MEMO

Date: January 2, 2025

To: Mayor Sullivan
Tumwater City Council Members
Tumwater Planning Commission Members

From: Karen Kirkpatrick, City Attorney

CC: Lisa Parks, City Administrator
Mike Matlock, Community Development Director
Brad Medrud, Planning Manager

Subject: Attorney General's Advisory Memorandum and Recommended Process for Evaluating Proposed Regulatory or Administrative Actions to Avoid Unconstitutional Takings of Private Property

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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 the government to evaluate proposed regulatory or administrative actions to assure that these actions do not result in unconstitutional takings of private property or raise substantive due process concerns. This process must be used by local governments that plan under the Growth Management Act (GMA). As a result of this direction, the *Advisory Memorandum and Recommended Process for Evaluating Proposed Regulatory or Administrative Actions to Avoid Unconstitutional Takings of Private Property* (Advisory Memorandum) was prepared. The Attorney General's Office reviews the Advisory Memorandum annually and updates it as necessary.

The current version was issued October 2024 and is available at this link: http://www.atg.wa.gov/avoiding-unconstitutional-takings-private-property.

The recommended process outlined in Part 1 of the four-part Advisory Memorandum includes the following:

1. Review and Distribute. In addition to review by the City Attorney, it is recommended that the Advisory Memorandum be distributed to all of the City's decision makers and key staff.

2. Use Warning Signals. The Advisory Memorandum states that local governments should use the "Warning Signals" to evaluate proposed regulatory actions. Examples are listed in Part Three starting on Pg. 13.

3. Develop an Internal Process. Staff and legal counsel have developed an internal process based on the Advisory Memorandum for assessing constitutional issues that uses confidential attorney-client communications and legal memoranda. This process occurs whenever action is taken to implement the Growth Management Act, adopt development regulations or land use designations, establish policies or guidelines for conditions, exactions, or impact fees, condition or deny permits for land use development or other regulatory or administrative actions are taken impacting private property.

4. Incorporate Constitutional Assessments into the Agency Review Process. The nature and extent of the assessment will depend on the type of regulatory action and the specific impacts on private property. The City assesses constitutional issues through the City Attorney's office. This information is communicated to staff and decision makers via confidential attorney-client communications including confidential attorney-client memoranda and executive sessions.

5. Develop an Internal Process to Respond to Identified Constitutional Issues. The City Attorney prepares an analysis of potential constitutional issues and options based on the Advisory Memorandum, independent analysis, and advice of outside counsel. That analysis is then communicated to staff and decision makers through verbal communication, confidential attorney-client communications and legal memoranda, and executive sessions.

Please review the Attorney General's Advisory Memorandum and use it when considering amendments to the Comprehensive Plan and associated rezones and any other land use actions that come before you. If you have any questions, please contact me.

If you have a problem with the above link to the Advisory Memorandum, prefer a printed copy, or have any questions, please contact my assistant, Sharleen Johansen, by phone at 360-701-3748 or email sjohansen@ci.tumwater.wa.us.

STATE OF WASHINGTON
OFFICE OF THE ATTORNEY GENERAL
BOB FERGUSON

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

October 2024

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

October 2024

Introduction

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

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

> ***RCW 36.70A.370 Protection of Private Property.***
>
> *(1) The state attorney general shall establish … an orderly, consistent process, including a checklist if appropriate, that better enables state agencies and local governments to evaluate proposed regulatory or administrative actions to assure that such actions do not result in an unconstitutional taking of private property….*
>
> *(2) Local governments that are required or choose to plan under RCW 36.70A.040 and state agencies shall utilize the process established by subsection (1) of this section to assure that proposed regulatory or administrative actions do not result in an unconstitutional taking of private property.*
>
> *…*

Purpose of This Document

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

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

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

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

This ***Advisory Memorandum*** is intended as an internal management tool for agency decision makers. It is not a formal Attorney General's Opinion under RCW 43.10.030(7) and should not be construed as an opinion by the Attorney General on whether a specific action constitutes an unconstitutional taking or a violation of substantive due process. Legal counsel should be consulted for advice on whether any particular action may result in an unconstitutional taking of property requiring the payment of just compensation or may result in a due process violation requiring invalidation of the government action.

Prior editions of this document are superseded by this document.

Organization of This Document

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

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

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

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

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

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

Recommended process:

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

2. Use the "Warning Signals" to Evaluate Proposed Regulatory Actions. Local governments and state agencies may use the ***Warning Signals*** in part three of this ***Advisory Memorandum*** as a checklist to determine whether a proposed regulatory action may violate a constitutional requirement. The warning signals are phrased as questions. If there are affirmative answers to any of these questions, the proposed regulatory action should be reviewed by staff and legal counsel.

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

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

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

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

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

A. Overview

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

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

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

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

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

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

When evaluating whether government action has gone too far, resulting in a taking of specific private property, courts typically engage in a detailed factual inquiry to gauge whether the government regulation is such a burden on property that it is the functional equivalent of an appropriation of that property—a regulatory "taking" requiring the payment of just compensation. This examination usually considers the magnitude of the government action's economic impact, the degree to which it interferes with legitimate property interests, 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 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 United States Constitution against the flagrant abuse of government power. *Calder v. Bull*, 3 U.S. 386 (1798).

In the context of government interference with an individual's right to use property as they wish, 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 not be clearly arbitrary and unreasonable. It must serve a legitimate governmental objective and use means that are reasonably necessary to achieve that objective. Violation of substantive due process requires invalidation of the violating government action rather than the payment of just compensation. The United States Supreme Court has clarified that substantive due process is a separate constitutional inquiry into the validity of governmental action and is not part of the Fifth Amendment takings analysis.

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 I, Section 16. Article I, 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. 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 United States Constitution, which does not have a separate provision expressly prohibiting the taking of private property for private use. *See Manufactured Housing Communities of Washington v. State,* 142 Wn.2d 347, 13 P.3d 183 (2000); *see also Yim v. City of Seattle*, 194 Wn.2d 651, 667, 451 P.3d 675 (2019) (*Yim I*) overruling *Manufactured Housing* on other grounds but confirming that article I, section 16 of the Washington State Constitution is more restrictive than the federal constitution in its near prohibition on takings 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.

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

Washington State Constitution, Article I, Section 3. Like its federal counterpart, article I, section 3 of the Washington State Constitution also provides that no person shall be deprived of property without due process of law.

2. The Exercise of Eminent Domain - Condemnation Proceedings.

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

Government historically acquires property and compensates landowners through a condemnation proceeding in which the appropriate amount of compensation is determined and paid before the land is taken and used by government. The property generally may be condemned only for a public use. Washington courts narrowly interpret what is a public use and prohibit 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 attorney's 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, courts have interpreted the state and federal constitutions 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 actually should 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, courts have interpreted the state and federal constitutions 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 examine the government's regulatory action and the degree to which it affects investment backed expectations for the use of private property, and (3) challenges to permit conditions that exact some interest in private property.

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

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

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

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

(2) Evaluating the Government's Regulatory Action and Its Effect on Particular Private Property. If the government regulation does not fall within one of the narrow categories of "per se" takings, ascertaining whether that regulation goes so far as to take private property usually requires a detailed factual investigation into the regulation's economic impact on the claimant, the extent to which it interferes with distinct investment-backed expectations, and the character of the government action. This analysis was set forth in *Penn Central Transportation Co. v. New York City,* 438 U.S. 104 (1978). The majority of regulatory takings cases will be evaluated using this traditional multi-factor analysis—weighing the impact of government regulation, the government's objectives, and the means by which they are achieved.

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

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

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

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

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.

In 2019, in *Yim v. City of Seattle*, 194 Wn.2d 651, 451 P.3d 675 (2019) (*Yim I*), the Washington Supreme Court made clear that there was no Washington-specific definition or test for a regulatory taking. Instead, the

Court adopted the definition set forth in federal law, specifically, the definition laid out in *Lingle v. Chevron,* 544 U.S. 528 (2005). In *Lingle v. Chevron*, the United States Supreme Court recognized the two categories of *per se* takings: a regulation that results in a physical invasion of property and a regulation that deprives an owner of all economically beneficial uses. In addition, the Supreme Court clarified that regulatory takings claims outside these two *per se* categories should be analyzed under the factors set forth in *Penn Central Transportation Co. v. New York City*, 438 U.S. 104 (1978). In adopting the federal analysis in *Lingle v. Chevron*, the Washington Supreme Court explicitly disavowed seven of its prior cases and implicitly disavowed any other state case that purported to adopt a test for a regulatory taking under Washington law that would diverge from federal law. In light of the Court's decision in *Yim I*, it is advisable that local governments and state agencies carefully analyze any court decisions made prior to this case to determine if the holdings and rationale in those decisions are consistent with *Yim I* and are still good law.

Note that in *Lingle v. Chevron*, the United States Supreme Court also explained that the question of whether government regulation advances a legitimate state interest is not relevant to a claim of taking by regulation. Instead, the issue of whether a regulation substantially advances a legitimate government purpose is evaluated under principles of substantive due process (discussed below).

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

The limitations that are placed upon property exactions are further discussed in the ***Appendix***, in the case notes relating to the United States Supreme Court decisions in *Dolan v. City of Tigard,* 512 U.S. 374 (1994); *Koontz v. St. Johns River Water Management District*, 570 U.S. 595 (2013), and in the case notes discussing Washington cases following *Dolan*. *See*, *e.g.*, *Sparks v. Douglas County*, 127 Wn.2d 901, 904 P.2d 738 (1995); *Burton v. Clark County*, 91 Wn. App. 505, 958 P.2d 343 (1998), *review denied*, 137 Wn.2d 1015 (1999).

4. Substantive Due Process.

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

Under Washington law, even if a government action does not effect a taking, it may be unconstitutional if it violates principles of substantive due process. Substantive due process invokes the due process provisions of the Fifth and Fourteenth Amendments to the United States Constitution to invalidate flagrant abuses of government power—actions that authorize some manifest injustice or that take away the security for

personal liberty or private property that our government was formed to protect. *Calder v. Bull*, 3 U.S. 386 (1798). While the remedy for a government action that works a taking is just compensation, the remedy for a government action that violates substantive due process is invalidation of the violating government action.

a. Substantive Due Process in Land Use Cases.

In 2019, in *Yim v. City of Seattle*, 194 Wn.2d 682, 686, 451 P.3d 694 (2019) as amended January 9, 2020 (*Yim II*), the Washington Supreme Court declined to adopt a heightened standard of scrutiny for substantive due process challenges to laws regulating the use of property as a matter of independent state law. The Court held that "state substantive due process claims are subject to the same standards as federal substantive due process claims" and clarified that rational basis review applied. Higher scrutiny is not required by article I, section 3 of the Washington State Constitution for laws regulating the use of property. The Court rejected past precedent which adopted an "unduly oppressive" test, which appeared to provide for an intermediate level of scrutiny. The court included a lengthy and non-exhaustive list of cases that it was overruling in an appendix to the decision. Counsel are advised to exercise caution when citing any decisions addressing takings and substantive due process issued prior to *Yim I* and *Yim II* to determine if those decisions are consistent with the holdings of those cases.

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).

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

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

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

5. Remedies.

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

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

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

If a court determines a regulation has taken private property for private use, the court probably will invalidate the regulation rather than ordering compensation. *See Yim v. City of Seattle*, 194 Wn.2d 651, 660, 451 P.3d 675 (2019) (*Yim I*). If a court determines there has been a substantive due process violation, the appropriate remedy is invalidation of the regulation. *Robinson v. City of Seattle*, 119 Wn.2d 34, 49, 830 P.2d 318 (1992) (overruled on other grounds by *Yim I*). 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 in state court until the landowner has exhausted all administrative remedies and explored all regulatory alternatives. The landowner generally must submit an application and pursue available administrative appeals of any action that the landowner contends is erroneous and must allow the planning or regulatory agency to explore the full breadth of the agency's discretion to allow some productive use of property. A landowner may need to seek a variance or submit multiple applications to determine the full extent to which the regulatory laws may allow or limit development. However, the landowner should not be made to explore futile options that have no practical chance of providing some meaningful use of the land. Once the government comes forward with evidence that there are regulatory options which might provide for some use of the land, the landowner has a heavy burden to show that pursuing these options would be futile. *See Estate of Friedman v. Pierce County,* 112 Wn.2d 68, 768 P.2d 462 (1989).

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

In some cases, a landowner may pursue a "facial challenge" to a law, claiming that the mere enactment of legislation results in a taking or violates due process. These are difficult cases to make because legislation is presumed constitutional and the landowner must demonstrate that under every conceivable set of facts the challenged legislation is constitutionally defective. *See Yim v. City of Seattle*, 194 Wn.2d 651, 451 P.3d 675 (2019) (*Yim I*).

Part Three: Warning Signals

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

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

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

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

1. Does the Regulation or Action Result in a Permanent or Temporary Physical Occupation of Private Property? Government regulation or action resulting in a permanent physical occupation of all or a portion of private property generally will constitute a taking. For example, a regulation requiring landlords to allow the installation of cable television boxes in their apartments was found to constitute a taking, even though the landlords suffered no economic loss. *See Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982).

This is one of two "categorical" forms of property takings. It does not require any investigation into the character of or justification for the government's actions. Its premise is that

a permanent physical occupation is such an unusual and severe impact on property that it will always be treated as an action that requires the payment of just compensation. However, because this is such a strict and narrow test, it applies only when the government physically occupies the property or provides another person the right to do so.

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

This is the other narrow categorical form of taking that does not require the balancing of the government's interests in regulation against the impact of regulation. However, in this circumstance, unlike the permanent physical occupation analysis, it is necessary to evaluate the regulation's economic impact on the property as a whole, and not just on the portion of the property being regulated. Accordingly, it is necessary to assess whether there is any profitable use of the remaining property available. *See*, *e.g.*, *Florida Rock Industries, Inc. v. United States*, 791 F.2d 893 (Fed Cir. 1986). The existence of some economically viable use of the property will preclude the use of this categorical test. Furthermore, the remaining use does not necessarily have to be the owner's planned use, a prior use, or the highest and best use of the property. However, the fact that some value remains does not preclude the possibility that the regulatory action might still be a taking of property under other takings tests that balance economic impact against other factors.

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

To ascertain the "whole" parcel being regulated in assessing the impact of regulation, the United States Supreme Court established a three-part test in *Murr v. Wisconsin*, 582 U.S. 383 (2017). This "objective" test evaluates whether a landowner would reasonably be expected to anticipate that their landholdings would be treated as a unitary whole rather than as separate parcels. The test considers "[1] the treatment of the land under state and local law; [2] the physical characteristics of the land; and [3] the prospective value of the regulated land." With regard to the third factor, the analysis should give "special attention to the effect of burdened land on the value of other holdings." See the ***Appendix*** for more discussion of this case.

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

In some situations, pre-existing limitations on the use of property could insulate the government from takings liability even though the regulatory action leaves the property with no value. For example, limitations on the use of tidelands under the public trust doctrine probably constitute a pre-existing limitation on the use of property that could insulate the government from takings liability for prohibiting development on tidelands. *See Esplanade Properties, LLC v. City of Seattle*, 307 F.3d 978, 983 (9th Cir. 2002). A proposed land use that is precluded by principles of nuisance law is another example. However, the United States 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 Require a Property Owner to Dedicate a Portion of Property, to Grant an Easement, or to Undertake Some Independent Financial Obligation? Regulation that requires a private property owner to formally dedicate land to some public use, that extracts an easement, or that imposes some independent financial obligation as a condition of development should be carefully reviewed. The dedication, easement, or financial obligation that is required from the landowner must be reasonable and proportional—i.e., specifically designed to mitigate adverse impacts of a proposed development. A distinction is made here between normal taxes and permit application fees (which may be levied under normal tax and fee authorities) and project mitigation obligations that may impose a financial expense (e.g., requiring the permit applicant to purchase additional land to establish a buffer, or expend money constructing off-site mitigation projects) as a condition of the development permit. For local governments, this duty is mirrored in RCW 82.02.020. Ultimately, the government must demonstrate that it acted reasonably, and that its actions are proportionate to an identifiable problem. Usually, the burden is on the government to identify the problem and demonstrate the reasonableness and proportionality of its regulation in relation to the specific project being conditioned. Where standardized formulas or tables are utilized, they should be based upon a careful analysis of the range of impacts being regulated, and their application to a specific project should be analyzed and documented in relation to the nexus and rough proportionality required for government-imposed exactions.

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

> ***a. Factors to Consider in a Regulatory Takings Analysis.*** Regulatory action that deprives property of all value constitutes a taking of that property. Where there is less than a complete deprivation of all value, a court will evaluate whether a taking has occurred by considering the economic impact in relation to at least two other factors: (1) the extent to which the government's action impacts legitimate and long-standing expectations about the use of the property; and (2) the character of the government's actions — for instance whether it amounts to a physical invasion or merely affects property interests though a public program adjusting the economic benefits and burdens of the property to promote the common good. Following the decision in *Lingle v. Chevron*, this inquiry is likely better understood as an evaluation of the burden of the regulation on the affected private property in relation to the regulatory objective rather than an inquiry into whether the regulation is the best way to accomplish the regulatory objective. Recall that the takings analysis is

ultimately geared to ascertain whether the regulation is such a burden on property that it is the functional equivalent of an appropriation of the property, such that compensation should be paid.

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

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

b. Factors to Consider in a Substantive Due Process Analysis. Substantive due process principles require the government to ensure that its actions are reasonably designed to advance a legitimate state interest. To determine whether the government action is reasonable, a court will consider the relation between the government's purpose and the burden on the landowner. To what extent does the landowner's land contribute to the problem the government is attempting to solve? How far will the proposed regulation or action go toward solving the problem? A court will also want to know if less intrusive solutions are feasible.

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

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

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

Conclusion

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

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. Decisions that were specifically abrogated in *Yim I* and *Yim II* are not included in this ***Appendix*** or are included with specific notation on what elements of the case remain good law. Caution should be taken when interpreting any of the Washington State cases listed below to determine if the specific holdings or rationale in those decisions are consistent with *Yim I* and *Yim II* and are still good law. There are many takings cases not discussed here, as well as several excellent law review articles on the subject. Cross-referenced decisions that are summarized in this ***Appendix*** are underlined where cited.

Contents of Appendix

2000 – 2009

2010 – 2023

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

1970 – 1979

1980 – 1989

1990 – 1999

2000 – 2009

2010 – 2023

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

Before 1970

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

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

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

1970 – 1979

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

Takings claims are evaluated by examining and weighing three factors: (1) the economic impact of the regulatory action on the property; (2) the extent to which legitimate property use expectations exist and have been interfered with; and (3) the extent to which the government has used reasonable means to achieve an important public objective. When undertaking this evaluation the court must consider the impact on the entire property owner's interest at stake, not just the portion subjected to regulation.

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

1980 – 1989

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

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

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

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

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

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

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

***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 total abrogation of the right to pass property to heirs (or similar "essential sticks in the bundle of rights" such as 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 to tribal members whose property was lost under the statute. Tribal members challenged the statute. The Court noted that, under the balancing test traditionally applied to takings challenges, the statute might be constitutional. In this case, however, the character of the government action was "extraordinary" in that it destroyed "one of the most essential" rights of ownership: the right to transfer property, especially to one's family. The Court held that such an action was a taking, regardless of the public interest that might favor the legislation.

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

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

Pennsylvania enacted a law requiring coal companies to leave certain amounts of coal in place to prevent subsidence of surface property. Keystone claimed a taking, alleging the law would require it leave up to 27 million tons of its coal un-mined, thereby effectively appropriating its coal for a public purpose. Keystone challenged the law on its face, rather than challenging its application in a particular set of facts. The Court held Keystone had a difficult burden of proof because legislation is presumed to be constitutional. The Court explained that legislation properly may regulate an activity to prevent severe impacts to the public, even if the activity has not traditionally been classified as a nuisance. Absent a showing that the legislation had a severe impact on Keystone's entire property (the 27 million tons of coal was about two percent of Keystone's holdings) the Court declined to invalidate the legislation. In response to Keystone's arguments that its coal had been appropriated for a public purpose, the Court reaffirmed that takings law does not compensate a landowner for every loss in value. The Court refused to consider the coal left behind as a separate piece of property and affirmed that takings law evaluates the impact of regulation on the entire property held by the landowner, not just the portion being regulated.

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

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

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

1990 – 1999

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

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

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

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

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

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

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

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

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

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

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

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

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

2000 – 2009

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

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

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.

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

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

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

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

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

***Lingle v. Chevron U.S.A. Inc.*,**
544 U.S. 528, 125 S. Ct 2074, 161 L. Ed. 2d 876 (2005)

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

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

government regulation, or (4) a land-use exaction violating the *Nollan* and *Dolan* reasonable relationship and proportionality standards.

***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 United States 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 United States Supreme Court affirmed. The Court held a government action serves a government use as long as it advances a public purpose. Relying on precedents extending back to the 19th century, the Court rejected the argument that "public use" literally means "use by the general public." The Court looked instead to the state legislative determination as to whether the proposed use was a public use and held that in some circumstances economic development is a valid public use that can justify the condemnation of private property through eminent domain.

2010 – 2024

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

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

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

***Arkansas Game and Fish Commission v. United States*,**
568 U.S. 23, 133 S. Ct. 511, 184 L. Ed. 2d 417 (2012)

When the government makes a decision to release water from a retaining dam, it can be sued under the federal Takings Clause for damage to downstream property

arising from the "invasion" of water (even if the downstream flooding is temporary in duration), provided the released water causes sufficient damage that is traceable to the decision to release.

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

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

***Koontz v. St. Johns River Water Management District*,**
570 U.S. 595, 133 S. Ct. 2586, 186 L. Ed. 2d 697 (2013)

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

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

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

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

***Horne v. Department of Agriculture*,**
569 U.S. 513, 133 S. Ct. 2053, 186 L. Ed. 2d 69 (2013)
576 U.S. 350, 135 S. Ct. 2419, 192 L. Ed. 2d 388 (2015)

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

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

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

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

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

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

turn over a portion of its raisin crop without just compensation as a regulatory condition of participating in interstate commerce.

Murr v. Wisconsin,
582 U.S. 383, 137 S. Ct. 1933, 198 L. Ed. 2d 497 (2017)

The "whole parcel" is considered when evaluating the impact and economic effect of land use regulation and is determined based upon an objective test of whether a landowner would reasonably expect their land holdings to be aggregated or treated separately.

The Murr family owned two adjacent riverfront lots. They decided to sell one lot and retain the other. However, state property regulations precluded sale or development of adjacent riverfront parcels of land held by a common landowner unless each parcel has at least one acre of land suitable for development. Because each lot had less than the required room for development, the separate sale of one parcel was not permitted. Murr sued, alleging all or most of the value of the parcel they wanted to sell had been taken. The Supreme Court affirmed lower court determinations that both the Murr parcels should be evaluated as a whole parcel and that no taking had occurred because the whole parcel retained substantial value.

The Court rejected Murr's argument that an affected parcel is defined simply by the two parcels' lot lines. The Court also rejected the State's proposed test—whether any state law treats the parcels as a unitary whole. (The state law here treated adjacent riverfront parcels that came to be held in common ownership as having been effectively "merged" into one parcel.) Instead, the court adopted an "objective" three-part test of whether a reasonable landowner would consider the parcels as separate or unitary. The test evaluates three factors: "[1] the treatment of the land under state and local law; [2] the physical characteristics of the land; and [3] the prospective value of the regulated land." With regard to the third factor, the analysis should give "special attention to the effect of burdened land on the value of other holdings." Applying these factors, the Court concluded that Murr's two lots should be treated as one for takings analysis. First, Wisconsin property law—specifically, the merger provision—treats the two parcels as one. Second, the landowners reasonably should have anticipated regulation of their contiguous lots because of their "rough terrain," "narrow shape," riverfront location, and preexisting federal, state, and local regulations along the river. Third, the lots are more valuable when combined.

Knick v. Township of Scott, Pennsylvania
588 U.S. 180, 139 S. Ct. 2162, 204 L. Ed. 2d 558 (2019)

A property owner has an actionable Fifth Amendment takings claim in federal court at the time that a local government takes the property and can bring a claim in federal court in a §1983 action.

Prior to *Knick*, a property owner could not bring a takings claim against a local government in federal court until a state court had denied a claim for compensation under state law. Here the Court overruled *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) and restricted the holdings of *San Remo Hotel v. City and County of San Francisco*, 545 U.S. 323, 125 S. Ct. 2491, 162 L. Ed. 2d 315 (2005) and *MacDonald, Sommer & Frates v. Yolo County*, 477 U.S. 340, 106 S. Ct. 2561,

91 L. Ed. 2d 285 (1986). *Williamson County* held that a takings claim was not ripe in federal court until the property owner had been denied compensation in state court. *San Remo Hotel* held that a state court's resolution of a takings claim would generally have a preclusive effect in a subsequent federal proceeding. The *Knick* Court recognized that these decisions created a "trap" for property owners that would prevent a federal takings claim from being heard if compensation were denied on state law grounds. The Court concluded that a state court litigation requirement was "an unjustifiable burden on takings plaintiffs" and held that the property owner could bring a takings claim under §1983 at the time the government takes the property. *Knick* at 2168.

***Cedar Point Nursery v. Hassid*,**
594 U.S. 139, 141 S. Ct. 2063, 210 L. Ed. 2d 369 (2021)

A California regulation granting labor organizations a "right to take access" to an agricultural employer's property in order to organize employees is a per se physical taking of property and was held to be unconstitutional.

California state law guarantees agricultural workers the right to self-organize and makes it an unfair labor practice for employers to interfere with that right. The California Agricultural Labor Relations Board adopted a regulation under that statute that provided that agricultural workers' right to self-organization included a right of access by unions to the employers' property for the purpose of meeting with and talking to employees about labor issues and union organization. The Supreme Court found that the regulation which provided for union access to the employer's land for three hours per day for 120 days a year, "appropriates for the enjoyment of third parties the owners' right to exclude." *Cedar Point Nursery* at 2072. Citing *Loretto*, the Court found this right of the union to physically enter and occupy the employer's property was a per se physical taking.

***Tyler v. Hennepin County, Minnesota, et al.*,**
598 U.S. 631, 143 S. Ct. 1369, 215 L. Ed. 2d 564 (2023)

Governments may impose property taxes and may foreclose on property to enforce and recover due taxes along with interest and penalties. However, governments may not take more than is due and must refund excess recoveries to the taxpayer.

Washington, like most states and the federal government, provides that excess recovery after a tax foreclosure sale to recover unpaid taxes, interest and penalties must be refunded to the taxpayer. However, Minnesota's statutory scheme provided that the taxpayer had no property interest in surplus proceeds from a tax foreclosure sale. In this case, Ms. Tyler owed Hennepin County approximately $15,000 in unpaid real estate taxes, interest and penalties. Hennepin County foreclosed on and sold her property for approximately $40,000, keeping the excess $25,000 as provided by Minnesota statute. The Eighth Circuit Court of Appeals upheld the constitutionality of the Minnesota statute and affirmed the District Court's dismissal of Tyler's takings claim deciding that, as she had interest in her property under Minnesota law, she had sustained no injury and thus had no standing to bring her takings claim. The Supreme Court reversed and found that Tyler had suffered financial harm sufficient for standing and had stated a claim under the Takings Clause of the Fifth Amendment. The Court stated that taxpayers are entitled to the

surplus in excess of debt owed and to withhold such surplus is a violation of the Fifth Amendment.

Sheetz v. County of El Dorado, California
601 U.S. 267, 144 S. Ct. 893, 218 L. Ed. 2d 224 (2024)

The Supreme Court held that permit conditions imposed by legislative action are subject to the same takings analysis under Nollan and Dolan as permit conditions imposed on an individual permit applicant by administrators (i.e. executive branch officials administering the permitting process). The Court held that the Takings Clause does not distinguish between legislative and administrative permit conditions.

El Dorado County's Board of Supervisors adopted land use planning regulations requiring developers to pay a traffic impact fee as a condition of receiving a building permit. The traffic impact fee amount was not based on costs specifically attributable to the impacts of the particular project. George Sheetz challenged the substantial traffic fee he was assessed ($23,420) when he sought a permit to build a modest prefabricated house on his property. Sheetz contended in state court that the traffic impact fee was an unlawful "extraction" of money in violation of the principles laid out in *Nollan* and *Dolan*. After the California Supreme Court denied review, Sheetz sought review by the United States Supreme Court which granted certiorari.

The Supreme Court's decisions in *Nollan* and *Dolan* address the potential abuse of the permitting process by setting out a two-part test. First, permit conditions must have an "essential nexus" to the government's land-use interest, ensuring that the permit condition is related to some impact associated with the property owner's intended action. Second, permit conditions must have "rough proportionality" to the development's impact on the land-use interest. A permit condition may not require a landowner to give up more than is necessary to mitigate harms resulting from new development.

The California Courts upheld the County's traffic impact fee with the rationale that the *Nollan/Dolan* test does not apply to monetary fees imposed by a legislature. The Supreme Court disagreed finding that nothing in constitutional text, history, or precedent supported exempting legislatures from ordinary takings rules. The Court held that conditions on building permits are not exempt from scrutiny under *Nollan* and *Dolan* just because a legislative body imposed them.

***DeVillier, et al. v. Texas*,**
601 U.S. 285, 144 S. Ct. 938, 215,___ L. Ed. 2d ___ (2024)

Richard DeVillier and more than 120 other petitioners owned property on the north side of Interstate Highway 10 (I-10) between Houston and Beaumont, Texas. The State of Texas had built a flood barrier along the median of I-10 which acted to impound water on the north side of the highway while keeping the south side of I-10 open as an emergency excavation route. Petitioners brought suit in Texas state court asserting an inverse condemnation claim that their properties on the north side of I-10 were flooded and destroyed by the impoundment of water during hurricanes and tropical storms and that they bore the burden of the benefit to the public of an open evacuation route during such storms. The complaint alleged violations of the

Texas State Constitution and the Takings Clause of the federal constitution. The State of Texas removed the suit to federal court and then moved for dismissal of the Takings Clause claims contending that the federal takings claim must be brought under 42 U.S.C. § 1983 and further that the § 1983 claims fail as they cannot be brought against a state but instead must be brought against a state official. Petitioners contended that their federal takings claim could be directly brought against the state under the Fifth Amendment. The Fifth Circuit Court of Appeals agreed with the State of Texas and held, per curium, that the Fifth Amendment Takings Clause as applied to the State of Texas through the Fourteenth Amendment does not provide a right of action for a takings claim against the State.

The Supreme Court granted certiorari to decide whether a property owner may sue for just compensation directly under the Takings Clause. The Court examined prior precedent and while the Takings Clause provided the substantive rule of decision for the equitable claims in prior cases, the Court found that no prior case had held that the clause creates a cause of action for damages, a legal and not equitable remedy. However, the Court went on to hold that it was premature to decide the question of whether the Takings Clause was self-executing in providing that legal remedy as the Petitioners had a viable state law inverse condemnation cause of action based on both the Texas and federal constitutions. The Court vacated the decision of the Court of Appeals and remanded to the district court to allow the Petitioners to amend their complaint and proceed with the state law cause of action.

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 United States 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.

***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 United States 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. While several of the federal cases cited in this opinion have been overruled or limited by the United States Supreme Court in *Knick v. Township of Scott, Pennsylvania*, the holding in this case appears sound under a state law analysis. 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

***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 landlocked 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.

***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, 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 an 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.

2000 – 2009

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

Under the Washington State 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 finding that article I, section 16, of the Washington State Constitution, which prohibits government from taking private property for a "private use," provides greater protection than the federal Constitution. While the analysis of this decision related to the definition of a regulatory taking has been abrogated by *Yim I*, the Washington Supreme Court confirmed in *Yim I* the greater protections provided in article I, section 16 and the near prohibition on takings of private property for private use. The appropriate remedy for violation of this prohibition is invalidation of the regulation.

***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.

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 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 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.

***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*, 544 U.S. 977 (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.

***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 I, section 16 of the Washington State 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.

***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.

***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.

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

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

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

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

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

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

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

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

The PUD leased land owned by North American, a private company, to locate electrical generators, and indicated its intent to negotiate purchase of the leased land. When purchase negotiations broke down, the PUD Commission approved a resolution authorizing condemnation of the land and filed a condemnation petition.

North American challenged the petition on procedural grounds. The Washington Supreme Court held that the statutory notice requirements in certain sections of RCW Title 35 apply to PUDs and are mandatory, and that the PUD complied with those requirements. The Court refused an invitation to constitutionalize the statutory notice requirements. It also affirmed the trial court's finding that substantial evidence supported a determination of public use and necessity.

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

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

In response to a suspected methamphetamine operation, a King County District Court judge issued a warrant authorizing the search of an abandoned warehouse, several outbuildings, eight semitrailers, and a mobile home on property in Kent owned by Brutsche. Because of the methamphetamine connection, the search was considered high risk. In executing the warrant, the police gained access to several of the structures by using a battering ram, damaging doors and door jambs in the process. Brutsche maintained the destruction was unnecessary because he offered his keys to the officer in charge, and offered to escort the officers around the property and open all doors for them. The police found no evidence during their search, and took no subsequent prosecutor actions. Brutsche filed a lawsuit alleging trespass and the unconstitutional taking of private property. In denying the taking claim, the Court held that this case was indistinguishable from *Eggleston*, in which the Court found that the destruction of property by police activity pursuant to a valid warrant is a valid exercise of the police power to conserve the safety, morals, health and general welfare of the public, and is not a taking under article 1, section 16 of the Washington State Constitution. The Court also rejected Brutsche's claim that the damage to his property constituted a permanent physical occupation of his property under *Loretto*.

2010 – 2024

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

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

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

RMA then brought a claim of inverse condemnation, along with other claims, contending the superior court lacked subject matter jurisdiction to consider the petition for condemnation because the board lacked the power of eminent domain.

The Court of Appeals agreed and dismissed the condemnation action, holding (1) that statutes delegating the state's sovereign power of eminent domain are strictly construed; (2) that any delegation of that power must be express or clearly implied; and (3) that the governing statute, RCW 14.08.200, did not authorize the city and county to delegate their power to condemn to the board.

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

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

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

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

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

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

In an earlier appeal, Union Elevator prevailed on its claim of inverse condemnation for loss of feasible access to its grain elevator facility because of a highway project that redesigned and upgraded State Route 395. 96 Wn. App. 288 (1999). After relocating its facility, Union Elevator prevailed in a claim for statutory compensation for new equipment under the Relocation Act, RCW 8.26. 144 Wn. App. 593 (2008). Union Elevator then sought interest on the statutory compensation awarded under RCW 8.26, arguing that it was part of just compensation for inverse condemnation. The Washington Supreme Court rejected that claim, based on the language of the statute and the absence of any statutory waiver of sovereign immunity in the statute, holding that relocation benefits and interest under RCW

8.26 cannot be considered part of the compensation and damages available for inverse condemnation.

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

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

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

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

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

On the same day a developer submitted a site plan application for a condominium building on Thun's property, the city rezoned most of the property. The new zoning did not allow condominiums. Thun claimed the rezone was an unconstitutional taking under article I, section 16. The court of appeals held the as-applied takings claim was not ripe for review because no building permit application had been filed. The court explained that a plaintiff need not show ripeness to bring a facial takings claim, but in an as-applied claim the plaintiff must show (1) that there has been a final decision by the municipality, and (2) that the plaintiff has sought compensation from the municipality for the alleged taking. Where there is uncertainty or questions that may be resolved by a building permit or variance, the court will decline to find a final decision. More than uncertainty is required to show that exhaustion of administrative remedies would be futile. This decision is notable for having applied the ripeness standards for takings claims brought under the federal constitution to the "final decision" requirement recognized by Washington courts. Note that the discussion of the standard applicable to regulatory takings claims in this opinion has been abrogated by *Yim I*.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

A group of homeowners sued PSE (under nuisance theories) and the City of Kirkland (under an inverse condemnation claim) alleging damage associated with the harmful effects of electromagnetic energy emanating for a cell tower constructed by PSE and permitted by the City of Kirkland. The trial court dismissed their taking claim against the city on the basis that it should have been raised in a timely Land Use Petition Act (LUPA) challenge. The Washington Supreme Court reversed on this point, holding that claims for eminent domain damages do not need to be brought under LUPA. Nevertheless, the Court found that the taking claim was properly dismissed. Citing *Phillips v. King County,* the Court held that principles of proximate causation and the public duty doctrine preclude a taking claim based solely on the issuance of a permit, even if the ensuing development allegedly produces some harm. Government permitting that facilitates a third party project

involves no appropriation of property for public use, no damage associated with construction of a public project, and no regulation of property use sufficient to state a claim under eminent domain or regulatory takings law.

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

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

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

***Kinderace LLC v. City of Sammamish*,**
194 Wn. App. 835, 379 P.3d 135 (2016), *review denied*, 187 Wn.2d 1006 (2017), *cert. denied*, 137 S. Ct. 2328 (2017)

Using a boundary line adjustment to create an undevelopable new parcel does not support a claim that the parcel's owner has been deprived of all economically viable use of the parcel.

By means of a boundary line adjustment, Kinderace LLC created a new 32,850 square foot parcel of which all but 83 square feet had been designated by the City as environmentally critical areas and buffers. Before the boundary line adjustment and development application, Kinderace used the subject parcel as part of a multi-party development venture, allowing valuable development of a Professional Center to proceed by using the subject parcel as a storm water detention pond. A stream also ran through the subject parcel. After development occurred, Kinderace used a boundary line procedure to isolate the stream area and storm water pond on a new legal parcel separate from the developed upland property.

Kinderace then requested a reasonable use exception that would have allowed it to proceed with a proposed development project on the new parcel. By that time, however, the City's stream buffers had been enlarged and covered most of the newly configured parcel. The City therefore denied Kinderace's request, and Kinderace brought a regulatory takings claim against the City, alleging that the denial deprived it of all economically viable use of the parcel—a per se "total taking."

The Court of Appeals considered this history when rejecting Kinderace's claim that the boundary line adjustment had created a new discrete parcel of land, with value, all of which had been taken by the denial of a development permit. Relying on the relevant statutes, the court rejected the argument that a boundary line adjustment inherently creates a developable parcel. As to the takings claim, the Court held it was appropriate to consider the prior value Kinderace obtained in using the subject property to develop other property, and that this consideration of value barred

Kinderace's claim that it had been deprived of all economic value associated with the new allegedly undevelopable parcel.

***Tapio Investment Company I v. State*,**
196 Wn. App. 528, 384 P.3d 600 (2016), *review denied*, 187 Wn.2d 1024 (2017)

Preparatory activities that might lead to an exercise of eminent domain do not themselves effect a taking of property, unless those activities physically or legally interfere with the property's use.

Tapio owned a three-acre office park located near a proposed freeway interchange, which was part of the Department of Transportation's (DOT) ongoing highway expansion project in that area. Even though DOT had not physically or legally interfered with the use of Tapio's property, Tapio brought an inverse condemnation claim arguing that publicity about the freeway project and DOT's acquisition of nearby properties hampered Tapio's leasing activity. Tapio asserted the market value of its office park had been so diminished as to constitute a taking.

The Court of Appeals affirmed the trial court's grant of summary judgment in favor of DOT. The Court held that "[l]egal acts that do not interfere, physically or by regulating use of private property, are not takings, and neither the Washington nor federal constitutions have been held to require compensation for depreciation in market value caused by such legal acts." The Court specifically rejected Tapio's argument that DOT's preparatory planning actions had a quasi-regulatory effect requiring application of the *Penn Central* fact specific takings analysis.

The Court also rejected Tapio's alternate and more traditional inverse condemnation claims. Its conclusion is supported by a long line of case law concluding there is no taking based upon lost property value associated with planned construction and possible future exercise of eminent domain, absent facts showing the government has taken actual steps that physically touch property or legally restrict its use.

***Yim v. City of Seattle (Yim I)*,**
194 Wn.2d 651, 451 P.3d 675 (2019)

Seattle landlords challenged the City of Seattle's "first-in-time" or FIT rule which required that landlords provide prospective tenants of their rental criteria, screen completed applications in chronological order and offer the vacancy to the first qualified applicant (subject to a limited number of exceptions). The trial court found that the FIT rule was a per se taking under article I, section 16 of the Washington State Constitution as it destroyed one or more fundamental attributes of ownership citing to prior Washington precedent which appeared to create a Washington-specific definition of a regulatory taking. The Washington Supreme Court took the opportunity in *Yim I* to clarify that prior Washington case law had attempted to achieve consistency with federal takings law but sometimes diverging lines of federal authority had given rise to Washington cases that appeared to create a new Washington specific per se category of regulatory takings that would invalidate regulations that "destroy one or more of the fundamental attributes of property ownership (the right to possess, to exclude others, or to dispose of property)". The Washington Supreme Court clarified in *Yim I* that the federal definition of a regulatory taking controlled and declined to adopt a state specific analysis for regulatory takings under article I, section 16. The Court did note that article I, section 16 is more protective of takings of private property and prohibits takings

for private use but that this analysis involves a separate question than the definition of a regulatory taking. The Court concluded by explicating adopting the definition of regulatory taking laid out in *Lingle v. Chevron*; that there are only two per se categories of regulatory takings: 1) where the government requires permanent physical invasion of a property and 2) where the regulations deprive the owner of all economically beneficial use of a property. If the alleged taking does not fit into either category, it must be analyzed on a case-by-case basis using the factors laid out in *Penn Central*. The Court specifically disavowed some of its precedent, but many other Washington cases rely on whole or in part on the analysis of these disavowed precedent. Therefore, practitioners are urged to proceed with caution with citing case law prior to *Yim I* describing the definition of a regulatory taking.

***Yim v. City of Seattle (Yim II)*,**
194 Wn.2d 684, 451 P.3d 694 (2019), as amended January 9, 2020

In this case, the Washington Supreme Court answered questions on certification from the federal district court from the Western District of Washington regarding the proper standard to analyze a substantive due process claim involving a land use regulation under the state constitution. This case, *Yim II*, was issued on the same day as *Yim I* and answered these questions in parallel with its holdings on the definition of a regulatory taking in *Yim I*. Here, the plaintiffs challenged the City of Seattle's Fair Chance Housing ordinance which among other provisions, prohibited inquiry into a prospective renters' criminal record or history of eviction. The Washington Supreme Court held that the standard for a substantive due process claim in this context under state law is the same as that under federal law and that the applicable standard is rational basis. The Court rejected the proposition that when a "fundamental property interest" is involved, courts should review claims under the state constitution with an intermediate heightened scrutiny. Use of property is not recognized as a fundamental right for substantive due process purposes. The Court clarified that prior precedent was not correct if it suggested that such property interests were fundamental rights deserving of intermediate or even strict scrutiny. The Court rejected past precedent which adopted a "unduly oppressive" test which appeared to provide for an intermediate level of scrutiny under federal law as *Lingle v. Chevron* clarified that these other "tests" correspond to rational basis review. The Court clarified and unambiguously held that rational basis review applies under article I, section 3 of the Washington State Constitution for challenges to laws regulating the use of property. The Court specifically disavowed a long list of prior cases but other Washington cases may suggest that higher scrutiny is appropriate. Therefore, practitioners are urged to proceed with caution with citing case law prior to *Yim II* describing an appropriate level of scrutiny other than rational basis review.