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SNOHOMISH COUNTY PLANNING
AND DEVELOPMENT SERVICES

BEFORE THE SNOHOMISH COUNTY COUNCIL

In Re Stillwater Preserve RB Stillwater Preserve LLC, Applicant/Appellant.	Hearing Examiner No. 25-101010 PSD County Council No. APPEAL TO SNOHOMISH COUNTY COUNCIL

1 **I. INTRODUCTION**

2 Stillwater Preserve is a proposed upscale, gated small rural cluster subdivision of 14 one-
3 acre lots. *See*, Hearing Examiner ("HE") Exhibit A.2 Project Narrative and Exhibit M.5
4 Applicant Response. It is located south of the east-west County Road known as Dubuque Road.
5 *See*, Decision of the Snohomish County Hearing Examiner dated March 24, 2026 (the
6 "Decision") at page 1. On March 24, 2026, the Hearing Examiner issued his decision as to the
7 preliminary 14-lot rural cluster subdivision wherein he approved the preliminary plat subject to
8 51 conditions. This is an appeal of Condition 44 only which reads as follows:

9 44. Pedestrian facilities shall have been constructed to the reasonable satisfaction
10 of the county from the subject development on 52nd St SE to Dubuque Road or
11 other location that has been accepted by the Snohomish School district and
12 Snohomish County.

13 (the "Condition"). Decision at page 25, lines 9-11.

14 This unlawful condition would require this small 14-lot rural cluster subdivision to
15 construct +/-2,700 lineal feet of off-site pedestrian pathway at a cost of $325,210.60. *See*, HE

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1 Exhibit M.5 Applicant Response, Exhibit E. The off-site pedestrian pathway would cross an
2 existing bridge. A deviation was granted such that the bridge would not be widened. *See*, HE
3 Exhibit H.6 Traffic Review Memo. There would be no pathway on the bridge. *Id.* The absence
4 of a sufficient bridge for a pathway, and the absence of a pathway, is a pre-existing condition.
5 Decision at page 14, lines 11-25.

6 Why a pathway was not required when other properties in the area were developed is
7 unexplained in the Decision. Why or how Stillwater creates a new or different hazard than the
8 existing circumstances to require the Condition is also unexplained by evidence in the record.

9 **II. BASIS OF THE APPEAL**

10 Condition 44 in the Decision exceeded the Hearing Examiner's jurisdiction. The Hearing
11 Examiner's jurisdiction is limited by statute and any County Code provision to the contrary is
12 preempted. The Hearing Examiner, in imposing the Condition, committed multiple errors of law.
13 These errors of law include, but are not limited to:

14 a. The Hearing Examiner exceeded his jurisdiction to impose the Condition.
15 b. The Hearing Examiner ignored state law that preempts County Code.
16 c. The Hearing Examiner made multiple material errors as to the evidence.
17 d. The Hearing Examiner improperly took "official notice" that violated the rules of
18 evidence.
19 e. The Hearing Examiner relied on impermissible speculation.
20 f. The Hearing Examiner relied on his own impermissible predictions.
21 g. The Hearing Examiner did not properly apply the burden of proof.

1 h. The Hearing Examiner did not rely on proper evidence for proportionality. There is no
2 evidence in the record of individualized analysis, calculations, and/or assessments of
3 needs and impacts.
4 i. The Hearing Examiner used the wrong test for proportionality of the Condition to the
5 impacts of the development.
6 j. The Hearing Examiner ignored the County's burden to prove nexus and proportionality.
7 k. The Hearing Examiner's findings and conclusions related to the Condition, and
8 Condition 44 itself, are not supported by substantial evidence in the record consisting of:
9 1. Proof of reasonable necessity of the Condition as a direct result of the proposed
10 development.
11 2. Evidence of individualized analysis, appropriate calculations, and demonstration
12 of specific need of the Condition.
13 The Hearing Examiner made multiple errors which individually and/or collectively
14 require reversal of his imposition of Condition 44 on Stillwater Preserve.

15 **III. REVIEW OF THE RECORD; HEARING EXAMINER'S**
16 **DISREGARD OF THE RECORD**

17 Pages 4 to 17 of the Decision, under the heading IV. FINDINGS OF FACT, contain the
18 Hearing Examiner's references to the evidence in the record and factual findings.
19 At Subsection E.3, public comments are reported. There is no mention of Condition 44
20 or anything like it. There is no comment and no evidence in this subsection related to an off-site
21 school pedestrian pathway.
22 At Subsection F.7.C, a pedestrian facility is discussed. The subsection is a jumble of
23 Hearing Examiner argument, with attempts at legal conclusions, and only two actual facts. Fact

1: The Snohomish School District's bus picks up at the intersection of 211th Avenue SE and Dubuque Road. Decision at page 15, lines 16-17. Fact 2: 211th Avenue SE lacks a pedestrian pathway. Decision at page 15, lines 17-18. Stillwater does not object to these two actual, accurate findings.

The Hearing Examiner makes no other actual findings of fact, and in the entirety of Subsection F.7.C, the Hearing Examiner cites to **no evidence** in the record. This is despite the existence of **much evidence** in the record. A review of this evidence in the record, with full citations to the record, follows.

As noted in the Introduction, at issue is the construction of +/-2,700 feet of off-site pedestrian pathway on 211th Avenue SE. At the present time, about 25 households front or take access from 211th Avenue SE. *See*, HE Exhibit M.5 Applicant Response, Exhibit A. Stillwater would add 14 more residences. Decision at page 9, line 10. Consistent with practices that have emerged since the 1970s, few children walk along 211th Avenue SE to Dubuque Road to ride on a school bus. *See*, HE Exhibit M.5 Applicant Response. Recent counts show only 1 child occasionally walked 211th to the bus stop at Dubuque Road. *See*, HE Exhibit M.5 Applicant Response, Exhibits B & F. There is no evidence to suggest that Stillwater's houses will increase this usage.

Also, as noted in the Introduction, any child pedestrians on the southern end of 211th currently cross a narrow bridge. A deviation was granted so no changes to the bridge are required to build Stillwater Preserve. Decision at page 14, lines 11-25. The deviation does require lighting on an existing power pole by the bridge and signage. Decision at page 14, lines 23-25.

The conclusions from this evidence in the record are inescapable. The absence of a pedestrian path is an existing condition. If there is a hazard, it already exists. There is no evidence

1 Stillwater Preserve will intensify any pedestrian use or interactions. There is minimal pedestrian
2 usage today—consistent with developing trends—and with Stillwater Preserve, there will be
3 minimal pedestrian usage in the future. *See*, HE Exhibit M.5 Applicant Response.

4 Other than bureaucratic intransigence, there is no reason and no evidence in the record
5 to impose Condition 44 on Stillwater Preserve. With the absence of reason and evidence in the
6 record, how did we get here? By speculation and prediction, the Hearing Examiner imagined his
7 own evidence.

8 He imagines at the first paragraph of page 16 of the Decision that the homeowners in
9 Stillwater Preserve will have school age children who "must be schooled." Further, that those
10 children will be compelled to walk along 211th Avenue SE to Dubuque Road to the bus stop.
11 Whether any of these imaginings are fully accurate, or accurate at all, he concludes that there is
12 sufficient "nexus" for the need for a pathway. But the record does not show this and there is no
13 "nexus" or "cause" for Stillwater to build a pedestrian path.

14 One must presume there was no nexus or cause for the existing development, houses and
15 households using 211th Avenue SE or there would be an existing path. If there was no nexus or
16 cause for them when they developed, then there can be no nexus for Stillwater to now build a
17 pedestrian path.

18 The illogic of the Hearing Examiner's nexus finding is amplified for any number of
19 reasons. The hypothetical children could be home schooled. Or they could go to private or
20 parochial schools. Or they could be picked up by a private school bus, carpooled, or transported
21 by their parents. There is no evidence in the record establishing "nexus" (or "causation") simply

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because there are potential school age children that might dwell in Stillwater Preserve. In fact, the number of students who walk to school has decreased since the 1970s.[1]

The Hearing Examiner then suggests the hypothetical Stillwater children will be less safe than existing neighborhood children. The Hearing Examiner imagines the Stillwater children to be targets because walking on a road "places them at risk of being hit by cars and trucks." Never mind that there are 25 existing houses, some with children, and there is no evidence of any accidents or injuries resulting from collisions between schoolchildren and vehicles. Again, no evidence in the record, no nexus or causation.

One might also question if children are unsafe targets, how does a pathway make a difference? If cars or trucks are carelessly driven, a pathway on the shoulder hardly provides any protection.

The Hearing Examiner's imaginings in the first paragraph of Page 16 related to nexus then morph into "official notice." He states that in the Pacific Northwest, winter drop offs or pick-ups in the dark "increas[e]" students' "risk of being struck" by vehicles.[2]

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[1] "Over the past 4 decades, there has been a steady decline in the proportion of pedestrian fatalities among children 14 and younger. In the late 1970s children younger than 15 represented 18% of all pedestrian fatality victims. By 20211 [sic] they represented just 2.4% of all pedestrian fatalities. ***These decreases correspond with declining rates of walking by children as measured by national surveys of household travel.***" National Highway Traffic Safety Administration, *Countermeasures That Work: A Highway Safety Countermeasure Guide for State Highway Safety Offices*, 11th Edition, 2023 (emphasis added) (internal citations omitted) available at https://www.nhtsa.gov/book/countermeasures-that-work/pedestrian-safety.

[2] The Washington Traffic Safety Commission reported that about two-thirds of fatal crashes that occurred in December of a given year were in darkness, while two-thirds of fatal crashes in July occurred during daylight conditions. Fatal crashes involving impairment, distraction, speeding, and pedestrians were proportionately higher in darkness than in daylight conditions. "Driving During the Day and Night, Darkness and Light" by Washington Traffic Safety Commission, March 2019, available at https://wtsc.wa.gov/wp-content/uploads/dlm_uploads/2019/03/Daytime-and-Night-Darkness-and-Light_Mar2019.pdf

At the second paragraph of Page 16, he turns to the subject of "proportionality."[3] In other words, what directly relates to Stillwater Preserve's development to justify the cost to build the pedestrian pathway. The Hearing Examiner asserts the cost of a pathway is $300,000. He then imagines that this cost is proportionate to a future accident which causes death, injury, or property damage to a child walking along 211th to the school bus. He gratuitously adds that Stillwater will pass the cost of constructing the pathway on to the home purchasers. He then acknowledges he is "speculat[ing]" and it is "difficult to predict with any certainty the number of school age children who will reside in the new development." To which, Stillwater would add that it is even harder to predict their school choice and their transportation options. Speculation is not evidence in the record.

From speculation, the Hearing Examiner turns to a conclusion that is inexplicable:

> With respect to the current number of school bus pedestrians, the off-site pathway requirement is not due to the current number of school age children walking on 211th to meet their school bus but due to Stillwater's desire to build and sell 14 new homes.

So, there it is. On imagined facts, according to the Hearing Examiner, a perceived desire to build a home is always proportionate and obligates a developer, builder, lot owner, home purchaser, or person seeking a building permit for a home to build an off-site pathway for a hypothetical, speculative school child in public schools anywhere in the county where a path or a sidewalk does not already exist.

IV. ARGUMENT

A. The Hearing Examiner exceeded his jurisdiction to impose the Condition.

[3] The Hearing Examiner does not refer to either strict proportionality or rough proportionality.

The only asserted present authority for pathways for school students is set out in RCW 58.17.110 which reads in salient part as follows:

> **RCW 58.17.110**
> **Approval or disapproval of subdivision and dedication—Factors to be considered—Conditions for approval—Finding—Release from damages.**
>
> (1) The city, town, or county legislative body shall inquire into the public use and interest proposed to be served by the establishment of the subdivision and dedication. It shall determine: (a) If appropriate provisions are made for, but not limited to, the public health, safety, and general welfare, for open spaces, drainage ways, streets or roads, alleys, other public ways, transit stops, potable water supplies, sanitary wastes, parks and recreation, playgrounds, schools and schoolgrounds, ***and shall consider all other relevant facts, including sidewalks and other planning features that assure safe walking conditions for students who only walk to and from school;*** and (b) whether the public interest will be served by the subdivision and dedication.
>
> (2) A proposed subdivision and dedication shall not be approved unless the city, town, or county legislative body makes written findings that: (a) Appropriate provisions are made for the public health, safety, and general welfare and for such open spaces, drainage ways, streets or roads, alleys, other public ways, transit stops, potable water supplies, sanitary wastes, parks and recreation, playgrounds, schools and schoolgrounds and all other relevant facts, including sidewalks and other planning features that assure **safe walking conditions for students who only walk to and from school**; and (b) the public use and interest will be served by the platting of such subdivision and dedication. If it finds that the proposed subdivision and dedication make such appropriate provisions and that the public use and interest will be served, then the legislative body shall approve the proposed subdivision and dedication. Dedication of land to any public body, provision of public improvements to serve the subdivision, and/or impact fees imposed under RCW 82.02.050 through 82.02.090 may be required as a condition of subdivision approval. Dedications shall be clearly shown on the final plat. No dedication, provision of public improvements, or impact fees imposed under RCW 82.02.050 through 82.02.090 shall be allowed that constitutes an unconstitutional taking of private property. The legislative body shall not as a condition to the approval of any subdivision require a release from damages to be procured from other property owners. [...] [emphasis added]

The present language was added by 1990 1st Executive Session Laws, Chapter 17, Section 52. The critical language is "who only walk to and from school." The critical nature of this language is manifest from the 1989 version of RCW 58.17.110:

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> The city, town, or county legislative body shall inquire into the public use and interest proposed to be served by the establishment of the subdivision and dedication. It shall determine if appropriate provisions are made for, but not limited to, the public health, safety, and general welfare, for open spaces, drainage ways, streets, alleys, other public ways, water supplies, sanitary wastes, parks, playgrounds, sites for schools and schoolgrounds, and shall consider all other relevant facts, including sidewalks and other planning features that assure ***safe walking conditions for students who walk to and from school***, and determine whether the public interest will be served by the subdivision and dedication. If it finds that the proposed plat makes appropriate provisions for the public health, safety, and general welfare and for such open spaces, drainage ways, streets, alleys, other public ways, water supplies, sanitary wastes, parks, playgrounds, sites for schools and schoolgrounds and all other relevant facts, including sidewalks and other planning features that assure ***safe walking conditions for students who walk to and from school***, and that the public interest will be served by the platting of such subdivision, then it shall be approved. [...]

Washington Laws, 1989, Chapter 330, Section 3 (emphasis added). The prior language left open the possibility of requiring sidewalks to a bus stop for students who walk part way to school by transiting to a bus stop and then taking a bus the rest of the way to school because the critical word "only" is absent.

Under the present language of RCW 58.17.110, and the addition of "only" in 1990, there is no express or implied authority to condition approval of a plat on the construction of off-site improvements for a walkway or sidewalk for school children who ride in part to school on a school bus.

This conclusion is consistent with the statute related to Student Transportation, RCW 28A.160.160 where definition (5) defines the "walk area" for access to school to be "a walking distance of less than one mile."

It is conceded that Snohomish County has failed to note and failed to revise its code to reflect the 1990 amendment. *See*, SCC 30.41A.100 which reads as follows:

> **30.41A.100 Decision criteria - general.**

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> (1) The hearing examiner and the department shall inquire into the public use and interest proposed to be served by the establishment of the subdivision and dedication. The hearing examiner shall approve a preliminary subdivision only if appropriate provisions are made for, but not limited to, the public health, safety, and general welfare, for open spaces, drainage ways, streets, alleys, other public ways, transit stops, potable water supplies, sanitary wastes, parks and recreation, playgrounds, sites for schools and school grounds, fire protection and other public facilities. The hearing examiner shall consider all other relevant facts, including the physical characteristics of the site and sidewalks and other planning features that assure safe walking conditions for students ***who walk to and from school*** to determine whether the public interest will be served by the subdivision and dedication. [emphasis added]

County code conspicuously omits the word "only," thus conflicting with RCW 58.17.110.

The State Constitution, at Article XI Section 11 provides: "Any county ... may make and enforce within its limits all such local police, sanitary[,] and other regulations as are not in conflict with general laws."

RCW 58.17.110 sets out general law pertaining to school pedestrian pathways: "***that assure safe walking conditions for students who only walk to and from school.***" (emphasis added). Snohomish County's local provision, SCC 30.41A.100, irreconcilably conflicts because it authorizes pathways for students who only walk to a school bus pick up site when that is prohibited by the current RCW 58.17.110.

B. Except for evidence matters, Stillwater does not assert that the Hearing Examiner failed to follow applicable procedures.

SCC 30.72.080 details the ground for filing an appeal. So that this Appeal to County Council follows the prescribed format, this heading **B** has been included. Stillwater only challenges the evidence and evidence rulings of the Hearing Examiner and no other applicable procedures.

C. The Hearing Examiner committed multiple errors of law.

1. Authority.

Stillwater will not repeat its jurisdictional argument in the prior section. Suffice it to say that RCW 58.17.100 preempts any effort to exercise authority under County Code to require Condition 44, the pathway that would only go to a bus stop. The effort to impose Condition 44 therefore is contrary to law and is itself an error of law.

2. Official notice.

At page 16 of the Decision, the Hearing Examiner states:

> The Hearing Examiner takes official notice that during Pacific Northwest winters, school buses often pick up or drop off children in the dark or low light conditions, increasing their risk of being struck by vehicles while walking to the bus stop.

Stillwater does not object to the first half of this statement up to the word "conditions." The balance of this statement is not proper and is unlawful "official notice." This error of law is material because it is central to the Hearing Examiner's finding or conclusion of "nexus." "Nexus," along with "proportionality," must both exist under constitutional scrutiny and state statute (RCW 82.02.020) before an off-site condition such as Condition 44 can be imposed on a development.

"Official notice" is best understood from the Washington Rules of Evidence ("ER") where it is called "judicial notice." ER 201 provides as follows:

> ER 201 JUDICIAL NOTICE OF ADJUDICATIVE FACTS
> (a) Scope of Rule. This rule governs only judicial notice of adjudicative facts.
> (b) Kinds of Facts. A judicially noticed fact must be one not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.
> (c) When Discretionary. A court may take judicial notice, whether requested or not.
> (d) When Mandatory. A court shall take judicial notice if requested by a party and supplied with the necessary information.

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> (e) Opportunity To Be Heard. A party is entitled upon timely request to an opportunity to be heard as to the propriety of taking judicial notice and the tenor of the matter noticed. In the absence of prior notification, the request may be made after judicial notice has been taken.
> (f) Time of Taking Notice. Judicial notice may be taken at any stage of the proceeding

"Increasing their risk of being struck" is a fact subject to dispute and neither generally known or capable of accurate and ready determination. The Hearing Examiner could not take "official notice" of this fact.

The Hearing Examiner then compounded his error of law in attempting to take "official notice" by asserting this fact in a final decision where no opportunity to be heard existed. The Examiner therefore committed an error of law in taking improper "official notice."

3. Preemption.

Stillwater argues above that the Hearing Examiner has exceeded his jurisdiction. This is itself an error of law. The Hearing Examiner in Footnote 35 to the Decision has attempted to salvage his unlawful exercise of excess jurisdiction:

> The state legislature did not appear to preempt the field by enumerating all factors of the public interest to be considered when approving subdivisions. *State v. Richards,* 28 Wn. App. 2d 730, 746, 537 P.3d 1 1 1 8, 1 1 28 (2023), *aff'd,* 4 Wn.3d 83, 559 P.3d 1 07 (2024) (citations omitted). Snohomish County as a charter county may legislate unless preempted by the state legislature.

The Hearing Examiner therefore errs again. *Richards* is not authority for his assumption of jurisdiction. Nor is it good authority establishing preemption. The historic setting of changes made to RCW 58.17.110 must be considered. The precise language resulting from the changes must be considered. The distinct facts of *Richards* must be considered.

a. The Historic Setting.

As originally adopted in 1989, the at issue language in RCW 58.17.110 read: "... including sidewalks and other planning features that assure ***safe walking conditions for students who walk to and from school***, ..." (emphasis added). But in 1990, the language was changed to read: "... ***safe walking conditions for students who only walk to and from school.***" (emphasis added). What happened? Between the two enactments, a decision by the then-Snohomish County Hearing Examiner happened.

On January 18, 1990 in the matter of the application of Sundquist Homes Inc. for Meadowdale Park Division 4, ZA 890734 and the County Council motion approving the said decision Motion 90-071 dated February 28, 1990, a school pedestrian pathway was required by construing the language "for students who walk to and from school" to apply to students who walk to a bus stop, because they walk "part" of the way to school. That decision was affirmed by the Motion, and thus Snohomish County established a practice of requiring off-site improvements consisting of a pathway to a school bus stop as part of a pathway to school.

The development community went to the Legislature and RCW 58.17.110 was changed to the present "who only walk to and from school" language. The historic setting establishes that the addition of "only" was remedial to address the exact practice the legislature did not countenance, i.e., any requirement to extend pathways or to require off-site dedication or construction of sidewalks to a school bus drop off site.

b. The exact language.

Once the historic context of the amendment to add "only" is appreciated, its plain meaning is manifest. Authority exists to require an off-site pathway only when students "only" walk to school. You cannot require an off-site pathway to walk to a bus stop, for students who, loosely put, "partly" walk to school by walking to the bus stop.

c. Richards *is distinguishable and not controlling.*

At issue in *Richards* was a small portion of RCW 16.08.070(2)(c) emphasized in the following:

> (2) "Dangerous dog" means any dog that (a) inflicts severe injury on a human being without provocation on public or private property, (b) kills a domestic animal without provocation while the dog is off the owner's property, **or (c) has been previously found to be potentially dangerous because of injury inflicted on a human,** the owner having received notice of such and the dog again aggressively bites, attacks, or endangers the safety of humans.

As described by the Court of Appeals, under the Wahkiakum County Code:

> … a dog is a "dangerous dog" when the county has previously found it to be a potentially dangerous dog, the owner has received notice of that designation, and "the dog again aggressively bites, attacks[,] or endangers the safety of humans or domestic animals."

The Court of Appeals found that the County Code could be harmonized with the state statute and therefore the county regulation was not preempted and was lawful:

> We will not find preemption if "the two enactments can be harmonized." Rabon, 135 Wash.2d at 292, 957 P.2d 621. Thus, "a local ordinance does not conflict with a state statute in the constitutional sense merely because one prohibits a wider scope of activity than the other." City of Seattle v. Eze, 111 Wash.2d 22, 33-34, 759 P.2d 366 (1988)

The Wahkiakum Code therefore survived challenge because it prohibited a wider scope of activity. A potentially dangerous dog also could not endanger the safety of domestic animals.

RCW 58.17.110 and SCC 30.41A.100 function differently than the dangerous dog provisions at issue in *Richards.* Here, RCW 58.17.110 permits the requirements of sidewalks while **prohibiting** them when students do not "only" walk to school. Under *Richards*, County Code could prohibit sidewalks as mitigation for students who "only" walk to school also since that would be an expansion of a prohibition and not a conflict.

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1 But *Richards* does not change the basic rule of conflict at play here. RCW 58.17.110 only
2 allows sidewalks as a condition where those sidewalks would serve students who "only" walk to
3 school. To require more—sidewalks for students who walk partly to school or to a bus stop—is
4 a conflict and an impermissible expansion of a prohibition. It was error for the Hearing Examiner
5 to rely on *Richards*.

6 4. <u>Proportionality</u>.

7 The evidence in the record was discussed at length under the earlier heading **III.**
8 **REVIEW OF THE RECORD.** The Hearing Examiner speculated and predicted that there was
9 a direct and consistent relationship between the hypothetical existence of one school age child
10 walking 211th to the bus stop on Dubuque and substantial injury to that speculative child. The
11 Hearing Examiner imagines that the cost of constructing the pedestrian path (approximately
12 $300,000) is in a direct and consistent relationship with the speculative cost of at least $300,000
13 of damages for injury to the child in the event of accident. In effect, the Hearing Examiner found
14 strict proportionality, as if this was a math problem and not a legal question.

15 "Proportionality" is defined by Dictionary.com as: (1) having due
16 proportion; corresponding; (2) being in or characterized by proportion; (3) of, relating to, or
17 based on proportion; relative; and (4) *Mathematics.* (a) (of two quantities) having the same or
18 a constant ratio or relation; (b) (of a first quantity with respect to a second quantity) a constant
19 multiple of. In mathematical terms this might be expressed "xy" always equals "z" ("xy = z").
20 So, where "x" is a house and "y" is a speculative child who may walk to school or walk to a
21 school bus stop, then "xy" requires ("equals") a pathway "z."

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But this is not what Washington case law requires. The Hearing Examiner uses the wrong test for proportionality and then puts it on its head. He also disregards the issue of burden of proof.

Under Washington law—whether framed as a "strict," "rough," or "direct relationship"—the County has the burden of proof on nexus and proportionality:

> [U]nder RCW 82.02.020 the burden of establishing that a condition is reasonably necessary as a direct result of the proposed development is on the [local government].

Isla Verde Intern. Holdings v. Camas, 146 Wash.2d 740, 755-756, 49 P.3d 867. Since Snohomish County submitted no proof of reasonable necessity as a direct result of the proposed development—no proof of nexus or proportionality—speculation and prediction by the Hearing Examiner does not substitute for and constitute proof to carry the County's burden to establish Condition 44.

But even if speculation and prediction could be taken as evidence, the speculation here is not sufficient evidence to establish a direct result, or "rough proportionality." The court in *Sparks v. Douglas County,* 127 Wn.2d 901, 915, 904 P.2d 738 (1995) stated:

> While Dolan disregarded precise calculations in analyzing development impacts, it ruled that local government must make some effort to quantify its findings to support its permit conditions. In this case, the findings made by the County were more than mere conclusory statements of general impact. They were the result of the kind of individualized analysis required under Dolan. The report prepared by the Planning Office for each of the short plats documented the deficiencies in the right of way width and surfacing of the adjoining streets. Douglas County's records also reflect calculation of increase in traffic and the specific need for dedication of rights-of-way based upon the individual and cumulative impacts of the series of short subdivisions.

"Rough proportionality" is not satisfied by "conclusionary statements." And, certainly, it would not be satisfied by "speculation" or "predictions." The record requires evidence of "individualized analysis, "appropriate calculations," and demonstration of "specific need." That

1 evidence, individualized analysis, appropriate calculation, and demonstration of specific need is
2 absent in the record related to Stillwater Preserve and speculation and prediction is no substitute.
3 Truth be told, there is no Washington case on "proportionality" or "rough
4 proportionality" where a +/-2,700-foot-long off-site pedestrian path was held "roughly
5 proportional" to the impact of a 14-lot proposed preliminary plat.
6 One unpublished Court of Appeals Division I decision coincidentally discusses an
7 apparent 2,700-foot-long path, *Rapczak v. City of Kirkland,* No. 85626-0-I (Wash App. Sep 30,
8 2024) (unpublished) (copy attached as Appendix A).

9 Here, like in *Dolan,* the City's requirement that the Rapczaks dedicate a public
10 pathway for pedestrian traffic is not roughly proportional to the effect of the
11 Rapczaks' proposed development of a single-family home. The City does not
12 allege, nor did it show, that the Rapczaks' development would increase pedestrian
13 traffic such that it creates a need for a pedestrian easement.

14 *Id.*

15 As in *Rapczak,* here the County has not "shown," that is to say, carried the burden, that
16 Stillwater Preserve creates a need for a +/-2,700-foot-long pedestrian path to a school bus stop.
17 The Hearing Examiner erred as a matter of law to conclude proportionality based upon
18 speculation and predictions since the County did not carry its burden of proof. The Hearing
19 Examiner's speculation "that if one school age child is injured in an accident the predicted
20 damages might exceed the cost of the way pedestrian path" is a truism but not a showing of
21 increased pedestrian use, not a showing of the potential for more accidents, and the truism is not
22 substitute for individualized analysis, appropriate calculations (based on study), and
23 demonstration of specific need.

24 **D. Condition 44 and its related findings and conclusions are not supported by any**
25 **evidence, let alone substantial evidence, in the record.**

The evidence in and **not in** the record was reviewed at length in **III. REVIEW OF THE RECORD** above. The absence of "substantial evidence" has been demonstrated in various sections of this appeal. By the Hearing Examiner's own words, the Hearing Examiner speculated and predicted future use ("future use [of an off-site walkway] is speculative," and it is "difficult to predict with any certainty the number of school age children who will reside in the development.") In other words, the Hearing Examiner concedes there is no evidence, let alone any substantial evidence, related to children in the development, or children from the development who might make use of an off-site walkway.

At the same time, the Hearing Examiner concedes that from existing development there is a "current number of school bus pedestrians" who use the school bus by walking on 211th uneventfully.

If the Hearing Examiner has actually made any findings, they are not supported by substantial evidence, and the findings do not support the Hearing Examiner's conclusion that nexus and proportionality obligate Stillwater Preserve to build +/- 2,700 lineal feet of pedestrian walkway as required by Condition 44.

One final Hearing Examiner statement, whether a finding, a conclusion or something else requires comment. At page 17 of the Hearing Examiner Decision, the Hearing Examiner says:

> Having considered all relevant facts, including the characteristics of the site, the location of the bus stop, and the characteristics of 211th St. SE, the Hearing Examiner determines the public interest will not be served by a subdivision that does not have an adequate, safe pedestrian path to the children's school bus stop.

This statement demonstrates the detachment of the Hearing Examiner's decision from reality, its illogic, its predilection for circular logic and non-sequiturs. This statement entirely misses the point. The public interest might be served by the construction of a pathway. The point is,

however, the absence of any nexus or proportionality, any direct connection to Stillwater Preserve. Questions hammer home the point and the County Council is welcome to supplement the following list of unanswered questions as it reverses the requirement that Stillwater Preserve construct +/- 2,700 of off-site pedestrian pathway to a school bus site as required by Condition 44:

1. What relevant facts did the hearing examiner consider?
2. What characteristics of the Stillwater site obligate the developer of Stillwater Preserve to build the pathway?
3. What is unique about the location of the bus stop site that obligates the developer of Stillwater Preserve to build a pathway to that location?
4. What characteristics of 211th Avenue SE obligate the developer of Stillwater Preserve to build the pathway now?
5. If 211th Avenue SE is deficient, why does it not already have a pathway?
6. Where is the showing of need that the pathway is the obligation of Stillwater Preserve?

Imagination can probably double or triple the number of questions. The County Council is welcome to supplement the list of unanswered questions as it reverses the requirement that Stillwater Preserve construct +/-2,700 feet of off-site pedestrian pathway to a school bus site as required by Condition 44.

V. CONCLUSION

In 1961, British author Martin Esslin wrote a book entitled "The Theater of the Absurd," largely a commentary on theater and drama of the time, that is theater and drama that abandoned realism, was illogical, full of non-sequiturs, but full of circularity. The Hearing Examiner's

Decision here to impose Condition 44 is by its detachment from the real facts in the record, its illogic, non-sequiturs and circularity similarly absurd. The Hearing Examiner assumed authority he did not have, committed errors of law, and most grievously disregarded the evidence in the record to make findings and draw conclusions not supported by substantial evidence.

For these reasons, the County Council should sustain this appeal and rule on the true and real record of this matter that Condition 44 is unlawful and cannot be imposed on Stillwater Preserve.

DATED and respectfully submitted this 6th day of April, 2026.

By ______________________________

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APPENDIX A

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Rapczak v. City of Kirkland

Court:	Washington Court of Appeals
Writing for the Court:	BOWMAN, J.
Docket Number:	85626-0-I
Decision Date:	30 September 2024
Citation:	Rapczak v. City of Kirkland, 85626-0-I (Wash. App. Sep 30, 2024)
Parties:	JESSE and FOREST RAPCZAK, and the marital community thereof, Appellants, v. CITY OF KIRKLAND, a municipal corporation, Respondent.

Id. vLex Fastcase: VLEX-1051005463

Link: https://fastcase.vlex.com/vid/rapczak-v-city-of-1051005463

JESSE and FOREST RAPCZAK, and the marital community thereof, Appellants, v. CITY OF KIRKLAND, a municipal corporation, Respondent.

No. 85626-0-I

Court of Appeals of Washington, Division 1

September 30, 2024

UNPUBLISHED OPINION

BOWMAN, J.

Jesse and Forest Rapczak sought a building permit to construct a new home on their Kirkland waterfront property. As a condition of issuing the permit, the city of Kirkland (City) required the Rapczaks to dedicate a public pedestrian path across their lot. The Rapczaks challenged the City's permit condition under the Land Use Petition Act (LUPA), chapter 36.70C RCW, arguing it amounts to an unconstitutional taking of private property. The trial court denied and dismissed the Rapczaks' LUPA petition with prejudice. Because the City's permit condition is not roughly proportional to the nature and impact of the Rapczaks' development, we reverse and remand for further proceedings.

The Rapczaks live in a single-family home at 315 Lake Avenue West on the Kirkland waterfront. As the picture below shows, to the west of their lot is Lake Washington,[1] and to the east is a steep hill. Lake Avenue West is a private road that runs north-south on the east side of the waterfront homes and serves several residences, including the Rapczaks. By car, there are two dead-end sections of Lake Avenue West-the northern section, which runs between 401 and 411 Lake Avenue West, and the southern section, which runs between 299 Lake Avenue West and the Rapczaks' home at 315 Lake Avenue West, with a "gap" in the road between the two sections. But by foot, the sections are connected by a pedestrian path along the Rapczaks' and their two northern neighbors' driveways.

(Image Omitted)

As shown in the picture below, from the south, the pedestrian path runs across the Rapczaks' driveway. It then narrows to an almost five-foot-wide compact dirt and gravel trail and ends at a gate, which opens to their northern neighbor's property.

(Image Omitted)

Members of the public use the pedestrian path, but the deed to the Rapczaks' property does not show a recorded pedestrian easement, and there has been no judicial determination as to a prescriptive easement. Instead, the Rapczaks' property is encumbered by a road and utility easement that created Lake Avenue West and extends north-south along the property in the area of the existing pedestrian path. A 1948 deed for the property describes an easement" '[20] feet wide'" for" 'road purposes, sewer, water pipes, power and light, [and] telephone and drainage ditches,'" and it reserves" 'the right to the use of said easement for [the] benefit of . . . other tracts in the near vicinity.'" A 1952 deed similarly reserves an easement for road and public utility purposes.[2]

In November 2020, the Rapczaks submitted preliminary plans to the City to build a new home on their property. The plans show that they would demolish their existing house and build a new, larger house, set back further from the water.[3] The Rapczaks' plans eliminated the existing pedestrian path.

In December 2020, the Rapczaks attended a meeting with City staff to discuss the project. At that meeting, the City informed the Rapczaks that it believed there is a public pedestrian easement across their property, and that they must maintain the pedestrian path as a permit condition under Kirkland Zoning Code (KZC) 105.19. KZC 105.19(1) provides that "the City may require [a building permit] applicant to install pedestrian walkways for use by the general public . . . and dedicate public pedestrian access rights . . . where the walkway is reasonably necessary as a result of the development activity." It then lists circumstances where walkways are reasonably necessary, such as "to provide efficient pedestrian access to an activity center of the City," to shorten pedestrian routes through "unusually long" blocks, or to "connect between . . . dead-end streets" or "[o]ther public pedestrian access walkways." KZC 105.19(1)(b), (d), (e)(i), (e)(iv).

Based on that discussion, the Rapczaks asked the City for a formal decision about its path requirement before they submitted final plans. On March 16, 2021, the City issued a decision, "requiring the dedication of a public pedestrian walkway easement" across the Rapczaks' property under KZC 105.19(1). In its decision, the City explained that Lake Avenue West is a privately owned right-of-way that encumbers the Rapczaks' property, and

cited the historic deeds' road and utility easement over the property. The City said that "for most of its life," the easement was "used as a vehicular access road" and "as a pedestrian pathway since at least [1952]."[4]

The City then found that the Rapczaks' proposed plans constituted "development activity." It applied the criteria under KZC 105.19(1) and determined that the pedestrian dedication is "reasonably necessary" because "[t]he pedestrian path on Lake Avenue West provides [a route for] pedestrian traffic between two shoreline parks," and "provides safe pedestrian access to downtown Kirkland, shopping areas, employment centers and transit." The City found that the path provides a route for pedestrians through a block that is "unusually long" because "Lake Avenue West is approximately 2,700 feet long," and "most Kirkland blocks follow the pre-established street grid measuring 500 feet in length." The City also found that pedestrian access is necessary to connect between dead-end streets where the north and south portions of Lake Avenue West terminate "at [the Rapczaks'] Property." Accordingly, the City concluded that under KZC 105.19(1), "a dedicated public pedestrian walkway will be required as part of [the Rapczaks'] application for a new single-family residence."[5]

On April 1, 2021, the Rapczaks filed a LUPA petition and a complaint for declaratory relief.[6] In the LUPA petition, the Rapczaks challenged the City's authority to require the dedication of a public pedestrian walkway. And in the declaratory action, the Rapczaks sought a declaration that there is no public right-of-way over their property. The City counterclaimed, seeking a declaration that there is a prescriptive easement for public pedestrian use across the Rapczaks' property. In June 2021, the Rapczaks and the City agreed to bifurcate the LUPA and declaratory causes of action and stipulated that the court should stay the requests for declaratory judgment until the LUPA cause of action concluded.[7]

In April 2022, the court held a hearing on the LUPA petition. At the hearing, the Rapczaks argued that the City cannot show the pedestrian path dedication was "reasonably necessary as a direct result of [their] replacement of their existing home" under KZC 105.19.[8] And they argued the City's permit condition amounted to an unconstitutional taking of private property under *Dolan v. City of Tigard*, 512 U.S. 374, 114 S.Ct. 2309, 129 L.Ed.2d 304 (1994), and *Nollan v. California Coastal Commission*, 483 U.S. 825, 107 S.Ct. 3141, 97 L.Ed.2d 677 (1987).[9] The City argued that there is a prescriptive easement across the Rapczaks' property because pedestrians had continuously used it since the 1950s. And it contended that because the Rapczaks' new development will eliminate the existing path, the dedication is reasonably necessary.

The trial court found that there were issues of fact about whether a prescriptive easement exists and remanded for factfinding "on the scope and boundaries of the alleged easement through the Rapczak property." The court ordered that once the factfinding is complete, "the matter shall be returned for a decision on this appeal." On remand, the City visited the site and produced a supplemental summary for the record in the LUPA action.

In its January 2023 supplemental summary, the City explained that the pedestrian path across the Rapczaks' property narrows at the northern portion to about five feet wide. And, based on a review of "dozens of emails and sworn statements," it asserted that "the public has used this trail openly and without permission for decades." As a result, the City determined that "there is sufficient evidence in the LUPA file to support a finding that the public had a prescriptive easement for a walking path across the [Rapczaks'] property." So, the City concluded that the Rapczaks should maintain the "decades-old pedestrian pathway across the property," and record "a [five]-foot-wide pedestrian pathway easement across the property" as a condition of the Rapczaks' redevelopment.

The Rapczaks responded that the City "wholly failed to prove the existence of a prescriptive easement" and reminded the court that the issue of prescriptive easement was not before it. They argued that the court "must assume that none exists for purposes of its LUPA ruling" and find that the permit condition is an unconstitutional taking.[10]

In May 2023, the trial court held a second hearing on the Rapczaks' LUPA petition. The Rapczaks again argued that the City has no authority to require them to dedicate a pedestrian path because their proposed development does not warrant a new public easement under KZC 105.19(1), RCW 82.02.020, or *Dolan* and *Nollan*. And the City again argued that the dedication is reasonably necessary under KZC 105.19(1) because the development will eliminate an existing path that connects two dead-end streets on an unusually long block between two parks. The City also argued there is substantial evidence in the record to support finding that there is a prescriptive pedestrian easement.

In July 2023, the court entered an "Order on LUPA Appeal," concluding that the City's "requirement for dedication of a pedestrian easement across the [Rapczaks'] Property pursuant to [KZC] 105.19(1) . . . is supported by law and substantial evidence in the record." The court explained that the requirement is reasonably necessary under KZC 105.19(1).[11] And it concluded that "the City's proposed requirement for dedication of a pedestrian pathway easement also meets the constitutional nexus and rough proportionality tests of *Nollan* and *Dolan*."[12] The court denied and dismissed with prejudice the Rapczaks' LUPA petition.

The Rapczaks appeal.

ANALYS

Is the Rapczaks argue that the trial court erred by denying and dismissing their LUPA petition because the City's permit condition that they dedicate a pedestrian path across their private property without compensation amounts to an unconstitutional taking of their property. We agree.

LUPA governs judicial review of land use decisions. RCW 36.70C.030. Under LUPA, a court may grant relief from a land use decision if the party seeking relief shows that the decision violates their constitutional rights. RCW 36.70C.130(1)(f). Constitutional issues are questions of law that we review de novo. *Olympic Stewardship Found. v. Envt'l &Land Use Hr'gs Off.*, 199 Wn.App. 668, 710, 399 P.3d 562 (2017).

The takings clause of the Fifth Amendment to the United States Constitution prohibits the government from taking private property "for public use, without just compensation." Similarly, under our state constitution, "[n]o private property shall be taken or damaged for public or private use without just compensation having been first made." WASH. CONST. art. I, § 16. The right to exclude others from the use of private property is" 'one of the most essential sticks in the bundle of rights that are commonly characterized as property.'" *Dolan*, 512 U.S. at 384 (quoting *Kaiser Aetna v. United States*, 444 U.S. 164, 176, 100 S.Ct. 383, 391, 62 L.Ed.2d 332 (1979)).

In *Dolan* and *Nollan*, the United States Supreme Court established a two-part test to determine whether a government condition on development that affects a property owner's rights amounts to an unconstitutional taking. Under *Dolan*, the government's condition on development must be roughly proportional to the effect of the proposed development. 512 U.S. at 391. And under *Nollan*, there must be an "essential nexus" between the government's condition on the development and the state interest served by imposing the condition. 483 U.S. at 837.

Together, *Dolan* and *Nollan* hold that the government may not condition approval of a land-use permit on the owner's relinquishment of a portion of his or her property unless there is rough proportionality between the government's demand and the effects of the proposed land use, and a nexus between the condition and the state interest served. *Koontz v. St. Johns River Water Mgmt. Dist.*, 570 U.S. 595, 599, 133 S.Ct. 2586, 186 L.Ed.2d 697 (2013); *Church of Divine Earth v. City of Tacoma*, 194 Wn.2d 132, 138, 449 P.3d 269 (2019). A city's uncompensated requirement to dedicate private property as public is unlawful where it fails to fulfill both requirements. *Divine Earth*, 194 Wn.2d at 138.

The Rapczaks argue that the City's permit condition requiring them to dedicate a public pedestrian path across their property amounts to an unconstitutional taking under *Dolan* because the condition "is not roughly proportionate to the nature and extent of the impacts of rebuilding a single-family home." The City argues that the requirement is roughly proportional because the path "has existed on the property for decades," and that the Rapczaks' development "will disrupt current and longstanding pedestrian access on Lake Avenue West." We agree with the Rapczaks.

In *Dolan*, business owner Florence Dolan sought to redevelop her 1.67-acre property in the city of Tigard's central business district. 512 U.S. at 378-79. Her lot had an existing 9,700-square-foot store and gravel parking lot on the east side of the property. *Id.* at 379. And a creek flowed through the southwest corner and along the west border of the property. *Id.* Dolan proposed plans to relocate the store to the west side of her property, nearly double the size of the store, and pave a 39-space parking lot. *Id.* She also proposed demolishing the existing store and adding a new structure and parking lot in its place for complementary businesses. *Id.*

The city's planning commission granted Dolan's permit but required her to "dedicate the portion of her property lying within the 100-year floodplain" as a public greenway "for improvement of a storm drainage system," and to dedicate "an additional 15-foot strip of land adjacent to the floodplain as a pedestrian/bicycle pathway." *Dolan*, 512 U.S. at 379-80. The city justified its requirement that Dolan dedicate a public greenway on her property on the commission's findings that "increased storm[ ]water flow from [her] property 'can only add to the public need to manage the [floodplain] for drainage purposes.'" *Id.* at 388.[13] And it justified its bicycle and pedestrian path dedication on her property on its finding that" 'the proposed expanded use of this site is anticipated to generate additional vehicular traffic thereby increasing congestion on nearby collector and arterial streets,'" so creating" 'a convenient, safe pedestrian/bicycle pathway system as an alternative means of transportation could offset some of the traffic demand on these nearby streets and lessen the increase in traffic congestion.'" *Id.* at 389.

Dolan requested variances from the city's standards, which the commission denied. *Dolan*, 512 U.S. at 380-81. It found that the floodplain dedication was reasonably related to the increase in impervious surface and stormwater runoff caused by the development, and that the pathway dedication was reasonably related to the need to accommodate increased traffic by providing alternative means of transportation. *Id.* at 381-82. Dolan appealed to the Oregon Land Use Board of Appeals, which agreed with the city that the dedications did not amount to unconstitutional takings because they were reasonably related to the impact they were meant to mitigate. *Id.* at 382-83. The Oregon Court of Appeals and Oregon Supreme Court affirmed. *Id.* at 383. Dolan

then appealed to the United States Supreme Court. *Id.*

The United States Supreme Court determined that the city's permit conditions did not bear the required relationship to the projected impact of Dolan's proposed development. *Dolan*, 512 U.S. at 394-95. The Court held that the constitution demands "rough proportionality" between the two. *Id.* at 391. And while "[n]o precise mathematical calculation is required," to satisfy the requirement of rough proportionality, "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." *Id.* The Supreme Court rejected the city's justifications, concluding they did not support finding that the required dedications were roughly proportional to the impact of Dolan's proposed development. *Id.* at 394-95.

On the requirement of a public greenway, the Court accepted the finding that "increasing the amount of impervious surface will increase the quantity and rate of storm[ ]water flow from petitioner's property." *Dolan*, 512 U.S. at 392. But it explained that "[t]he city has never said why a public greenway, as opposed to a private one, was required in the interest of flood control." *Id.* at 393. It explained that "[i]t is difficult to see why recreational visitors trampling along petitioner's floodplain easement are sufficiently related to the city's legitimate interest in reducing flooding problems." *Id.* That is, the city's interest in managing the floodplain through a public greenway was not roughly proportional to "eviscerat[ing]" Dolan's right to exclude others from her property. *Id.* at 394. The Court recognized that "[i]f [Dolan]'s proposed development had somehow encroached on existing greenway space in the city, it would have been reasonable to require [her] to provide some alternative greenway space for the public either on her property or elsewhere." *Id.* But the city's findings "do not show the required reasonable relationship between the floodplain easement and the petitioner's proposed new building." *Id.* at 394-95.

As for the bicycle path, the Court concluded even if the larger store increased street traffic, "the city has not met its burden of demonstrating that the additional number of vehicle and bicycle trips generated by [Dolan]'s development reasonably relate to the city's requirement for a dedication of the pedestrian/bicycle pathway easement." *Dolan*, 512 U.S. at 395. The city "simply found that the creation of the pathway 'could offset some of the traffic demand . . . and lessen the increase in traffic congestion.'" *Id.*[14]

Here, like in *Dolan*, the City's requirement that the Rapczaks dedicate a public pathway for pedestrian traffic is not roughly proportional to the effect of the Rapczaks' proposed development of a single-family home. The City does not allege, nor did it show, that the Rapczaks' development would increase pedestrian traffic such that it creates a need for a pedestrian easement. Instead, the City argues that the development would disrupt current public use of the path. As recognized in *Dolan*, such a condition may be roughly proportional to the Rapczaks' development if their new home somehow encroached on a public easement. But there is no recorded pedestrian easement across the Rapczaks' property. Nor is there a judicial determination as to a prescriptive easement. Indeed, whether a prescriptive easement exists is at issue in the parties' stayed declaratory actions.

Still, the City argues that even if there is no current pedestrian easement across the Rapczaks' property, KZC 105.19(1) justifies a dedicated public trail. According to the City, its zoning code supports such a dedication when a "walkway is reasonably necessary as a result of development activity." KZC 105.19(1). And under the code, a pedestrian path is reasonably necessary when it would provide "efficient pedestrian access to an activity center of the City, such as schools, parks, shopping areas, employment centers or transit," when "blocks are unusually long," or when "[p]edestrian access is necessary to connect between . . . [e]xisting or planned dead-end streets . . . or . . . [o]ther public pedestrian access walkways." KZC 105.19(1)(b), (d), (e)(i), (e)(iv).

But we must interpret municipal codes in a manner that renders them constitutional. *See Ace Fireworks Co. v. City of Tacoma*, 76 Wn.2d 207, 210, 455 P.2d 935 (1969) (we presume an ordinance is constitutional if it is reasonably capable of constitutional construction). So, we read the "reasonably necessary as a result of development activity" language in KZC 105.19(1) in the context of the rough proportionality test under *Dolan*.[15] And here, the City fails to meet that test.

We conclude that the trial court erred by denying and dismissing the Rapczaks' LUPA petition because the City fails to show rough proportionality under *Dolan*. We reverse the trial court's order dismissing the Rapczaks' LUPA petition and remand for it to determine whether the property is subject to a prescriptive pedestrian easement before ruling on the merits of the petition.[16]

----

[1] There is also a City sewer easement along the western part of their lot.

[2] In 2008, the homeowners served by the southern portion of Lake Avenue West recorded a "driveway easement," seeking to supersede and revise the road and utility easement "by eliminating the north 60 feet of said easement" so it would extend across only the southernmost 20 feet of the Rapczaks' property. The parties dispute the validity of the 2008 easement revision. Because the purported easement is unrelated to our determination, we do not weigh in on that dispute.

[3] If they rebuild, the Rapczaks must shift the footprint of the house east because of the sewer easement, which they cannot encroach or build on.

[4] The City noted the 2008 easement revision but found that it "is not relevant to the City's request for a dedicated 20-foot pedestrian easement."

[5] On May 14, 2021, the City issued a second formal determination letter, again requiring the Rapczaks to dedicate a public pedestrian access easement.

[6] The Rapczaks amended their petition on April 13, 2021 and again on May 28, 2021 without any substantive changes to their claims.

[7] The City later moved under CR 16 to "re-sequence" the claims so the court would hear the declaratory action first. After a hearing on the matter, the court denied the City's motion. It determined the parties' stipulation was binding, and there was no compelling reason to set it aside.

[8] They also argued the permit condition violates RCW 82.02.020. That statute prohibits local governments from imposing "any tax, fee, or charge, either direct or indirect, on the construction or reconstruction of residential buildings." But it allows

> 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.

RCW 82.02.020.

[9] Addressed further in our analysis, *Dolan* and *Nollan* hold that the government may not condition approval of a land-use permit on the owner's relinquishment of a portion of his or her property unless there is rough proportionality between the government's demand and the effects of the proposed land use, and a nexus between the condition and the state interest served. *Dolan*, 512 U.S. at 391; *Nollan*, 483 U.S. at 837.

[10] The Rapczaks also moved to strike portions of the City's January 2023 supplemental summary as incorrect, unsubstantiated, or extraneous to the factfinding ordered by the court. They argued that the court should consider only the information that is relevant to the scope and boundaries of the alleged easement and strike the rest. The court denied the motion to strike.

[11] The court also found the dedication reasonably necessary under RCW 82.02.020.

[12] The court also concluded that the City established that a prescriptive pedestrian easement exists along the path across the Rapczaks' property. The Rapczaks moved for reconsideration, asking that the court strike its conclusion on the prescriptive easement. The court granted the Rapczaks motion for reconsideration to strike that specific language, explaining that it did not intend to reach the legal issue of prescriptive easement in its LUPA order.

[13] Third alteration in original.

[14] Alteration in original.

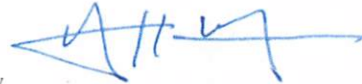
[15] We also view the "reasonably necessary" language of RCW 82.02.020 in the context of the *Dolan* rough proportionality requirement. *See Grant v. Spellman*, 99 Wn.2d 815, 818-19, 664 P.2d 1227 (1983) (we reject statutory interpretations "in favor of a construction which will sustain the constitutionality of the statute"). As a result, the City's permit condition violates that statute as well.

[16] Because we reverse and remand to consider whether the Rapczaks' property is subject to a prescriptive pedestrian easement, we do not address the Rapczaks' argument that the permit condition violates the essential nexus test under *Nollan* or that the trial court erred by denying their motion to strike from the record parts of the City's January 2023 supplemental summary.

Decision here to impose Condition 44 is by its detachment from the real facts in the record, its illogic, non-sequiturs and circularity similarly absurd. The Hearing Examiner assumed authority he did not have, committed errors of law, and most grievously disregarded the evidence in the record to make findings and draw conclusions not supported by substantial evidence.

For these reasons, the County Council should sustain this appeal and rule on the true and real record of this matter that Condition 44 is unlawful and cannot be imposed on Stillwater Preserve.

DATED and respectfully submitted this 6th day of April, 2026.



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