Spokane Plan Commission Agenda

March 8, 2017
2:00 PM to 5:00 PM
City Council Chambers

TIMES GIVEN ARE AN ESTIMATE AND ARE SUBJECT TO CHANGE

	Public Comment Period:	
3 minutes each	Citizens are invited to address the Plan Commission on any topic not on the agenda	
	Commission Briefing Session:	
2:00 - 2:15	1) Approve February 22, 2017 meeting minutes	
	2) City Council Report	Lori Kinnear
	3) Community Assembly Liaison Reports	Greg Francis
	3) President Report	Dennis Dellwo
	4) Transportation Subcommittee Report	John Dietzman
	5) Secretary Report	Lisa Key
	Workshops:	
2:15 - 2:45	1) Existing Neighborhood Commercial Structures in Residential Zones	Nathan Gwinn
2:45 - 3:25	2) Infill Project Update	Nathan Gwinn
3:25 - 3:55	3) Parklet Ordinance Workshop	Tami Palmquist
	Hearings:	
4:00	1) Comprehensive Plan Update	Jo Anne Wright
	2) Wetlands Ordinance Amendments	Jo Anne Wright
	Adjournment:	
	Next Plan Commission meeting will be on March 22, 2017 at 2:00 pm	

The password for City of Spokane Guest Wireless access has been changed:

Username: COS Guest
Password:

AMERICANS WITH DISABILITIES ACT (ADA) INFORMATION: *The City of Spokane is committed to providing equal access to its facilities, programs and services for persons with disabilities. The Spokane City Council Chamber in the lower level of Spokane City Hall, 808 W. Spokane Falls Blvd., is wheelchair accessible and also is equipped with an infrared assistive listening system for persons with hearing loss. Headsets may be checked out (upon presentation of picture I.D.) at the City Cable 5 Production Booth located on the First Floor of the Municipal Building, directly above the Chase Gallery or through the meeting organizer. Individuals requesting reasonable accommodations or further information may call, write, or email Human Resources at 509.625.6363, 808 W. Spokane Falls Blvd, Spokane, WA, 99201; or jjackson@spokanecity.org. Persons who are deaf or hard of hearing may contact Human Resources through the Washington Relay Service at 7-1-1. Please contact us forty-eight (48) hours before the meeting date.*

Spokane Plan Commission

February 22, 2017
Meeting Minutes: Meeting called to order at 2:04 pm

Attendance:

- Board Members Present: Christy Jeffers, Christopher Batten, Patricia Kienholz, Dennis Dellwo, Greg Francis; Community Assembly Liaison, Lori Kinnear; Council Liaison
- Board Not Members Present: John Dietzman, Todd Beyreuther, Jacob Brooks, FJ Dullanty
- Staff Members Present: Lisa Key, Amanda Winchell, Jacqui Halvorson, James Richman, Jo Anne Wright, Boris Borisov, Dave Kokot, Andrew Worlock, Tirrell Black

Public Comment:

- None

Briefing Session:

February 8, 2017 meeting minutes forwarded

1. City Council Liaison Report-Lori Kinnear
   - Council is working with the Mayors team to review the snow removal process during the winter of 2016-2017 and developing a comprehensive approach to filling potholes and repairing streets throughout the City.
2. Community Assembly Liaison Report- Greg Francis
   - None
3. Transportation Subcommittee Report - John Dietzman
   - None
4. Secretary Report-Lisa Key
   - Notices regarding the changes to the Wetlands ordinance and changes to the Centers and Corridors have been mailed out to the public.
   - Comprehensive Plan Amendment hearing will be held on March 8, 2017.
   - Open houses for LINK Spokane will be;
     - February 28 5:30 at the East Central Community Center
     - March 1 at 11:30 at River Park Square
     - March 4 at 4:30 at the West Central Community Center
     - March 7th at 5:30 at the South Hill Library
     - March 8th at 3:00 pm at City Hall in the Chase Gallery
5. Commissioner Updates-Commission Members
   - None
6. Commission President Report-Dennis Dellwo
   - None

Workshops:

1. Downtown Plan Update/CCL-Andrew Worlock
   - Presentation and overview given
   - Questions asked and answered
   - Discussion ensued
2. Monroe Street Update-Boris Borisov
   - Presentation and overview given
   - Questions asked and answered
   - Discussion ensued
3. Procedural Changes to Building and Fire Code-Brian McClatchy
   - Presentation and overview given
   - Questions asked and answered

- Discussion ensued

4. Comprehensive Plan Update, Final Outreach & Schedule-Jo Anne Wright
    - Presentation and overview given
    - Qeustions asked and answered
    - Discussion ensued

Meeting Adjourned at 4:29 P.M.

Next Plan Commission meeting is scheduled for February 22, 2017

Return to Agenda

PLANNING & DEVELOPMENT
808 W. SPOKANE FALLS BLVD.
SPOKANE, WASHINGTON 99201-3329
509.625.6300
FAX 509.625.6013
WWW.SPOKANEPLANNING.ORG
WWW.BUILDINGSPOKANE.ORG

March 1, 2017

TO: City Plan Commission

FROM: Project Team, Planning & Development Department

RE: Existing Neighborhood Commercial Structures in Residential Zones Briefing

Your workshop on March 8 will concentrate on an update on staff analysis and revisit scope alternatives. I attached the updated project information document, previously supplied last December.

Four attached maps show locations in the city's northwest, northeast, southeast, and southwest quadrants of most of the properties in Spokane that contain non-residential structures in residential zones. These are defined for this project as "Type 1 Properties," and include schools, churches, and similar non-residential uses. Such structures are more precisely described as follows:

- **Type 1** – structures located in a residential zone whose current uses are non-conforming, in that they contain non-residential uses. These properties will be identified utilizing 2015 Assessor data, selecting for those properties that are located in residential zones (according to City GIS data) but for which the assessor records a non-residential use. The Assessor currently uses its own system of "use codes" for each property, identifying the current property use description. Subject properties would be those in residential zones with any use code other than (11) Single Family, (12) Two-to-Four Unit, (13) Five-Plus Unit, (15) Mobile Home Park, (18) Other Residential, or (19) Vacation Home. Examples of these include churches, parks, schools, etc.

The inventory of Type 2 Properties is still in progress. These additional properties will be displayed on updated maps in the future, because a display on the attached maps at this time would not reflect their distribution citywide. The number of these parcels is relatively fewer than the Type 1 Properties. Structures on Type 2 Properties are now used for residential use, but historically contained a non-residential use:

- **Type 2** – structures located in a residential zone which currently contain a residential use (use codes 11, 12, 13, 15, 18, or 19) but show clear signs that their original use was non-residential in nature. These properties would be identified visually using a number of sources of information. To identify likely sites, City staff will utilize (1) a historic map of land uses from 1952, (2) historic trolley lines, and (3) current arterials. Examples include the former library on West Heroy Avenue, near North Wall Street, that is now a residence, as well as a number of old corner stores on trolley lines that have been minimally modified to function as homes.

Either Type 1 or Type 2 properties may contain a building that has become discontinued or abandoned and has lost its right to continue as a nonconforming use.

Planning and Development Services Department
Planning Initiatives and Project Information

Title of Initiative/Project: Existing Neighborhood Commercial Structures in Residential Zones Expansion

- Also called *'Legacy Business,' 'Historical Neighborhood Retail,' 'Perry Dist. Historic Building Overlay'*

Project Manager: Nathan Gwinn, Assistant Planner, 625-6893

Program Manager: Lisa Key, Planning Services Director

Project or Initiative Sponsor: Ben Stuckart, Spokane City Council President

Summary of Project: This initiative would expand the area where pre-existing commercial structures in residential zones may be reused for low-impact neighborhood scale and neighborhood serving businesses. An existing pilot code allowing such development is limited to the West Central neighborhood (SMC 17C.370).

Vision:

- Re-use of now underutilized buildings, which once served neighborhoods with small businesses.
- Reinvestment in sites served with infrastructure and near arterials, aligned with public investments, or sites of historic significance.
- Residential areas will be served with active, walkable retail and other commercial uses to provide economic development and increase the diversity of options for small businesses in a manner that has minimal impact to neighbors.
- Repurposing structures with low property maintenance that, without encouraged investment, may otherwise deteriorate, or have a potentially blighting effect on the surrounding neighborhood.

Project Goals:

- Evaluate why the existing provisions adopted in 2012 have not been used
- Understand the impacts from alternate uses of historic structures in residential neighborhoods under hearing examiner process (SMC 17C.335 Historic Structures-Change of Use). E.g. Library, Batch Bakeshop (St. Paul Market Building), Browne's Tavern
- Understand the effect of expanding boundaries beyond the West Central neighborhood
- Potentially amend 17C.370 or investigate different code
    - Concentrated public education to promote any new code changes
    - Evaluate the impact and effectiveness

Success Criteria:

- Robust Public Engagement
- More Alternatives for Small Businesses
- Preservation of the Best Neighborhood Assets
- Legal Requirements

Examples of Expansion Scope Alternatives:

- Geographic Limitation:
    - Extend Provisions to Residential Zones in East Central
    - Expand within an "Urban Core" Overlay Defined by a Measurable Attribute (e.g., Lot Size)
    - Expand to Residential Zones Citywide
    - Location Directly on an Arterial, or Distance away?
    - Minimum Distance (400 feet?) between Developments under This Section
- Time Limitation (e.g., 5 Developments or 2 Years, Whichever Occurs First, Then Revisit Ordinance)
- Limitation on Size, or Threshold for More Extensive Process for Large Buildings?

Background:

Related Reports, Documents, Guidelines, Regulations:

- Spokane Municipal Code - Chapter 17C.370: Existing Neighborhood Commercial Structures in Residential Zones

Related Projects:

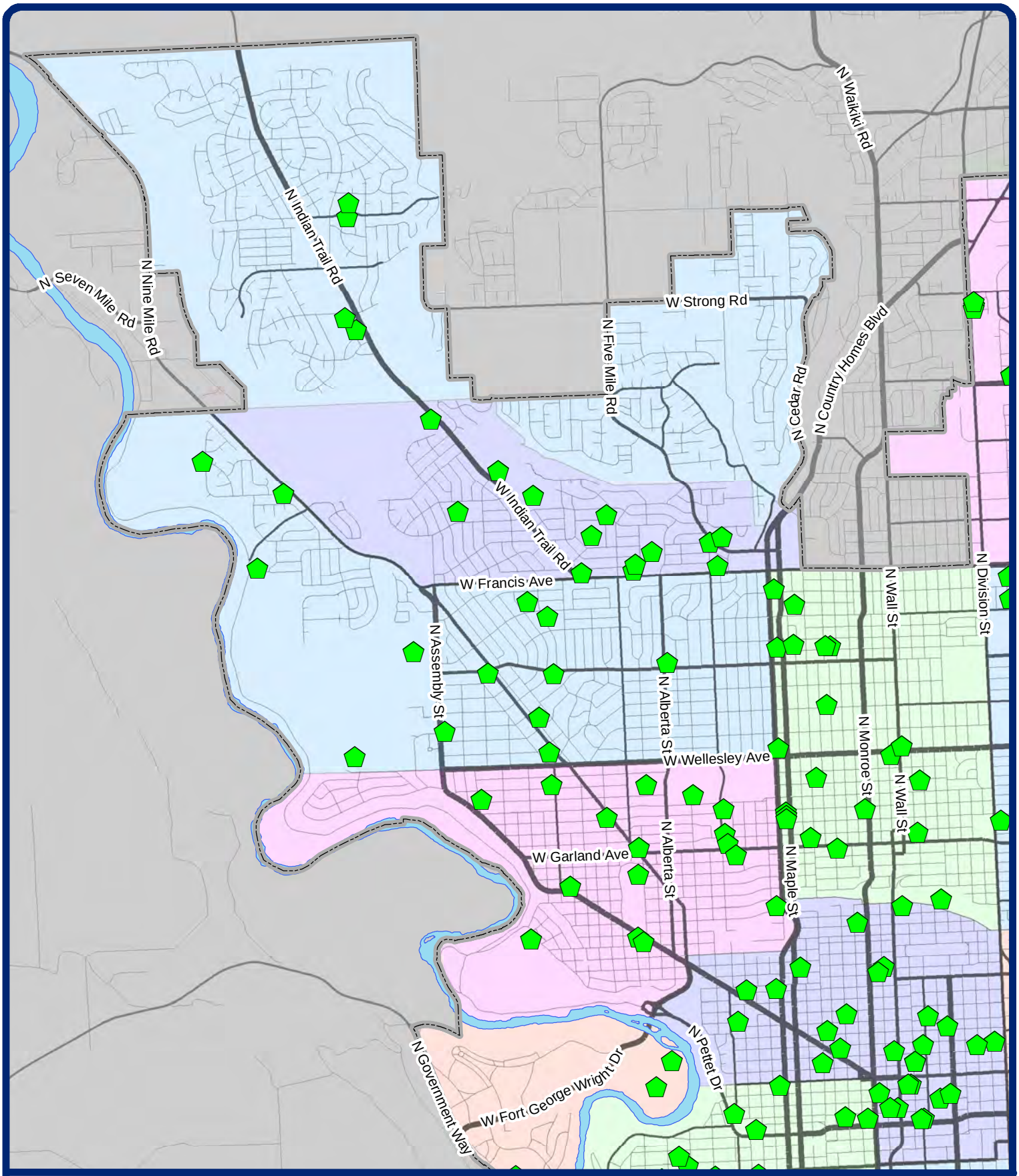
- SMC 17C.335 Historic Structures-Change of Use
- Adoption of SMC 17C.370 (2012)
- Infill Development (2016)
- Economic Development – Community, Housing, and Human Services Department
- Neighborhood Retail LU 1.6 Expansion + Other Comp Plan/Land Use Considerations (Future)

Public Engagement:

- Outreach to the Community Assembly Land Use Committee, Realtors Association, Neighborhood Business Associations, Neighborhood Councils, and Other Community Organizations.
- Public Open House
    - Widespread public notice will be provided before a scheduled meeting, where participants will be asked to provide input on draft code revisions and alternatives showing potentially eligible properties. Public input received will be prepared for consideration by the Plan Commission and City Council.
- Distribute Public Notices and Information
    - The City of Spokane will use a variety of methods—for example, Internet via the City's website and social media, email list of interested persons, news releases to TV and print media, and others such as direct mail and video productions—to inform the public about meetings, availability of draft proposals, and important milestones

Draft Timeline:

Activity	Tentative Date	
• Develop Methodology for Outreach & Survey of Property Owners under Current Ordinance	November	2016
• Plan Commission Workshop to Discuss Project Scope	December	
• Outreach to Stakeholder Groups	Jan.-June	2017
• Complete Preliminary GIS Inventory	January	
• Plan Commission Workshop – Update • Complete Initial Analysis and Project Webpage, Assemble Resources, Notification of Open House(s), Marketing Campaign	March	
• Public Open House(s) – Review Code Draft and Alternatives (Potentially Eligible Properties)	April	
• Plan Commission Workshop to Report Results, Prepare for Public Hearing	May	
• Plan Commission Hearing	June	
• City Council Hearing & Adoption	July	



Non-Residential Uses in Residential Zones

Northwest Quadrant

City of Spokane | Type I Properties | Water

Freeway/Arterial | Local Street

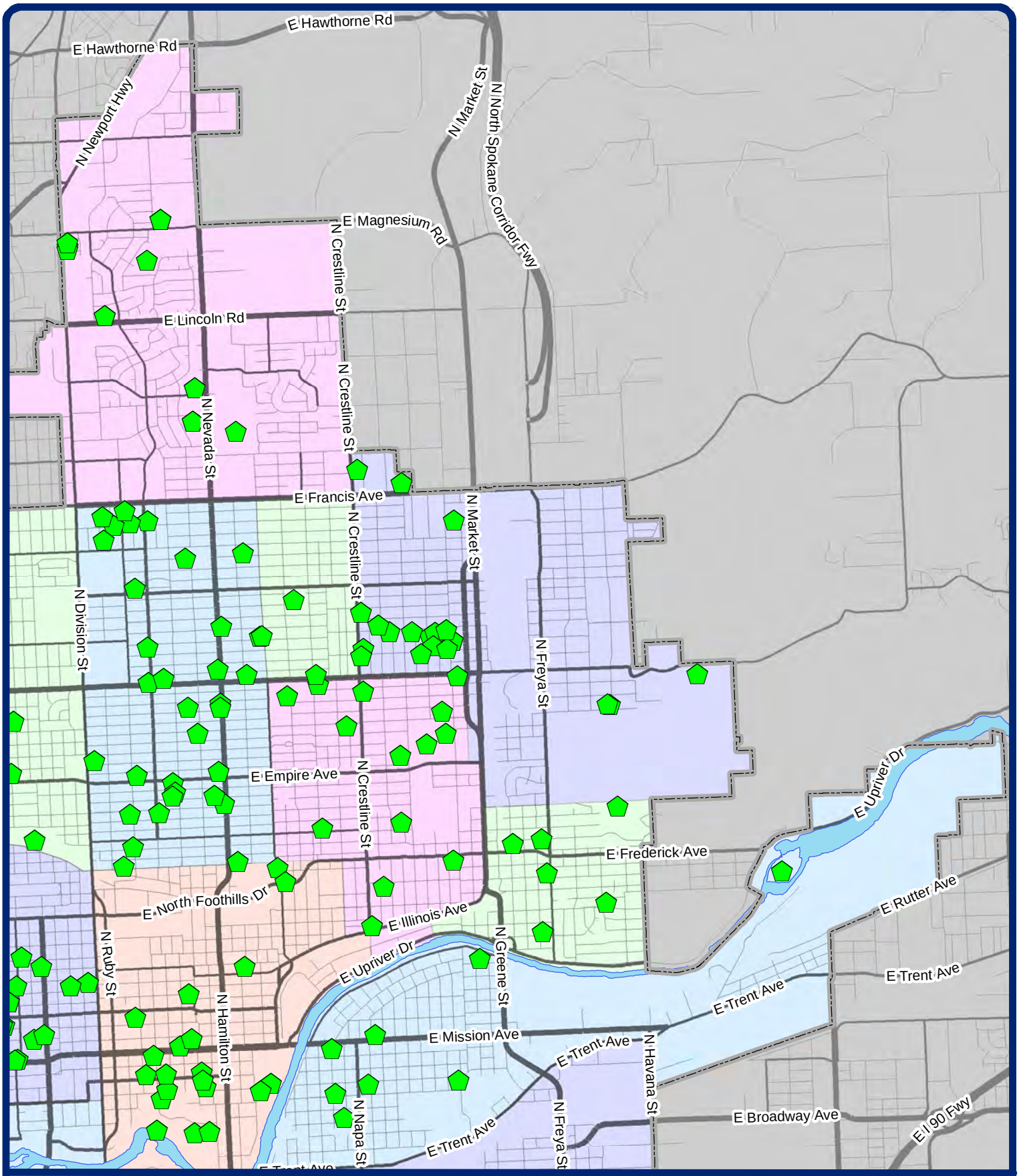
**Type 1 Properties are those that currently contain a non-residential use, as indicated by County of Spokane Assessor Data.*

THIS IS NOT A LEGAL DOCUMENT:
The information shown on this map is compiled from various sources and is subject to constant revision. Information shown on this map should not be used to determine the location of facilities in relationship property lines, section lines, roads, etc.

0 0.125 0.25 0.5 0.75 1 Miles

N W E S

Source: Planning Dpt Date: 2017 01 17



Non-Residential Uses in Residential Zones

Northeast Quadrant

City of Spokane | Type I Properties | Water

Freeway/Arterial | Local Street

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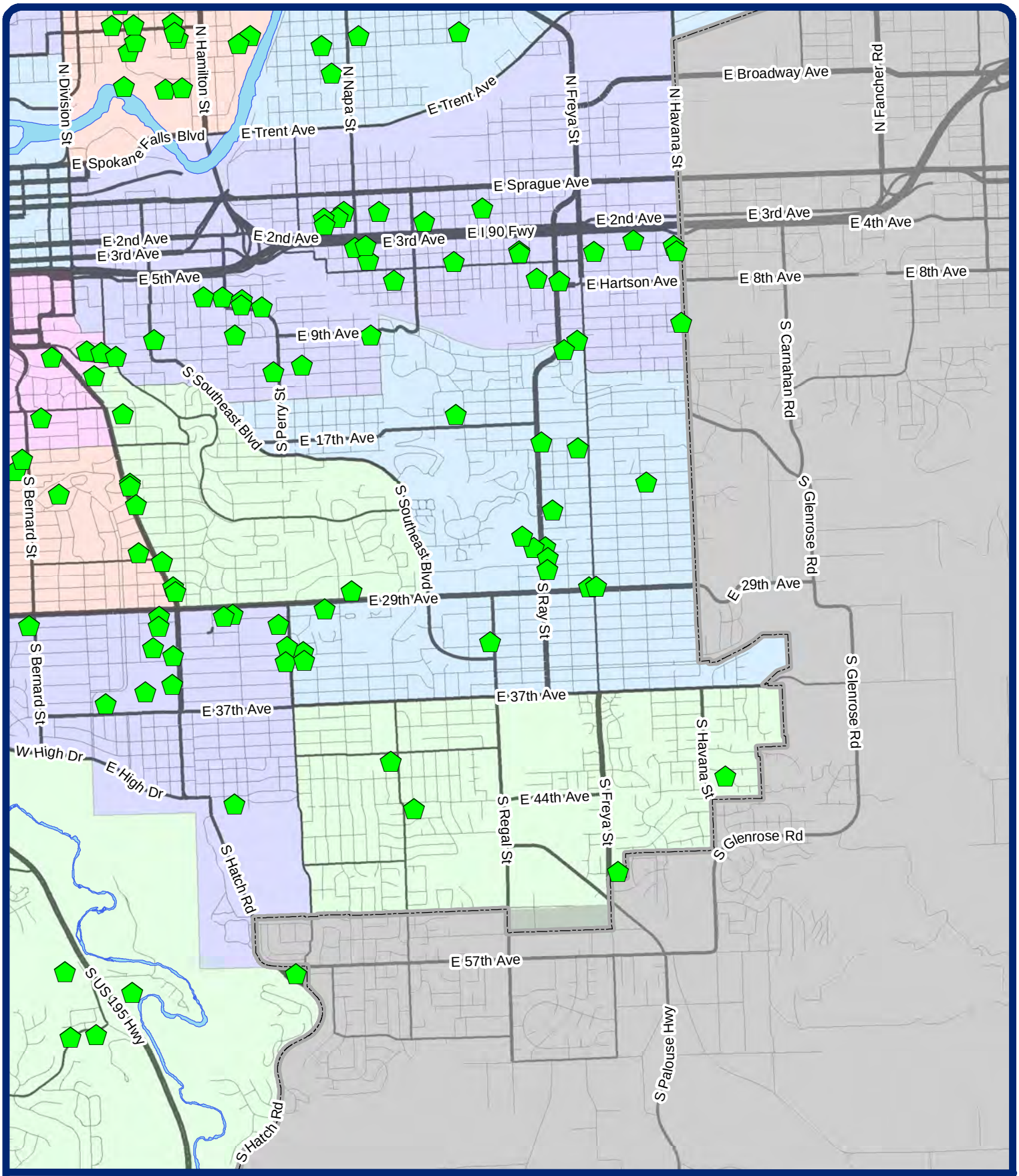

Non-Residential Uses in Residential Zones

Southeast Quadrant

City of Spokane | Type I Properties | Water

Freeway/Arterial | Local Street

**Type 1 Properties are those that currently contain a non-residential use, as indicated by County of Spokane Assessor Data.*

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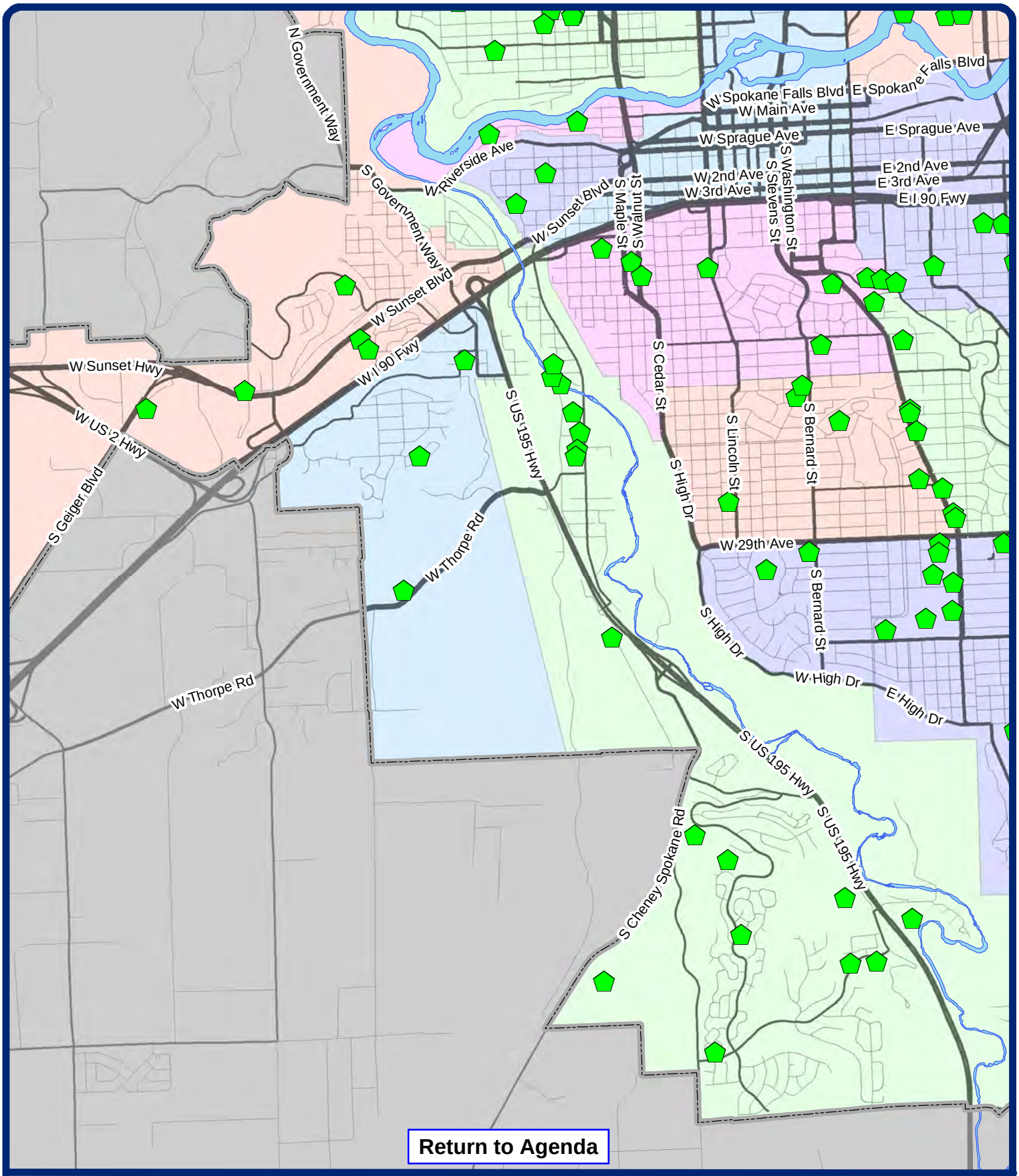

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Non-Residential Uses in Residential Zones

Southwest Quadrant

City of Spokane | Type I Properties | Water

Freeway/Arterial | Local Street

**Type 1 Properties are those that currently contain a non-residential use, as indicated by County of Spokane Assessor Data.*

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0 0.125 0.25 0.5 0.75 1 Miles

N W E S

Source: Planning Dpt Date: 2017 01 17

BRIEFING PAPER
City of Spokane
DSC/ Plan Commission
March 8, 2017

Subject
Staff will be introducing an ordinance to formalize the criteria and application process to allow Parklets and Streateries in the City.

Background
Parklets are an emerging way to provide additional public gathering spaces in urban areas. Additionally, Streateries can be used as an extension of adjacent restaurants and businesses. They have been utilized with positive impact on pedestrian and business activity in cities such as Seattle, Portland, San Francisco, New York, Washington D.C., and others. The city of Spokane has run two pilot projects authorizing Parklets within the downtown core.

Parklets and Streateries have been implemented with success in multiple municipalities; increasing the vibrancy of the public realm, generating pedestrian activity, and activating new uses for streets.

Impact
Parklets and Streateries will have the most immediate impact on the city block on which they are placed. They will allow for pedestrians to use the space, smaller events, such as music, to attract public interest, and as an extension of businesses.

Implementation of Parklets or Streateries will require the occupation of one or more spaces of on street parking.

Action
Staff is working on the Ordinance and Policy documents now and hopes to reach out to community stakeholders in the next 30-60 days for their feedback and experience during the pilot program. Staff anticipates holding a public Hearing with PC in June.

Funding
Not applicable

Return to Agenda

March 1, 2017

Re: March 8 Hearing – Shaping Spokane, the 2017 Update to the Comprehensive Plan

Dear Plan Commission Members:

For your consideration prior to the March 8 hearing regarding Shaping Spokane, the 2017 Update to the City's Comprehensive Plan, the entire document has been made available to you and to the public at the following location:

www.shapingspokane.org/draft-plan/

As we have in the past, both a tracked-changes version and a final formatted version is available. We have also provided links to each individual chapter in case the full document is too large to download. Also included on that page are links to the various appendices of the Comprehensive Plan. For the appendices related to Shaping Spokane, see Volume V.

As always, if you have any difficulty accessing the document please don't hesitate to contact me via email at kfreibott@spokanecity.org or at 509.625.6184.

Sincerely,

Kevin Freibott, Assistant Planner
Comprehensive Plan, Neighborhoods, and Codes Team

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March 1, 2017

Re: March 8 Hearing – Mandated Spokane Municipal Code Amendments

Dear Plan Commission Members:

Along with the 2017 Comprehensive Plan Update, some modification to the Wetlands Protection standards in Spokane Municipal Code Chapter 17E.070 must be made to reflect recent changes in State law. Attached to this letter please find a tracked-changes version of Chapter 17E.070 for your consideration. In addition to conformance with state law, minor changes have also been recommended for readability and clarity. Additional information can be found on the project site here:

https://my.spokanecity.org/projects/wetlands-protection-spokane-municipal-code-amendment/

We look forward to seeing all of you at the hearing on March 8.

Sincerely,

Kevin Freibott, Assistant Planner
Comprehensive Plan, Neighborhoods, and Codes Team

Title 17E Environmental Standards

Chapter 17E.070 Wetlands Protection

Section 17E.070.010 Title and Purpose

A. This chapter shall be known and may be cited as the "Spokane Wetlands Protection Code."

B. This chapter is based on and implements the City of Spokane's comprehensive plan~~,~~ and shoreline master program as amended from time to time. The purpose of this chapter is to protect the public health, safety and welfare by preserving, protecting and restoring wetlands through the regulation of development and other activities within wetlands and their buffers.~~,~~ ~~and~~ This chapter is not intended to create or otherwise establish or designate any particular person, or class, or group of persons who will or should be especially protected or assisted by the terms or provisions of this chapter. Further, it is the purpose of this chapter through the regulation of development and activities to meet the required goal of no net loss of wetland areas, functions and values.

1. The ~~city~~ City ~~council~~ Council finds that wetlands constitute important natural resources which provide significant environmental functions including:

    a. improving water quality through biofiltration, adsorption, retention and transformation of sediments, nutrients and toxicants;

    b. maintaining the water regime in a watershed (hydraulic functions) such as reducing peak flows, erosion control, stabilizing stream banks and shorelines and recharging ground water;

    c. providing general ~~habitat,~~ habitat for invertebrates, amphibians, anadromous fish and resident fish;

    d. providing habitat to aquatic birds and ~~aquatic~~ mammals ~~and~~, providing richness of food and supporting food webs; and

    e. providing a place for education, scientific study and aesthetic appreciation.

C. The provisions of this chapter shall be liberally construed to effectively carry out its purpose. If any provisions of this chapter conflict with other regulations, ordinances or other authorities, the provision that provides more protection to wetlands and wetland buffers shall apply.

Date Passed: Monday, December 3, 2007

Effective Date: Sunday, January 6, 2008

ORD C34148 Section 73

Section 17E.070.020 Applicability

A. The requirements of this chapter apply to all activities and development occurring in a wetland or wetland buffer, as defined in this chapter. Property located in a wetland or wetland buffer as defined in this chapter is subject to both its zoning classification regulations and to the additional requirements imposed under this chapter. In any case where there is a conflict between the provisions of the underlying zone and this chapter, the provisions of this chapter shall apply.

B. Wetlands are those areas, designated in accordance with the most current edition of the federal wetland delineation manual and applicable regional supplements~~Washington State Wetland Identification and Delineation Manual~~, that are inundated or saturated by surface water or ground water at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands generally include swamps, marshes, bogs and similar areas. Wetlands do not include those artificial wetlands intentionally created from non-wetland sites, including, but not limited to, irrigation and drainage ditches, grass-lined swales, canals, detention facilities, wastewater treatment facilities, farm ponds and landscape amenities, or those wetlands created after July 1, 1990, that were unintentionally created as a result of the construction of a road, street or highway. Wetlands may include those artificial wetlands intentionally created from non-wetland areas created to mitigate conversion of wetlands. All areas within the City meeting the wetland designation criteria in the federal wetland delineation manual and applicable regional supplements~~Identification and Delineation Manual~~, regardless of any formal identification, are hereby designated critical areas and are subject to the provisions of this chapter.

C. Nothing contained in this chapter is intended to be nor shall be construed to create or form the basis for liability on the part of the City, or its officers, officials, employees or agents for any injury or damage resulting from the failure of any owner of property or land to comply with the provisions of this chapter, or by reason or in consequence of any inspection, notice, order, certificate, permission or approval authorized or issued in connection with the implementation or enforcement of this chapter, or by reason of any action or inaction on the part of the City related in any manner to the enforcement of this chapter by its officers, officials, employees or agents.

Date Passed: Monday, December 3, 2007

Effective Date: Sunday, January 6, 2008

ORD C34148 Section 73

Section 17E.070.030 Identification, Designation and Mapping of Wetlands

A. Wetland Maps.
The approximate location and extent of wetlands in the City is compiled in the City's wetlands inventory. Their approximate location is displayed on City maps. The foregoing maps are to be

used as a guide for the City, project applicants and/or property owners, and may be continuously updated as new wetlands are identified. The maps are references and do not provide a final wetlands designation or delineation. Wetlands of any size and state of isolation are regulated under the provisions of this ordinance. Wetlands not shown on City maps or wetlands inventory are presumed to exist in the ~~city~~ City and are protected under the provisions of this chapter. In the event that any of the wetland designations shown on the wetland inventory or maps conflict with the criteria set forth in this chapter, the criteria shall control.

B. Determination of Wetland Boundary.

1. The applicant shall, through the performance of a field investigation by a qualified professional wetland scientist applying the wetland definition provided in this chapter and in SMC 17A.020.230 and as part of the wetlands report requirement found in this chapter, provide a site analysis including: a determination of the exact location of the wetland boundary; an analysis of wetland functions and values; and a wetland rating according to the wetlands rating system criteria adopted in SMC 17E.070.100. Qualified wetland scientists shall perform wetland delineations using the Federal Manual for Identifying and Delineating Jurisdictional Wetlands (1987), ~~Interim Regional Supplement:~~ Arid West ~~Wetlands Manual~~Final Regional Supplement (~~2006~~2008), ~~and Washington State Wetlands Identification and Delineation Manual~~ as revised or supplemented. The director, upon consultation with the ~~department~~ Department of ~~ecology~~Ecology, may determine that wetland identification and delineations made prior to adoption of these standards, or for a different use requiring permit changes, require a new determination by a qualified wetland scientist. Wetland determinations are subject to Corps Regulatory Guidance Letter (RGL) 05-02, 2005 and expire after five years from the date of determination and must follow requirements for review by a qualified wetland scientist upon expiration of the five-year limitation.

2. Where an applicant has provided a delineation of a wetland boundary, the department shall verify the accuracy of, and may render adjustments to, the boundary delineation. ~~and the~~The applicant may be charged by the department for costs incurred in verifying the accuracy of the delineation. In the event the adjusted boundary delineation is contested by the applicant, the department may, at the applicant's expense, obtain the services of a second wetlands scientist to perform a delineation. The second delineation shall be final, unless appealed to the hearing examiner.

Date Passed: Monday, December 3, 2007

Effective Date: Sunday, January 6, 2008

ORD C34148 Section 73

Section 17E.070.040 Regulated Activities

A. No regulated activity shall be undertaken in a wetland or wetland buffer without submitting a critical areas checklist as provided ~~at~~ in SMC 17 E.070.080 and first obtaining required permits. Uses and activities in wetlands are only allowed as conditional use permits or planned unit developments under the provisions of the City zoning code. Unless expressly provided otherwise in this chapter, regulated activities include any of the following activities which occur in a wetland or its buffer:

1. Removal, excavation, grading or dredging of soil, sand, gravel or other similar materials.
2. Dumping, discharging or filling with any material.
3. Draining ~~or~~, flooding, or disturbing of the water level or water table.
4. Driving of pilings.
5. Placing of obstructions.
6. Construction, reconstruction, demolition or expansion of any structure.
7. The removal, cutting, clearing, harvesting, shading or intentional burning of any vegetation, including removal of snags or dead or downed woody material, or planting of non-native vegetation that would degrade the wetland, provided that these activities are not part of a forest practice governed under chapter 76.09 RCW and its rules.
8. Activities that restrict, increase or otherwise measurably alter the hydrology, water quality or limnology of the wetland.
9. Construction or installation of streets or utilities; and
10. Construction and maintenance of pervious trails.

B. Where a regulated activity is proposed which would be partly inside and partly outside a wetland or wetland buffer, a wetland permit shall be required for the entire regulated activity. The standards of this chapter shall apply only to that part of the regulated activity which occurs inside the delineated boundaries of a wetland or a wetland buffer, provided all activities that occur outside a wetland or wetland buffer are prohibited from negatively impacting a wetland or wetland buffer.

Date Passed: Monday, December 3, 2007

Effective Date: Sunday, January 6, 2008

ORD C34148 Section 73

Section 17E.070.050 Unregulated Activities

A. The following activities are exempt from the requirement to obtain a permit and are allowed within a wetland or wetland buffer to the extent that they are not prohibited by other local, state or federal law, ~~and~~ do not degrade a wetland or wetland buffer, and are reviewed by the City prior to any action:

1. Conservation or preservation of soil, water, vegetation, fish, shellfish and other wildlife including the planting of native wetland vegetation.

2. Activities having minimal adverse impacts on wetland buffers and no adverse impact on wetlands, including low-intensity, passive recreation activities such as short-term scientific or education activities and sport~~s~~ fishing or hunting.

3. Repair and maintenance of existing drainage ditches which are part of a nonconforming wetland use, provided no expansion or introduction of new adverse impact to the wetland takes place. Maintenance of existing drainage ditches should be limited to removing sediment to the depth recorded ~~at~~ during the last authorized maintenance activity. The use of current best management practices is especially encouraged to improve agricultural practices in and near wetlands.

4. Placement of navigation aids and boundary markers.

5. Placement of boat mooring buoys.

6. Site investigative work necessary for land use application submittal such as surveys, soil logs and other related activities. Disturbance shall be minimized to the greatest extent possible. Examples of minimal impact methods include, but are not limited to, hand dug test pits or hand borings. All subsurface exploration methods shall be approved in advance by the director. In every case, wetland impacts shall be minimized and disturbed areas shall be immediately restored; and

7. ~~Normal maintenance of existing utility and street systems, provided that, whenever possible, maintenance activities be confined to late summer and fall. Operation, maintenance or repair of public rights-of-way, legally existing roads, structures or facilities and associated right-of-way used in the service of the public to provide transportation, electricity, gas, water, telephone, telegraph, telecommunication, sanitary sewer, stormwater treatment and other public utility services are exempt from this chapter. Operation, maintenance or repair activities that do not require construction permits, if the activity does not further alter or increase impact to, or encroach further within, the critical area or buffer and there is no increased risk to life or property as a result of the proposed operation, maintenance or repair. Operation and vegetation management performed in accordance with best management practices that is part of ongoing maintenance of structures, infrastructure, or utilities, provided that such management actions are part of a regular ongoing maintenance, do not expand further into the critical area, are not the result of an expansion of the structure or utility,~~

~~and do not directly impact endangered species. These ongoing activities are not subject to new or additional mitigation when they do not expand further into the critical area, are not the result of an expansion of the structure or utility, or do not directly impact endangered species. Whenever possible, maintenance activities will be confined to late summer and fall.~~The following activities are not subject to the provisions of this chapter provided they do not expand further into the critical area, do not alter or increase the impacts to the critical area or buffer, do not directly impact endangered species and do not increase risk to life or property. Whenever possible, maintenance activities will be confined to late summer and fall.

a. Operation, maintenance or repair of public rights-of-way, legally existing roads, structures or facilities and associated rights-of-way used to provide transportation, electricity, gas, water, telephone, telecommunication, sanitary sewer, stormwater treatment and other public utility;
b. Operation, maintenance or repair activities that do not require construction permits;
~~a.~~c. Vegetation management performed in accordance with best management practices as part of the ongoing maintenance of structures, infrastructure, or utilities, provided that such management activities are not the result of an expansion of the structure or utility.

B. Forest practices and conversions shall be governed by chapter 76.09 RCW and rules promulgated thereunder. This permit exemption does not apply where such activities result in the conversion of a wetland or wetland buffer to a use requiring a permit under this chapter.

Date Passed: Monday, December 3, 2007

Effective Date: Sunday, January 6, 2008

ORD C34148 Section 73

Section 17E.070.060 Emergency Activities

A. Notwithstanding the provisions of this chapter or any other laws to the contrary, the director may allow emergency activities if the:

1. director determines that an imminent threat to public health, safety or the environment will occur if an emergency activity is not allowed; and

2. threat to or loss of wetlands may occur before the normal and usual process ~~is~~ can be followed or activities can be modified ~~under~~ pursuant to the procedures ~~otherwise~~ normally required by this chapter.

B. The exemption for emergencies should not eliminate the need for later mitigation to offset the impacts of emergency activity. Once the immediate threat has been addressed, any adverse impacts on critical areas should be minimized and mitigated.

~~B.~~C. Any emergency activity allowed shall:

1. incorporate to the greatest extent practicable the standards and criteria required for non-emergency activities;

2. be limited in duration to the time required to complete the authorized emergency activity, not to exceed ninety days without reapplication; and

3. require the restoration of any wetland altered as a result of the emergency activity within ninety days following the emergency repair, or during the growing season after the emergency repair. Procedures otherwise required by this chapter must be followed for restoration efforts required by the emergency repair in accordance with this chapter.

Date Passed: Monday, December 3, 2007

Effective Date: Sunday, January 6, 2008

ORD C34148 Section 73

Section 17E.070.070 Prohibited Activities

Activities that are not regulated activities under SMC 17E.070.040, unregulated activities under SMC 17E.070.050, or emergency activities under SMC 17E.070.060, are prohibited. In order to conduct an otherwise prohibited activity in a wetland or wetland buffer, the applicant must satisfy the requirements for a reasonable use exception as described in SMC 17E.070.120.

Date Passed: Monday, December 3, 2007

Effective Date: Sunday, January 6, 2008

ORD C34148 Section 73

Section 17E.070.080 Application Submittal Requirements

A. A pre-development conference is required for all regulated activities proposed in potential wetland areas and associated buffers per ~~chapter~~ SMC 17G.060 ~~SMC~~. The pre-development conference is intended to acquaint an applicant with standards, requirements, investigation procedures, best management practice and potential review procedures prior to ~~making~~ submitting an application.

B. All activities identified in SMC 17E.070.040 shall meet the following application submittal requirements in addition to the application submittal requirements specified in other codes. The

director may modify the submittal requirements based upon reasonable documentation, including BAS, needed to ensure compliance with this chapter, provided no construction activity, clearing or grading has taken place. A written summary of analysis and findings shall be included in any staff report or decision on the underlying permit.

1. Wetlands Report.
   This report shall include a written assessment and accompanying maps of the impacted wetland including, at a minimum, wetland delineation and rating as determined by SMC 17E.070.100; existing wetland acreage; proposed wetland impacts; alternatives to wetlands impacts; proposed wetland buffer; vegetative, faunal and hydrological characteristics; soil and substrate conditions and topographic elevations; and shall be submitted as a part of the permit application.

2. Topographic Survey.
   To the extent not provided in the wetlands report, a topographic site plan, prepared and stamped by a State of Washington licensed surveyor, is required for sites that include a wetland or its buffer. The topographic site plan shall include the following existing physical elements:

   a. Existing topography at two-foot contour intervals on-site, on adjacent lands within twenty-five feet of the site's property lines, and on the full width of abutting public and private rights-of-way and easements.

   b. Terrain and stormwater-flow characteristics within the site, on adjacent sites within twenty-five feet of the site's property lines, and on the full width of abutting public and private rights-of-way and easements.

   c. Location of areas with significant amounts of vegetation, and specific location and description of all trees with trunks six inches or greater in diameter at breast height (dbh) measured four feet, six inches above the ground, and noting their species.

   d. Location and boundaries of all existing site improvements on the site, on adjacent lands within twenty-five feet of the site's property lines, and on the full width of abutting public and private rights-of-way and easements. This shall include the amounts of developmental coverage, including all impervious surfaces (noting total square footage and percentage of site occupied).

   e. Location of all ongoing grading activities ~~in progress, and~~ as well as all natural and artificial drainage control facilities or systems in existence ~~or~~ on the site, on adjacent lands ~~on the site,~~ within twenty-five feet of the site's property lines, and in the full width of abutting public and private rights-of-way and easements.

f. Location of all existing utilities (water, sewer, gas, electric, phone, cable, etc.), both above and below ground, on the site, on adjacent lands within twenty-five feet of the site's property lines and in the full width of abutting public rights-of-way; and

g. ~~Such a~~Additional information on existing physical elements ~~information for~~ on the site and surrounding area as required by the director to inform a complete review of a project subject to the standards of this chapter.

3. Additional Site Plan Information.
To the extent not provided in the wetlands report, the following site plan information shall also be required for sites that include wetlands and their buffers. Information related to the location and boundaries of wetlands and required buffer delineations shall be prepared by qualified professionals with training and experience in their respective area of expertise as demonstrated to the satisfaction of the director.

a. Location and boundaries of all wetlands and wetland buffer on the site and on adjacent lands within twenty-five feet of the site's property lines, noting both total square footage and percentage of site.

b. Location and identification of all wetlands within one hundred feet of the site's property lines.

c. Location and boundaries of all proposed site improvements on the site, on adjacent lands within twenty-five feet of the site's property lines, and on the full width of abutting public and private rights-of-way and easements. This shall include the amount of proposed land disturbing activities, including amounts of developmental coverage, impervious surfaces and construction activity areas (noting total square footage and percentage of site occupied).

d. Location of all proposed grading activities and all proposed drainage control facilities or systems on the site or on adjacent lands within twenty-five feet of the site's property lines, and on the full width of abutting public and private rights-of-way and easements.

e. Location of all proposed utilities (water, sewer, gas, electric, phone, cable, etc.), both above and below ground, on the site, on adjacent lands within twenty-five feet of the site's property lines, in the full width of abutting public rights-of-way, and any proposed extension required to connect to existing utilities, and proposed methods and locations for the proposed development to hook-up to these services; and

f. Such additional site plan information related to the proposed development as required by the director to inform a complete review of a project subject to the standards of this chapter.

4. Technical Reports.
To the extent not provided in the wetlands report, technical reports and other studies and submittals shall be prepared as required by the director detailing on-site soils, ~~geological~~geology, hydrology~~ical~~, drainage, plant ecology and botany and other pertinent site information. The reports, studies and submittals shall be used to condition development to prevent potential harm and to protect the critical nature of the site, adjacent properties, and the drainage basin.

Date Passed: Monday, December 3, 2007

Effective Date: Sunday, January 6, 2008

ORD C34148 Section 73

Section 17E.070.090 Posting, Covenants and Recording Conditions

A. During construction, the director may require conditions to be posted on the site that are visible from public rights-of-way.

B. The director shall require the boundaries of wetlands and their buffers and any permanent conditions imposed be legibly shown and described in a permanent covenant with the property, which must be acceptable to the director and city attorney and shall be recorded ~~in~~ with the Spokane County auditor's office.

C. The covenant shall be recorded prior to the issuance of any permit or at the time a plat is recorded.

D. The covenant shall be permanent unless a revocation is applied for that includes a wetland determination by a qualified wetland scientist that provides evidence the wetland no longer exists. The revocation application must be approved by the director in writing.

E. The director may require placement of small permanent visible markers to delineate the areas described in subsection B of this section. Said markers shall be posted at intervals required by the director and must be perpetually maintained by the property owner. The markers shall be worded as follow or with alternative language approved by the director: "The area beyond this sign is a critical area or critical area buffer. This sensitive environment is to be protected from alteration or disturbance. Please call the City of Spokane for more information." The location of the markers shall be legibly shown and described in the permanent covenant.

Date Passed: Monday, December 3, 2007

Effective Date: Sunday, January 6, 2008

ORD C34148 Section 73

Section 17E.070.100 Wetlands Rating System

A. Wetlands shall be rated according to the Washington State department of ecology wetland rating system found in the Washington State Wetlands Rating System for Eastern Washington (~~2004~~2014) as revised~~, together with the Wetlands in Washington State Volume 1 and 2 (2005) as revised.~~. These rating system documents contain the definitions and methods for determining if the criteria in subsections B through E of this section below are met. In using the rating system the City will not consider aspen-dominated forested wetlands larger than one-fourth acre to be Category I Wetlands unless they also meet one or more of the other criteria for a Category I Wetland.

B. Category I Wetlands.

1. These wetlands are not common and make up a small percentage of wetlands in the region. Category I wetlands are those that exhibit these primary characteristics:

   a. Represent a unique or rare wetland type.

   b. Are more sensitive to disturbance than most wetlands.

   c. Are relatively undisturbed and contain ecological attributes that are impossible to replace within a human lifetime; and

   d. Provide a high level of function.

2. In eastern Washington Category I Wetlands include but are not limited to the following examples:

   a. Alkali wetlands.

   b. Wetlands of High Conservation Value (formerly called Natural Heritage ~~Program (DNR)~~ Wetlands).

   c. Bogs and Calcareous Fens.

   d. Mature and old-growth forested wetlands over one-fourth acre with slow growing trees; and

   e. Wetlands that perform ~~many functions very well~~functions at high levels (scores of ~~seventy~~ twenty-two points or more).

C. Category II Wetlands.

Category II wetlands are difficult, although not impossible, to replace and provide high levels of some functions. These wetlands occur more commonly than Category I wetlands, but still need a relatively high level of protection. Category II wetlands include:

1. forested wetlands in the floodplains of rivers;
2. mature and old-growth forested wetlands over one-fourth acre with fast growing trees;
3. vernal pools; and
4. wetlands that perform functions well (scores between ~~fifty-one~~nineteen and ~~sixty-nine~~twenty-one points).

D. Category III Wetlands.
Category III wetlands generally have been disturbed in some ways, and are often smaller, less diverse and/or more isolated from other natural resources in the landscape than Category II wetlands and may not need as much protection as Category I and II Wetlands. Category III wetlands are:

1. vernal pools that are isolated, and
2. wetlands with a moderate level of function (between ~~thirty~~ sixteen and ~~fifty~~ eighteen points).

E. Category IV Wetlands.
Category IV wetlands have the lowest levels of function (less than ~~thirty~~ sixteen points) and are often heavily disturbed. These are wetlands that may be replaced and in some cases improved. These wetlands may provide some important function, and also need to be protected. Category IV wetlands are comprised of one vegetative class other than the forested wetland class.

Date Passed: Monday, December 3, 2007

Effective Date: Sunday, January 6, 2008

ORD C34148 Section 73

Section 17E.070.110 Wetland Buffers

A. Standard Buffer Zone Widths.
Wetland buffer zones shall be required for all regulated activities adjacent to wetlands. Any wetland created, restored or enhanced as compensation for approved wetland alterations shall also include the standard buffer required for the category of the created, restored or enhanced wetland. All buffers shall be measured from the wetland boundary as surveyed in the field pursuant to the requirements of SMC 17E.070.030. The width of the wetland buffer zone shall be determined according to the rating assigned to the wetland in accordance with SMC 17E.070.100 and consistent with Wetlands in Washington State, Volume 2, Protecting and Managing Wetlands, Guidance on Buffers and Ratios (Appendix 8-D) as revised, for wetland category, intensity of impacts, wetland functions, habitat scores or special characteristics. Standard buffer widths will be determined based on an evaluation of the following:

1. Conditions of the wetland.
2. Conditions of the buffer.
3. Proposed land uses adjacent to the buffer; and
4. The functions intended to be protected.

B. Wildlife habitat function is the most susceptible to developmental change and requires the greatest buffer protection. Protection of wildlife habitat functions require twenty-five to seventy-five feet for wetlands with minimal habitat functions and low intensity land uses adjacent to the wetlands, fifty to two hundred feet for wetlands with moderate habitat function and moderate or high intensity land use adjacent to the wetlands, and one hundred fifty to two hundred fifty plus feet for wetlands with high habitat functions depending on the intensity of the adjacent land use. The width of the wetland buffer zone shall be determined from one of the following two alternatives:

1. Alternative 1.
   Unless SMC 17E.070.110(3) (Table 17E.070.110-4) applies, width based solely on wetland category as follows:

Table 17E.070.110-1	
Wetland Category	**Buffer Width (feet)**
Type I	250
Type II	200
Type III	150
Type IV	50

2. Alternative 2.
   Alternative 2 provides three buffer widths based on habitat scores. Habitat score refers to the quality of physical structures such as vegetation, open water and connections to other wildlife habitats that are necessary for a wide range of species, including birds, mammals, and amphibians. Where more than one width applies based on score for function or based on special characteristics, the calculation providing the widest buffer

shall be used. Widths are based on wetland category, intensity of impacts from proposed changes in land use, and wetland functions or special characteristics. Land use intensity shall be determined as follows:

Table 17E.070.110-2. Types of proposed land use that can result in high, moderate, and low levels of impacts to adjacent wetlands.	
Impact from Proposed Change in Land Use	**Types of Land Use Based on Common Zoning Designations**
High	Commercial, Industrial and Institutional Residential (more than 1 unit/acre) High-intensity Recreation (golf courses, ball fields, etc.) Conversion to High Intensity Agricultural (dairies, nurseries, greenhouses, etc.) Hobby Farms
Moderate	Residential (1 unit/acre or less) Moderate-intensity Active Open Space (parks with biking, jogging, etc.) Conversion to Moderate Intensity Agriculture (orchards, hay fields, etc.) Paved Trails Building of Logging Roads Utility Corridor With Access/Maintenance Road Forestry (cutting of trees only)
Low	Passive Open Space (hiking, bird-watching, etc.) Unpaved Trails Utility Corridor Without Road or Vegetation Management

~~Table 17E.070.110-3~~				
~~Wetland Category~~	~~Habitat Score~~	~~Wetland Minimum Buffer Width (in feet)~~		
-	-	~~Low Impact~~	~~Moderate Impact~~	~~High Impact~~
~~I and II~~	~~29-36~~	~~100~~	~~150~~	~~200~~
-	~~20-28~~	~~75~~	~~110~~	~~150~~
-	~~< 20~~	~~50~~	~~75~~	~~100~~
~~III~~	~~20-28~~	~~75~~	~~110~~	~~150~~
-	~~< 20~~	~~40~~	~~60~~	~~80~~
~~IV~~	-	~~25~~	~~40~~	~~50~~

Table 17 E.070.110-3			
Category of Wetland	Land Use with Low Impact	Land Use with Moderate Impact	Land Use with High Impact
I	125 ft	190 ft	250 ft
II	100 ft	150 ft	200 ft
III	75 ft	110 ft	150 ft
IV	25 ft	40 ft	50 ft

3. If a Type I wetland is classified with at least one of the following special characteristics the following buffer table shall apply:

~~Table 17E.070.110-4~~			
~~Type I Special Characteristics~~	~~Low Impact~~	~~Moderate Impact~~	~~High Impact~~
~~Vernal Pool~~	~~100~~	~~150~~	~~200~~

~~Vernal Pool With Regional Plan~~	~~40~~	~~60~~	~~80~~
~~Natural Heritage Wetland~~	~~125~~	~~190~~	~~250~~
~~Bogs~~	~~125~~	~~190~~	~~250~~
~~Alkali~~	~~100~~	~~150~~	~~200~~
~~Riparian Forest~~	~~Buffer width to be based on score for habitat functions or water quality functions~~		

Table 17E.070.110-4

Wetland Characteristics	**Buffer Widths by Impact of Proposed Land Use (apply most protective if more than one criterion is met)**	**Other Measures Recommended for Protection**
Wetlands of High Conservation Value	Low - 125 ft Moderate – 190 ft High – 250 ft	No additional surface discharges to wetland or its tributaries No septic systems within 300 ft Restore degraded parts of buffer
Bogs	Low - 125 ft Moderate – 190 ft High – 250 ft	No additional surface discharges to wetland or its tributaries Restore degraded parts of buffer
Forested	Buffer size to be based on score for habitat functions or water quality functions	If forested wetland scores high for habitat, need to maintain connectivity to other natural areas Restore degraded parts of buffer
Alkali	Low – 100 ft Moderate – 150 ft High – 200 ft	No additional surface discharges to wetland or its tributaries Restore degraded parts of buffer
High level of function for habitat (score for habitat 8 – 9 points)	Low – 100 ft Moderate – 150 ft High – 200 ft	Maintain connections to other habitat areas Restore degraded parts of buffer
Moderate level of function for habitat (score for habitat 5 - 7 points)	Low – 75 ft Moderate – 110 ft High – 150 ft	No recommendations at this time
High level of function for water quality improvement (8 - 9 points) and low for habitat (less than 5 points)	Low – 50 ft Moderate – 75 ft High – 100 ft	No additional surface discharges of untreated runoff
Not meeting any of the above	Low – 50 ft	No recommendations at this

characteristics	Moderate – 75 ft High – 100 ft	time

C. Increased Wetland Buffer Zone Width.
The City may require increased buffer zone widths on a case-by-case basis as determined by the director when a larger buffer is necessary to protect wetland functions and values. This determination shall be supported by appropriate documentation showing that it is reasonably related to protection of the functions and values of the wetland. The documentation must include but not be limited to the following criteria:

1. The wetland is used by a plant or animal species listed by the federal government or the state as endangered, threatened, sensitive or documented priority species or habitats, or essential or outstanding potential habitat for those species, or has unusual nesting or resting sites such as heron rookeries or raptor nesting trees; or

2. The adjacent land is susceptible to severe erosion and erosion control measures will not effectively prevent adverse wetland impacts; or

3. The adjacent land has minimal vegetative cover or slopes greater than thirty percent.

D. Reduction of Standard Wetland Buffer Zone Width.
The City may reduce the standard wetland buffer zone width on a case-by-case basis as determined by the director, consistent with Wetlands in Washington State, Volume 2, Protecting and Managing Wetlands, Guidance on Buffers and Ratios (Appendix 8-D) as revised, ~~if~~ for wetlands that score:

1. moderate or high for habitat (~~twenty~~ five points or more for the habitat functions) the width of the buffer can be reduced if the following criteria are met:

   a. a relatively undisturbed vegetative corridor of at least one hundred feet in width is protected between the wetland and any other priority habitats; and

   b. the protected area is preserved by means of easement, covenant or other measure;

   c. measures identified in SMC 17E.070.110(~~C~~D)(2) (Table 17E.070.110-5) are taken to minimize the impact of any proposed land use or activity.

2. less than ~~twenty~~ five points for habitat, the buffer width can be reduced to that required for moderate land-use impacts by applying the following measures to minimize the impacts of the proposed land uses or activities:

Table 17E.070.110-5

Disturbance	Examples of Measures Used to Minimize Impacts
Light	Direct lights away from wetland
Noise	Locate activity that generates noise away from wetland
Toxic Runoff	Route all new untreated runoff away from wetland while ensuring wetland is not dewatered, establish covenants limiting use of pesticides within one hundred fifty feet, may apply integrated pest management
Stormwater Runoff	Retrofit stormwater detention and treatment for roads and existing adjacent development, prevent channelized flow from lawns that directly enters buffer
Change in Water Regime	Infiltrate or treat, detain, and disperse into buffer new runoff from impervious surfaces and new lawns
Pets and Human Disturbance	Use privacy fencing; plant dense vegetation to delineate buffer edge and to discourage disturbance using vegetation appropriate for the ecoregion; place wetland and its buffer in a separate tract~~plant appropriate vegetation to discourage disturbance~~
Dust	Use best management practices to control dust

E. Standard Buffer Width Averaging.

Wetlands may contain significant variations in sensitivity due to existing physical characteristics that may justify buffer width averaging. Standard wetland buffer zones may be modified by averaging buffer widths or a combination of averaging and reduction. Wetland buffer width averaging shall be allowed only where the applicant demonstrates all of the following:

1. Averaging will provide the necessary biological, chemical and physical support necessary to protect the wetland in question, taking into account the type, intensity, scale and ~~landscape~~ location of the proposed land use.

2. The land uses causing the least disturbance would be located adjacent to areas where buffer width is reduced and that such land uses are guaranteed in perpetuity by covenant, deed restriction, easement or other legally binding mechanism.

3. The total area contained within the wetland buffer after averaging is not less than that contained with the standard buffer prior to averaging. In no instance shall the buffer width be reduced by more than fifty percent of the standard buffer or be less than twenty-five feet.

F. Wetland Buffer Maintenance.
Except as otherwise specified wetland buffer zones shall be retained in their natural condition and free from mowing or other cutting activity, except for the removal of noxious weeds. Where buffer disturbances have occurred before or during construction, revegetation with native vegetation shall be required.

G. Permitted Uses in a Wetland Buffer Zone.
Regulated activities shall not be allowed in a buffer zone except for the following:

1. Activities having minimal adverse impacts on buffers and no adverse impacts on wetlands. These may include low-intensity, passive recreational activities such as trails, non-permanent wildlife watching blinds, short-term scientific or education activities, and sport fishing or hunting. Pervious pedestrian trails may be allowed in a wetland for minor crossings only and with minimal impacts. Trails may be allowed in the outer twenty-five percent of a wetland buffers and should be designed to avoid removal of significant trees. Such trails are limited to no more than five feet in width.

2. Stormwater management facilities, including biofiltration swales, designed according to the City of Spokane Stormwater Management Manual as revised, and chapter 17D.060 SMC, Stormwater Facilities, if no reasonable alternative on-site location is available within the meaning of SMC 17E.070.130, and if sited and designed so that the buffer zone as a whole provides the necessary biological, chemical and physical protection to the wetland in question, taking into account the scale and intensity of the proposed land use. Biofiltration swales will take into account the scale and intensity of the proposed land use, be located in the outer twenty-five percent of a Category III or IV wetland buffer provided that no other location is feasible, and will not degrade the functions and values of the wetland or its buffer.

H. Structural Setbacks from Buffers.
Unless otherwise provided, buildings and other accessory structures shall be set back a distance of ten feet from the edges of all delineated critical area buffers protecting fish and wildlife habitat conservation and wetland protection areas. The director may reduce the structural setback limit by up to five feet if construction, operation and maintenance of the building do not create a risk of negative impacts on the adjacent buffer area. Approval of a reduction of the structural setback from the buffer line shall be provided in writing by the director. The following uses may be allowed in the structural setback area:

1. Landscaping.

2. Uncovered decks.

3. Roof eaves and overhangs, maximum of twenty-four inches.

4. Pervious unroofed stairways and steps.

5. Impervious ground surfaces, such as driveways and patios.

Date Passed: Monday, December 3, 2007

Effective Date: Sunday, January 6, 2008

ORD C34148 Section 73

Section 17E.070.120 Reasonable Use Exceptions

A. Regulated activities shall not be authorized within a wetland or wetland buffer except where it can be demonstrated that an extraordinary hardship exists, or the impact is both unavoidable and necessary, or that all reasonable economic uses are denied, as defined below:

1. Extraordinary Hardship.
With respect to Category I and II wetlands, an applicant must demonstrate that denial of the permit would impose an extraordinary hardship on the part of the applicant brought about by circumstances peculiar to the subject property and not as a direct result of actions taken by the current or previous owner(s).

2. Unavoidable and Necessary Impacts.
With respect to all other wetlands, the following provisions shall apply. For water-dependent activities, unavoidable and necessary impacts can be demonstrated when there are no practicable alternatives which would not:

   a. involve a wetland or which would not have less adverse impact on a wetland;

   b. have other significant adverse environmental consequences.

3. Stormwater management facilities will be considered in wetland buffers with overflow into wetlands or wetland buffers, subject to regulation under the City of Spokane Stormwater Management Manual as revised, chapter 17D.060 SMC, Stormwater Facilities, and all other applicable provisions in this chapter.

4. Where non-water-dependent activities are proposed, the applicant must demonstrate that:

   a. the basic project purpose cannot reasonably be accomplished using an alternative site in the general region that is available to the applicant and may feasibly be used to accomplish the project;

b. a reduction in the size, scope, configuration or density of the project as proposed and all alternative designs of the project as proposed that would avoid, or result in less, adverse impact on a wetland of its buffer will not accomplish the basic purpose of the project; and

c. in cases where the applicant has rejected alternatives to the project as proposed due to constraints such as zoning, deficiencies of infrastructure, or parcel size, the applicant has made a reasonable attempt to remove or accommodate such constraints.

B. Reasonable Use.
If an applicant for a development proposal demonstrates to the satisfaction of the director that application of the standards of this chapter would deny all reasonable economic use of the property, development as conditioned shall be allowed if the applicant also demonstrates all of the following to the satisfaction of the director:

1. That the proposed development is water-dependent or requires access to the wetland as a central element of its basic function, or is not water-dependent but has no practicable alternative pursuant to this section.

2. That no reasonable use with less impact on the wetland and its buffer is possible.

3. That there is no feasible on-site alternative to the proposed development, including reduction in density, planned unit development and/or revision of road and lot layout that would allow a reasonable economic use with less adverse impacts to wetlands and wetland buffers.

4. That the proposed development will not jeopardize the continued existence of species listed by the federal government or the state as endangered, threatened, sensitive or documented priority species or priority habitats.

5. That any and all alterations to wetlands and wetland buffers will be mitigated as provided in ~~SMC 17E.070.040~~SMC 17E.070.130.

6. That there will be no damage to nearby public or private property and no threat to the health or safety of people on or off the property; and

7. That the inability to derive reasonable economic use of the property is not the result of actions by the applicant, or the present or prior owner of the property, in segregating or dividing the property and creating the undevelopable condition after the effective date of this chapter.

C. Mitigation will be required for impacts to a wetland or wetland buffer caused by unavoidable and necessary, extraordinary hardships, and reasonable use exceptions to standards.

D. Prior to granting any special exception under this section, the director shall make written findings on each of the items listed above.

Date Passed: Monday, December 3, 2007

Effective Date: Sunday, January 6, 2008

ORD C34148 Section 73

Section 17E.070.130 Mitigation

Wetland mitigation shall be consistent with Wetland Mitigation in Washington State, Parts 1 and 2 (2006) as amended from time to time, to provide consistency for applicants who must also apply for state and federal permits.

A. Conditions.
As a condition of any permit or approval allowing alteration of wetlands or associated buffers, the applicant will engage in the restoration, creation, rehabilitation, enhancement or preservation of wetlands in order to offset the impacts resulting from the applicants or violators actions. The applicant will develop an appropriate mitigation plan that provides for mitigation measures as outlined below. Wetland mitigation means the use of any or all of the following action listed in descending order of preference (mitigation sequencing):

1. Avoiding the impact altogether by not taking a certain action or parts of an action.
2. Minimizing impacts by limiting the degree or magnitude of the action and its implementation, by using appropriate technology, or by taking affirmative steps to avoid or reduce impacts.
3. Rectifying the impact by repairing, rehabilitating or restoring the affected environment.
4. Reducing or eliminating the impact over time by preservation and maintenance operations during the life of the action.
5. Compensating for the impact by replacing, enhancing or providing substitute resources or environments; or
6. Monitoring the impact and the compensation project and taking appropriate corrective measures. Mitigation may include a combination of the above measures.

B. Performance Standards.
Compensatory mitigation must follow a mitigation plan which includes the components listed in subsection D of this section. All mitigation plans must meet the minimum performance standards set forth in subsection C of this section.

C. Wetlands Restoration, Creation, Rehabilitation, Enhancement and Preservation.

1. Any person who degrades wetlands must restore, create, rehabilitate, ~~or~~ enhance, or preserve equivalent areas or greater areas of wetlands than those altered in order to compensate for loss of wetland acreage or functions.

2. Acreage Replacement Ratio.
   The following standard ratios apply to compensatory wetland mitigation that is in-kind. If a proposal seeks to eliminate a functional wetland through development, that loss must be compensated through creation or restoration mitigation. This strategy meets the no net loss standard for wetland function and value. The first number specifies the acreage of wetlands requiring replacement and the second specifies the acreage of wetlands altered.

Table 17E.070.130-1

Category and Type of Wetland Impacts	**Type of Wetland Mitigation**				
	Re-establishment or Creation	**Rehabilitation Only [1]**	**Re-establishment or Creation (R/C) and Rehabilitation (RH) [1]**	**Re-establishment or Creation (R/C) and Enhancement (E) [1]**	**Enhancement Only [1]**
All Category IV	1.5:1	3:1	1:1 R/C and 1:1 RH	1:1 R/C and 2:1 E	6:1
All Category III	2:1	4:1	1:1 R/C and 2:1 RH	1:1 R/C and 4:1 E	8:1
Category II Forested	4:1	8:1	1:1 R/C and 4:1 RH	1:1 R/C and 6:1 E	16:1
Category II Vernal Pool	2:1 Compensation must be seasonally ponded wetland	4:1 Compensation must be seasonally ponded wetland	1:1 R/C and 2:1 RH	Case-by-case	Case-by-case

All Other Category II	3:1	6:1	1:1 R/C and 4:1 RH	1:1 R/C and 8:1 E	12:1
Category I Forested	6:1	12:1	1:1 R/C and 10:1 RH	1:1 R/C and 20:1 E	24:1
Category I – Based on Score for Functions	4:1	8:1	1:1 R/C and 6:1 RH	1:1 R/C and 12:1 E	16:1
Category I Natural Heritage Site	Not considered possible [2]	6:1 Rehabilitation of a Natural Heritage Site	R/C not considered possible [2]	R/C not considered possible [2]	Case-by-case
Category I Alkali	Not considered possible [2]	6:1 ~~Rehabilition~~Rehabilitation of an alkali wetland	R/C not considered possible [2]	R/C not considered possible [2]	Case-by-case
Category I Bog	Not considered possible [2]	6:1 Rehabilitation of a bog	R/C not considered possible [2]	R/C not considered possible [2]	Case-by-case

[1] These ratios are based on the assumption that the rehabilitation or enhancement actions implemented represent the average degree of improvement possible for the site. Proposals to implement more effective rehabilitation or enhancement actions may result in a lower ratio, while less effective actions may result in a higher ratio. The distinction between rehabilitation and enhancement is not clear-cut. Instead, rehabilitation and enhancement actions span a continuum. Proposals that fall within the gray area between rehabilitation and enhancement will result in a ratio that lies between the ratios for rehabilitation and the ratios for enhancement.

[2] ~~Natural heritage sites~~Wetlands with a high conservation value and~~,~~ alkali wetlands are considered irreplaceable wetlands because they perform functions that cannot be replaced through compensatory mitigation. Impacts to such wetlands would therefore result in a net loss of some functions no matter what kind of compensation is proposed.

3. Increased Replacement Ratio.
   The standard replacement ratio may be increased under the following circumstances:

   a. High degree of uncertainty as to the probable success of the proposed restoration or creation.

   b. Significant period of time between destruction and replication of wetland functions.

   c. Projected losses in functional value and other uses, such as recreation, scientific research and education, are relatively high.

   d. Not possible to create or restore same type of wetland.

   e. Off-site compensation is offered.

4. Decreased Replacement Ratio.
   The standard replacement ratio may be decreased under the following circumstances: scientifically supported evidence which demonstrates that no net loss of wetland function or value is attained under the decreased ratio. In all cases, a minimum acreage replacement ratio of 1:1.5 is required.

5. Wetland Enhancement.

   a. Any applicant proposing to degrade wetlands may propose to enhance existing wetlands in order to compensate for wetland losses. Applicants proposing to enhance wetlands must identify how enhancement conforms with the overall goals and requirements of the wetlands protection program.

   b. A wetlands enhancement compensation project will be considered, if enhancement for one function and value will not degrade another function or value. Acreage replacement ratios may be increased up to one hundred percent to recognize existing functional values. Category I wetlands may not be enhanced.

6. In-kind/Out-of-kind Mitigation.
   In-kind mitigation must be provided except where the applicant can demonstrate that:

   a. the wetland system is already degraded and out-of-kind replacement will result in a wetland with greater functional value;

   b. technical problems such as exotic vegetation and changes in watershed hydrology make implementation of in-kind mitigation impossible.

Where out of-kind replacement is accepted, greater acreage replacement ratios may be required to compensate for lost functional values.

7. On-site/Off-site Mitigation.
   On-site mitigation shall be provided except where the applicant can demonstrate that:

   a. the hydrology and ecosystem of the original wetland and those who benefit from the hydrology and ecosystem will not be damaged by the on-site loss; and

   b. on-site mitigation is not scientifically feasible due to problems with hydrology, soils, or factors such as other potentially adverse impacts from surrounding land uses; or

   c. existing functional values at the site of the proposed restoration are significantly greater than lost wetland functional values; or

   d. established goals for flood storage, flood conveyance, habitat or other wetland functions have been established and strongly justify location of mitigation measures at another site.

8. Mitigation Outside of Primary Drainage Basin.
   Wetland creation or restoration must occur within the same primary drainage basin as the wetland loss occurred, unless the applicant can demonstrate that:

   a. the hydrology and ecosystem of the original wetland and those who benefit from the hydrology and ecosystem will not be substantially damaged by the loss within that primary drainage basin; and

   b. in-basin mitigation is not scientifically feasible due to problems with hydrology, soils or other factors such as other potentially adverse impacts from surrounding land uses; or

   c. existing functional values in a different primary drainage basin are significantly greater than lost wetland functional values; or

   d. established goals for flood storage, flood conveyance, habitat or other wetland functions have been established and strongly justify location of mitigation measures in a different primary drainage basin.

9. Mitigation Site Selection.
   In selecting mitigation sites, applicants are encouraged to utilize *Selecting Wetland Mitigation Sites Using a Watershed Approach* (Eastern Washington) (Publication #10-06-07, November 2010). Applicants must pursue siting in the following order of preference:

   a. Upland sites which were formerly wetlands.

   b. Degraded upland sites generally having bare ground or vegetative cover consisting primarily of exotic introduced species, weeds or emergent vegetation; and

c. Other upland sites.

10. Timing.
    Where feasible, mitigation projects are to be completed prior to activities that will disturb wetlands. Bonding is required if mitigation projects cannot be completed prior to project completion. Construction of mitigation projects must be timed to reduce impacts to existing wildlife and flora.

D. Components of Mitigation Plans.
All wetland restoration, creation, rehabilitation, enhancement and/or preservation projects required pursuant to this chapter, either as a permit condition or as the result of an enforcement action, must follow a mitigation plan prepared by qualified wetland professionals meeting City requirements. The applicant or violator must receive written approval of the mitigation plan prior to commencement of any wetland restoration, creation or enhancement activity. The mitigation plan must contain at least the following components:

1. Baseline Information.

    a. A written assessment and accompanying maps of the impacted wetland including, at a minimum:

        i. Wetland delineation.

        ii. Existing wetland acreage.

        iii. Proposed wetland impacts.

        iv. Vegetative, faunal and hydrologic characteristics.

        v. Soil and substrate conditions; and

        vi. Topographic elevations.

    b. If the compensation site is different from the impacted wetland site, baseline information should also include:

        i. the watershed.

        ii. surface hydrology,

        iii. existing and proposed adjacent land uses,

        iv. proposed buffers; and

        v. ownership.

2. Environmental Goals and Objectives.
    A written report must be provided identifying:

a. goals and objectives and ~~describing~~project description;

b. site selection criteria;

c. compensation goals;

d. target evaluation species and resource functions;

e. dates for beginning and completion; and

f. a complete description of the functions and values sought in the new wetland.

The goals and objectives must be related to the functions and values of the original wetland, or if out-of-kind, the type of wetland to be emulated. The report must also include an analysis of the likelihood of success of the compensation project at duplicating the original wetland, and the long-term viability of the project, based on the experiences of comparable projects, if any.

3. Monitoring Program.
   Specific measurable criteria approved by the director, ~~are~~ shall be provided for evaluating whether the goals and objectives of the project are being achieved, and for determining when and if remedial action or contingency measures should be implemented. Such criteria may include water quality standards, survival rates of planted vegetation, species abundance and diversity targets, habitat diversity indices, or other ecological, geological or hydrological criteria. The mitigation plan manager must assure work is completed in accordance with the mitigation plan and, if necessary, the contingency plan. The monitoring program will continue for at least five years from the date of plant installation. Monitoring will continue for ten years where woody vegetation (forested or shrub wetlands) is the intended result. These communities take at least eight years after planting to reach eighty percent canopy closure. Reporting for a ten year monitoring period shall occur in years one, two, three, five seven and ten. Monitoring in all instances shall be bonded. Reporting results of the monitoring data to the director is the responsibility of the applicant.

4. Detailed Construction Plans.
   Written specifications and descriptions of mitigation techniques are to be provided, as specified by the director.

5. Construction Oversight.
   The construction of the mitigation project will be monitored by a qualified wetlands professional to insure that the project fulfills its goals.

6. Contingency Plan.
   The plan must identify potential courses of action that can be taken when monitoring or evaluation indicates project performance standards are not being met.

7. Permit Conditions.
   Any mitigation plan prepared pursuant to this section becomes part of the ~~any~~ permit application or approval.

8. Performance Bonds and Demonstration of Competence.
   The applicant must provide demonstration of administrative, supervisory and technical competence, financial resources and scientific expertise of sufficient standing to successfully execute the mitigation plan. The applicant will name a mitigation project manager and provide the qualifications of each team member involved in preparing, implementing and supervising the mitigation plan. This includes educational background ~~and~~, areas of expertise, training and experience with comparable projects. In addition, bonds ensuring fulfillment of the mitigation project, the monitoring program, and any contingency measures must be posted in the amount of one hundred twenty-five percent of the expected ~~project~~ cost of mitigation, plus a factor to be determined to allow for inflation during the time the project is being monitored. An administration fee for the mitigation project may be assessed to reimburse the City for costs incurred during the course of the monitoring program.

9. Consultation With Other Agencies.
   Applicants are encouraged to consult with federal, state, local agencies having expertise or interest in a mitigation proposal.

Date Passed: Monday, December 3, 2007

Effective Date: Sunday, January 6, 2008

ORD C34148 Section 73

Section 17E.070.140 Mitigation Banking

Mitigation banking shall be consistent with chapter 90.84 RCW. Credits from a wetland mitigation bank may be approved for use as compensation for unavoidable impacts when the:

A. bank is certified under chapter 173-700 WAC;

B. director, in consultation with the ~~department~~ Department of ~~ecology~~Ecology, determines that the wetland mitigation bank provides appropriate compensation for the authorized impacts; and,

C. proposed use of credits is consistent with the terms and conditions of the bank's certification.

Replacement ratios for projects using bank credits shall be consistent with replacement ratio~~n~~s specified in the bank's certification. Credits from a certified wetland mitigation bank may be used to compensate for impacts located with the service area specified in the bank's certification. In some cases, the service

area of the bank may include portions of more than one adjacent drainage basin for specific wetland functions.

Date Passed: Monday, December 3, 2007

Effective Date: Sunday, January 6, 2008

ORD C34148 Section 73

Section 17E.070.150 Incentives and Stewardship Options

A. On-site Density Transfer or Clustering.
For residential development proposals on lands containing potential or identified critical areas, including wetland areas and buffers, the applicant may apply for planned unit development (PUD) under chapter 17G.070 SMC. The maximum number of dwelling units (DU) for a lot or parcel that contains a wetland area and buffer is determined by the site's zoning and by the density bonus allowed in chapter 17G.070 SMC. The use of residential density transfer or clustering through the use of planned unit developments (PUDs) including bonus density is encouraged as a means to protect and preserve wetlands, wetland buffers and fish and wildlife habitat conservation areas. The provisions of chapter 17G.070 SMC shall control the use of density transfer or clustering, planned unit developments and bonus density.

B. Property Tax and Income Tax Advantages.

1. Property Tax Relief.
The Spokane County ~~assessor~~ Assessor shall consider the wetland areas and associated buffers contained within this chapter when determining the fair market value of land. Any owner of a wetland area who has dedicated a conservation easement or entered into a perpetual conservation restriction with a department of the local, state or federal government or a nonprofit organization to permanently control some or all ~~the~~ uses and activities within these areas may request that the Spokane County ~~assessor~~ Assessor reevaluate that specific area consistent with those restrictions and provisions of open space land current use taxation (see RCW 84.40.030).

2. Federal Income Tax Advantages.
There are significant federal income tax advantages that can be realized by an individual or estate for gifts of real property for conservation purposes to local governments or non-profit organizations, such as land trusts. The specific rules on federal income tax deductions can be found in section 170 of the Internal Revenue Code.

C. Stewardship Options.

1. The Spokane County conservation district offers stewardship information, classes and technical assistance to property owners. Programs include shoreline stewardship, forestry, small acreage conservation agriculture, water resources, and soil information.

2. Spokane County conservation futures program, initiated in 1994, is funded by a property tax assessed for each home in the county. This tax money is earmarked solely for the acquisition of property and development rights. These funds acquire lands or future development rights on lands for public use and enjoyment. The conservation areas are defined areas of undeveloped land primarily left in its natural condition. These areas may be used for passive recreational purposes, to create secluded areas, or as buffers in urban areas. Conserved lands include wetlands, farmlands, steep hillsides, river corridors, viewpoints and wildlife habitats and corridors.

Date Passed: Monday, December 3, 2007

Effective Date: Sunday, January 6, 2008

ORD C34148 Section 73

Section 17E.070.160 Administration

A. The department director identified in chapter 17A.010 SMC ("Director") shall administer and interpret the provisions of this chapter, except as specifically provided. The director is authorized to adopt, in accordance with administrative procedures set by ordinance, such rules as are necessary to implement the requirements of this chapter and to carry out the duties of the director hereunder. Except as otherwise provided in this chapter, the administrative procedures set forth in chapter 17G.010 SMC and chapter 17G.060 SMC shall apply to this chapter.

B. The director may also consult with other City departments and state and federal agencies as necessary to obtain additional technical and environmental review assistance.

C. The director shall review and analyze all applications for all permits or approvals subject to this chapter. Such applications shall be approved only after the director is satisfied the applications comply with this chapter.

D. Every City department issuing a permit for development on parcels containing a wetland or buffer shall require the use of best management practices to prevent impacts to wetlands and buffers and to meet the intent of this chapter. Departments shall require mitigation to address unavoidable impacts. All such City departments shall maintain records documenting compliance with this subsection.

E. Except as otherwise stipulated in this chapter, the administrative procedures set forth in chapter 17A.010 SMC apply to this chapter.

Date Passed: Monday, December 3, 2007

Effective Date: Sunday, January 6, 2008

ORD C34148 Section 73

Section 17E.070.170 Violations

A. It is a violation of this chapter to fail to comply with any provision of this chapter or with any term of any permit condition or approval issued pursuant to this chapter.

B. It is a violation of this chapter to fail to comply with any order issued pursuant to this chapter or to remove or deface any sign, notice, complaint or order required by or posted in accordance with this chapter.

C. It is a violation of this chapter to misrepresent any material fact in any application, on plans, or in any other information submitted to obtain any determination, authorization, permit condition or approval under this chapter.

D. It is a violation of this chapter to aid and abet, counsel, encourage, hire, command, induce or otherwise procure another to violate or fail to comply with this chapter.

E. Violations of this chapter are subject to the penalties set forth in chapter 1.05 SMC.

Date Passed: Monday, December 3, 2007

Effective Date: Sunday, January 6, 2008

ORD C34148 Section 73

Section 17E.070.180 Authority to Enforce

A. The director is authorized to enforce this chapter and may call upon other appropriate City departments to assist in enforcement.

B. It is the intent of this chapter to place the obligation of complying with its requirements upon the owner, occupier or other person responsible for the condition of the wetland, buffer, land, premises, building or structure within the scope of this chapter.

C. No provision ~~of~~ or term used in this chapter is intended to impose any duty upon the City or any of its officers or employees that would subject them to damages in a civil action.

D. Nothing contained in this chapter is intended to be nor shall be construed to create or form the basis for liability on the part of the City or its officers, officials, employees or agents for any injury or damage resulting from the failure of any owner of property or land to comply with the provisions of this chapter, or by reason or in consequence of any inspection, notice, order, certificate, permission or approval authorized or issued in connection with the implementation or enforcement of this chapter, or by reason of any action or inaction on the part of the City related in any manner to the enforcement of this chapter by its officers, officials, employees or agents.

Date Passed: Monday, December 3, 2007

Effective Date: Sunday, January 6, 2008

ORD C34148 Section 73

OFFICE OF THE SPOKANE CITY ATTORNEY
CONFIDENTIAL INTEROFFICE MEMORANDUM

TO: MEMBERS OF THE SPOKANE PLAN COMMISSION

CC: LISA KEY, DIRECTOR, PLANNING SERVICES DEPARTMENT

FROM: JAMES A. RICHMAN, ASSISTANT CITY ATTORNEY

SUBJECT: UPDATE OF CITY'S WETLAND ORDINANCE

DATE: MARCH 2, 2017

The Growth Management Act (GMA) requires the City to adopt regulations protecting environmentally sensitive critical areas in the development process. RCW 36.70A.060(2) and RCW 36.70A.172(1). GMA also requires the City to periodically review and, if necessary, update the City's critical area ordinances using best available science. The Washington State Department of Ecology recently updated its guidance documents that assist local jurisdictions with incorporating best available science into their critical area ordinances. These updates include modifications to the Washington State Wetland Rating System and associated buffer tables.

Consistent with Ecology's updated guidance, the City is updating its Wetlands Ordinance, Chapter 17E.070 SMC. The proposed changes are very limited in scope and substantive changes are generally limited to bringing City's wetlands regulations into compliance with Ecology's updated guidance.

As the City updates its wetlands ordinance, RCW 36.70A.370 requires the City to have a process for assuring that the proposed regulations do not result in an unconstitutional taking of private property. Along those lines, and pursuant to RCW 36.70A.370, the State Attorney General has prepared an advisory memorandum that provides local governments with guidance regarding this requirement. A copy of the advisory memorandum is attached. Staff has been mindful of the guidance in this memorandum in preparing the proposed wetlands ordinance updates, and does not believe that the updated regulations will result in an unconstitutional taking of private property, particularly because of the reasonable use provisions section 17E.070.120.

Appendix

1. *Attorney General Advisory memorandum*

STATE OF WASHINGTON
OFFICE OF THE ATTORNEY GENERAL
BOB FERGUSON

Advisory Memorandum and Recommended Process for Evaluating Proposed Regulatory or Administrative Actions to Avoid Unconstitutional Takings of Private Property

DECEMBER 2015

STATE OF WASHINGTON
OFFICE OF THE ATTORNEY GENERAL

Advisory Memorandum and Recommended Process for Evaluating Proposed Regulatory or Administrative Actions to Avoid Unconstitutional Takings of Private Property

December 2015

Introduction

The Office of the Attorney General is directed under RCW 36.70A.370 to advise state agencies and local governments on an orderly, consistent process that better enables government to evaluate proposed regulatory or administrative actions to assure that these actions do not result in unconstitutional takings of private property.

This process must be used by state agencies and local governments that plan under RCW 36.70A.040—Washington's Growth Management Act. The recommended process may also be used for other state and local land use planning activities.[1] Ultimately, the statutory objective is that state agencies and local governments carefully consider the potential for land use activity to "take" private property, with a view toward avoiding that outcome.

RCW 36.70A.370 Protection of Private Property.

(1) The state attorney general shall establish ... 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....

(2) Local governments that are required or choose to plan under RCW 36.70A.040 and state agencies shall utilize the process established by subsection (1) of this section to assure that proposed regulatory or administrative actions do not result in an unconstitutional taking of private property.

...

Purpose of This Document

This ***Advisory Memorandum*** was developed to provide state agencies and local governments with a tool to assist them in the process of evaluating whether proposed regulatory or administrative actions may result in an unconstitutional taking of private property or raise substantive due process concerns. Where state agencies or local governments exercise regulatory authority affecting the use of private property, they must be sensitive to the constitutional limits on their authority to regulate private property rights. The failure to fully consider these

[1] The process used by state agencies and local governments to assess their activities is protected by attorney-client privilege. Further, a private party does not have a cause of action against a state agency or local government that does not use the recommended process. RCW 36.70A.370(4).

constitutional limits may result in regulatory activity that has the effect of appropriating private property even though that outcome may not have been intended. If a court concludes that private property has been "taken" by regulatory activity, it will order the payment of "just compensation" equal to the fair market value of the property that has been taken, together with costs and attorneys fees. In other cases, a government regulation may be invalidated if it is found to violate constitutional substantive due process rights.

Where state agencies or local governments exercise regulatory authority affecting the use of private property, they must be sensitive to the constitutional limits on their authority to regulate private property rights.

This ***Advisory Memorandum*** is intended as an internal management tool for agency decision makers. 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 an unconstitutional taking or a violation of substantive due process. Legal counsel should be consulted for advice on whether any particular action may result in an unconstitutional taking of property requiring the payment of just compensation or may result in a due process violation requiring invalidation of the government action.

Prior editions of this document are superseded by this document.

Organization of This Document

This *Advisory Memorandum* contains four substantive parts. The first part outlines a ***Recommended Process for Evaluating Proposed Regulatory or Administrative Actions to Avoid Unconstitutional Takings of Private Property*** utilizing the other substantive portions of the *Advisory Memorandum.*

The second part, ***General Constitutional Principles Governing Takings and Due Process***, presents an overview of the general constitutional principles that determine whether a government regulation may become so severe that it constitutes an unconstitutional taking of private property or violates substantive due process rights. This discussion is derived from cases that have interpreted these constitutional provisions in specific fact situations.

The third part is a list of ***Warning Signals***. This section provides examples of situations that may raise constitutional issues. The warning signals are useful as a general checklist to evaluate planning actions, specific permitting decisions, and proposed regulatory actions. The warning signals do not establish the existence of a problem, but they highlight specific instances in which actions should be further assessed by staff and legal counsel.

The fourth part is an ***Appendix***, which contains summaries of significant court cases addressing takings law.

Part One: Recommended Process for Evaluating Proposed Regulatory or Administrative Actions to Avoid Unconstitutional Takings of Private Property

1. Review and Distribute This *Advisory Memorandum*. Local governments and state agencies should review this ***Advisory Memorandum*** with their legal counsel and distribute it to all decision makers and key staff to ensure that agency decision makers at all levels of government have consistent, useful guidance on constitutional limitations relating to the regulation of private property. Legal counsel should supplement this document as appropriate to address specific circumstances and concerns of their client agency or governmental unit.

Recommended process:

1. *Review and distribute this Advisory Memorandum to legal counsel, decision makers, and key staff.*
2. *Use the "Warning Signals" to evaluate proposed regulatory actions.*
3. *Develop an internal process for assessing constitutional issues.*
4. *Incorporate constitutional assessments into the agency's review process.*
5. *Develop an internal process for responding to constitutional issues identified during the review process.*

2. Use the "Warning Signals" to Evaluate Proposed Regulatory Actions. Local governments and state agencies may use the ***Warning Signals*** in part three of this ***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 by staff and legal counsel.

3. Develop an Internal Process for Assessing Constitutional Issues. State agency and local government actions implementing 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 adoption of development regulations that implement the comprehensive plan or establish policies or guidelines for conditions, exactions, or impact fees incident to permit approval. A similar assessment, by both staff and legal counsel, should be used for the conditioning or denial of permits for land use development. Other regulatory or administrative actions proposed by state agencies or directed by the Legislature should be assessed by staff and legal counsel if the actions impact private property.

4. Incorporate Constitutional Assessments Into the Agency's Review Process. A constitutional assessment should be incorporated into the local government's or state agency's process for reviewing proposed regulatory or administrative actions. The nature and extent of the assessment necessarily will depend on the type of regulatory action and the specific impacts on private property. Consequently, each agency should have some discretion to determine the extent and the form of the constitutional 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 may be necessary to coordinate the assessment with another jurisdiction where private property is subject to regulation by multiple jurisdictions. It is strongly suggested, however, that any government regulatory actions which involve warning signals be carefully and thoroughly reviewed by legal counsel. The Legislature

has specifically affirmed that this assessment process is protected by the normal attorney-client privilege. RCW 36.70A.370(4).

5. Develop an Internal Process for Responding to Constitutional Issues Identified During the Review Process. If the constitutional assessment indicates a proposed regulatory or administrative action could result in an unconstitutional taking of private property or a violation of substantive due process, the state agency or local government should have a process established through which it can evaluate options for less restrictive action or—if necessary, authorized, and appropriate—consider whether to initiate formal condemnation proceedings to appropriate the property and pay just compensation for the property acquired.

Part Two: General Constitutional Principles Governing Takings and Substantive Due Process

A. Overview

"Police Power." State governments have the authority and responsibility to protect the public health, safety, and welfare. This authority is an inherent attribute of state governmental sovereignty and is shared with local governments in Washington under the state constitution. Pursuant to that authority, which is called the "police power," the government has the ability to regulate or limit the use of property.

Government has the authority and responsibility to protect the public health, safety, and welfare.

Police power actions undertaken by the government may involve the abatement of public nuisances, the termination of illegal activities, and the establishment of building codes, safety standards, and sanitary requirements. Government does not have to wait to act until a problem has actually manifested itself. It may anticipate problems and establish conditions or requirements limiting uses of property that may have adverse impacts on public health, safety, and welfare.

Sometimes the exercise of government police powers takes the form of limitations on the use of private property. Those limitations may be imposed through general land use planning mechanisms such as zoning ordinances, development regulations, setback requirements, environmental regulations, and other similar regulatory limitations. Regulatory activity may also involve the use of permit conditions that dedicate a portion of the property to mitigate identifiable impacts associated with some proposed use of private property.

Regulatory Takings. Government regulation of property is a necessary and accepted aspect of modern society and the constitutional principles discussed in this ***Advisory Memorandum*** do not require compensation for every decline in the value of a piece of private property. Nevertheless, courts have recognized that if government regulations go "too far," they may constitute a taking of property. This does not necessarily mean that the regulatory activity is unlawful, but rather that the payment of just compensation may be required under the state or federal constitution. The rationale is based upon the notion that some regulations are so severe in their impact that they are the functional equivalent of an exercise of the government's power of eminent domain (i.e., the formal condemnation of property for a public purpose that requires the payment of just compensation). Courts often refer to this as an instance where regulation goes so far as to acquire a public benefit (rather than preventing some harm) in circumstances where

fairness and justice require the public as a whole to bear that cost rather than the individual property owner.

A government regulation that is so severe in its impact that it is the functional equivalent of condemnation requires the payment of just compensation.

When evaluating whether government action has gone too far, resulting in a taking of specific private property, courts typically engage in a detailed factual inquiry that evaluates the government's intended purpose, the means the government used to accomplish that purpose, and the financial impact on the property, in order to gauge whether the government regulation is such a burden on property that it is the functional equivalent of an appropriation of that property—a regulatory "taking" requiring the payment of just compensation. Severe financial impacts, unclear government purposes, or less intrusive means for accomplishing the identified purpose are factors that can tip the scale in favor of a determination that the government has taken property. The mere presence of these factors does not necessarily establish a taking of property, but may support a taking claim if they are significant enough, either individually or collectively. They should be carefully considered and evaluated, along with the ***Warning Signals*** in part three of this ***Advisory Memorandum***, to determine if another course of action would achieve the government's purpose without raising the same concerns.

In some limited cases, courts may find that a taking has occurred without engaging in the detailed factual inquiry discussed above. For example, where government regulation results in some permanent or recurring physical occupation of property, a taking probably exists, requiring the payment of just compensation. In addition, where government regulation permanently deprives an entire piece of property of all economic utility, and where there is no long-standing legal principle such as a nuisance law that supports the government regulation, then a taking probably has occurred, requiring the payment of just compensation.

Substantive Due Process. Washington courts have applied principles of substantive due process as an alternate inquiry where government action has an appreciable impact on property. A land use regulation that does not have the effect of taking private property may nonetheless be unconstitutional if it violates principles of substantive due process. Substantive due process is the constitutional doctrine that legislation must be fair and reasonable in content and designed so that it furthers a legitimate governmental objective. The doctrine of substantive due process is based on the recognition that the social compact upon which our government is founded provides protections beyond those that are expressly stated in the U.S. Constitution against the flagrant abuse of government power. *Calder v Bull*, 3 U.S. 386 (1798).

Courts have determined that substantive due process is violated when a government action lacks any reasonable justification or fails to advance a legitimate governmental objective. To withstand a claim that principles of substantive due process have been violated, a government action must (1) serve a legitimate governmental objective, (2) use means that are reasonably necessary to achieve that objective, and (3) not be unduly oppressive. Violation of substantive due process requires invalidation of the violating government action rather than the payment of just compensation. The U.S. Supreme Court has clarified that substantive due process is a separate constitutional inquiry into the validity of governmental action and is not part of the Fifth Amendment takings analysis. As explained below, Washington courts have not yet formally responded to this clarification.

B. Constitutional Principles Relating to the Regulation of Private Property

Courts have used a number of constitutional principles to determine whether a given government regulation effects a "taking" under the federal or state constitutions and whether it violates principles of substantive due process. The following paragraphs summarize the key legal and procedural principles.

1. Constitutional Provisions

United States Constitution — Takings Clause and Due Process Clauses. The Fifth Amendment to the United States Constitution provides that private property shall not be taken for public use without the payment of just compensation. Accordingly, the government may not take property except for public purposes within its constitutional authority and must provide just compensation for the property that has been taken. The Fifth and Fourteenth Amendments also provide that no person shall be deprived of property without due process of law.

Washington State Constitution, Article 1, Section 16. Article 1, section 16 of the Washington State Constitution provides, in part, that "[n]o private property shall be taken or damaged for public or private use without just compensation." In other words, the government may take private property, but must pay just compensation for the private property that is taken.

The Washington Constitution provides that "[n]o private property shall be taken or damaged for public or private use without just compensation."

Article 1, Section 16 also expressly prohibits state and local governments from taking private property for a private use with a few limited exceptions: private ways of necessity and drainage for agricultural, domestic or sanitary purposes. This provision goes beyond the U.S. Constitution, which does not have a separate provision expressly prohibiting the taking of private property for private use. As discussed below, this clause has been interpreted to prevent the condemnation of property as part of a government redevelopment plan where the property is to be transferred to a private entity.

2. The Exercise of Eminent Domain - Condemnation Proceedings.

Through the exercise of eminent domain, government has the power to condemn private property for public use, as long as it pays just compensation for the property it acquires. Taking land to build a public road is a classic example of when the government must provide just compensation to a private property owner for its exercise of the power of eminent domain.

Government historically acquires property and compensates landowners through a condemnation proceeding in which the appropriate amount of compensation is determined and paid before the land is taken and used by government. The property generally may be condemned only for a public use. Washington's Constitution has been interpreted narrowly in this regard and prohibits condemnation actions that are part of a plan to transfer property to private developers for redevelopment projects that involve private

In Washington, property generally may be condemned only for a public use.

ownership of the developed property. The only exception to the public use requirement is that private property may be taken for private ways of necessity, and for drains, flumes, or ditches on or across the lands of others for agricultural, domestic, or sanitary purposes.

The Legislature has enacted a number of statutes specifying which state and local government agencies possess authority to acquire property through condemnation and setting forth the procedures that must be followed during condemnation. *See* Title 8 RCW. Washington law provides that, in some cases, property may be taken immediately with compensation being determined and paid in a subsequent judicial proceeding or by agreement between the government and landowner. *See* RCW 8.04.090.

3. Inverse Condemnation.

There may be times where the government does not intend to acquire property through condemnation, but the government action nonetheless has a significant impact on the value of property. In some cases, the government may argue that its action has not taken or damaged private property, while the property owner argues that a taking has effectively occurred despite the fact that a formal condemnation process has not been instituted. This dispute may lead to an "inverse condemnation" claim, and the filing of a lawsuit against the government, in which the court will determine whether the government's actions have damaged or taken property. If a court determines that the government's actions have effectively taken private property for some public purpose, it will award the payment of just compensation, together with the costs and attorneys fees associated with litigating that inverse condemnation claim. Inverse condemnation cases generally fall into two categories: those involving physical occupation or damage to property, and those involving the impacts of regulation on property.

a. Physical Occupation or Damage. The government may be required to pay just compensation to private property owners whose land has been physically occupied or damaged by the government on a permanent or ongoing basis. For example, if the construction of a public road blocks access to an adjacent business resulting in a significant loss of business, the owner may be entitled to just compensation for "damage" to the property.

b. Regulatory Takings. In general, zoning laws and related regulation of land use activities are lawful exercises of police powers that serve the general public good. However, the state and federal constitutions have been interpreted by courts to recognize that regulations purporting to be a valid exercise of police power still must be examined to determine whether they unlawfully take private property for public use without providing just compensation. This relationship between takings law and regulation is sometimes explained as looking at whether a regulation has the effect of forcing certain landowners to provide an affirmative benefit for the public, when the burden of providing that benefit is

In general, zoning laws and related regulation of land use activities are lawful exercises of police powers that serve the general public good. However, the state and federal constitutions have been interpreted by courts to recognize that regulations purporting to be a valid exercise of police power must still be examined to determine whether they unlawfully take private property for public use without providing just compensation.

one that actually should be carried by society as a whole.

The issue is how to identify just when a specific regulation may exceed constitutional limits. When there is a question of regulatory taking, the inquiry often focuses on the nature and purpose of the government regulation, the means used to achieve it, and the effect of the regulation on legitimate and established expectations for the use of private property.

To better explain when a regulation unlawfully takes property, this section briefly describes three major types of regulatory takings challenges: (1) challenges alleging a categorical taking, (2) challenges that require a court to examine the government's regulatory action and the degree to which it affects investment backed expectations for the use of private property, and (3) challenges to permit conditions that exact some interest in private property.

(1) Challenges Alleging a Categorical Taking. Certain forms of government action are characterized as "categorical" or "per se" takings. In these circumstances the government action is presumptively classified as a taking of private property for public use for which the payment of just compensation is required. The court does not engage in the typical takings analysis involving a detailed factual inquiry that weighs the utility of the government's purpose and the impact experienced by the landowner.

Physical occupations of property are the most well-understood type of categorical taking. When the government permanently or repeatedly physically occupies property, or authorizes another person to do the same, this occupation has been characterized as such a substantial interference with property that it always constitutes a taking requiring the payment of just compensation, even if the amount of compensation is small.

A second form of categorical taking that requires the payment of just compensation without further takings analysis is a regulation that deprives a landowner of all economic or beneficial use of property or that destroys a fundamental property right (such as the right to possess the property, the right to exclude others, or the right to dispose of the property). However, a regulation that prohibits all economically viable or beneficial use of property is not a taking if the government can demonstrate that the proposed use of the property being denied is prohibited by laws of nuisance or other long-standing and pre-existing limitations on the use of property.

Courts have emphasized that these "categorical" forms of taking arise in exceptional circumstances and that the tests are narrowly tailored to deal with these exceptional cases.

(2) Evaluating the Government's Regulatory Action and Its Effect on Particular Private Property. Ascertaining whether a government regulation goes so far as to take private property usually requires a detailed factual investigation into the purpose of the government regulation, the means used to achieve the government's purpose, and the financial impact on the individual landowner. This analysis was set forth in *Penn Central Transportation Co. v. New York City*, 438 U.S. 104 (1978). The majority of regulatory takings cases will be evaluated using this traditional multi-factor analysis—weighing the impact of government regulation, the government's objectives, and the means by which they are achieved.

If government has authority to deny a land use, it also has authority to condition a permit to engage in that use. For example, a local government may condition a development permit by requiring measures that mitigate identifiable adverse impacts of the development. However, a permit condition that imposes substantial costs or limitations on the use of property, unrelated or out of scale to an identifiable impact, could amount to a taking.

In assessing whether a regulation or permit condition constitutes a taking in a particular circumstance, courts weigh the public purpose of the regulatory action in relation to the impact on the landowner's vested development rights. Courts also consider whether the government could have achieved the stated public purpose by less intrusive means. One factor used to assess the economic impact of a permit condition is the extent to which the condition interferes with a landowner's reasonable investment-backed development expectations.

The federal and state constitutions do not require the government to compensate landowners for every decline in property value associated with regulatory activity.

Most courts apply this analysis using a case-by-case factual inquiry into the fairness of the government's actions. Economic impacts from regulation are usually fair and acceptable burdens associated with living in an ordered society. The federal and state constitutions do not require the government to compensate landowners for every decline in property value associated with regulatory activity. However, government action that tends to secure some affirmative public benefit rather than preventing some harm, or that is extremely burdensome to an individual's legitimate expectations regarding the use of property, or that employs a highly burdensome strategy when other less burdensome options might achieve the same public objective, raises the possibility that the action may be a taking of private property. A useful way to approach this principle is to consider whether there is any substantial similarity between a proposed regulatory action and the traditional exercise of the power to condemn property. When government regulation has the effect of appropriating private property for a public benefit rather than to prevent some harm, it may be the functional equivalent of the exercise of eminent domain. In those cases the payment of just compensation will probably be required.

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Washington courts employ a detailed three-part test for evaluating takings claims. This test was articulated by the Washington State Supreme Court in *Guimont v. Clarke*, 121 Wn.2d 586, 854 P.2d 1 (1993). See the ***Appendix*** in part four of this ***Advisory Memorandum*** for a discussion of that case.

The first part of Washington's takings analysis evaluates whether one the two categorical, or *per se*, takings exists: a physical occupation or appropriation of property, or a regulation depriving property of all value. Assuming there is no categorical taking, the second part of Washington's takings analysis asks two questions: whether a

fundamental property interest is impinged upon, and whether the government's action essentially works to prevent harm rather than seeking to acquire some public benefit. If the answer to both these questions is "no," the takings analysis ends. But if a substantial property interest is impinged, or if the government action is not manifestly about preventing public harm, the takings test continues. Part three of Washington's takings analysis then asks whether the regulation of property substantially advances a legitimate government interest. If the answer is "no," a taking has occurred. If some legitimate state interest is advanced, the takings analysis concludes with a *Penn Central*-type analysis.

Note: In *Lingle v. Chevron*, 544 U.S. 248 (2005), summarized in the ***Appendix***, the United States Supreme Court explained that the question of whether government regulation advances a legitimate state interest (i.e., part three of Washington's takings analysis as set out in *Guimont*) is not relevant to a claim of taking by regulation. Instead, the issue of whether a regulation substantially advances a legitimate government purpose is evaluated under principles of substantive due process (discussed below). Washington's courts have not yet considered whether or how to modify the state's takings analysis in light of this recent U.S. Supreme Court precedent.

(3) Challenges to Permit Conditions That Exact Some Interest in Property. Sometimes a permit condition will attempt to extract an interest in property as mitigation for the adverse public impact of the proposed development. Courts have referred to these types of conditions as *exactions*. One example could be a permit requirement to grant an access easement. While such exactions are permissible, government must identify a real adverse impact of the proposed development and be prepared to demonstrate that the proposed exaction is reasonably related to that impact. The government also must be prepared to demonstrate that the burden on the property owner is roughly proportional to the impact being mitigated. These principles also apply to so-called "monetary exactions"—permit conditions that require the applicant to spend money as a condition of permitted land use activity. Taxes and permit fees levied under a government's authority to levy such fees and taxes are not at issue here. Rather, the nexus and proportionality principles associated with exactions apply where a monetary obligation is established as a condition of a development permit (e.g., requiring the permit applicant to purchase additional property to create a buffer or to undertake an offsite mitigation project as a condition of development).

The limitations that are placed upon property exactions are further discussed in the ***Appendix***, in the case notes relating to the United States Supreme Court decisions in *Dolan v. City of Tigard*, 512 U.S. 374 (1994), *Koontz v. St. Johns River Water Management District*, 133 S. Ct. 2586 (2013), and in the case notes discussing some of the more recent Washington cases following *Dolan*. *See, e.g.*, *Sparks v. Douglas County*, 127 Wn.2d 901, 904 P.2d 738 (1995); *Burton v. Clark County*, 91 Wn. App. 505, 958 P.2d 343 (1998), *review denied*, 137 Wn.2d 1015 (1999).

4. Substantive Due Process.

Under Washington law, even if a regulation does not effect a taking, it is subject to substantive due process requirements.

Under Washington law, even if a government action does not effect a taking, it may be unconstitutional if it violates principles of substantive due process. Substantive due process invokes the due process provisions of the Fifth and Fourteenth Amendments to the U.S. Constitution to invalidate

flagrant abuses of government power—actions that authorize some manifest injustice or that take away the security for personal liberty or private property that our government was formed to protect. *Calder v Bull*, 3 U.S. 386 (1798). While the remedy for a government action that works a taking is just compensation, the remedy for a government action that violates substantive due process is invalidation of the violating government action.

a. Substantive Due Process in Land Use Cases. Washington courts frequently consider both takings claims and substantive due process claims as alternative claims in the same case. In contrast, federal courts sitting in Washington have dismissed Fourteenth Amendment substantive due process claims where a remedy is available by bringing a takings claim under the Fifth Amendment Takings Clause. *See Armendariz v. Penman*, 75 F.3d 1311 (9th Cir. 1996) (en banc).

Our State Supreme Court's approach to substantive due process in a land use regulation context was first developed in *Orion Corp. v. State*, 109 Wn.2d 621, 747 P.2d 1062 (1987), *cert. denied*, 486 U.S. 1022 (1988), and *Presbytery of Seattle v. King County*, 114 Wn.2d 320, 787 P.2d 907, *cert. denied*, 111 S. Ct. 284 (1990), and refined in *Guimont v. Clarke*, 121 Wn.2d 586, 854 P.2d 1 (1993), and *Margola Associates v. Seattle*, 121 Wn.2d 625, 854 P.2d 23 (1993). These decisions are summarized in the ***Appendix*** in part four of this ***Advisory Memorandum***. In assessing whether a regulation has exceeded substantive due process limitations and should be invalidated, the court considers three questions. First, is the regulation aimed at achieving a legitimate public purpose? There must be a public problem or "evil" that needs to be remedied 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? Failing to consider and address each of these questions may lead to a substantive due process violation.

The "unduly oppressive" inquiry, which has been the decisive inquiry in most Washington substantive due process cases, 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 (a) the nature of the harm sought to be avoided; (b) the availability and effectiveness of less drastic protective measures; and (c) the economic loss suffered by the property owner.

In assessing these factors to determine whether a land-use regulation should be invalidated as a violation of substantive due process, the Washington Supreme Court has directed trial courts to the following considerations:

> 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.
>
> 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.

b. Substantive Due Process and Retroactive Legislation. A statute or regulation may attempt to impose new standards for previously-authorized conduct or may attempt to remedy newly-discovered impacts from conduct that was previously

legal. The requirements of substantive due process do not automatically prohibit such retroactive legislative action so long as it serves a rational purpose. However, retroactive legislation is generally not favored because "elementary considerations of fairness dictate that individuals should have an opportunity to know what the law is and to conform their conduct accordingly; settled expectations should not be lightly disrupted." *Landgraf v. USI Film Products*, 511 U.S. 244, 265 (1994).

In light of the substantive due process principles discussed above, Washington courts tend to apply a stricter standard of rationality to retroactive legislation than to prospective legislation. The fact that legislation may be rational when applied prospectively does not mean it will necessarily be rational when applied retroactively. There must be some independent rational basis for the retroactivity itself. Some of the additional factors to consider when evaluating the retroactivity of legislation include the following:

> Whether there is a direct relationship between the conduct of the landowner and the "harm" that is being remedied.
>
> Whether the imposed "cure" is proportional to the harm being caused.
>
> Whether the landowner could have generally anticipated that some form of retroactive regulation might occur. It appears this factor is of greater importance where there is a weak link between the landowner's conduct and the "cure" being imposed by the government.

These standards are not individually determinative; they operate together to paint a picture that speaks to the "fairness" of retroactive regulation. *See Rhod-A-Zalea & 35th Inc. v. Snohomish County,* 136 Wn.2d 1, 959 P.2d 1024 (1998).

5. Remedies.

In the usual condemnation case, the government must pay just compensation to a property owner before the property may be taken and used for a public purpose. Compensation usually is based on the fair market value of the property at the time of the taking.

In an inverse condemnation case, the payment of just compensation is due the property owner if a taking has occurred without compensation first having been paid. Compensation usually is based on the fair market value of the property actually taken, at the time of the taking. The government may also be liable for the payment of interest and the property owner's legal expenses incurred in obtaining just compensation.

If a court determines there has been a regulatory taking, the government generally has the option of either paying just compensation or withdrawing the regulatory limitation. However, even if the regulation is withdrawn, the government might be obligated to compensate the property owner for a temporary taking of the property during the period in which the regulation was effective.

If a court determines a regulation has taken private property for private use, the court probably will invalidate the regulation rather than ordering compensation. *See Manufactured Housing Communities of Washington v. State,* 142 Wn.2d 347, 13 P.3d 183 (2000).

If a court determines there has been a substantive due process violation, the appropriate remedy is invalidation of the regulation. *See Guimont v. Clarke*, 121 Wn.2d 586, 854 P.2d 1 (1993). A prevailing landowner who also proves that the government's actions were irrational or invidious may recover damages and reasonable attorney's fees under the Federal Civil Rights Act, 42 U.S.C. § 1983.

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If a court determines there has been a substantive due process violation, the appropriate remedy is invalidation of the regulation.

In addition to the causes of action and remedies discussed above, under Washington law, a property owner who has filed an application for a permit may also have a cause of action for damages to obtain relief from government actions that were arbitrary, capricious, or made with the knowledge that the actions were in excess of lawful authority. *See* RCW 64.40. This statute also provides relief for failure to act within the time limits established by law.

6. Burdens of Proof and Prerequisites to the Filing of a Claim.

A person challenging an action or ordinance generally has the burden of proving that the action or ordinance is unconstitutional. However, in a challenge to a government exaction of land to mitigate for adverse impacts from a proposed land use activity, the burden is on the government to identify a specific impact that needs to be mitigated and demonstrate that the exaction is roughly proportional to the identifiable impact.

A claim that property has been taken may not be brought until the landowner has exhausted all administrative remedies and explored all regulatory alternatives. The landowner generally must submit an application and pursue available administrative appeals of any action that the landowner contends is erroneous and must allow the planning or regulatory agency to explore the full breadth of the agency's discretion to allow some productive use of property. A landowner may need to seek a variance or submit multiple applications to determine the full extent to which the regulatory laws may allow or limit development. However, the landowner should not be made to explore futile options that have no practical chance of providing some meaningful use of the land. Once the government comes forward with evidence that there are regulatory options which might provide for some use of the land, the landowner has a heavy burden to show that pursuing these options would be futile. *See Estate of Friedman v. Pierce County*, 112 Wn.2d 68, 768 P.2d 462 (1989).

A claim that property has been taken may not be brought until the landowner has exhausted all administrative remedies and regulatory alternatives.

In some cases a landowner may pursue a "facial challenge" to a law, claiming that the mere enactment of legislation results in a taking or violates due process. These are

difficult cases to make because legislation is presumed constitutional and the landowner must demonstrate that under every conceivable set of facts the challenged legislation is constitutionally defective. *See Manufactured Housing Communities of Washington v. State*, 142 Wn.2d 347, 13 P.3d 183 (2000).

Part Three: Warning Signals

The following warning signals are examples of situations that may raise constitutional issues. The warning signals are phrased as questions that state agency or local government staff can use to evaluate the potential impact of a regulatory action on private property.

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

The presence of a warning signal means there could be a constitutional issue that government staff should review with legal counsel.

The fact that a warning signal may be present does not mean there has been a taking or substantive due process violation. It means only that there *could* be a constitutional issue and that staff should carefully review the proposed action with legal counsel. If property is subject to the 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 or Temporary Physical Occupation of Private Property? Government regulation or action resulting in a permanent physical occupation of all or a portion of private property generally will constitute a taking. For example, a regulation requiring landlords to allow the installation of cable television boxes in their apartments was found to constitute a taking, even though the landlords suffered no economic loss. *See Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982).

This is one of two "categorical" forms of property takings. It does not require any investigation into the character of or justification for the government's actions. Its premise is that a permanent physical occupation is such an unusual and severe impact on property that it will always be treated as an action that requires the payment of just compensation. However, because this is such a strict and narrow test, it applies only when the government physically occupies the property or provides another person the right to do so.

2. Does the Regulation or Action Deprive the Owner of All Economically Viable Uses of the Property? If a regulation or action permanently eliminates all economically viable or beneficial uses of the property, it will likely constitute a taking. In this situation, the government can avoid liability for just compensation only if it can demonstrate that the proposed uses are prohibited by the laws of nuisance or other pre-existing limitations on the use of the property. *See Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992).

This is the other narrow categorical form of taking that does not balance the government's interests in regulation against the impact of regulation. However, in this circumstance, unlike the permanent physical occupation analysis, it is necessary to evaluate the regulation's economic impact on the property as a whole, and not just on the portion of the property being regulated. Accordingly, it is necessary to assess whether there is any profitable use of the remaining property available. *See, e.g., Florida Rock Industries, Inc. v. United States*,

791 F.2d 893 (Fed Cir. 1986). The existence of some economically viable use of the property will preclude the use of this categorical test. Furthermore, 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. However, the fact that some value remains does not preclude the possibility that the regulatory action might still be a taking of property under other takings tests that balance economic impact against other factors.

A regulation must be analyzed for its economic impact on the property as a whole, not just the portion being regulated.

Regulations or actions that require all of a particular parcel of land be left substantially in its natural state should be reviewed carefully.

In some situations, pre-existing limitations on the use of property could insulate the government from takings liability even though the regulatory action leaves the property with no value. For example, limitations on the use of tidelands under the public trust doctrine probably constitute a pre-existing limitation on the use of property that could insulate the government from takings liability for prohibiting development on tidelands. *See Esplanade Properties, LLC v. City of Seattle*, 307 F.3d 978, 983 (9th Cir. 2002); *Orion Corp. v. State*, 109 Wn.2d 621, 747 P.2d 1062 (1987), *cert. denied*, 486 U.S. 1022 (1988). A proposed land use that is precluded by principles of nuisance law is another example. However, the U.S. Supreme Court has made it clear that this principle does not apply simply because the property was acquired after a regulation prohibiting some land use was enacted. *See Palazzolo v. Rhode Island*, 533 U.S. 606 (2001). A pre-existing limitation on the use of property must be a long-standing property or land use principle before it will effectively insulate the government from takings liability in those rare cases where the property is left with no value. The pre-existing nature of any regulation that limits the use of property may be an important consideration for other takings tests, however, because it may demonstrate whether the landowner had a reasonable expectation of using the property in some manner. This issue should be carefully evaluated with legal counsel.

3. Does the Regulation or Action Deny or Substantially Diminish a Fundamental Attribute of Property Ownership? Regulations or actions that deny or impair a landowner's ability to exercise a fundamental attribute of property ownership are potential takings which should be analyzed further. The fundamental attributes of property ownership are generally identified as the right to own or possess the property, the right to exclude others from the property, and the right to transfer the property to someone else. *See Guimont v. Clarke*, 121 Wn.2d 586, 854 P.2d 1 (1993). For example, regulations that prevent property from being inherited have been found to destroy a fundamental property attribute.

4. Does the Regulation or Action Require a Property Owner to Dedicate a Portion of Property, to Grant an Easement, or to Undertake Some Independent Financial Obligation? Regulation that requires a private property owner to formally dedicate land to some public use, that extracts an easement, or that imposes some independent financial obligation as a condition of development should be carefully reviewed. The dedication, easement, or financial obligation that is required from the landowner must be reasonable and proportional—i.e., specifically designed to mitigate adverse impacts of a proposed development. A distinction is made here between normal taxes and permit application fees (which may be levied under normal tax and fee authorities) and project mitigation obligations that may impose a financial expense (e.g., requiring the permit applicant to purchase additional land to establish a buffer, or expend money constructing off-site mitigation projects) as a condition of the development permit. For local governments, this duty is mirrored in RCW 82.02.020. Ultimately, the government must demonstrate that it acted reasonably, and that its actions are proportionate to an identifiable

problem. Usually, the burden is on the government to identify the problem and demonstrate the reasonableness and proportionality of is regulation in relation to the specific project being conditioned. Where standardized formulas or tables are utilized, they should be based upon a careful analysis of the range of impacts being regulated, and their application to a specific project should be analyzed and documented in relation to the nexus and rough proportionality required for government imposed exactions.

5. Does the Regulatory Action Have a Severe Impact on the Landowner's Economic Interest? Courts have acknowledged that regulations are a necessary part of an ordered society and that they may limit the use of property, thereby impacting its value. Such reductions in value do not necessarily require the payment of compensation under either the federal or state constitutions. Nor do they necessarily violate substantive due process. However, if a regulation or regulatory action is likely to result in a substantial reduction in property value, the agency should consider the possibility that a taking or a violation of substantive due process may occur. If the regulation or regulatory action acts more to provide a public benefit than to prevent a public harm, it should be evaluated using the takings analysis discussed below. If it acts more to prevent a public harm, it is probably not a taking, but should nonetheless be evaluated using the substantive due process analysis discussed below. Because government actions often are characterized in terms of overall fairness, a taking or violation of substantive due process is more likely to be found when it appears that a single property owner is being forced to bear the burden of addressing some societal concern when in all fairness the cost ought to be shared across society.

a. Factors to Consider in a Regulatory Takings Analysis. Regulatory action that deprives property of all value constitutes a taking of that property. Where there is less than a complete deprivation of all value, a court will evaluate whether a taking has occurred by considering the economic impact in relation to at least two other factors: (1) the extent to which the government's action impacts legitimate and long-standing expectations about the use of the property; and (2) the character of the government's actions—is there an important interest at stake and has the government tended to use the least intrusive means to achieve that objective? Following the decision in *Lingle*, this inquiry is likely better understood as an evaluation of the burden of the regulation on the affected private property in relation to the regulatory objective rather than an inquiry into whether the regulation is the best way to accomplish the regulatory objective. Recall that the takings analysis is ultimately geared to ascertain whether the regulation is such a burden on property that it is the functional equivalent of an appropriation of the property, such that compensation should be paid.

Other factors to consider include the presence or absence of reciprocal benefits and the manner in which the costs and benefits of regulations are shared. For example, zoning regulations may eliminate some profitable uses of property while simultaneously preserving or enhancing property value by limiting development activities (e.g., preventing industrial operations in residential neighborhoods).

As with other analyses of economic impact where a taking is alleged, this evaluation of economic impacts and weighing of other factors is normally applied to the property as a whole, not just the portion subject to regulation.

b. Factors to Consider in a Substantive Due Process Analysis. Substantive due process principles require the government to ensure that its actions are reasonably designed to advance a legitimate state interest. To determine whether the government

action is reasonable, a court will consider the relation between the government's purpose and the burden on the landowner. To what extent does the landowner's land contribute to the problem the government is attempting to solve? How far will the proposed regulation or action go toward solving the problem? A court will also want to know if less oppressive solutions are feasible.

Often a key question is the amount by which the value of the owner's property will be decreased by the government's action. In evaluating this loss in property value, a court will look at both the absolute decrease in value of the property and the percentage this decrease comprises of the total value of the property.

Another factor to consider is how the owner's plans for the property are affected by the proposed government action. What uses remain after the proposed action? Is the regulation temporary or permanent? Should the owner have been able to anticipate the regulation? How feasible is it for the owner to alter present or planned uses?

Conclusion

Ultimately, the people of Washington State are best served when state and local governments aspire to adopt the fairest possible approaches for accomplishing important public purposes. We therefore encourage government decision-makers to seek effective regulatory approaches that fairly consider both the public interests and the interests of private property owners, while using these guidelines to avoid unconstitutional regulation.

The people of Washington are best served when governments aspire to adopt the fairest possible approaches for accomplishing important public policy purposes.

Part Four: Appendix

This ***Appendix*** includes lists of *some* of the principal cases dealing with takings and/or related due process issues and a short summary of the result in each case. These cases provide examples of how federal courts and Washington courts have resolved specific questions and may be helpful for assessing how courts might resolve analogous situations. There are many takings cases not discussed here, as well as several excellent law review articles on the subject. Cross-referenced decisions that are summarized in this ***Appendix*** are underlined where cited.

Contents of Appendix

2. Summaries of Significant Washington State Takings Cases (Chronological Order)

1990 – 1999

2000 – 2009

2010 – 2015

1. Summaries of Significant Takings Cases in the United States Supreme Court (Chronological Order)

Before 1970

***Pennsylvania Coal Co. v. Mahon*,**
260 U.S. 393, 43 S. Ct. 158, 67 L. Ed. 322 (1922)

Regulations can "go too far" and may become the functional equivalent of an exercise of eminent domain that requires the payment of just compensation.

This case begins the United States Supreme Court's development of the concept of regulatory takings. Pennsylvania's laws had prohibited coal mining that produced severe ground subsidence, which made it commercially impossible to mine coal in certain areas of the state. The Court rejected the notion that the constitutional requirement of just compensation was limited to traditional exercises of eminent domain (formal condemnation proceedings). Instead, the Court noted that regulatory activity can "go too far," having such an impact on property that it is the functional equivalent of an exercise of eminent domain. The Court did not lay out clear standards as to when a regulatory action "goes too far."

1970 – 1979

***Penn Central Transportation Co. v. New York City*,**
438 U.S. 104, 98 S. Ct. 2646, 57 L. Ed. 2d 631 (1978)

Takings claims are evaluated by examining and weighing three factors: (1) the economic impact of the regulatory action on the property; (2) the extent to which legitimate property use expectations exist and have been interfered with; and (3)

the extent to which the government has used reasonable means to achieve an important public objective. When undertaking this evaluation the court must consider the impact on the entire property owner's interest at stake, not just the portion subjected to regulation.

Grand Central Station was declared a landmark under New York City's historic preservation ordinance. Penn Central, the owner, proposed to "preserve" the original station while building a 55-story building over it. The city denied the construction permit. The Court rejected Penn Central's takings claim, explaining that the city ordinance served a valid public purpose and, 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. Responding to Penn Central's argument that the ordinance would deny it the value of its "pre-existing air rights" to build above the terminal, the Court held that it must consider the impact of the ordinance upon the property as a whole, not just upon "air rights." The Court also applied a multi-factor test for evaluating a claim that specific government action has "taken" property. Courts must consider and weigh three factors: (1) the economic impact of the regulation on the property; (2) the extent to which the regulation interferes with investment-backed expectations; and (3) the character of the governmental action (whether it furthers an important interest and could have been accomplished by less intrusive means).

1980 – 1989

Agins v. City of Tiburon,
447 U.S. 255, 100 S. Ct. 2138, 65 L. Ed. 2d 106 (1980)

Regulatory actions may be a taking where they fail to advance a legitimate state interest or where they deprive property of all its value.

[In Lingle, the Court abandoned the "substantially advance" test as part of takings analysis, recognizing it instead as an element of substantive due process.]

The city adopted a zoning ordinance that limited property development to no more than five homes per parcel of land. Agins brought a takings claim alleging that the ordinance "completely destroyed the value of the property." The Court appears to have identified an alternative test for evaluating whether a regulation results in a taking. The Court held that a taking occurs only where the regulation (1) fails to substantially advance a legitimate state interest; or (2) denies an owner all economically viable uses of the land. The Court upheld the ordinance because it advanced a legitimate interest and did not deprive the landowner of all economic value.

Loretto v. Teleprompter Manhattan CATV Corp.,
458 U.S. 419, 102 S. Ct. 3164, 73 L. Ed. 2d 868 (1982)

A physical invasion of property, no matter how slight, will categorically constitute a taking of that portion of the property occupied for the period of time that it is occupied.

A state statute required landlords to allow the installation of cable television on their property. The owner of an apartment building challenged the statute, claiming a 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 Court held 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 property and that such an occupation is "qualitatively more severe" than a regulation on the use of property.

Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City,
473 U.S. 172, 105 S. Ct. 3108, 87 L. Ed. 2d 126 (1985)

A taking claim is not ripe and must be dismissed in two instances: (1) where the land use decision process has not been pursued, or is incomplete; and (2) where the landowner brings suit in federal court without first seeking compensation at the state level. The federal Just Compensation Clause does not require payment of compensation before a taking occurs, so long as a means of obtaining just compensation is provided.

Over a course of years, the county first granted in part, then ultimately denied applications for permits to develop a golf course and residential area. The applicant alleged a taking. The Court held the claim was premature for two reasons: (1) the applicant had not sought variances that would have allowed it to develop the property according to its proposed plat and thus had not obtained a final decision as to the application of the ordinance to its property; and (2) the applicant had not used state procedures provided for obtaining just compensation. Tennessee had a statutory scheme allowing persons claiming a regulatory taking to file an inverse condemnation claim; the Court held the statutory scheme provided an adequate procedure for seeking just compensation, and the applicant could not claim a violation of the federal Just Compensation Clause until it used the state procedure and was denied just compensation. The Court also held that the Fifth Amendment does not require that just compensation be paid in advance of, or contemporaneously with, a taking; all that is required is that a "reasonable, certain and adequate provision for obtaining compensation" exists at the time of the taking.

MacDonald, Sommer & Frates v. Yolo County,
477 U.S. 340, 106 S. Ct. 2561, 91 L. Ed. 2d 285 (1986)

Where a land use planning agency retains some discretion to allow for meaningful use of the property, those opportunities must be explored before alleging that a final disposition exists regarding the permissible uses of the property.

A developer appealed the county's denial of a "tentative subdivision map," claiming the denial deprived it of all economic use of its property. Following the reasoning in *Williamson County*, the Court held that until a property owner has obtained a final decision regarding the application of the zoning ordinance and subdivision regulations to its property, it is impossible to tell whether the land retains any reasonable beneficial use or whether existing expectation interests have been destroyed.

First English Evangelical Lutheran Church of Glendale v. Los Angeles County, California,
482 U.S. 304, 107 S. Ct. 2378, 96 L. Ed. 2d 250 (1987)

The remedy for a regulatory taking of property is the payment of just compensation rather than simple invalidation of the regulation. If a regulation

found to have "taken" property subsequently is repealed by the government, the property owner may be entitled to compensation for a "temporary taking"—the loss of value during the time the taking existed.

When a flood destroyed a church campground, California responded with a moratorium prohibiting development in the flood plain area. The church sought damages, claiming its property had been taken. California argued that the only remedy available was to challenge the validity of the regulation and seek to have it overturned, but the Court held that just compensation is the appropriate remedy if property was "taken." The Court also explained that if a statute effected a taking, the state could not avoid paying compensation by repealing the statute; compensation might be required for any loss of value during the time that the taking existed, that is for the "temporary taking." The Court did not conclude there was a "temporary taking" in this case, only that the Just Compensation Clause allows compensation for a "temporary taking."

***Hodel v. Irving*,**
481 U.S. 704, 107 S. Ct. 2076, 95 L. Ed. 2d 668 (1987)

The destruction of a "fundamental attribute of property" (the right to own, exclude others, dispose of property, or make at least some economic use of the property) will result in a taking.

Portions of the Sioux Indian reservation that had been "allotted" to individual tribal members had become fractionated, sometimes into very small parcels. Good land often lay fallow, amidst great poverty, because of the difficulties in managing the property. In 1983, Congress passed legislation which provided that any undivided fractional interest constituting less than two percent of a given tract's acreage and earning 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. Tribal members challenged the statute. The Court noted that, under the balancing test traditionally applied to takings challenges, the statute might be constitutional. In this case, however, the character of the government action was "extraordinary" in that it destroyed "one of the most essential" rights of ownership: the right to transfer property, especially to one's family. The Court held that such an action was a taking, regardless of the public interest that might favor the legislation.

***Keystone Bituminous Coal Association v. DeBenedictis*,**
480 U.S. 470, 107 S. Ct. 1232, 94 L. Ed. 2d 472 (1987)

Takings claims must be evaluated with respect to the entire parcel of land owned by the claimant, not just the portion affected by the regulation. Property may not be segmented into separate legal interests for purposes of evaluating a takings claim.

Pennsylvania enacted a law requiring coal companies to leave certain amounts of coal in place to prevent subsidence of surface property. Keystone claimed a taking, alleging the law would require it leave up to 27 million tons of its coal un-mined, thereby effectively appropriating its coal for a public purpose. Keystone challenged the law on its face, rather than challenging its application in a particular set of facts. The Court held Keystone had a difficult burden of proof because legislation is presumed to be constitutional. The Court explained that legislation properly may regulate an activity to prevent severe impacts to the public, even if the activity has not traditionally been classified as a nuisance.

Absent a showing that the legislation had a severe impact on Keystone's entire property (the 27 million tons of coal was about two percent of Keystone's holdings) the Court declined to invalidate the legislation. In response to Keystone's arguments that its coal had been appropriated for a public purpose, the Court reaffirmed that takings law does not compensate a landowner for every loss in value. The Court refused to consider the coal left behind as a separate piece of property and affirmed that takings law evaluates the impact of regulation on the entire property held by the landowner, not just the portion being regulated.

Nollan v. California Coastal Commission,
483 U.S. 825, 107 S. Ct. 3141, 97 L. Ed. 2d 677 (1987)

Permit conditions that extract something from a landowner must have some reasonable relationship (some "nexus") to an identifiable impact that the conditions seek to mitigate.

The Nollans sought a permit to replace a bungalow with a larger house on their California oceanfront property. 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 along their beach. The Court found this requirement to be a taking. The Court reasoned that it would have been a taking if the government had simply ordered the Nollans to give the public an easement outside of any permit process; the existence of a permit process and the extraction of an easement as a permit condition changes nothing unless the condition is related to some impact associated with the permit application. Even then, the permit condition is only valid if it substantially advances a legitimate state interest. The Court observed that if the Nollans' proposed house had blocked the public's view of the ocean from the street, a view easement perhaps would have been appropriate. But 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. Accordingly, the Court held there was no reasonable relationship, or "nexus," between the permit condition and any public interest that might be harmed by the construction of the house. Lacking this nexus, the required easement was a taking of property.

1990 – 1999

Lucas v. South Carolina Coastal Council,
505 U.S. 1003, 112 S. Ct. 2886, 120 L. Ed. 2d 798 (1992)

A regulation that permanently deprives property of all economic value is a categorical form of taking that does not need to be evaluated using the Penn Central test. If, however, the government can show that the regulated use of property would be barred under fundamental principles of property law or nuisance, there is no categorical taking even if the property is left without economic value.

Lucas bought two South Carolina beachfront lots intending to develop them. Before he initiated any development of the lots, the state enacted legislation to protect its beaches, which prevented development of the lots. The parties stipulated that the parcels had no remaining economic value. The Court held that a regulation which "denies all economically beneficial or productive use of land" is categorically a taking unless the government can show that the proposed uses of the property are prohibited by nuisance laws or other preexisting limitations on the use of property. The Court explained, however, that such categorical takings

will be "relatively rare" and the usual approach for determining takings, from *Penn Central*, will apply in most cases.

Yee v. City of Escondido, California,
503 U.S. 519, 112 S. Ct. 1522, 118 L. Ed. 2d 153 (1992)

Government regulation that affects the use of property, but that does not compel a landowner to involuntarily suffer the presence of the government or a third party, is not a categorical taking under Loretto.

Yee challenged a rent control ordinance for mobile home parks that scaled rents back to 1988 levels and prohibited increases without city approval. Yee argued that the rent control provision, in combination with the state laws limiting the termination of rental agreements, forced the property to be used as a mobile home park with artificially low rents. He contended the result was a categorical taking similar to the physical invasion identified in the *Loretto* case. Observing that Yee voluntarily rented space to mobile homes and could get out of the business and convert the property to another use at any time, the Court held the ordinance was a regulation of property, not a physical invasion. The Court noted that a conventional regulatory taking analysis under *Penn Central* might be possible in this circumstance, but refused to apply that analysis because Yee's suit had only been litigated as a physical occupation claim.

Dolan v. City of Tigard,
512 U.S. 374, 114 S. Ct. 2309, 129 L. Ed. 2d 104 (1994)

Under Nollan, a permit condition that extracts something from a landowner must have some nexus to an identifiable impact. In addition, the scope of the condition must be "roughly proportional" to the impact being mitigated.

The city approved a permit to expand a store and pave a parking lot, on condition that the business owner (1) dedicate a portion of her property for a public greenway along an adjacent stream to minimize flooding that would be exacerbated by the increased impervious surface, and (2) provide for a bicycle path intended to relieve traffic congestion. When the city denied her variance request, she alleged a taking. The Court distinguished most of its prior regulatory takings cases for two reasons: (1) they involved challenges to legislative comprehensive land use regulations, whereas this case involved an adjudicative decision to condition an application for a building permit on an individual parcel; and (2) the conditions imposed here did not simply limit use, but also required that the landowner deed portions of her property to the city. The Court found a sufficient nexus between the permit conditions and the impacts they targeted, under *Nollan*, then proceeded to consider whether the required dedication was "roughly proportional" to the impacts being mitigated. The Court held 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. Finding that the city had not demonstrated why the floodplain could not be protected without depriving the landowner of her property, the Court held there was no evidence of a reasonable relationship between the business expansion and the required dedication for a public greenway. The Court also found that the bike path could be a reasonable requirement to mitigate the impact of increased traffic caused by the expanded business, but it was troubled by the lack of evidence concerning the magnitude of any traffic impact. The Court remanded for further proceedings.

City of Monterey v. Del Monte Dunes at Monterey, Ltd.,
526 U.S. 687, 119 S. Ct. 1624, 143 L. Ed. 2d 882 (1999)

(1) If a takings claim can be brought in federal court and is raised as a 42 U.S.C. §1983 civil rights claim, a jury may be used to evaluate the government's regulatory activity.

(2) The "rough proportionality" analysis set forth in Dolan is used only to evaluate regulatory exactions of some interest in property.

After the city repeatedly failed to approve the development of a 37.6-acre parcel of land, based on the need to protect the habitat of an endangered butterfly, the plaintiffs sought compensation in federal court. The takings claim was lodged as a civil rights violation under 42 U.S.C. § 1983. At trial, a jury was used to consider two different takings theories—a categorical *Lucas*-type taking based upon a complete deprivation of all economically viable uses, and a takings theory based upon the Court's *Agins* analysis examining the nature of the government's actions. (Note: After *Lingle*, decided in 2005, this second form of takings analysis is no longer used in federal courts). On appeal from a successful verdict, the city argued that it was improper to submit the takings question to a jury. The Court disagreed, noting that the jury was not being asked to scrutinize the question of whether the government's regulatory decisions were appropriate. The case had been raised as a civil rights claim and was litigated on the premise that the city's regulations were valid but had been applied inconsistently. The Court specifically refused to decide whether a jury might be used to determine takings claims brought outside of this context. In addition, the Court clarified that the rough proportionality test laid out in *Dolan* applies only when evaluating whether a property exaction amounts to a taking; it does not apply to regulatory actions that do not exact some property interest from the landowner.

2000 – 2009

Palazzolo v. Rhode Island,
533 U.S. 606, 121 S. Ct. 2448, 150 L. Ed. 2d 592 (2001)

(1) The mere fact that a government regulation was enacted before a regulated property was acquired does not mean the regulation will be treated as a background limitation on the use of the property that cuts off a taking claim, although the regulation may be considered in any Penn Central analysis that is performed. Only background limitations that traditionally have limited the use of property will cut off a regulatory takings claim.

(2) Where a regulation denies or limits the use of property, a takings claim will be ripe only if the landowner fully explores available variances or regulatory land use options or demonstrates that it would be futile to do so.

A landowner was denied a permit to fill wetlands as part of a plan to build several waterfront homes. The landowner sued, alleging that the property had no remaining value and had been taken under the "total deprivation of all value" test laid out in *Lucas*. The planning agency responded (1) that the claim was not ripe because the landowner had not sought a variance; (2) that, because the landowner had acquired the property after the effective date of the regulation, the regulation constituted a preexisting limitation on the use of property, thereby cutting off any taking claim; and (3) that no *Lucas* claim existed because the evidence showed at least one home could be built on the unfilled portion of the property.

The Court reaffirmed that a case is not ripe where a planning agency retains the discretion to allow some alternate form of valuable development. In this case, while the applicable ordinance allowed for variances based upon a showing of "compelling public purpose," the planning agency had already indicated that no compelling interest could be shown. On that basis, the Court held the appeal was ripe because it would be futile to make the landowner go through the motions of attempting to obtain a variance.

Agreeing that pre-existing property limitations may cut off a taking where the background limitation on property uses has always existed as a part of the law of property, the Court held this principle should not be used to treat newly enacted regulations as some bright line cut-off of any subsequent claim that the newly enacted regulations amount to a taking. Instead, the fact that a property owner may have acquired property with the knowledge that a previous regulation might preclude certain land uses could be weighed as part of the *Penn Central* test when evaluating a landowner's legitimate investment expectations. Finding that the entire property retained some value, the Court rejected the *Lucas*-based takings claim and remanded the case for a determination whether a taking had occurred, using the *Penn Central* test.

Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency,
535 U.S. 302, 122 S. Ct. 1465, 152 L. Ed. 2d 517 (2002)

This opinion summarizes much of the Court's prior takings analysis, including the principle that property is not segmented into components for purposes of a takings analysis (the "whole parcel rule"), and confirms that the Penn Central test is the usual test for evaluating takings claims. Categorical takings claims are limited to the narrowly tailored exceptions set forth in Loretto (physical occupation) and Lucas (total deprivation of all economic value).

The Tahoe Regional Planning Agency imposed two moratoria, totaling 32 months, on development in the Lake Tahoe Basin while formulating a comprehensive land use plan for the area. Landowners affected by the moratoria filed suit claiming a taking of their property without just compensation, alleging that their properties had been deprived of all value during the moratoria. The Court refused to apply the categorical taking test of *Lucas*, explaining that a temporary deprivation of all value does not qualify as a taking under *Lucas*. For example, the normal delay associated with getting a permit does not give rise to a claim for any lost value. The Court held moratoria should be evaluated instead using the *Penn Central* test, under which a moratorium could be treated as a taking if imposed for a long enough time or in a manner that was disproportionate to the legitimate planning needs of the agency.

The Court affirmed that takings claims normally are evaluated using the *Penn Central* test. Categorical takings, such as the total deprivation of all value principle laid out in *Lucas* or the physical invasion principle laid out in *Loretto*, are rare and narrowly-tailored exceptions to normal takings analysis. The Court also affirmed that takings analysis must not segregate the regulated property into partial interests when evaluating the regulatory impact (e.g., a portion of time when the property may be used, a partial legal interest in the use of the property, or a physical segment of the property being regulated). The property must be considered as a whole when evaluating the impact of regulation.

Lingle v. Chevron U.S.A. Inc.,
544 U.S. 5288, 125 S. Ct 2074, 161 L. Ed. 2d 876 (2005)

The "substantially advances" formula articulated in Agins is not an appropriate test for determining whether a regulation effects a taking of property requiring just compensation, but is instead a principle associated with a substantive due process analysis.

Concerned about the effects of market concentration on retail gasoline prices, the Hawaii Legislature passed a law limiting the rent that oil companies could charge dealers leasing company-owned service stations. Chevron sued, seeking a declaration that the rent cap was a taking of its property. Applying *Agins*, the district court held that the rent cap effected a taking in violation of the Fifth and Fourteenth Amendments because it did not substantially advance Hawaii's asserted interest in controlling retail gas prices. The Court reversed, concluding the "substantially advances" formula is not a valid method of identifying compensable regulatory takings. Rather, it prescribes an inquiry in the nature of a due process test, which has no proper place in takings jurisprudence. A plaintiff seeking to challenge a government regulation as a taking of private property may proceed by alleging (1) a *Loretto*-based physical taking, (2) a *Lucas*-type total regulatory taking, (3) a *Penn Central* taking using the traditional inquiry into the nature and effect of the government regulation, or (4) a land-use exaction violating the *Nollan* and *Dolan* reasonable relationship and proportionality standards.

San Remo Hotel v. City and County of San Francisco,
545 U.S. 323 , 125 S. Ct. 2491, 162 L. Ed. 2d 315 (2005)

Full Faith and Credit considerations bar a Fifth Amendment takings claim from further litigation in federal court after a state court has analyzed the federal takings issue, found no taking, and denied compensation. It makes no difference that a federal suit would have been dismissed under Williamson County as unripe for failing to first proceed in state court.

The San Remo Hotel was subject to a city ordinance requiring anyone wishing to convert residential hotel units into tourist hotel units to mitigate the loss of residential units by constructing new residential units, rehabilitating old ones, or paying an "in lieu" fee. When the hotel sought to convert all its rooms to tourist units, the city required it to pay a $567,000 "in lieu" fee after all the units in the hotel were classed as residential. San Remo filed a state court action challenging the classification of its units, and a federal court action asserting that the ordinance worked a taking, both facially and as applied to San Remo. Relying on the ripeness principles in *Williamson County*, the Ninth Circuit held the as-applied challenge in federal court was not ripe because state court proceedings were available to seek just compensation. The Court of Appeals granted San Remo's petition that it abstain from deciding the facial challenge until the state court case was resolved. The state court case then was expanded to include both facial and as-applied takings claims.

The California Supreme Court, analyzing the takings claims under both the federal and California constitutions, denied both takings claims. San Remo then attempted to litigate its takings claims in federal court. The federal district court held that both takings challenges were barred by traditional principles of abstention: federal courts do not re-litigate claims resolved in state courts because

they are not courts of appeal for such litigation. The U.S. Supreme Court affirmed, invoking the Full Faith and Credit clause of the U.S. Constitution, Art. IV, § 1; the full faith and credit statute, 28 USC 1738; and traditional abstention principles. The Court explained that the fact that state court proceedings are not chosen, but instead are required to ripen federal takings claims, does not eliminate the preclusive effect of the prior determination so long as the state court proceedings fully litigate the takings issues.

Kelo v. City of New London,
545 U.S. 469 , 125 S. Ct. 2655, 162 L. Ed. 2d 439 (2005)

Under the Fifth Amendment to the U.S. Constitution, the condemnation of private property and its transfer to private developers under a government-approved program for economic rejuvenation is evaluated using a broad definition of "public use" that defers in part to a legislative determination that the program is of public benefit.

The city approved an integrated development plan designed to revitalize its ailing economy. The city purchased most of the property earmarked for the project from willing sellers, but it initiated condemnation proceedings against those owners who refused to sell. These property owners sued in state court, claiming the condemnation of their property as part of a plan to transfer the property to private developers did not constitute a "public use" of their property, as required in the federal Takings Clause. The Connecticut Supreme Court held the condemnation action was valid, and the U.S. Supreme Court affirmed. The Court held a government action serves a government use as long as it advances a public purpose. Relying on precedents extending back to the 19th century, the Court rejected the argument that "public use" literally means "use by the general public." The Court looked instead to the state legislative determination as to whether the proposed use was a public use and held that in some circumstances economic development is a valid public use that can justify the condemnation of private property through eminent domain.

2010 – 2015

Stop the Beach Renourishment, Inc. v. Florida Department of Environmental Protection,
560 U.S. 702, 130 S. Ct. 2592, 177 L. Ed. 2d 184 (2010)

The concept of "judicial takings"—the notion that court decisions affecting the contours of property rights might be viewed as a taking of property if long-held property expectations are upset—remains unresolved.

To protect coastal property owners and the community as a whole from vulnerabilities caused by beach erosion, Florida established a beach renourishment program that placed sand on publically-owned submerged land to help restore damaged beaches. Several Florida beachfront homeowners alleged the program resulted in a taking of their rights of exclusive access, unobstructed view, and future accretion. When the state supreme court upheld the program, the homeowners petitioned the Supreme Court, alleging the state court decision constituted a "judicial taking" of their property. The Court held unanimously that there was no taking in this case, but it deadlocked 4-4 (one Justice recused) on whether to recognize, for the first time in American history, a "judicial taking" doctrine. Because the Court deadlocked, the doctrine was not recognized.

Arkansas Game and Fish Commission v. United States,
568 U.S. ___, 133 S. Ct. 511, 184 L. Ed. 2d 417 (2012)

When the government makes a decision to release water from a retaining dam, it can be sued under the federal Takings Clause for damage to downstream property arising from the "invasion" of water (even if the downstream flooding is temporary in duration), provided the released water causes sufficient damage that is traceable to the decision to release.

From 1993 through 2000, the United States Army Corps of Engineers created a temporary but periodic flood regime for management of a federal wildlife management area in Arkansas. The flood regime caused flooding across the region, which restricted access to and destroyed or degraded thousands of timber trees on land owned by the state. The state sued, alleging that the federal government's periodic flooding had damaged its property and was subject to the payment of just compensation.

The Court rejected the federal government's claim that temporary flood waters are categorically exempt from a takings claim. The length and severity of the property interference caused by the flooding is just one factor among many a court must consider when determining whether a specific government action produces a taking. Other factors include the intent behind the action and the degree to which the interference was a foreseeable result of an authorized government action. The case was remanded to the trial court for a full takings analysis consistent with these principles.

Koontz v. St. Johns River Water Management District,
___ U.S. ___, 133 S. Ct. 2586, 186 L. Ed. 2d 697 (2013)

(1) The Nolan and Dollan requirements—that governments show both a nexus and rough proportionality between its demand on the landowner and the effects of the proposed land use—are not avoided simply because a permit is denied after the landowner refuses to meet the demand. (Unanimous decision.) The merits of imposing the proposed exaction can still be reviewed.

(2) The Nolan and Dollan requirements apply to both property exactions (demanding some interest in the regulated property as a condition of development) as well as monetary exactions (where the demand on the landowner is the expenditure of money on mitigation projects). (5-4 decision)

Koontz wanted to develop wetland property he owned in Florida. During the permitting process, he offered to grant a substantial conservation easement to the District, but the District rejected his proposal, informing him that his permit would be denied unless he agreed to do one of two things: (1) scale back his planned development and give the District a larger conservation easement; or (2) maintain the proposal, but also hire contractors to make improvements to separate land owned by the District.

The Court held that when a government conditions or denies a land use permit based upon a demand for valuable services or an interest in the land, there is an "exaction" and the government must show that there is some nexus and rough proportionality between its demand on the landowner and the effects of the proposed land use. Monetary exactions requiring the expenditure of money to create or acquire mitigation measures were distinguished from normal taxes and permitting fees that the government is authorized to impose in order to fund government operations and which are not subject to an exaction analysis.

Horne v. Department of Agriculture,
___ U.S. ___, 133 S. Ct. 2053, 186 L. Ed. 2d 69 (2013)
___ U.S. ___, 135 S. Ct. 2419, 192 L. Ed. 2d 388 (2015)

(1) Physical appropriations of property by the government—whether of real property or personal property—always require the payment of just compensation, even if the government provides for retention of some continuing or future economic interest in the appropriated property.

(2) As a factual matter, requiring a raisin grower to turn over a portion of its raisin crop in order to participate in interstate commerce cannot be characterized as a voluntary exchange for a valuable government benefit (in contrast, e.g., to requiring a government license to produce and sell potentially dangerous chemicals).

The U.S. Department of Agriculture determined that a farmer violated an agricultural marketing order designed to stabilize the raisin market. The order was based upon a regulatory plan establishing a "reserve requirement" that precludes raisin growers from selling all of their raisins, thereby restricting supply and maintaining prices at higher levels. The raisins that cannot be sold are to be turned over to the government for later sale or disposal by the government, with any profits returned to the grower. In this case the grower refused to comply, was assessed a substantial penalty, and sued the Department, arguing that the fine was an unconstitutional "taking."

In its 2013 decision (133 S. Ct. 2053), the Court held that the grower was not required to bring that claim in the Court of Federal Claims, and could bring his "takings" claim in a regular federal district court without first paying the fine. It remanded to the Ninth Circuit to decide the takings claim. The Ninth Circuit observed that the grower had not alleged a standard regulatory taking claim under the *Penn Central* theory. Applying an analysis like that in *Koontz*, the Ninth Circuit concluded that the marketing order was directly related to the need to stabilize markets for raisins, and the reserve amount (adjusted annually) was proportionate to the objective of avoiding an unstable market.

In its 2015 decision (135 S. Ct. 2419), the Supreme Court reversed, holding that the government's actions constituted a physical taking of personal property because the reserve raisins had to be turned over to the government. A physical taking always requires the payment of just compensation. The fact that the regulatory format provided some possibility of economic return from the reserved raisins did not change the takings analysis, but was relevant only to the amount of just compensation that is due.

The Court also held that the taking cannot be characterized a voluntary exchange for a valuable government benefit. *See Ruckelshaus v. Monsanto Co.*, 467 U.S. 986 (1984) (disclosure of valuable trade secrets as a condition for licensing sales of potentially dangerous chemicals is not a taking because the impact on the property interest in trade secrets was a reasonable condition for allowing the licensing of dangerous products). In this respect, the Court appears to have drawn a distinction between regulations that appropriate an interest in property whose use is inherently dangerous and not typically allowed and regulations that appropriate other types of property. Government may impose conditions on dangerous uses of property, consistent with regulatory takings or exaction principles, in exchange for approval to conduct the dangerous use. But the

government could not require the grower to turn over a portion of its raisin crop without just compensation as a regulatory condition of participating in interstate commerce.

2. Summaries of Significant Washington State Takings Cases (Chronological Order)

1970 – 1979

***Maple Leaf Investors, Inc. v. Department of Ecology*, 88 Wn.2d 726, 565 P.2d 1162 (1977)**

A prohibition on construction for human habitation within a floodway is a valid exercise of the state police power, not a taking or damaging of private property.

Maple Leaf Investors owned property along the Cedar River in an area subject to flood control regulations, which prohibited construction for human habitation within the floodway channel. Seventy percent of the property lay within the floodway channel. Considering a claim that the flood control regulations effected a taking, the Washington 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 the primary purpose of the regulations was not to put the property to public use, but to protect the public health and safety: the regulations prevented harm to persons who might otherwise live in the floodway, and barred the construction of structures that might break loose during a flood 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 nature, not the government, that placed Maple Leaf's property in the path of floods. The court rejected the taking claim.

***Department of Natural Resources v. Thurston County*, 92 Wn.2d 656, 601 P.2d 494 (1979), *cert. denied*, 449 U.S. 830 (1980)**

Restricting development density to protect bald eagle habitat is not a taking, so long as the county allows sufficient density for the owner to make a profitable use of its property.

A developer leasing property from the state sought plat approval from the county for a proposed residential development. The county denied preliminary plat approval, finding the proposed development would interfere with eagle perching and feeding areas. The developer claimed a taking of private property. The Washington Supreme Court held it was not a taking, primarily because the county had indicated it would approve a less intensive development. (The county commission had found no adverse impact from the development of 11 of the 22 lots proposed by the developer.) The court held 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.

1980 – 1989

Granat v. Keasler,
99 Wn.2d 564, 663 P.2d 830, *cert. denied*, 464 U.S. 1018 (1983)

A city ordinance that conveyed perpetual occupancy rights to paying tenants effected a taking of property from houseboat moorage owners.

Under a Seattle houseboat ordinance, the only reason a houseboat moorage owner could evict a paying tenant would be to use the moorage site for the owner's own non-commercial residence. A moorage owner appealed the ordinance. The Washington Supreme Court held the ordinance was a taking of private property without just compensation. The court's reasoning followed that 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 effectively conveyed perpetual occupancy rights of a landowner's property to another person.

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

A historical preservation requirement in a city ordinance does not effect a taking if, considering the market value and income producing potential of the subject property, the requirement imposes no unnecessary or undue hardship on the plaintiff.

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 its property was taken without compensation. Following the U.S. Supreme Court's analysis in *Penn Central*, the Washington Supreme Court held 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 court rejected the taking challenge to the historic preservation ordinance.

Valley View Industrial Park v. City of Redmond,
107 Wn.2d 621, 733 P.2d 182 (1987)

A reasonable delay in obtaining a required development permit does not give rise to a claim for a regulatory taking.

A developer sought to build a phased development on a parcel that was the focus of efforts to conserve agricultural lands, which resulted in several delays during the permit approval process. The Washington Supreme Court found the task of obtaining a regulatory permit usually takes many months, and often several years, and concluded that reasonable delays do not result in a taking of property. The court also reiterated the Washington rule that, although the mere passage of time does not bar a landowner's right to seek just compensation for an alleged taking by inverse condemnation, that right may be subject to statutory time limits.

Orion Corp. v. State,
109 Wn.2d 621, 747 P.2d 1062 (1987), *cert. denied*, 486 U.S. 1022 (1988)

(1) A government prohibition on development actions that is reasonably tailored to protect the public interest in navigable waters under the Public Trust Doctrine does not constitute a regulatory taking.

(2) If a court concludes there is a regulatory taking, the decision lies with the legislative branch to decide whether to (a) cure the taking by amending the regulations, while providing compensation for a temporary taking; or (b) exercise eminent domain to complete a permanent taking, with appropriate compensation for the condemnation.

The Orion Corporation was denied a shoreline permit to build a residential community on tidelands in Padilla Bay. Although the denial was issued pursuant to a county shoreline ordinance, the Washington Supreme Court found the state was the proper defendant for Orion's regulatory takings claim; the court concluded the county was acting as agent for the state when it adopted its shoreline ordinance, because the ordinance became effective only when approved by the state. This case contains extensive discussions of the evolving notion of regulatory takings, although many of the principles discussed have been more fully developed since the time this opinion was issued. In addition to the interesting historical look at the development of the law, the opinion continues to be noteworthy for its conclusions (1) that private interests in navigable waters are burdened by public interests under the Public Trust Doctrine, and (2) the government may prohibit development actions that impair these public interests without effecting a taking and without violating principles of due process so long as the government's actions are reasonably tailored to prevent an impairment of the public's interests in the property.

***Unlimited v. Kitsap County*,**
50 Wn. App. 723, 750 P.2d 651, *review denied*, 111 Wn.2d 1008 (1988)

To avoid a taking, an exaction placed on a proposed development must serve a legitimate public purpose, must be reasonable, and must address a problem that arises from the proposed development.

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 to (1) dedicate a 50-foot right of way to provide commercial access to the next door property, and (2) dedicate a strip of its property sufficient to extend a county arterial along the front of its property. Unlimited appealed these conditions. The Washington Court of Appeals, relying upon the U.S. Supreme Court's decision in *Nollan*, 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 benefited a private person, rather than mitigating a public problem, and it found nothing in the proposed development that created a need to extend the arterial. The court held the conditions imposed by the county effected a taking.

***Estate of Friedman v. Pierce County*,**
112 Wn.2d 68, 768 P.2d 462 (1989)

A taking claim is not ripe for judicial review where the government retains some discretion to allow profitable uses of land.

After the county denied a master application for a proposed development, the developer challenged the denial and alleged a taking. The superior court rejected both claims, dismissing the taking claim as not ripe for review because no specific project had been proposed. The Washington Supreme Court affirmed, holding that

a taking claim is not ripe for adjudication where a regulatory agency retains some discretion to allow profitable uses of land. Without a final regulatory disposition that clearly shows the economic impact of the regulatory program, it is not possible for the court to assess the extent to which the regulation interferes with reasonable investment-backed expectations. Ripeness is a question for the judge, not the jury. If the regulatory agency raises as a defense the landowner's failure to exhaust administrative remedies, the burden is on the landowner to persuade the court that futility excuses exhaustion. The burden is on the landowner to demonstrate it would be futile to pursue available development alternatives, and this is a substantial burden.

1990 – 1999

Presbytery of Seattle v. King County,
114 Wn.2d 320, 787 P.2d 907, cert. denied, 498 U.S. 911 (1990)

A land use regulation may be challenged either as a taking or as a violation of substantive due process.

Presbytery purchased land on which it intended to build a church. The land contained a significant wetland, which occupied approximately one-third of the 4.5-acre parcel. Several years after the purchase, but before Presbytery had filed any development application, the county adopted an ordinance protecting wetlands, including the wetland on this parcel. Although the ordinance contained a reasonable use exemption, and despite the county's contention that a church could be built on the remaining two-thirds of the parcel, Presbytery alleged the wetlands portion of its property had been taken without just compensation.

This case marked the Washington Supreme Court's first attempt to provide an analytical framework for evaluating regulatory takings that incorporated U.S. Supreme Court cases and allowed for simultaneous or alternative substantive due process challenges. The state court's analysis first considered whether a regulation safeguards the public interest in health, safety, the environment, or fiscal integrity of an area rather than seeking to acquire some benefit for the public. If so, the regulation is not normally a taking. The constitutional validity of such a regulation then would be analyzed by considering whether it violates substantive due process.

If the regulation went beyond safeguarding the public's interests and worked to enhance a public interest, or if it destroyed a fundamental attribute of property ownership (the right to possess, to exclude others, or to dispose of property), then the regulation would be subject to analysis under the federal takings clause. A taking analysis would start by assessing whether the regulation substantially advances a legitimate state interest. If it did not, then there would be a taking. If the regulation does substantially advance a legitimate state interest, then the court would assess the extent of the economic impact on the property subject to the regulation, employing the test laid out in *Penn Central*.

The usual remedy for a violation of substantive due process is invalidation of the ordinance. The usual remedy for a taking is just compensation. (But see the decision in *Manufactured Housing*, summarized below.)

The *Presbytery* test was re-worked in *Guimont v. Clarke* in response to subsequent U.S. Supreme Court holdings.

***Sintra, Inc. v. City of Seattle*,**
119 Wn.2d 1, 829 P.2d 765, *cert. denied*, 506 U.S. 1028 (1992) (*Sintra I*)

A substantive due process claim rests on a showing that interference with property rights was irrational or arbitrary, not on a showing that no viable use of the property remains. Where money damages are sought for a substantive due process violation under 42 U.S.C. § 1983, there also must be a showing that the land use regulation is invidious or irrational.

This is one in a series of related cases in which the plaintiffs applied to develop and change the use of hotels that previously had been used for low-income housing. In each case, Seattle imposed a housing preservation assessment under its housing preservation ordinance as a condition of development. While the applications were pending, the superior court invalidated this provision of the ordinance as an unconstitutional tax, and the Washington Supreme Court affirmed in *San Telmo Assocs. v. Seattle*, 108 Wn.2d 20, 25, 735 P.2d 673 (1987).

Sintra filed a lawsuit under 42 U.S.C. § 1983 seeking damages for the imposition of the housing preservation assessment on its proposed development, alleging both a violation of substantive due process and a taking of private property. The superior court dismissed the claim for damages, but the Washington Supreme Court reversed. Applying the *Presbytery* test, the court found the record insufficient to determine whether a taking had occurred and remanded also for a determination whether the ordinance placed so great an economic burden on the property that no viable use was available. If Sintra could make such a showing, then compensation for a taking would be available. (*See Sintra II*.)

Turning to the substantive due process claim, the court held that even though the housing preservation ordinance served a legitimate public purpose, it violated substantive due process because it was unduly oppressive, because the burden of providing low-income housing fell entirely on regulated landowners. Consistent with *Presbytery*, the court invalidated the assessment. To recover damages for this violation, however, the court held the plaintiff must prove the city acted invidiously or irrationally in imposing the assessment on the plaintiffs. The court remanded for a determination whether plaintiffs could make the required showing.

***Guimont v. Clarke*,**
121 Wn.2d 586, 854 P.2d 1 (1993), *cert. denied*, 510 U.S. 1176 (1994)

This opinion set forth the basic steps used by Washington courts to analyze challenged alleging regulatory takings or violations of substantive due process.

In 1989, the Legislature adopted a statute that required owners of mobile home parks to establish a fund to financially assist tenants in moving their homes should the owner decide to close the park or change the property to another use. The statute was challenged facially by park owners on regulatory takings and substantive due process grounds. In its first takings case since the U.S. Supreme Court's decision in *Lucas*, the Washington Supreme Court reviewed its *Presbytery* analysis and re-worked the analysis slightly to accommodate the *Lucas* holding. Interpreting U.S. Supreme Court cases, the court mapped out a three-part regulatory takings analysis in Washington.

(1) The court begins with a threshold analysis, which applies the classic categorical or "*per se*" takings tests, in which the government's actions are not weighed against their financial

impact. The court asks whether the challenged regulation deprives the owner of all economic value (*Lucas*), causes a physical invasion (*Loretto*), or otherwise destroys a fundamental attribute of property ownership (the right to own property, exclude others, or dispose of the property). If so, a taking has occurred unless, in a *Lucas*-type claim, the background property limitation principle applies. If not, the court proceeds to a second threshold analysis.

(2) The second threshold analysis asks two subsidiary questions. First, does the regulation impinge upon a fundamental attribute of property ownership? (*See* *Hodel* and *Agins*.) Second, does the regulation do more to prevent harm to the public than to acquire some affirmative public benefit? If the regulation does not impinge upon a fundamental attribute of property ownership and if it manifestly prevents harm rather than acquiring a benefit for the public, then no taking exists and the taking analysis concludes. Otherwise, the court proceeds to the third part of the takings analysis. (Note that the harm/benefit test frequently is difficult to apply because it is difficult to distinguish between harm prevention and benefit acquisition.)

(3) If the regulatory action impinges upon a fundamental attribute of property ownership, or if some public benefit is acquired, the court asks whether the regulatory action substantially advances a legitimate state interest. If the answer is no, the action is a taking. If the answer is yes, the Court then uses the test set forth in *Penn Central* to evaluate the economic impact of the government's actions against the purposes and methods used by the government.

In this case there was no taking because the landowners could still evict tenants and change the use of the property. However, the court held the statute violated substantive due process because the potential financial impact of the statute's relocation reimbursement requirements would be unduly oppressive on park owners.[2] While the statute legitimately addressed the problem of declining space for mobile homes, the court concluded that the park owners were not more responsible for the problem than the general public and should not be required to bear the entire responsibility for achieving the stated public goal. Following the test in *Presbytery*, the court invalidated the Act.

Margola Associates v. City of Seattle,
121 Wn.2d 625, 854 P.2d 23 (1993)

To prove a regulation results in a physical taking, a landowner must show the regulation requires the landowner to submit to the physical occupation of his or her land.

Apartment house owners challenged a city ordinance that required owners of buildings with more than one housing unit to register with the city and pay an annual inspection fee. Owners who did not register could not evict a tenant. Applying the analysis from *Guimont v. Clarke*, the court held the ordinance did

[2] The test for substantive due process set out in *Presbytery* is (1) whether the regulation is aimed at achieving a legitimate public purpose; (2) whether it uses means that are reasonably necessary to achieve that purpose; and (3) whether it is unduly oppressive on the landowner. As in *Guimont v. Clarke*, the analysis usually turns on the "unduly oppressive" part of the test.

not effect a regulatory taking, finding the city had a legitimate interest in ensuring compliance with its housing code and concluding the ordinance neither deprived the owners of all economic value nor amounted to a physical invasion. Relying on the U.S. Supreme Court decision in *Yee*, the Washington Supreme Court rejected the argument that the ordinance's restriction on eviction effectively compelled a physical invasion of property, explaining that the owners had voluntarily rented the units and could continue to evict tenants by paying a small fee, so the owners' right to exclude others was not destroyed. The court also found the small annual fee (one-half of one percent of the average rent) was not an undue burden on the owners and held the owners were not deprived of substantive due process.

***Guimont v. City of Seattle*,**
77 Wn. App. 74, 896 P.2d 70, *review denied*, 127 Wn.2d 1023 (1995)

A prohibition on one type of use does not effect a regulatory taking if other economically viable uses remain available.

While the Washington Supreme Court's review was pending in *Guimont v. Clarke*, the Legislature amended the statute at issue by scaling back the required financial contributions to the relocation program. Instead of challenging the amended statute, the plaintiffs in this case challenged a Seattle ordinance that reserved spaces in mobile home parks solely for mobile homes, excluding "recreational vehicles." Both facial and "as applied" taking claims were alleged, together with a substantive due process claim. The Washington Court of Appeals found the record insufficient to decide the as-applied claims and rejected the facial claims. Applying the *Guimont v. Clarke* analysis, the court held (1) there was no categorical taking because the law did not prevent all economically viable use of the property and because there was no physical invasion (using reasoning similar to that used by the U.S. Supreme Court in *Yee*); (2) no fundamental property attribute was destroyed, derogated, or implicated; (3) the showing of financial impact was insufficient to support a general conclusion that the ordinance unfairly disrupted the landowners' investment-backed expectations; and (4) the legislation advanced a legitimate state interest in dealing with declining opportunities to locate mobile homes that are occupied by elderly and low-income families. The court concluded the ordinance had "minimal" impact on the mobile park owners and did not violate substantive due process.

***Luxembourg Group, Inc. v. Snohomish County*,**
76 Wn. App. 502, 887 P.2 446, *review denied*, 127 Wn.2d 1005 (1995)

To meet Nollan's "essential nexus" requirement, an exaction of property must address some problem arising from the development under consideration.

As a condition for approving a subdivision, the county required the developer to grant an easement to a neighboring landlocked property owner. The Washington Court of Appeals held the condition was a taking, because the there was no essential nexus between the easement requirement and any adverse impact of the development (*see Nollan*). The court reasoned that the interior parcel would be land-locked regardless of whether the developer's property was subdivided or not.

***Sparks v. Douglas County*,**
127 Wn.2d 901, 904 P.2d 738 (1995)

The government must demonstrate that the exaction it imposes to mitigate development is "roughly proportional" to the impact of the development.

As a condition for approval of a development plat, the county required the developer to dedicate several rights of way for future street improvements. The developer conceded there was a "nexus" between the condition and the identified impact of the proposed development, but challenged the amount of the dedication as a taking, claiming it was not specifically proportional to the identified impact. Applying the "rough proportionality" test of *Dolan*, the Washington Supreme Court concluded the county did not need to show exactly proportional mitigation requirements, just a roughly proportional calculation of impact and mitigation. So long as the county had some valid reasoning and did not rely upon merely conclusory findings, the mitigation condition could be upheld.

Ventures Northwest Ltd. Partnership v. State,
81 Wn. App. 353, 914 P.2d 1180 (1996)

A plaintiff alleging a regulatory taking must be able to demonstrate the alleged deprivation of property actually was caused by the government's regulation or action.

Ventures sought to develop property in a flood plain and applied for permits from both the state and the federal government. The federal permitting process proved difficult and a federal Corps of Engineers permit was denied for several reasons, including opposition by various federal agencies, the state Department of Ecology's refusal to issue water quality certifications, and Ventures' repeated failure to work through various permitting information concerns. While the federal permit decision was pending, the county denied a grading and filling permit. Ultimately, the county began foreclosure proceedings against Ventures' property for nonpayment of assessments and taxes. Ventures filed takings claims against the state and the county. Ventures alleged the state's actions had caused the federal permit process to fail, and it alleged the county's permit denial contributed to its inability to develop its property. The Washington Court of Appeals rejected the claims, explaining that a taking claim must be premised upon "causation in fact"—the plaintiff must be able to demonstrate the alleged loss would not have occurred "but for" the government's actions. The court concluded the federal government had a basis to deny the permits before the state refused to provide the required water quality certification. The court also concluded the county's denial of the permit was reasonable because Ventures failed to satisfy a properly imposed condition and because Ventures failed to show that the permit denial resulted in any loss of economic viability.

Schreiner Farms, Inc. v. Smitch,
87 Wn. App. 27, 940 P.2d 274 (1997)

A restraint on the sale of property is not a taking where it is not accompanied by some physical restriction on the property.

Schreiner Farms operated an 800-acre game farm that bred and raised several exotic animal species, along with native elk. To protect native wildlife from disease, the state adopted regulations banning the importation, possession, or sale of elk, with certain exceptions, including a limited right to continue possession of previously-acquired elk. Schreiner Farms sued for compensation, alleging its elk and other property were taken by the regulations. The Washington Court of Appeals held the regulations did not destroy or derogate a fundamental attribute of property because Schreiner Farms retained the right to possess the elk and could dispose of them so long as they were transported out of state. The

regulations imposed a restraint upon the range of options for disposing of the elk (including a bar on in-state sales), but the court, relying on *Andrus v. Allard*, 444 U.S. 51 (1979), held the restraint on sale of elk was not a taking where there was no accompanying physical property restriction, such as a prohibition on possession or transportation of the elk.

***Sintra, Inc. v. City of Seattle*,**
131 Wn.2d 640, 935 P.2d 555 (1997) (*Sintra II*)

A plaintiff who prevails on a regulatory takings claim is entitled to payment of interest on the value of the property taken for the time period between the taking and the ultimate payment of compensation.

After *Sintra I* remanded to the superior court, a jury found a taking had occurred and awarded compensation to Sintra, but the jury denied Sintra's claim for money damages under 42 U.S.C. § 1983 flowing from the city's violation of substantive due process, finding the violation had not proximately caused Sintra any harm. The Washington Supreme Court affirmed.

Sintra II involved questions about the appropriate amount of interest to be paid as part of compensation for a taking. The court explained that just compensation should be sufficient to put the property owner into the same position monetarily as the owner would have been had the property not been taken. The value of just compensation is calculated as of the time the taking occurs. In an inverse condemnation or regulatory taking, however, there is a delay between a taking and the judicial determination that compensation should be awarded, such that the payment of interest is necessary to compensate the owner for the lost use of the monetary value of a taking. The court held that simple interest at the statutory rate should be awarded, unless there is evidence that such an award would not afford just compensation. In this case, the trial court erred by awarding compound interest.

***Snider v. Board of County Commissioners of Walla Walla County*,**
85 Wn. App. 371, 932 P.2d 704 (1997)

A court cannot force a legislative branch of government to exercise the power of eminent domain.

As a condition for approving a preliminary plat for a proposed subdivision, the county required that an existing road be widened, which would require the developer to acquire a right of way from an adjacent landowner. The superior court upheld the determination that a widened road was needed to serve the proposed development, but held it was arbitrary and capricious for the county to require the developer to obtain the right of way. The superior court modified the condition to require the developer to deposit money with the county sufficient to acquire the right of way and construct the necessary improvements, effectively requiring the county to use its eminent domain power to acquire the right of way. The Washington Court of Appeals reversed. It held the original condition was proper given the impact of the development. More fundamentally, under the doctrine of separation of powers, the court held the superior court lacked the power to modify the condition to require the county to exercise its power of eminent domain.

***Burton v. Clark County*,**
91 Wn. App. 505, 958 P.2d 343 (1998),*review denied*, 137 Wn.2d 1015 (1999)

To avoid constituting a taking, an exaction placed on a proposed development must solve or tend to alleviate an identified public problem.

As a condition for approving a short plat, the county required the applicant to dedicate right of way and construct a road, curbs, and sidewalks. Applying the principles of *Nollan* and *Dolan*, the Washington Court of Appeals held that, before a government agency may condition a permit using an exaction, it must identify a public problem—not just a problem affecting some private landowners—and must be able to conclude that the proposed development will exacerbate this public problem. The exaction must solve or tend to alleviate the identified problem that is caused by the development and it must do so in a roughly proportional manner. The Washington Court of Appeals found the proposed subdivision would aggravate certain public problems related to traffic congestion problems, but it concluded the road exaction would contribute to the solution of this problem only if it were extended across another undeveloped parcel. Because there was no evidence any such extension might occur, the court held the county had not met its burden of showing the condition would help solve the identified problem.

***Phillips v. King County*,**
136 Wn.2d 946, 968 P.2d 871 (1998)

No inverse condemnation claim lies against a county that issued a permit to a private development that has a design defect leading to surface water flooding of adjacent property, unless the government is acting as a direct participant in the development that caused the flooding.

A developer proposed a drainage plan that constructed a discharge system on adjacent county right-of-way even though its engineers warned of liability to adjacent landowners because of soil conditions. The drainage plan was vested under an old code and did not meet the standards of the existing code. The county approved the plan notwithstanding concerns raised by Phillips, whose property lay on the opposite side of the county right-of-way.

Soon after the drainage system was built, Phillips sued both the developer and the county, claiming the system resulted in flooding of Phillips' property. Phillips alleged the county's approval of the drainage system resulted in an inverse condemnation of a portion of Phillips' property. The Washington Supreme Court rejected the inverse condemnation claim. The court explained that a claim for inverse condemnation from surface water flooding is possible where a county artificially collects and discharges water onto surrounding property in a manner different than from the natural flow, but no inverse condemnation arises (1) where the county merely permitted a development that causes a surface water problem when constructed or (2) where the county later took ownership of the drainage system and the surface water problem was not due to the county's poor maintenance but to the developer's poor design. The court held, however, that when the county allowed the drainage system to be built on county land it potentially became part of the problem by allowing its land to be used in an allegedly improper manner. The court remanded to the trial court to determine if the county had participated in a surface water invasion of the neighbor's property.

***Kahuna Land Co. v. Spokane County*,**
94 Wn. App. 836, 974 P.2d 1249 (1999)

Conditions imposed on development that are reasonably necessary for public health and safety do not effect a taking. Conditions made necessary by the character of the property are not unduly oppressive and do not violate substantive due process.

As a condition for approving a preliminary plat for a proposed subdivision, the county required the construction of an access road and sewer across an adjacent parcel owned by the federal government. Alleging the cost of this condition was so great it would take all profit from the development, Kahuna claimed a taking of property and was a violation of substantive due process. The Washington Court of Appeals rejected Kahuna's categorical taking claim, applying *Guimont v. Clarke* and finding the property retained value and had not been physical invaded. Finding the access and sewer requirements imposed by the county were reasonably necessary for public health and safety and that no public benefit had been acquired, the court found it unnecessary to undertake a *Penn Central* analysis. The court also rejected the substantive due process claim, concluding the conditions were reasonably necessary to a legitimate public purpose, and the cost of the conditions had more to do with the remoteness of the site than the county's choices as to conditions.

2000 – 2009

***Manufactured Housing Communities of Washington v. State*,**
142 Wn.2d 347, 13 P.2d 183 (2000)

Under the Washington Constitution, private property may be taken only for public use, and not for private use (with certain exceptions). Public benefit, by itself, does not constitute public use.

To address problems facing low income and elderly mobile home tenants as space for mobile homes became increasingly scarce, the Washington Legislature enacted a statute that gave qualified mobile home tenant organizations a right of first refusal to purchase mobile home parks when the landlord decided to sell the land. The mobile home park owners complained that granting a right of first refusal would impair their power to negotiate the best sale of their property and that the enactment of the legislation took their property. The Washington Supreme Court agreed. It first conducted a *Gunwall* analysis[3] and held the opening portion of article I, section 16, of the Washington Constitution, which prohibits government from taking private property for a "private use," provides greater protection than the federal Constitution.

The court concluded the statute impinged on the "right of first refusal," which the court found to be a significant interest in property. A finding that fundamental property interests have been impinged upon normally leads to a *Penn Central* analysis, under the test set forth in *Guimont v. Clarke*). In this instance, however, the statute transferred the right of first refusal from the mobile home park owner to a third person—the mobile home tenant's association, and the court found this transfer to be functionally equivalent to the exercise of eminent domain, and therefore a taking of property. Rather than awarding compensation, however

[3] *Gunwall v. State*, 106 Wn.2d 54, 720 P.2d 808 (1986).

(which the statute provided in full measure), the court invalidated the statute, holding that the statute violated the first portion of article I, section 16. The court explained that although the statute might provide a public benefit, mere public benefit does not constitute public use for purposes of article I, section 16.

Eggleston v. Pierce County,
148 Wn.2d 760, 64 P.3d 618 (2003)

Police power and eminent domain power are separate and distinct powers of government. The duty to provide evidence in a criminal case, which involves the police power, does not give rise to a taking of property.

Mrs. Eggleston's home was rendered uninhabitable when county police removed a load-bearing wall to preserve evidence of a crime committed by her adult son. The police action was taken pursuant to a search warrant and an order to preserve evidence. While the court struggled with the severe impact sustained by Mrs. Eggleston, it concluded that some government actions are pure exercises of police powers and cannot be equated with the power of eminent domain. The preservation of evidence for criminal proceedings is such a power. The court left open the possibility that Mrs. Eggleston may have other legal means to address the manner in which the police acted, but concluded that the matter should not be analyzed as a taking of property.

Edmonds Shopping Center Associates v. City of Edmonds,
117 Wn. App. 344, 71 P.3d 233 (2003)

A reasonable exercise of the police power that does not destroy a fundamental attribute of ownership or impose a private burden for a public benefit is not a taking.

The city granted Marty's Public House a gambling permit to expand its card table gambling operation and a building permit to expand its building. Shortly thereafter, the city adopted an ordinance banning cardrooms. Marty's claimed the ordinance was not a legitimate exercise of the police power and effected a taking. The Washington Court of Appeals rejected that claim, holding the regulation of gambling is a reasonable exercise of the police power to protect the public health, safety and welfare, and the ordinance neither destroyed a fundamental attribute of ownership nor imposed a private burden for a public benefit. The court also rejected Marty's substantive due process claim, concluding an ordinance is not unduly oppressive when it regulates only the activity which is directly responsible for the harm and noting that Marty's building could be used for other purposes.

Saddle Mountain Minerals, L.L.C. v. Joshi,
152 Wn.2d 242, 95 P.3d 1236 (2004)

Before a property owner can raise a regulatory taking claim, there must be a final governmental decision regarding the application of the regulation to the property at issue.

In 1993, the city rezoned a parcel owned by Joshi to high density residential, a designation that does not allow mining. Thereafter, Saddle Mountain Minerals purchased the mineral estate in Joshi's parcel. A year later, Joshi began developing the property, using sand and gravel from the property to grade an off-site access road. Saddle Mountain sued Joshi, claiming damages for the off-site use of the sand and gravel, part of the mineral estate of the property. Joshi defended by arguing that the mineral estate had been destroyed when the zoning

was changed and that Saddle Mountain's predecessor should have filed a takings claim against the city.

The Washington Supreme Court rejected Joshi's defense, holding that the city's ordinance did not destroy Saddle Mountain's mineral rights. The court explained (1) it was inappropriate to apply takings law to a dispute between private parties; (2) a takings claim against the city was not ripe because there was no final government decision applying the zoning regulations to the site, since Saddle Mountain had never applied for a variance or waiver from the mining prohibition in the ordinance; and (3) there was no determination by a fact finder of the remaining value of Saddle Mountain's mineral rights.

In the Matter of Property Located at: 14255 53rd Ave S., Tukwila, King County, Washington,
120 Wn. App. 737, 86 P.3d 222 (2004), ***review denied,*** **152 Wn.2d 1034 (2004),** ***cert. denied,*** **125 S. Ct. 1862 (2005)**

Government action necessary to avert a public calamity does not give rise to a takings claim.

Washington State declared an emergency when it discovered that plants in a commercial nursery were infested with the citrus longhorned beetle. The unchecked spread of this beetle could have devastating effects on Washington's trees and native forests. The primary control strategy approved by a panel of scientists required the destruction of potential host trees within a certain radius of the infested nursery. Three homeowners whose trees were to be destroyed alleged this control strategy was a taking of their property and that compensation had to be paid in advance of any control activities. The Washington Court of Appeals disagreed, holding (1) the destruction of potential host trees was not a physical invasion leading to a taking claim; (2) government action undertaken to avoid a public disaster is not an appropriation of private property for public use and is not susceptible to a takings analysis; and (3) that there is no private right to maintain property in a condition that would lead to a public nuisance, so that the government may abate the nuisance without facing a taking claim.

Paradise Village Bowl v. Pierce County,
124 Wn. App. 759, 102 P.3d 173, ***review denied,*** **154 Wn.2d 1027 (2005)**

A regulation that does no more than protect the public against a specific harm does not effect a regulatory taking.

Paradise challenged a county ordinance that eliminated social card gaming unless it was conducted for charitable or non-profit purposes, claiming a taking and a violation of substantive due process. The Washington Court of Appeals rejected both claims. Applying the threshold questions in *Guimont v. Clarke*, the court concluded (1) the ordinance had not destroyed a fundamental attribute of property, including the ability to make some profitable use of the property, since the plaintiff could continue to use its property as a bowling alley and restaurant; and (2) the ordinance was designed to protect the public, by regulating against social ills associated with unrestricted gambling, rather than to acquire some public benefit. Because the threshold questions were answered in the negative, there was no need to undertake the *Penn Central* test to evaluate whether there might be a taking based upon the magnitude of the economic impact and the means used to regulate the property.

In rejecting the substantive due process claim, the court concluded an ordinance is not unduly oppressive when it regulates only the activity which is directly responsible for the harm.

Dickgieser v. State,
153 Wn.2d 530, 105 P.3d 26 (2005)

(1) A taking may exist for damage to private property that is reasonably necessary for a public use to proceed.

(2) An alleged governmental tort, such as negligence, does not become a taking simply because the government is the alleged tortfeasor.

Logging on state land resulted in flooding damage to Dickgieser's property, which lay down slope from the state land. Dickgieser claimed the state's actions constituted an inverse condemnation of his property, but the trial court granted summary judgment to the state, ruling that no taking occurred because the logging of state lands was not a public use. The Washington Supreme Court reversed. The court held damage to private property that is reasonably necessary to log state lands is for a public use and requires compensation under article 1, section 16 of the Washington Constitution. The court remanded to the trial court for a determination whether the damage to Dickgieser's property was reasonably necessary for logging of state land, and whether the state's logging activity concentrated and gathered water into artificial channels or drains and discharged it onto Dickgieser's land in quantities greater than or in a different manner than the natural flow.

The court rejected the state's argument that Dickgieser's claim was no more than a negligence claim against the state, finding that Dickgieser in fact had raised a taking claim. The court reiterated, however, that alleged governmental torts, such as negligence, do not become takings simply because the government is the alleged tortfeasor.

Tiffany Family Trust Corp. v. City of Kent,
155 Wn.2d 225, 119 P.3d 325 (2005)

The Legislature may impose time periods and other statutory limits on takings claims.

In 1986, Tiffany entered into a mitigation agreement with the city to pay a proportional amount of the related cost of improvements to nearby roads, to mitigate impacts associated with an application for a conditional use permit. Rather than requiring any payment at the time the permit was granted, however, payment for the improvements was to be made pursuant to the formation of a local improvement district (LID). When the LID was formed in 1998, however, the assessment was 15 times the estimate made in 1986. Tiffany sued, alleging a taking of property, a violation of substantive due process, and a civil rights claim under 42 U.S.C. § 1983. Tiffany asked the court both to declare the assessment void and to award compensation for a taking. The trial court dismissed the claims, ruling that the statutory time period for attacking the assessments had passed, and that Tiffany could not get around that bar by collaterally attacking the assessment using the same arguments disguised as constitutional claims. The Washington Supreme Court affirmed. While LID assessments in excess of special benefits received are prohibited and result in a taking, a property owner who wishes to challenge a LID assessment must do so before the final assessment roll is

confirmed, after which the LID is deemed conclusively correct and may not be challenged.

HTK Management, L.L.C. v. Seattle Popular Monorail Authority,
155 Wn.2d 612, 121 P.3d 1166 (2005)

If a condemning authority has conducted its deliberations on an action honestly, fairly, and upon due consideration for facts and circumstances, that action will be upheld, even where the court believes an erroneous conclusion has been reached.

The Seattle Monorail Project (SMP) brought an action to condemn a parking garage for use as a monorail station. HTK, owner of the garage, challenged the condemnation. The parties agreed that SMP needed a portion of the property for the station itself and the remainder of the property for staging during construction, after which the excess property would be sold.

As a threshold question, HTK claimed SMP lacked authority to condemn private property. The Washington Supreme Court found that SMP was a creature of the City of Seattle, so that the city's condemnation authority and procedures applied to SMP.

HTK contended SMP should be limited to acquiring a multiyear lease on the portion of the property needed only during construction. The court upheld SMP's finding that it needed the entire property, holding that determinations about the type and extent of property interest necessary to carry out a public purpose are legislative questions to which courts give deference. If a condemning authority has conducted its deliberations on an action honestly, fairly, and upon due consideration for facts and circumstances, that action will be upheld, even when there is room for a difference of opinion upon the course to follow, or a belief by the reviewing authority that an erroneous conclusion has been reached.

City of Des Moines v. Gray Businesses, LLC,
130 Wn. App. 600, 124 P.3d 324, *review denied,* 158 Wn.2d 1024 (2006)

A taking does not arise from the regulation or denial of a property use that is contingent on state or local regulations. Such use is not a part of the bundle of sticks the owner enjoys as a vested incident of ownership, and the regulation or denial of that use does not derogate a fundamental property interest.

When the owner of a mobile home park failed to provide the city with a site plan of its park within the time required by ordinance, the city notified the owner that it would no longer issue permits allowing mobile homes to come onto the site to replace those that moved away. The owner subsequently claimed a regulatory taking, arguing the right to lease vacant spaces was at least as important as the right of first refusal at issue in *Manufactured Housing*. The Washington Court of Appeals disagreed, holding the right to operate as a mobile home park was not a fundamental attribute of ownership. *Manufactured Housing* dealt with an owner's inherent right to sell or lease its property to anyone it chooses. By contrast, the right to use and lease property for mobile homes is not inherent, but derived from and limited by state and local laws. The ability to use or lease property for mobile home is not a part of the bundle of sticks the owner enjoys as a vested incident of ownership.

Central Puget Sound Regional Transit Authority v. Miller,
156 Wn.2d 403, 128 P.3d 588 (2006)

Compliance with statutory notice requirements constitutes adequate notice of a public hearing concerning the anticipated condemnation of property.

Sound Transit provided notice of a public meeting to discuss possible sites for condemnation by posting notice and its agenda on its web site, but nowhere else. One month later, Sound Transit determined to condemn Miller's property. At the public use and necessity hearing for the condemnation, Miller claimed notice of the prior public meeting was inadequate. The Washington Supreme Court rejected Miller's claim, finding Sound Transit had satisfied its statutory notice requirement. Sound Transit was required to use the same methodology as first class cities for giving notice of public meetings where condemnation is discussed.

Peste v. Mason County,
133 Wn. App. 456, 136 P.3d 140 (2006), *review denied*, 159 Wn.2d 1013 (2007)

To allege successfully that a statute on its face effects a taking by regulating the permissible uses of property, a landowner must show that the mere enactment of the regulation denies all economically viable use of the property.

Peste appealed a down-zoning of his property, claiming a taking and a violation of substantive due process. The Washington Court of Appeals rejected both claims. Relying primarily on *Guimont v. Clarke*, the court examined first whether the downzone on its face destroyed a fundamental attribute of property ownership, in this case the right to make some economically viable use of the property. To prove that a statute on its face effects a taking by regulating the permissible uses of property, the landowner must show that the enactment of the regulation denies the owner all economically viable use of the property. The court concluded Peste presented no evidence showing a facial taking. Peste's as-applied takings claim also failed for lack of evidence. On the record before it, the court rejected Peste's substantive due process claim, finding the downzone was not unduly oppressive.

Wallace v. Lewis County,
134 Wn. App. 1, 137 P.3d 101 (2006)

In some circumstances, the passage of time may bar an inverse condemnation claim.

Neighbors filed nuisance claims against a landowner who operated a tire disposal business, and inverse condemnation and other claims against the county for using the business for tire disposal. The trial court dismissed all claims and the Washington Court of Appeals affirmed. Insofar as the inverse condemnation claim rested on the fact that tires spilled onto one neighbor's property, the court held the tires had been placed on the neighbor's property for so long they created a prescriptive easement, so that the passage of time barred an inverse condemnation claim. The court also held the inverse condemnation claim failed because the county's tire-disposal activities were not related to a public use or a public benefit; the county acted as a private party who contracted with another private party for disposal of its own tires.

Clear Channel Outdoor v. Seattle Popular Monorail Authority,
136 Wn. App. 781, 150 P.3d 649, *review denied,* 136 Wn.2d 781 (2007)

For an owner to be entitled to just compensation for an alleged inverse condemnation, the property interest at issue must be something more than a mere unilateral expectation of continued rights or benefits.

A billboard owner with month-to-month lease had no compensable property interest when the Seattle Popular Monorail Authority ordered the billboard removed after purchasing the property in lieu of and under threat of condemnation.

***Public Utility District No. 2 of Grant County v. North American Foreign Trade Zone Industries,* LLC,**
159 Wn.2d 555, 151 P.3d 176 (2007)

The state's power of eminent domain is an inherent attribute of sovereignty that is limited by the constitution. Political subdivisions of the state, including public utility districts, have only the eminent domain power delegated in state statutes, and that power must exercised in strict compliance with those statutes.

The PUD leased land owned by North American, a private company, to locate electrical generators, and indicated its intent to negotiate purchase of the leased land. When purchase negotiations broke down, the PUD Commission approved a resolution authorizing condemnation of the land, and filed a condemnation petition. North American challenged the petition on procedural grounds. The Supreme Court held that the statutory notice requirements in certain sections of Title 35 RCW apply to PUDs and are mandatory, and that the PUD complied with those requirements. The Court refused an invitation to constitutionalize the statutory notice requirements. It also affirmed the trial court's finding that substantial evidence supported a determination of public use and necessity.

Brutsche v. City of Kent,
164 Wn.2d 664, 193 P.3d 110 (2008)

In an extension of Eggleston, the Court found no taking for damage that occurred when police with a valid search warrant battered doors open with a battering ram even though property owner offered to open the doors with the keys, and no evidence was gathered and no prosecution resulted.

In response to a suspected methamphetamine operation, a King County District Court judge issued a warrant authorizing the search of an abandoned warehouse, several outbuildings, eight semitrailers, and a mobile home on property in Kent owned by Mr. Brutsche. Because of the methamphetamine connection, the search was considered high risk. In executing the warrant, the police gained access to several of the structures by using a battering ram, damaging doors and door jambs in the process. Mr. Brutsche maintained the destruction was unnecessary because he offered his keys to the officer in charge, and offered to escort the officers around the property and open all doors for them. The police found no evidence during their search, and took no subsequent prosecutor actions. Mr. Brutsche filed a lawsuit alleging trespass and the unconstitutional taking of private property. In denying the taking claim, the Court held that this case was indistinguishable from Eggleston v. Pierce County, 148 Wn.2d 760, 64 P.3d 618 (2003), in which the Court found that the destruction of property by police activity pursuant to a valid warrant is a valid exercise of the police power to conserve the safety, morals, health and general welfare of the public, and is not a taking under Article 1,

section 16 of the Washington Constitution. The Court also rejected Mr. Brutsche's claim that the damage to his property constituted a permanent physical occupation of his property under *Loretto v. Teleprompter Manhattan CATV Corp*, 458 U.S. 419 (1982).

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Spokane Airports v. RMA, Inc., 149 Wn. App. 930, 206 P.3d 364 (2009), *review denied*, 167 Wn.2d 1017 (2010)

A local governmental entity that has not been statutorily delegated eminent domain authority lacks that authority. Eminent authority cannot be delegated from one local governmental entity to another without statutory authority to do so.

The City of Spokane and Spokane County entered into a joint agreement to empower a board to operate, maintain, and develop Spokane International Airport and other airports in the county. The board began work to construct a new air traffic control tower, which would require the removal of buildings leased to RMA, a private company providing aircraft support and maintenance services. After the city and county passed a resolution condemning the leases, the board filed a petition in superior court to condemn RMA's leasehold interests, leading to stipulated order of public use and necessity and a stipulated order for immediate possession and use.

RMA then brought a claim inverse condemnation, along with other claims, contending the superior court lacked subject matter jurisdiction to consider the petition for condemnation because the board lacked the power of eminent domain. The Court of Appeals agreed and dismissed the condemnation action, holding (1) that statutes delegating the state's sovereign power of eminent domain are strictly construed; (2) that any delegation of that power must be express or clearly implied; and (3) that the governing statute, RCW 14.08.200, did not authorize the city and county to delegate their power to condemn to the board.

Fitzpatrick v. Okanogan County, 169 Wn.2d 598, 238 P.3d 1129 (2010)

The common enemy doctrine does not bar inverse condemnation claims for damage to property caused by water flowing through a natural watercourse, as can occur when a landowner obstructs a watercourse or natural drainway or prevents water from entering a flood channel.

In 1986, the Fitzpatricks built a log house on their property adjacent to the Methow River. In 2002, that house was washed away when the Methow River changed course during a 2-year storm event. The Fitzpatricks filed an inverse condemnation claim, alleging that emergency work done in 1999 on a flood control project maintained by Okanogan County and the State blocked some of the river's natural side channels, causing the river to change course. The County and State claimed that the common enemy rule barred the law suit. Clarifying its holding in *Halverson v. Skagit County*, 139 Wn. 2d 1, 983 P.2d 643 (1999), the Court found that the common enemy doctrine does not bar inverse condemnation claims for damage to property caused by water flowing through a natural watercourse, as can occur when a landowner obstructs a watercourse or natural drainway or prevents water from entering a flood channel. The Court then noted that the correct standard for analyzing inverse condemnation actions was that

articulated in *Dickgieser*, which looks at whether the damage to the property was a necessary incident to the public use of the state's land. Here, the Court found that the Fitzpatricks provided evidence that the damage may have been a necessary incident to the work done on the dike in 1999, and remanded to the trial court for hearing on that question.

The State also maintained it did not have a sufficient proprietary interest in the dike to render it liable for damages. The court held that issue was to be resolved by the trial court on remand.

***Union Elevator & Warehouse Co., Inc. v. State ex rel. Department of Transportation,* 171 Wn.2d 54, 248 P.3d 83 (2011)**

The Relocation Act, RCW 8.26, which provides relocation benefits for certain condemnation actions, provides only the benefits specified in the statute. While interest may be available in certain regulatory taking claims, it is not available under this statute.

In an earlier appeal, Union Elevator prevailed on its claim of inverse condemnation for loss of feasible access to its grain elevator facility because of a highway project that redesigned and upgraded State Route 395. 96 Wn. App. 288 (1999). After relocating its facility, Union Elevator prevailed in a claim for statutory compensation for new equipment under the Relocation Act, RCW 8.26. 144 Wn. App. 593 (2008). Union Elevator then sought interest on the statutory compensation awarded under RCW 8.26, arguing that it was part of just compensation for inverse condemnation. The Supreme Court rejected that claim, based on the language of the statute and the absence of any statutory waiver of sovereign immunity in the statute, holding that relocation benefits and interest under RCW 8.26 cannot be considered part of the compensation and damages available for inverse condemnation.

***Tom v. State*, 164 Wn. App. 609, 267 P.3d 361 (2011), *review denied*, 173 Wn.2d 1025 (2012)**

Where a private landowner claims his property, recently rezoned for residential use, is unmarketable because of activity on adjacent government property that had been ongoing for more than a century, there is no taking.

Since 1886, the state had operated an on-site firing range at the state penitentiary in Walla Walla. Tom owned property adjacent to the penitentiary. In 2004, that property was rezoned from agricultural to residential. Tom asked the state to stop using the firing range, but the state declined. Tom then filed an inverse condemnation claim, arguing that his property was unmarketable because of the firing range. The court rejected the claim, noting that no Washington case has ever recognized a compensable taking where the claim arises from a pre-existing government use. The court left open the possibility of a claim for a "new taking" for lost value to property caused by additional or increased government activity occurring after the property has been purchased. The court also held that a rezone, by itself, does not give rise to a cause of action for a new physical taking. It declined to establish a rule that would "allow one government's regulatory action (a zoning change) to give rise to a new takings claim for another government's physical activity (firing range noise) that predates the zoning change by almost a century."

***Thun v. City of Bonney Lake*,**
164 Wn. App. 755, 265 P.3d 207 (2011), *review denied*, 173 Wn.2d 1035 (2012)

An as-applied takings claim against a municipality generally is not ripe for judicial review until the municipality has issued a final decision and the plaintiff has sought compensation from the municipality.

On the same day a developer submitted a site plan application for a condominium building on Thun's property, the city rezoned most of the property. The new zoning did not allow condominiums. In *Abbey Road Group, LLC v. City of Bonney Lake*, 167 Wn.2d 242, 218 P.3d 180 (2009), the court held the developer's rights did not vest to the prior zoning because the site plan application was not a valid building permit application. In this case, Thun claimed the rezone was an unconstitutional taking under article I, section 16. The court of appeals held the as-applied takings claim was not ripe for review because no building permit application had been filed. The court explained that a plaintiff need not show ripeness to bring a facial takings claim, but in an as-applied claim the plaintiff must show (1) that there has been a final decision by the municipality, and (2) that the plaintiff has sought compensation from the municipality for the alleged taking. Where there is uncertainty or questions that may be resolved by a building permit or variance, the court will decline to find a final decision. More than uncertainty is required to show that exhaustion of administrative remedies would be futile. This decision is notable for having applied the ripeness standards for takings claims brought under the federal constitution to the "final decision" requirement recognized by Washington courts.

***Olympic Stewardship Foundation v. Western Washington Growth Management Hearings Board*,**
166 Wn. App. 172, 374 P.3d 1040, *review denied*, 174 Wn.2d 1007 (2012)

The plaintiff's claim was dismissed as not ripe because the plaintiff did not show the existence of any set of facts under which a landowner would suffer a taking.

Jefferson County enacted a critical areas regulation requiring property owners to retain all vegetation located in "high-risk" channel migration zones for five of the County's rivers. Olympic Stewardship Foundation alleged violations under the Growth Management Act and claimed the regulation facially violated the nexus and proportionality requirements in RCW 82.02.020 and the Fifth Amendment's Takings Clause.

The Court held that the Foundation failed to preserve its RCW 82.02.020 claim by not raising the issue in the administrative proceeding. The Court rejected the facial takings claim on ripeness grounds: concluding that that the administrative record contained no evidence that the County had made any final decision regarding the application of the vegetation regulation to an individual parcel that contains a high-risk CMZ, the Court held that it was not possible to determine whether the vegetation regulation deprived any individual landowner of all economically beneficial use of his or her parcel or defeated the landowner's reasonable investment-backed expectations sufficient to constitute a taking.

***Cradduck v. Yakima County*,**
166 Wn. App. 435, 271 P.3d 289 (2012)

A county's reasonable restrictions on development that are calculated to avoid property damage and injury in a designated floodplain do not violate the landowner's right to substantive due process of law.

After two significant floods of the Naches River causing substantial property damage, Yakima County updated its maps designating areas at risk from flooding. Relying on new information and new scientific methods, the maps expanded the designated floodways. Cradduck owned a mobile home park within the expanded floodway of the Naches River. She applied for a permit to put a mobile home on a lot in his park. The county denied the application under an ordinance that prohibited new residential construction in floodways. The trial court reversed the denial, finding that the regulation was unduly oppressive, violating Cradduck's right to substantial due process.

The Court of Appeals reversed the trial court and upheld the permit denial. Applying the three-part analysis from *Presbytery of Seattle*, it concluded: (1) the regulation is aimed at protecting life and property from flooding, which is a legitimate public purpose; (2) the development and use of more accurate floodway maps and the restrictions of residential construction in floodways are reasonably necessary because they tend to solve the problem of flood damage to private property and protect public health and safety; (3) the county's restrictions of residential construction are not unduly oppressive, when the public's interest in protecting against a serious flooding threat is weighed against the burden imposed on Cradduck, which is the loss of some income and the requirement to limit an activity that will likely contribute directly to a public problem.

Wolfe v. Department of Transportation,
173 Wn. App. 302, 293 P.3d 1244, *review denied*, 177 Wn.2d 1026 (2013)

The subsequent purchaser rule bars a cause of action for a taking where the claimed injury is ongoing erosion resulting from a governmental action that occurred before the landowner purchased the property.

In 1986, the state Department of Transportation reconstructed a bridge crossing the Naselle River. Landowners claimed that the reconfiguration of the support piers changed the flow of the river, causing increased erosion of their property, and they alleged inverse condemnation and other claims. The Court of Appeals upheld the trial court's dismissal of the inverse condemnation claim under the subsequent purchaser rule (a purchaser of land cannot sue for a taking or injury that occurred before he acquired title). Wolfe purchased the parcels in 2003 and 2004, well after the bridge reconstruction. The Court rejected Wolfe's contention that continuing erosion constituted new injury, holding that a new taking cause of action requires additional governmental action, which was not present here.

Keene Valley Ventures, Inc. v. City of Richland,
174 Wn. App. 219, 298 P.3d 121, *review denied*, 178 Wn.2d 1020 (2013)

The plaintiff bears the burden to establish its losses in an inverse condemnation action.

A land development company (KVV) purchased property at the low point in a valley that was being developed in stages. As part of the staged development, the city planned for various water runoff control measures, which had not yet been fully constructed. As the staged development continued water occasionally collect on Johnson's property. KVV sued for inverse condemnation. It prevailed, but the trial court ruled that the damage to the land was temporary because the city could reroute the water and it awarded only nominal damages (one dollar) and denied attorney fees because KVV had failed to proved that it had sustained damage.

The Court of Appeals affirmed, holding that KVV bears the burden to establish its losses in an inverse condemnation action. The plaintiff must establish more that simple interference with property rights—it must demonstrate a temporary or permanent interference that "destroys or derogates" a fundamental ownership interest.

Jackass Mt. Ranch, Inc. v. South Columbia Basin Irrigation District,
175 Wn. App. 374, 305 P.3d 1108 (2013)

Governmental conduct that is not a cause of damage to a plaintiff cannot constitute a taking in an inverse condemnation claim.

After a cherry orchard was damaged by a landslide, the owners of the orchard sued the irrigation district, claiming the landslide was caused by water seepage from a wasteway the district operated. The evidence at trial showed that the seepage resulted from the design and construction of the wasteway, which had been planned, designed, engineered, and constructed by the U.S. Bureau of Reclamation. There was no evidence that the district's operation of the wasteway caused the taking. The Court of Appeals affirmed the order granting summary judgment to the district.

Mangat v. Snohomish County,
176 Wn. App. 324, 308 P.3d 786 (2013), *review denied*, 179 Wn.2d 1010, 179 Wn.2d 1012 (2014)

Applicant for a permit to develop real property, who defaulted on the purchase agreement and no longer held any interest in the property to be developed, cannot claim that the permit application itself constitutes "property" for purposes of a taking claim.

Mangat entered into a purchase agreement for land that allowed for the submission of platting and other permit applications prior to the close of the sale. The agreement provided that all platting materials be turned over to the selling landowner if the purchase agreement fell through. Mangat submitted platting applications but later defaulted after financing for the development project fell through. The county then continued to process the permit applications for the benefit of the original landowners. Mangat sued, claiming the permit applications had been "taken" by the county and violated principles of due process. The Court examined Washington statues and case law addressing permit applications and vested rights and concluded that the permits relate to the land and the landowner, not the applicant. Accordingly, Mangat had no due process rights that were violated and no property that could be "taken."

Lakey v. Puget Sound Energy, Inc.,
176 Wn.2d 909, 296 P.3d 860 (2013)

A land use permit authorizing development by a private party does not form the basis for an inverse condemnation claim by another party affected by the permitted land use activity.

A group of homeowners sued PSE (under nuisance theories) and the City of Kirkland (under an inverse condemnation claim) alleging damage associated with the harmful effects of electromagnetic energy emanating for a cell tower constructed by PSE and permitted by the City of Kirkland. The trial court dismissed their taking claim against the city on the basis that it should have been raised in a timely Land Use Petition Act (LUPA) challenge. The Supreme Court

reversed on this point, holding that claims for eminent domain damages do not need to be brought under LUPA. Nevertheless, the Court found that the taking claim was properly dismissed. Citing *Phillips v. King County*, the Court held that principles of proximate causation and the public duty doctrine preclude a taking claim based solely on the issuance of a permit, even if the ensuing development allegedly produces some harm. Government permitting that facilitates a third party project involves no appropriation of property for public use, no damage associated with construction of a public project, and no regulation of property use sufficient to state a claim under eminent domain or regulatory takings law.

***Admasu v. Port of Seattle*,**
185 Wn. App. 23, 340 P.3d 873, *review denied*, 183 Wn.2d 1009 (2014)

An easement granted to allow specific government activities with regard to property eliminates inverse condemnation claims for damage to the property necessarily associated with the permitted activity.

Property owners sought compensation for the diminished value of their properties due to the Port of Seattle's operation of the third runway at the Seattle–Tacoma International Airport, asserting inverse condemnation due to noise and relying on both the federal and state constitutions. The trial court dismissed the claims of one group of property owners because they had conveyed avigation easements to the Port in exchange for noise-proofing services. The Court of Appeals affirmed. This kind of easement allows for "unimpeded aircraft flights over the servient estate[s]." Having granted such easements the landowners effectively waived any right to a taking claim for noise damage.

***Fedway Marketplace West, LLC v. State*,**
183 Wn. App. 860, 336 P.3d 615 (2014), *review denied*, 182 Wn.2d 1013 (2015)

Landowners hoping to lease retail space to businesses acquiring the right to operate private liquor stores alleged that the State's plan to allow a wider range of business location options damaged their leasing marketplace and thus produced a "taking" of property. Because the State has a genuine police power interest in a limited liquor sales marketplace, the auction of rights to new liquor store businesses, coupled with a policy of allowing bidders to operate in a new location, resulted in no taking requiring just compensation.

Following passage of Initiative 1183, privatizing Washington's liquor sales marketplace, the state Liquor Control Board terminated its leases for state-run liquor store facilities pursuant to contract provisions expressly anticipating this outcome. The state then began to auction rights to operate privately-owned liquor stores at each of the state's pre-existing stores. While Initiative 1183 envisioned that these new enterprises would generally operate in the same locations previously leased by the state, the Board adopted a relocation policy allowing bidders to negotiate a new store lease with the landowner at the same location, or instead to relocate at a different location nearby. The landowners with existing liquor store facilities alleged (1) that, by allowing new store operators to relocate their businesses to other premises, the state had eliminated the landowners' lease negotiation leverage and diminished future lease values; and (2) that the Board's relocation policy produced a benefit to the state in the form of increased bid values because bidders could relocate a liquor store business and avoid having to deal with a single leasehold option. Based on those allegation, the landowners claimed that the State had "taken" their leasing advantage in order to produce a

benefit to the state in the form of higher bid values from prospective liquor store operators.

Applying the first part of the *Guimont* takings analysis, the Court of Appeals found that, in spite of the relocation policy, the landowners fully retained all the value of their original property holdings—the State had not destroyed or diminished any fundamental attribute of their property interests (the rights to possess, dispose, or make economic use of the property). As to whether the challenged government action worked more to prevent harm than acquire some public benefit, the Court rejected the landowner's claim that the relocation policy was primarily about acquiring some public benefit. Instead, the Court concluded that the Board's action was part of an overall government plan to provide a limited private marketplace, thereby preventing a proliferation of liquor outlets. While the auction of exclusive rights to operate liquor stores in various locations brought value to the State, it was ultimately connected to a broader recognized police power—regulation of liquor sales. Having answered the first two threshold inquires in *Guimont* in this manner, no further takings analysis was required.

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