoff, including those required by other sections of the San Juan County Code. Examples include using the discharge factor for lawn when roof runoff is disposed of in an infiltration trench constructed in a lawn area. Applicants should submit proposals for base stormwater discharge factor reductions to the Department for approval.

v. Slope adjustment. For vegetated surfaces, determine the approximate slope of each segment along the flow path (as a percentage), multiply it by 0.01, and enter the product in column 3 of Table 3.5. (e.g. for 8% slope enter 0.08). If the slope exceeds 30%, enter 0.3.

vi. Drainageway and stream adjustment. If a drainageway or stream connects any portion of the development to the wetland (including existing and proposed lawn, gardens and impervious areas), select the appropriate factor from Table 3.4 and enter it in column 4 of Table 3.5. (Note: This applies to the impervious areas, lawn, and garden throughout the development area being evaluated, not just the portion along the flow path.)

vii. For each row in Table 3.5 (i.e. each segment along the flow path), add the values in columns 2, 3, and 4 and enter the sum in column 5.

viii. For each row in Table 3.5 (i.e., each segment along the flow path), multiply the value in column 5 by the value in column 6 and enter the resulting product in column 7.

ix. Add all the values in column 6 of table 3.5. Add all the values in column 7. Divide the total of column 7 by the total of column 6. This is the Composite Stormwater Discharge Factor.

x. If desired, repeat to determine buffers for other, less intensely developed portions of the site.

Table 3.3

Base Stormwater Discharge Factor[1] by Surface Type	
Surface Type	**Stormwater Discharge Factor**
Coniferous forest with ≥65% canopy cover, rough ground surface, and undisturbed soils and duff layer	.02
Other heavily vegetated areas with rough ground surface and undisturbed soils and duff layer	.05
Pasture	.07
Lawn or garden	.09
Green roof	
slope ≤5°	
<4" thick	.50
4-10" thick	.30
8-20" thick	.20
>20" thick	.10
Slope >5°	.70

[1] Stormwater discharge factors are based on runoff coefficients used with the "Rational Method", which is a hydrologic model that estimates peak stormwater discharge from a drainage area. The factors represent the approximate percentage of runoff for a given amount of precipitation, and generally represent the low end of published values, with separate upward adjustments made for vegetated areas on slopes, and for the presence of drainageways. A value of 1.00 indicates that a surface is entirely impervious and that all precipitation will result in surface runoff.

Permeable pavement or permeable concrete	.35
Undisturbed, natural bedrock areas	.35
Gravel driveway	.40
Asphalt	.85
Concrete	.90
Brick	.70
Roof	.75

Table 3.4

Stormwater Discharge Factor Adjustments for Drainageways and Streams	
Drainageway or Stream Characteristics	**Stormwater Discharge Factor**
A. The drainageway(s) or stream(s) is not well defined (i.e., there is no bare soil, sand, or gravel, or discernible thinning of the vegetation in the drainageway).	0.06
B. The drainageway(s) or stream(s) is well-defined (e.g., there is discernible thinning of the vegetation and/or bare soil, sand, or gravel in the drainageway).	0.10

Table 3.5

Composite Stormwater Discharge Factor						
Column 1	**Column 2**	**Column 3**	**Column 4**	**Column 5**	**Column 6**	**Column 7**
Surface Type (by segment along the flow path)	Base Stormwater Discharge Factor	Slope Adjustment (0.01 per % slope, maximum of .30. 12% slope = .12)	Drainageway and Stream Adjustment	Sum of Columns 2, 3, & 4	Length of Segment (in feet)	Col. 5 x Col. 6
Total for Column 6 (add all rows)						
Total for Column 7 (add all rows)						
Divide the total of Col. 7 by the total of Col. 6; this is the Composite Stormwater Discharge Factor:						

Step 5. Green Development Option. A buffer adjustment is available to property owners who commit to using green development practices as outlined below.

i. The Green Development option only applies to buffers for proposed buildings and associated infrastructure and cannot be used to reduce buffers for lawns and landscaped areas.

ii. To use the Green Development option, as part of the permit approval the property owner must agree to the County recording a Notice to Title describing the requirements associated with the Green Development option.

iii. All of the following must be implemented and maintained while the Green Development remains on the property:

(A) Roof materials for proposed buildings must consist of product that are not known to release chemicals that are harmful to wetland plants or animals (e.g. enamel coated metal, tile without moss prevention products, sod if membrane does not contain fire retardant, phthalates etc.); and

(B) The disposal area for any on-site sewage systems associated with proposed buildings must meet current standards and, in addition, must be no closer to the

wetland than the specified edge of the water quality buffer for "normal" development; and

(C) The driveway serving proposed buildings must be designed and built to direct runoff into vegetated areas. Options include crowning or insloping with properly spaced relief culverts; outsloping; and installing trench drains or flexible water diverters; and

(D) The portions of the driveway that drain to the wetland must be covered with gravel, permeable pavement, permeable concrete, or other suitable material that will minimize erosion, rutting, and tracking of mud.

Step 6. Urban Growth Area Option. A buffer adjustment is available within the Eastsound and Lopez Village Urban Growth Areas as shown in Table 3.6. Within these areas, a reduced buffer may be used if adverse impacts to the functions and values of the wetland are identified and mitigated in accordance with SJCC 18.30.110.

Step 7. Determine Water Quality Buffer from Table 3.6. For all wetland types apply the Composite Stormwater Discharge Factor from Table 3.5, to the Water Quality Buffer Table 3.6, to determine the required size of the Water Quality Buffer. If the wetland type is a bog, use the greater of this value or 200 feet. (If the bog is located within another wetland type the 200 foot buffer only applies to the area immediately adjacent to

the bog, and not to the surrounding wetland). Buffers are measured horizontally from the edge of the wetland.

TABLE 3.6

Composite Stormwater Discharge Factor for Flow Path	Water Quality Buffer (feet)					
	Low Water Quality-Sensitivity Rating	Medium Water Quality-Sensitivity Rating		High Water Quality-Sensitivity Rating		Lopez Village and Eastsound UGA With Mitigation[1]
	Normal Development (60% Pollutant Removal)	Normal Development (65% Pollutant Removal)	Green Development Option (60% Pollutant Removal)	Normal Development (70% Pollutant Removal)	Green Development Option (65% Pollutant Removal)	
<0.10	30	30	30	30	30	30
0.10-<.20	30	30	30	50	30	30
0.20-<0.30	30	50	30	70	50	30
0.30-<0.40	45	65	45	95	65	30
0.40-<0.50	65	85	65	115	85	35
0.50-<0.60	80	105	80	140	105	40
0.60-<0.70	95	125	95	160	125	50
0.70-<0.80	110	140	110	185	140	55
≥.80	125	160	125	205	160	65

1 Use of this option requires the mitigation of adverse impacts in accordance with SJC 18.30.110.

* * *

APPENDIX B

Excerpts from Ordinance 26-2012, an Ordinance Regarding General Regulations for Critical Areas (shown without underline/strikeout formatting of original)

18.30.110 Critical Areas.

* * *

D. Reasonable Use Exception

It is the policy of San Juan County that private property shall not be taken for public use without just compensation having been made. The property rights of landowners shall be protected from arbitrary and discriminatory actions.

To avoid the taking of property without just compensation, this subsection establishes a reasonable use exception from standard critical area protection regulations. (Also see SJCC section 18.80.100 on the procedures and requirements for approval of a variance). Reasonable use shall be liberally construed to protect the constitutional property rights of the applicant.

* * *

4. Two sets of options are available under the reasonable use exception.

   Option One – No Mitigation:

   a. A development area of up to 2,500 s.f. of development constructed using Low Impact Development practices may be located in a critical area buffer.

b. A development area of up to 1,500 s.f. of development constructed using Low Impact Development practices may be located in a critical area.

c. A combined development area of 2,500 s.f. of low impact development, with no more than 1,500 s.f. located in the critical area and the balance located in the critical area buffer.

And;

Option Two – With Mitigation

a. Up to 10% of the parcel, or up to one half (1/2) acre, or the minimum necessary to allow for reasonable use of the property, whichever is more, may be developed if adverse impacts to critical area functions and values are mitigated in accordance with subsection 18.30.110.F of this section.

b. Low impact development practices are encouraged in all development under the reasonable use exception and are required for all reasonable use exception development creating a footprint greater than 10,890 s.f. in size.

* * *

G. Existing legally established structures, uses, and activities. It is the policy of San Juan County that existing legally established structures, uses and activities existing on the effective date of this ordinance may continue in perpetuity

and will not be considered nonconforming as a result of critical area requirements.

* * *

To determine the applicable critical area, buffer, or Tree Protection Zone relevant to this Section, the area should be drawn to exclude all existing development areas.

* * *