

## Theresa Rice

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**From:** Diane Berry on behalf of PCD  
**Sent:** Friday, August 12, 2011 10:55 AM  
**To:** Kathy Cook; Libby Hudson; Ryan Ericson; Theresa Rice  
**Subject:** FW: Buffers do not meet the legal requirement

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**From:** Bainbridge Citizens [<mailto:gary@tripp.net>]  
**Sent:** Friday, August 12, 2011 9:02 AM  
**To:** \*Bainbridge Citizens  
**Subject:** Buffers do not meet the legal requirement

Buffers do not meet the legal requirement for cause and effect and proportionality

To Planning Commission [pcd@ci.bainbridge-isl.wa.us](mailto:pcd@ci.bainbridge-isl.wa.us) and City Council [Council@bainbridgewa.gov](mailto:Council@bainbridgewa.gov)

The proposed buffers **do not meet the legal requirement** for nexus (cause and effect) and proportionality. The Planning Commission should ask the City to present a written legal brief describing how the proposed buffers meet Nexus and Proportionality requirements of the Nollan and Dolan.

### Nexus

Whenever local jurisdictions impose conditions on land use permits, they must be aware of constitutional limits, particularly the “nexus” or identification of the problem caused by the development. *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987).

This is very straightforward. If a development is increasing stormwater runoff or pollution - then restriction and requirements to mitigate the problem are justified.

### Proportionality

Proportionality as found in *Dolan v. City of Tigard*, 512 U.S.374 (1994) and the Fifth Amendment’s takings clause requires that the mitigation be proportional to the impact caused by development.

In other words the development should be required to provide mitigation for its stormwater or pollution but not for his neighbors’ or the community’s.

“Proportionality” does not require a precise mathematical calculation, but jurisdictions must make an individualized determination that the required [condition] is related both in nature and extent to the impact of the proposed development.

There is no showing in the City’s science that waterfront homes are causing any harm. The fact that the land is not in its undeveloped or natural state does not mean it is causing harm. The proposed buffers are not a direct mitigation for the direct impacts of the development but are an attempt to restore the ecosystem and mitigate the impacts of other developments like Seattle and Bremerton.

The proposed buffers are larger than required to mitigate an individual home’s impacts (stormwater) and are therefore DISPROPORTIONAL to the impact. - If a 16 foot grass buffer can remove 80% of sediment and attached pollutants from stormwater, why is the city asking for 30 to 150 foot buffers. Stormwater is effectively mitigated by infiltration or ponds.

If these basic constitutional questions are not answered now, then the City will likely have to answer them in court. The prudent thing for the Planning Commission and City Council to do is to lay out the legal arguments they believe would provide the Constitutional justification for the proposed buffers.

A written legal brief that the City Council can rely on is a minimum requirement and a second opinion would be prudent.

PS – “Everyone is doing it,” is not a legal argument.

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**Bainbridge Citizens**

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