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August 19, 2015

TO: City Plan Commission

FROM: Planning & Development Department

RE: Comprehensive Plan Text Amendment Application, File Z1400065-COMP
Mobile/Manufactured Home Park Preservation
Preliminary Supplemental Background Report and Attachments
for the Plan Commission's August 26, 2015 Workshop Agenda Item #5

Staff will request a public hearing on this and the other proposed Comprehensive Plan amendments following the Plan Commission workshop scheduled for August 26, 2015. This document and attachments are materials for discussion at the workshop.

Staff prepared relevant information gathered for the City of Spokane Comprehensive Plan text amendment application for mobile and manufactured home park preservation. This report provides this information and some answers to questions asked in discussions at the Plan Commission workshops, an open house and two stakeholder group meetings. It is meant to summarize preliminary research conducted during the first stages of the Plan Commission's consideration but is not meant to serve as an exhaustive investigation. A final staff report will be prepared separately prior to the Plan Commission public hearing on this item.

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Attachments

Attachment 1: Washington State Law on Mobile Home Park Closures

Attachment 2: Manufactured Homes & Senior Tax Exemptions – City of Spokane

Attachment 3: 6/17/2015 Mobile/Manuf. Home Park Preservation Stakeholder Group Meeting Notes

Attachment 4: 7/9/2015 Mobile/Manuf. Home Park Preservation Stakeholder Group Meeting Notes

Attachment 5: Appendix

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Permit and Regulation History

Recent Manufactured Housing Land Use Regulations, Local Park Closures and Permitting			File/Ord.
1984	*	The City of Spokane developed standards for siting manufactured homes on individual lots in residential areas outside manufactured home parks.	
1985	**	Manufactured home parks were allowed in any zone except the agricultural and country residential zones, on a minimum area of ten acres and with a maximum density of seven units per gross acre, and subject to other requirements.	C28051
1989	**	The Springwood Mobile Home Park on West Cora Avenue between Post and Calispel streets closed. The park contained 114 leased spaces, built in 1973 for temporary use to house visitors to the 1974 world's fair. Over time, the infrastructure began to deteriorate. The needed repairs and zoning design upgrades to continue the park permanently were not pursued, and the land-use permit expired in 1990. Unrelated to the closure, a church was later built on the site in 1996.	
1995	*	Regulations were adopted to allow individual manufactured homes placed on lots outside mobile or manufactured home parks in three special overlay districts by special permit. Placement was subject to several conditions that would prevent groupings of such homes: no more than two would be allowed in any block on one side of the street, they could not adjoin each other on abutting lots, and the block frontage had to consist of at least 50 percent existing site-built, habitable residences. A ten-year maximum unit age requirement was also imposed on such homes placed outside mobile or manufactured home parks.	C31338
1996	*	The City reviewed and amended regulations for manufactured homes to allow their placement on individual lots outside a mobile or manufactured home parks in any zone that allows single-family dwellings (except historic districts), but continuing the maximum of two per block and other dispersal requirements. The changes reduced the maximum unit age requirement from ten to five years for placing such homes. Other new requirements included a design compatibility evaluation by staff to ensure compatibility with the character of the neighborhood surrounding the individual manufactured home.	C31762
	**	A manufactured home park consisting of about 250 spaces (never developed) was proposed as part of a rezone proposal associated with the Grayhawk development on a 44-acre site in the M1 zone, located approximately 1,600 feet northeast of the intersection of Lincoln Road and Nevada Street.	
1997	*	Following the request of a property owner of multiple separate lots who wished to place several manufactured homes on a block, changes to regulations removed the dispersal requirements, allowing neighboring manufactured homes in any zone that allows single-family dwellings (except historic districts).	C31969

Recent Manufactured Housing Land Use Regulations, Local Park Closures and Permitting			File/Ord.
1998	**	An interpretation was issued regarding establishing a manufactured home park in the M1 zone as part of the Grayhawk development. The project was not pursued.	Z9800028-AD Cameron
2000	**	The Charter Mobile Home Park on North Nevada Street between Rosewood and Lyons avenues closed after more than 40 years to make way for an Albertson's supermarket, constructed on the site in 2003. Kromer (1999) reported that the 72 units comprising the park were all pre-1977 mobile homes. All units were successfully relocated except one, which had extensive alterations.	
2003	**	A second phase of Sundance Meadows manufactured home park was approved, authorizing a total of 117 spaces for Phases 1 and 2. To date, 50 units have been placed. The units placed are newer homes, the oldest of which is a 2001 model according to Assessor's records. They feature attached garages and permanent foundations.	Z0300040
2004	*	The State of Washington passed a law that prevented local governments statewide from excluding manufactured homes by regulation from areas where site-built homes are allowed. The stated purpose was to protect consumer access to manufactured housing as a significant resource for affordable homeownership and rental housing. However, the law outlined several permissible regulations by local government for placing manufactured homes, such as requirements that manufactured homes placed be new at the time of placement, be a minimum size, be set upon a permanent foundation, and other possible requirements. RCW 35.21.684	
2006	*	Regulations change for manufactured homes, on individual lots outside of manufactured home parks, reducing the maximum age requirement from five years at the time they are placed to be new at the time they are placed.	C33830 (adopt ch. 17C.345), C33843 - repeal §11.19.300, and C33844 - repeal §11.19.355
	**	Regulations change for mobile/manufactured home parks to provide that they are permitted in the Residential Agricultural (RA) and Residential Single-Family (RSF) zones, subject to Type III review and approval. The density requirements change from seven units per gross acre to an allowed range with a minimum of four units per acre and a maximum of ten.	
2010	**	Medo Mist Mobile Home Park is granted final Planned Unit Development approval. The fully developed project would have 67 spaces. Although infrastructure has been built on site for the first phase, only one home has been placed so far.	C34570
2012	**	Finish Line Mobile Home Park closes to construct the Cheney Spokane Road interchange on Highway 195, eliminating 21 spaces.	
* Event related to manufactured homes on individual lots, outside a mobile or manufactured home park ** Event related to mobile/manufactured home parks			

Comments on Some Effects of Closures

Looking back at the most recent three decades, the number of spaces closed in the city of Spokane was 114 (Springwood, 1989), 72 (Charter, 2000) and 21 (Finish Line, 2012). However, a regulatory or incentive program, such as the types being explored in this Comprehensive Plan Text Amendment and discussed by the various parties who have provided comments, would not have affected the closure of either the Springwood or Finish Line parks, leaving only the 72 units at the Charter Manufactured Home Park to consider as a voluntary park closure that the proposal of manufactured home park preservation is meant to address.

As a basic comparison in terms of overall numbers, the loss of 72 units displaced at Charter Mobile Home Park has been offset by the placement since then of 80 units in Sundance Meadows and Spring Creek manufactured home parks, and the permitting since then of a total of 133 additional spaces in Sundance Meadows and Medo Mist manufactured home parks that have not yet been filled. The units displaced are physically different than the units placed, however.

The units placed in the city's parks after Charter Mobile Home Park closed are at least 20 years newer, with higher assessed property values, and most include attached garages. The units removed from Charter Mobile Home Park were older mobile homes (factory-built dwellings built prior to June 15, 1976 to standards other than the HUD code) destined mostly for the unincorporated area of Spokane County and other communities north of Spokane. Consultants hired to assist in relocation of the residences worked with the neighborhood council and Spokane Neighborhood Action Programs to qualify the homes for rehabilitation and for necessary alterations.

Today, it would not be financially feasible to relocate many of the residences like those in the Charter Mobile Home Park due to limited rehabilitation funding, increased costs associated with alterations and expenses such as contained asbestos abatement.

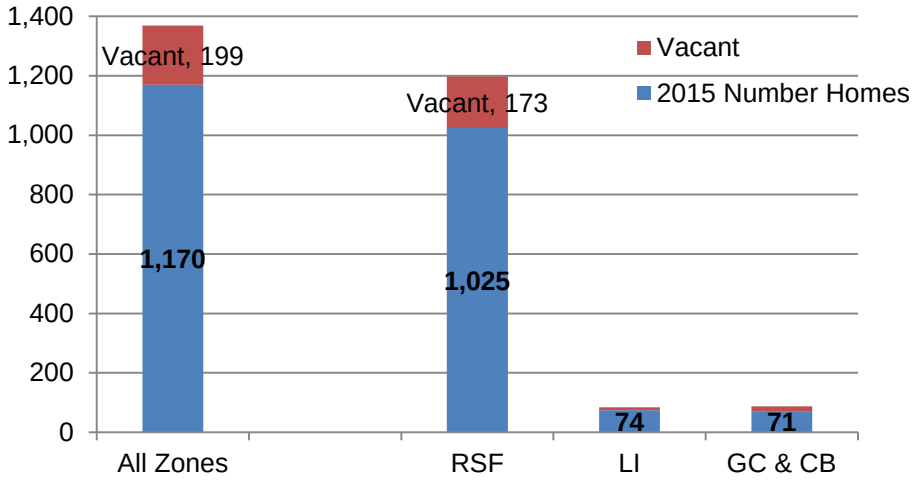
Closures in Communities near Spokane since 2007

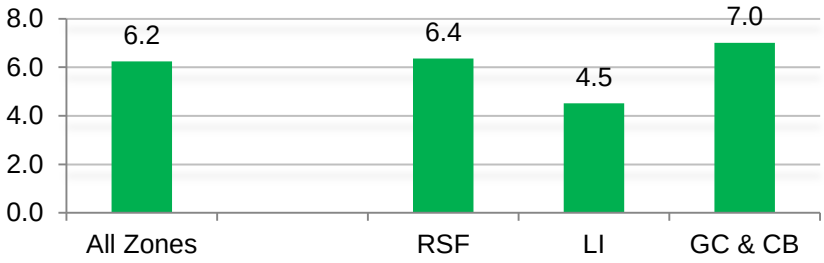
In other communities and the unincorporated area of Spokane County since the beginning of 2007, there were two voluntary mobile home park closures tracked by the Washington Department of Commerce (2015), both in the year 2008: one in the city of Cheney (44 spaces) and one on Silver Lake east of the city of Medical Lake (49 spaces), for a total of 93 spaces eliminated. (A third closed manufactured home park near Deer Lake, with a Loon Lake address attributed to Spokane County in the Commerce list, affecting two spaces, is actually located in Stevens County.) Additional research would be required to identify the amount and model years of units placed in other communities and areas in Spokane County over this period of time.

Mobile/Manufactured Home Parks in Spokane

Capacity and Density of Spokane Manufactured Home Parks by Zone

Zoning Districts:		All Zones	Residential Single Family (RSF)	Light Industrial (LI)	General Commercial/ Comm. Bus. (GC & CB)
Manufactured Home Park Site Capacity					
MANUF. HOME PARK SITES SURVEYED		19	12	4	3
TOTAL CAPACITY (spaces)		1,369	1,198	84	87
RANGE:	Site with most:	283	283	67	45
	Median:	38	55	6	36
	Site with least:	4	4	4	6
Overall Manufactured Home Park Density at Maximum Capacity (units per gross acre)					
RANGE:	Densest site:	15.1	8.1	11.5	15.1
	Median:	6.6	6.4	6.6	10.9
	Site with least density:	0.8	3.0	0.8	4.1



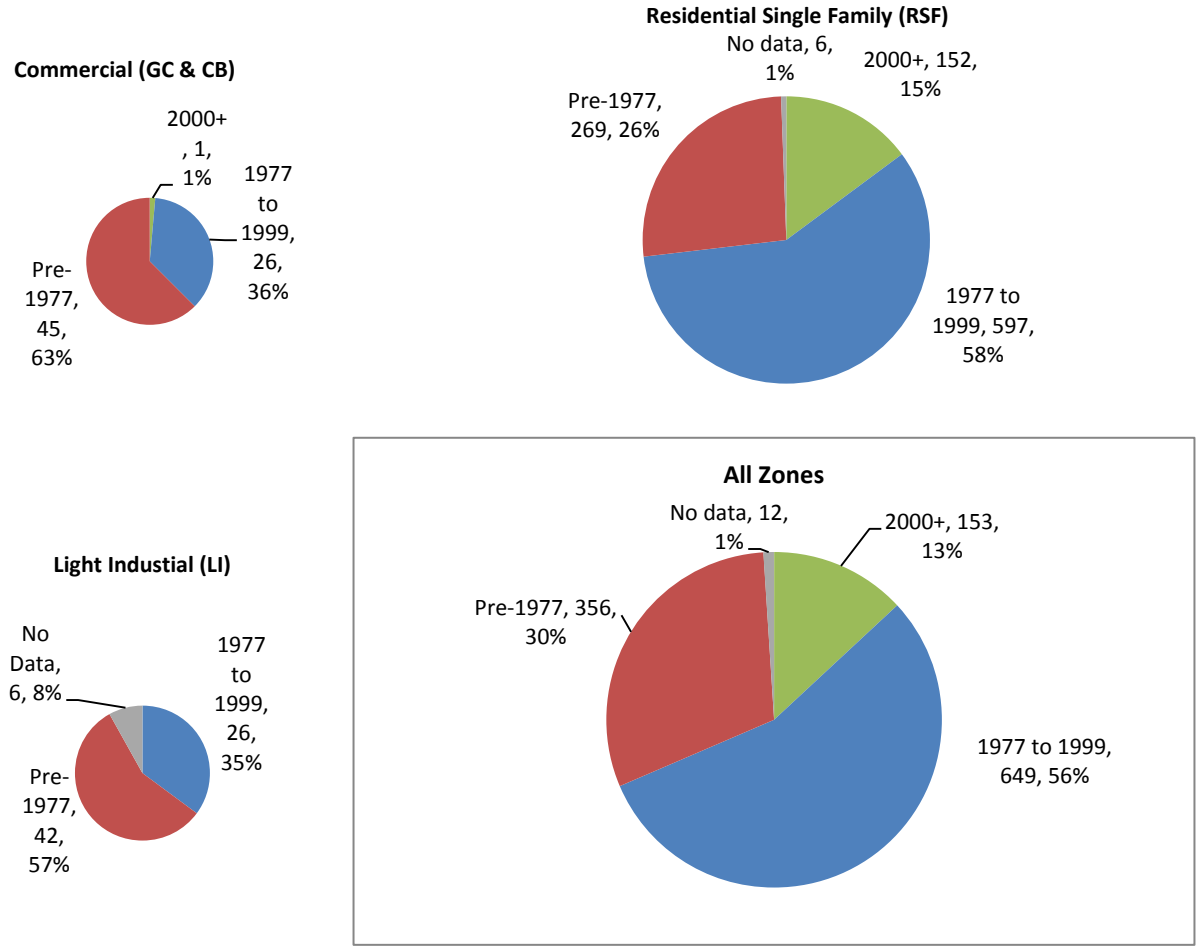


Note: Data represented are based on an annual survey, adjusted for additional vacancies, that excludes the following:

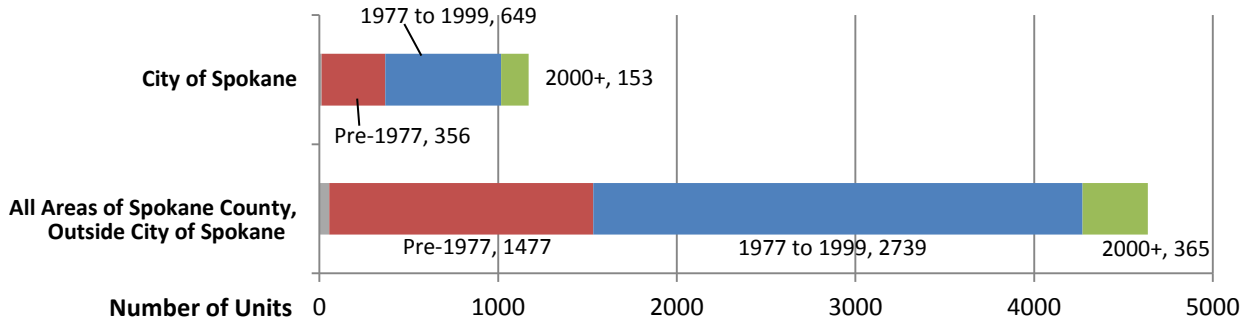
- Five manufactured home parks that each contain two units per site.
- One manufactured home park under development that contains only one unit.
- One mobile home park condominium containing 13 units.
- Between 230 and 400 manufactured homes located on individual lots outside manufactured home parks.

Sources: City of Spokane, Spokane County Assessor

Model years of units in mobile and manufactured home parks by zone in the city of Spokane, March 2015.



Model years of units in mobile and manufactured home parks in the city of Spokane and areas of Spokane County outside the city of Spokane, March 2015.



Model Year:	No Data	Pre-1977	1977 to 1999	2000+	Total
City of Spokane	13 (1% of total)	356 (30%)	649 (55%)	153 (13%)	1,170
Spokane Co. Outside City of Spokane	55 (1%)	1,477 (32%)	2,739 (59%)	365 (8%)	4,636

Sources: Spokane County Assessor, City of Spokane

Housing Condition Survey at Selected Manufactured Home Parks

Staff members conducted a windshield survey of homes in late May 2015 in four of Spokane's six largest manufactured home parks containing more than 50 units. The parks surveyed include 768 units, roughly equal to 65 percent of the 1,174 total units in parks in Spokane. The surveyed parks were all zoned Residential Single-Family, were comprised of a range of unit age representative of the units in the city, and were located in all three City Council districts in the city. Staff surveyed between 21 and 41 units in each district. The sample in the surveyed parks represented 12.7 percent of the units within those parks, and 8.2 percent of units in parks in Spokane overall. The survey included an assessment of both the structure of the dwelling unit and the condition of the yard and other areas of the site surrounding the unit.

The dwelling unit portion of the survey concerned several aspects of each structure's condition—the roofing, siding, windows/ doors, and porches (a copy of the survey appears on the next page). The survey of conditions resulted in finding 69 of the 97 surveyed units (71 percent) were rated with a score of zero, or excellent condition, with no deferred maintenance or other defect observable from the private access street. The worst rating was 11, or minor rehabilitation, occurring on only three units (three percent) of the units surveyed. The foundation portion of the survey did not apply to the surveyed units, since the parks visited did not require permanent foundations, and skirting obscured views of the footings beneath the units in all cases.

Extending these results to the other units in the surveyed parks and elsewhere in Spokane, the survey infers that at least 70 percent of the units located within manufactured home parks in the city show no sign of exterior damage or deferred maintenance on the portion visible from the access street. Conversely, at least three percent of units in parks are in need of minor structural repair or maintenance.

The lot condition, or the condition of the yard and other areas of the site surrounding each surveyed unit, was assessed by rating the condition of detached structures, yard, fencing, and degree of graffiti present at each unit. Nearly 89 percent of the units surveyed had good lot conditions. The worst rating given was 6, or fair condition, with only three occurrences (three percent). No graffiti was found at any of the visited sites. The survey demonstrates that a comfortable majority of homes in manufactured home parks have well-kept and maintained yards. Meanwhile, at least three percent of unit spaces have a component in need of minor maintenance, such as minor landscaping or fence repainting. In the rare cases present, typical lot condition issues included detached structures that need repainting or fence repairs.

MANUFACTURED HOME PARK SURVEY NUMBERS

97

HOMES SURVEYED, MORE THAN EIGHT PERCENT OF ALL UNITS IN PARKS IN SPOKANE

71%

HOMES WITH NO VISIBLE DEFECTS

25%

REQUIRE MINOR MAINTENANCE

3%

REQUIRE MINOR REHABILITATION OR STRUCTURAL REPAIR

89%

OF YARDS SURROUNDING UNITS ARE WELL MAINTAINED

Housing Condition Survey Methodology

The housing condition survey of selected manufactured home parks used methods and terms adapted from the City of Oakland (2009) and staff from Community Frameworks in Spokane. Similar studies were conducted in 2010 for mobile/manufactured home parks in the city of Airway Heights, and in 2003 and 2009 for all types of homes in the East Central Neighborhood. Additional definitions of housing conditions developed under this method are listed by the City of Oakland (2014, p. 361).

The definitions of housing conditions found in the Spokane manufactured home park survey results are as follows:

Dwelling Unit Condition Definitions

Excellent:	These units scored from 0 to 2. The dwelling unit is new or well maintained. It is structurally sound with a foundation that appears structurally undamaged and a straight roofline. Windows, doors, and siding are in good repair. The porch is structurally sound. Exterior paint is in good condition.
Sound:	These units scored from 3 to 9. The dwelling unit requires minor deferred maintenance, such as repainting, window repairs, the replacement of a few shingles on the roof, the repair of minor sections of the porch, or other small repairs.
Minor Rehabilitation:	With a score between 10 and 19, the dwelling unit shows signs of deferred maintenance of multiple items, or that requires the repair of one major component.

Lot Condition Definitions

Good:	These sites scored from 0 to 2. The lot is well maintained. Yard is clean and not overgrown, detached structures, such as garages or sheds are structurally sound, fencing is in good repair, and no graffiti is present on the property.
Fair:	With a score between 3 and 9, one or more components of the lot needs minor maintenance.

[2015] Housing Windshield Survey

Surveyor Name:	Survey Date:
Parcel ID No.:	Census Tract No.:
Block Group:	Block No:
Street No:	Street Name:
Photo ID No.:	Age:
Structure Type:	
No. of Units:	

Abandoned Type:

N- Not Abandoned/Vacant	*Building appears occupied.*
V- Vacant Land	*No structure is located on lot.*
A- Vacant Structure	*Structure/Main Dwelling on lot appears to be vacant.*
B- Burned/Vacant	*Structure appears vacant w/ visible fire damage*
D- Boarded/Vacant	*Structure appears vacant w/ windows boarded*

Under Construction: Y or N

Portion Under Construction:

Lot Condition:

Condition of Detached Structures

Good Condition	*0*
Needs Repainting	*3*
Major Repairs Needed	*5*
Dilapidated	*10*
No Existing Structures on Property	*0*

Yard Condition

Good Condition	*0*
Needs minor landscaping or yard clean-up	*3*
Lot Neglected, Major Landscaping Needed	*5*

Fencing

Good Condition	*0*
Needs Minor Maintenance- (e.g. painting)	*3*
Dilapidated- Needs to be replaced or removed	*5*
No Existing Fencing on Property	*0*

Graffiti

Good Condition- No Graffiti	0
Minor Graffiti	3
Major Graffiti	5

Dwelling Unit Condition Rating	
Excellent	*0-2*
Sound	*3 - 9*
Minor Rehabilitation	*10-19*
Moderate Rehabilitation	*20-39*
Substantial Rehabilitation	*40-55*
Delapidated	*56+*

Lot Condition Rating	
Good	*0*
Fair	*3 - 9*
Poor	*10-15*
Dilapidated	*16+*

Comments:

Dwelling Unit Condition

Roofing

Good Condition	*0*
Cracked/Broken/curled shingles/shakes (incl. broken downspouts & rain gutters)	*5*
Needs Partial Re-roofing	*10*
Needs Complete Re-roofing	*20*
Roof structure needs replacement (roofline is bowed, wavy or uneven)	*25*

Type of Roof:

Foundation

Good Condition	*0*
Cracked/broken, but reparable	*5*
Needs partial replacement	*10*
Needs complete replacement	*20*
No Foundation	*25*
Not visible from street	*0*

Type of Foundation:

Siding (incl. fascia boards & gables)

Good Condition	*0*
Needs repainting, peeling paint	*3*
Cracked/broken in spots, but reparable	*5*
Needs replacement (siding is too deteriorated for repair)	*10*
Not visible	*0*

Type of Siding:

Windows/Doors (incl. jambs/frames)

Good Condition	*0*
Needs repairing	*3*
Cracked/broken, but reparable	*5*
Needs complete replacement	*10*
Single Pane Windows	*5*

Porches

Good Condition	*0*
Minor repair/repainting	*3*
Deteriorated/worn components (decking, ballusters, etc), but reparable	*5*
Major repair/replacement of components	*10*

Requirements for Relocating Mobile and Manufactured Homes

Moving a home may require a permit, depending on what rules apply at the location to which the home is moved. All homes placed on individual lots and in manufactured home parks require a building permit if the new location of the home is within the city of Spokane. As noted above, only new manufactured homes are permitted outside manufactured home parks within the city. Obtaining a City of Spokane building permit for placing a manufactured home involves a one-page application form to provide information about the type of structure and whether it will be set in a mobile or manufactured home park. Homes have either a red label, denoting a mobile home built before June 15, 1976, or a gold label, if built to the post-June 15, 1976 HUD code.

Removal of a home may involve altering the structure, which requires alteration insignia issued by the Washington Department of Labor and Industries to ensure compliance with federal law governing alterations of manufactured homes. Under rules developed under RCW 43.22.340, if a mobile home will be structurally altered during its relocation from an existing site to another approved site, then a fire safety certificate is required, involving necessary alterations to the wiring system, fire protection, emergency egress and other requirements, outlined in WAC 296-150M-0550. However, units that are forced to be removed because of a mobile home park closure or conversion are exempted from these requirements under RCW 59.21.105, although requirements related to funding sources may trigger these or other necessary alterations for eligibility.

A number of other factors, besides fire safety alterations, influence whether a home of any age is relocated or demolished, including the cost of other necessary alterations to obtain permits, such as greater snow-load requirements for areas north of Spokane; the value of the home; cost of relocation; and, as mentioned above, asbestos surveying and possibly abatement. In 2014, the Spokane Regional Clean Air Agency amended its definition of the term "demolition" to exclude structures moved which are mobile homes that remain intact (Regulation I, Article IV, Section 9.02.M). The change means that moving a mobile home no longer requires a notification permit (with a fee of $250, covering review of as many as five structures), but a limited asbestos survey must still be conducted and can be expensive if multiple materials samples are required due to post-construction alterations or due to the structure's complexity.

Number of City of Spokane Manufactured Building Permits, 2007 - 2014

Status	Mobile or Manufactured Homes		Non-Residential Buildings
	Within a mobile or manufactured home park	Individual lot outside a mobile or manufactured home park	
Final Inspection Done, Issued, or Final	39	12	30
Expired	17	4	15
Withdrawn, Canceled, or Closed	8	3	2

The relationship between successfully completed permits and those that expire or are withdrawn indicate the success of home placement in the city and difficulties encountered. Common on-site inspections consist of checking tie-downs and the blocking pad, and that connections to utilities were performed by certified installation personnel. The high number of expired permits typically is caused by a failure to request a final inspection; these structures will technically require a new permit and fee.

Contractors may have a 30-day permit that is issued month-to-month from the Washington State Department of Transportation to transport structures between sites, based on a monthly or annual manufactured housing permit through that agency, and the contractor additionally may need oversize/overweight movement approvals for superloads that they can apply to WSDOT for on a case-by-case basis.

Mobile and Manufactured Housing in Other Communities

This section discusses some noteworthy examples of manufactured housing and policies in the context of manufactured home park preservation. The unit estimates displayed below are for all mobile and manufactured homes, including those located within and outside manufactured home parks.

Mobile/manufactured housing in selected cities in the state of Washington.

City	2013 Population Estimate	Estimated Housing Units, All Types, 2013	Mobile Homes (includes Manufactured Homes)	
			Estimated Units, 2013	2013 Percent of All Types
Seattle	626600	309205	1234	0.4%
Spokane**	211300	94793	1512	1.6%
Tacoma	200400	86195	245	0.3%
Vancouver	164500	70006	1705	2.4%
Bellevue	132100	56433	182	0.3%
Kent	120500	42763	1519	3.6%
Everett	104200	44770	1350	3.0%
Renton	95540	39006	928	2.4%
Yakima	92620	35085	2069	5.9%
Spokane Valley**	91490	38973	2641	6.8%
Federal Way**	89720	36321	1406	3.9%
Bellingham**	82310	36015	1128	3.1%
Kirkland	81730	33701	128	0.4%
Kennewick	76410	28915	2479	8.6%
Auburn	73235	29085	2720	9.4%
Pasco	65600	19296	1623	8.4%
Marysville*	62100	22846	1342	5.9%
Lakewood	58310	27023	1596	5.9%
Redmond	55840	24874	392	1.6%

City	2013 Population Estimate	Estimated Housing Units, All Types, 2013	Mobile Homes (includes Manufactured Homes)	
			Estimated Units, 2013	2013 Percent of All Types
Shoreline	53670	22135	81	0.4%
Richland	51150	21277	682	3.2%
Lacey	44350	18007	871	4.8%
Lynnwood*	35960	14713	494	3.4%
Bothell*	34460	14218	1444	10.2%
Port Angeles	19120	9382	269	2.9%
Mill Creek	18600	8074	29	0.4%
Ellensburg	18370	7740	135	1.7%
Tumwater*	18300	8384	636	7.6%

* Cities with a mobile/manufactured home park comprehensive plan designation
** Cities with recent proposed mobile/manufactured home park comprehensive plan policies or designations
Source: American Community Survey 2009-2013 estimates.

Bothell
Policy HHS-P11 of the Imagine Bothell…Comprehensive Plan's (2015) Housing and Human Services Element links retaining existing mobile/manufactured home parks throughout the city to affordable housing, and provides a Mobile Home Park Overlay zone as a means to achieve the objective. A Mobile Home Park Overlay zoning classification is described in Bothell Municipal Code section 12.04.100. Like Spokane, the development standards in Bothell for mobile/manufactured home parks (Chapter 12.08 of the Bothell Municipal Code) require a minimum park size of ten acres.

Lynnwood
Policy LU-28 of the Land Use Element provides for land use regulations for mobile and manufactured home parks that "shall allow for the continued viability, maintenance and upgrading of existing parks" (2015, p. 2.17). The Housing Element describes a regulation and incentive approach to reduce "redevelopment pressures" (2015, pp. 7.9-7.10). Policies H-9, H-26 and H-31 discuss the role of manufactured home parks in providing affordable housing and the City's efforts to encourage their long-term preservation.

Accordingly, the Lynnwood Municipal Code contains a Mobile Home Park Zone (Chapter 21.71), with eight listed permitted uses as well as several conditional and accessory uses. The Code also provides a minimum site size of three acres and a maximum density of six units per net acre (Lynnwood Municipal Code 21.70.500). Prior to adopting current zoning regulations, the City tried an incentive program to allow landowners the option of reduced property taxes if they agreed not to close a manufactured home park for five years, but it is not clear that there was any interest in the program.

Marysville
The City's draft Housing Element cites a "dramatically lower" local average sale price as a reason manufactured homes there are most likely to be affordable compared to other housing types (2015, p. 5-40). Policy HO-5 provides support for development and preservation of mobile home parks. The draft

Land Use Element describes twelve locations for a mobile home park overlay designation (out of 17 parks) and lists the overlay zone and incentives as reasonable measures to increase residential capacity. Policy LU-28 specifies "land use regulations shall allow for the continued viability, maintenance and upgrading of existing parks" (2015, p. 2.17).
Section 22C. 230.030 of the Marysville Municipal Code provides a mobile/manufactured home park zone and lists five types of permitted uses. Marysville's development standards require a minimum of three acres for a manufactured home park, with a maximum density of eight units per gross acre (MMC section 22C.230.050).

Other Communities
Snohomish County and the City of Tumwater have similar provisions in their comprehensive plans and codes as the cities of Bothell, Lynnwood and Marysville. The City of Seattle requires a relocation report and plan in provisions dating from the year 1990, detailed in Seattle Municipal Code section 22.904.420. The relocation report and plan are also components of the City of Tumwater's regulations. Other communities that may be considered in future research are other county jurisdictions and those communities within Spokane's regional housing market in Kootenai County, Idaho.

Manufactured Home Park Zoning and Case Law Consideration of Its Effect on Private Property
If the City Council were to adopt the proposed Comprehensive Plan text amendment, one possible implementation measure would involve the possible creation in Spokane of a manufactured home park zoning district which could be applied to existing manufactured home parks in order to increase the stability of the continuation of the current land use, or extend the period of time required for its conversion to another land use that would displace residents.

In the year 2012, the U.S. Ninth Circuit Court of Appeals upheld development regulations that established a manufactured home park zone in Tumwater, Washington. *Laurel Park Community v. City of Tumwater*, No. 11-35466 (9th Cir., Oct. 29, 2012). A copy of the case is included in the Appendix. The case involved the city of Tumwater's zoning district, applied to six of its manufactured home parks and equipped with a "safety valve" for the zoning to revert to its previous zoning upon the property owner's demonstration to the city council either that (1) the landowner has no reasonable use of their property under the zoning, or that (2) uses authorized by the zoning are not economically viable at that location (Tumwater Municipal Code Chapter 18.49, section 18.49.070).

Although the plaintiffs in the *Tumwater* case raised a number of theories before the district court, they limited their appeal to the 9th Circuit to three claims: a federal takings claim, a state takings claim, and a state substantive due process claim. Plaintiffs failed to establish that Tumwater's ordinances, on their face, effected a taking or constituted undue oppression. The most fundamental reason why that was so was that the plaintiffs offered very little evidence of economic effect resulting from enactment of the ordinances. They could continue to use the properties just as they had chosen to do for years; and the new zoning ordinances contained a safety valve pursuant to which plaintiffs could pursue other uses if the authorized uses were not economically viable. The court also considered a challenge that the regulations of individual parks amounted to illegal spot zoning, and found the regulations did not constitute spot zoning because they bore a substantial relation to the general welfare of the community.

For an opposing legal analysis on establishing mandatory manufactured housing zoning, the Appendix includes a copy of an article titled "Manufactured Housing Community Zoning: A Legal Analysis," prepared for Manufactured Housing Communities of Washington by Bill Clarke, Attorney at Law. This article was prepared before the 9th Circuit's decision on the Tumwater ordinances, but it provides an informative analysis of the various theories that would be raised in a facial or as applied of a mandatory manufactured home park zoning in Spokane. Also included in the Appendix is a copy of a document titled "Advisory Memorandum: Avoiding Unconstitutional Takings of Private Property," dated December 2006 and prepared by the Washington State Attorney General's Office.

Formerly Enacted Protections Overturned: Park Owner Provision of Relocation Funds and Right of First Refusal

The implementation of the manufactured park zone as a response to mobile/manufactured home park closures arose in part because of the evolution of legislation that included two key prior failed attempts in Washington during preceding decades to protect residents in manufactured home parks. The Ninth Circuit U.S. Court of Appeals's (2012) *Tumwater* opinion gave the following summary of these events on pp.12963-12964:

> The Washington legislature responded to the large number of park closures by enacting, first, the Mobile Home Relocation Assistance Act, Wash. Rev. Code § 59.21, 1989 Wash. Sess. Laws, ch. 201. "When a mobile home park is closed, this law requires the park owner to contribute money toward the tenants' relocation costs." *Guimont v. Clarke*, 854 P.2d 1, 3 (Wash. 1993). The Washington Supreme Court held that "the Act is unduly oppressive and violates substantive due process." *Id.* at 16. The court invalidated the law in its entirety. *Id.* at 16-17.
>
> Next, the Washington legislature enacted a law that "gives mobile home park tenants a right of first refusal when the park owner decides to sell a mobile home park." Manufactured Hous., 13 P.3d at 185 (citing Wash. Rev. Code § 59.23.025 (2000)). The Washington Supreme Court invalidated that law, too, this time holding that "the statutory grant of a right of first refusal to tenants of mobile home parks[] amounts to a taking and transfer of private property." *Id*. at 196. Although some protections for owners of mobile homes remain on the books in Washington, they are mostly procedural, such as the requirement that, before closure of a mobile home park, the park's owner must give at least 12 months' notice to all residents of the park [RCW 59.21.030].

Household Income Terms and Housing Trends

The application for this Comprehensive Plan text amendment discusses the relationship between preservation of manufactured home parks and providing an affordable housing option to lower-income residents in the city of Spokane. The glossary of the City of Spokane Comprehensive Plan provides the following definitions for these terms:

> **Affordable Housing** Adequate, appropriate shelter (including basic utilities) costing no more than 30 percent of a household's gross monthly income or up to 2.5 times the annual income. Standard is used by federal and state governments and the majority of lending institutions. (Glossary, p. 1). (Note: Calculations for annual income times 2.5 apply

to the original principal amount for which there is a financial commitment, such as a mortgage, for an owned housing unit.)

Family For purposes of census tabulations, a family consists of a householder and one or more other persons living in the same household who are related to the householder by birth, marriage, or adoption (U.S. Census Bureau) (Glossary, p. 3).

Household A household includes all the persons who occupy a housing unit. The occupants may be a single family, one person living alone, two or more families living together, or any other group of related or unrelated persons who share living arrangements (U.S. Census Bureau).

Household Income The total of all the incomes of all the people living in a household.

Low-Income Housing Economically feasible housing for families whose income level is categorized as low, using the standards set by the Department of Housing and Urban Development (HUD). (Glossary, p. 5).

The area median income used for Fair Market Rents, Section 8 income limits, the Washington State Housing Trust Fund, and other programs uses a HUD calculation based partly on the American Community Survey 5-year estimates for median family income. The base year used for the current estimate is from the 2008-2012 American Community Survey, which provided the estimated median household income for the city of $42,274 and the median family income estimate of $54,500. However, these figures are both lower than the area median income, which is instead based on higher estimates for the entire county.

The U.S. Department of Housing and Urban Development (2015) calculates the median family income estimate for a family of four for FY 2015 at $64,500 for the Spokane, WA Metropolitan Statistical Area. For a household of one person living alone, the low (80% median) income limit is $36,150, and for a two-person family, it is $41,300.

Spokane County Senior Citizen Property Tax Relief in Manufactured Home Parks

The Washington Department of Revenue (2014) reported 10,229 total participants of senior citizen property tax relief on levies due in 2014 in Spokane County. The attached Manufactured Homes & Senior Tax Exemptions – City of Spokane document reports that 279 households within manufactured home parks in the city had a total annual household income less than $35,000, based on Spokane County Assessor data. Household types may be either family (comprised of related people) or nonfamily (with only one householder or unrelated roommates), but in either case, the households with Senior Citizen property tax relief are below the low-income limit, and are categorized as low using the HUD standards.

These data verify that low-income households exist in manufactured home parks in Spokane. Indeed, the correlation between low-income households and manufactured home parks is positive, because the rate of Senior Citizen exemptions in manufactured home parks (23.8%) is more than three times the rate on

individual parcels with single-family residences (7.1%), the latter of which is by far the most prevalent form of housing in the city. For the housing units to be considered "affordable" to low-income households (using the monthly calculation for the term provided in the Comprehensive Plan), the cost of housing must be less than $904 per month.

Local Trends in Affordable Housing

The Affordable Housing Advisory Board and other partners conducted a 2015 Housing Needs Assessment (Washington Department of Commerce, 2015), reporting on affordable housing availability in the state, with a forecast locally at the county and urbanized area levels. The report predicts slightly more affordable housing will become available by year 2019 to the zero-percent-to-30-percent and zero-percent-to-50-percent median family income populations by 2019, both in the Spokane Urbanized Area and in Spokane County overall. The report used federal, state and housing authority data on affordable housing.

The Washington Center for Real Estate Research (University of Washington) (reported in City of Spokane Consolidated Plan, 2015, p. 29) conducted surveys of multifamily residences larger than five units. The surveys indicated a general trend over a six-year period of rising rents (to an average of $749/month) and declining vacancies (to 3.4 percent) in these units in Spokane.

Mobile/Manufactured Home Park Preservation Stakeholder Group

Below are listings of the group members and the suggestions of the group members at meetings and some of the alternatives suggested by Plan Commission members who comprised a subcommittee in participation of the meeting. This report provides notes from the group meetings of stakeholders as Attachments 3 and 4.

Name	Organization	Meeting Attendance	
		June 17	July 9
Gary Griglak	Cascade Manufactured Home Community (Landowner)	X	
Stanley Schwartz	Attorney for Cascade Manufactured Home Community	X	X
Robert Cochran	Contempo Manufactured Home Community and Manufactured Housing Communities of WA (Landowner's Association)	X	X
Buck Buchanan	Shrine Park Association (Sans Souci West) (Landowner)	X	
Jay Smith	Shrine Park Association (Sans Souci West)		X
Nathan Smith	Attorney for Shrine Park Association (Sans Souci West)	X	X
Ishbel Dickens	National Manufactured Home Owners Association (NMHOA)	X	X
Kylin Parks	National Manufactured Home Owners Association (NMHOA)	X	
Randy Chapman	Association of Manufactured Home Owners (AMHO)	X	X
Brenda Bailey	Cascade Home Owners' Association	X	
Jerry Bailey	Cascade Home Owner	X	
Doug Saty	Bud and Doug's Mobile Home Service LLC	X	X

Suggested Alternatives Developed by Stakeholder Group and Subcommittee		Source
Original Proposal	LU 1.X Mobile Home Parks *Designate appropriate areas for the preservation of mobile and manufactured home parks.* **Discussion:** Manufactured and/or Mobile Home Parks provide affordable housing to many City residents. In many cases, they provide the opportunity of home ownership to households which cannot afford to purchase other types of housing. When existing manufactured home parks are redeveloped, many homeowners are unable to move their homes to other sites. Additionally, redeveloped mobile and manufactured home parks are generally not replaced by new parks within the City, resulting in a net loss of this type of housing.	Application
1. Proposed Policy Alternative 1:	H 1.X Mobile and Manufactured Home Park Incentives *Examine potential incentives for the maintenance and development of mobile and manufactured home parks.* **Discussion:** Mobile and manufactured homes provide an affordable housing option for some of the city's residents. The City should explore the feasibility of using incentives to encourage preservation of existing manufactured and/or mobile home parks and the development of new manufactured and/or mobile home parks.	N. Smith, 6/17/2015, discussion by staff
2. Proposed Policy Alternative 2:	H 1.X Housing in Mobile and Manufactured Home Parks *Adopt appropriate criteria for the maintenance and/or development of mobile and manufactured home parks as one means of ensuring an adequate stock of affordable housing.* **Discussion:** Manufactured and/or mobile home parks can provide affordable housing to many city residents. In many cases, they provide the opportunity of home ownership to households which cannot afford to purchase other types of housing. The City should develop a set of criteria to determine opportunities for preservation and development of manufactured and/or mobile home parks. Criteria to consider may be the occupancy rate of the park, the age and condition of the housing stock, the location of the park, whether the park serves seniors, and the demand for manufactured and/or mobile homes in the city of Spokane.	D. Burnett, 6/17/2015, discussion by staff
3. Proposed Policy Alternative 3:	H 1.X Housing in Mobile and Manufactured Home Parks *Encourage through incentives the development and maintenance of (manufactured/)mobile home parks as a type of affordable housing.* **Discussion:** Mobile and manufactured home parks provide diverse housing for a variety of income classes. To encourage the development and retention of affordable housing in these communities, the City should explore and consider the use of economic and land use incentives to encourage the preservation of existing and development of new mobile and manufactured home parks.	S. Schwartz, 7/9/2015
4. Alternative Action:	Reject proposed policy of LU 1.X as unneeded and unnecessary;	R.

Suggested Alternatives Developed by Stakeholder Group and Subcommittee		Source
	the application does not contain enough information to go forward and is not consistent with the City of Spokane Comprehensive Plan.	Cochran, 7/9/2015
5. Alternative Action:	Further develop policy for Manufactured Housing overall and potentially purchase a park that the City wants to protect.	Some stakeholder group members, 7/9/2015
6. Alternative Action:	Make an assessment, based on available metrics, of the condition of housing of all types in Spokane. Compare the results with the housing goals in the Comp Plan and make recommendations for remediating areas of deficiency. Areas for focus should include evaluations of the state of low income housing of all types, the state of in-fill housing toward the city center, the effectiveness of efforts to control of sprawl, an evaluation of the need for additional protections and preservation incentives for mobile and manufactured homes and other forms of housing that can meet affordable housing criteria, and an assessment of the need for changes to SMC 17C.345 regarding Manufactured Homes and Manufactured Home Parks (ie. 10 acre minimum park size, only new manufactured homes on individual lots).	Some stakeholder group members, 7/9/2015, summarized by J. Dietzman 7/15/2015
7. Voluntary Down Zoning Coupled with Incentives, M/MH Parks	<u>Example of Alternate LU 1.X Mobile and Manufactured Home Parks</u> *Establish a designation that would be available for M/MH Parks, and link this designation to incentives that will encourage the preservation of existing M/MH Parks and the establishment of new M/MH Parks.* <u>Example of Alternate H 1.X Housing in Mobile and Manufactured Home Parks</u> *Encourage through incentives the development and preservation of M/MH Parks as a type of affordable housing, with the incentives linked to a long term commitment to keep the land use as M/MH Parks.*	J. Dietzman, 7/24/2015

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Attachment 1: Washington State Law on Mobile Home Park Closures

Pursuant to the Revised Code of Washington (RCW) 59.20.080, a notice of closure must be given to the director and all tenants of a mobile home park in writing at least 12 months before the intended closure date. Notice must also be posted at all park entrances.

RCW 59.21.030 lists the following requirements in regards to these notices:

- The closure notice must be included with all month-to-month rental agreements signed after the park closure notice date.
- Notice to the director must include:
    - A "good faith estimate" for the removal of mobile homes.
    - The reason for the closure.
    - A list of names and mailing addresses of all current registered park tenants.
    - Notice to the director must be sent within ten business days of the notice sent to tenants.
- The notice must be recorded in the Auditor's Office where the park is located.

Park owners are not required to give tenants an opportunity to purchase the park before they can sell the land. Older mobile homes that are forced to relocate "may not be required by any city or county to comply with requirements of any applicable fire, safety or construction code for the sole reason of its relocation."[1]

Relocation Assistance

The Department of Commerce must mail every tenant an application and information on relocation assistance within ten business days of receipt of the park closure notice.[2]

Per RCW 59.21.021, low income tenants are eligible for relocation assistance on a first come, first serve basis. In the statute, low income is defined as a "single person, family or unrelated persons living together whose adjusted income is less than eighty percent of the median family income, adjusted for household size, for the county where the mobile or manufactured home is located."[3]

Assistance is provided on a reimbursement basis; meaning tenants pay the cost up-front and are reimbursed by the Department of Commerce once they have received a receipt of the costs.[4] The maximum that a person or family can receive for relocation assistance is $7,500 for a single-wide and $12,000 for a double-wide.[5]

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[1] RCW 59.21.105 (2).
If the mobile home has been "substantially remodeled or rehabilitate," or there is a change in the original occupancy classification of the home, then this code waiver does not apply.
[2] RCW 59.21.030 (2).
[3] RCW 59.21.021 (1).
[4] RCW 59.21.050.
[5] RCW 59.21.021 (3).

Attachment 2: Manufactured Homes & Senior Tax Exemptions – City of Spokane

Analysis by Blaine Stum, Legislative Assistant to City Council Member Jon Snyder

In the state of Washington, seniors and disabled people 61 years old and above who earn a certain amount of annual income can be exempt from real property taxes.[6] In order to qualify for an exemption, the following criteria must be met:

- Level 'A' Exemption: Total household income between $0-$25,000.
- Level 'B' Exemption: Total household income between $25,001-$30,000.
- Level 'C' Exemption: Total household income between $30,001-$35,000.

Current data from the Spokane County Assessor's Office show a total of 279 households in manufactured homes *within parks* receive this exemption.[7] The exemptions break down as follows:

- 198 Level 'A' Exemptions.
- 44 Level 'B' Exemptions.
- 37 Level 'C' Exemptions.

Our last annual survey shows 1,174 units in manufactured home parks in the city of Spokane. This means that at least 23.7 percent of all manufactured homes in the city of Spokane are occupied by people ages 61 and above with household incomes of $35,000 or less.[8] A vast majority of these exemptions (70.9%) are for households with an income between $0 and $25,000.

Data from the Spokane County Assessor's Office on non-manufactured homes in the city receiving an exemption break down as follows:

Housing Type	Parcels	With Exemption	% W/ Exemption
Single Family Residence	61,642	4,383	7.1%
Condos	2,206	150	6.8%
Duplex	3,358	66	1.9%
Other	No Data	8	N/A

Conclusion: *Individuals who occupy manufactured homes in the city of Spokane are more likely to be seniors/disabled and have lower household incomes than people within the general population of the city.*

[6] Chapter 84.36 RCW. The amount that one is exempt from depends on which "level" of exemption they qualify for.

[7] A total of 306 households in manufactured homes receive the exemption, but for purposes of this analysis the 27 units that are not within a manufactured home park are not being considered.

[8] The actual amount of households in manufactured homes who qualify for the exemption is likely higher than the number of people receiving the exemption.

ATTACHMENT 3
NOTES FROM MOBILE/MANUFACTURED HOME PARK PRESERVATION STAKEHOLDER GROUP
JUNE 17, 2015 - COUNCIL BRIEFING CENTER

INTRODUCTION

Purpose of Meeting: To obtain input from landowners, tenants and service providers on our comprehensive plan policy amendment. Discuss implementation alternatives of the proposed policy, alternative policy wording and implications, and supporting information for policy development.

Round Table Stakeholder Introductions:		
o **Brenda Bailey**, Cascade Homeowners Association President	o **Jerry Bailey**, Cascade Manufactured Home Community Resident	o **Blaine Stum**, City of Spokane
o **Doug Saty**, Bud & Doug's Transport, Bennett Trucking	o **Nathan Smith**, Witherspoon Kelley, for Shrine Park Assoc.	o **F.J. Dullanty, Jr.**, City Plan Commission
o **Buck Buchanan**, Shrine Park Association	o **Kylin Parks**, National Manuf. Home Owners Assoc.	o **Randy Chapman**, WA Assoc. of Manufactured Home Owners
o **Robert Cochran**, Contempo MHP and Manuf. Housing Communities of WA	o **Gary Griglak**, Cascade Manuf. Home Community	o **Stanley Schwartz**, Witherspoon Kelley, for Cascade Manuf. Home Community
o **Ishbel Dickens** (by phone), National Manuf. Home Owners Assoc.	o **Nathan Gwinn**, City of Spokane	o **Melora Sharts**, City of Spokane
o **Dave Burnett**, Community Assembly Liaison to City Plan Commission	o **Dennis Dellwo**, City Plan Commission	

Meeting Ground Rules were provided to the group on the reverse side of the agenda and reviewed.
Preferred date and time of second meeting, if needed: July 9 at 4:00 PM

REVIEW OF THE POLICY AND ITS INTENT

Comprehensive Plan Amendment Application to Adopt New Policy

B. Stum reviewed the proposed policy language. He explained that it the policy would add an extra layer of scrutiny to closures of parks to supplement inadequate State regulations. He made clear that the policy's intent isn't to say these mobile home parks can never be redeveloped. Instead, the intent is to provide that a comprehensive plan land-use plan map amendment would be required as opposed to sudden closure.

Following questions and comments from the group, B. Stum clarified that the text amendment does not create any prohibition to a future rezone, but that process is not yet defined. Other jurisdictions have imbedded in ordinance opportunity if landlord is losing money to come back and demonstrate to the City Council that the property is losing money.

However, the typical process for amending the City Comprehensive Plan can be uncertain and lengthy, as demonstrated by this subject application, tied to multiple other map amendments, which are simultaneously processed and considered by the City Council. The proposal came to council members from primarily local residents of manufactured homes. Part of a development code was shared by Association of Manufactured Home Owners but was not used by the applicant. Instead, it was decided

to do more legwork to look up how parks close and what State regulations are. The purpose of the stakeholder group meeting is to get input from park owners and home owners as well.

S. Schwartz remarked that we have a very extensive regulatory system that is unique in Washington: not a boilerplate state statute. Point to state law—this isn't good enough, what is the problem we're trying to fix?

F.J. Dullanty identified a need for a list of closures and new parks since adoption of current land use code and GMA comprehensive plan in the 1990s. When was the last MHP closed? Albertsons (2000). Before that park closed, what was the year the next previous park closed? Is it possible to have a new mobile home park in the city? Criteria is so difficult, requires so much land, zoning. Review and understand: if we're looking at affordable housing, how difficult is it to create a new manufactured home park? If it's not cost-effective, then we can never have affordable housing that way.

Implementation in Other Jurisdictions

N. Gwinn reviewed City of Bothell comprehensive plan policy from 2010, including policy HO-P11 special land-use designation, HO-P12, explore other strategies to maintain manufactured home parks. Change of use requires prior review and amendment to the comprehensive plan. He also reviewed the City of Seattle's regulations that date to the early 1990s, requiring an approved relocation report and plan before eviction notices go into effect—another approach to closing parks.

OVERVIEW OF REQUIREMENTS IN STATE LAW GOVERNING CLOSURE OF PARKS

B. Stum provided an overview of RCW 59.20.080 notice of closure to all the tenants if closing or redeveloping park for any purpose: it must be provided 12 months in advance. Notices must be included in several visible locations and there are several other requirements. Beyond these requirements, park owners aren't required to negotiate with tenants to let them buy the park. Older relocated homes get a waiver from complying with fire or other codes. The State Department of Commerce notifies tenants of the availability of relocation assistance, provided to only to low-income households (80 percent area median income) and maximum reimbursements of $7,000 for a single-wide home and $12,000 for a double-wide.

S. Schwartz-Only the relocation assistance relates to low-income households. The City does not assist.

D. Saty related his experience working with residents in two city park closures, and three closures in the county. At the time homes weren't required to be upgraded; the biggest problem now is finding parks in the city that will take them. The County has snow load requirements. There is a lack of family parks: most are 55 and older – problem with trying to get families established in the city.

I. Dickens remarked that a vast majority of home owners, 80 percent of manufactured homes are not moved or not movable. Meanwhile, money in the State Relocation Fund is not constantly available because it ebbs and flows. R. Cochran stated that the State Department of Commerce has confirmed with Manufactured Housing Communities of Washington that 60 percent do get relocated (not the vast majority that don't get moved). D. Saty said he has not had major problems with moving older homes in the 35 years he has been involved, leaving him to believe that the 80 percent number was incorrect.

N. Smith stated that the closure of a manufactured home park is extraordinarily important as the problem the City is trying to correct, and may help identify some other means we can address or correct the situation.

I. Dickens said that 18 states have closure notice laws – some are longer and others shorter than Washington, which is in the middle or slightly above the middle – not the best, some reasonable protections, some have more protections.

N. Smith said he is interested in the facts around this. Show some factual data from Commerce. Who takes relocation funds, who gets relocated to a different spot, how exactly do we approach this from an actual case-by-case basis, what were the funds used in the Albertson's mobile home park closure in 2000?

The Department of Commerce only tracks closures that go through this formal process, and do not know about Finish Line (located in the city of Spokane and closed for a highway interchange by the Department of Transportation) or another park located in the city of Cheney, because they didn't go through the process.

N. Smith: Voluntary park closures have different circumstances.

F. Dullanty said that at the Albertson's park, consultants Jack Geraghty and his wife (Kerry Lynch) were hired by the new property owner. Relocation program rolled out funds with Department of Community Development. Have good information – would be helpful. Get ahold of them. The system worked well, people didn't need as much money as they thought, use of consultant paid money when it was due, information for how much was needed to effectively relocate these units.

K. Parks shared her experience after being served a 12-month notice, where she waged a preservation effort and 98 homes were preserved: The reason was proving that it was more affordable to keep in place than to lose it. When an owner is responsible and puts out the relocation money ahead of time, and then state reimburses the owner, that is one possibility. However, a lot of community owners are not willing to do that. In the case of a park closure in Kirkland right now, the property owner is not willing to do that. It is hard for a homeowner to shell out $12,000 to either find place to move it or move to dump. They would probably be on government subsidy if they lose everything. That is how they were able to save her community: realizing savings of State social services, saving transportation and other intangible costs. County and the housing trust fund got involved, Housing Authority of Snohomish County, posted bond when entered into purchase and sale agreement with the property owner, who made a profit.

S. Schwartz: City of Spokane could put together such a program if people want to pay for it.

B. Stum reviewed data concerning a property tax exemption for Seniors in Spokane: addressed at 26 percent of households in manufactured home parks. So many incentives available to you.

D. Saty: Defend for individual homeowners and individual stress they go through to relocate. Folks in their 60s – especially in 55+ parks – relocating so stressful compared to relative ease of closing the park. Moving their homes, leaving their community.

R. Cochran shared thoughts about inverted statistics where majority of manufactured homes are in community in the city of Spokane. No one makes them live in a park. Why do they? City's policies have been so restrictive that brand new only are allowed outside of parks. City policies: if people want to live in a manufactured home, their only choice is to live in 55+ year older community. City has made this

problem itself. Why not a 2-acre, 3-acre requirement for a community? Rebuild community. It sounds like we're only talking about larger parks. And parks by law can't deny an older home based on its age.

I. Dickens shared information about a proposal by Manufactured Housing Communities of WA, two or more years ago, to amend the State Growth Management Act so that new manufactured home parks could be built outside areas outside of growth boundaries. At the time she offered three conditions to support the proposal: (1) that the land would be zoned as a mobile home park district when built, (2) that there be an opportunity for homeowners or nonprofit to purchase, and (3) if there was some kind of rent-fairness built into it. With these conditions in place, as the cities expand in the future, land could remain as manufactured housing communities. She did not know if anyone at Manufactured Housing Communities of WA would ever agree to the conditions. If areas could be found in the city of Spokane that could hold 10 to 20 homes and they could live there without fear of eviction, then I. Dickens would be right behind R. Cochran.

D. Burnett: Comments under review of existing comprehensive plan policy. From an economic perspective, doesn't seem that if this is really about affordable housing, doesn't make sense to freeze current supply without relaxing the restrictions on new supply. From a policy perspective, it doesn't make sense to go through all the hoops to amend the existing comprehensive policy on mobile home parks if we don't in fact have a comprehensive policy on mobile home parks. We'll go through the same amount of effort for this one small piece when we could have a much more comprehensive piece that really addresses affordable housing which is an issue at this time.

EXISTING MANUFACTURED HOME PARKS IN THE CITY OF SPOKANE

The inventory of existing manufactured home parks in the City of Spokane were reviewed, particularly the larger parks. Preliminary results of the housing conditions survey were shared. A comment was shared that the parks were located on the periphery of the city, also speaking to the preferential zoning to keep them out.

REVIEW OF EXISTING COMPREHENSIVE PLAN POLICY

The proposed policy and existing policies in the Comprehensive Plan were reviewed:

- Land Use Goal 1 Citywide Land Use
- Housing Goal 1 Affordable Housing
- Housing Goal 2 Housing Choice and Diversity
- Housing Goal 3 Housing Quality

There is a lot of overlap and support in the adopted policies (passed out) for the proposed policy.

- Policy H 3.3 Housing Preservation: the existing condition of manufactured housing is viable, for the most part. Housing destroyed cannot be replaced elsewhere at the same cost level. The policy may be interpreted in a number of ways.
    - Talk about homes being destroyed, but with MHP relocations only loss is in most cases (60 percent of homes can be moved) is the place where the home goes.
    - Disposal of units containing asbestos is costly, which could be addressed on a state level with regard to the Department of Ecology's requirements for disposal.
- Policy H 1.9 Low-Income Housing Development is not on the table. The proposed legislation is not support, as viewed from the private property owner's perspective.
- Policy H 1.16 Partnerships to Increase Housing Opportunities. Incentive programs authorized by law that City has not taken advantage of. Instead, zoning practices do not allow used manufactured homes on individual lots.

- Policy H 2.2 senior housing uses the word "encourage:" it doesn't say restrict or take.
- The proposed policy does not mirror the comprehensive approach by these policies presented in the Comprehensive Plan.
- H 3.5 Housing Goal Monitoring. Has annual report ever been prepared? The City should take a look at what housing looks like universally. Important to look at goal and ask whether this is a preferred alternative.

Could the proposed policy be dropped? At a series of meetings, Plan Commission could vote to recommend to approve, modify or reject the proposal. Report with the Commission's recommendation or, if a split vote, a minority report, could lead to a whole discussion on affordable housing generally in the city. These options are available to Plan Commission and ultimately City Council.

FACILITATED GROUP DISCUSSION OF PROPOSED POLICY

Alternative Policy Wording:

- The group could consider specifying areas for preservation in the policy language.
- Seven units/acre thought to be the minimum for a manufactured home park, and this is not an appropriate residential infill development density.
- The policy is isolated to preserving existing parks, and doesn't deal with new or prospective manufactured home parks.
- The policy does not deal with the issue of eminent domain, where the City may decide it needs a currently designated MHP property—it restricts private property and use only, leaving public needs unrestricted.
- Can the language be tweaked or is it frozen? The text might be shifted in a way that allows us to move forward.
- Staff could submit alternative language more in tune with current policies and GMA based on workshops like this.
- N. Smith: Suggestion for text change to proposed policy:

  ((~~Designate appropriate areas~~)) Develop incentives for the ((~~preservation~~)) maintenance and development of mobile and manufactured home parks.
- Shouldn't place restrictive burden on existing parks. What will the City do in terms of cooperation or encouragement if a developer wants to develop a manufactured home park?
- D. Burnett suggested:

  Designate appropriate ((~~areas~~)) criteria for the ((~~preservation~~)) maintenance and promotion of mobile and manufactured home parks as one means of ensuring an adequate stock of affordable housing.
- We came to this situation because cities failed to provide protections to prevent closures. It is positive to include other measures but not at the expense of it.

Policy Considerations:

- Use of a "carrot" approach rather than a "stick" approach to regulatory policy.
- Must consider holistically. Is it compliant with the Comprehensive Plan if policy H 3.5 annual progress report hasn't been complied with regard to the annual report on the quality of the existing housing stock?
- How difficult is it to move homes? If the structure has been altered, or if cost efficiency wasn't there, a demolition crew will be called instead of moving the home.

Incentive Ideas:

- The City of Lynwood tried an incentive program encouraging retention before adopting the mobile home park zone: under the program, landowners could volunteer to keep their parks for five years during which time they were given tax breaks in return. No one signed up to take advantage of the voluntary incentive program. Why?
- Utilities or loan funds might offer significant savings, or the five-year time period might be extended to a longer time period.
- A deterrent might be that at the end of the classification period, the property owner would have to pay back taxes for a defined period, similar to the current-use property tax exemption.
- There is potential in including other aspects or programs as part of a bucket full of options, in I. Dickens's opinion. A ten-year period without change in use is sufficient to stimulate homeowner investment, and there is real potential in other options. Pilot projects, aging in place projects at particular parks, social services, public-private partnerships.
- Consider the conditions that cause parks to close. Expendable communities, unprofitable communities, market demand for more intense uses available. Discussion should include what would precipitate a closure—it's not apparent for a large park such as Contempo. A wide range of reasons: crime, dilapidation, underlying land use, but why would you go through the heartache. What could City put together to facilitate a closure prevention – incentives to help avoid, reduced utilities for serving an affordable housing population. Homeowners borrow from to fix problems, zero-interest loan.
- A program similar to the CDBG-funded single family rehab program using city funds. (Federal funds are already overprescribed and are getting smaller—there is a lot more need than funds available. Cannot be counted on to receive funds readily.)

WRAP UP

ATTACHMENT 4
NOTES FROM MOBILE/MANUFACTURED HOME PARK PRESERVATION STAKEHOLDER GROUP
JULY 9, 2015 - CITY HALL CONFERENCE ROOM 3B

Attendees:		
o **Robert Cochran**, Contempo MHP and Manuf. Housing Communities of WA	o **John Dietzman**, City Plan Commission	o **Gail Prosser**, City Plan Commission
o **Doug Saty**, Bud & Doug's Transport, Bennett Trucking	o **F.J. Dullanty, Jr.**, City Plan Commission	o **Stanley Schwartz**, Witherspoon Kelley, for Cascade Manuf. Home Community
o **Nathan Smith**, Witherspoon Kelley, for Shrine Park Assoc.	o **Jay Smith**, Shrine Park Association	o **Ishbel Dickens**, National Manuf. Home Owners Assoc. and WA Assoc. of Manufactured Home Owners
o **Randy Chapman**, WA Assoc. of Manufactured Home Owners	o **Nathan Gwinn**, City of Spokane	o **Melora Sharts**, City of Spokane
o **Blaine Stum**, City of Spokane		

ALTERNATIVE POLICY WORDING AND POTENTIAL IMPLEMENTATION METHODS: COMPARISON/DISCUSSION

Original Proposal

Proposed Policy LU 1.X Mobile Home Parks

Designate appropriate areas for the preservation of mobile and manufactured home parks. [discussion]

Suggested Alternatives

Proposed Policy Alternative 1:

H 1.X Mobile and Manufactured Home Park Incentives
Examine potential incentives for the maintenance and development of mobile and manufactured home parks.
Discussion: Mobile and manufactured homes provide an affordable housing option for some of the city's residents. The City should explore the feasibility of using incentives to encourage preservation of existing manufactured and/or mobile home parks and the development of new manufactured and/or mobile home parks.

This policy language was suggested by N. Smith at the June 17th meeting as a carrot approach to what the City is driving at with the initial draft of the policy. S. Schwartz pointed out that the first sentence of the discussion paragraph can be read to imply that all manufactured housing is affordable, which is false, which is why his proposed alternative (#3) restates it in a different way.

Proposed Policy Alternative 2:

H 1.X Housing in Mobile and Manufactured Home Parks

Adopt appropriate criteria for the maintenance and/or development of mobile and manufactured home parks as one means of ensuring an adequate stock of affordable housing.

A number of criteria were listed under proposed policy alternative number 2, such as considering the occupancy rate of the park, age and condition of housing stock and various other factors weighing into whether that park serves to assure an adequate stock of affordable housing, without programming a change to development regulations. Nothing in the second paragraph discusses the size of a manufactured home park, which is considered unrealistic to obtain under an existing minimum requirement of ten acres for a new manufactured home park; a change to the minimum might be added to the policy to direct a change to the code. A recommendation might be sufficient to change this minimum, rather than mention in the policy. The policy also does not indicate what to do next, once the criteria are adopted. N. Smith suggested the two ideas—criteria and incentives—might be linked and combined to decide which of the parks merit incentives. A reservation expressed was that the term criteria might be construed to include zoning. To avoid a one-sided implementing ordinance, the policy should not be effective until a well-vetted procedure for implementing it is developed. The process may lead to development in the meantime of a toolkit for addressing affordable housing.

R. Cochran linked the relatively small supply of manufactured housing in Spokane to the City's history of prejudice against that form of housing as a reason for a small number of individual manufactured homes located on lots outside mobile home parks. F.J. Dullanty posed the question of what percentage do other cities have? Mr. Cochran thought that about 9 percent of households statewide are manufactured homes. What restrictions are there for placing a manufactured home on a lot? Do we know why we have a policy limiting manufactured homes to new? Could we as an incentive take that prohibition out, and say manufactured homes after a defined date that meet all code requirements may be relocated to a different lot?

With regard to the percentage of housing stock, N. Smith suggested that a determination or decision should be addressed as to whether the city is deficient in manufactured housing: maybe this could be addressed through the annual housing monitoring report called for in Comprehensive Plan Policy H 3.5 Goal Monitoring. The report might identify targets for types of portions of the housing stock.

M. Sharts related that a local problem for housing developers is finding available land that is developable. Rather than dictate a housing type percentage, policies enabling incentives and ways to have it easier to be an option would be more productive. Might be helpful to talk about policy things. Other considerations beyond manufactured housing exist for achieving affordable housing goals. The report could guide the policy that's being proposed; we missed a step. Will decision makers consider the proportion of manufactured housing relative to the other types of housing sufficient to use City resources to address the problem?

The City changed requirements over time for moving homes from a manufactured home park to a single-family residential setting; at one time a manufactured home placed on an individual lot outside a mobile home park was required to be less than ten years old, then five years, then the person needed special approval, and now it is new. As it is now so restrictive, people have to seek 5- or 10-acre lots outside the city. When did the age requirement change?

Some group members felt the proposed policy alternatives #1 and #2 (and #3, listed below under Other Suggestions) may not be appropriately placed under Goal H1 Affordable Housing, but may more appropriately fit under goals H2 Housing Diversity or H3 Housing Quality.

Other Suggestions

Proposed Policy Alternative 3:

H 1.X Housing in Mobile and Manufactured Home Parks
Encourage through incentives the development and maintenance of (manufactured/)mobile home parks as a type of affordable housing.
Discussion: Mobile and manufactured home parks provide diverse housing for a variety of income classes. To encourage the development and retention of affordable housing in these communities, the City should explore and consider the use of economic and land use incentives to encourage the preservation of existing and development of new mobile and manufactured home parks.

I. Dickens outlined conditions to protect the homeowner tenants that would be necessary for encouraging development of new manufactured housing communities: (1) the new communities should be zoned as a manufactured home park, (2) homeowners should have option to purchase when the community is sold, and (3) there is some balancing of stabilization of rent. Testimony from landowners suggests that manufactured home parks are purchased with the hope that they will become more valuable as another land use, so the homeowners need these protections to assure a longer security of tenure for their investment in that location.

S. Schwartz stated that the use of the term "economic" and land use incentives, invokes statutes to help encourage more affordable development in the manufactured home park. Land use incentives include bonuses or non-cost options that could be enacted. In addition to creating incentives, disincentives could be identified if there is a shortage of places to provide manufactured housing. A section in the lease of lots at a manufactured home park in Cheney offers an option to purchase the lot if the tenant wants.

Protections for new buyers in a park include a required notification on a lease that must be signed by the community owner and tenant before anyone moves in. Not many communities in this state have been built with offering the buyer the option to purchase. The kind of security of tenure desired by those that the National Manufactured Homeowners Association is what Tumwater, Lynwood and others have already done; this would support the landlord to operate the business and sell it, while giving the tenant sufficient security of tenure. This includes the use exception if it is demonstrated to the city that there is no longer an economically viable use.

The policy alternative language would suggest incentives only if it's affordable housing, rather than for all manufactured home residents. It would be voluntary the owner to designate a portion of parks affordable and the city could create incentives, such as for energy saving retrofits. The incentives could be extended to other forms of housing that were designated affordable. R. Cochran mentioned that if an escalation clause was present in the landowner's park, any savings in utility assessments or taxes would be required to be passed onto the tenants, thereby not benefitting the landowner or serving to incentivize participation in the program. The degree of prevalence of such escalation clauses was disputed. There was some support for expanding the policy alternative language to include other forms

of housing, but to look at the remainder of the housing policy chapter to make sure these provisions aren't already existing adopted policy. It was also suggested to remember to incorporate manufactured housing on individual lots, outside of mobile/manufactured home parks, in an incentives policy.

> Alternative Action to Adopting the Proposed Policy:
>
> Reject proposed policy of LU 1.X as unneeded and unnecessary; the application does not contain enough information to go forward and is not consistent with the City of Spokane Comprehensive Plan.

R. Cochran suggested this alternative because there is not enough information and the original goal of the application states it wants to protect residents of manufactured home parks from potential relocation as a result of landowner sales. If that is a public policy issue and the landowner should be responsible for it, then a policy should be developed that the entire citizenry of Spokane deals with it. A policy could be developed to independently evaluate and encourage manufactured housing, but not with the program advanced by outside organizations. It appeared obvious to Mr. Cochran that larger parks were being studied for issues, while a smaller six-unit park on Crestline was closed without discussion.

> Alternative Action to Adopting the Proposed Policy:
>
> Further develop policy for Manufactured Housing overall and potentially purchase a park that the City wants to protect.

Other communities have preserved manufactured home parks from closure or conversion by buying them. This approach would be unprecedented for the City of Spokane.

Incentives and disincentives may be identified to encourage not only preservation of existing housing but use of manufactured housing by developers of new housing. State level incentives include real estate excise tax exemptions for manufactured home parks sales to nonprofit organizations or to homeowners' associations, and more incentives are being explored in this vein to continue to encourage preservation. State funds may be available to such nonprofits for parks that meet criteria such as an affordable housing requirement. The State Housing Trust Fund has diminished in value to less than half of what it was historically.

NEXT PROCESS STEPS: POSSIBLE SCENARIOS

The Plan Commission could decide at an upcoming workshop to take the proposal to public hearing. Additional options include placing the topic on a future work plan for further and broader study in the context of affordable housing, including studying the link between the proposal and affordable housing objectives. Another area of interest is data regarding trends in demand for manufactured housing.

A significant oversight mentioned was the annual housing report under City Comprehensive Plan Policy H 3.5, Housing Goal Monitoring.

WRAP UP: REQUEST CONSENSUS OR CALL FOR CONCERNS

The stakeholder group was unable to reach a consensus for recommendation to the Plan Commission for proceeding.

Attachment 5: Appendix

These three documents are contained within the following appendix to this report.

A. *Laurel Park Community v. City of Tumwater*, No. 11-35466 (9th Cir., Oct. 29, 2012)

B. "Manufactured Housing Community Zoning: A Legal Analysis," prepared for Manufactured Housing Communities of Washington by Bill Clarke, Attorney at Law.

C. "Advisory Memorandum: Avoiding Unconstitutional Takings of Private Property," prepared by the Washington State Attorney General's Office, December 2006.

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

LAUREL PARK COMMUNITY, LLC, a Washington limited liability company; TUMWATER ESTATES INVESTORS, a California limited partnership; VELKOMMEN MOBILE PARK, LLC, a Washington limited liability company; and MANUFACTURED HOUSING COMMUNITIES OF WASHINGTON, a Washington nonprofit corporation, *Plaintiffs-Appellants,* v. CITY OF TUMWATER, a municipal corporation, *Defendant-Appellee.*	No. 11-35466 D.C. No. 3:09-cv-05312-BHS OPINION

Appeal from the United States District Court
for the Western District of Washington
Benjamin H. Settle, District Judge, Presiding

Argued and Submitted
August 8, 2012—Seattle, Washington

Filed October 29, 2012

Before: John T. Noonan, Susan P. Graber, and
Johnnie B. Rawlinson, Circuit Judges.

Opinion by Judge Graber

COUNSEL

Philip A. Talmadge, Talmadge/Fitzpatrick PLLC, Tukwila, Washington, for the plaintiffs-appellants.

Jeffrey S. Myers, Law, Lyman, Daniel, Kamerrer & Bogdanovich, P.S., Olympia, Washington, for the defendant-appellee.

Daniel A. Himebaugh, Pacific Legal Foundation, Bellevue, Washington, for the amicus curiae.

OPINION

GRABER, Circuit Judge:

Defendant City of Tumwater enacted two ordinances that seek to preserve the existing stock of manufactured home

parks within the municipality by limiting the uses of certain properties. Plaintiffs are three of the affected property owners —Laurel Park Community, LLC; Tumwater Estates Investors; and Velkommen Mobile Park, LLC—and a nonprofit entity, Manufactured Housing Communities of Washington. Plaintiffs allege that the ordinances, on their face, violate various constitutional provisions. The district court held that the facial constitutional challenges fail and granted summary judgment to Defendant. On de novo review, *Strategic Diversity, Inc. v. Alchemix Corp.*, 666 F.3d 1197, 1205 (9th Cir. 2012), we affirm.

FACTUAL AND PROCEDURAL HISTORY

A. *Manufactured Homes*

The term "manufactured homes" describes a type of housing that typically is not constructed at the installation site. *See generally* Werner Z. Hirsch & Joel G. Hirsch, *Legal-Economic Analysis of Rent Controls in a Mobile Home Context: Placement Values and Vacancy Decontrol*, 35 U.C.L.A. L. Rev. 399 (1988). Originally called "mobile homes," early versions were no more than travel trailers hitched to the back of a car. Mobile homes can be moved from one site to another, allowing the owner to change locations without changing housing.

Over time, however, the predominant use of this type of housing began to shift toward a more fixed use. Occupants installed a "mobile" home in a fixed location and lived in it year-round. In 1974, recognizing that these homes were more akin to permanent dwellings than to travel trailers, Congress enacted the National Mobile Home Construction and Safety Standards Act of 1974, Pub. L. No. 93-383, 1974 S. 3066, §§ 601-628 (now codified at 42 U.S.C. §§ 5401-5426). That statute authorized the Department of Housing and Urban Development to regulate the construction and safety of mobile homes. In 1980, Congress replaced nearly all references to

"mobile home" with "manufactured home." Pub. L. No. 96-399, § 308(c).

As the Supreme Court has noted, "[t]he term 'mobile home' is somewhat misleading." *Yee v. City of Escondido*, 503 U.S. 519, 523 (1992).

> Mobile homes are largely immobile as a practical matter, because the cost of moving one is often a significant fraction of the value of the mobile home itself. They are generally placed permanently in parks; once in place, only about 1 in every 100 mobile homes is ever moved.

Id.; *see also Manufactured Hous. Cmtys. of Wash. v. State*, 13 P.3d 183, 206 (Wash. 2000) (Talmadge, J., dissenting) ("Mobile homes are not mobile. The term is a vestige of earlier times when mobile homes were more like today's recreational vehicles. Today mobile homes are designed to be placed permanently on a pad and maintained there for life." (internal quotation marks omitted)).

The Supreme Court has described the typical arrangement between a mobile home's owner and a mobile home park's owner:

> A mobile home owner typically rents a plot of land, called a "pad," from the owner of a mobile home park. The park owner provides private roads within the park, common facilities such as washing machines or a swimming pool, and often utilities. The mobile home owner often invests in site-specific improvements such as a driveway, steps, walkways, porches, or landscaping.

Yee, 503 U.S. at 523; *see also Manufactured Hous.*, 13 P.3d at 206 (Talmadge, J., dissenting) ("In most instances a mobile home owner in a park is required to remove the wheels and

anchor the home to the ground in order to facilitate connections with electricity, water and sewerage." (internal quotation marks omitted)).

Given the "site-specific improvements," *Yee*, 503 U.S. at 523, and the fact that "mobile homes are designed to be placed permanently on a pad and maintained there for life," *Manufactured Hous.*, 13 P.3d at 206 (Talmadge, J., dissenting), it is not surprising that the costs of relocating a mobile home are very high. "Once 'planted' and 'plugged in,' [mobile homes] are not easily relocated." *Id.* (internal quotation marks omitted). For example, "[p]hysically moving a double- or triple-wide mobile home involves unsealing; unroofing the roofed-over seams; mechanically separating the sections; disconnecting plumbing and other utilities; removing carports, porches, and similar fixtures; and lifting the home off its foundation or supports." *Id.* (internal quotation marks omitted).

Because they cost less than traditional homes (less even than rental housing in some circumstances), manufactured homes are an attractive option for lower-income and poorer residents. "Mobile home residents are typically poorer than the average rental household, with incomes lower by one-third." *Id.* at 207 (internal quotation marks omitted).

The combination of those factors—the "immobility of mobile homes," *id.* at 206, the resulting high costs of relocation, the fact that mobile home owners typically do not own their pads, and the limited financial resources of many owners of mobile homes—has led to a well-documented problem when the owner of a mobile home park wants to convert the property to a different use:

> The effects on mobile home owners . . . faced with moving because mobile home park owners . . . want to convert a mobile home park to another use can be devastating. A home owner owns the mobile home,

> but only rents the land on which it sits. Closure and conversion of a mobile home park force the owner either to move, or to abandon what may be his most valuable equity investment, a mobile home, to the developer's bulldozer. Displacement from a mobile home park can mean economic ruin for a mobile home owner.
>
> . . . .
>
> . . . [Moreover,] there is a major shortage of space for mobile homes. Thus the owner who needs to rent a lot for his mobile home has no choice but to enter the "park owner's market" in which the demand for space far exceeds the supply of available lots.

Id. at 206-07 (citations and internal quotation marks omitted).

As a result, many states and municipalities have enacted laws aimed at protecting owners of manufactured homes. Those actions, though, often impinge on the property rights of the owners of mobile home parks, sometimes to such a degree that the legislation amounts to a constitutional violation.

In the state of Washington, an average of 5.8 mobile home parks closed every year between 1989 and 2002. That average rose to 14 park closures per year between 2003 and 2008. The number of closures is not surprising, given the high level of residential development during those years. As some of the Plaintiffs here candidly admit, one investment strategy for mobile home parks is to purchase land located in the path of development. The rental income from the mobile home pads provides steady income and, if the land's value rises as development surrounds the park, the park's owner can sell the land or convert it to other, more profitable uses, such as multi-family housing.

The Washington legislature responded to the large number of park closures by enacting, first, the Mobile Home Reloca-

tion Assistance Act, Wash. Rev. Code § 59.21, 1989 Wash. Sess. Laws, ch. 201. "When a mobile home park is closed, this law requires the park owner to contribute money toward the tenants' relocation costs." *Guimont v. Clarke*, 854 P.2d 1, 3 (Wash. 1993). The Washington Supreme Court held that "the Act is unduly oppressive and violates substantive due process." *Id.* at 16. The court invalidated the law in its entirety. *Id.* at 16-17.

Next, the Washington legislature enacted a law that "gives mobile home park tenants a right of first refusal when the park owner decides to sell a mobile home park." *Manufactured Hous.*, 13 P.3d at 185 (citing Wash. Rev. Code § 59.23.025 (2000)). The Washington Supreme Court invalidated that law, too, this time holding that "the statutory grant of a right of first refusal to tenants of mobile home parks[ ] amounts to a taking and transfer of private property." *Id.* at 196. Although some protections for owners of mobile homes remain on the books in Washington, they are mostly procedural, such as the requirement that, before closure of a mobile home park, the park's owner must give at least 12 months' notice to all residents of the park. Wash. Rev. Code § 59.21.030.

B. *Tumwater's Ordinances*

Tumwater contains ten manufactured home parks. The parks are located throughout Tumwater, and none appears to border any other park. Three of the parks are very small and do not have a name apart from their respective addresses. The remaining seven are named Laurel Park, Tumwater Mobile Estates, Velkommen, Eagles Landing, Western Plaza, Thunderbird Villa, and Allimor Carriage Estates.

Against the backdrop of increasing closures of manufactured home parks in Washington and the limited constitutionally valid statutory protections, the Tumwater City Council began hearing concerns from residents that some of the own-

ers of Tumwater manufactured home parks had plans to close. Tumwater residents expressed their views at several public meetings. Mobile home owners tended to seek protection from park closures, while park owners tended to emphasize respect for private property and the legal limits on property restrictions.

The City Council ultimately enacted two ordinances. Ordinance No. O2008-027 amended the Tumwater Comprehensive Plan and the Tumwater Zoning Map. Ordinance No. O2008-009 amended the Tumwater City Code. The ordinances create a new Manufactured Home Park land use designation ("MHP") and a new Manufactured Home Park zone district.

The ordinances designate six of the ten existing Manufactured Home Parks—Laurel Park, Tumwater Mobile Estates, Velkommen, Eagles Landing, Western Plaza, and Thunderbird Villa—under the new land use designation and include those properties, and only those properties, as the new Manufactured Home Park zone district. Before the enactment of the ordinances, the zoning code permitted a wide range of uses on the properties, including multi-family residences and other dense types of development. The ordinances restrict those uses in the following relevant ways.

First, the ordinances specify certain "permitted uses," which are allowed as of right: manufactured home parks, one single-family dwelling per lot, parks, trails, open spaces, other recreational uses, family child care homes, and child mini-day care centers. Second, the ordinances specify 11 "conditional uses," which are allowed via a discretionary conditional use permit: churches, wireless communication facilities, cemeteries, child day care centers, schools, neighborhood community centers, neighborhood-oriented commercial centers, emergency communications towers, group foster homes, agriculture, and bed and breakfast establishments. Third, the ordinances permit still other uses if specified criteria are met:

"The City Council may approve the property owner's request for a use exception if the property owner demonstrates a. they do not have reasonable use of their property under the MHP zoning; or b. the uses authorized by the MHP zoning are not economically viable at the property's location."

The stated "intent" of the ordinances is: "The Manufactured Home Park (MHP) zone district is established to promote residential development that is high density, single family in character and developed to offer a choice in land tenancy. The MHP zone is intended to provide sufficient land for manufactured homes in manufactured home parks."

The ordinances include many explanations for the creation of the new land use designation and zone district and the inclusion of existing manufactured home parks in the district. Most relevant here, the ordinances state that applying the new designation and zone district to existing manufactured home parks is consistent with a wide range of goals and policies included in various documents, such as the Tumwater Comprehensive Plan. They also state that:

- "applying the Manufactured Home Park land use designation and zone district to existing manufactured/mobile home parks will help to ensure a sufficient supply of land for these types of uses in the future"

- "manufactured home parks are a source of affordable single family and senior housing in Tumwater," and "protecting manufactured home parks from the pressures of development will help to maintain the existing stock of manufactured housing provided by these 'parks.' "

- "the manufactured/mobile home parks known as Eagles Landing, Laural [sic] Park, Tumwater Mobile Estates, Thunderbird Villa, Velkommen,

and Western Plaza are located within residential neighborhoods and currently have residential zoning and are easily recognized as traditional manufactured housing communities."

- "applying the Manufactured Home Park zone to the six traditional mobile/manufactured home parks . . . is consistent with [a stated policy] to support healthy residential neighborhoods which continue to reflect a high degree of pride in ownership or residency" and "is consistent with [a stated policy] to support the stability of established residential neighborhoods"

The ordinances exclude the three small, unnamed parks, in part because "the small size of these three 'parks' does not foster a sense of community or neighborhood, and the owners of these three small 'parks' appear to own all of the dwellings located on the properties which contrasts sharply with the rest of the more traditional mobile/manufactured home parks in Tumwater where the majority of dwellings are not owned by the land owner." The ordinances excluded the seventh named park—Allimor Carriage Estates ("Allimor")—because it "is currently the only mobile/manufactured home park within Tumwater that is zoned General Commercial, the only 'park' that is almost completely surrounded by General Commercial zoning, and the only 'park' that abuts intensive commercial development in the form of commercial strip development and intensive large scale commercial retail including Albertsons, Costco, and Fred Meyer."

C. *Procedural History*

The owners of three of the six newly designated Manufactured Home Parks—Laurel Park, Tumwater Estates, and Velkommen—along with the nonprofit Manufactured Housing Communities of Washington, filed this action in federal

district court.[1] Plaintiffs allege that the enactment of the ordinances violated their constitutional rights under several theories. The district court granted summary judgment to Defendant on all claims and entered final judgment. Plaintiffs timely appeal.

DISCUSSION

Although Plaintiffs raised a number of theories before the district court, they have limited their appeal to three claims: (1) a federal takings claim, (2) a state takings claim, and (3) a state substantive due process claim.[2]

A. *Federal Takings Claim*

The Fifth Amendment provides, "nor shall private property be taken for public use, without just compensation." There are two types of "per se" takings: (1) permanent physical invasion of the property, *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 426 (1982); and (2) a deprivation of all economically beneficial use of the property, *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1015-16 (1992). Plaintiffs do not contend that the ordinances constitute a "per se" taking. They argue, instead, that the ordinances constitute a regulatory taking because the ordinances go "too far." *Pa. Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922).

[1]Plaintiffs also filed a petition for review with the state administrative agency, alleging certain state-law violations. The agency found that Defendant had violated certain state-law provisions but declined to reach, for lack of jurisdiction, the constitutional issues. Those administrative proceedings are not part of this appeal.

[2]Plaintiffs also argue that the district court abused its discretion by granting a motion to quash certain notices of deposition filed by Plaintiffs. *See Mattel Inc. v. Walking Mountain Prods.*, 353 F.3d 792, 813 (9th Cir. 2003) (holding that we review for abuse of discretion a district court's decision on a motion to quash). We hold that the district court did not abuse its discretion. The evidence sought is either known to Plaintiffs or is irrelevant to the facial challenges.

[1] As a general rule, zoning laws do not constitute a taking, even though they affect real property interests: "[T]his Court has upheld land-use regulations that destroyed or adversely affected recognized real property interests. Zoning laws are, of course, the classic example, which have been viewed as permissible governmental action even when prohibiting the most beneficial use of the property." *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 125 (1978) (citations omitted); *see Pa. Coal*, 260 U.S. at 413 ("Government hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law."); *see also Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 538 (2005) (holding that, in considering a regulatory taking case, "we must remain cognizant that 'government regulation—by definition—involves the adjustment of rights for the public good' " (quoting *Andrus v. Allard*, 444 U.S. 51, 65 (1979)).

[2] Nevertheless, as noted, regulations that go "too far" constitute a taking. Determining whether a regulation goes too far requires a court to engage in "essentially ad hoc, factual inquiries." *Penn Cent.*, 438 U.S. at 124. "[R]egulatory takings challenges are governed by the standards set forth in [*Penn Central*]." *Lingle*, 544 U.S. at 538. "Primary among [the relevant] factors are [1] the economic impact of the regulation on the claimant and, particularly, [2] the extent to which the regulation has interfered with distinct investment-backed expectations. In addition, [3] the character of the governmental action . . . may be relevant in discerning whether a taking has occurred." *Id.* at 538-39 (citation, internal quotation marks, and brackets omitted). "[T]hese three inquiries . . . share a common touchstone. Each aims to identify regulatory actions that are functionally equivalent to the classic taking in which government directly appropriates private property or ousts the owner from his domain." *Id.* at 539.

At the outset, we note that Plaintiffs bring a *facial* challenge. It is not clear that a facial challenge can be made under

Penn Central. *Guggenheim v. City of Goleta*, 638 F.3d 1111, 1118 & n.32 (9th Cir. 2010) (en banc), *cert. denied*, 131 S. Ct. 2455 (2011). As we did in *Guggenheim*, we will "assume, without deciding, that a facial challenge can be made under *Penn Central*." *Id.* at 1118. We turn, then, to the three *Penn Central* factors.

1. *"Economic Impact of the Regulation on the Claimant"*

[3] Plaintiffs offer very little evidence of economic effect resulting from enactment of the ordinances. At best, Plaintiffs have presented information that reflects an economic loss of less than 15% with respect to one of the three Plaintiff properties and *no effect* on the other two Plaintiff properties or the properties of the remaining affected MHP parks.[3] Although there is no precise minimum threshold, Plaintiffs' evidence is of very little persuasive value in the context of a federal takings challenge. *See, e.g.*, *Cienega Gardens v. United States*, 331 F.3d 1319, 1343 (Fed. Cir. 2003) (holding that a taking occurred when a regulation effected a 96% loss of return on equity). A small decrease in value, for only one affected property, falls comfortably within the range of permissible land-use regulations that fall far short of a constitutional taking. *See Penn Cent.*, 438 U.S. at 125 ("[T]his Court has upheld land-use regulations that destroyed or adversely affected recognized real property interests."). The Supreme Court cases "uniformly reject the proposition that diminution in property value, standing alone, can establish a 'taking,' see *Euclid v.*

[3]The one Plaintiff property that showed a decrease in value was Velkommen. Various reports and assessments—operating under different background assumptions—valued the park: One report assigned a pre-ordinance value of $2.7M and a post-ordinance value of $2.4M (11.1% decrease); one assessment assigned a pre-ordinance value of $1.8M and a post-ordinance value of $1.6M (11.1% decrease); and a final report assigned a pre-ordinance value of $1.675M and a post-ordinance value of $1.45M (13.4% decrease). The other two Plaintiff properties showed no change pre-ordinance and post-ordinance (with appraised values of $6.3M and $4.37M, respectively).

Ambler Realty Co., 272 U.S. 365 (1926) (75% diminution in value caused by zoning law); *Hadacheck v. Sebastian*, 239 U.S. 394 (1915) (87 1/2% diminution in value)." *Penn Central*, 438 U.S. at 131.

[4] In sum, the minimal economic effect of the ordinances does not support a takings claim.

2. *"Distinct Investment-backed Expectations"*

[5] When Plaintiffs bought the properties, they had the expectation that, when they desired or when market conditions made it attractive, they could convert to a more profitable use, such as multi-family housing or housing developments. The zoning laws previously allowed such development, and the ordinances now foreclose that option (at least until Plaintiffs show that there are no economically viable options available under the other uses expressly permitted by the ordinances). But those facts are no different than the assertions that could be made by property owners adversely affected by any zoning law. As the Supreme Court wrote in *Penn Central*, "the submission that [the plaintiffs] may establish a 'taking' simply by showing that they have been denied the ability to exploit a property interest that they heretofore had believed was available for development is quite simply untenable. Were this the rule, this Court would have erred [in many of its previous takings cases]." *Id.* at 130. Of most importance, Plaintiffs retain the ability to continue operating the properties as manufactured home parks. "So the law does not interfere with what must be regarded as [Plaintiffs'] primary expectation concerning the use of the parcel." *Id.* at 136. In other words, although the ordinances affected one of Plaintiffs' expectations—that at some indefinite time in the future they could convert their properties to some other specific uses—the ordinances did not affect Plaintiffs' "primary expectation."

In *Guggenheim*, we held that " '[d]istinct investment-backed expectations' implies reasonable probability, like

expecting rent to be paid, not starry eyed hope of winning the jackpot if the law changes." 638 F.3d at 1120. In our view, the ordinances at issue here fall between the two poles used in that example. Plaintiffs' expectation of converting their properties is speculative to a degree, because it depends on future events (chief among them, market forces making conversion economically attractive). But it is not as speculative as "winning the jackpot if the law changes," because it depends only on unknown future economic trends, not an outright change in law. Our clarification later in the same paragraph provides a means of assessing Plaintiffs' expectations here: "Speculative possibilities of windfalls do not amount to 'distinct investment-backed expectations,' unless they are shown to be probable enough materially to affect the price." *Id.* at 1120-21. As discussed above, the speculative possibility of converting the properties to another use had *little to no effect* on price.

[6] This factor, too, fails to support a takings claim.

3. *"The Character of the Governmental Action"*

"[T]he character of the governmental action—for instance whether it amounts to a physical invasion or instead merely affects property interests through some public program adjusting the benefits and burdens of economic life to promote the common good—may be relevant in discerning whether a taking has occurred." *Lingle*, 544 U.S. at 539 (internal quotation marks omitted). The government generally cannot " 'forc[e] some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.' " *Id.* at 537 (quoting *Armstrong v. United States*, 364 U.S. 40, 49 (1960)).

[7] Although it is a close call, we agree with Plaintiffs that the character of the governmental action here slightly favors their takings claim. The intent and effect of the ordinances are to require only Plaintiffs and the other affected owners of

manufactured home parks to continue to provide the public benefit (manufactured home parks), when the benefit could be distributed more widely (for example, by providing relocation assistance to owners of manufactured homes or a larger MHP zone district). The ordinances do allow many other uses but, at least at the moment, those other uses do not appear to provide truly economically attractive alternatives to the existing manufactured home parks. As a practical matter, Plaintiffs must continue to use their properties as manufactured home parks. Indeed, that was the intended effect of the ordinances.

[8] That analysis goes only so far, however. Unlike in other cases where the challenged law *required* continued operation of an existing use, *e.g.*, *Cienega Gardens*, 331 F.3d at 1338-39, the ordinances here do not *force* Plaintiffs to continue operating their properties as manufactured home parks. *See Lingle*, 544 U.S. at 537 (holding that the government cannot "forc[e] some people alone to bear public burdens"). As just a few examples, Plaintiffs could decide to close their parks, to convert their properties to other allowed uses, or to sell the properties, and the ordinances have no effect on those possibilities.

4. *Conclusion*

[9] Because the first two factors weigh strongly against a takings claim and the third factor weighs only slightly in favor of a takings claim, we conclude that, on their face, the ordinances do not constitute a taking under the Fifth and Fourteenth Amendments. *See also Guggenheim*, 638 F.3d at 1120 (holding that the first two factors are the "primary" factors to consider; the character of the governmental action is not on equal footing).

B. *State Takings Claim*

Plaintiffs next argue that, even if the ordinances do not constitute a taking under the Federal Constitution, the ordinances

nevertheless effect a taking under the state constitution.[4] Article I, section 16 of the Washington Constitution provides, in relevant part: "No private property shall be taken or damaged for public or private use without just compensation having been first made . . . ."

Commentators have asserted that the Washington Supreme Court cases that interpret that provision are confusing and that discerning the applicable analytical framework is difficult. Roger D. Wynne, *The Path Out of Washington's Takings Quagmire: The Case for Adopting the Federal Takings Analysis*, 86 Wash. L. Rev. 125 (2011); Jill M. Teutsch, Comment, *Taking Issue with Takings: Has the Washington State Supreme Court Gone Too Far?*, 66 Wash. L. Rev. 545 (1991); Richard L. Settle, *Regulatory Taking Doctrine in Washington: Now You See It, Now You Don't*, 12 U. Puget Sound L. Rev. 339 (1989); *see also Guimont v. City of Seattle*, 896 P.2d 70, 75-76 (Wash. Ct. App. 1995) (describing the doctrine as "the complex, confusing and often-ethereal realm of theoretical law that has developed in Washington under the taking clause"). Quagmire or not, we need not wade far into this area of Washington law, because Plaintiffs advance only two specific arguments—both leaning heavily on the Washington Supreme Court's decision in *Manufactured Housing*—concerning state takings law. We turn to that case.

[10] In *Manufactured Housing*, 13 P.3d at 185, the Washington Supreme Court considered the constitutionality of a state law that "g[ave] qualified tenants a right of first refusal to purchase a mobile home park."[5] The court held that "a right

[4]The district court did not analyze this issue. Because this is a pure issue of law that the parties have briefed fully, we decide it on the merits. *Bibeau v. Pac. Nw. Research Found. Inc.*, 188 F.3d 1105, 1111 n.5 (9th Cir. 1999).

[5]The court described the act as follows:

> To exercise a right of first refusal, the tenants must organize into a "qualified tenant organization" and give the park owner

of first refusal, even one created by statute, can create an interest in property." *Id.* at 192. The court reasoned that "[a] right of first refusal to purchase is a valuable prerogative, limiting the owner's right to freely dispose of his property by compelling him to offer it first to the party who has the first right to buy." *Id.* (internal quotation marks omitted). Citing a treatise, the court concluded that "the right to grant first refusal is a part of 'the bundle of sticks' which the *owner* enjoys as a vested incident of ownership." *Id.* at 193 (footnote omitted). "Property is not one single right, but is composed of several distinct rights, which each may be subject to regulation. The right of property includes four particulars: (1) right of occupation; (2) right of excluding others; (3) right of disposition, or the right of transfer in the integral right to other persons; (4) right of transmission." *Id.* (internal quotation marks and brackets omitted). Accordingly, "the statute deprives park owners of a fundamental attribute of ownership." *Id.* at 194; *see also id.* ("The instant case falls within the rule that would generally find a taking where a regulation deprives the owner of a fundamental attribute of property ownership.").

> written notice of "a present and continuing desire to purchase the mobile home park." Once the park owner has received such notice, the park owner must notify the tenants of any agreement to sell the park to a third party, as well as disclose the agreement's terms. If the park owner fails to properly notify the qualified tenant organization, a pending third party sale is voidable.
>
> Upon receiving proper notice, the tenants have 30 days in which to pay the park owner two percent of the third party's agreed purchase price and to tender a purchase and sale agreement as financially favorable as the agreement between the owner and the third party. If the tenants meet these requirements within the 30-day period, the park owner must sell them the park. If, however, the tenants fail to meet these requirements or if, in the case of seller financing, the owner determines selling the park to the tenants would create a greater financial risk than selling to the third party, the owner may proceed with the sale to the third party.

Manufactured Hous., 13 P.3d at 185 (citations and footnotes omitted).

[11] The court held, additionally, that "we are persuaded that a taking has occurred in this case not only because an owner is deprived of a fundamental attribute of ownership, but also because this property right is statutorily *transferred*" to the park residents, who can exercise the right of first refusal. *Id.* "[T]he actual effect of [the statute] is more closely akin to the exercise of eminent domain . . . because the property right is not only taken, but it is statutorily transferred to a private party for an alleged public use." *Id.*

[12] Plaintiffs first argue that the ordinances have destroyed one of the sticks in the bundle representing a fundamental property right, by depriving the parks' owners of the right to dispose of their property as they choose and effectively conferring control of that right on the tenants. We disagree. As an initial matter, the ordinances here do not at all limit the owners' ability freely to *dispose* of the property. Indeed, one owner appears to have sold his property.

[13] The ordinances restrict to some extent the owners' ability to *use* their properties, because they can no longer build multi-family housing, for example. But imposing *use* restrictions on property—as distinct from restrictions on alienation—is the essence of zoning. The Washington Supreme Court consistently has defined the fundamental attributes of property rights by reference to rights that do *not* include the free use of the property. *See id.* at 193 (identifying the fundamental rights of occupation, excluding others, disposition, and transmission); *see also Guimont*, 854 P.2d at 10 ("[T]he court must first ask whether the regulation destroys or derogates any fundamental attribute of property ownership: including the right to possess; to exclude others; or to dispose of property."); *Presbytery of Seattle v. King County*, 787 P.2d 907, 912 (Wash. 1990) ("[T]he court should ask whether the regulation destroys one or more of the fundamental attributes of ownership—the right to possess, to exclude others and to dispose of property."). Indeed, concerning *use*, the court has defined a fundamental attribute of property only with respect

to being able to make *some economically viable use* of the property. *See, e.g.*, *Guimont*, 854 P.2d at 10 ("[A]nother 'fundamental attribute of property' appears to be the right to make *some* economically viable use of the property."). Plaintiffs do not argue, of course, that the ordinances deprive them of all economically viable uses; they are instead being encouraged to continue the economically viable use that they freely chose. In sum, the ordinances do not destroy or limit any fundamental property right as defined by the Washington Supreme Court.

Plaintiffs' other argument is that a taking has occurred because some property right has been transferred to the parks' residents. As an initial matter, it is unclear whether this alternative argument is viable. The court's discussion of the statutory transfer issue in *Manufactured Housing* appears to be premised on its finding of a fundamental property right: "[W]e are persuaded that a taking has occurred in this case not only because an owner is deprived of a *fundamental* attribute of ownership, but also because *this* property right is statutorily *transferred*." 13 P.3d at 194 (first emphasis added). In any event, Plaintiffs' argument fails on its own terms.

In *Manufactured Housing*, the statute granted the right of first refusal *to the parks' residents*. Accordingly, the residents —and only the residents—could exercise that valuable property right. Here, the residents have no ability—now or in the future—to require the parks' owners to perform any act. Nothing prohibits the owners from converting their properties to one of the many permitted uses under the ordinances (such as a cemetery, bed and breakfast, day care center, recreational facility, or single-family dwelling) or from selling to a third party. If a park owner so chose, the residents would be powerless to affect that decision.

[14] We therefore hold that the ordinances do not constitute a taking under the Washington Constitution.

C. *State Substantive Due Process Claim*

[15] Finally, Plaintiffs argue that the ordinances violate their state substantive due process rights. Article I, section 3 of the Washington Constitution states: "No person shall be deprived of life, liberty, or property, without due process of law."

> To determine whether the regulation violates due process, the court should engage in the classic 3-prong due process test and ask: (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 land owner. In other words, 1) there must be a public problem or "evil," 2) the regulation must tend to solve this problem, and 3) the regulation must not be unduly oppressive upon the person regulated. The third inquiry will usually be the difficult and determinative one.

Presbytery, 787 P.2d at 913 (footnotes and some internal quotation marks omitted).

The first prong is "whether the regulation is aimed at achieving a legitimate public purpose." *Id.* The stated "intent" of the ordinances is: "The Manufactured Home Park zone district is established to promote residential development that is high density, single family in character and developed to offer a choice in land tenancy. The MHP zone is intended to provide sufficient land for manufactured homes in manufactured home parks." That stated purpose is quintessentially legitimate: the organization of land uses to promote the public goals of "high density, single family" development and a "choice in land tenancy." This prong is easily met. *See, e.g.*, *Guimont*, 854 P.2d at 14 (concluding, with little discussion, that "aid[ing] mobile home owners with relocation expenses

when a mobile home park is closed" is a legitimate public purpose).

The second prong is "whether [the law] uses means that are reasonably necessary to achieve that purpose." *Presbytery*, 787 P.2d at 913. In *Guimont*, the Washington Supreme Court held:

> Certainly, providing mobile home owners with relocation assistance would be a reasonably necessary step in achieving the Act's purpose. The more difficult issue here is whether it is reasonably necessary to require the assistance to be paid by the closing park owner. To assist in determining whether these means used by the Act are reasonably necessary in all regards, we must turn to the third due process question, that of undue oppression.

854 P.2d at 14.

[16] A similar analysis applies here. The zoning changes encourage the continued provision of manufactured home parks, which is "[c]ertainly" a reasonably necessary step in achieving the ordinances' purpose. "The more difficult issue here is whether it is reasonably necessary to require" that development to be provided only by some of the present-day park owners. *Id.* Plaintiffs have a point that the provision of certain types of housing may be considered a burden that should be borne more generally by the public. As in *Guimont*, the answer to the reasonableness of the law depends on "the third due process question, that of undue oppression." *Id.*; *see also Presbytery*, 787 P.2d at 913 ("The third inquiry will usually be the difficult and determinative one.").

> We determine if a statute is unduly oppressive by examining a number of nonexclusive factors to weigh the fairness of the burden being placed on the property owner:

> 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 would all be relevant. On the owner's side, the amount and percentage of value loss, the extent of remaining uses, past, present and future uses, 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.

Guimont, 854 P.2d at 14-15 (internal quotation marks omitted).

[17] Here, we conclude that the two most important factors are the fact that the present-day effect on Plaintiffs' property values is little to none and the fact that Plaintiffs may continue to use their properties as they have been used for decades. It is true that Tumwater's solution is not necessarily the most efficient and that it concentrates the economic burden on a relatively small number of property owners. It is also true that the regulation is permanent (at least until future speculative amendments). But, when all is said and done, the amount of harm is very small or nonexistent. In each case described by Plaintiffs in which the Washington Supreme Court has found a due process violation, the amount of measurable harm has been great. *See Guimont*, 854 P.2d at 15-16 (concluding that the relocation-assistance statute violated substantive due process because it imposed a fee of $7,500 per pad on a park owner who wished to close, which would amount to $750,000 for a park with 100 pads); *Sintra, Inc. v. City of Seattle*, 829 P.2d 765, 776-77 (Wash. 1992) (holding that imposition of a $218,000 fee to develop a $670,000 property was unduly oppressive).

[18] In this regard, we consider it important that Plaintiffs have chosen to raise a *facial* challenge. If a particular Plaintiff

could show a significant diminution in value of a particular parcel of property, then the weighing of the factors might be different. As it stands, however, the fact that Plaintiffs have presented no evidence of diminution of value, apart from one park that suffered a loss in value of less than 15%, severely undermines their claim that, *on their face*, the ordinances are unduly oppressive. It would be odd to conclude that an ordinance that had no economic effect on most properties was oppressive at all, let alone unduly oppressive. For those reasons, we hold that the ordinances do not violate Washington principles of substantive due process.

Under the heading of substantive due process, Plaintiffs also argue that the ordinance is illegal "spot zoning": "that an individual piece of property was singled out for zoning incompatible with neighboring property." *Buckles v. King County*, 191 F.3d 1127, 1137 (9th Cir. 1999).[6] As an initial matter, it is unclear whether a party can raise a "spot zoning" challenge in the context of a facial challenge to ordinances; we have found no Washington cases that involve a *facial* "spot zoning" challenge. We assume, without deciding, that a facial "spot zoning" challenge is viable.

[19] "Spot zoning has been consistently defined to be zoning action by which a smaller area is singled out of a larger area or district and specially zoned for a use classification totally different from and inconsistent with the classification of surrounding land, and not in accordance with the comprehensive plan." *Save Our Rural Env't v. Snohomish County*, 662 P.2d 816, 819 (Wash. 1983). There is no "hard and fast rule that all spot zoning is illegal." *Id.* "[T]he main inquiry of the court is whether the zoning action bears a substantial rela-

[6]"Spot zoning" "is variously characterized as a substantive due process violation, a taking, or even an equal protection violation; spot zoning does not neatly fit into one category." *Buckles*, 191 F.3d at 1137. In the absence of any objection, we accept, for purposes of analysis, Plaintiffs' characterization of their spot zoning claim.

tionship to the general welfare of the affected community." *Id.* For all the reasons discussed above, there is little doubt that the ordinances bear a substantial relationship to the general welfare of the community. Other than the original Washington "spot zoning" decision in 1969, *Smith v. Skagit County*, 453 P.2d 832 (Wash. 1969), in which the court held that placing an aluminum processing plant on an island constituted illegal spot zoning, Plaintiffs cite no case in which the Washington courts have found illegal spot zoning. *See Save Our Rural Env't*, 662 P.2d at 819 (holding that no illegal spot zoning occurred where a new "business park zoning classification provides a flexible means to broaden the industrial base of the region and to produce energy and travel time savings for employees"); *Bassani v. Bd. of Cnty. Comm'rs*, 853 P.2d 945, 951 (Wash. Ct. App. 1993) (holding that there was no illegal spot zoning where the zoning was "generally consistent" with the relevant plans and was "good for the county, and good for one of the county's major employers"). We thus reject Plaintiffs' spot zoning challenge.

CONCLUSION

Plaintiffs cannot establish that the Tumwater ordinances, on their face, effect a taking or constitute undue oppression. The most fundamental reason why that is so is that the enactment of the ordinances had nearly no effect on the value of their properties. They can continue to use the properties just as they have chosen to do for years; the new zoning ordinances allow many alternative uses; and the new zoning ordinances contain a "safety valve" pursuant to which Plaintiffs may pursue other uses if the presently authorized uses are not economically viable.

AFFIRMED.

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Manufactured Housing Community Zoning: A Legal Analysis

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EXECUTIVE SUMMARY

I. Background - Washington Supreme Court Has Twice Found Statutes Establishing Obligations on Owners of MHCs Unconstitutional

In the past 15 years, the Washington State Supreme Court has twice invalidated statutes that imposed mandatory restrictions or obligations on the owners of Manufactured Housing Communities ("MHC") in order to preserve MHCs. These landmark cases were *Manufactured Housing Communities of Washington v. State of Washington*, 142 Wn.2d 347 (2000), and *Guimont v. Clarke*, 121 Wn.2d 586 (1993).

In *Manufactured Housing*, the Supreme Court invalidated a state statute granting MHC tenant organizations a right of first refusal to purchase a MHC that was being sold. The Court concluded that the property rights of the MHC owner include the right to sell the MHC, and that while preserving MHCs provided a public benefit of preserving a source of housing, that the "statute's design and its effect provide a beneficial use for private individuals only." *Manufactured Housing*, 142 Wn.2d at 362. The Court invalidated the statute based on its conclusion that Article 1 § 16 of the Washington State Constitution forbids the taking of private property for a private use.

In *Guimont*, the Washington Supreme Court invalidated a statutory requirement that MHC owners pay the relocation costs for residents of a MHC that will be closing. The Court found that this statute violated substantive due process requirements by placing the burden of addressing the societal concern of affordable housing solely on the owners of MHCs:

> "Likewise, in this case, the costs of relocating mobile home owners, like the related and more general problems of maintaining an adequate supply of low income housing, are more properly the burden of society as a whole than of individual park owners.
>
> . . .
>
> An individual park owner who desires to close a park is not significantly more responsible for these general society-wide problems than is the rest of the population. Requiring society as a whole to shoulder the costs of relocation assistance represents a far less oppressive solution to the problem.

Guimont, 121 Wn.2d at 611.

Guidance required by the Growth Management Act to be provided by the Washington State Attorney General's Office to local governments on avoiding unconstitutional takings of private property reaches the same conclusion:

> Because government actions 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.

Advisory Memorandum: Avoiding Unconstitutional Takings of Private Property, Washington State Attorney General's Office, p. 15 (December 2006).

II. Other Legal Prohibitions to Mandatory MHC Zoning

In addition to the Washington Supreme Court's decisions in the *Manufactured Housing* and *Guimont* decisions, other legal considerations apply that would prohibit the adoption of mandatory Manufactured Housing Community Zoning ("MHC Zoning"). These include prohibitions against spot zoning, equal protection requirements, and provisions under the Growth Management Act.

III. Consideration of Mandatory MHC Zoning

In spite of these legal principles, several local governments have considered or are considering adopting mandatory MHC Zoning that would prohibit a MHC from converting to a different land use. To date, no local government in Washington State has in fact enacted a mandatory MHC zone. This is due to a number of considerations, including that the adoption of a mandatory MHC Zoning violates constitutional requirements under both regulatory takings and substantive due process doctrines.

IV. The Valid Alternative – Voluntary MHC Zoning

Because of the legal constraints against and unintended consequences of mandatory MHC Zoning, local governments should instead consider voluntary MHC Zoning. Recently, both Snohomish County and the City of Lynnwood have examined MHC Zoning issues and opted to adopt voluntary MHC Zoning. In Lynnwood, the City is proposing to offer financial incentives to MHC owners in exchange for a commitment to preserve an MHC for a defined period of time, such as 7 or 10 years. The City would agree to lower utility rates (sewer, water, stormwater) for a MHC that has agreed to remain an MHC for a specific duration. In addition, if the MHC owner opted to preserve the MHC for a minimum of ten years, the County Assessor has indicated it would be possible to value the MHC using an income-based rather than market-based method. In Snohomish County, the County adopted an ordinance in April 2007 to provide

an incentive for MHC owners to preserve MHCs by basing assessed values on the use of property as an MHC. Snohomish County established a new Mobile Home Park Zone, which the owner of an MHC could opt into for a minimum of five years in order to receive a decrease in assessed value and therefore property taxes.

This legal analysis provides an overview of why mandatory MHC Zoning is unlawful. MHCW has developed this legal analysis to provide guidance to MHC owners, MHC residents, and local governments as affordable housing issues are considered at the local level. MHCW was involved in the litigation that resulted in both the *Manufactured Housing* and *Guimont* decisions, and is committed to protecting the ability of MHC owners to convert MHCs to other land uses. Adopting mandatory MHC Zoning would result in litigation based on the principles in the Washington Supreme Court's *Guimont* and *Manufactured Housing* decisions, and will not further the cause of ensuring permanent, adequate supplies of affordable housing. This analysis should be read in concert with other information from MHCW that provides lawful and viable alternatives to mandatory MHC Zoning that will address affordable housing needs.

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LEGAL ANALYSIS

I. Background

A. Manufactured Housing Community Zoning ("MHC Zoning")

It is well-known that many areas of the Washington State have experienced significant increases in real estate values over the past decade. Recently, real estate values have continued to increase in many parts of Washington State, even while national real estate value trends have been flat or even shown declining values. Increasing real estate values will mean that lower value land uses will convert to higher value uses over time. This is especially true of MHCs in the Central Puget Sound area, where the location on existing MHC sites relative to job centers and urban commercial development makes conversion of MHCs to traditional single family and commercial development more likely. The Central Puget Sound area is expected to have population growth of over 1.5 million people by 2040, and this will continue to increase the pressures to convert MHC to more intense residential and commercial land uses.

The Manufactured Housing Communities of Washington (MHCW) represents the owners of the hundreds of MHCs in Washington State that provide affordable housing to thousands of Washington citizens. MHCW works throughout Washington State to promote both new and existing MHCs as an important source of affordable housing, and is well aware of the impacts of MHC closures on residents. While MHCs provide a source of affordable housing, the economic reality of the real estate market will result in the closure of some MHCs.

A number of local governments in Washington State have considered or are considering adopting mandatory MHC Zoning. Under MHC Zoning, the specific parcel or parcels of land being used for a MHC would be rezoned specifically and exclusively for MHC use. This means that the MHC would be forever locked in to its existing use as an MHC, and prevented from converting to a different use. Under MHC Zoning, the MHC would be singled out from the zoning in the surrounding area and assigned a zoning designation solely to benefit tenants of the MHC. Unlike the function of traditional zoning actions intended to prevent conflicting land uses and establish regulatory controls on structures to protect the public safety, health, and welfare, mandatory MHC Zoning would be solely for the purpose of benefiting private parties - the tenants of the MHC. In addition, in areas that have experienced residential and commercial development surrounding an existing MHC, mandatory MHC Zoning would be contrary to the zoning purpose of ensuring compatible land uses.

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B. Zoning, Generally

Local government zoning has two primary functions: First, to determine the allowable uses of a particular piece of property, and second, to regulate the dimensions of buildings and other improvements, such as the height, size, and setbacks. The fundamental purpose of zoning is ensure that adjacent land uses are compatible in nature, in order to protect homeowner concerns such as health, safety, community character, and property values. See J. Richard Aramburu and Jeffrey M. Eustis, *Zoning, Washington Real Property Deskbook*, Chapter 97, page 97-3.

The origin and legal basis for local government local to adopt zoning regulations is the local police power, which is the power to protect public health, safety, and general welfare. *McNaughton v. Boeing*, 68 Wn.2d 659 (1966). The Washington State Constitution, at Article 11, § 11, grants cities and counties the police power authority to protect the public health, safety and welfare. Pursuant to that authority, a city or county may regulate the use of property. They may regulate property for purposes such as abating nuisances, enforcing building and health codes, zoning and planning, and environmental protection. The police power and zoning authority of the state and local governments has been described as follows:

> It is the basis of the idea that the private individual must suffer without other compensation than the benefit to be received by the general public. It does not authorize the taking or damaging of private property in the sense used in the constitution with reference to taking such property for a public use.. Eminent domain takes private property for a public use, while the police power regulates its use and enjoyment, or if it takes or damages it, it is not a taking or damaging for the public use, but to conserve the safety, morals, health, and general welfare of the public.

Conger v. Pierce County, 116 Wn. 27, 36 (1921).

In addition to the traditional purposes for local governments to adopt zoning codes to protect health, safety, and welfare, Washington State's Growth Management Act requires the adoption of zoning and other development regulations to implement the local government's Growth Management Act Comprehensive Plan. *RCW 36.70A.120.* Local Comprehensive Plans, zoning, and development regulations must balance the fourteen goals of GMA, and be internally consistent. The Comprehensive Plan must include a housing element, which provides policies for all types of housing, including manufactured housing. RCW 36.70A.070(2). Once the Comprehensive Plan and housing element have been adopted, they become the basis for more detailed zoning and

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development regulations. In fact, MHC conversions generally bring the parcel of land into conformity with other surrounding uses. Establishing mandatory MHC Zoning would be inconsistent with many local government Comprehensive Plans, which would require reexamination and amendment of various Comprehensive Plan provisions. In addition, the Growth Management Act requires local governments to ensure that planning actions do not violate constitutional rights of private landowners. RCW 36.70A.370. The analysis prepared by the Washington State Office of the Attorney General, *Advisory Memorandum: Avoiding Unconstitutional Takings of Private Property*, includes guidance consistent with this legal opinion, as will be described later.

II. Legal Analysis

A. Constitutional Issues

Under both the federal and Washington State Constitutions, government may not take private property unless the taking is for a public use, and just compensation is paid to the owner of the private property. Just compensation is considered to be the fair market value of the property at the time of the taking. Takings generally take one of two forms: (1) a physical taking of property, where the government seeks to actually use or occupy the property; or (2) regulating or limiting the use of property under the government's police power authority in such a way as to destroy one or more of the fundamental attributes of ownership (the rights to possess and use property, exclude others, and to dispose of property), deny all reasonable economic use of the property, or require the property owner to provide a public benefit rather than addressing some public impact caused by a proposed use.

For physical takings, the government may initiate eminent domain proceedings, through which public use and necessity and just compensation are determined. In a regulatory taking, the legal action is typically initiated by the property owner.

Both federal and state courts have recognized that government regulation of private property can go "too far" so as to have the same effect on a property owner as if the government had actually physically occupied the land. In Washington State, the courts have also used a "substantive due process" test to analyze the burdens imposed by land use regulations. In general, a land use regulation may be challenged on state and federal constitutional grounds either as an unconstitutional taking or as a violation of substantive due process. *Presbytery of Seattle v. King County*, 114 Wn.2d 320, 329, cert. denied 498 U.S. 911, (1990).

Both the federal and state constitutions provide due process protections through the Fourteenth Amendment and Article 1, § 3 respectively. Substantive

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due process requires that a regulation be imposed reasonably and fairly. Under this test, a regulation must not only have a legitimate public purpose, but it must also use means to achieve that purpose that do not impose an unfair burden on affected property owners. A regulation is a taking if it violates the constitutional requirement of compensation when private property is taken for a public use, while a substantive due process violation occurs when a regulation exceeds the constitutionally permissible scope of the police power. While the remedy for a taking is compensation, the remedy for a substantive due process violation is invalidation of the regulation.

The Washington State Supreme Court has twice invalidated mandatory restrictions or obligations placed on the owners of MHCs. In *Guimont v. Clarke*, 121 Wn.2d 586 (1993), the Court invalidated on substantive due process grounds a state statute requiring MHC owners to provide monetary assistance for tenant relocation. In *Manufactured Housing Communities of Washington v. State of Washington*, 142 Wn.2d 347 (2000), the Court found that a state statute granting MHC residents a right of first refusal to purchase an MHC was an unconstitutional taking of private property for private use in violation of Article I, § 16 of the Washington State Constitution.

Both the *Guimont* and *Manufactured Housing Communities* decisions involve legal issues and analysis similar to that which would occur in an inevitable challenge against a local government's mandatory MHC Zoning ordinance. These two leading cases, as well as other supporting decisions, provide the necessary framework to understand why Washington State courts would ultimately determine that MHZ Zoning is unlawful in Washington State.

1. Regulatory Takings

The Washington Supreme Court's decisions in *Presbytery of Seattle v. King County*, 114 Wn.2d 320 (1990), and *Guimont*, 121 Wn.2d 586 (1993), established the threshold test to determine first whether a regulation constitutes a taking, and if it does not, whether the regulation violates due process. While the *Presbytery* decision was a seminal decision on this issue in Washington State, the U.S. Supreme Court issued a major regulatory takings decision shortly after the Washington Supreme Court issued *Presbytery*. See *Lucas v. South Carolina Coastal Commission*, 505 U.S. 1003 (1992). The *Lucas* decision created an inconsistency with the recent *Presbytery* opinion, which the Washington Supreme Court sought to resolve in *Guimont v. Clarke*, 121 Wn.2d 586 (1993). Thus, when the Washington Supreme Court issued the *Guimont* decision, it also provided a revised analytical framework for regulatory takings:

> Because the plaintiff must have the opportunity at the outset to prove a 'physical invasion' or 'total taking,' *Lucas* necessitates that we reorder the first two steps of our *Presbytery* threshold test. As

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> noted above, we previously asked under the threshold test whether a regulation implicated fundamental attributes of ownership *after* analyzing the purpose of the statute in preventing harm or conferring a benefit. According to *Lucas*, challenges implicating fundamental attributes of ownership, such as 'total takings' or 'physical invasions,' are subject to categorical treatment and do not require analysis of the purpose of the regulation or the legitimacy of the State's interest. [cites omitted] Therefore, based on *Lucas*, we must analyze at the outset of the *Presbytery* test whether fundamental attributes of ownership are impaired through 'physical invasions' or 'total takings,' without engaging in any harm-versus-benefit analysis or examining the legitimacy of the governmental interest.
>
> This requirement of *Lucas* can easily be squared with our *Presbytery* analysis by simply reordering the two questions of our threshold inquiry. Hereafter, the court will begin the threshold inquiry by asking whether the regulation denies the owner a fundamental attribute of ownership. Any analysis of 'physical invasions' or 'total takings,' including all facial challenges to land use regulations, will be analyzed at the outset under the first prong of the threshold test. If the plaintiff proves a 'physical invasion' or 'total taking' occurred, the plaintiff need not proceed with the remainder of the *Presbytery* analysis. . . .
>
> . . .
>
> Under the *Presbytery* threshold inquiry, as revised above, the court must first ask whether the regulation destroys or derogates any fundamental attribute of property ownership: including the right to possess, to exclude others; or to dispose of property. . .
>
> . . . If the landowner proves a 'total taking' or 'physical invasion' has occurred, and if the State fails to rebut that claim, the owner is entitled to categorical treatment under *Lucas*. [cites omitted]. In other words, the owner is entitled to just compensation without case-specific inquiry into the legitimacy of the public interest supporting the regulation.

Guimont, 121 Wn.2d at 600 – 603.

The Washington State Supreme Court then applied the revised Presbytery test to the issues in *Guimont*. *Guimont* concerned the constitutionality of the

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Mobile Home Relocation Assistance Act of 1990, Chapter 59.21 RCW. The law required MHC owners to pay a portion of their tenants' relocation costs when an MHC was converted to another use. The Washington Supreme Court determined that MHC owners were not subject to a physical taking through the statute, since under the *Lucas* case, such a physical taking "requires the landowner to submit to the physical occupation of [his or her] land." *Guimont*, 121 Wn.2d 586, at 607 (1993).

It is notable, however, than in determining that the tenant relocation assistant payments did not effect a physical taking, the Washington State Supreme Court relied on *Yee v. Escondido*, 503 U.S. 519 (1992), a prior U.S. Supreme Court decision concerning the City of Escondido's Mobile Home Residency Law, a local rent control ordinance. In determining that the relocation assistance payments did not amount to a physical taking, the Washington State Supreme Court emphasized that in the *Yee* opinion:

> ". . . the Mobile Home Residency Law provides that a park owner who wishes to change the use of his land may evict his tenants, albeit with six or twelve months notice. Put bluntly, no government has required any physical invasion of [the park owners'] property. [The park owners'] tenants were invited by [the park owners], not forced upon them by the government. (emphasis added)
>
> In Yee, the park owners could still evict the tenants and change the use of their land. Thus, the Supreme Court held the rent control ordinance in that case was only a regulation of the park owners' use of the property, and did not amount to a per se taking because it did not authorize an unwanted physical occupation of the park owners' land. (emphasis added)
>
> Like Yee, the park owners' physical takings argument in this case lacks merit. The Act on its face does not force park owners to allow others to occupy their land. Rather, the park owners have voluntarily rented space to the mobile home owners, and the Act itself does not compel the park owners to continue this relationship. Indeed, the Act still allows the park owners to terminate their tenancies, close their parks, and sell their land.
>
> . . .
>
> Likewise, for the same reasons, the Act does not unconstitutionally infringe any other fundamental attribute of property ownership, such as the right to possess, exclude others, or dispose of property.

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Guimont, 121 Wn.2d at 607, citing *Yee*, 112 S.Ct at 1528. (emphasis added).

Thus, the distinction in *Yee* relied upon by the Washington Supreme Court in *Guimont* that prevented a physical taking from occurring was that in *Yee*, the owners of an MHC could in fact convert the park to a different use. Under the MHC Zoning being considered by some Washington local governments, MHC owners could not convert the MHCs to a different land use. Thus, the adoption of mandatory MHC Zoning would be a zoning action that is squarely within the takings considerations in the *Lucas*, *Yee*, and *Guimont* line of decisions.

Though the Washington Supreme Court did not find a physical taking in *Guimont*, it did in fact invalidate the tenant relocation assistance law under a substantive due process analysis that is discussed in more detail below. The takings analysis in *Guimont* is notable for the fact that it relies on the ability of MHC owners to convert a MHC to a different land use to in concluding that no takings occurred. In a challenge to MHC Zoning, the ability to convert a MHC to a different use would not exist, and thus the appeal would be squarely within the Washington Supreme Court's analysis of *Yee* in the *Guimont* case.

2. Washington Constitution, Article 1, § 16.

In addition to the standard regulatory takings analysis in *Lucas*, Article 1, § 16 of the Washington State Constitution provides a significant additional legal barrier against MHC Zoning. Article 1, § 16 states "Private property shall not be taken for private use . . . " and ". . . No private property shall be taken or damaged for public or private use without just compensation having been first made . . . " In its *Manufactured Housing Communities of Washington* decision in 2000, the Washington Supreme Court relied on Article 1 § 16 to invalidate a state law that granted residents of MHCs a right of first refusal in the sale of a MHC.

In 1993, the Washington State Legislature adopted Chapter 59.23 RCW, the Washington Mobile Home Parks Resident Ownership Act. The Legislature adopted the Act due to concerns about the loss of affordable housing provided by manufactured housing caused by "the pressure to convert mobile home parks to other uses . . . " *Former RCW 59.23.005.*

The Resident Ownership Act provided residents of MHCs the right of first refusal to buy the MHC from the MHC owner when the owner decided to sell. Under the Resident Ownership Act, tenants would first establish a "qualified tenant organization," and then would provide the community owner notice of the organization's "present and continuing desire to purchase the community." *Former RCW 59.23.015.* After a MHC owner received such a notice from a qualified tenant organization, the owner would have to notify the tenants of any agreement to sell the community, and must disclose the terms of the agreement

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to the qualified tenant organization. *Former RCW 59.23.030.* The Act established detailed requirements and deadlines for payment by tenants to the owner of the community, and that such purchase by tenants must be as financially favorable as the agreement between the owner and the third party. *Former RCW 59.23.025; See Manufactured Housing,* 142 Wn.2d at 351-352.

MHCW challenged the law on the basis that it unconstitutionally deprived owners of MHCs of fundamental property rights under the Washington State and U.S. Constitution. MHCW argued that the Act eliminated property rights, specifically the right to (1) freely dispose of their property; (2) to exclude others; and (3) to immediately close the sale of a community. Though the *Manufactured Housing* case also included federal constitutional claims, they were not addressed because the Act was invalided on state constitutional grounds. *Manufactured Housing,* 142 Wn.2d at 353.

Because the *Manufactured Housing* case focused on state constitutional issues, the Washington Supreme Court first applied the *Gunwall* analysis – the examination of six nonexclusive neutral criteria to determine whether the Washington State Constitution extends broader rights to citizens than does the U.S. Constitution. *State v. Gunwall,* 106 Wn.2d 54, 61 (1986). The Gunwall factors are:

(1) the textual language of the state constitutional provision at issue;

(2) differences in the parallel texts of the federal and state constitutions;

(3) An examination of Washington constitutional law and common law history;

(4) Preexisting state law;

(5) Structural differences between the federal and state constitutions; and

(6) Whether the issue deals with matters of particular state or local concern.

In reviewing the *Gunwall* factors, the Supreme Court determined that the "private use" under Article 1, § 16, is defined more literally than under the federal Fifth Amendment, and that Washington's interpretation of "public use" has been more restrictive. The Court then analyzed the meaning of "private use" and "public use" under the facts of the statutory right of first refusal granted to MHC residents in the Resident Ownership Act.

The Court interpreted Article 1, § 16 to establish "a complete restriction against taking private property for private use: 'private property shall not be

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taken for private use . . .'" The Court noted that under Chapter 59.23 RCW, "the statute's **design and its effect provide a beneficial use for private individuals only.**" *Manufactured Housing*, 142 Wn.2d at 362. (emphasis added)

Were a local government to adopt mandatory MHC Zoning, this zoning action would be invalidated under the same Article 1, § 16 analysis: the "design and effect" of the zoning action would "provide a beneficial use for private individuals only" – the residents of the MHC.

The Court then reinforced precedent that "property consists of a group of rights inhering in the citizen's relation to the physical thing, as the right to possess, use, and dispose of it." *Manufactured Housing*, 142 Wn.2d at 365. In an earlier decision, the Washington Supreme Court concluded that "the substantial value of property lies in its use. If the right of use be denied, the value of the property is annihilated and ownership is rendered a barren right." *Ackerman v. Port of Seattle*, 55 Wn.2d 400, 409, (quoting *Spann v. City of Dallas*, 111 Tex. 350, 355, overruled on other grounds by *Highline School District No. 401 v. Port of Seattle*, 87 Wn.2d 6, (1976)).

In *Manufactured Housing*, the State of Washington argued that the Resident Ownership Act was a legitimate exercise of police power, and that the Act did not result in a taking under either the Washington State or federal constitution. *Manufactured Housing*, 142 Wn.2d at 354. One of the key holdings of the *Manufactured Housing* decision is that the inability of a community owner to dispose of the property as he or she saw fit was a taking under the Washington State Constitution. An equally important holding in the Court's decision was that restricting the use of manufactured housing communities to the existing use was not a "public use," but was in fact a private use prohibited by the state constitution. The State of Washington, in its argument to the Washington Supreme Court, argued that the preservation of the manufactured housing communities in order to ensure affordable housing was in fact a public use:

> "Assuming then that the chapter's right of first refusal is a taking or damaging, RCW 59.23 achieves a public use: maintaining a significant source of low income and elderly housing. Even though the right of first refusal benefits mobile home park tenants, a use may directly benefit a private party yet still be a 'public use.' [cites omitted]
>
> Here, the Legislature found that mobile home parks provide 'a significant but increasingly insecure source of homeownership for 'many Washington residents.' RCW 59.23.005 . . .
>
> In short, if this Court finds that the right of first refusal takes or damages the park owners' property, then the State has used its police power for the vital public use of preserving dwindling

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> hosing stocks for an important and particularly vulnerable segment of society.

Washington State Supreme Court Brief of Respondent, State of Washington, at 35-36; 38.

The Washington Supreme Court clearly rejected the State's argument that preserving a MHC was a 'public use':

> The State, apparently assuming 'public purpose' and 'public use' are always the same thing under the existing Washington law, argued that preserving a declining housing resource so greatly benefits the public that RCW 59.23 plainly converts the private use to a public use. It does not.
> . . .
> . . . [A]fter a mobile home park has been forcibly sold to a 'qualified tenant organization,' no member of the public can freely use the park. In fact, only the park tenants can freely use it. Although preserving dwindling housing stocks for a particularly vulnerable segment of society provides a 'public benefit,' this public benefit does not constitute a 'public use.'" [cites omitted]

Manufactured Housing, 142 Wn.2d at 371-372, 373.

Similarly, MHC Zoning would be subject to this same Article 1, § 16 analysis that occurred in the *Manufactured Housing* decision. Under the *Manufactured Housing* decision, preserving an existing MHC through mandatory MHC Zoning is not a public use, but rather is a private benefit conferred solely on the residents of the MHC. As a private benefit, restrictions on MHCs such as mandatory MHC Zoning fail to fit the overarching requirement for zoning under Article 11, § 11 of the Washington State Constitution that the benefit of a local government zoning action is "to be received by the general public." *Conger v. Pierce County*, 116 Wn. 27, 36 (1921). The local issues of concern surrounding the closure and conversion of MHCs are precisely those identified by the Washington Legislature in enacting Chapter 59.23 RCW. The Supreme Court has determined that preserving MHC residency by mandatory regulatory action, and to the detriment of MHC owners, is in fact a private use that is forbidden under Article 1, § 16 of the Washington State Constitution.

3. Substantive Due Process

In addition to the regulatory takings analysis, zoning ordinances are also subject to substantive due process requirements. The 14th Amendment of the U.S. Constitution prohibits states from "depriv[ing] any person of life, liberty, or

property, without due process of law . . . " U.S. Const. Amend. 14 § 1. The test for whether a regulation violates a property owner's substantive due process rights has three parts:

> (1) Whether the regulation is aimed at achieving a legitimate public purpose;
>
> (2) Whether the regulation uses means that are reasonably necessary to achieve the stated purpose; and
>
> (3) Whether the ordinance unduly oppresses the property owner.

Guimont, 121 Wn.2d 586, 609 (1993), *Presbytery of Seattle v. King County*, 114 Wn.2d 320, 330, cert. denied, 498 U.S. 911 (1990).

If an ordinance fails to meet any of the three prongs of the substantive due process test, then the ordinance is invalid. *Brutsche v. City of Kent*, 78 Wn.App. 370, 374 (1995), citing *Robinson v. Seattle*, 119 Wn.2d 34, 55; *Presbytery*, 114 Wn.2d at 331-332. Due process violations may also give rise to claims for damages under 42 U.S.C. § 1983. See further, *Washington Lawyer's Practice Manual*, § 23.2.45.

In the *Guimont* decision, the Court did not find a regulatory taking. However, the Court proceeded to analyze the relocation assistance payment statute under substantive due process requirements. The application of the substantive due process test to validity of the relocation assistance payments at issue in *Guimont* is telling as to why the adoption of MHC Zoning would not withstand judicial scrutiny. First, the Court determined that making funds available to mobile home owners for relocation expenses met a legitimate state interest in addressing statewide problems with relocations. *Guimont*, 121 Wn.2d at 609-610. As to the second prong of the substantive due process test, whether the means are reasonable necessary, the Court found that question "debatable," and turned to the third prong of undue oppression. *Guimont*, 121 Wn.2d at 610.

To determine whether the regulation was unduly oppressive, the Court examined a number of nonexclusive factors to weigh the fairness of the burden being placed on the property owner. These factors are considered both from the public side in examining the state's interest, and from the property owner's side in examining the impact to the burdened individual. The Court's factors included the following:

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

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- the feasibility of less oppressive solution would all be relevant.

On the owner's side,

- the amount and percentage of value loss,
- the extent of remaining uses,
- past, present, and future 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.

Guimont, 121 Wn.2d at 610, citing *Presbytery*, 114 Wn.2d at 331, (citing Stoebuck, *San Diego Gas: Problems, Pitfalls and a Better Way*, 25 J.Urb. & Contemp.L. 3, 33 (1983)).

Analyzing the various factors on the public's side, the Court found that "by requiring the closing park owner to pay [relocation costs] which can amount to extremely high sums of money, the State is placing the burden of solving housing problems on the shoulders of a few. *Guimont*, 121 Wn.2d at 611. The Court continued that

> "Likewise, in this case, the costs of relocating mobile home owners, like the related and more general problems of maintaining an adequate supply of low income housing, are more properly the burden of society as a whole than of individual park owners.
>
> ...
>
> An individual park owner who desires to close a park is not significantly more responsible for these general society-wide problems than is the rest of the population. Requiring society as a whole to shoulder the costs of relocation assistance represents a far less oppressive solution to the problem.

Guimont, 121 Wn.2d at 611.

In considering whether the relocation assistance payment obligations were oppressive on the MHC owner, the Court reached a number of conclusions that would apply equally to MHC Zoning. For example, the Court found the financial obligation on the MHC owner to be "staggering," at up to $7,500 for each tenant in the MHC. In addition, the Court noted that a MHC owner would be obligated to pay relocation assistance to all MHC tenants, including MHC tenants who were not low income. The Court concluded that:

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> There is no indication the park owners could have anticipated the Act's requirements when they opened their parks; certainly the Act itself did not give them any grace period in allowing them to decide whether to continue to use their property as a mobile home park before the Act went into effect. Thus, park owners were given no opportunity to alter their present or planned uses without subjecting themselves to the Act's onerous obligations.
>
> In this regard, we deem it important that the increased costs imposed by the Act attach to the activity of leaving a business rather than of entering or conducting the business.

Guimont, 121 Wn.2d at 611-612.

Mandatory MHC Zoning has the identical substantive due process flaws found in *Guimont*, where the Washington Supreme Court ruled that the "more general problems of maintaining an adequate supply of low income housing, are more properly the burden of society as a whole than of individual park owners." *Guimont*, 121 Wn.2d at 611. In *Guimont*, the Washington Supreme Court provided six factors that must be considered from the property owner's perspective in a substantive due process analysis. Under any of these six factors, the impact of mandatory MHC Zoning would result in significant economic losses solely on MHC owners in order to preserve affordable housing - as the Washington Supreme Court said in *Guimont*, "placing the burden of solving housing problems on the shoulders of a few." *Guimont*, 121 Wn.2d at 611. These six factors are as follows:

> **1. The amount and percentage of value loss.** Under mandatory MHC Zoning, the economic losses to MHC owners would be significant both in terms of total value and percentage. This is especially true in situations where an MHC is surrounded by valuable commercial land, and the MHC may be less desirable for continuing residential use.
>
> **2. The extent of remaining uses.** Mandatory MHC Zoning would result in the MHC owner being left with only a single use that results in a significant loss of economic value, especially compared to surrounding property owners.
>
> **3. Past, present, and future uses.** MHC owners would be unable to use property for any other use, even if such use is authorized under the zoning code.
>
> **4. The temporary or permanent nature of the regulation.** While a permanent zoning change would clearly have a greater impact on the property owner, even a temporary zoning change or

moratorium will have economic impacts, and gives rise to takings and substantive due process claims.

5. **The extent to which the owner should have anticipated such regulation.** Because the conversion of MHCs to other residential or commercial uses is done based on existing zoning and Comprehensive Plan provisions, the owners of MHCs cannot have anticipated the imposition of mandatory MHC Zoning. In fact, under existing zoning provisions, MHCs may be nonconforming uses which are generally disfavored under zoning. While such a use may be continued without expansion, it is in fact expected that the use will at some point terminate.

6. **How feasible it is for the owner to alter present or currently planned uses.** In most cases, it is very feasible for the owner of the MHC to convert the MHC to change the use to a different residential or commercial use. Thus, the MHC owner is not seeking to protect the ability to change the use of the property to a use that is not likely to occur, but in fact, to a use that is likely to occur.

These six factors required in a substantive due process analysis from *Guimont* all result in a conclusion that mandatory MHC Zoning violates the substantive due process rights of MHC owners.

4. Equal Protection

Zoning decisions can also be subject to invalidation on equal protection grounds. Under a constitutional equal protection analysis, laws resulting in unequal treatment are reviewed under varying degrees of scrutiny, depending on classification of the parties. In the land use context, an equal protection claim would likely be based on a rational relationship test. In a rational relationship equal protection challenge, a court uses the following test:

1. Whether the classification applied to the claimant applies alike to all members within his designated class;

2. Whether some basis exists in reality for reasonably distinguishing those within and without the designated class; and

3. Whether the challenged classification has any rational relationship to the purpose of the challenged regulation.

See *Yakima County Deputy Sheriff's Ass'n v. Board of Comm'rs*, 92 Wn.2d 831 (1979), and see generally, Stoebuck & Weaver, *Planning and Zoning, Washington Practice* § 4.8.

The U.S. Supreme Court has concluded that a successful equal protection claim can be brought by a class of one when the plaintiff alleges that he or she

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'has been intentionally' treated differently from others similarly situated and that there is no rational basis for the difference in treatment. *Village of Willowbrook v. Olech*, 528 U.S. 562 (2000).

Mandatory MHC Zoning may raise a variety of equal protection issues, including the differing treatment and resulting economic impact on MHC owners compared to other categories of property owners. In addition, equal protection claims could arise from the differing treatment of individual MHC owners themselves based on the income status of MHC tenants, the location of particular MHCs, or the likelihood of MHC conversion.

The equal protection requirement that regulations have a rational relationship to the particular governmental interest concerns the same issues in the *Guimont* and *Manufactured Housing* decisions, in terms of the public interest in providing affordable housing. In those decisions, the Washington Supreme Court concluded that while affordable housing is in fact a legitimate public interest, that it was unreasonable to burden the owners of MHCs with providing affordable housing for MHC tenants, a private interest.

Equal protection violations may also be included in a spot zoning challenge against mandatory MHC Zoning. This is because owners of MHCs are being differentially treated than other landowners, and the result is that other landowners allowed to retain residential or commercial zoning are being granted an economic benefit not enjoyed the owners of MHCs. Equal protections claims against MHC Zoning are especially viable given the Washington Supreme Court's finding in *Guimont* that

> "an individual park owner who desires to close a park is not significantly more responsible for these general society-wide problems than is the rest of the population. Requiring society as a whole to shoulder the costs of relocation assistance represents a far less oppressive solution to the problem.

Guimont, 121 Wn.2d at 611.

5. Inverse Condemnation

In the Manufactured Housing decision, the Court found that

> "the actual effect of chapter 59.23 RCW is more closely akin to the exercise of eminent domain, and not the police power, because the property right is not only taken, but it is statutorily transferred to a private party for an alleged public use. . . . While chapter 59.23 RCW says nothing about condemnation, its condemnatory effect is *necessarily implied*."

Manufactured Housing, 142 Wn.2d at 369. (emphasis in original).

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The State, in an attempt to prevent the invalidation of the statute, argued that even if the tenants' statutory right of first refusal resulted in the taking of the MHC owners' property rights, such taking was lawful if just compensation was paid to the MHC owner. The Washington Supreme Court rejected this argument, concluding that there could be no exercise of the state's eminent domain authority because the taking was not for a "public use," but rather was for the "private use" of the MHC tenants.

Inverse condemnation occurs when a governmental entity does not intend to acquire property through eminent domain, but in fact takes an action resulting in the taking of private property for a public purpose. If a court finds that inverse condemnation has occurred, it will award the property owner just compensation, as well as attorney costs and fees from litigating the inverse condemnation claim. However, the inverse condemnation remedy of just compensation is not available to a local government that adopted mandatory MHC Zoning, because under the Washington Supreme Court's analysis, there is no "public use" at issue, and therefore, the local government lacks the authority to use eminent domain. Like in the *Manufactured Housing* decision, the result of a challenge to mandatory MHC Zoning would not be a determination of "just compensation," but rather, invalidation of the zoning decision.

B. Growth Management Act

In addition to state and federal constitutional limitations, MHC Zoning actions may violate the Growth Management Act, or at the least would be subject to the GMA's procedural requirements for adoption. Under the GMA, local governments must adopt Comprehensive Plans, Zoning, and Development Regulations to balance the fourteen goals of the GMA. One of the GMA's planning goals is to encourage "the availability of affordable housing to all economic segments[,]" as well as "variety of residential densities and housing types, and [the] preservation of existing housing stock." *RCW 36.70A.020(4).* The Comprehensive Plan is a "generalized coordinated land use policy statement of the governing body of the county or city . . . " *RCW 36.70A.030(4).* The Comprehensive Plan serves as a general guide, while zoning and development regulations adopted based on the Comprehensive Plan provide the basis for land use permitting decisions. *Weyerhaeuser v. Pierce County,* 124 Wn.2d 26, 43 (1994).

A fundamental component of the Comprehensive Plan is the designation of Urban Growth Areas ("UGA") within which "urban growth shall be encouraged." *RCW 36.70A.110(1).* The size of and land use densities within the UGA must be sufficient to accommodate the population growth expected within twenty years. *RCW 36.70A.110(2).* UGAs should be located first in areas already characterized by urban growth that have adequate existing public facilities, such

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as water, sewer, and transportation, and then in urban areas that will be adequately served by public facilities. *RCW 36.70A.110(3).*

The Comprehensive Plan must also include specific elements, including a land use element and a housing element. *RCW 36.70A.070(1) and (2).* The Housing Element must include an inventory and analysis of housing needs, including the number of housing units needed for projected growth, and goals, policies, and objectives for preserving, improving, and developing housing, including manufactured housing. *RCW 36.70A.070(2)(i)(ii).*

RCW 36.70A.120 requires local government to "enact development regulations that are consistent with and implement the comprehensive plan." Such development regulations include zoning. *RCW 36.70A.030(7).* Thus, zoning designations must be consistent with the relevant provisions of the Comprehensive Plan, including the housing element, land use element, and UGA designation necessary to accommodate projected growth over 20 years. This relationship has been described as follows:

> "Within urban growth areas, a comprehensive plan will generally proscribe the location of various zoning classifications based on the residential capacity required to accommodate forecasted growth at urban density levels and the location of public facilities within the urban growth area. [cites omitted] Zoning ordinances that provide for densities or uses inconsistent with the land use designations in the comprehensive plan would be subject to legal challenge and could be rendered inoperative through invalidation."

Washington Lawyers Practice Manual, Chapter 23 – Growth Management Act (Brent Lloyd) § 23.1.29 (2006).

In practice, a local government's existing Comprehensive Plan, development regulations, and zoning may prevent the adoption of mandatory MHC Zoning. This is because the parcels that would be rezoned to the mandatory MHC Zoning have already been zoned as residential, commercial, or another zoning classification necessary to accommodate projected population growth or provide buildable land with existing urban services in order to implement the Comprehensive Plan. In many cases, the existing MHC land use is inconsistent with the underlying zoning and neighborhood character. Thus, mandatory MHC Zoning would make permanent an inconsistent and incompatible use, and be contrary to the purpose and effect of the original zoning designation as supported by the Comprehensive Plan. At the least, adoption of mandatory MHC Zoning would require a comprehensive reexamination of numerous other related parts of the Comprehensive Plan and development regulations.

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Comprehensive Plans may be amended in order to facilitate future zoning decisions. However, Comprehensive Plans may be amended no more than once per year, and all Comprehensive Plan amendment proposals "shall be considered by the governing body concurrently so the cumulative effect of the various proposals can be ascertained." *RCW 36.70A.130(2)(a)-(b).* These limitations would be especially relevant in the consideration of mandatory MHC Zoning, which could result in the loss of significant amounts of previously buildable urban land. The elimination of land from a local government's buildable land inventory would have a ripple effect on how a local government intended to meet its 20-year population projection and other provisions under the housing and land use elements. While the extent of conflict with the Comprehensive Plan could be minimized by applying mandatory MHC Zoning to fewer than all MHCs within a jurisdiction, this type of action would clearly be spot zoning, and would also raise constitutional equal protection issues based on the unequal treatment of different MHCs within the same jurisdiction.

Amendments to development regulations, including zoning, are not subject to the once-per-year limitation on Comprehensive Plan amendments in *RCW 36.70A.130(2)(a)-(b).* However, such amendments are subject to GMA's public participation requirements. In the case of a site-specific action such as adoption of mandatory MHC Zoning, generalized public notice is likely insufficient. See *Holbrook v. Clark County*, 112 Wn.App 354 (2002)(Adoption of legislation action does not require notice to individual landowners). In contrast, mandatory MHC Zoning would likely trigger RCW 36.70A.035(1)(a), which requires public notice in the form of "posting the property for site-specific proposals."

Planning actions under the GMA must allow be undertaken consistent with one of the GMA's 14 fundamental policies that "Private property shall not be taken for public use without just compensation having been made. The property rights of landowners shall be protected from arbitrary and discriminatory actions." *RCW 36.70A.020(6).* The Washington State Supreme Court has found that preserving MHCs for the benefit of tenants is in fact a private use, not a public use. In addition, to ensure compliance with constitutional limits, the Legislature enacted RCW 36.70A.370, which requires the Attorney General's Office to establish a process to enable local governments "to evaluate proposed regulatory or administrative actions to assure that such actions do not result in an unconstitutional taking of private property." *RCW 36.70A.370(1).* Local governments planning under GMA are required to use the process established by the Attorney General's Office to ensure that all actions are constitutional. *RCW 36.70A.370(2).*

In December 2006, the Attorney General's Office released a revised *Advisory Memorandum: Avoiding Unconstitutional Takings of Private Property.* This

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document includes a review of the variety of constitutional issues that must be considered by local governments, and provides a checklist for local governments to review on relevant takings issues. While the Advisory Memorandum does not include an exhaustive analysis of either the *Guimont* or *Manufactured Housing* cases, it does provide some useful summaries of the state of the law on takings and substantive due process:

> "[B]ecause 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."

Advisory Memorandum, at 15.

This conclusion in the Attorney General's Memorandum is consistent with the Washington Supreme Court's decisions in the *Guimont* and *Manufactured Housing* opinions, and provides authority that must be considered under GMA that mandatory MHC Zoning is unlawful.

C. Spot Zoning and Downzoning

Spot zoning is a zoning decision in which a smaller area, specific parcel, or parcel is singled out of a larger area or zone and given a use classification that is different from or inconsistent with general zoning of the surrounding land. As the Washington Supreme Court stated in *Narrowsview Preservation Association v. City of Tacoma*, 84 Wn.2d 416 (1974):

> We have recently stated that illegal spot zoning is arbitrary and unreasonable zoning action by which a smaller area is singled out of a larger area or district and specially zoned for use classification totally different from and inconsistent with the classification of the surrounding land, not in accordance with a comprehensive plan.
>
> The reasons for invalidating a rezone as an illegal spot zone usually include one or more of the following: (1) the rezone primarily serves a private interest, (2) the rezone is inconsistent with a comprehensive plan or the surrounding territory, or (3) the rezone constitutes arbitrary and capricious action. Each situation must be determined on its own facts and it is not always easy to determine conclusively whether a rezone would constitute an illegal spot zone.

Claims of spot zoning may involve of number of inquiries, including whether the zoning action bears a substantial relationship to the general welfare

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of the affected community. *Save A Neighborhood Environment v. Seattle*, 101 Wn.2d 280, 286 (1984). Where a spot zoning action confers a discriminatory benefit to a group of owners or a single owner to the detriment of neighbors or the community at large without adequate public justification, the rezone will be overturned. *Bassani v. County Commissioners*, 70 Wn.App. 389 (1993); *Anderson v. Island County*, 81 Wn.2d 312, 325 (1972). See Charles E. Maduell, *Fundamental Zoning and Land Use Actions, Practical Guide to Zoning and Land Use Law*, National Business Institute (2005).

According to Richard Settle in *Washington Land Use and Environmental Law and Practice:*

> The vice of spot zoning is not the differential regulation of adjacent land but the lack of public interest justification for such discrimination. Where differential zoning merely accommodates some private interest and bears no rational relationship to promoting legitimate public interest, it is "arbitrary and capricious" and hence "spot zoning." . . . Thus, "spot zoning" is not really a distinct legal doctrine, but a misleading term for the application of the constitutional requirements of equal protection and substantive due process.

See Settle at § 2.11(c). Mandatory MHC Zoning has all of the hallmarks of spot zoning. As the Supreme Court determined in both the *Manufactured Housing* and *Guimont* decisions, an action that preserves MHC housing solely for the benefit of the MHC residents is not an action that protects in the public interest, but is in fact an action that benefits the private interests of the MHC residents.

In this sense, MHC Zoning falls squarely into the spot zoning trap as the zoning action "merely accommodates some private interest." Professor Settle's observation that spot zoning is not a distinct legal doctrine comports with the Washington Supreme Court's conclusion that while preserving affordable housing is a valid public objective, that the objective is "more properly the burden of society as a whole than of individual park owners." *Guimont*, 121 Wn.2d at 611.

The adoption of mandatory MHC Zoning would in most cases be a downzone, because the parcel would be relegated to only a single type of less intensive land use – an MHC – rather than the pre-existing more intense use, such as high density residential or commercial use. The Planning Association of Washington and Washington State Department of Community, Trade, and Economic Development's Short Course on Local Planning describes a number of barriers to downzoning that are not typically present in area-wide zoning decisions, including:

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- Parcel specific rezoning does not have the presumption of validity that legislative actions such as area-wide zoning carry, citing *Hayden v. Port Townsend*, 93 Wn.2d 870 (1980), overruled on other grounds, *SANE v. Seattle*, 101 Wn.2d 288 (1984);

- Rezones must be based on a change in circumstances or community needs, or must be necessary to implement the policies of an adopted comprehensive plan, citing *Parkridge v. Seattle*, 89 Wn.2d 454 (1978);

- Rezoning cannot be based exclusively on the desires of public interest groups, citing *Hayden v. Port Townsend*, 93 Wn. 2d at 870 (1980);

- Rezones contrary to the comprehensive plan are generally considered to be spot zones, and are unlawful because the rezone benefits private interests rather than the public, citing *Smith v. Skagit County*, 75 Wn.2d 715, 743 (1969);

- Downzones must be consistent with the comprehensive plan, must meet a public objective, and must permit reasonable use of the property after the downzone, citing *Parkridge v. Seattle*, 89 Wn.2d 454 (1978).

See *A Short Course on Local Planning*, Planning Association of Washington and Washington Department of Community, Trade, and Economic Development, at 5-9, 5-10 (March 2006). Thus, rezoning actions in general, and parcel specific zoning actions in particular have a much more difficult burden than area wide zoning decisions.

D. Moratorium Issues

In addition to considering adopting permanent MHC Zoning, some local governments have considered the use of moratoria to temporarily prevent MHCs from converting to different uses. The adoption of even temporary restriction on MHC can raise takings issues, and the power of local governments to do enact moratoria is limited.

The U.S. Supreme Court has concluded that even temporary takings are subject to the "categorical treatment" of regulations that deny property owners all use of property. *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304 (1987). In that case, the Court stated that "Temporary" takings that deny a landowner all use of his or her property "are no different in kind from permanent takings, for which the Constitution clearly requires compensation." *Guimont*, 121 Wn.2d at 598, citing *First English*, 482 U.S. at 318.

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This discussion is of great relevance given the Washington Supreme Court's analysis that the prohibition against takings in Article 1, § 16 of the Washington Constitution is "a complete restriction against taking private property for private use." *Manufactured Housing*, 142 Wn.2d at 362. Since the takings prohibition under Article 1 § 16 is a "complete prohibition" it would clearly prohibit any type of taking, including a temporary one.

In addition, a moratorium-based taking claim would follow the same pattern as the two landmark constitutional cases regarding MHCs: both were as-applied challenges, meaning that the takings or due process violation existed upon adoption of the statute. It would not be necessary to establish damages particular to a specific MHC, nor sufficient to merely dismiss the impact of the moratorium as temporary.

In addition to the constitutional issues, the ability of local governments to adopt moratoria is limited specific types of situations that do not apply to the situation of MHC converting to a different use. Local government authority to adopt moratoria is provided at RCW 36.70A.390 of the GMA, and also at RCW 35.63.200 and 35.63A.220. These statutes both generally provide that a moratorium or interim zoning control may be effective for not longer than six months, but may be effective for up to one year if a work plan is developed for related studies providing for such a longer period. In addition, a moratorium or interim zoning control may be renewed for one or more six-month periods if a subsequent public hearing is held and findings of fact are made prior to each renewal.

The authority of local governments to adopt moratoria or interim zoning is limited to emergency situations where the local government needs to protect the status quo until permanent development regulations can be adopted. In order to adopt a moratorium or other interim zoning control without the full public participation and other procedural requirements of the GMA, local governments must first determine that an emergency exists. *McVittie v. Snohomish County*, CPSGMHB No. 00-3-0016, (Final Decision and Order, 2001). The Central Puget Sound Growth Management Hearings Board has described a moratorium as "temporary, interim, or stopgap measures to managed development activity while appropriate analysis and planning can occur." *SHAG v. City of Lynnwood*, CPSGMHB No. 01-3-0014 (Order on Motions, August 3, 2001).

Professors Stoebuck and Weaver have characterized the case on the constitutionality of building moratoria as "in considerable disarray," but have recognized the following principles:

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(1) There must be some pressing and temporary situation that justifies a development moratorium while permanent solutions to the situation can be worked out;

(2) The local government must be developing a plan to work out those solutions;

(3) The moratorium must be 'temporary,' of a length of time that relates to the time necessary to work out the plan; and

(4) The moratorium does not violate constitutional guarantees of equal protection.

Stoebuck and Weaver, *Planning and Zoning*, Washington Practice § 4.15 (2004).

The conversion of MHCs to other uses cannot be considered a temporary or emergency situation, distinct from general issue of housing affordability. This is especially so when the conversion of MHCs is being done consistent with the local Comprehensive Plan and zoning. In fact, MHC conversion generally results in a more consistent and compatible land use pattern. The conversion of MHCs cannot be considered a temporary situation because over time, lower value land uses will in fact convert to higher value land uses. This is especially true inside Urban Growth Areas, where the lower intensity and lower value MHC use will at some point convert to a higher value, higher intensity land use as envisioned by the Comprehensive Plan.

Washington's Growth Management Hearings Boards have authority to review moratoria, as they have been considered as a development regulation under GMA. *Master Builders Association of King and Snohomish Counties v. City of Sammamish* (MBA/Camwest I), CPSGMHB No. 05-3-0030c, and Final Decision and Order in case no. 05-3-0027, at 10. In addition, because a moratorium is a "development regulation" under GMA, the moratorium must implement and be consistent with the Comprehensive Plan. *MBA/Camwest I*, at 13. A local government adopting a moratorium must also consider and make findings that the moratorium is consistent with the goals and policies of the GMA and the local comprehensive plan. *MBA/Camwest I*, at 14. Thus, it would be difficult for a local government to determine that the conversion of a MHC is an emergency, if such conversion is consistent with Comprehensive Plan and zoning. In this situation, the conversion of the MHC would be implementing the Comprehensive Plan and zoning, while a moratorium would act to prevent the Comprehensive Plan and zoning from being implemented.

The conversion of a MHC to a different residential use or commercial use, consistent with the Comprehensive Plan, is unlikely to provide the basis for a declaration of emergency. This is because under RCW 36.70A.070(2) (the

housing element), the local government Comprehensive Plan must include an inventory and analysis of housing needs, and identification of sufficient land for housing necessary to accommodate a jurisdiction's 20 year population growth. The adoption of development regulations and zoning then implement those Comprehensive Plan provisions. The ad hoc adoption of a moratorium to prevent a land use activity otherwise authorized under the Comprehensive Plan and zoning would defeat the purpose of the internal consistent requirements between the Comprehensive Plan and development regulations.

E. Limits on Exactions and Fees

As a component of mandatory MHC Zoning, local governments may also consider the use of mitigation fees or exactions to be paid by MHC owners or developers when a MHC is converted to a different use. There is no authority under Washington law that enables a local government to impose a fee or exaction for this purpose.

The Washington Supreme Court concluded that the both monetary mitigation fees and dedications of land are treated as "exactions" for the purpose of a constitutional takings analysis. *Benchmark v. City of Battle Ground,* 94 Wn.App. 537, 548 (1992). The Washington Legislature has expressly prohibited local governments from imposing fees or conditioning development upon payment of impact fees unless the fee is authorized under Chapter 82.02 RCW. RCW 82.02.050 through .090 limits the impact fee authority of local governments to only collect impact fees only for the following public facilities: streets and roads; parks, open space, and recreational facilities; schools; and fire protection facilities if the area is not within a fire protection district. *RCW 82.02.050.* This statute clearly prohibits local governments from assessing impact fees to preserve MHCs. The Legislature amended the GMA in 2006 to allow voluntary and incentive-based housing programs but did not explicitly authorize local governments to charge impact fees or exactions for this purpose. *RCW 36.70A.540.*

Local government impact fee authority is further constrained by the requirements for "nexus" and "rough proportionality." First, there must be a "nexus" between the impacts of a development and the dedication being proposed. *Nollan v. California Coastal Commission,* 483 U.S. 825 (1987). In addition, an exaction must be "roughly proportionate" to the impact caused by the development. *Dolan v. City of Tigard,* 512 U.S. 374 (1994). In Washington State, the test for nexus and rough proportionality includes the threshold question whether the exaction serves a legitimate police power purpose. *Burton v. Clark County,* 91 Wn.App 505, 521-24 (1998). Based on the Washington Supreme Court decisions in *Guimont* and *Manufactured Housing,* impact fees or exactions of property to preserve MHCs do not pass the threshold question of

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whether a legitimate police power is served, because these decision conclude that preserving a MHC is to the private benefit of the MHC, beyond the scope of the police power to regulate to protect public safety, health, and welfare.

In addition, Washington courts will review development conditions or exactions under substantive due process after the exactions withstand a takings analysis. *Isla Verde v. City of Camas*, 99 Wn.App. 127, 134, aff'd on other grounds, 146 Wn.2d 740 (2000). This would then lead to the same type of substantive due process analysis in the *Guimont* and *Manufactured Housing* decisions, where the Washington Supreme Court invalidated regulations that placed the burden of protecting existing housing supply on the owners of MHCs.

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Advisory Memorandum: Avoiding Unconstitutional Takings of Private Property

December 2006

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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 2006

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.[*] 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

[*] 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).

consider these 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.

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.

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.

Prior editions of this document were published in February 1992, April 1993, March 1995, and December 2003. Those editions 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.

[†] The Office of the Attorney General reviews the Memorandum on Takings on an annual basis and updates it when necessary to maintain consistency with changes in case law. No significant case law updates have been needed since the 2006 memorandum was issues. Accordingly, the 2006 Advisory Memorandum continues as the currently recommended basis for state and local government planners to evaluate proposed regulatory or administrative action so that unconstitutional takings of private property may be avoided.

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 and balances the government's intended purpose, the means the government used to accomplish that purpose, and the financial impact on the property. 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 and balancing of interests 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.

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 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 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.

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

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

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.

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 balance the governmental interest against the effect on particular private property, and (3) challenges to permit conditions that exact some interest in 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 against 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 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) is the second form of categorical taking, requiring the payment of just compensation without further takings analysis. 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 that is 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) Balancing the Governmental Interest Against the 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 is often referred to as the "*Penn Central* balancing test," because it 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 against 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 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 against 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 balancing 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.

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 probably will be required.

Washington's rather detailed test for evaluating takings claims was set out 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.

Note: Until recently, the takings analysis also asked whether the regulation of property substantially advanced a legitimate government interest. In *Lingle v. Chevron*, 544 U.S. 248 (2005), summarized in the ***Appendix***, the United States Supreme Court explained that this question is not relevant to a claim of taking by regulation. Instead, the issue of whether a regulation substantially advances a legitimate government purpose is better 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 some interest in property as mitigation for the adverse public impact of the proposed development. Courts have referred to these types of conditions as *exactions.* 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.

The limitations that are placed upon property exactions are further discussed in the ***Appendix***, in the case note relating to the United States Supreme Court decision in *Dolan v. City of Tigard*, 512 U.S. 374 (1994), and in the case notes discussing some of the more recent Washington cases following *Dolan*.

4. Substantive Due Process.

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.

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

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 Cy.*, 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 Assoc. 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 Cy.*, 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.

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.

If a court determines a regulation has taken private property for private use, the court probably will invalidate the regulation rather than ordering compensation.

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. This means that the landowner generally must submit an application and pursue available administrative appeals of any action that the landowner contends is erroneous. Furthermore, the landowner must allow the planning or regulatory agency to explore the full breadth of the agency's discretion to allow some productive use of property. This may include seeking variances and submitting several 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 Cy.*, 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. It is premised upon the belief 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 Coun.*, 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 important to assess whether there is any profitable use of the remaining property available. *See, e.g., Florida Rock Industr., 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 ends up leaving 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 or to Grant an Easement? Regulation that requires a private property owner to formally dedicate land to some public use or that extracts an easement should be carefully reviewed. The dedication or easement that is required from the landowner must be reasonable and proportional — i.e., specifically designed to mitigate adverse impacts of a proposed development. 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.

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 balancing the economic impact against 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?

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 impact and balancing 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?

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

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.

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.

Contents of Appendix

2000 –

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

1970 – 1979

1980 – 1989

1990 – 1999

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 balancing 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 balance 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,[3] 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

[3] Cross-referenced decisions that are summarized in this ***Appendix*** are underlined.

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 balancing 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 balancing 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 –

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* balancing 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* balancing 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 balancing 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* balancing 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* balancing 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 Supreme 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 balancing 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.

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 balancing 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 substantative 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 balancing 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.[4] 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 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

[4] 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.

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 (s*ee 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* balancing 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.

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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[5] 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,

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

however (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* balancing 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 (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 than 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)

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.


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