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HAVE WASHINGTON COURTS LOST ESSENTIAL NEXUS TO THE PRECAUTIONARY PRINCIPLE?

Citizens' Alliance for Property Rights v. Sims

by
Brian T. Hodges*
Daniel A. Himebaugh**

*Managing Attorney, Pacific Legal Foundation, Pacific Northwest
**College of Public Interest Law Fellow, Pacific Legal Foundation, Pacific Northwest.

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"That's right," shouted Vroomfondel, "we demand rigidly defined areas of doubt and uncertainty!" Douglas Adams, *The Hitchhiker's Guide to the Galaxy*[1]

Abstract

This Article examines how Washington State courts have allowed the precautionary principle to encroach upon the essential nexus test in the context of land use exactions. The essential nexus test requires government to establish a cause-and-effect connection between development and an identified public problem before placing conditions on development. The precautionary principle, however, endorses regulation of land use in the absence of causation. Although U.S. Supreme Court precedent requires government to prove causal connections, recent Washington case law shows that this test of causation is morphing into a less scrutinizing means-end test of rationality. This shift was evident in the recent case of Citizens' Alliance for Property Rights v. Sims. *In that case, Washington courts found the government's generalized scientific assessments to satisfy the essential nexus test, even though the science did not establish a causal connection between clearing of rural properties and environmental harm due to stormwater runoff. This Article urges courts to take a more vigorous interest in protecting private property rights by making causation, not precaution, the driving principle of environmental regulation.*

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* Managing attorney of Pacific Legal Foundation's Pacific Northwest Regional Office; J.D., *cum laude*, Seattle University School of Law, 2001; M.A., University of Washington, 1998; B.A., *cum laude*, University of Washington, 1996. Mr. Hodges was the lead attorney during the trial and appellate phases of *Citizens' Alliance for Property Rights v. Sims*. Mr. Hodges thanks Meriem Hubbard, principal attorney at Pacific Legal Foundation, for her supervision during the *Citizens' Alliance* litigation.
** Attorney at Pacific Legal Foundation's Pacific Northwest Regional Office; J.D., *cum laude*, Pepperdine University School of Law, 2009; M.P.P., Pepperdine University School of Public Policy, 2008; B.A., *summa cum laude*, Hillsdale College, 2004. Mr. Himebaugh thanks R.S. Radford, principal attorney at Pacific Legal Foundation, for his guidance on this article.
[1] DOUGLAS ADAMS, *The Hitchhiker's Guide to the Galaxy*, *in* THE ULTIMATE HITCHHIKER'S GUIDE 115 (1986).

Introduction

Government must have a good reason for restricting the development of private property. Development restrictions are, after all, exceptions to a property owner's rights of use and enjoyment. Protecting the environment has become a familiar justification for restricting how property owners can develop their property, and it's probably safe to assume that many property owners are sympathetic to environmental concerns. But environmental restrictions quickly lose their social appeal (not to mention their constitutionality) when they have no basis in scientific fact. Why should a homeowner, for example, whose life and livelihood is intimately tied to her home, be forbidden for environmental reasons from adding on to her home when the government cannot show that building the addition will harm the environment? More specifically, why should a rural King County homeowner be required to set aside half of his yard as an untouchable "natural resource area" when the county cannot show that clearing his lot will actually result in harm to local wetlands or waterways? An environmental restriction on property development that serves no environmental purpose is unjustifiable.

The precautionary principle—a doctrine that endorses regulation in the absence of causation—turns this understanding of property rights and environmental restrictions upside-down. The precautionary principle allows the government to exchange scientific uncertainty for a license to regulate. Thus, the government does not need to prove that the development restriction it wants to impose really prevents environmental harm; rather, the government needs to show only that it is *uncertain* whether the development will harm the environment. The precautionary principle is, if unconstrained, the device

that will help the exception (environmental restrictions on the use of private property) overtake the rule (property rights).

This is essentially what happened in 2004, when King County, Washington enacted an ordinance that permanently restricted rural property owners from developing up to 65 percent of their parcel area if they obtained a clearing and grading permit.[2] Four years later, the Washington Court of Appeals invalidated that ordinance in *Citizens' Alliance for Property Rights v. Sims* because it violated Washington's statutory prohibition against local taxes, fees, and charges on the development of land, and because it failed to satisfy the constitutional standard of "rough proportionality" under *Dolan v. City of Tigard*.[3] Regrettably, every court that heard *CAPR* glossed over the "essential nexus" rule of *Nollan v. California Coastal Commission* in holding that King County's generalized best available science record established a sufficient connection between land clearing on rural properties and harm to critical areas.[4]

This perfunctory treatment of the essential nexus rule suggests that the precautionary principle is encroaching upon the courts' understanding of essential nexus.[5]

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[2] Washington's Growth Management Act directs local governments, such as King County, to designate and protect critical areas. Wash. Rev. Code Ann. § 36.70A.172 (West 2009). King County Code (KCC) 16.82.150 was enacted for the ostensible purpose of protecting critical areas in King County. *See* King County, Wash. Code 16.82.150, *available at* http://www.kingcounty.gov/council/legislation/kc_code.aspx (last visited Dec. 29, 2009). "Critical areas include the following areas and ecosystems: (a) Wetlands; (b) areas with a critical recharging effect on aquifers used for potable water; (c) fish and wildlife habitat conservation areas; (d) frequently flooded areas; and (e) geologically hazardous areas." Wash. Rev. Code Ann. § 36.70A.030(5) (West 2009). King County's best available science in support of KCC 16.82.150 identified seven types of critical areas: (1) wetlands; (2) critical aquifer recharge areas; (3) aquatic areas; (4) wildlife areas; (5) flood hazard areas; (6) channel migration zones; (7) geologic hazard areas. King County, *Best Available Science: Volume I: A Review of Science Literature: King County Executive Report February 2004: Critical Areas, Stormwater, and Clearing and Grading Proposed Ordinances*, 1-2, *available at* http://www.kingcounty.gov/property/permits/codes/CAO.aspx (last visited Dec. 29, 2009) [hereinafter *Best Available Science Vol. I*].

[3] Citizens' Alliance for Property Rights v. Sims, 145 Wash. App. 649, 661-67, *rev. denied*, 203 P.3d 378 (2009). *See* Dolan v. City of Tigard, 512 U.S. 374 (1994).

[4] *CAPR*, 145 Wash. App. at 669-70. *See* Nollan v. California Coastal Comm'n, 483 U.S. 825 (1987).

[5] *See infra* Part III-IV.

Washington courts should not allow the precautionary principle to guide their decisions about how government may impose conditions on the development of private property. Instead, they should seriously apply *Nollan*'s essential nexus test to protect property owners from unnecessary—and unconstitutional—land use restrictions.[6]

This article argues that government cannot impose conditions on the development of private property unless it can prove that the conditions are necessary to mitigate the actual impacts of that development. Part I defines the precautionary principle, and raises concerns about its compatibility with current Supreme Court exactions jurisprudence.[7] Part II describes the *Nollan* essential nexus test and the *Dolan* rough proportionality test, and how those standards have been incorporated into Washington's development fee statute, RCW 82.02.020.[8] Part III examines the county's generalized science and the judiciary's surprising finding of essential nexus.[9] Part IV speaks to the influence of the precautionary principle in *CAPR*, and advises that causation, not precaution, should be the primary principle in determining when government may impose conditions on the development of private property.[10]

I. The Precautionary Principle: Undermining Causation

The precautionary principle, as generally understood, "espouses the belief that under conditions of substantial scientific uncertainty environmental regulations should err on the side of caution in order to prevent harm."[11] In its most innocuous form, the

[6] *See infra* Part II.
[7] *Infra* Part I.
[8] *Infra* Part II.
[9] *Infra* Part III.
[10] *Infra* Part IV.
[11] Stephen Charest, *Bayesian Approaches to the Precautionary Principle*, 12 DUKE ENVTL. L. & POL'Y F. 265, 265-66 (2002).

precautionary principle merely reflects the adage: "better safe than sorry."[12] In practice, however, the precautionary principle tends to acquire a distinctly paternalistic tone by insisting "that regulators should take steps to protect against potential harms, even if causal chains are unclear."[13]

The precautionary principle has largely supplanted causation as the driving force behind environmental law: "[I]n the face of a peril to the environment, conclusive scientific proof is nowadays no longer a prerequisite, nor uncertainty an obstacle, for taking measures to counter it."[14] From its origin in the 1970s as a strategic approach to environmental law, the precautionary principle has developed into an influential premise for supporting measures meant to prevent environmental harm and curtail private enterprise.[15] To that end, the precautionary principle has become part of national law in some European countries, but not (de jure) the United States.[16]

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[12] CASS R. SUNSTEIN, LAWS OF FEAR: BEYOND THE PRECAUTIONARY PRINCIPLE 13 (2005); Cass R. Sunstein, *The Paralyzing Principle*, *in* REGULATION 32 (Winter 2002-2003). The co-authors are aware that "[d]espite the apparent increase in its application, the Precautionary Principle remains ill-defined." Charest, *supra* note 11 at 265. Professor Sunstein identifies over twenty definitions of the precautionary principle, some of which are not compatible with one another. Sunstein, LAWS OF FEAR at 18. *See* Frank B. Cross, *Paradoxical Perils of the Precautionary Principle*, 53 WASH. & LEE L. REV. 851 (1996) (explaining that scholars place versions of the precautionary principle in a continuum ranging from "weak" to "strong," which may lead to different regulatory outcomes).

[13] Sunstein, LAWS OF FEAR, *supra* note 12 at 4. *See* BJORN LOMBORG, COOL IT 158 (2007); Stephen G. Wood, et al., *Whither the Precautionary Principle? An American Assessment From an Administrative Law Perspective*, 54 AM. J. COMP. L. 581, 587 (2006) (citing Lead Indus. Ass'n, Inc. v. EPA, 647 F.2d 1130 (D.C. Cir. 1976), *cert. denied*, 449 U.S. 1042 (1980)).

[14] ARIE TROUWBORST, EVOLUTION AND STATUS OF THE PRECAUTIONARY PRINCIPLE IN INTERNATIONAL LAW 11-12 (2002).

[15] "The first explicit references to precautionary action as a legal concept can be found in the domestic environmental law of the Federal Republic of Germany in the seventies." Trouwborst, *supra* note 14 at 17. *See* Sunstein, LAWS OF FEAR, *supra* note 12 at 15 ("[The precautionary principle] has been a staple of regulatory policy for several decades."); Joel Tickner et al., *The Precautionary Principle in Action: A Handbook* 2, *available at* http://www.biotech-info.net/handbook.pdf (last visited Dec. 29, 2009) ("The precautionary principle has its beginnings in the German principle of *Vorsorge*, or foresight. At the core of early conceptions of this principle was the belief that society should seek to avoid environmental damage by careful forward planning, blocking the flow of potentially harmful activities."); The Precautionary Principle Project, *Guidelines for Applying the Precautionary Principle to Biodiversity Conservation and Natural Resource Management*, *available at* http://pprinciple.net/PP_guidelines_brochure.pdf (citing Rio Declaration, 1992; Convention on Biological Diversity, 1992; UK Biodiversity Action Plan, 1994; Convention on International Trade in Endangered Species of Wild Fauna and Flora, Resolution Conf. 9.24

Despite dealing in hypotheses that may lack logical rigor,[17] the precautionary principle has flourished as an emergent environmental management tool, becoming a "centralized theme within environmental issues, especially when scientific knowledge concerning a specific [] risk is wanting . . . ."[18] But the precautionary principle has its detractors, some of whom have called it "the most reckless, arbitrary, and ill-advised" new concept in environmental policy over the past quarter century.[19]

(Rev CoP13)) (last visited Dec. 29, 2009); Ronald Bailey, *Precautionary Tale: The latest environmentalist concept—the Precautionary Principle—seeks to stop innovation before it happens. Very bad idea.*, *in* REASON MAGAZINE, Apr. 1999, *available at* http://www.reason.com/news/printer/30977.html (last visited Dec. 29, 2009) (parsing precautionary principle and its origins, and criticizing it for stifling innovation).

[16] For a discussion of the precautionary principle in American law, *see* Trouwborst, *supra* note 14 at 189-200. *See* David Appell, *The New Uncertainty Principle*, *in* SCIENTIFIC AMERICAN, Jan. 2001, *available at* http://www.scientificamerican.com/article.cfm?id=the-new-uncertainty-princ (last visited Nov. 24, 2009) (reporting that the precautionary principle is "a matter of law in Germany in Sweden"); Tickner et al., *supra* note 15 at 2 ("On a national level Sweden and Denmark have made the precautionary principle . . . guide[] to their environmental and public health policy."); Linda Cameron, *Environmental Risk Management in New Zealand—Is There Scope to Apply a More Generic Framework*, New Zealand Treasury Policy Perspective Paper 06/06 19-20 (2006) ("Although the United States government denied the existence of the precautionary principle, the United States view is that precaution can be implemented only within a framework of risk management, otherwise significant costs and distortions would result."); *but see The Cautious Society? An Essay on the Rise of the Precautionary Culture* 3, 11 ("[The precautionary principle's] status as a firmly established principle of international law is still hotly debated."). One formal exception to America's reluctance to explicitly adopt the precautionary principle is San Francisco's adoption of the precautionary principle as a binding requirement for all of its environmental and health decisions. Gary E. Marchant & Kenneth L. Mossman, ARBITRARY AND CAPRICIOUS: THE PRECAUTIONARY PRINCIPLE IN THE EUROPEAN UNION COURTS 6 (2005). *See also* Wood, et al., *supra* note 13 at 585 (positing that some federal regulatory schemes may be employing versions of the precautionary principle in risk assessment but calling it by another name); Jonathan B. Wiener, *Precaution in a Multi-Risk World*, *in* DENNIS D. PAUSTENBACH, ED., THE RISK ASSESSMENT OF ENVIRONMENTAL AND HUMAN HEALTH HAZARDS, Duke Law School Public Law and Legal Theory Working Paper Series, Working Paper No. 23 1 (Dec. 2001), *available at* http://papers.ssrn.com/abstract=293859 (citing Ethyl Corp. v. EPA, 541 F.2d 1 (D.C. Cir. 1976) and TVA v. Hill, 437 U.S. 153 (1978)) (last visited Dec. 29, 2009).

[17] *See* Sunstein, LAWS OF FEAR, *supra* note 12 at 35-64 (discussing the logical "blinders" implicit in the precautionary principle); David E. Adelman, *Scientific Activism and Restraint: The Interplay of Statistics, Judgment, and Procedure in Environmental Law*, 79 NOTRE DAME L. REV. 497, 560 (2004) ("Probably the most common criticism of the Precautionary Principle is that it risks advancing a model for scientific inference that lacks both objective measures and quantitative clarity.").

[18] *The Cautious Society?*, *supra* note 16 at 3. *See generally* Scott LaFranchi, *Surveying the Precautionary Principle's Ongoing Global Development: The Evolution of an Emergent Environmental Management Tool*, 32 B.C. ENVTL. AFF. L. REV. 679 (2005).

[19] Marchant & Mossman, *supra* note 16 at 1.

Criticism of the precautionary principle rests on the view that it is not really a matter of science, but a catchword of political philosophy.[20] For example, Professor Holly Doremus acknowledged this dichotomy in a 2007 symposium on environmental law and the Puget Sound.[21] As Doremus put it, "precaution . . . is a moral argument that makes no pretense of value neutrality."[22] "[The precautionary principle] provides normative judgments about how information generated by science (including the limits and lingering uncertainties of that information) should be translated into individual and societal action."[23] It "moves the real burden of taking [sic] decisions from scientists to policy makers,"[24] and advises local governments to take action to "protect the environment," even in the absence of evidence of harm, and notwithstanding the costs.[25]

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[20] *Id.* at Foreword (suggesting that the precautionary principle has acquired "shibboleth status" because it has been adopted with enthusiasm despite possessing no agreed upon definition); Per Sandin, *Better Safe Than Sorry: Applying Philosophical Methods to the Debate on Risk and the Precautionary Principle*, Thesis in Philosophy from the Royal Institute of Technology 3 (2004) (identifying precautionary principle as a moral and/or prudential decision making tool). *The Precautionary Principle In Action: A Handbook*, a text prepared for the Science and Environmental Health Network, explains that, "An underlying theme of the principle is that decision-making in the face of extreme uncertainty and ignorance is a matter of policy and political considerations." Tickner et al., *supra* note 15 at 4.

[21] Holly Doremus, *Precaution, Science, and Learning While Doing in Natural Resource Management*, 82 WASH. L. REV. 547, 558-60 (2007). Doremus cites other commentators who have criticized the precautionary principle as being "anti-scientific." Among them are Gail Charnley and E. Donald Elliott, who "characterize precautionary decisions as those made 'in the absence of adequate science,' and argue that such decisions should include some signal 'that policy, not science, underlies those standards.'" *Id.* at 559 (quoting Gail Charnley & E. Donald Elliott, *Risk Versus Precaution: Environmental Law and Public Health Protection*, 32 ENVTL. L. REP. 10,363, 10,365 (2002)). Doremus also cites Frank Cross, who "complains about 'the disdain for scientific evidence' of precautionary principle advocates." *Id.* (quoting Cross, *supra* note 12 at 854).

[22] Doremus, *supra* note 21 at 560.

[23] *Id.*

[24] Trouwborst, *supra* note 14 at 16 (quoting EPA official Richard D. Morgenstern).

[25] *See* Cross, *supra* note 12 at 851; *but see* Sunstein, LAWS OF FEAR, *supra* note 12 at 4 (arguing that strong versions of the precautionary principle are "literally incoherent" and "paralyzing" because there are risks "on all sides" of any action; the precautionary principle will not automatically lead to action); Cameron, *supra* note 16 at 6 (arguing that precautionary principle applies only in cases of "potentially serious environmental impacts and/or irreversible threats of harm"). It might appear that Washington has adopted a version of the precautionary principle for GMA planning, but Department of Community, Trade, and Economic Development guidelines establishing a "precautionary or a no risk approach" have been interpreted only to authorize local government to adopt adaptive management programs for critical areas if the program includes monitoring for effectiveness, a commitment to develop a scientific record, and a commitment to change regulations that are not effective. Wash. Admin. Code 365-195-920 (2009); *see* Swinomish Indian Tribal Cmty. v. W. Wash. Growth Mgmt. Hearings Bd., 161 Wash. 2d 415 (2007);

The U.S. Supreme Court has demanded heavier deference to private property rights than the precautionary principle is likely to afford.[26] *Nollan*, in particular, requires the government to show a close causal connection between the identified public problem it wants to control and the proposed development before placing conditions on a property owner's ability to develop his or her property.[27] But *Nollan* stands in marked contrast to a popular statement of the precautionary principle, which says "when an activity raises *threats* of harm to human health or the environment, precautionary measures should be taken *even if some cause and effect relationships are not fully established*."[28] *Nollan*'s essential nexus test and the precautionary principle are at clear odds because the former demands a close causal link; the latter relies substantially less on cause-and-effect connections.[29]

Evergreen Islands v. City of Anacortes, WWGMHB No. 05-2-0016 (2005); Swinomish Indian Tribal Cmty. v. Skagit County, WWGMHB No. 02-2-0012c (2005); Olympic Envtl. Council v. Jefferson County, WWGMHB No. 01-2-0015 (2003). However, some Growth Management Hearings Boards have seized on CTED guidelines as a strong version of the precautionary principle. *See id.* (deciding that local government should implement a precautionary approach when faced with uncertainty in the scientific record). In *CAPR*, King County's best available science record declared, "In the face of uncertainty about the workings of ecosystems and the effects of human action, the potential for harm should be anticipated and human actions should err on the side of caution. In this precautionary context, absence of adequate scientific data should not be used to justify a delay in taking conservation actions." *Best Available Science Vol. I* at 2-1.

[26] *See infra* Part II.

[27] *Nollan*, 483 U.S. at 831-37.

[28] This excerpt comes from the famous Wingspread Conference definition of the precautionary principle. The full statement is as follows: "When an activity raises threats of harm to human health or the environment, precautionary measures should be taken even if some cause and effect relationships are not fully established. In this context the proponent of the activity, rather than the public, should bear the burden of proof. The process of applying the Precautionary Principle must be open, informed and democratic and must include potentially all affected parties. It must also involve an examination of the full range of alternatives, including no action." Science & Environmental Health Network, The Wingspread Statement on the Precautionary Principle, *available at* http://www.sehn.org/state.html#w (last visited Dec. 29, 2009). The 1998 Wingspread Conference of activists, scholars, scientists, and lawyers at the Johnson Foundation in Racine, Wisconsin was "the first major effort in the United States to bring the precautionary principle to the level of day-to-day environmental and public health decision-making at the state or federal level." *See* Tickner et al., *supra* note 15 at 3. The Science & Environmental Health Network convened the conference to "discuss methods to implement the precautionary principle, and barriers to that implementation." Appell, *supra* note 16.

[29] *See infra* Part II-IV.

II. General Rules: *Nollan*, *Dolan*, and RCW 82.02.020

The law has long recognized that land use restrictions can have such a drastic impact on a property owner's interests that they accomplish an uncompensated "regulatory" taking of private property.[30] An exaction is a special kind of regulatory taking that arises when property owners are required to obtain permission from the government to use their private property.[31] In this circumstance, the government might place conditions on that permission, thus "exacting" from the property owner some benefit to the government in exchange for the permit.[32] The Court's opinions in *Nollan* and *Dolan* hold that exactions are unconstitutional unless the government can demonstrate both "essential nexus" and "rough proportionality."[33]

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[30] *See* Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1014 (1992) ("If . . . the uses of private property were subject to unbridled, uncompensated qualification under the police power, the 'natural tendency of human nature [would be] to extend the qualification more and more until at last private property disappeared.'") (quoting Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 415 (1922)); San Diego Gas & Elec. Co. v. City of San Diego, 450 U.S. 621, 652 (1981) ("Police power regulations such as zoning ordinances and other land-use restrictions can destroy the use and enjoyment of property in order to promote the public good just as effectively as formal condemnation or physical invasion of property."); *Pennsylvania Coal Co.*, 260 U.S. at 415 ("[I]f regulation goes too far it will be recognized as a taking."); Lange v. State, 86 Wash. 2d 585, 590 (1976) ("Property in a thing consists not merely in its ownership, but in the unrestricted right of use, enjoyment, and disposal. Anything which destroys any of these elements of property, to that extent destroys the property itself. The substantial value of property lies in its use. If the rights of use be denied, the value of the property is annihilated and ownership is rendered a barren right.") (quoting Ackerman v. Port of Seattle, 55 Wash. 2d 400, 409 (1960)); *see also* John M. Groen and Richard M. Stephens, *Takings Law, Lucas, and the Growth Management Act*, 16 U. PUGET SOUND L. REV. 1259, 1261 (1993); Elaine Spencer, *Dashed "Investment-Backed" Expectations: Will the Constitution Protect Property Owners From Excesses in Implementation of the Growth Management Act?*, 16 U. PUGET SOUND L. REV. 1223 (1993).

[31] An exaction is a requirement that a property owner provide a benefit to the government in return for receiving permission to use land. Exactions can take any form including dedications of land and cash payments. *See* Steven A. Haskins, *Closing the Dolan Deal—Bridging the Legislative/Adjudicative Divide*, 38 URB. LAW. 487, 488-89 (2006). The Court's exactions jurisprudence is rooted in the Takings Clause of the Fifth Amendment: "[N]or shall private property be taken for public use, without just compensation." U.S. CONST. amend. V.

[32] *See* Haskins, *supra* note 31 at 488-89.

[33] *Nollan*, 483 U.S. at 831-37; *Dolan*, 512 U.S. at 391. Those standards have been adopted by Washington courts. *See* Sparks v. Douglas County, 127 Wash. 2d 901, 913 (1995) (adopting *Dolan* test in Washington); Trimen Dev. Co. v. King County, 124 Wash. 2d 261, 274 (1994) (exaction must meet *Dolan* rough proportionality); Cobb v. Snohomish County, 64 Wash. App. 451, 467-68 (1991) (adopting *Nollan* test in Washington); *see also* Jan G. Laitos, *Causation and the Unconstitutional Conditions Doctrine: Why the City of Tigard's Exaction Was a Taking*, 72 DENV. U. L. REV. 893, 905 (1995) ("The essence of this *Dolan* rule is that there must be a 'cause and effect' relationship between the social evil that the exaction or

A. *Nollan*'s Essential Nexus Test

In the *Nollan* case, the Nollans sought a permit from the California Coastal Commission to replace their beachside bungalow with a three-bedroom house.[34] The Commission told the Nollans that it would grant the permit only if the Nollans dedicated an easement to allow the public to pass over their property.[35] The Commission argued that the easement was necessary because the Nollans' project would block the view of the ocean from the road and create a psychological barrier to accessing the beach.[36] The U.S. Supreme Court rejected the Commission's findings and concluded that the Commission's imposition of the permit condition was not a legitimate exercise of land-use power.[37] "It is quite impossible to understand how a requirement that people already on the public beaches be able to walk across the Nollans' property reduces any obstacles to viewing the beach created by the new house," the Court explained.[38] "It is also impossible to understand how it lowers any 'psychological barrier' to using the public beaches, or how it helps to remedy any additional congestion on them caused by construction of the Nollans' new house."[39] The Court found no connection between the Nollans' proposed

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regulation seeks to remedy and the property use that is either (1) subject to an exaction requirement, or (2) restricted by a regulation. If this causative link is absent, as it was in *Dolan*, the government action may be [invalid]."); James L. Huffman, *Colloquium on Dolan: The Takings Clause Doctrine of the Supreme Court and the Federal Circuit: Dolan v. City of Tigard: Another Step in the Right Direction*, 25 ENVTL. L. 143, 150, 152 (1995) ("The Takings Clause . . . protects against this majoritarian tyranny . . . by insisting that the costs imposed by government use or regulation of private property are borne by all to whom the benefits inure."); Timothy A. Bittle, *Nollan v. California Coastal Commission: You Can't Always Get What You Want, But Sometimes You Get What You Need*, 15 PEPP. L. REV. 345 (1988) ("[U]ncompensated dedication requirements, standing alone, are unconstitutional.").

[34] *Nollan*, 483 U.S. at 828.

[35] *Id.*

[36] *Id.* at 828-29.

[37] *Id.* at 837-42.

[38] *Id.* at 838.

[39] *Id.* at 838-39.

development and the public problems that the Commission cited in support of its permit condition.[40]

Under *Nollan*, local governments must demonstrate "a close causal nexus between the burdens imposed by the regulations, and the social costs that would otherwise be imposed by the property's unregulated use."[41] A simple way to remember this test is to ask whether the government can prove that the proposed development will cause the public harm that the government is concerned about. Or in the words of the Washington Court of Appeals, the government must show that the development "will create or exacerbate the identified public problem."[42] The essential nexus test is an examination of cause and effect.[43] "It is the requirement of a cause-effect nexus, not a means-end fit, that offers real protection against the imposition of unjustified or disproportionate burdens on individual property owners."[44]

The government must establish a close causal relationship between the impact of the development and the identified public problem to keep "from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole."[45] In *Nollan*, this meant that the Commission could not deny permission to build in order to force the Nollans to give up land the state would otherwise have to pay for.[46] If the power to regulate land use went that far, local governments could engage in "out-and-out plan[s] of extortion"[47] by withholding permission to

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[40] *Id.*
[41] R.S. Radford, *Of Course a Land Use Regulation That Fails to Substantially Advance Legitimate Interests Results in a Regulatory Taking*, 15 FORDHAM ENVTL. L. REV. 353, 390 (2004).
[42] Burton v. Clark County, 91 Wash. App. 505, 522 (1998).
[43] *See id.*
[44] Radford, *supra* note 41 at 391.
[45] *Nollan*, 483 U.S. at 836 (quoting Armstrong v. United States, 364 U.S. 40, 49 (1960)).
[46] *Id.*
[47] *Id.* at 837 (quoting J.E.D. Associates, Inc. v. Atkinson, 432 A.2d 12, 14-15 (N.H. 1981)).

develop unless the property owner bankrolled the public project du jour, without considering the relationship between the property owner's development plan and the government's regulatory preferences.[48]

The essential nexus is the cause-and-effect connection between the proposed development and the identified public problem. Government cannot place conditions on the development of private property without first establishing this essential nexus.

B. *Dolan*'s Rough Proportionality Test

Once the government is able to prove an essential nexus, it must then "show that its proposed solution to the identified public problem is 'roughly proportional' to that part of the problem that is created or exacerbated by the landowner's development."[49] The rough proportionality test is a matter of degree. It measures the relationship between the conditions placed on the use of the property and the negative impacts of that use that would justify the denial of the proposed use in the first place.[50]

In *Dolan*, the owner of a plumbing and electric supply store applied for a permit to redevelop her site, including expanding the size of her store and paving her parking lot.[51] The city granted the permit, but imposed two conditions: (1) dedicate a portion of

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[48] *See* David L. Callies & Christopher T. Goodin, *The Status of Nollan v. California Coastal Commission and Dolan v. City of Tigard After Lingle v. Chevron U.S.A., Inc.*, 40 J. MARSHALL L. REV. 539, 558 (2007). Callies and Goodin explain the *Nollan* (and *Dolan*) test in terms of the Court's doctrine of unconstitutional conditions. That doctrine prevents government from requiring a person to give up a constitutional right in exchange for a discretionary benefit conferred by the government. "In *Nollan*, the Court's implicit reliance on this doctrine was evident when it said that 'the lack of nexus between the condition and the original purpose of the building restriction converts that purpose to . . . the obtaining of an easement to serve some valid governmental purpose, but without paying compensation.' The principles underlying the unconstitutional conditions doctrine have a long history in the context of challenges to exactions under the Takings Clause." *Id.*

[49] *Burton*, 91 Wash. App. at 523.

[50] Sintra, Inc. v. City of Seattle, 131 Wash. 2d 640, 676 (1997) ("The 'rough proportionality' test measures the relationship between the conditions placed on the use of property and the *negative* impacts of that use that would justify the denial of the proposed use in the first instance.") (citing *Sparks*, 127 Wash. 2d at 914-16).

[51] *Dolan*, 512 U.S. at 379.

land within the floodplain to the city for drainage improvements; and (2) dedicate a fifteen foot strip of land adjacent to the floodplain to the city for a bike path.[52] The Court took the case as an opportunity to address the question it had left open in *Nollan*, i.e., "whether the degree of the exactions demanded by the city's permit conditions bears the required relationship to the projected impact of [plaintiff's] proposed development."[53] The Court found essential nexus, but also found that both exactions failed the test of "rough proportionality," which requires that "the city must make some sort of individualized determination that the required dedication is related both in nature and extent to the impact of the proposed development."[54]

Professor Mark W. Cordes has called attention to the practical application of *Dolan* in protecting property rights: "[*Dolan*] makes the common municipal practice of using the development exaction process as a means to capture already targeted tracts of land without paying just compensation highly questionable."[55] Without the *Dolan* test, the relationship between the exaction and the development impact might be proportional, but it is more likely than not that "any proportional relationship would be fortuitous, since the type and extent of the exaction is determined by the preexisting determination of the plan rather than the impact of the development."[56]

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[52] *Id.* at 379-80.
[53] Callies & Goodin, *supra* note 48 at 547 (quoting *Dolan*, 512 U.S. at 388).
[54] *Dolan*, 512 U.S. at 391.
[55] Mark W. Cordes, *Legal Limits on Development Exactions: Responding to Nollan and Dolan*, 15 N. ILL. U. L. REV. 513, 551 (1995).
[56] *Id.*

C. RCW 82.02.020 and Incorporating *Nollan* and *Dolan*

RCW 82.02.020 prohibits local governments in Washington from imposing taxes, fees, or charges on land development, unless those fees satisfy certain narrow exceptions:[57]

> Except as provided in RCW 82.02.050 through 82.02.090, no county, city, town, or other municipal corporation *shall impose any tax, fee, or charge, either direct or indirect, on the construction or reconstruction of residential buildings . . . or on the development, subdivision, classification, or reclassification of land.* However, this section does not preclude dedications of land or easements within the proposed development or plat which the county, city, town, or other municipal corporation can *demonstrate are reasonably necessary as a direct result of the proposed development or plat to which the dedication of land or easement is to apply.*[58]

Washington courts have construed RCW 82.02.020 to require local governments to establish an essential nexus between the property owner's proposed development and the identified public problem.[59] The courts also require that conditions imposed on the development must be roughly proportional in scope to the developer's contribution to the identified public problem.[60] To meet the statute's "reasonably necessary" requirement, an ordinance containing a development condition must be tied to a specific, identified

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[57] Wash. Rev. Code Ann. § 82.02.020 (West 2009); *see* Isla Verde Int'l Holdings v. City of Camas, 146 Wash. 2d 740, 753 (2002); Vintage Constr. Co., Inc. v. City of Bothell, 83 Wash. App. 605, 607 (1996) ("RCW 82.02.020 regulates the imposition of local fees on developers. The statute . . . identifies two types of development fees that are permissible if the city can show they are reasonably necessary as the direct result of the development. One type is a fee in lieu of a dedication of land that the municipality could otherwise require. The other type is a fee to mitigate a direct impact caused by the development."); Southwick v. City of Lacey, 58 Wash. App. 886, 893 (1990) (finding legislature enacted RCW 82.02.020 to prevent local government from imposing general social costs of development on landowners); *see also* David L. Callies & Glenn H. Sonoda, *Providing Infrastructure for Smart Growth: Land Development Conditions*, 43 IDAHO L. REV. 351, 368 (2007) (discussing various state legislative applications of *Nollan* and *Dolan*).

[58] Wash. Rev. Code Ann. § 82.02.020 (West 2009) (emphasis added).

[59] *Cobb*, 64 Wash. App. at 467-68 (adopting *Nollan* for RCW 82.02.020 analysis).

[60] *Sparks*, 127 Wash. 2d at 913 (adopting *Dolan* for RCW 82.02.020 analysis); *Trimen*, 124 Wash. 2d at 274 (finding exaction must satisfy *Dolan* rough proportionality test).

impact of the development.[61] As Washington Court of Appeals Judge Agid stated in *Cobb*, a condition on development must "mitigate a direct impact that has been identified as a consequence of a proposed development" because this "reflects the Legislature's adoption of the 'nexus' requirement imposed by case law on governmental exactions and conditions."[62] The burden rests on the government to prove that essential nexus and rough proportionality have been satisfied, or else the development condition constitutes an illegal tax, fee, or charge under RCW 82.02.020.[63] This burden applies to cities and counties even when they craft regulations to comply with Washington's Growth Management Act.[64]

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[61] *See, e.g., Isla Verde*, 146 Wash. 2d at 761 (citing *Vintage Construction*, 83 Wash. App. at 611-12) ("The statute mandates that a municipality must demonstrate that a dedication is 'reasonably necessary *as a direct result of the proposed development or plat*,' and also mandates that, in the case of a payment in mitigation of a '*direct impact* that has been identified as a *consequence*' of the proposed development, a municipality must establish that the payment is 'reasonably necessary *as a direct result of the proposed development or plat*.' We have repeatedly held, as the statute requires, that development conditions must be tied to a specific, identified impact of a development on a community.") (emphasis in original).

[62] *Cobb*, 64 Wash. App. at 467-68 (Agid, J., concurring and dissenting in part).

[63] Homebuilders Ass'n of Kitsap County v. City of Bainbridge Island, 137 Wash. App. 338, 347 (2007) ("The City is correct that the burden of proof rests with any challenger who asserts a fee or tax is invalid or unconstitutional because it is unreasonable. But Home Builders challenge whether the City's fees fall within the allowed statutory exceptions to RCW 82.02.020. In *Isla Verde*, our Supreme Court held that, for purposes of RCW 82.02.020, the burden of establishing a statutory exception is on the party claiming the exception. . . . Because these fees are, by statute, an exception to the general prohibition against fees on construction and development, the City must show that its fees fall within the specific exception and that they are reasonable. Thus, the trial court erred and we vacate and remand the case for further proceedings allocating the burden of proof to the City."); *see Isla Verde*, 146 Wash. 2d at 755 ("RCW 82.02.020 requires strict compliance with its terms . . . [a development condition] is invalid unless it falls within one of the exceptions specified in the statute.").

[64] *CAPR*, 145 Wash. App. at 663 ("[N]o Washington law supports the County's argument that KCC 16.82.150 is exempt from the requirements of RCW 82.02.020 because it was adopted in response to the State's GMA requirements. Nor is there authority for the proposition that a local jurisdiction is bound by the statute *only* when adopting an ordinance on its own initiative) (emphasis in original).

III. *CAPR*: The Precautionary Principle Slips In

A. King County Ignores Science, Regulates in Response to Uncertainty

On October 26, 2004, seven of the thirteen King County council members, all representing the urban areas of the county, voted to adopt the highly controversial critical areas ordinance, codified at King County Code (KCC) 16.82.150.[65] The ordinance required a set-aside of up to 65 percent of the owner's parcel area as a condition to obtaining a clearing and grading permit.[66] It applied uniformly to all rural residential properties in a preset amount based on parcel size, regardless of whether or not the property was located on or near a critical area.[67] The ordinance required the property owner to designate the portion of his property that would remain un-cleared on a site plan for approval by the county.[68] When the county approved the site plan, the un-cleared area had to be "maintained by the property owner as a natural resource area" for the purpose of promoting forest cover, which it was assumed would protect critical areas from stormwater runoff.[69]

Immediately upon adoption of the ordinance, Citizens' Alliance for Property Rights, a non-partisan political action committee that formed in 2003 to represent the interests of property owners during the critical areas deliberation process, and several

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[65] King County, Wash. Ordinance 15053 (2004); *see also* Keith Ervin, *King County, Wash., panel approves land-use package*, SEATTLE TIMES, Oct. 29, 2004, *available at* 2004 WLNR 14530757. Upon adoption, one King County councilmember called the clearing and grading ordinance "the most draconian land-use regulation[] in the state, if not the country." Keith Ervin, *In effort to preserve land, King County, Wash., limits uses of rural property*, SEATTLE TIMES, Oct. 26 2004, *available at* 2004 WLNR 14643898 (quoting former King County councilmember and current Washington Attorney General McKenna).

[66] King County, Wash. Code 16.82.150. A clearing and grading permit is essential for nearly all development.

[67] *Id.*

[68] *Id.*

[69] *Id.* The ordinance did not require King County to demonstrate that the clearing restriction was necessary to mitigate impacts caused by a proposed land use. Instead, the clearing restriction could be modified, but not decreased, if there was an approved or current rural stewardship plan, or a farm management plan. King County, Wash. Code 16.82.150(C)(1).

individual rural King County property owners, filed a lawsuit challenging KCC 16.82.150.[70] The alliance bypassed administrative review at the Growth Management Hearings Board, and brought a facial challenge alleging that KCC 16.82.150 violated the essential nexus and rough proportionality requirements of RCW 82.02.020.[71]

On December 21, 2006, the Snohomish County Superior Court granted King County's motion for summary judgment, and dismissed CAPR's lawsuit.[72] At summary judgment, King County admitted that the scientific record supporting its 50 to 65 percent set-aside requirement did not contain any studies that identified the actual stormwater runoff impacts of any particular development.[73] Instead, the county relied on studies that discussed the general relationship between the "urbanization" process on a regional scale

[70] Snohomish County Superior Ct. Compl. No. 04-2-13831-9 (Dec. 6, 2004).

[71] Bringing a facial challenge meant that the Alliance could not challenge the county's scientific findings, just the ordinance. Although a party who challenges a regulation for compliance with the GMA must file a petition for review with one of Washington's Growth Management Hearings Boards, the boards lack the jurisdictional authority to decide claims alleging a violation of property rights, including a violation of RCW 82.02.020. *See, e.g.,* Whidbey Environmental Action Network v. Island County, WWGMHB, No. 06-2-0023 (2007) (finding growth boards do not have the authority to determine what property rights exist under Washington law); Open Frame, L.L.C. v. City of Tukwila, CPSGMHB No. 06-3-0028, 2006 WL 3694092 at *7 (2006) ("[F]or the Board to review any of the City's actions . . . would amount to the Board's review of actions under RCW 82.02.020, for which the Board has no jurisdiction."); Hood Canal Envt'l Council, et al. v. Kitsap County, CPSGMHB No. 06-3-0012, 2006 WL 2644138 at *35 (2006) (property rights claims brought under statutory or constitutional protections "must be decided by the Courts, not this Board."); Master Builders Ass'n of Pierce County v. City of Bonney Lake, CPSGMHB 05-3-0045, 2006 WL 352275 at *6 (2006) (declining to address requirements of RCW 82.02.020 challenge brought as a GMA consistency challenge); Keesling v. King County, CPSGMHB, No. 05-3-001 (2005) (finding that property rights challenges, whether brought under statute or the Constitution cannot be brought in GMA challenge but must be decided by the courts). A recent Note suggests that RCW 82.02.020, its incorporated essential nexus and rough proportionality requirements, and *Isla Verde* and *Trimen* should not have applied in *CAPR* because the case involved no "proposed development." Donya Williamson, Note, *Urbanites Versus Rural Rights: Contest of Local-Government Land Use Regulations Under Washington Preemption Statute 82.02.020*, 84 WASH. L. REV. 491, 517-19 (2009). Washington courts, however, allow facial challenges under RCW 82.02.020 to statutes that contain preset and generally applicable development regulations, such as KCC 16.82.150. *See, e.g.,* R/L Associates, Inc. v. City of Seattle, 113 Wash. 2d 402, 409 (1989) (holding that a local ordinance was facially invalid under RCW 82.02.020); Carlson v. Town of Beaux Arts Village, 41 Wash. App. 402, 408 (1985); Buchsieb/Danard, Inc. v. Skagit County, 99 Wash. 2d 577, 580-81 (1983); Norco Constr., Inc. v. King County, 97 Wash. 2d 680, 685 (1982); *see also Trimen*, 124 Wash. 2d at 269-70; *Cobb*, 64 Wash. App. at 459; View Ridge Park Associates v. Mountlake Terrace, 67 Wash. App. 588, 600 (1992).

[72] Snohomish County Superior Ct. Mem. Decision Granting Def. King County's Mot. for Summ. J. No. 04-2-13831-9 at 4 (Dec. 21, 2006).

[73] Snohomish County Superior Ct. Def. King County's Resp. to Pl.'s Mot. for Summ. J. No. 04-2-13831-9 at 52, 54-55 (Sept. 27, 2006).

and increased stormwater runoff.[74] King County argued that this general relationship justified taking measures to limit all activities included as part of urbanization in order to preserve existing conditions in rural areas, and potentially forestall any increase in runoff.[75] According to the county, this means-end relationship satisfied the essential nexus requirement.[76] The Superior Court accepted King County's position, concluding that a generalized assessment of area-wide impacts would suffice to satisfy essential nexus.[77]

The problem with the county's argument is that endorsing a means-end standard allows government to achieve a regulatory goal that is not causally related to all of the regulated activities.[78] King County's ordinance limited all development that required any land clearing on every regulated property as a condition to obtaining permit approval, but the county's science did not prove that this was necessary to prevent stormwater runoff from harming critical areas.[79] A review of the county's scientific record demonstrates how the precautionary principle influenced the policy decisions made in adopting KCC 16.82.150.[80]

King County adopted KCC 16.82.150 as part of an "emerging generalized strategy for conservation" that combined site-specific restrictions, such as riparian

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[74] *See infra* Part IIIA.
[75] *See* Snohomish County Superior Ct. Def. King County's Resp. to Pl.'s Mot. for Summ. J. No. 04-2-13831-9 at 51-52 (Sept. 27, 2006).
[76] *See id.*
[77] "Defendant King County has supplied voluminous data which is not challenged by the plaintiffs that evaluate the overall impacts of the effects of clearing in rural areas. Therefore the nexus required by RCW 82.02.020 has been satisfied." Snohomish County Superior Ct. Mem. Decision Granting Def. King County's Mot. for Summ. J. at 4.
[78] *See infra* Part IIIA.
[79] *See id.*
[80] *See id.*

buffers, alongside generally applicable development standards.[81] The 50 to 65 percent clearing restriction was meant to "augment" existing critical area protections by imposing an area-wide regulation to promote forest cover in rural areas.[82] The county noted, however, that the clearing restriction created a potential problem due to the generalized nature of the science upon which it was based: "The [clearing] threshold . . . [is] controversial in that [it is] based on *general relationships* derived from complex watershed conditions and interactions."[83] Indeed, the county did not know whether the 50 to 65 percent set-aside strategy would benefit critical areas at the time the county imposed this development condition on rural properties:

> The 35 percent clearing restriction *may or may not benefit wetland functions depending on site-specific watershed, geology, soils, and current vegetative condition. These data are currently unavailable.* Consequently, if watershed exhibit steep slopes, surface bedrock, and shallow soils, or are considerably below the recommended vegetation cover, *the mechanisms of attaining additional wetland function protection may not be realized at all*, or will take years to develop.[84]

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[81] *See* King County, Wash. Ordinance 15051 § 3; *Best Available Science Vol. I* at 7-15.

[82] *See* King County, Wash. Ordinance 15051 § 3(f). It should be noted that the county's rural streams were in nearly pristine condition in 2004. King County, *King County Benchmarks 2004: Environment* CA 45 (2004). The county had lost little forest cover in a decade, much of which arose from growth along urban boundaries prior to 1996. King County, *The 2004 Annual Growth Report* 19 (2004). The county lost only two percent of forest land between 1994 and 2001. *Benchmarks 2004* at CA 46. The county also gained 3.4 percent in regenerated forest in urban and rural areas since 2001. *Id.*

[83] King County, *Best Available Science: Volume II: Assessment of Proposed Ordinances: King County Executive Report February 2004: Critical Areas, Stormwater, and Clearing and Grading Proposed Ordinances*, 4-7, *available at* http://www.kingcounty.gov/property/permits/codes/CAO.aspx (last visited Dec. 29, 2009) [hereinafter *Best Available Science Vol. II*].

[84] *Best Available Science Vol. II* at 4-15 (emphasis added). Elsewhere the county's science explained that "65 percent forest cover is a plausible . . . value for [vegetative retention]," but "as noted in earlier analyses, other soils . . . yield much greater hydrologic response, even with lesser amounts of clearing." *Best Available Science Vol. I* at App. B, p.14; *see also Best Available Science Vol. II* at 4-12 (noting that science also did not address the effect of the clearing restriction on parcels that already had more than 65 percent vegetation cover). The county could not quantify the effect of removing vegetation from un-cleared lots. *Id.* "This creates uncertainty on whether the standard will be effective over the long term." *Id.*

In fact, all of the studies addressing the impact of clearing consistently rejected the strategy of imposing a uniform and preset buffer on a region-wide scale.[85] The best available science concluded that for such a restriction to have a beneficial effect, it must be based on the specific characteristics of the regulated property.[86] For example, the authors of *Structural and Non-Structural BMPs for Protecting Streams* explained that the conclusions of generalized studies should not be applied without first conducting necessary site-specific studies.[87]

These authors were not alone in concluding that a uniformly applied preset buffer was not an appropriate, scientifically supportable approach to mitigating the effects of stormwater runoff.[88] Another study stated plainly, "'A one-size fits all' buffer likely will not work. This would argue for a watershed-by-watershed, stream-by-stream, and site-by-site approach . . . [that] may look daunting and costly . . . but is necessary if we are to conserve our salmonid resources, protect [our] water quality, and improve our quality of life."[89] Yet another report highlighted the unfitness of a uniform approach given the variation among riparian areas: "Since riparian areas differ considerably in the type of vegetation supported, each riparian area must be assessed for its potential to support the establishment and growth of a variety of vegetation life forms (i.e. site potential).

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[85] *See infra* Part IIIA.
[86] *See id.*
[87] Horner, et al., *Structural and Non-Structural BMPs for Protecting Streams*, 193 (submitted by King County as an exhibit in the county's best available science). "At least with the present level of understanding and confidence, analyses like this should be used in management only with caution and as advisory tools, and not as strict quantitative determinants . . . . [The predictive quality of such analysis] depends on many circumstances not reflected in this simple analysis, such as where the developed area is relative to the stream and drainage pathways to it, what type of activity occurs there, and specific qualities of the natural landscape units . . . . If these cautions are recognized, though, watershed planners and managers can employ the findings [of this study] as approximate guides. The authors' hope is that their use will reduce instances of decision making without specific goals and consideration of the most crucial elements that determine their achievement." *Id.* at 193-94.
[88] *See infra* Part IIIA.
[89] May & Horner, *The Cumulative Impacts of Watershed Urbanization on Stream-Riparian Ecosystems* at "Conclusion." (submitted by King County as an exhibit in the county's best available science).

Blanket recommendations . . . will not be successful everywhere because these site potentials are not obtainable everywhere."[90]

In *A Review of Stream Restoration Techniques and a Hierarchical Strategy for Prioritizing Restoration in Pacific Northwest Watersheds*, the authors strongly suggested that local government must identify the specific needs of each riparian area before imposing any restoration or management system.[91] This included consideration of the "location within the drainage network and site-specific physical characteristics (e.g., valley slope, valley confinement, and proximity to sediment sources);" "the types of riparian forests that are suited to a particular geomorphic setting;" "rates of sediment supply from landslides, dynamics of riparian forests, and stream temperature regimes."[92] Such a "watershed assessment is the first step in understanding watershed processes and identifying restoration needs within the watershed."[93]

The authors of *Structural and Non-Structural BMPs for Protecting Streams* similarly cautioned against adopting a forest retention standard without conducting the proper analyses.[94] In fact, this study proposed a formula that takes into account existing development, forest cover in the watershed, and wetlands to determine a relationship between existing conditions and the need for forest retention.[95] A determination of forest retention needs, such as King County's uniform 50 to 65 percent set-aside area, must be tempered by analysis of area-specific circumstances:

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[90] Independent Multidisciplinary Science Team, *Recovery of Wild Salmonids in Western Oregon Lowlands*, 100 (2002) (submitted by King County as an exhibit in the county's best available science).
[91] Roni, et al., *A Review of Stream Restoration Techniques and a Hierarchical Strategy for Prioritizing Restoration in Pacific Northwest Watersheds*, 22 NORTH AMERICAN J. OF FISHERIES MGMT. 1, 2-3 (2002) (submitted by King County as an exhibit in the county's best available science).
[92] *Id.*
[93] *Id.* at 3.
[94] Horner et al., *supra* note 87 at 193-94.
[95] *Id.*

> The predictive quality of such analysis depends on many circumstances not reflected in this simple analysis, such as where the developed area is relative to the stream and drainage pathways to it, what type of activity occurs there, and specific qualities of the natural landscape units. . . . With all of these many factors unaccounted for, these data should be used only with care that conservatively protects resources.
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> If these cautions are recognized, though, watershed planners and managers can employ the findings [of this study] as approximate guides. The authors' hope is that their use will reduce instances of decision making without specific goals and consideration of the most crucial elements that determine their achievement. Decisions made in this way should reduce simplistic, overly optimistic approaches that often lead to resource deterioration.[96]

However, King County failed to cite any evidence that it undertook any recommended assessments demonstrating that its uniform 50 to 65 percent "resource area" requirement was reasonably necessary to address any potential development.[97]

Perhaps the most troubling aspect of King County's decision to impose a mandatory and uniform set-aside condition on all rural lots was its reliance on the suggestions from one article authored by Dr. Derek Booth: *Forest Cover, Impervious-Surface Area, and the Mitigation of Stormwater Impacts*.[98] In this article, Dr. Booth

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[96] *Id.* In applying its analytical method to various realistic levels of density and forest and wetland retention, the study concluded that the determination of need could range dramatically based on local conditions. *Id.* at 194.

[97] *See* Snohomish County Superior Ct. Def. King County's Resp. to Pl.'s Mot. for Summ. J. No. 04-2-13831-9 (Sept. 27, 2006).

[98] Derek B. Booth, *Forest Cover, Impervious-Surface Area, and the Mitigation of Urbanization Impacts in King County, Washington* (included as Appendix B of *Best Available Science Vol. I*). This article was the only study specifically identified at summary judgment by King County's employees and experts as having been relied on by King County to develop the 50 to 65 percent set-aside requirement. *See* Snohomish County Superior Ct. No. 04-2-13831-9 Decl. of Gino Luchetti (identifying only this Booth article as influencing his decision to pursue a 65 percent restriction on all rural development); Snohomish County Superior Ct. No. 04-2-13831-9 Decl. of Megan Smith (identifying only this Booth article as relevant to the suggestion that King County adopt a 65 percent restriction on all rural development); Snohomish County Superior Ct. No. 04-2-13831-9 Decl. of Curt W. Crawford (not identifying any studies as basis for 65 percent "resource area" requirement); Snohomish County Superior Ct. No. 04-2-13831-9 Decl. of Robert

reported that, based on modeling programs, he noted a general trend indicating increased stormwater runoff when 35 percent of vegetation on an undisturbed lot was removed and replaced with 10 percent impervious surface area.[99] Even so, Dr. Booth concluded that adopting a "one size fits all" strategy for all watersheds "simply makes no sense."[100] Instead, Dr. Booth recommended limiting any mandatory forest cover requirement to *only* property that is connected to wetlands, "preferentially in headwater areas and around streams and wetlands to maintain intact riparian buffers."[101] Dr. Booth qualified this recommendation by stating that the scientific community "still lack[s] empirical data on the response of aquatic resources to such 'well designed' developments. Therefore, these recommendations are based on extrapolations, model results, and judgment; they are tentative at best."[102] As a result, Dr. Booth warned that the 65 percent forest cover thresholds "implied by these data are simply the 'wrong' type on which to base genuine resource protection."[103]

Two years later, in 2004, Dr. Booth published another article in which he reiterated that the modeling data from his earlier study did not sufficiently establish a relationship between any particular development threshold and stream health:

> [A]lthough data from this and previous studies [relating to impermeable surface area and vegetation cover] may support the use of [impervious area] as a broad index of certain forms of human disturbances and perhaps as an

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Fuerstenberg (not identifying any studies as basis for 65 percent "resource area" requirement); Snohomish County Superior Ct. No. 04-2-13831-9 Decl. of William Eckel (not identifying any studies as basis for 65 percent "resource area" requirement). King County included two versions of this article in its record, an unpublished version from 2000, and a published version from 2002. The published version appeared in the Journal of the American Water Resources Association.

[99] Booth, *supra* note 98 at 14-16 (unpublished version)

[100] Booth et al., *Forest Cover, Impervious-Surface Area, and the Mitigation of Stormwater Impacts*, 38:3 JOURNAL OF THE AMERICAN WATER RESOURCES ASSOCIATION 835, 844 (June 2002) (published version).

[101] *Id.*

[102] *Id.*

[103] *Id.* at 843.

> upper bound on potential stream condition, they do not justify its use as a predictor of stream health or as a guide to "acceptable" thresholds of development.[104]

Like all of the other scientists whose studies King County reviewed, Dr. Booth concluded that for a regulation of forest cover retention to be effective, it must go further than relying on a generalized assessment of area-wide impacts because:

> One must remember that stream conditions are not determined solely by flow regime, which in turn is not determined solely by urban development. Intrinsic watershed geology, soil permeability and depth, topography, channel network, and climate — are also relevant. Thus no single watershed indicator should be expected to predict flow regime or all the consequences of changes in flow for stream conditions . . . .[105]

> The degree of urbanization and the specific complex of activities characterizing local development differ for each stream. *The result is a lack of precise association between stream health and urban development* . . . [a]ny effort to manage a specific stream must relate stream biological condition to specific human activities and their effects in that watershed. Not doing so is akin to prescribing a cure for an ill person without identifying his symptoms or looking for their likely causes.[106]

By its own terms, King County's best available science rejected a "one size fits all" approach to clearing restrictions because it could not establish a relationship sufficient enough to suggest that mandatory forest retention is necessary for all development activity.[107] Instead, the county explained that "[a]bsent the ability to predict/quantify acceptable biological impacts" resulting from clearing, the decision to

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[104] Booth et al., *Reviving Urban Streams: Land Use, Hydrology, Biology, and Human Behavior* JOURNAL OF THE AMERICAN WATER RESOURCES ASSOCIATION, 1351, 1356 (Oct. 2004).
[105] *Id.* at 1357.
[106] *Id.* at 1359.
[107] *See supra* Part IIIA.

adopt a 50 to 65 percent vegetation retention standard became purely a policy choice.[108] King County chose to burden private property rights in order to protect streams from unproven potential impacts.[109]

The decision to adopt KCC 16.82.150 shows the precautionary principle at work.[110] King County compiled and reviewed best available science in determining its critical areas protection, as required by state law.[111] The science arrived at some tentative, general conclusions about potential relationships between clearing and stormwater runoff impacting critical areas.[112] Where the science created uncertainty, however, the county chose to adopt the most stringent policy of restricting all development to protect against uncertain harms, and contrary to the recommendations of the cited scientists.[113]

In granting summary judgment to the county, the trial court made two mistakes. First, the trial court's order proclaimed the essential nexus requirement satisfied because the county supplied "voluminous data" on the "overall impacts of the effects of clearing in rural areas."[114] The trial court erred in this conclusion because, as shown above, the county's science did not establish the causal connection necessary to prove essential

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[108] Curt W. Crawford, *Impact Analysis of 65-10 Versus Alternative Standards* 1 (submitted by King County in support of the proposed ordinance KCC 16.82.150). "Although studies have found that [increase of impermeable surface and clearing] have a negative effect on fish and fish habitat that is proportional to the magnitude of change, this negative effect is not understood well enough to predict/quantify an acceptable level of biological impact (i.e., how much increase in volume or loss of base flow is too much). Absent the ability to predict/quantify acceptable biological impact, the choice of [a 65 percent set-aside requirement] versus a [40 percent set-aside requirement] or [just limiting impermeable development to 10 percent with no set-aside requirement] becomes one of balancing the magnitude of hydrologic change against reasonable use of the property." *Id.*
[109] *See supra* Part IIIA.
[110] *See supra* Part I.
[111] *See supra* Part IIIA; Wash. Rev. Code Ann. § 36.70A.172 (West 2009).
[112] *See supra* Part IIIA; *Best Available Science Vol. I*; *Best Available Science Vol. II*.
[113] *See supra* Part IIIA.
[114] Snohomish County Superior Ct. Mem. Decision Granting Def. King County's Mot. for Summ. J. at 4.

nexus between the clearing restriction and harm to critical areas.[115] Second, the trial court did not address the rough proportionality test at all.[116] Essential nexus and rough proportionality are conjunctive tests: each must be satisfied for a government's imposed condition on the use of private property to be constitutional.[117] The Court of Appeals corrected this second mistake, striking down KCC 16.82.150 on rough proportionality grounds.[118] However, the Court of Appeals left in place the county's precautionary essential nexus findings, repeating the trial court's means-end interpretation of essential nexus.[119]

B. *CAPR* on Appeal

The difficult question in *CAPR* was whether KCC 16.82.150 qualified as an exception to RCW 82.02.020, that is, whether the ordinance was "reasonably necessary as a direct result of the proposed development to which the dedication of land . . . is to apply."[120] The determination of whether a regulation is subject to essential nexus and rough proportionality under RCW 82.02.020 focuses on whether the regulation imposes a condition on development that *actually* mitigates the identified public problem.[121]

Citing *Isla Verde International Holdings, Inc. v. City of Camas*, the Court of Appeals held that, because the plain language of KCC 16.82.150 provided that a property owner could clear a maximum amount of area based only on lot size, it established no

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[115] *See supra* Part IIIA.
[116] *See* Snohomish County Superior Ct. Mem. Decision Granting Def. King County's Mot. for Summ. J.
[117] *See supra* Part II.
[118] *See infra* Part IIIB.
[119] *See id.*
[120] Wash. Rev. Code Ann. § 82.02.020 (West 2009).
[121] *See Lingle v. Chevron, U.S.A., Inc.*, 544 U.S. 528, 547-48 (2005) ("Whereas the 'substantially advances' inquiry . . . is unconcerned with the degree or type of burden a regulation places upon property, *Nollan* and *Dolan* both involved dedications of property so onerous that, outside the exactions context, they would be deemed *per se* physical taking. In neither case did the Court question whether the exaction would advance *some* legitimate state interest. (citation omitted). Rather, the issue was whether the exactions substantially advanced the *same* interests that land-use authorities asserted would allow them to deny the permit altogether.") (emphasis in original).

proportional relationship between the clearing restriction and the need to protect critical areas.[122] According to the court, KCC 16.82.150 imposed a uniform and preset restriction for cleared area on each lot "unrelated to any evaluation of the demonstrated impact of proposed development" on critical areas.[123] No part of KCC 16.82.150 addressed the RCW 82.02.020 requirement that "clearing limitations be impact specific."[124] The county's ordinance could not pass the rough proportionality test because the county did not establish by some sort of individualized determination that the required dedication related both in nature and scope to the impact of the proposed development.[125]

The red flag in the Court of Appeals' opinion is the court's inaction in correcting the trial court's mistake on essential nexus. The Court of Appeals did not go back to the scientific record, but instead adopted the trial court's conclusion that King County had proven a legally sufficient causal connection: "Here, the trial court correctly determined that the record establishes the required nexus. As the trial court stated, the County has submitted a wealth of unchallenged evidence that shows a nexus between excessive clearing and the proposed solution limiting clearing."[126] Proof of essential nexus would not have changed the outcome in the case because the court had already determined that the ordinance violated rough proportionality, but the Court of Appeals' summary acceptance of the county's generalized science deserves a closer look in light of the

[122] *CAPR*, 145 Wash. App. at 667.
[123] *Id.* at 668.
[124] *Id.* (quoting *Henderson Homes*, 67 Wash. App. at 209-10 (Agid, J. dissenting)).
[125] *See Dolan*, 512 U.S. at 391.
[126] *CAPR*, 145 Wash. App. at 669-70.

GMA's requirement that critical areas ordinances may be enforced only insofar as they are consistent with best available science.[127]

Washington's GMA directs local governments to protect critical areas.[128] This directive has a significant, often detrimental, effect on private property rights because local governments have largely responded to it by adopting precautionary area-wide buffers, natural resource areas, or habitat corridors.[129] The GMA requires the protection of private property rights too, but this goal gets easily lost among many contradictory GMA objectives for regulation.[130] There is, however, an obvious GMA limitation on local government authority: "Counties and cities shall include the best available science in developing policies and development regulations to protect the functions and values of critical areas."[131]

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[127] *See* Wash. Rev. Code Ann. § 36.70A.172 (West 2009).
[128] *Id.*
[129] *See* Spencer, *supra* note 30 at 1223 (arguing that the GMA's various mandates necessarily result in "sweeping revisions to the regulation of real property rights" in Washington); *see also* Callies & Sonoda, *supra* note 57 at 361-64; Chris J. Williams, *Do Smart Growth Policies Invite Regulatory Takings Challenges? A Survey of Smart Growth and Regulatory Takings in the Southeastern United States*, 55 ALA. L. REV. 895, 913 (2004) ("There seems to be no question that smart growth regulation can 'impose unreasonable public burdens on landowners and developers through limiting the use and development of land while providing for public needs . . . [thereby] rais[ing] constitutional concerns regarding fundamental fairness to landowners.'") (quoting James E. Holloway & Donald C. Guy, *Smart Growth and Limits on Government Powers: Effecting Nature, Markets, and the Quality of Life Under the Takings Clause and Other Provisions*, 9 DICK. J. ENVTL. L. & POL'Y 421, 430, 448 (2001)); Groen & Stephens, *supra*, note 30 at 1259.
[130] Wash. Rev. Code Ann. § 36.70A.020(6) (West 2009) ("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."). *See* Wash. Rev. Code Ann. § 36.70A.370 (West 2009); Richard L. Settle & Charles G. Gavigan, *The Growth Management Revolution in Washington: Past, Present, and Future*, 16 U. PUGET SOUND L. REV. 867, 872 (1993) (noting that the GMA's various goals were "shaped or deformed . . . by last-gasp political compromises, contain unresolved internal inconsistencies, politically necessary vague language, and significant gaps"); Richard L. Settle, 23 SEATTLE U. L. REV. 5, 34 (1999) ("GMA was spawned in controversy, not consensus. The relative spheres of state mandate and local autonomy were the product of extremely difficult legislative compromise. It is no accident that the GMA contains no provision for liberal construction.").
[131] Wash. Rev. Code Ann. § 36.70A.172(1) (West 2009). *See* Honesty in Envtl. Analysis & Legislation v. Cent. Puget Sound Growth Mgmt. Hearings Bd., 96 Wash. App. 522, 532 (1999) (finding "best available science" mandate meant to preclude local authorities from relying upon "speculation and surmise" in protecting critical areas).

The GMA does not instruct local governments to craft the most aggressive measures to regulate the environment.[132] Instead, a series of Washington decisions has interpreted the GMA's best available science provision as a substantive limitation on overly precautionary critical areas restrictions.[133] Property owners must be assured that critical areas regulations are supported by a high degree of useful analysis and scientific justification.[134] The best available science provision requires local governments to establish the important factual foundation that must undergird development conditions on the use of private property.[135] In this way, best available science can be used to establish the essential cause-and-effect connection between property development and public harm.

In *Honesty in Environmental Analysis & Legislation v. Central Puget Sound Growth Management Hearings Board (HEAL)*, the Washington Court of Appeals rejected the notion that the GMA's broad grant of planning discretion gave local government unchecked authority to adopt scientifically unsupportable critical areas regulations.[136] The City of Seattle had adopted amendments to its steep slope regulations

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[132] *See id.* at 531 (finding that the GMA's best available science provision does not require any "substantive outcome or product"). In 2007 the Supreme Court of Washington clarified what counties and cities are required to do to "protect" critical areas, almost two decades after the legislature enacted the GMA. In *Swinomish Indian Tribal Community v. Western Washington Growth Management Hearings Board*, Skagit County had adopted critical areas regulations that allowed for ongoing agricultural activity within designated critical areas along regional streams, so long as the activities did no harm to existing fish habitat. The Swinomish tribe and an environmental organization challenged the regulation on the grounds that the county violated the GMA by not adopting large buffers, as had been recommended by some of the scientific reviews, and which could have (eventually) restored the full functions and values of degraded streams. Skagit County argued that the GMA required only the protection of critical areas as found in their present condition, not complete restoration. The court agreed with the county and held that the GMA does not require the restoration or enhancement of critical areas to their full potential. *See Swinomish*, 161 Wash. 2d at 427-30.

[133] *See infra* Part IIIB.

[134] *See HEAL*, 96 Wash. App. at 533.

[135] *See id.* at 532.

[136] *Id.* at 533-34.

to prevent erosion of steep slopes as part of its critical areas update under the GMA.[137] The legislative record, however, contained several reports from geotechnical engineers that found the city's prohibition against steep slope disturbance would not prevent erosion.[138] Nevertheless, Seattle adopted its steep slope regulations without discussing the dissenting scientific viewpoints.[139]

Seattle interpreted the best available science provision as a procedural requirement to include the geotechnical reports in the legislative record, but not as direction to engage in any sort of substantive review of the competing science.[140] The city argued that its policy decision should trump science because "it [was] clear that the Legislature did not intend to require science to be the pre-eminent standard for evaluating the result."[141] The court rejected the argument and concluded instead that the identification of critical areas is a uniquely scientific inquiry that should identify the "nature and extent of [the critical areas'] susceptibility" to damage that will *in fact* result from use or development of the property.[142] Moreover, the court held that the GMA does not grant local government boundless discretion because critical areas policies that restrict the use of private property must not be unduly precautionary, or based on "speculation and surmise."[143] A local government that ignores best available science and skims over *Nollan*'s essential nexus test will find its regulations invalid.[144]

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[137] *Id.* at 525.
[138] *See* Respt's Br., Wash. Ct. App. Div. 1 No. 40939-5-I at 3-7 (Dec. 17, 1997).
[139] *See id.* at 7.
[140] *See HEAL*, 96 Wash. App. at 529-30.
[141] *Id.* at 530 (quoting Respt's Br.).
[142] *Id.* at 533 ("[Critical areas] are deemed 'critical' because they may be more susceptible to damage from development. The nature and extent of this susceptibility is a uniquely scientific inquiry. It is one in which the best available science 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.").
[143] *Id.* at 531 (quoting Bennett v. Spear, 520 U.S. 154, 176 (1997)).
[144] *See id.*

The Washington Court of Appeals revisited the best available science requirement, again limiting local government discretion in developing critical areas regulations, in *Whidbey Environmental Action Network v. Island County* (*WEAN*).[145] In *WEAN*, an environmental organization claimed that Island County's critical areas restrictions failed to comply with the GMA because the county relied on science developed for marine shorelines to establish the size of its stream buffers.[146] Building on *HEAL*, the court ruled that local governments must demonstrate that the best available science applies to the targeted property.[147] Therefore, Island County had violated the GMA by estimating the risk of harm based on inapplicable science.[148]

The Supreme Court of Washington addressed the GMA's best available science provision in the 2005 case *Ferry County v. Concerned Friends of Ferry County*.[149] That case involved a citizen group's challenge to Ferry County's amended critical areas ordinance.[150] The plaintiffs alleged that the county failed to properly consider best available science when it relied on two letters from a retired wildlife planner in amending its critical areas ordinance.[151] The citizens argued that the planner's letters did not constitute "science" under the GMA.[152]

The GMA grants planning discretion to local governments, and the legislature did not define "best available science" in the statute.[153] Yet, the Court determined that the GMA requires local governments to engage in a "reasoned process" by considering valid

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[145] Whidbey Environmental Action Network v. Island County, 122 Wash. App. 156 (2004).
[146] *See id.* at 173-74 (finding the county's habitat study "was limited to the [marine] shoreline environment and [had] questionable application to interior stream buffer issues").
[147] *See id.*
[148] *See id.* at 174-75.
[149] Ferry County v. Concerned Friends of Ferry County, 155 Wash. 2d 824 (2005).
[150] *See id.* at 826.
[151] *Id.* at 830.
[152] *Id.* at 830-31.
[153] *Id.* at 834-35.

scientific evidence, competing evidence, and other factors to develop a locally appropriate critical areas regulation.[154] The Court found that the letters did not constitute "science" under the statute.[155] Ferry County failed to engage in a reasoned process and, as a result, its critical areas ordinance did not comply with the GMA.[156]

Best available science is a tool for identifying the existence of threats to critical areas based on the actual conditions on properties targeted for regulation.[157] Washington courts have recognized that the best available science process is intended to assure that critical areas regulations do not impose conditions on development that are unrelated to the impacts of the development.[158] Best available science should ensure that local government discretion to adopt critical areas policies comports with the constitutional requirements of essential nexus and rough proportionality.[159]

These are not tremendous revelations. As other commentators have noted, there should be no conflict between the essential nexus and rough proportionality requirements of *Nollan* and *Dolan* and local land use policies when government engages in individualized assessments of development conditions according to the actual impacts of

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[154] *Id.* at 836-38.
[155] *Id.*
[156] *Id.*
[157] *See HEAL*, 96 Wash. App. at 533-34. The *HEAL* Court provided an example: "[I]f the City proposed a policy prohibiting development on slopes steeper than a 40 percent grade or requiring expensive engineering conditions for any permitted project, only the best available science could provide its policy makers with facts supporting those policies and regulation which, when applied to an application, will assure that the nexus and rough proportionality tests are met. If the City failed to use the best available science here in making its policy decision and adopting regulations, the permit decisions it bases on those regulations may not pass constitutional muster under *Nollan* and *Dolan*. The science the legislative body relies on must in fact be the best available to support its policy decisions. Under the cases and statutes cited above, it cannot ignore the best available science in favor of the science it prefers simply because the latter supports the decision it wants to make. If it does, that decision will violate either the nexus or rough proportionality rules or both." *Id.*
[158] *See id.* at 533-35.
[159] *See id.*

proposed development.[160] Conflicts do routinely appear, however, when local government imposes uniform and preset conditions on development, especially when proof of harm is lacking.[161]

The Court of Appeals should not have concluded that King County established essential nexus when the county cited studies that cautioned against uniform regulations and directed the county to consider actual circumstances to determine necessity.[162] The county did not apply those studies to determine the extent, no less the existence, of actual impacts on critical areas from development of the regulated rural properties.[163] In short, the government did not show that development in rural King County would cause or exacerbate any harm to critical areas.[164] A legally sufficient essential nexus must show a close causal connection between the identified public problem (such as stormwater runoff that harms critical areas) and the impact of land development (such as a property owner's clearing of his rural lot).[165] In *CAPR*, King County relied on a collection of studies that commented on the general impacts of development on a region-wide basis, but never applied those studies to establish the actual connection to the plaintiffs' properties.[166] Therefore, despite the quantity of science provided to the court, King County did not establish that the 50 to 65 percent clearing restriction of KCC 16.82.150 satisfied the essential nexus test.[167]

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[160] *See, e.g.,* Williams, *supra* note 129 at 912-13; Duane J. Desiderio, *Growing Too Smart—Takings Implications of Smart Growth Policies*, 13 NAT. RESOURCES & ENV'T 330, 333-34 (1998); Cordes, *supra* note 55 at 551-54.
[161] *See supra* Part IIIA.
[162] *See id.*
[163] *See id.*
[164] *See id.*
[165] *See supra* Part II.
[166] *See supra* Part IIIA.
[167] *See id.*

IV. The Precautionary Principle Weakens Essential Nexus

CAPR's abbreviated analysis of essential nexus indicates that the *Nollan* test is morphing into something less rigorous than a cause-and-effect inquiry.[168] The court decided that the county "submitted a wealth of unchallenged evidence that shows a nexus *between excessive clearing and the proposed solution limiting clearing*."[169] But this conclusion answered the wrong question.[170] Essential nexus is not a means-end inquiry for the reasonableness of a public policy; it is a test of causation.[171] The county's best available science did not establish causation, but the county applied that science to write KCC 16.82.150 based on the precautionary principle.[172]

Applying the precautionary principle to land use policy in Washington is a sure way to roll back important constitutional protections. The precautionary principle whittles away *Nollan*'s commonsense rule, which limits the government's ability to condition development to those circumstances where government can show that the restrictions are necessary to mitigate or avoid harm that the owners' proposed use will really cause.[173] In contrast, the precautionary principle eschews the need to establish causal connections as a precondition to regulation.[174] Under the precautionary principle, site-specific evaluation of development is a superfluous exercise because proof that a

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[168] *See supra* Part III.
[169] *CAPR*, 145 Wash. App. at 669-70. "[T]he County has submitted a wealth of unchallenged evidence that shows a nexus *between excessive clearing and the proposed solution limiting clearing*" (emphasis added); *see also Lingle*, 544 U.S. at 547-48. This rational basis style of review is inappropriate for *Nollan* and *Dolan* analysis. *Id.*
[170] *See id.*
[171] Radford, *supra* note 41 at 391.
[172] *See supra* Part IIIA.
[173] *See supra* Part IIA.
[174] *Supra* Part I.

property owner's particular development will actually contribute to a public problem is unnecessary.[175]

Disregarding causation invites arbitrary regulation because it allows the government to justify land use restrictions on even the most remote probability of public harm.[176] It also encumbers landowners with the arduous task of proving that their proposed development will never cause public harm.[177] Confronted by that prospect, most property owners will bow to whatever conditions government imposes mainly to avoid the cost and hardship of proving the absolute "safety" of their proposals.[178] *Nollan* guards against this application of government authority by requiring the government to prove that its regulations are necessary to prevent harm.[179] In this way, *Nollan* presumes that property owners may use their property as they please unless and until the government can show that the owners are causing harm to the public.[180] Precautionary policymaking is antithetical to *Nollan* because it presumes that property owners are free to do nothing they cannot prove is harmless.[181] Considering that nothing is inherently harmless, property owners are left with a seemingly insurmountable problem.[182]

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[175] *See* Natasja Börjeson, *WTO, GMO and the Precautionary Principle*, Master-Level Thesis, Södertörn University College 29 (2007) ("The lack of full scientific evidence is a prerequisite for applying the principle, if scientific evidence is certain then the measure would be of prevention rather than precaution.").
[176] *See* Marchant & Mossman, *supra* note 16 at 16-20.
[177] *See id.*
[178] *See* Trouwborst, *supra* note 14 at 15. "[U]p to a point, every human activity could be said to have an adverse impact on the environment. . . . [T]he very notion of a hundred per cent scientific certainty regarding environmental effects is to be dismissed as a utopian scheme. Thus, an interpretation of the precautionary principle demanding prior conclusive proof of no harm whatsoever would seem to impose an unrealistically heavy burden on developers." *Id.*
[179] *See supra* Part IIA.
[180] *See id.*
[181] *See supra* Part I.
[182] "No amount of scientific experimentation will ever result in certainty. Omniscience, as inherently requested by the [precautionary principle] is an unattainable goal which empirical science, by definition, cannot deliver." *The Cautious Society?*, *supra* note 16 at 4. Michael Fumento wryly demonstrates the difficulty of proving the absence of risk: "*Anything can kill you*. No, not *practically* anything, but *anything*. Witness the following death circumstances as collected by the authors of *The Book of Lists* and *The People's Almanac*, Irving Wallace, David Wallechinsky and Amy Wallace. Zeuxis, a fifth-century

The GMA's best available science requirement should provide flesh for the bones of *Nollan* by creating a process where local government has to both measure and consider the actual impact of critical areas regulation on individual properties before imposing development conditions.[183] Best available science will often arrive at a point already known to practitioners in the land use field: Environmental science is complex and incorporates a high level of uncertainty.[184] But it is precisely this recognition of complexity, and the difficulty of predicting the effect of any particular land use on an ecosystem, that demands the type of focused scientific inquiry envisioned by Washington's courts before landowners are forced to bear the brunt of speculative regulation.[185]

Greek painter, laughed so hard at his own painting of an old hag that he broke a blood vessel and died. Claudius I of Rome choked to death on a feather which his physician shoved down his throat to induce vomiting after Claudius's wife served the emperor poisoned mushrooms. Detective Allan Pinkerton accidentally bit his tongue and died of gangrene. Jerome Napoleon Bonaparte, the last American Bonaparte, died of injuries sustained when he tripped over the leash of his wife's dog in New York's Central Park. Nothing is so irrelevant or innocuous that it cannot kill you." Michael Fumento, SCIENCE UNDER SIEGE 259-60 (1996) (emphasis in original); *see Wiener*, *supra*, note 16 at 3. "All activities involve risk. Risk besets even the most mundane necessities, such as eating (choking; foodborne disease), breathing (pollution; airborne disease), walking (falling), keeping warm (fire or other energy sources), and sleeping (apnea; bad dreams; oversleeping and missing an appointment). . . . [A]ll decisions about the future must be made in the face of uncertainty. We can never be completely certain that something will cause harm; we never have certainty about the risks we incur, or about the opportunities we seek. . . . Any substance or activity could be a hazard that results in harm, if it is experienced in the wrong dose or at the wrong place or time. Even the necessities of life, such as water, salt, oxygen, sunshine, and vitamins, can be harmful or fatal in large quantities (e.g., oxygen poisoning, skin cancer) or in the wrong circumstances (e.g., water in the lungs, salt in the wound). . . . What is a hazard thus depends not on a classification of intrinsic good versus intrinsic bad, but rather on context." *Id*.

[183] *See supra* Part IIIB.

[184] *See* Trouwborst, *supra* note 14 at 10. "[E]cological science represents 'a prominent example of an uncertain science, which must cope with a wide range of unpredictabilities, lack of data, competing models and explanations.'" *Id.* (quoting M. Tallacchini, *A Legal Framework from Ecology*, *in* 9 BC 1085-1098 (2000)); Daniel A. Farber, *Probabilities Behaving Badly: Complexity Theory and Environmental Uncertainty*, 27 ENVIRONS ENVTL. L. & POL'Y J. 145, 152 (2003). "Ecology is following physics as it owes much to chaos theory. Non-equilibrium ecology rejects the vision of a balance of nature. Change and instability are the new constants . . . . Ecosystems are patches or collections of conditions that exist for finite periods of time. The accelerating interaction between humans and the natural environment makes it impossible to return to an ideal state of nature. At best, ecosystems can be managed rather than restored or preserved, and management will consist of a series of calculated risky experiments." *Id.* (quoting Fred Bosselman & A. Dan Tarlock, *The Influence of Ecological Science on American Law: An Introduction*, 69 CHI-KENT L. REV. 847, 869-70 (1994)).

[185] *See supra* Part IIIB.

Washington should not allow the precautionary principle to change the standard of proof necessary to satisfy essential nexus.[186] Conditions on the development of property must be firmly grounded in the principle of causation, not precaution. For this reason, *Nollan* represents the Court's best answer yet for reconciling the constitutional rights of property owners and the government's desire to mitigate identified public problems. *Nollan* does not question the government's authority to condition private development, but it does limit the government's discretion, thereby vindicating constitutional protections of private property rights.[187] Requiring the government to show that the development it wants to restrict will cause the problem about which the government is concerned is the epitome of reason. *Nollan* does this; the precautionary principle does not.[188]

Conclusion

CAPR is a warning. While the court correctly determined that King County's clearing and grading ordinance violated the statutory prohibition on development fees of RCW 82.02.020 and *Dolan*'s rough proportionality test, its cursory treatment of essential

[186] *See, e.g.,* Wash. Admin. Code 365-195-920 (2009).
[187] *See* U.S. CONST. amend. V, XIV; *Lingle*, 544 U.S. at 547-48.
[188] Furthermore, the precautionary principle is a logical trap. While taking precaution to avoid unverified harm has some surface-level appeal, it quickly disintegrates into a standard-less strategy. The precautionary principle establishes a framework for applying normative judgments in the face of uncertainty. However, it does not establish *what* we should take precaution to protect. We often encounter the precautionary principle in the context of protecting "the environment," but we need not limit its application to environmental regulation. *See, e.g.,* Jessica Stern & Jonathan B. Wiener, *Precaution Against Terrorism*, J. OF RISK RESEARCH, Vol. 9, No. 4, 393, 395 (June 2006) ("The application of the Precautionary Principle to counterterrorism is important for us to study because it helps to lay bare some of the pros and cons of the principle, irrespective of the type of hazard or political orientation, and thereby move toward a more moderate, less ideological approach that considers consequences rather than labels."). *But see* Trouwborst, *supra* note 14 at 33. Environmentalist proponents of the precautionary principle see this point differently. Trouwborst, for example, accepts the precautionary principle as the highest form of authority. "Given both the urgent need for coping with international environmental problems and the latter's complex nature, defending the position that precautionary action is mandated by a principle of natural law would be as easy as falling off a log." *Id.*

nexus was short and disappointingly un-instructive. The essential nexus test for development exactions will eventually erode away in Washington if courts continue to consider means-end rationale as a replacement for evidence of causation. If essential nexus goes, Washington property owners stand to lose significant constitutional protection from government restrictions on the use of their land. Fortunately, *Nollan*'s principle of causation is easy to understand and apply. Courts that reinvigorate their concern for establishing causation in the regulation of critical areas will help to produce truly necessary environmental law while upholding the rights of property owners under the Constitution. This is a worthy goal.