

## Merrill, Hannah

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**From:** pearl hewett [REDACTED]  
**Sent:** Friday, May 13, 2011 9:24 AM  
**To:** zSMP  
**Subject:** Fw: consistency review Fw: United States Supreme Court RULES

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Please add this as my #6 comment to the SMP consistency review and update.  
Pearl Rains Hewett

----- Original Message -----

**From:** [pearl hewett](#)  
**To:** [tharinger.steve@leg.wa.gov](mailto:tharinger.steve@leg.wa.gov)  
**Sent:** Friday, May 13, 2011 8:04 AM  
**Subject:** Fw: United States Supreme Court RULES

----- Original Message -----

**From:** [pearl hewett](#)  
**To:** [admin@electreneholiday.com](mailto:admin@electreneholiday.com)  
**Sent:** Friday, May 13, 2011 7:48 AM  
**Subject:** United States Supreme Court RULES

**This is AMAZING an definitely worth reading**

**TAKEN OUT OF CONTEXT - KEEP READING IF YOU ARE INTERESTED**

### **A. Nollan's Essential Nexus Test**

**(34) The United States 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.**

**(1) An environmental restriction on property development that serves no environmental purpose is unjustifiable.**

**Environmental restrictions quickly lose their social appeal--not to mention their constitutionality--when they have no basis in scientific fact.**

**(7) best available science record**

**(19) the precautionary principle rests on the view that it is not really a matter of science**

**(20) For example, Professor Holly Doremus acknowledged this dichotomy in a 2007 symposium on environmental law and the "Puget Sound".**

## **(44) If the power to regulate land use went that far, local governments could engage in "out-and-out plan[s] of extortion"**

**That was just to get your attention**

**Pearl Rains Hewett**

**KEEP READING**

### **Have Washington courts lost essential nexus to the precautionary principle? Citizens' Alliance for Property Rights v. Sims.**

I. INTRODUCTION II. THE PRECAUTIONARY PRINCIPLE: UNDERMINING CAUSATION III. GENERAL RULES: NOLLAN, DOLAN, AND RCW 82.02.020 A. Nollan's Essential Nexus Test. B. Dolan's Rough Proportionality Test C. RCW 82.02.020 and Incorporating Nollan and Dolan IV. CAPR: THE PRECAUTIONARY PRINCIPLE SLIPS IN A. King County Ignores Science, Regulates in Response to Uncertainty B. CAPR on Appeal. V. THE PRECAUTIONARY PRINCIPLE WEAKENS ESSENTIAL NEXUS VI. CONCLUSION

#### **I. INTRODUCTION**

"That's right," shouted Vroomfondel, "we demand rigidly defined areas of doubt and uncertainty!" (1)

The 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 is 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 (2)--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 sixty-five percent of their parcel area **if they obtained a clearing and grading permit.** (3) Four years later, the Washington Court of Appeals

invalidated that ordinance in *Citizens' Alliance for Property Rights v. Sims* (CAPR) (4) 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 under *Dolan v. City of Tigard* (5) of "rough proportionality." (6) Regrettably, every court that heard CAPR glossed over the "essential nexus" rule of *Nollan v. California Coastal Commission* (7) 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.

(8) This perfunctory treatment of the essential nexus rule suggests that the precautionary principle is encroaching upon the courts' understanding of essential nexus.

(9) **Washington courts should not allow the precautionary principle to guide their decisions about how the 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.**

(10) this article argues that the 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 United States Supreme Court exactions jurisprudence. 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.** Part III examines the **county's generalized science** and the judiciary's surprising finding of essential nexus. 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.**

## II. 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." In its most innocuous form, the 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)

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)

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.... [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." (22) **"[I]t moves the real burden of taking [sic] decisions from scientists to policy makers,"** (23) **and advises local governments to take action to "protect ... the environment," even in the absence of evidence of harm, and notwithstanding the costs.** (24)

The United States Supreme Court has demanded heavier **deference to private property rights** than the precautionary principle is likely to afford. Nollan, in particular, **requires the government to show a 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.** (25) 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." (26) Nollan's essential nexus test and the precautionary principle are at clear odds because the former demands a causal link; the latter relies substantially less on cause-and-effect connections. (27)

### **III. 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.** (28) 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.** (29) 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.** (30) The Court's opinions in Nollan and Dolan hold that **exactions are unconstitutional** unless the government can demonstrate both an essential nexus and rough proportionality. (31)

#### **A. Nollan's Essential Nexus Test**

In Nollan, the Nollans sought a permit from the California Coastal Commission to replace their beachside bungalow with a three-bedroom house. (32) 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. (33) 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. (34) **The United States 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.** (35) "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. (36) "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." (37) The Court found no connection between the Nollans' proposed development and the public problems that the Commission cited in support of its permit condition. (38)

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." (39) 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."** (40) The essential nexus test is an examination of cause and effect. (41) "It is the requirement of a cause-effect nexus, not just an ends-mean fit, that offers real protection against the imposition of unjustified or **disproportionate burdens on individual property owners."**

(42) The government must establish a direct 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." (43) 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.

(44) **If the power to regulate land use went that far, local governments could engage in "out-and-out plan[s] of extortion"** (45) by withholding permission to 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.

(46) The essential nexus is the cause-and-effect connection between the proposed development and the identified public problem. The 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." (47) 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. (48)

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. (49) The city granted the permit but imposed two conditions: 1) dedicate a portion of 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**. (50) The Court took the case as an opportunity to address the question it had left open in Nollan, "[W]hether the degree of the exactions demanded by the city's permit conditions bears the required relationship to the projected impact of [plaintiffs] proposed development." (51) The Court found an 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." (52)

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.**" (53) 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."

(54) 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: (55)

Except as provided in RCW 64.34.440 and 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.

(56) Washington ...