



MEMORANDUM

TO: Lake Forest Park Tree Board

CC: Mark Hofman, Community Development Director
Larry Goldman, City Council liaison to the Tree Board

FROM: Kim Adams Pratt, City Attorney

DATE: September 25, 2024

RE: Constitutional claims to consider when amending land use regulations

Dear Tree Board, this memorandum is sent to provide you with legal issues to consider as you review possible amendments to the Tree Canopy Preservation and Enhancement regulations in Chapter 16.14 of the Lake Forest Park Municipal Code (“LFPMC”). Generally, two constitutional claims are made against land use regulations adopted by cities:

1. The regulation deprived me of my property without **substantive due process**.

No person shall be deprived of life, liberty or property without due process of law. *Washington State Constitution Article I, § 3*

2. The regulation has **taken** my private property without compensation.

The City cannot take private property for a public purpose without justly compensating the owner. *Washington State Constitution Article I, §16*.

Substantive due process. The test to determine if a property owner has been deprived of their property rights without substantive due process is whether the regulation is **rationaly related to a legitimate city interest**. The regulation cannot be arbitrary or irrational. LFPMC 16.14.030 includes Table 1, Exceptional Tree Species and Their Threshold Diameters. If threshold diameters are amended, the City needs to articulate a rational relationship between a legitimate City interest and any amendment to the threshold diameter.

For example, the City’s legitimate interest may be that Exceptional trees are the foundation of LFP’s community forest, and that the current threshold diameters in

14205 SE 36th Street, Suite 100 PMB 440, Bellevue, WA 98006 • Tel: (425) 201-5111

www.MadronaLaw.com

MEMORANDUM

LFPMC protects too few trees in LFP, and that without amending the LFPMC the result will be too few exceptional trees in LFP. Any amendment must be rationally related to the City's interest. To avoid a claim of being arbitrary, the amendment should be supported with information such as expert data, expert opinion, and data from the City's tree survey.

Takings. Some "takings" of private property are more obvious than others. An obvious one is when a city takes private property to widen a road. A more nebulous taking is a regulatory taking, which happens when a city restricts what can be done on private property to such an extent that it becomes a taking. There is no formula to calculate when fairness requires that the economic injuries caused by a regulation be compensated by the government rather than remain uncompensated and remain disproportionately concentrated on a few property owners. Whether a particular regulation/restriction will be found invalid because the government did not pay for the loss caused by it depends largely on the particular circumstances of the case.

A three-part test is generally used to determine if a regulatory taking has occurred: 1) What is the regulation's economic impact on the property owner? 2) To what extent does the regulation interfere with distinct investment backed expectations of the owner? 3) What is the character of the government's action?

1. What is the regulation's **economic impact** on the property owner? If the regulations prevent **any reasonable economic use** of the owner's property that is usually a regulatory taking and LFPMC 16.14.100 provides a reasonable use exception that may be granted by the City's Hearing Examiner so the owner can use their property.

2. To what extent does the regulation **interfere with distinct investment backed expectations**? Until a project is vested to land use regulations, cities have the authority to adopt new and amend old regulations. A regulation that continues to allow the current use of the property is more likely to pass this part of the test. If the new regulation continues to allow a reasonable return on investment it is more likely to pass this part of the test.

3. What is the **character of the government's action**? Courts will ask "what is the **severity of the burden** imposed on private property rights? And is the burden disproportionately concentrated on a few property owners?" A regulation that is concentrated on a few owners for the greater good is more likely to be ruled a regulatory taking that must be compensated.

MEMORANDUM

Thank you for taking on this project of reviewing these code provisions. Please let me know if I can help by clarifying any of the above information or answering follow-up questions.