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SHORELINE MANAGEMENT ACT AND PUBLIC ACCESS

A Critique of Common Practices

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Many communities are in the process of updating Shoreline Master Programs, which are the regulatory tools used to enforce the Shoreline Management Act requirements throughout the State of Washington. This paper is addressed to the public access requirements of the Washington State Shoreline Management Act, Chapter 90.58 RCW, and the Shoreline Management Act guidelines adopted by the Washington Department of Ecology in 2003, Chapter 173-26 WAC.

Public access to state shorelines for use and enjoyment is a goal emphasized by WDOE in the guidelines, but one that must be tempered by legal limitations in the form of regulatory and constitutional limits on the ability of public agencies to require public access as a condition of developing on the state's shorelines. During the update process, local governments are often advised to emphasize the agency guidelines in providing for public access. In too many cases, however, the public access requirements in master programs are set forth in mandatory terms without processes or procedures designed to identify and implement regulatory and constitutional limits inherent in mandating public access to private property. The effect of this failure to adequately provide a process to temper the public demand for water access with private property rights to exclude others is to shift the burden of assuring private property interests are protected from the municipality adopting the program in advance of taking action, to the property owner forced to prove illegality of a required dedication after the condition has been imposed. The point of this paper is to assert that such burden shifting is contrary to the SMA guidelines, unlawful, and a sound basis to challenge the program of any jurisdiction that fails to address the "property rights" issues inherent in public access requirements at the outset.

As will be discussed below, local governments following the program of adopting required public access exactions without adopting clear guidelines as to when such requirements may be imposed are facing a variety of potential challenges, which may include:

As Written:

- The guidelines fail to comply with the policies of the Shoreline guidelines by which programs will be evaluated and may be challenged by property owners or groups adversely affected by the threat of unlawful requirements.

As Applied:

- When a local government seeks to impose a public access requirement as a condition of shoreline development, it is the local government which has the burden of proving both nexus and proportionality measured against the impacts of the proposal under review. The mere fact of development on the shoreline is not sufficient justification for conditioning approval by some form of public access. The local Government must tie any condition to the circumstances of the case, and has the duty to prove the condition is "reasonably necessary under the circumstances. Conditions such as linear trails or direct access where none has existed before violate a fundamental right of property ownership—the right to

exclude others and will be subject to successful challenge under many circumstances..

- Subdivision creates the potential for new homes and population that may increase the demand for access to waterfront property. Programs that treat the subdivision of waterfront properties differently from subdivision of upland properties, however, although both create similar demands on waterfront access attempt to impose a condition based on a distinction without rational justification and creates the potential for challenge on equal protection grounds.

I. Background

Securing public access to private property, even in the context of development, redevelopment, or modifications of shoreline property, is fraught with legal constraints and constitutional sideboards that limit the public's unrestricted right to command such access. The purpose of this paper is to explore the requirements and limitations on local authority to command public access to shorelines in connection with private development and to examine the various theories in which such access may be required and those instances where such requirements are unlawful under a variety of established doctrines.

As will be discussed in detail below, cities and counties must read the public access guidelines very carefully and understand that while the guidelines encourage public access where at all feasible, such encouragement does not mean that cities and counties may require access with impunity. The shoreline guidelines, corresponding city requirements, and legal commentary on each element of public access follow. As we review the statutory requirements, the administrative guidelines, and the local responses, it is well to remember a key legislative caveat concerning protection of property rights in developing shoreline policy stated in the Shoreline Management Act:

> … coordinated planning is necessary in order to *protect the public interest* associated with the shorelines of the state while, at the same time, *recognizing and protecting private property rights* consistent with the public interest. …

RCW 90.58.020, emphasis supplied.

As will be demonstrated by the language of the guidelines below, State Law imposes a duty on local governments to plan for the local master programs to provide mechanisms and processes that assure the protection of private property rights. The burden is on local governments to identify such a process in the master program itself, and not, as evident in so many programs, mandate public access as a condition of most or all shoreline developments under a variety of conditions, and merely affirm but make no provision for providing the required protections or standards by which adequate protection of property rights may be measured administratively.

Instead, all too often the master plans leave the protection of property rights to the property owner forced to challenge a requirement to provide public access. It is this failure to provide a process to address and temper public access requirements with a recognition that the burden is on the municipality to demonstrate both nexus and proportionality as a condition to securing public access that is the material defect in the local planning programs. Ignoring the limits of municipal authority in the shoreline update, and shifting the burden to protect property rights to those who can afford appeals and litigation, violates the Shoreline Management Act and applicable guidelines and provides a sound basis for challenge if not corrected.

II. The Legislative Mandate--Local Governments are Required to Protect Property Rights During the Planning Process.

The analysis starts with the only legislatively mandated public access requirement in the Shoreline Management Act. The provision is set forth in the legislative declaration of policy, which states:

> …local government, *in developing master programs* for *shorelines of statewide significance*, shall give preference to uses in the following order of preference which:
>
> (5) Increase public access to publicly owned areas of the shorelines;

RCW 90.58.020, emphasis supplied.[1]

The Legislature also recognized the inherent problem between the public's interest in access and the need to protect private interests.

> The legislature further finds that much of the shorelines of the state and the uplands adjacent thereto are in private ownership; … and, therefore, *coordinated planning is necessary* …***while, at the same time, recognizing and protecting private rights consistent with the public interest***. …

RCW 90.58.020.

It is important to note, first, that the legislative directive is aimed only at "shorelines of statewide significance" and second, and more importantly, that the directive is at the point where the local jurisdiction is "developing master programs" and that it is the "planning" for shoreline management that must make provision to accommodate and protect private property rights.

[1] A second and parallel provision calls for an increase in the recreational opportunities for the public "in the shoreline," but with no reference to whether that increase is related to public or private lands.

III. Regulatory Implementation

A. "Governing Principles"

Guidelines for "developing" master programs are found in Chapter 173-26 WAC and the initial assertion of responsibility to local governments for planning to protect private property during the development of the master program is set forth in WAC 173-26-186, "Governing Principles of the Guidelines."

> The governing principles listed below are intended to articulate a set of foundational concepts that underpin the guidelines, guide the development of the planning policies and regulatory provisions of master programs, and provide direction to the department in reviewing and approving master programs. …

WAC 173-26-186.

The Governing Principles first specifically note that regulation is not the only technique by which the planning goals may be achieved:

> (4) The *planning policies* of master programs (as distinguished from the development regulations of master programs) *may be achieved by a number of means, only one of which is the regulation of development*. Other means, as authorized by RCW 90.58.240, include, but are not limited to: The acquisition of lands and easements within shorelines of the state by purchase, lease, or gift, either alone or in concert with other local governments; and accepting grants, contributions, and appropriations from any public or private agency or individual. Additional other means may include, but are not limited to, public facility and park planning, watershed planning, voluntary salmon recovery projects and incentive programs.

WAC 173-26-186, emphasis supplied.

The Governing Principles also specifically note that the burden is on local government to develop a lawful approach to regulation of private property; not, as so many plans propose, to put the burden of protecting "protected rights" on the back of the property owner.

> (5) The policy goals of the act, implemented by the planning policies of master programs, may not be achievable by development regulation alone**.** *Planning policies* ***should*** *be pursued through the regulation of development of private property* ***only to an extent that is consistent with all relevant constitutional and other legal limitations*** *(where applicable, statutory limitations such as those contained in chapter 82.02 RCW and RCW 43.21C.060) on the regulation of private property***.**

WAC 173-26-186, emphasis supplied.[2] [3]

The section goes on to provide that local governments are required to develop a "process" by which such protection is assured.

> … Local government should use a process designed to assure that proposed regulatory or administrative actions do not unconstitutionally infringe upon private property rights. …

WAC 173-26-186(5).

B. Public access

The WDOE "Public Access" guidelines are found at WAC 173-26-221(4). (Copy attached as Attachment 1.) At the outset it should be noted that the guidelines expand the public access requirements consideration from the statutory "shorelines of statewide significance" noted above, to all shorelines.

> (4) Public access.
>
> (a) Applicability. Public access includes the ability of the general public to reach, touch, and enjoy the water's edge, to travel on the waters of the state, and to view the water and the shoreline from adjacent locations. Public access provisions below apply to *all shorelines of the state* unless stated otherwise.

WAC 173-26-221(4).

There is no definition of "public access" in either the legislation or the definition section of the guidelines and as such the provisions above are the only guide to understanding the intended scope of the term.

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[2] While the regulation uses the term "should," the definitions in the guidelines, WAC 173-26-020, make it clear that in this context "should" is a mandate, excused only for good cause shown.

> (32) "Should" means that the particular action **is required** unless there is a demonstrated, compelling reason, based on policy of the Shoreline Management Act and this chapter, against taking the action.

[3] The statutory provision goes on to state: "A process established for this purpose, related to the constitutional takings limitation, is set forth in a publication entitled, "State of Washington, Attorney General's Recommended Process for Evaluation of Proposed Regulatory or Administrative Actions to Avoid Unconstitutional Takings of Private Property," first published in February 1992. The attorney general is required to review and update this process on at least an annual basis to maintain consistency with changes in case law by RCW 36.70A.370." WAC 173-26-186(5). (See AGO 1992-23 attached, which addresses property rights issues under GMA and attaches a copy of the referenced guidelines.)

A key point of this provision, beyond addressing all shorelines, is to note that the term "public access" as used in the guidelines contemplates a variety of activities on and near shorelines:

- Reach, touch, and enjoy the water's edge;
- Travel on the waters; and
- View the water and the shoreline from "adjacent" locations.

The section quoted does not identify when each is appropriate or whether one form of access is more important than others. Note that the regulations do expand public access objectives to all shorelines, not just those of shorelines of statewide significance. Having expanded the scope of the public access rules to cover all shorelines, not just those of statewide significance, the guidelines still reaffirm the duty of the **municipality** while developing its program to address competing interests in both gaining public access and protecting private property rights and focus specifically about access to waters "held in public trust":

> (b)(i) Promote and enhance the public interest with regard to rights to access waters held in public trust by the state *while protecting private property rights* and public safety.

WAC 173-26-221(4), emphasis supplied.

As will be discussed in detail below, the rights inherent in the "public trust doctrine" focus on the rights inherent in using the state's waterways and the state's regulatory authority over waterways and do not suggest or imply the ability to command public access on dry lands above the line of ordinary high water.

The guidelines then address a recommended "planning process" in which they note the difficulty in creating hard and fast rules for public access and instead recommend certain guidelines.

> (c) Planning process to address public access. Local governments should plan for an integrated shoreline area public access system that identifies specific *public needs* and *opportunities to provide public access*. Such a system can often be more effective and economical than applying uniform public access requirements to all development. This planning should be integrated with other relevant comprehensive plan elements, especially transportation and recreation. ***The planning process shall also comply with all relevant constitutional and other legal limitations that protect private property rights.*** ...

WAC 173-26-221(4), emphasis supplied.

The guidelines emphasize public access to publicly owned properties:

> **At a minimum**, the public access planning should result in public access requirements for shoreline permits, recommended projects, port master plans, and/or ***actions to be taken to develop public shoreline access to shorelines on public property.***

WAC 173-26-221(4)(c), emphasis supplied.

But also recognizes the desirability to provide:

> … a variety of shoreline access opportunities and circulation for pedestrians (including disabled persons), bicycles, and vehicles between shoreline access points, consistent with other comprehensive plan elements.

WAC 173-26-221(4)(c), emphasis supplied.

The guidelines then identify four standards, reproduced below that "should guide"[4] public access provisions in local master programs.

> (d) Standards. Shoreline master programs should implement the following standards:
>
> (i) **Based on the public access planning** described in (c) of this subsection, establish policies and regulations that protect and enhance both physical and visual public access. The master program **shall address public access on public lands**. The master program **should seek to increase the amount and diversity of public access to the state's shorelines consistent with the** ***natural shoreline character, property rights, public rights under the Public Trust Doctrine, and public safety***.
>
> (ii) [Public access to publicly owned shorelines].
>
> (iii) Provide ***standards for the dedication and improvement of public access in developments*** for water-enjoyment, water-related, and nonwater-dependent uses and ***for the subdivision of land into more than four parcels.*** In these cases, ***public access should be required <u>except:</u>***
>
> > (A) Where the local government provides more effective public access through a public access planning process described in WAC 173-26-221 (4)(c).

[4] Remember the mandatory nature of "should" unless the community can demonstrate why the guideline cannot be achieved. See footnote 2, p. 6, *supra*.

> (B) Where it is demonstrated to be ***infeasible due to reasons of*** incompatible uses, safety, security, or impact to the shoreline environment or due to ***constitutional or other legal limitations that may be applicable.***
>
> In determining the infeasibility, undesirability, or incompatibility of public access in a given situation, ***local governments shall consider alternate methods of providing public access***, such as offsite improvements, viewing platforms, separation of uses through site planning and design, and restricting hours of public access.
>
> (C) For individual single-family residences not part of a development planned for more than four parcels.

WAC 173-26-221(4), emphasis supplied.

As you read the guidelines, it is important to note that the direction is for local governments to put a program in place that achieves public access goals, but which also recognizes appropriate limitations on the public's ability to command public access from private property owners.

Unfortunately, many draft master programs simply copy the language of the guidelines as a short cut to describing public access policy in the local master programs. As a result, the local master programs often contain a mandate for public access and related improvements, with a statement about protecting private property rights, but make no effort to define how those rights are to be protected. In such cases in implementing the master program, then, the community follows its own rules, insists on the identified public access in connection with specified developments and leaves to the property owner the cost and effort necessary to protect their private property rights where such access is not legally authorized. As noted above, such programs turn the guidelines on their head. It is the local government, through its planning process, that is to define a program that in fact protects private property rights in advance of a mandate for public use of private property, not force each individual property owner to assert such rights or lose them.

In examining your local draft program you may be able to identify a number of problems that may exist in seeking to push public access requirements as part of the shoreline update. We will explore these specific defect types in the section that follows.

To reiterate the salient point of this paper, in developing planning policies and regulations dealing with public access, the burden is on the local government to pursue such regulation requirements in the development of their master programs "only" to the extent that such regulation is consistent with "all relevant constitutional and other legal limitations," *Ibid,* and provide a mechanism for dealing with the issue during the permit review process.

A problem with deferring evaluation of legal limits to public access conditions to the appeal stage of the permit process is that hearing examiners and City Councils will often decline to

consider issues of constitutional import, as will the Shoreline Hearings Board, which is a required administrative appeal before judicial review is warranted.[5]

Thus, property owners, upon whom unlawful requirements have been imposed, will be forced through several levels of expensive administrative litigation in which projects with unlawful conditions are likely held up while they must make the necessary record in forums that will likely refuse to decide the constitutional question. Only after administrative appeals are exhausted and judicial review is sought can the property owner seek real relief for the unlawful action. As noted above, the thesis of this paper is that the guidelines did not contemplate shifting the burden of proving violation of property rights in public access cases to the property owner in after-the-fact appeals. The law does not presume the validity of such conditions, and as will be discussed in detail below, the courts have made it very clear that a municipality seeking to impose public rights on private lands that intrude on the property right to exclude others has a heavy burden to prove entitlement to such conditions. As such, where master programs fail to make early and clear definition where public access conditions may lawfully be imposed, and a contemporary provision for protection of private rights in the process, those participating in the master program update process should challenge such efforts and seek to have local governments follow the program requirements in advance and not shift the burden to the property owner.

A more detailed discussion of the legal framework in which master program conditions must be viewed follows.

IV. The Constitution and Legal Limitations to Public Access

A. Private property is a recognized as a fundamental right under the Washington State Constitution and U.S. Constitutions

Any analysis of the authority of a Washington city or county to command public access to lands abutting the shoreline must first begin with the understanding of fundamental principles set forth in the State's constitution:

> A frequent recurrence to fundamental principles is essential to the security of individual right and the perpetuity of free government.

Article 1, section 32, Washington State Constitution.

[5] *See e.g. William Walker v. Point Ruston LLC,* SHB Nos. 09-013, 09-016 (Consolidated), Order on Summary Judgment, "The Board also concludes that its de novo review authority cures any process issues, and that to the extent Petitioner's claims raise constitutional challenges they are beyond the jurisdiction of the Board." p. 3.

In a treatise on the origins and meanings of section 32, the author noted the core principle in the state constitution to be the protection of individual rights, which as will be seen included property rights.

> At the heart of the Washington Constitution is the emphasis on protecting individual rights. Washington, like other states, begins its constitution with a Declaration of Rights. The Declaration of Rights sets the tone for Washington's government by proclaiming the paramount purpose of government; "governments ... are established to protect and maintain individual rights

Brian Snure, *A Frequent Recurrence To Fundamental Principles: Individual Rights*, 67 Washington Law Review 669, July, 1992.

The author discusses the "natural law" origins of Article I, section 32 and a much earlier article on natural law that recognized three fundamental attributes of individual rights:

> To Blackstone the three absolute rights which proceed from the law of nature are the right of personal security, the right of personal liberty and **the right of private property**.

Yale Law Journal, *The Law of Nature in State and Federal Judicial Decisions*, 25 YLJ 617, June, 1916.

Examining both federal and state jurisprudence on shoreline cases related to the recognition and protection of competing rights at the shoreline reveals a significant difference between public rights below the line of ordinary high water and the limitation on public rights to lands abutting the shoreline but above the line of high water, commonly referred to as fast lands.

B. Private property at the shoreline—Riparian lands vs. fast lands—the federal perspective

The ability of the public to regulate shorelines has been a topic of much jurisprudence through the country's history. The defining feature is that the public owned and could regulate without compensation the navigable waters of the U.S., but could not regulate without compensation those "fast lands," being defined as lands abutting shorelines above the line of ordinary high water.

A case addressing the accepted doctrine along navigable shorelines is *U.S. v. Willow River Power Co.*, 324 U.S. 499, 65 S.Ct. 761 U.S., 1945, in which the Court reviewed the historic rights of riparian owners vis-à-vis the public along the shorelines. Quoting a recognized author on the topic the court noted:

> The owner of the bank has no jus privatum, or special unufructuary interest, in the water. He does not from the mere circumstance that he is

> the owner of the bank, acquire any special or particular interest in the stream, over any other member of the public, except that, by his proximity thereto, he enjoys greater conveniences than the public generally. To him, *riparian ownership brings no greater rights than those incident to all the public, except that he can approach the waters more readily, and* ***over lands which the general public have no right to use for that purpose.***

324 U.S. at 507-508, emphasis supplied.

The key distinction in the historic shoreline cases was a recognition of a very different set of rules affecting properties along the shorelines. Below the line of ordinary high water on navigable waters—the "riparian" area—the public had an interest in the navigable stream that could be exercised without compensation to the abutting land owner in most circumstances. But above the line of ordinary high water, the public's right to act to interfere with the owner's rights came with a duty to compensate the private owner for interference, as the public had no inherent rights on fast lands. *U.S. v. Kansas City Life Ins. Co.*, 339 U.S. 799, 70 S.Ct. 885 U.S. 1950.

A final case that deals with the issue of navigability and public rights was *Kaiser Aetna v. U. S.*, 444 U.S. 164, 100 S.Ct. 383 U.S. Hawaii, 1979, in which the court was asked to deal with the issue of whether a private pond subsequently connected to a navigable water, created not only jurisdiction for the U.S. under USCOE permit authority over navigable waters, but also a right of the public to use the previously private pond.

The case summary provided a helpful overview:

> Mr. Justice Rehnquist, held that although marina fell within definition of "navigable waters of the United States" when owners dredged it and then connected it to a bay in the Pacific Ocean, so as to be subject to regulation by Corps of Engineers, acting under authority delegated it by Congress in Rivers and Harbors Appropriation Act, *Government could not require owners to make marina open to the public without compensating the owners.*

The language of the case is instructive on the limits of public authority over private property connected with shorelines.

> The navigational servitude, which exists by virtue of the Commerce Clause in navigable streams, gives rise to an authority in the Government to assure that such streams retain their capacity to serve as continuous highways for the purpose of navigation in interstate commerce. … But none of these cases ever doubted that *when the Government wished to acquire fast lands, it was required by the Eminent Domain Clause of the Fifth Amendment to condemn and pay fair value for that interest*.

444 U.S. at 177.

> In this case, we hold that the "right to exclude," so universally held to be a fundamental element of the property right, FN11 falls within this category of interests that the Government cannot take without compensation.

444 U.S. at 179-180.[6]

Significantly, at issue in the *Kaiser* case was access by water and ability to force the owner to accept public moorage at its marina on the formerly private pond, not access across the private lands owned by Kaiser.

For purposes of evaluating Shoreline Master Programs, the key point is that the Federal case law concerning lands abutting shorelines, the superior public interests stop at the line of ordinary high water, and in no instance give rights to public access across private property without compensation. The recognition of the private property right to "exclude others" is a fundamental principle of property ownership and applies to fast lands abutting the shoreline as well as others, and any state action abridging such rights would be subject to very close scrutiny as violating Federal constitutional rights.

C. Federal limitations on state actions

Three principles are well established in connection with private rights on lands along shorelines. While often discussed, it is useful to look at cases that are commonly referred to in the context of "nexus," "proportionality" and "equal protection," as each may bear on analysis of a particular local requirement.

1. Nexus: *Nollan v. California Coastal Commission*, 483 U.S. 825, 107 S.Ct. 3141 U.S.Cal., 1987.

The first case is *Nollan,* which is referred to in short hand for the doctrine of "nexus" or reasonable relationship between the condition imposed and the burdens created by the project under review. The case involved a condition that the property owners dedicate a public trail across the ocean frontage of their property as a condition of securing permission to tear down a small cabin and build a 1,600 square foot home. It is instructive in that case to review the specific rationale relied upon by the state and why such rationalizations were rejected by the court, as the state approach may be found behind many "public access" demands in local master programs.

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[6] [FN 11]. As stated by Mr. Justice Brandeis, "[a]n essential element of individual property is the legal right to exclude others from enjoying it." [citations omitted] Thus, if the Government wishes to make what was formerly Kuapa Pond into a public aquatic park after petitioners have proceeded as far as they have here, it may not, without invoking its eminent domain power and paying just compensation, require them to allow free access to the dredged pond.

In *Nollan* the court visited the public authority on privately owned shorelines in which the Nollans would be required to accommodate a linear trail along the beach to facilitate public traffic. The state argued the trail was permissible in connection with legitimate public interests.

> The Commission argues that among these permissible purposes are *protecting the public's ability to see the beach*, assisting the public in *overcoming the "psychological barrier" to using the beach* created by a developed shorefront, and *preventing congestion on the public beaches*. We assume, without deciding, that this is so-in which case the Commission unquestionably would be able to deny the Nollans their permit outright if their new house (alone, or by reason of the cumulative impact produced in conjunction with other construction) FN4 would substantially impede these purposes, unless the denial would interfere so drastically with the Nollans' use of their property as to constitute a taking.

483 U.S at 835-36.

But the court pointed to two doctrines that emphasize the burden is on the public to show a real justification for a condition requiring interference with standard property rights. The mere fact of proximity to the water is not sufficient justification standing alone to intrude on private rights. The footnote referred to above provides the first caution:

> FN4. If the Nollans were being singled out to bear the burden of California's attempt to remedy these problems, although they had not contributed to it more than other coastal landowners, the State's action, even if otherwise valid, might violate either the incorporated Takings Clause or the Equal Protection Clause. One of the principal purposes of the Takings Clause is "to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole."

483 U.S at 836.

The second note of caution comes from the court's view that the right of exclusion is a right to be protected from excessive regulatory control. Specifically, the requirement for a linear pathway in connection with an otherwise permissible shoreline development had no connection to the interest in view corridors and therefore constituted an impermissible condition. In the language of the court:

> We have repeatedly held that, as to property reserved by its owner for private use, "the right to exclude [others is] 'one of the most essential sticks in the bundle of rights that are commonly characterized as property.' [citations omitted] In *Loretto* we observed that where governmental action results in "[a] permanent physical occupation" of the property, by the government itself **or by others**, [citation omitted], "our cases uniformly

> have found a taking to the extent of the occupation, without regard to whether the action achieves an important public benefit or has only minimal economic impact on the owner," [citations omitted] We think a "***permanent physical occupation" has occurred, for purposes of that rule, where individuals are given a permanent and continuous right to pass to and fro, so that the real property may continuously be traversed, even though no particular individual is permitted to station himself permanently upon the premises.***

483 U.S at 831-32, emphasis supplied.

The court noted that the ability to deny all building to achieve a legitimate public purpose could give rise to certain restrictions, including a view corridor. But without some direct connection to the legitimate purpose:

> … unless the permit condition serves the same governmental purpose as the development ban, the building restriction is not a valid regulation of land use but "an out-and-out plan of extortion."

483 U.S at 837.

The court also made it clear that mere ad hoc references to "legitimate public purposes" was not sufficient to satisfy the test of validity and due to the interests at stake. A heightened scrutiny was warranted to assure that any conditions imposed that introduce public access to private property are in fact based on a "substantial advancement "of the public interests to be protected and not merely a rationalization for avoiding compensation where compensation should be required:

> We view the Fifth Amendment's Property Clause to be more than a pleading requirement, and compliance with it to be more than an exercise in cleverness and imagination. As indicated earlier, our cases describe the condition for abridgement of property rights through the police power as a "*substantial* advanc[ing]" of a legitimate state interest. *We are inclined to be particularly careful about the adjective where the actual conveyance of property is made a condition to the lifting of a land-use restriction, since in that context there is heightened risk that the purpose is avoidance of the compensation requirement, rather than the stated police-power objective*

483 U.S at 841, emphasis supplied.

In the context of the Shoreline updates, where public access is being required in the context of the development or redevelopment of a shoreline property, the questions to be asked are:

- Is there a legitimate public interest identified that is being adversely affected by the development in question, and

- Does the public access requirement imposed "substantially advance" the "legitimate" public interest adversely affected by the development?

Where, as in *Nollan*, there is no indicia of a public right to cross private lands to reach the water, where the interests involved were at best the "view of the water" from the public right of way, and where the condition imposed goes beyond protecting the protected public interest, the condition lacks the necessary "nexus" with the protected public interest and is an unlawful exercise of regulatory authority without the exercise of eminent domain (taking) authority.

2. Proportionality: *Dolan v. City of Tigard*, 512 U.S. 374, 114 S.Ct. 2309 U.S.Or., 1994.

Seven years after *Nollan*, a second case was decided in which the court took the next step and addressed the issue of limitations on municipal authority where the necessary nexus between the public interests to be served and conditions imposed are found to exists. In *Dolan*, the property owner wanted to double the size of a commercial store adjacent to Fanno Creek in the City of Tigard. The project clearly increased the need for additional stormwater controls and increased traffic, which the record showed would be alleviated in part by encouraging the use of bicycles. As a result, the City looked to a City code provision that required a dedication of a "greenway" along Fanno Creek to deal with stormwater, but also provided additional public access, and required the improvement of a 15-foot trail system to accommodate bicycles. The provisions were upheld by the Oregon Courts by reason of the existence of the "nexus" with legitimate public interests required by *Nollan*.

But on appeal to the U.S Supreme Court, the Court examined the issue of the need for a reasonable relationship between the problem being affected and the condition imposed.

> Under the well-settled doctrine of "unconstitutional conditions," the government may not require a person to give up a constitutional right-here the right to receive just compensation when property is taken for a public use-in exchange for a discretionary benefit conferred by the government where the benefit sought has little or no relationship to the property.

512 U.S at 385.

The court reiterated the heightened scrutiny required when examining an exaction ostensibly tied to a condition that proposed public use as a condition of private development and concluded that in addition to "nexus" the reviewing agencies had to consider a second inquiry, the relationship between the impact created and the condition imposed and the need for some "reasonable relationship."

> The second part of our analysis requires us to determine whether the degree of the exactions demanded by the city's permit conditions bears the required relationship to the projected impact of petitioner's proposed development. *Nollan, supra*, [citations omitted] (" '[A] use restriction may

> constitute a "taking" if not **reasonably necessary** to the effectuation of a of a **substantial government purpose**' ").

512 U.S at 388, emphasis supplied.

After a lengthy discussion of the different approaches to exactions from the most strict to a more general "reasonable relationship" test, the court concluded that federal law looks to mirror the states' which have adopted the "reasonable relationship" test, but found the "reasonableness" test potentially confusing and concluded:

> We think the "reasonable relationship" test adopted by a majority of the state courts is closer to the federal constitutional norm than either of those previously discussed. But we do not adopt it as such, partly because the term "reasonable relationship" seems confusingly similar to the term "rational basis" which describes the minimal level of scrutiny under the Equal Protection Clause of the Fourteenth Amendment. *We think a term such as "rough proportionality" best encapsulates what we hold to be the requirement of the Fifth Amendment.*

512 U.S at 391, emphasis supplied.

The court continued, pointing out that it is the municipality that carries a heavy burden of proof. On the issue of burden of proof, the language of the court is critical in evaluating how local master programs address the need for supporting findings as a condition of imposing any type of public access requirements:

> Justice Stevens' dissent takes us to task for placing the burden on the city to justify the required dedication. He is correct in arguing that in evaluating most generally applicable zoning regulations, the burden properly rests on the party challenging the regulation to prove that it constitutes an arbitrary regulation of property rights. *See, e.g., Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 47 S.Ct. 114, 71 L.Ed. 303 (1926). **Here, by contrast, the city made an adjudicative decision to condition petitioner's application for a building permit on an individual parcel. In this situation, the burden properly rests on the city.** *See Nollan*, 483 U.S., at 836, 107 S.Ct., at 3148.

512 U.S at 391, Footnote 8, emphasis supplied.

In describing the inherent vagueness of a "reasonable" relationship the court said:

> *No precise mathematical calculation is required,* ***but 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.***

512 U.S. at 391, emphasis supplied.

In *Dolan*, the court found that there was no link between the desire to control flooding and the amount to land required to be dedicated to public access. The court found no nexus for the public access requirement in conjunction with a flood control condition. With respect to bicycles, the mere conclusionary statement that the bicycle path "would alleviate traffic" was not sufficient.

> … "[t]he findings of fact that the bicycle pathway system '*could* offset some of the traffic demand' is a far cry from a finding that the bicycle pathway system *will*, or is *likely to*, offset some of the traffic demand." 317 Ore., at 127, 854 P.2d, at 447 [emphasis in original]. No precise mathematical calculation is required, but the city must make some effort to quantify its findings in support of the dedication for the pedestrian/bicycle pathway beyond the conclusory statement that it could offset some of the traffic demand generated.

512 U.S at 395-396.

After *Nollan* and *Dolan*, a community can no longer assert that the condition in question is simply required by city code and have the courts uphold the validity of the condition based on the presumption of validity of the city codes. The failure of most draft master programs to make that burden of proof clear in the process by which the city evaluates shoreline permits and requires varying degrees of public access as a condition of development is a point in which most draft programs fail to achieve the SMA guideline requirement to create a process protective of property rights.

3. Equal protection: *Nollan v. California Coastal Commission*, 483 U.S. 825, 107 S.Ct. 3141 U.S.Cal., 1987.

The *Nollan* court did not need to reach the equal protection issues because of the penultimate finding that sufficient nexus did not exist to warrant the requirements for a trail. In a footnote, however, they identified that equal protection is another concern when evaluating the requirement for a condition tied to shoreline access. As stated by the court:

> If the Nollans were being singled out to bear the burden of California's attempt to remedy these problems, although they had not contributed to it more than other coastal landowners, the State's action, even if otherwise valid, might violate either the incorporated Takings Clause or the Equal Protection Clause. One of the principal purposes of the Takings Clause is "to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Armstrong v. United States* [citations omitted]

483 U.S. at 835-36, FN 4.

Equal protection asks the question whether distinctions in the treatment of different properties are warranted by a rational basis for differentiation or simply an opportunistic requirement because of the property's location, but without any real justification for differentiating impacts. In *Village of Belle Terre v. Boraas*, 416 U.S. 1, 94 S.Ct. 1536, 39 L.Ed.2d 797 (1974), the court concluded that no equal protection violation will be found under a rational basis analysis if governmental action had some **rational relationship** to the permissible state objective. But given the heightened scrutiny applied to cases in which the right to exclude others is abridged by public access requirements, here again, the municipal requirement for public access to the shoreline must achieve a rational public interest and not be inequitably applied.

More recently in *Village of Willowbrook v. Olech*, 528 U.S. 562, 120 S.Ct. 1073U.S., 2000, the court stated the rule in the following terms:

> '[t]he purpose of the equal protection clause of the Fourteenth Amendment is to secure every person within the State's jurisdiction against intentional and arbitrary discrimination, whether occasioned by express terms of a statute or by its improper execution through duly constituted agents.'[Citations omitted]

528 U.S. at 564.

The Ecology guideline suggesting that all subdivisions in excess of four lots be forced to provide public access begs the question of equal protection violation. Yes it applies to all subdivided waterfront lots, but fails to address why a house on a lot created from the subdivision of a waterfront parcel created a demand for water access different from the house on an adjoining lot created out of a non waterfront lot—it does not. In fact by forcing the waterfront property owners to provide public access to their property with subdivision is to impose a double burden on the waterfront owner not paid by the upland owner. General community public access is paid for by property taxes. Generally waterfront property taxes are higher than non waterfront properties due to the value placed on waterfront. But the waterfront subdivider is given no break in their taxes by reason of alleviating the burden on the public by providing a portion of the City's public access. Instead, they are required to provide public access and still pay property taxes to provide the community public access—a distinction without rational basis for which challenge is certainly warranted.

D. Private property at the shoreline—Riparian lands v. fast lands—the state perspective

Washington law very much mirrors federal law in the recognition and protection of private property rights along the state's shorelines.

Washington courts have long recognized the "right to exclude" others is a fundamental attribute of private property. In an unreported case, *City of Bainbridge Island v. Brennan*, 128 Wn. App. 1046, Not Reported in P.3d, 2005 WL 1705767 Wn. App., Div. 2, 2005, the court was

comfortable reciting the basic tenants of Washington law in a footnote so well accepted that the case did not warrant publication:

> FN 29. Property interests are not constitutionally created but are reasonable expectations of entitlement derived from independent sources such as state law. *Mission Springs, Inc.*, 134 Wn.2d at 962 n. 15 (citing *Bd. of Regents v. Roth*, 408 U.S. 564, 577, 92 S.Ct. 2701, 33 L.Ed.2d 548 (1972)). The right to exclude others is an essential stick in the bundle of property rights. *City of Sunnyside v. Lopez*, 50 Wn. App. 786, 795 n. 7, 751 P.2d 313 (citing *Kaiser Aetna v. United States*, 444 U.S. 164, 100 S.Ct. 383, 62 L.Ed.2d 332 (1979)), review denied, 110 Wn.2d 1034 (1988).

2005 WL 1705767 at 16.

In published decisions the Washington Courts have recognized that the property rights protected by the Washington State Constitution encompass the full range of rights inherent in property, *Orion Corp. v. State*, 103 Wn.2d 441, 693 P.2d 1369 (1985).

Washington State also has a substantial body of law dealing with riparian rights and the public trust doctrine, which mirrors the federal law on protecting navigability and ownership of the waters *below ordinary high water line* under the "public trust" doctrine:

> According to the public trust doctrine, the State holds state shorelines and waters in trust for the people of Washington, and "the state can no more convey or give away this jus publicum [FN8] interest than it can 'abdicate its police powers in the administration of government and the preservation of the peace.' "
>
> FN8. Jus publicum refers to the principle that the public has an overriding interest in the navigable ***waterways and the lands under them***. *Caminiti*, 107 Wash.2d at 668, 732 P.2d 989.

Samson v. City of Bainbridge Island, 149 Wn. App. 33, 202 P.3d 334 (2009).

But it is important to realize that the public trust doctrine deals with the navigable waterways "and the lands under them" and not the "fast lands" above the line of ordinary high water except to the extent that activities on the fast lands adversely affect the public interest in navigability. As we examine the cases, it is clear that the public trust doctrine does not translate into a public right to command public access over private lands abutting the shoreline.

1. The public trust doctrine and SMA.

Washington cases have held that the public trust doctrine is vital in the protection of state interests in navigable waters and the associated tidelands:

> The public trust doctrine is expressed, in part, in article XVII, section 1 of the Washington constitution, which reserves state ownership in 'the beds and shores of the state's navigable waters.' *Citizens*, 124 Wn. App. at 571 (citing *Rettkowski v. Dep't of Ecology*, 122 Wn.2d 219, 232, 858 P.2d 232 (1993)); see also *Esplanade Properties, LLC v. City of Seattle*, 307 F.3d 978, 985 (9th Cir.2002), cert. denied, 539 U.S. 926 (2003). The doctrine is also reflected in Washington's Shoreline Management Act, adopted in 1971. *See Esplanade Properties, LLC*, 307 F.3d at 985-86.
>
> ***
>
> The public trust doctrine extends 'beyond navigational and commercial fishing rights to include 'incidental rights of fishing, boating, swimming, water skiing, and other related recreational purposes.' *Orion Corp. v. State*, 109 Wn.2d 621, 641, 747 P.2d 1062 (1987) ('*Orion II*') (quoting *Wilbour v. Gallagher*, 77 Wn.2d 306, 316, 462 P.2d 232 (1969), cert. denied, 400 U.S. 878 (1970)), cert. denied, 486 U.S. 1022 (1988); *see also Johnson*, 67 Wash. L.Rev. at 567; *Longshore*, 141 Wn.2d at 427.

2005 WL 1705767 at 18.

But the public trust doctrine in this state, similar to the federal rights in navigation, are limited to the public interest in "the beds and shores" of the state's navigable waters. As such, the authority to regulate uplands under the public trust doctrine is limited to protection of that interest. While such interests include interests in the recreational use of the water and the necessary need to access the water, the Shoreline Management Act limits the upland requirements for public access to "public access of publicly owned shorelines" and does not provide rationale or justification for public access across private lands outside traditional notions of nexus and proportionality recognized at the federal level.

2. Nexus and proportionality—a state requirement.

Nexus has been a well recognized limit on the right of Washington municipalities to impose conditions otherwise designed to serve the public interest. The leading case under constitutional constrains is *Unlimited v. Kitsap County*, 50 Wn. App. 723, 750 P.2d 651 (1988), in which the county attempted to require a property owner to extend a county road to a property that was not developing and which road was not used or necessitated by a small commercial development on another portion of the property. As noted by the Court of Appeals:

> A property interest can be exacted without compensation only upon a proper exercise of government police power. Such power is properly exercised in zoning situations where the problem to be remedied by the exaction arises from the development under consideration, and the exaction is reasonable and for a legitimate public purpose. Unless these requirements are met, the exaction is an unconstitutional taking

50 Wn. App. at 727.

More recently the court in *Honesty in Environmental Analysis and Legislation (HEAL) v. Central*, 96 Wn. App. 522, 979 P.2d 864 (1999) reiterated the fundamental limits on permitting authority in language paralleling and citing *Nollan* and *Dolan*:

> Simply put, the nexus rule permits only those conditions necessary to mitigate a specific adverse impact of a proposal. The rough proportionality requirement limits the extent of the mitigation measures, including denial, to those which are roughly proportional to the impact they are designed to mitigate. Both requirements have also been incorporated into the GMA amendments to RCW 82.02 authorizing development conditions.

96 Wn. App at 533-534.

The Washington nexus and proportionality requirements have been incorporated into a statute, RCW 82.02.020, which was the statutory basis for both *Isla Verde* and for *Benchmark*. A recent Court of Appeals case holds RCW 82.02.020 does not apply to shoreline master programs. The decision does not change the requirements, it merely shifts review to constitutional guidelines rather than statutory, but in practice, the end result is the same.[7] Thus Washington cities and counties are limited when seeking to impose a public access condition on shoreline development, even one dictated by an adopted master program.

- Nexus: The municipality has the burden to prove that the condition is "reasonably necessary" to mitigate an existing problem created by the project under the facts of the particular case and may not simply rely on a boilerplate code provision to impose a limitation on property. *Isla Verde v. City of Camas*, 146 Wn.2d 740, 49 P.3d 867 (2002) and

- Proportionality: The municipality may not require the construction of a public facility to be developed far in excess of the burden imposed on a legitimate government interest. *Benchmark v. Battleground,* 146 Wn.2d 685, 49 P.3d 860 (2002).

Washington courts also recognize the equal protection concerns when a local government attempts to exact certain conditions from some but not all equally situate properties. *Samson v. City of Bainbridge Island*, 149 Wn. App. 33, 62, 202 P.3d 334, 349 (2009). A good summary of the tests and requirements were given by the Supreme Court in *Habitat Watch v. Skagit County*, 155 Wn.2d 397, 120 P.3d 56 (2005), in which the court said:

[7] In *Citizens for Rational Shoreline Planning v. Whatcom County*, 155 Wn. App. 937, 230 P.3d 1074 (2010), the Court of Appeals, Dwyer, C.J., held that SMPs were not subject to statutory prohibition in RCW 82.02.020 on municipalities from imposing direct or indirect taxes, fees, or charges on development. The case did not diminish the constitutional considerations, simply that RCW 82.02.020 was not the appropriate vehicle to challenge SMP provisions.

> The right to equal protection guarantees that persons similarly situated with respect to a legitimate purpose of the law receive like treatment. In order to determine whether the equal protection clause has been violated, one of three tests is employed. First, strict scrutiny is applied when a classification affects a fundamental right or a suspect class. Second, intermediate scrutiny is applied when a classification affects both a liberty right and a semi-suspect class not accountable for its status. The third test is rational basis. Under this inquiry, the legislative classification is upheld unless the classification rests on grounds wholly irrelevant to the achievement of legitimate state objectives.

155 Wn.2d at 413.

The guidelines on subdivision rules suggesting that the city or county should require dedication of public access for subdivisions on waterfront properties for projects in excess of four lots creates an apparent equal protection problem. In the first place, the guidelines assume that the creation of four or fewer lots does not create a burden on the shoreline and therefore does not have to provide public access. A plat of five or more units are typically required to provide public access. The problem with the provision, and local master programs adopting the language, is that the provision assumes that the creators of lots in the shoreline are required to provide "public access" a "public amenity, while an adjoining development, with exactly the same member of new units does not. This failure to treat equal properties equally raises significant equal protection issues, as a leading case noted:

> The aim and purpose of the special privileges and immunities provision of article 1, section 12, of the State Constitution and of the equal protection clause of the Fourteenth Amendment of the Federal Constitution is to secure equality of treatment of all persons, without undue favor on the one hand or hostile discrimination on the other.
>
> To comply with these constitutional provisions, legislation involving classifications must meet and satisfy two requirements: (1) The legislation must apply alike to all persons within the designated class; and (2) reasonable ground must exist for making a distinction between those who fall within the class and those who do not.

State ex rel. Bacich v. Huse, 187 Wash. 75, 59 P.2d 1101 (1936), rev'd on other grounds.

If the City had a park provision where a level of service for waterfront parks was established, and residential developers were required to pay a fee in lieu of park requirements (which met the test of *Trimen Dev't Co. v. King County*, 124 Wn.2d 261, 877 P.2d 187 (1994)), then a waterfront property owner may be permitted to choose to provide comparable water access as an alternative to paying the fee. But in such case, all developers are paying for water access for new homes, and the property owner with waterfront property is not required to shoulder the burden of

providing waterfront access for new subdivisions in a manner different from all other developers of residential lots. The distinction between upland and waterfront development is not the type of distinction sufficient to warrant a duty to provide public parks on one and not on the other and the master program conditions mirroring the WAC subdivision public access provisions will certainly be subject to challenge.

Shifting public burdens to private owners simply due to proximity to water is not a sufficient justification to create a discriminatory requirement others in the community do not share, and should provide a basis for complaint both as written and as applied where communities fail to recognize the concern.

D. Summary of Concerns

When participating in preadoption reviews of draft master programs, property owners and groups would do well to point out the provisions of the Governing Principles, WAC 173-26-186, and the provisions therein that specifically provide:

> "A process established for this purpose, related to the constitutional takings limitation, is set forth in a publication entitled, "State of Washington, Attorney General's Recommended Process for Evaluation of Proposed Regulatory or Administrative Actions to Avoid Unconstitutional Takings of Private Property," first published in February 1992.

Washington State Attorney General (Eikenberry) articulated the basic elements of property rights protection in the context of the state's Growth Management Act, in which he attached a copy of the AGO referenced in the shoreline Governing Principles and provided his own clarification. I have attached a copy of the AGO and attachment for reference purposes (Attachment 2). His summaries are not limited to GMA regulations and are equally applicable to shoreline-related ordinances. His summaries provide a useful checklist in the evaluation of any master program public access provision. The problem with too many draft programs presently in circulation is that the authors have not considered or have chosen to ignore the Attorney General's advice, much to the ultimate peril of the local jurisdiction considering adoption.

> The concept that private property shall not be taken for public use has its origins in the Fifth Amendment of the United States Constitution which provides in part that "[n]or shall private property be taken for public use, without just compensation." This restriction is applied to the states through the Fourteenth Amendment to the United States Constitution. Article 1, section 16 (amendment 9) of the Washington Constitution provides the same right. *Sintra, Inc. v. Seattle*, 119 Wn.2d 1, 13, 829 P.2d 765 (1992).
>
> In addition to outright physical appropriation of property, a taking can be accomplished by over-regulation. A taking by regulation is often called an

> inverse condemnation, because the condemnation is found by the court after it has already been implemented by the regulation.

AGO 1992 No. 23, see copy attached as Attachment 2.

After a detailed analysis of a variety of conditions and remedies, the Attorney General identified a series of warning signs that local governments should use in examining a rule or regulation that affects property rights. Three of the areas where caution was suggested were:

- Does the Regulation or Action Result in a Permanent Physical Occupation of Private Property?

  > Regulation or action resulting in a permanent physical occupation of all or a portion of private property will generally constitute a taking. For example, a regulation which required landlords to allow the installation of cable television boxes in their apartments was found to constitute a taking. *See Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982).

- Does the Regulation or Action Require a Property Owner to Dedicate a Portion of Property or to Grant an Easement?

  > If the dedication of property is not reasonably and specifically designed to prevent or compensate for adverse impacts of a proposed development on a legitimate public interest worthy of government protection, there may be a taking.

- Does the Regulation Deny a Fundamental Attribute of Ownership?

  > Regulations which deny the landowner a fundamental right of ownership, including the right to possess, exclude others and dispose of all or a portion of the property are potential takings.

AGO 1992 No. 23, pp. 12-13.

As we look at the implementation of public access guidelines in many draft master programs, the fact that the draft merely mirrors the WAC provisions for access, without providing a mechanism for limiting the requirements based on legal constraints, hits all target issues in creating a suspect requirement:

- They command the physical occupation of private property with a public amenity—a paved or surfaced trail to be maintained by the private property owner.

- They command that the rights of public access be permanent through legal encumbrance on title through restrictive covenant or easement.

- They deny the private land owner a fundamental attribute of ownership; that is, the right to exclude others.

- They treat waterfront subdivisions differently than upland subdivisions with the same density and projected population.

As noted by the Attorney General, the mere fact that the activity is suspect does not mean it is unlawful. However, the opinion did provide that upon review of a land use plan by the State Growth Management Hearings Board, the question of whether a land use plan was clearly erroneous was certainly appropriate for review. Since protection of private property rights was an issue to be considered in the preparation of land use plans under RCW 36.70A.020:

> … with regard to property rights, a government entity is **not** in compliance with the GMA if **it fails to consider property rights in developing its plans** and regulations, or if it considers property rights in an arbitrary and discriminatory manner. The Boards have jurisdiction to consider these issues

AGO 1992 No. 23, p. 6. The absence of a local "public process" addressing the issue of protecting property rights is a "failure to consider" a required element of the SMA guidelines and as such would certainly be a valid grounds for challenging the shoreline master program, which are now reviewed for compliance with the guidelines by the Growth Board for those counties under GMA jurisdiction and the Shorelines Hearings Board for those jurisdictions not planning under GMA. WAC 173-26-130.

Thus, the fatal flaw in many city plans is that there is no identified process or administrative guidelines to square the specific requirements in the master program with the specific limitation in the master program guidelines that:

> (b)(i) Promote and enhance the public interest with regard to rights to access waters held in public trust by the state *while protecting private property rights* and public safety
>
> (c) Planning process to address public access. Local governments should plan for an integrated shoreline area public access system that identifies specific *public needs* and *opportunities to provide public access*. Such a system can often be more effective and economical than applying uniform public access requirements to all development. This planning should be integrated with other relevant comprehensive plan elements, especially transportation and recreation. ***The planning process shall also comply with all relevant constitutional and other legal limitations that protect private property rights.***

WAC 173-26-221(4).

Without the public process to identify and modify conditions appropriate to given conditions, local programs will be subject to challenge and critique as written, and local governments may not be able to address excessive conditions as applied until after a long appeal process, in which the risk of damages for unlawful delay or wrongful conditions are very much a reality.

SHORELINE GUIDELINES: PUBLIC ACCESS WAC 173-221(4)

(4) ***Public access.***

(a) **Applicability.** Public access includes the ability of the general public to reach, touch, and enjoy the water's edge, to travel on the waters of the state, and to view the water and the shoreline from adjacent locations. Public access provisions below apply to all shorelines of the state unless stated otherwise.

(b) **Principles.** Local master programs shall:

(i) Promote and enhance the public interest with regard to rights to access waters held in public trust by the state while protecting private property rights and public safety.

(ii) Protect the rights of navigation and space necessary for water-dependent uses.

(iii) To the greatest extent feasible consistent with the overall best interest of the state and the people generally, protect the public's opportunity to enjoy the physical and aesthetic qualities of shorelines of the state, including views of the water.

(iv) Regulate the design, construction, and operation of permitted uses in the shorelines of the state to minimize, insofar as practical, interference with the public's use of the water.

(c) **Planning process to address public access.** Local governments should plan for an integrated shoreline area public access system that identifies specific public needs and opportunities to provide public access. Such a system can often be more effective and economical than applying uniform public access requirements to all development. This planning should be integrated with other relevant comprehensive plan elements, especially transportation and recreation. The planning process shall also comply with all relevant constitutional and other legal limitations that protect private property rights.

Where a port district or other public entity has incorporated public access planning into its master plan through an open public process, that plan may serve as a portion of the local government's public access planning, provided it meets the provisions of this chapter. The planning may also justify more flexible offsite or special area public access provisions in the master program. Public participation requirements in WAC 173-26-201 (3)(b)(i) apply to public access planning.

At a minimum, the public access planning should result in public access requirements for shoreline permits, recommended projects, port master plans, and/or actions to be taken to develop public shoreline access to shorelines on public property. The planning should identify a variety of shoreline access opportunities and circulation for pedestrians (including disabled persons), bicycles, and vehicles between shoreline access points, consistent with other comprehensive plan elements.

(d) **Standards.** Shoreline master programs should implement the following standards:

(i) Based on the public access planning described in (c) of this subsection, establish policies and regulations that protect and enhance both physical and visual public access. The master program shall address public access on public lands. The master program should seek to increase the amount and diversity of public access to the state's shorelines consistent with the natural shoreline character, property rights, public rights under the Public Trust Doctrine, and public safety.

(ii) Require that shoreline development by public entities, including local governments, port districts, state agencies, and public utility districts, include public access measures as part of each development project, unless such access is shown to be incompatible due to reasons of safety, security, or impact to the shoreline environment. Where public access planning as described in WAC 173-26-221 (4)(c) demonstrates that a more effective public access system can be achieved through alternate means, such as focusing public access at the most desirable locations, local governments may institute master program provisions for public access based on that approach in lieu of uniform site-by-site public access requirements.

(iii) Provide standards for the dedication and improvement of public access in developments for water-enjoyment, water-related, and nonwater-dependent uses and for the subdivision of land into more than four parcels. In these

cases, public access should be required except:

(A) Where the local government provides more effective public access through a public access planning process described in WAC 173-26-221 (4)(c).

(B) Where it is demonstrated to be infeasible due to reasons of incompatible uses, safety, security, or impact to the shoreline environment or due to constitutional or other legal limitations that may be applicable.

In determining the infeasibility, undesirability, or incompatibility of public access in a given situation, local governments shall consider alternate methods of providing public access, such as offsite improvements, viewing platforms, separation of uses through site planning and design, and restricting hours of public access.

(C) For individual single-family residences not part of a development planned for more than four parcels.

(iv) Adopt provisions, such as maximum height limits, setbacks, and view corridors, to minimize the impacts to existing views from public property or substantial numbers of residences. Where there is an irreconcilable conflict between water-dependent shoreline uses or physical public access and maintenance of views from adjacent properties, the water-dependent uses and physical public access shall have priority, unless there is a compelling reason to the contrary.

(v) Assure that public access improvements do not result in a net loss of shoreline ecological functions.

Wash. AGO 1992 NO. 23, 1992 WL 512203 (Wash.A.G.)

***1** Office of the Attorney General
State of Washington

AGO 1992 No. 23

October 13, 1992

GROWTH MANAGEMENT ACT—GROWTH PLANNING HEARINGS BOARDS—PROPERTY—ADMINISTRATIVE LAW—Appeal to Growth Planning Hearings Boards Based on Claim That Regulation has Negative Impact on Property

1. RCW 36.70A.280 authorizes the Growth Planning Hearings Boards to hear petitions which allege that governments planning under the Growth Management Act are not in compliance with the requirements of the Act as it relates to plans and regulations adopted pursuant to RCW 36.70A.040. One requirement of the Act is that governments adopting plans and regulations consider the goal of protecting private property rights. The Boards have jurisdiction over petitions that allege that private property rights have not been considered or have been considered in an arbitrary or discriminatory manner.

2. The Growth Management Act does not contain any provision prohibiting the adoption of plans and regulations that may negatively affect a particular private property interest. Therefore, RCW 36.70A.280 does not authorize the Growth Planning Hearings Boards to grant relief to a specific property owner if plans and regulations do have a negative impact on the owner's specific property and a property owner cannot challenge plans or regulations based solely on a claim that the plans or regulations result in a negative impact on the owner's property.

3. A city or county that adopts plans or regulations pursuant to RCW 36.70A.040 is not required to give individual notice to each property owner whose property value may be negatively impacted as a result of the plans or regulations.

Honorable Elmira Forner
State Representative

Dear Representative Forner:

By letter previously acknowledged, you asked our opinion on several questions related to the Growth Management Act, chapter 36.70A RCW as it relates to the protection of private property rights. RCW 36.70A.040 requires certain counties and cities to adopt a comprehensive land use plan and development regulations. RCW 36.70A.280 provides that the Growth Planning Hearings Boards, established pursuant to RCW 36.70A.250, can hear and determine certain petitions challenging the plans and regulations adopted pursuant to RCW 36.70A.040. Your questions relate to this appeal process. This opinion does not involve a property owner's ability to seek relief in court for an alleged unconstitutional taking of private property by the government. The appeal process before the Growth Planning Hearings Boards does not limit the relief available to a property owner in such a judicial action.

We paraphrase your questions as follows:

1. Do the Growth Planning Hearings Boards have the statutorily conferred jurisdiction to hear a claim which alleges that a city or county failed to properly consider the impact of its comprehensive plans or regulations on private property rights?

***2** 2. Do the Growth Planning Hearings Boards have the statutorily conferred jurisdiction to determine whether a comprehensive plan or regulation negatively impacts an individual owner's specific property?

3. If the answer to Question 2 is yes, what criteria should the Growth Planning Hearings Board use in determining whether the plans or regulations result in a negative impact on the owner's property?

4. Is a county or city that adopts comprehensive plans or regulations pursuant to RCW 36.70A.040, required to give individual notice to each private property owner whose property value may be negatively impacted as a result of the plans or regulations?

The answer to Question 1 is yes. The answers to Questions 2 and 4 are no. Since the answer to Question 2 is no, we do not reach Question 3.

BACKGROUND

Before addressing the specific questions, some background discussion of the relevant law is necessary. Your inquiries relate mainly to the Growth Management Act (GMA), originally enacted in 1990. Laws of 1990, 1st Ex.Sess., ch. 17. This legislation was intended to govern certain counties and cities in planning urban growth.

The GMA requires some government entities [FN1] to formulate and enact comprehensive land use plans and development regulations. RCW 36.70A.040. Each plan must include the following mandatory items:

1. A land use element
2. A housing element
3. A capital facilities element
4. A utilities element
5. A rural element (for counties only)
6. A transportation element

RCW 36.70A.070. Those counties which must act are to designate an urban growth area within which urban growth may occur but outside of which only nonurban growth is permitted. RCW 36.70A.110. Those counties and cities must enact development regulations to implement the comprehensive plan. RCW 36.70A.120. The GMA also specifies that government entities must designate and adopt development regulations addressing natural resource lands and critical areas. RCW 36.70A.060, .170.

In developing and implementing the comprehensive plan and development regulations, government entities are required to establish procedures for public participation. RCW 36.70A.140. That provision further states: “Errors in exact compliance with the established procedures shall not render the comprehensive land use plan or development regulations invalid if the spirit of the procedures is observed.” Id.

In addition to the requirements set forth above, the GMA also sets forth a list of goals which are to be considered in enacting plans and regulations. The statute provides:

> Planning goals. The following goals are adopted to guide the development and adoption of comprehensive plans and development regulations of those counties and cities that are required or choose to plan under RCW 36.70A.040. The following goals are not listed in order of priority and shall be used exclusively for the purpose of guiding the development of comprehensive plans and development regulations[.]

***3** RCW 36.70A.020 (emphasis added). The GMA then lists the following 13 goals:

1. Urban growth
2. Reduced sprawl
3. Transportation
4. Housing
5. Economic development
6. Property rights

7. Permits
8. Natural resource industries
9. Open space and recreation
10. Environment
11. Citizen participation and coordination
12. Public facilities and services
13. Historic preservation

RCW 36.70A.020.

In 1991, the GMA was modified and expanded. Laws of 1991 1st Sp.Sess., ch. 32. Additional requirements and considerations were mandated for planning. As relevant to the present questions, however, the most significant change to the GMA in 1991 was the creation of the Growth Planning Hearings Boards (Boards).

Three boards with regional jurisdictional boundaries were established. RCW 36.70A.250. The members of the Boards are appointed by the Governor. RCW 36.70A.260. The Boards are granted authority to hear only those petitions which allege either:

> (a) That a state agency, county, or city is not in compliance with the requirements of this chapter, or chapter 43.21C RCW [FN2] as it relates to plans, regulations, and amendments thereto, adopted under RCW 36.70A.040; or (b) that the twenty-year growth management planning population projections adopted by the office of financial management pursuant to RCW 43.62.035 should be adjusted.

RCW 36.70A.280(1). The Final Bill Report on the 1991 amendments states that the Boards were created to resolve disputes regarding the GMA. Final Bill Report, ESHB 1025, Laws of 1991, 1st Sp.Sess., ch. 32.

The GMA discusses the Boards' review of petitions:

> Comprehensive plans and development regulations, and amendments thereto, adopted under this chapter are presumed valid upon adoption. In any petition under this chapter, the board, after full consideration of the petition, shall determine whether there is compliance with the requirements of this chapter. In making its determination, the board shall consider the criteria adopted by the department under RCW 36.70A.190(4). [FN3] The board shall find compliance unless it finds by a preponderance of the evidence that the state agency, county, or city erroneously interpreted or applied this chapter.

RCW 36.70A.320 (emphasis added). In issuing a final order, the Boards must base their decisions exclusively on whether the city, county, or state agency is in compliance with the requirements of chapter 43.21 RCW. RCW 36.70A.300(1). [FN4] The Boards must find either (1) that the government entity is in compliance with the GMA, or (2) that the government entity is not in compliance and remand to the effected entity for compliance. Id. [FN5] Any party aggrieved by the Boards' final order may appeal to the Thurston County Superior Court. RCW 36.70A.300(2).

ANALYSIS

Question 1:

> Do the growth planning hearings boards have the statutorily conferred jurisdiction to hear a claim which alleges that a city or county failed to properly consider the impact of its comprehensive plans or regulations on private property rights?

***4** The first question addresses whether the Boards may hear petitions alleging that the government entities failed to properly consider the impact of their actions upon private property. This question relates to the Boards' authority to review petitions. As discussed above, the Boards may hear only those petitions which (a) allege noncompliance with the requirements of the GMA (or SEPA as it relates to plans or regulations adopted pursuant to RCW 36.70A.040), or (b) challenge the planning population projections. Thus, for purposes of the first question, in order to bring a petition before the Boards the challenge must be to government entities' compliance with the requirements of the GMA.

The GMA contains a list of goals which must be considered in developing comprehensive plans and regulations. RCW 36.70A.020. One of the 13 designated goals provides: "Property rights. 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." RCW 36.70A.020(6).

The concept that private property shall not be taken for public use has its origins in the Fifth Amendment of the United States **Constitution** which provides in part that "[n]or shall private property be taken for public use, without just compensation." This restriction is applied to the states through the Fourteenth Amendment to the United States **Constitution**. Article 1, section 16 (amendment 9) of the Washington **Constitution** provides the same right. Sintra, Inc. v. Seattle, 119 Wn.2d 1, 13, 829 P.2d 765 (**1992**).

> In addition to outright physical appropriation of property, a taking can be accomplished by over-regulation. A taking by regulation is often called an inverse condemnation, because the condemnation is found by the court after it has already been implemented by the regulation.

Id.; see Lucas v. South Carolina Coastal Coun., 505 U.S. 1003, 119 L.Ed.2d 561, 112 S.Ct. 2886 (**1992**).

The GMA lists the protection of private property rights as a goal in the development of plans and regulations. That goal has two distinct component parts. First, is the constitutional requirement of compensation for a taking of property, and second is the protection of property rights from arbitrary and discriminatory actions even when there is no constitutional taking. RCW 36.70A.020 provides that the goals (including property rights) "shall be used exclusively for the purpose of guiding the development of comprehensive plans and development regulations". Accordingly, government entities are required to consider the impact of their actions upon private property rights. The failure to do so constitutes noncompliance with the requirements of the GMA giving the Boards jurisdiction over such claims. [FN6]

In our judgment, therefore, the Boards have jurisdiction over a petition which alleges that private property rights have not been properly considered, or have been considered in an arbitrary or discriminatory manner. We do not speculate about what type of fact situation would be sufficient to warrant a finding of noncompliance with the GMA. That is clearly the province of the Boards.

***5** RCW 36A.70.320 provides that the Boards are to uphold the plan or regulation unless they find "by a preponderance of the evidence that the state agency, county, or city erroneously interpreted or applied this chapter." As it relates to Question 1, the GMA requires that private property rights shall be considered. If the Boards find by a preponderance of the evidence that government entities failed to consider the impact of their actions on private property rights, such entities would have erroneously applied the provisions of the GMA.

Additionally, RCW 36.70A.020(6) provides that such rights are to be free from "arbitrary and discriminatory actions". Thus, if the Boards find by a preponderance of the evidence that government entities considered private property rights but did so in an arbitrary or discriminatory manner, noncompliance with the GMA also would be established. Upon a determination of noncompliance for whatever reason, the matter is remanded to the relevant government entity for compliance. RCW 36.70A.300(1).

It is important to note that the Boards' jurisdiction relates to the process a local government follows in adopting its plans and regulations. RCW 36.70A.020(6) requires that local governments consider the goal of protecting private property. However, once this goal is considered, the GMA does not require that local governments reach a particular conclusion.

The GMA lists 12 other goals which must also be considered in developing comprehensive plans and regulations. These goals cover a number of areas ranging from reducing sprawl to promoting economic development to protecting natural resources. RCW 36.70A.020(2), (5), (8). The GMA does not dictate any particular goal, such as the protection of property interests should dominate over other goals. Rather, there is an inherent tension in seeking to ac-

commodate by comprehensive action all of these goals, some of which are in conflict. Government entities must weigh these goals and exercise discretion in determining how to address them in enacting their plans and regulations.

Thus, with regard to property rights, a government entity is not in compliance with the GMA if it fails to consider property rights in developing its plans and regulations, or if it considers property rights in an arbitrary and discriminatory manner. The Boards have jurisdiction to consider these issues.

Question 2:

> Do the growth planning hearings boards have the statutorily conferred jurisdiction to determine whether a comprehensive plan or regulation negatively impacts an individual owner's specific property?

The thrust of this question appears to relate to which forum is available to consider concerns about the protection of specific private properties. Not every negative impact on private property implicates the constitutional protection of property but some negative impacts do raise the issue of the taking of private property. Although your question is phrased in broader terms, it essentially addresses whether a private landowner, with reference to his or her own specific property, can seek redress for an alleged unconstitutional taking by an appeal through the Growth Planning Hearings Boards process established in the GMA.

***6** The focus of this question changes from the general validity of the comprehensive plan or regulation to the impact of the plan or regulation upon a particular individual. Essentially, your question is whether allegations of negative impact upon a specific piece of private property are claims of noncompliance with the GMA, such that the Boards have authority to review such petitions and grant relief for the specific property owner. We could answer that question in the affirmative only if the GMA requires government planning action to be free of negative impacts on any private property interests. We find no such requirement in the GMA.

The GMA specifies the mandatory elements to be included in the comprehensive plan. RCW 36.70A.070. [FN7] Nothing in this section, however, indicates that government planning action must be neutral with respect to private property interests. Accordingly, no relevant requirement is found in that section.

As discussed above, however, the GMA contains a goal providing that private property shall neither be taken without compensation nor be subject to arbitrary or discriminatory action. RCW 36.70A.020(6). This goal does not prohibit government entities from adopting comprehensive plans or regulations that result in an inverse condemnation of property that could be considered a taking under the constitution. (Of course, if the government takes private property, it will be liable for just compensation. See, e.g., Sintra,, 119 Wn.2d 1.)

Rather, this goal requires that government entities consider the impact of their plans and regulations upon property rights and that they not do so in an arbitrary or discriminatory manner. In this respect, the property rights goal provides statutory protection for property rights in addition to the protection provided by the constitution. The constitution prohibits taking private property without just compensation. The constitution does not require that government entities consider the impact of their plans and regulations on property rights prior to adoption, but the Legislature has required such consideration under the GMA.

The Boards were created to resolve questions about whether government entities have complied with the requirements of the GMA. These include the 13 goals to guide the adoption of plans and regulations. Property rights is but one of 13 goals. RCW 36.70A.020. No goal in the GMA takes precedence over the others. The goals are not listed in order of priority and some of the goals are in conflict. The challenge for government entities is to weigh these goals and decide which goals are most important in their local communities when formulating plans and regulations.

The Boards were not created to consider or resolve questions regarding the specific impact of plans or regulations on

individual property. Nor were they intended to be a forum for resolution of specific takings questions involving individual property. The purpose of the Boards is to ensure that government entities comply with the planning goals and requirements of the GMA. Accordingly, a claim of negative impact upon specific private property does not constitute a challenge to compliance with the property rights goal of the GMA.

***7** The GMA also contains a provision directing that the Attorney General's Office develop a process for the consideration of the constitutional protection of property being taken without compensation. RCW 36.70A.370 provides in part:

> (1) The state attorney general shall establish by October 1, 1991, an orderly, consistent process, including a checklist if appropriate, that better enables state agencies and local governments to evaluate proposed regulatory or administrative actions to assure that such actions do not result in an unconstitutional taking of private property. It is not the purpose of this section to expand or reduce the scope of private property protections provided in the state and federal Constitutions. The attorney general shall review and update the process at least on an annual basis to maintain consistency with changes in case law.

An analysis of that section shows that it also does not provide the basis for concluding that a negative impact on a specific private property right constitutes noncompliance with the planning requirements of the GMA. RCW 36.70A.370 relates only to the question of an unconstitutional taking of property. To the extent your question addresses impacts upon specific property that do not rise to the level of an unconstitutional taking, that statute does not apply.

For possible constitutional taking claims, RCW 36.70A.370 is designed to assist government entities in the evaluation of proposed comprehensive plans and regulations. While the Legislature provided a process to alert government entities to the potential costs of a "taking", it further provided that the review process is protected as an attorney client privilege. RCW 36.70A.370(4). This statute is directed to the process for evaluating impact, not the resultant decision.

The GMA is directed at comprehensive decisions. The requirements deal with the necessary elements and considerations on a broad basis. RCW 36.70A.370 must be evaluated in terms of the overall intent of the GMA. With this view, the process is established to ensure that government entities consider the overall issue of the possible constitutional compensation requirement for the taking of property. It is not intended as a mechanism for addressing whether there is in fact a taking and, if so, what is the compensation that is required to be paid for a particular piece of property.

For these specific situations, judicial review is available. Private property rights are protected by both the United States and Washington **Constitutions**. See Sintra, 119 Wn.2d at 13; Robinson v. Seattle, 119 Wn.2d 34, 49, 830 P.2d 318 (**1992**); Lucas v. South Carolina Coastal Coun., 505 U.S. 1003, 119 L.Ed.2d 561, 112 S.Ct. 2886 (**1992**). The courts may award monetary damages for constitutional takings. See Sintra, at 24. Thus, while the courts are available as forums to address such property rights claims, the Legislature has not given the Boards authority to provide relief for the "taking" of a specific property. We emphasize that the Boards' lack of jurisdiction over these individual claims in no way limits the relief available in court. Indeed, the Legislature appears to have made the judgment that the courts remain the proper forum to resolve an individual property owner's takings claim.

***8** In summary, the GMA does not contain any provision prohibiting the adoption of comprehensive plans or development regulations based solely on the fact that such plans or regulations may negatively affect a particular private property interest. Nor does the GMA authorize the Boards to grant relief to specific property owners if the comprehensive plans and regulations do have a negative impact upon those specific properties. Accordingly, we conclude that a private property owner cannot seek relief from a negative impact on that owner's specific property by appealing to the Boards.

Question 3:

If the answer to Question 2 is yes, what criteria should the growth planning hearings board use in determining whether plans or regulations result in a negative impact on the owner's property?

Since the answer to Question 2 is no, we do not reach Question 3.

Question 4:

Is a county or city that adopts plans or regulations pursuant to RCW 36.70A.040 required to give individual notice to each private property owner whose property may be negatively impacted as a result of the plans or regulations?

Your final inquiry is whether government entities must provide individual notice to property owners whose property may sustain a negative impact from government action relating to comprehensive plans and development regulations. You specifically reference RCW 36.70A.140 and .290. RCW 36.70A.140 requires government entities planning under the GMA to establish a procedure for public input during planning and implementation. This section does not specifically require individual notice.

RCW 36.70A.290 establishes the filing date for petitions before the Boards. [FN8] Such petitions must be filed within 60 days of the date cities and counties publish notice of the adoption of comprehensive plans or development regulations. This section does not specify the form of the publication. [FN9] Thus, the general city and county procedures for publication of ordinances and resolutions would govern. Cities are required to publish ordinances, or summaries thereof, in their official newspapers. RCW 35.21.180, 35.22.288, 35.23.310, 35.24.220, 35.27.300, 35.30.018, 35A.12.160. Similarly, counties are required to publish notices in their official newspapers. RCW 36.32.120(7). These statutes do not require that individual notice be given. We have found no provision in the GMA requiring notice directly to individuals who may be affected by actions taken under its provisions. Absent a specific statutory statement, there is no basis for imposing an individual notice standard with respect to planning actions.

You also ask whether any other state law relating to comprehensive planning or development regulations requires individual notice. Chapter 36.70 RCW, which grants authority for county and regional planning, requires notice of public hearings on comprehensive plans to be given through publication in a newspaper of general circulation in the county and in the official gazette of the county if one exists. RCW 36.70.390. [FN10] Similarly, the planning commission statute, authorizing municipalities to adopt comprehensive plans, requires notice of proposed adoption to be given by publication in a newspaper and official gazette. RCW 35.63.100. See also 35A.63.070 (requiring the same for code cities). Again, neither of these sections mandates individual notice and thus no such requirement can be implied.

***9** Because of the broad nature of this inquiry and the numerous statutes which arguably relate to comprehensive planning and development regulations, we cannot categorically state that no provisions exist which require individual notice. As discussed above, however, we reviewed the statutes specifically addressing the area of comprehensive planning by cities and counties and found no section requiring individual notice. [FN11]

We trust this opinion will be of assistance to you.

Very truly yours,
Kenneth O. Eikenberry
Attorney General

Stacia E. Reynolds
Assistant Attorney General

William B. Collins
Senior Assistant Attorney General

[FN1] For ease of reference those cities and counties either required to plan or choosing to plan, under RCW 36.70A.040, and thus subject to the requirements of the GMA, will be referred to in this opinion as "government entities".

[FN2] Chapter 43.21C RCW is the codification of the State Environmental Policy Act (SEPA). That act requires that environmental impact be considered in authorizing government actions. See Cougar Mountain Assoc. v. King Cy., 111 Wn.2d 742, 765 P.2d 264 (1988). In the context of the GMA, SEPA requires that government entities consider environmental impacts in adopting comprehensive plans and development regulations.

[FN3] That section requires the Department of Community Development to adopt "procedural criteria to assist counties and cities in adopting comprehensive plans and development regulations that meet the goals and requirements of this chapter." These rules were filed with the Code Reviser, pursuant to the Administrative Procedure Act, on September 2, 1992.

[FN4] The relevant portion of RCW 36.70A.300(1) provides:

> Such final order shall be based exclusively on whether or not a state agency, county, or city is in compliance with the requirements of this chapter, or chapter 43.21C RCW as it relates to plans, regulations, and amendments thereto, adopted under RCW 36.70A.040.

[FN5] If the matter is remanded on the Boards' own motion or that of the petitioner, the Boards may hold a second hearing to determine compliance. RCW 36.70A.330(1), (2). If the Boards find the entity not to be in compliance, they transmit the finding to the Governor. RCW 36.70A.330(3). The Governor may take action including the withholding of funds. RCW 36.70A.340.

[FN6] The requirement in RCW 36.70A.020(6), that local governments consider the goal of property rights, should not be confused with the requirement in RCW 36.70A.370, that local governments utilize the process established by the Attorney General to evaluate proposed regulatory or administrative actions to assure that such actions do not result in an unconstitutional taking of private property. RCW 36.70A.370(4) provides that the "process used by government agencies shall be protected by attorney client privilege." A copy of the process issued by the Attorney General in February 1992 is attached to this opinion. It contains an express statement that "[a] private party, however, does not have a cause of action against an agency for failure to utilize the recommended process."

[FN7] These elements are listed above at page 3.

[FN8] In relevant portion, RCW 36.70A.290(2) provides:

> The date of publication for a city shall be the date the city publishes the ordinance, or summary of the ordinance, adopting the comprehensive plan or development regulations, or amendment thereto, as is required to be published. Promptly after adoption, a county shall publish a notice that it has adopted the comprehensive plan or development regulations, or amendment thereto. The date of publication for a county shall be the date the county publishes the notice that it has adopted the comprehensive plan or development regulations, or amendment thereto.

[FN9] We note that the Boards have filed proposed regulations with the Code Reviser governing petitions for review filed with the Boards. See WAC 242–02–230, State Register 92–15–134 (Aug. 1992). However, this regulation does not impose a requirement upon local governments to give individual notice to each private property owner whose property nay be negatively impacted as a result of the plans or regulations.

[FN10] Although chapter 36.70 RCW, entitled the Planning Enabling Act, authorizes counties and regions to plan, it does not require such action of specified government entities as does the GMA, chapter 36.70A RCW.

[FN11] We note that SEPA requires that notice of government action under its provisions requires notice be given to individuals by mailing notice of a particular project to the latest recorded real property owners who share a common boundary line with the property upon which the project is proposed. RCW 43.21C.080.

ATTACHMENT

STATE OF WASHINGTON ATTORNEY GENERAL'S RECOMMENDED PROCESS FOR EVALUATION OF PROPOSED REGULATORY OR ADMINISTRATIVE ACTIONS TO AVOID UNCONSTITUTIONAL TAKINGS OF PRIVATE PROPERTY

FEBRUARY 1992

***10** The Washington State Legislature enacted amendments to the Growth Management Act during the 1991 session. Section 18 of the Act requires the Office of the Attorney General to develop an orderly, consistent process that better enables state agencies and local governments to evaluate proposed regulatory or administrative actions to assure that such actions do not result in unconstitutional takings of private property.

This process must be used by state agencies and local governments that are required to or choose to plan under RCW 36.70A.040. A private party, however, does not have a cause of action against an agency for failure to utilize the recommended process. The Act also provides that "The process used by government agencies shall be protected by attorney client privilege." See Laws of 1991, 1st Sp.Sess., ch. 32, § 18(2), (4).

Attorney General Eikenberry assigned a work group to develop an advisory memorandum on this subject along with a recommended process. This product was published in the Washington State Register, and widely distributed to government agencies, interested groups and individuals. The office also conducted seven public meetings around the state for comment on the subject. A substantial number of individuals and entities submitted written and oral comments. In response to this input, the Attorney General's Office has modified the initial draft advisory memorandum and recommendation.

Attorney General's Recommended Process

1. The Attorney General's Office has prepared and will distribute an advisory memorandum to all government agencies which exercise regulatory authority impacting private property rights. This advisory memorandum includes discussions of the most recent Supreme Court decisions, along with examples of specific types of situations which raise constitutional questions. The advisory memorandum will be updated annually to reflect recent court decisions.
2. Local governments and state agencies should review the advisory memorandum with their legal counsel and distribute it to all decisionmakers and key staff. Government sensitivity regarding private property rights can be further increased if agency decisionmakers at all levels of government have consistent, authoritative guidance on the applicable constitutional limitations. This is particularly important for potential property uses which may be subject to the regulatory jurisdiction of multiple agencies.
3. Local government and state agencies should use the warning signals in the advisory memorandum as a checklist to determine whether a proposed regulatory action may violate a constitutional requirement. The warning signals are phrased as questions. If there are affirmative answers to any of these questions, the proposed regulatory action should be reviewed in detail by staff and approved by counsel.
4. State agency and local government actions implementing the Growth Management Act programs, such as

planning under the Growth Management Act, should be assessed by both staff and legal counsel. Examples of these actions include the adoption of development regulations and designations for natural resource lands and critical areas, and the establishment of policies or guidelines for conditions, exactions or impact fees incident to permit approval. This assessment should also be used for the issuance or denial of permits for land use development.

***11** 5. The assessment should be incorporated into the agency's review process. Since the extent of the assessment necessarily depends on the type of regulatory action and the specific impacts on private property, the agency should have some discretion to determine the extent and the form of the assessment. For some types of actions, the assessment might focus on a specific piece of property. For others, it may be useful to consider the potential impacts on types of property or geographic areas. It is strongly suggested, however, that any government regulatory actions which involve warning signals be carefully and thoroughly reviewed by legal counsel. As mentioned above, the Legislature has specifically indicated that the process used shall be protected by attorney client privilege. The agencies therefore have the discretion to determine the extent of distribution and publication of reports developed as part of the recommended process.

STATE OF WASHINGTON ATTORNEY GENERAL'S ADVISORY MEMORANDUM FOR EVALUATION OF PROPOSED REGULATORY OR ADMINISTRATIVE ACTIONS TO AVOID UNCONSTITUTIONAL TAKINGS OF PRIVATE PROPERTY

Government agencies, exercising regulatory authority which impacts the use of property, must be sensitive to the constitutional limits on their authority, and thereby respect private property rights. The failure to recognize these constitutional limits erodes public confidence in government. It may also subject the government agency to liability for costs and damages associated with the invalidation of the government regulatory action, or the imposition of an obligation to pay compensation for the taking of the property.

The purpose of this advisory memorandum is to provide a tool to assist state agencies and local government in evaluating whether proposed administrative or regulatory actions may violate constitutional limitations. The memorandum outlines some general legal principles derived from cases which have interpreted the constitutional provisions in specific fact situations. Most of the cases involving regulatory takings issues have discussed the takings clause of the United States Constitution. Some opinions also refer to a substantive due process right under the Constitution. Both constitutional provisions are discussed. The memorandum also includes a list of warning signals, i.e., situations which may involve constitutional issues and should be further assessed by staff and legal counsel. Some important cases are listed and described briefly in Appendix A. An outline of the Washington Supreme Court's most recent decision on this subject is in Appendix B.

This memorandum is intended as an internal management tool for agency decisionmakers. It is not a formal Attorney General's Opinion under RCW 43.10.030(7), and should not be construed as an opinion by the Attorney General on whether a specific action constitutes a taking or a violation of substantive due process. Legal counsel should be consulted for advice as to any particular action which may involve a constitutional taking or due process violation.

I. GENERAL PRINCIPLES

***12** Government has the authority and responsibility to protect the public health, safety and welfare. This is an inherent attribute of sovereignty. Pursuant to this authority, the government may properly regulate or limit the use of property.

Accordingly, government may abate public nuisances, terminate illegal activity, establish building codes, safety standards or sanitary requirements. The government may limit the use of property through land use planning, zoning ordinances, setback requirements and environmental regulations.

The government may also establish conditions or requirements for potential uses of property which may have ad-

verse impacts. Conditions may include the granting of easements or donation of property for public use.

Government regulation which goes "too far," however, constitutes a taking of property for which just compensation may have to be paid. This portion of the memorandum outlines the general principles courts use to determine whether a given government regulation effects a "taking" under the constitution.

A. Takings Clause

The Fifth Amendment to the United States Constitution provides that private property shall not be taken for public use without just compensation. Article 1, section 16 of the Washington State Constitution provides that "No private property shall be taken or damaged ... without just compensation...." The government may not, therefore, take property except for public purposes within its constitutional authority and only upon payment of just compensation.

Government may take citizens' property and use the land for a public building, a highway or some other public purpose. When it does so, it must compensate the property owner. Government historically acquires property and compensates landowners whose land it takes through a condemnation proceeding. The government may also become liable for the payment of just compensation to private property owners whose land has been either physically occupied or invaded by the government on a permanent basis. This is generally referred to as an inverse condemnation.

Government land use regulation does not ordinarily constitute a taking of property. It may, however, amount to a taking if the regulation goes "too far." When this occurs, the government may be obligated to pay compensation.

There is no precise mathematical formula to determine when a regulation goes "too far." To determine whether this has occurred, courts engage in an ad hoc balancing of factors. Courts consider the economic impact of the regulation on the property, the extent of the regulation's interference with investment-backed expectations and the character of the government action. The character of the government action includes its purposes and the extent to which it destroys a property right such as the right to possess, exclude others from, or dispose of property.

B. Substantive Due Process

The Fourteenth Amendment to the United States Constitution has been interpreted by courts to include a right of substantive due process which protects an individual's property from arbitrary regulation. There is also a due process clause in article 1, section 3 of the Washington State Constitution. The Washington Supreme Court recently stated that the substantive due process limitation protects landowners from unduly oppressive regulation. The Court described a balancing test similar to the takings analysis involving the nature of the government interest and the extent of the impact on private property rights. If a land use regulation or ordinance is found unduly oppressive on the private landowner, the remedy is invalidation of the regulation or ordinance.

C. Remedies

***13** The violation of constitutional limits on the scope of regulatory authority may have financial consequences to government agencies. The specific remedy depends on the nature of the government action, and the impact on the property owner.

If a regulatory action is determined to be a taking of property, then just compensation is mandated. In determining just compensation, the court would consider the impact on the value of the property. If the taking was due to an overly severe land use regulation, and was temporary and reversible, the government has the option of either implementing the regulation and paying just compensation, or withdrawing the regulation. If the regulation is withdrawn, the government may nonetheless be liable for a temporary taking.

The remedy for a violation of the substantive due process requirement is the invalidation of the regulation. The government agency should be aware that if the regulation is invalidated under this constitutional provision, there may be claims for damages or reasonable attorney's fees under the Federal Civil Rights Act.

Government agencies should also be aware that under state law, a property owner who has filed an application for a permit has a cause of action for damages to obtain relief from agency actions which were arbitrary, capricious and made with knowledge that the action was in excess of lawful authority. See RCW 64.40. This state law also provides relief for failure to act within the time limits established by law.

A person challenging an action or ordinance generally must exhaust available administrative remedies before seeking court review and has the burden of proving that the action or ordinance violates the constitutional provision.

II. WARNING SIGNALS

The following warning signals are examples of situations which may raise constitutional issues. The warning signals are phrased as questions which agency staff may review regarding the potential impact of a regulatory action on specific property.

Agencies should use these warning signals as a checklist to determine whether a regulatory action may raise constitutional questions and require further review.

The fact that a warning signal may be present does not automatically mean that there has been a taking. It means only that there could be a constitutional issue and that agency staff should carefully review the proposed action with legal counsel. If property is subject to regulatory jurisdiction of multiple government agencies, each agency should be sensitive to the cumulative impacts of the various regulatory restrictions.

1. Does the Regulation or Action Result in a Permanent Physical Occupation of Private Property?

Regulation or action resulting in a permanent physical occupation of all or a portion of private property will generally constitute a taking. For example, a regulation which required landlords to allow the installation of cable television boxes in their apartments was found to constitute a taking. See Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982).

2. Does the Regulation or Action Require a Property Owner to Dedicate a Portion of Property or to Grant an Easement?

***14** If the dedication of property is not reasonably and specifically designed to prevent or compensate for adverse impacts of a proposed development on a legitimate public interest worthy of government protection, there may be a taking. A court will review whether the action in question substantially advances a legitimate state interest.

For example, the United States Supreme Court determined in Nollan v. California Coastal Comm'n, 483 U.S. 825 (1987), that compelling an owner of waterfront property to grant a public easement which does not substantially advance the public's interest in beach access, constitutes a taking. Similarly, the Washington Court of Appeals determined in Unlimited v. Kitsap Cy., 50 Wn.App. 723, 750 P.2d 651, review denied, 111 Wn.2d 1008 (1988), that compelling the landowner to dedicate strips of property to allow commercial access to a public road from a private property and to extend the road, constituted a taking. The Court held that the requirement of commercial access served no public purpose and that the acquisition of the land for an extension for which the County had no immediate plans to build was not necessitated by Unlimited's development.

On the other hand, state statutes require local governments to assure that adequate provisions have been made for the public health, safety and welfare before approving subdivisions. Miller v. Port Angeles, 38 Wn.App. 904, 909, 691 P.2d 229 (1984). The Court in Miller approved of the exaction of land to widen roads necessary to handle traffic generated by the proposed development.

3. Does the Regulation Deprive the Owner of All Economically Viable Uses of the Property?

Deprivation of all economically viable uses of the property may constitute a taking or a substantive due process violation.

Unlike warning signals 1 and 2, it is important to analyze the regulation's effect on the property as a whole, and not just the impact on a portion of the property. It is also important to assess whether there is any profitable use of the remaining property available. See, for instance, Florida Rock Industries, Inc. v. United States, 791 F.2d 893 (Fed.Cir.1986). The remaining use does not necessarily have to be the owner's planned use, a prior use or the highest and best use of the property. Among other factors, the court may consider whether there is an impact on investment-backed expectations.

4. Does the Regulation Have a Severe Impact on the Landowner's Economic Interest?

A regulation which has a significant impact on the owner's economic interest should be carefully reviewed. Courts will often compare the value of property before and after the impact of the challenged regulation. Although a reduction in property value, alone, may not be a taking, a severe reduction in property value often indicates a reduction, or elimination of reasonably profitable uses. Another economic factor which courts will consider is the extent to which the challenged regulation frustrates legitimate, investment-backed expectations of the owner. As with warning signal 3, these economic factors are normally applied to the property as a whole.

5. Does the Regulation Deny a Fundamental Attribute of Ownership?

***15** Regulations which deny the landowner a fundamental right of ownership, including the right to possess, exclude others and dispose of all or a portion of the property are potential takings.

The United States Supreme Court has held that barring the inheritance of certain interests in land held by individual members of an Indian tribe constituted a taking. Hodel v. Irving, 481 U.S. 704 (1987). The Washington Supreme Court has considered regulations which precluded houseboat moorage owners from terminating leases to regain possession as a taking. See Granat v. Keasler, 99 Wn.2d 564, 663 P.2d 830 (1983).

III. APPENDICES

Appendix A is a list of some of the principal cases dealing with regulatory takings issues, and a summary of the result in each case. These cases provide examples of how courts have resolved specific questions, and may be helpful for assessing how courts might resolve analogous situations. There are, of course, a number of other cases which have discussed or resolved regulatory takings issues, and some excellent law review articles on the subject.

Appendix B is a brief summary of the most recent State Supreme Court decision on a regulatory takings issue. Presbytery of Seattle v. King Cy., 114 Wn.2d 320, 787 P.2d 907 (1990). Presbytery held that plaintiff's failure to exhaust administrative remedies barred judicial consideration of its takings claims. The opinion, however, analyzed the state and federal case law on takings, and discussed the applicability of both the takings clause and substantive due process clause to government regulatory actions.

This opinion is a useful starting point for detailed legal analysis of whether a particular regulatory action constitutes a taking or a violation of substantive due process rights. This opinion should be carefully read in light of recent United States Supreme Court opinions on the subject (Nollan v. California Coastal Comm'n, 483 U.S. 825 (1987); Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470 (1987); and First English Evangelical Lutheran Church v. County of Los Angeles, 482 U.S. 304 (1987)). There are also some other cases pending in the Washington and United States Supreme Courts involving regulatory takings issues.

APPENDIX A

SUMMARIES OF “TAKINGS” CASES

(Arranged Alphabetically)

Buttnick v. Seattle, 105 Wn.2d 857, 719 P.2d 93 (1986).

A Seattle historic preservation ordinance required a building owner conducting repairs to replace a “parapet” in a

manner approximating the original design. The building owner claimed that the property was unconstitutionally taken. The State Supreme Court ruled that the estimated cost of replacing the parapet would not be an undue hardship on the building owner, considering the market value and income producing potential of the building. The constitutional challenge to the historic preservation ordinance was, therefore, rejected.

Department of Natural Resources v. Thurston County, 92 Wn.2d 656, 601 P.2d 494 (1979).
***16** Lake Lawrence, Inc., a lessee from the State, sought plat approval from Thurston County for a proposed residential development. The County denied preliminary plat approval upon the ground that the proposed development would interfere with eagle perching and feeding areas. In response to a claim that this was an unconstitutional taking of private property, the State Supreme Court held that it was not, primarily because the County had indicated that it would approve a less intensive development. (The County Commission had found no adverse impact from development of 11 of the 22 lots proposed by the developer.) There was a strong public interest in protecting the eagles, and there had been no showing that all reasonably profitable uses of the property were foreclosed.

Florida Rock Industries, Inc. v. United States, 791 F.2d 893 (Fed.Cir.1986), opinion on remand, 21 Cl.Ct. 153 (1990).
A mining company in 1972 purchased 1,560 acres of wetlands (formerly part of the Everglades, but now excluded by road, canal and levee) for the purpose of mining limestone. In 1980 the company applied to the U.S. Army Corps of Engineers for a "section 404" permit for the dredging and filling involved in the mining operation. The application covered only 98 acres, and the court limited the case to that acreage. The Corps of Engineers denied the application, primarily for the purpose of protecting the wetlands. The courts indicated that actions under the Clean Water Act are not insulated from takings challenges. In this case, the denial of a permit by the Corps of Engineers reduced the property value by 95 percent, and eliminated all reasonably profitable uses, except perhaps holding the property for speculation (which was not deemed a reasonable use, given that nothing could be done with the property). Under these circumstances, the courts held that the United States had unconstitutionally taken the mining company's property, and required that the government compensate the company.

Granat v. Keasler, 99 Wn.2d 564, 663 P.2d 830 (1983).
A Seattle houseboat ordinance provided that the only reason that a houseboat moorage owner could evict a paying tenant would be for the purpose of using the moorage site for the owner's own non-commercial residence. When an owner appealed, the State Supreme Court, after reviewing its prior opinions on the subject, ruled that the Seattle ordinance was an unconstitutional taking of private property without just compensation. The Court's reasoning followed the reasoning of its earlier decision in Kennedy v. Seattle, 94 Wn.2d 376, 617 P.2d 713 (1980), where a similar ordinance was invalidated because it basically turned over perpetual occupancy rights of a person's property to another.

Hodel v. Irving, 481 U.S. 704 (1987).
Pursuant to federal legislation passed in 1889, portions of Sioux Indian reservation land were "allotted" to individual tribal members (held in trust by the United States). Allotted parcels could be willed to the heirs of the original allottees. As time passed, the original 160–acre allotments became fractionated, sometimes into very small parcels. Good land often lay fallow, amidst great poverty, because of the difficulties in managing property held in this manner. In 1983 Congress passed legislation which provided that any undivided fractional interest which represented less than 2 percent of the tract's acreage and which earned less than $100 in the preceding year would revert to the tribe. No compensation was to be provided tribal members whose property was lost under the statute. The statute was challenged by tribal members. The United States Supreme Court noted that under the balancing test traditionally applied to "takings" challenges, it might very well have held the statute constitutional. In this case, however, the character of the government regulation was "extraordinary" in that it destroyed "one of the most essential" rights of ownership—the right to devise property, especially to one's family. The Court held that such a step was an unconstitutional taking without just compensation, regardless of the public interest which might favor the legislation.

Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982).

***17** A New York State statute required landlords to allow the installation of cable television on their property. The owner of an apartment building in New York City challenged the statute, claiming an unconstitutional taking of private property. The installation in question required only a small amount of space to attach equipment and wires on the roof and outside walls of the building. The United States Supreme Court ruled that the statute was unconstitutional, concluding that "a permanent physical occupation authorized by government is a taking without regard to the public interests that it may serve." The Court reasoned that an owner suffers a special kind of injury when a "stranger" invades and occupies the owner's property, and that such an occupation is "qualitatively more severe" than a regulation on the use of property.

Maple Leaf Investors, Inc. v. Department of Ecology, 88 Wn.2d 726, 565 P.2d 1162 (1977).
Maple Leaf Investors, appellant, owned property along the Cedar River in an area subject to flood control regulations. These regulations prohibited the construction for human habitation within the floodway channel; 70 percent of appellant's property lay within the floodway channel. On a challenge to the constitutionality of the flood control regulations, the Washington State Supreme Court examined the balance between the public interest in the regulations and the private interest in using the property without restriction. The Court found that the primary purpose of the regulations was not to put the property to public use, but to protect the public health and safety. The Court noted that the regulations prevented harm to persons who might otherwise live in the floodway, and also that structures built there might break loose and endanger life and property downstream. Further, since 30 percent of the property was still usable, there was no indication that the regulations prevented profitable use of the property. Finally, the Court noted that it was not the State which placed appellant's property in the path of floods. The Court upheld the constitutionality of the regulations.

Nollan v. California Coastal Comm'n, 483 U.S. 825 (1987).
James and Marilyn Nollan, the prospective purchasers of a beach front lot in California, sought a permit to tear down a bungalow on the property and replace it with a larger house. The property lay between two public beaches. The Nollans were granted a permit, subject to the condition that they allow the public an easement to pass up and down their beach. On appeal by the Nollans, the United States Supreme Court reasoned that it clearly would have been an unconstitutional taking of the Nollans' property if the government (absent the permit application) had simply ordered the Nollans to give the public an easement. The question remained whether this was proper in the context of the Nollans' permit application. The permit condition is only valid if it substantially advances legitimate state interests. There was no indication that the Nollans' house plans interfered in any way with the public's ability to walk up and down the beach. If the Nollans' plans would block views from the highway to the beach, requiring an easement along the beach front would not tend to solve that problem. There was, therefore, no "nexus" between any public interest which might be harmed by the construction of the house, and the permit condition. Lacking this connection, the required easement is just as unconstitutional as it would be if imposed outside of the permit context. (The Court noted that protecting views from the highway by limiting the size of the structure or banning fences may have been lawful.)

Penn Central Transp. Co. v. City of New York, 438 U.S. 104 (1978).
***18** Grand Central Station has been declared a "landmark" under the City of New York's historic preservation ordinance. Penn Central, the owner of Grand Central, proposed to "preserve" the original station while building a 55–story building over it. The City denied the construction permit. In response to Penn Central's takings claim, the United States Supreme Court noted that there was a valid public purpose to the City ordinance, and that, so far as the Court could ascertain, Penn Central could still make a reasonable return on its investment by retaining the Station as it was. Penn Central argued that the landmark ordinance would deny it the value of its "pre-existing air rights" to build above the terminal. The Court noted that it must consider the impact of the ordinance upon the property as a whole, not just upon "air rights." Further, under the ordinance in question, these rights were transferable to other lots, so they might not be lost. The Court upheld the constitutionality of the ordinance.

Unlimited v. Kitsap County, 50 Wn.App. 723, 750 P.2d 651, review denied, 111 Wn.2d 1008 (1988).
A property owner, Unlimited, sought a planned unit development approval to construct a convenience store on part

of its property. The County approved the application subject to two conditions, which required Unlimited (1) to dedicate a 50–foot right of way to provide commercial access to the next door property, and (2) to dedicate a strip of its property sufficient to extend a county arterial along the front of its property. Unlimited appealed these conditions. The State Court of Appeals, relying upon the United States Supreme Court's decision in Nollan v. California Coastal Comm'n, 483 U.S. 825 (1987), stated that a private property interest can be exacted without compensation only where "the problem to be remedied by the exaction arises from the development under consideration, and the exaction is reasonable and for a legitimate public purpose." The Court ruled that providing commercial access to the adjacent private property served no public interest, and that nothing in Unlimited's proposal caused the need to extend the arterial. Thus, the conditions imposed by the County were unconstitutional and the decision of the County was reversed.

APPENDIX B

Most of the cases involving regulatory takings issues have focused on the takings clause of the United States Constitution. Some opinions, however, also referred to a substantive due process limitation on regulatory actions.

The Washington State Supreme Court in a recent opinion has attempted to distinguish the two theories, and thereby provide an analytical framework for resolution of specific issues. See Presbytery of Seattle v. King Cy., 114 Wn.2d 320, 787 P.2d 907, cert. denied, 111 S.Ct. 284 (1990). See also Orion Corp. v. Washington, 109 Wn.2d 621, 747 P.2d 1062 (1987), cert. denied, 486 U.S. 1022 (1988) (Orion II).

The Presbytery opinion is a necessary starting point for a detailed legal analysis, especially for cases which will be resolved in state courts. This opinion, however, must be read in light of recent United States Supreme Court decisions on the takings clause. Those decisions, along with other federal court decisions, appear to view the relationship between substantive due process and takings concepts differently.

***19** The majority opinion in the Presbytery case, reads previous case law as indicating that the takings clause applies to a more narrow range of regulatory activity than the substantive due process clause. This distinction is critical because the remedy for a violation of the substantive due process clause is the invalidation of the regulation, rather than just compensation. Government agencies should be aware that the United States Supreme Court has accepted review of a South Carolina Supreme Court decision which similarly narrowed the range of regulatory activity subject to the just compensation remedy.

A. Threshold Inquiry

The Court in Presbytery indicated that the first step in analyzing a constitutional challenge to a land use regulation must be to determine whether to analyze the challenge under the "takings" clause or the due process clause. A regulation which safeguards the public interest in health, safety, the environment or the fiscal integrity of an area will not normally be a taking. The constitutional validity of such a regulation is analyzed by considering whether it violates substantive due process. The remedy for a violation of due process is normally invalidation of the ordinance.

On the other hand, if the regulation goes beyond safeguarding those public interests, and enhances a publicly owned right in property, or if it destroys a fundamental attribute of ownership (the right to possess, to exclude others and to dispose of property), then the regulation is subject to analysis under the "takings" clause. If it is a "taking," just compensation will be required.

After noting this threshold inquiry is necessary, the Court's opinion in Presbytery then goes on to describe how land use regulations are reviewed under both the due process and "takings" analyses.

B. Takings Analysis

The opinion reasoned that land use regulations which enhance a publicly owned right in the property, or deny a fun-

damental attribute of ownership are subject to a takings analysis. Examples may include requiring dedication of property, the granting of easements, or interference with the right to possess, or dispose of property, or to exclude others.

A takings analysis in a particular situation would first involve an assessment of whether the regulation substantially advances a legitimate state interest.

If the court determined that the regulation substantially advanced a legitimate state interest, then it would be necessary to assess the extent of the economic impact on the property subject to the regulation. The factors the court might consider include:

1. The economic impact of the regulation on the property;
2. The extent of the regulation's interference with investment-backed expectations; and
3. The character of the government action.

The opinion did not suggest a specific mathematical test to determine when a taking occurs. If the court, after assessing these factors, finds that there has been a taking, just compensation is required.

C. Substantive Due Process Analysis

***20** The opinion in Presbytery emphasized that even if a regulation did not amount to a taking, it is also subject to substantive due process requirements. In assessing whether a regulation has exceeded constitutional limitations, the court must consider three questions. First, is the regulation aimed at achieving a legitimate public purpose? There must be a public problem or "evil" for there to be a legitimate public purpose. Second, is the method used in the regulation reasonably necessary to achieve the public purpose? The regulation must tend to solve the public problem. Third, is the regulation unduly oppressive on the landowner? If so, there may be a due process violation. The "unduly oppressive" inquiry involves balancing the public's interests against those of the regulated landowner.

Factors to be considered in analyzing whether a regulation is unduly oppressive include:

1. The nature of the harm sought to be avoided;
2. The availability and effectiveness of less drastic protective measures; and
3. The economic loss suffered by the property owner.

In assessing these three factors, the Court directed trial courts to the following considerations:

a. On the public's side, the seriousness of the public problem, the extent to which the owner's land contributes to it, the degree to which the proposed regulation solves it and the feasibility of less oppressive solutions.

b. On the owner's side, the amount and percentage of value loss, the extent of remaining uses, the temporary or permanent nature of the regulation, the extent to which the owner should have anticipated such regulation and how feasible it is for the owner to alter present or currently planned uses.

The opinion did not suggest or establish a specific mathematical test to determine whether there was a violation of substantive due process requirements. The remedy for a violation of substantive due process is invalidation of the regulation.

It should be noted that some other decisions have not utilized the "unduly oppressive" standard in evaluating substantive due process issues. Government agencies should review this issue with their legal counsel.

Wash. AGO 1992 NO. 23, 1992 WL 512203 (Wash.A.G.)
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