

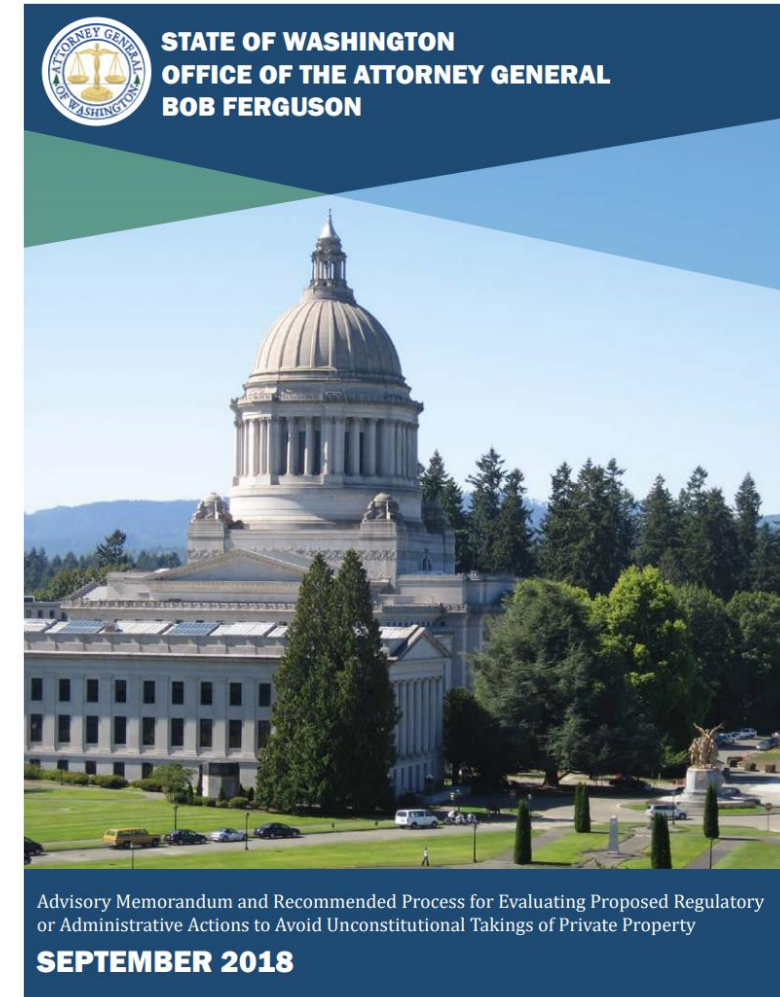
Attorney General's Advisory Memorandum



Planning Commission – January 23, 2024

Intent

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



Background

- The State Attorney General advises state agencies and local governments on an orderly, consistent process 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



Background

- The Attorney General prepared the Advisory Memorandum and Recommended Process for Evaluating Proposed Regulatory or Administrative Actions to Avoid Unconstitutional Takings of Private Property
- The Attorney General's Office reviews the Advisory Memorandum annually and updates it, as necessary
- City staff uses the memorandum to guide the development of defensible policies and regulations that protect property rights
- It is especially relevant as the Planning Commission considers new and amended policies and regulations that affect land use



General Constitutional Principles

1. Police Power
2. Regulatory Takings
3. Substantive Due Process



Police Power

1. State governments have the authority and responsibility to protect the public health, safety, and welfare
2. This authority is an inherent attribute of state governmental sovereignty and is shared with local governments in Washington under the state constitution
3. Pursuant to that authority, which is called the “police power,” the government can regulate or limit the use of property
4. Examples include abatement of public nuisances, the termination of illegal activities, and the establishment of building codes, safety standards, sanitary requirements, zoning regulations, or environmental protections



Regulatory Takings

1. Government regulation of property is a necessary and accepted aspect of modern society and compensation is not required for every decline in the value of a piece of private property
2. However, if government regulations go “too far,” they may constitute a taking of property
3. 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
4. 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



Substantive Due Process

1. 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
2. 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
3. To withstand a claim that principles of substantive due process have been violated, a government action must (1) serve a legitimate governmental objective, (2) use means that are reasonably necessary to achieve that objective, and (3) not be unduly oppressive



U.S. Constitutional Provisions

Takings Clause and Due Process Clauses

1. The Fifth Amendment provides that private property shall not be taken for public use without the payment of just compensation
2. 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
3. The Fifth and Fourteenth Amendments also provide that no person shall be deprived of property without due process of law



State Constitutional Provisions

Washington State Constitution, Article 1, Section 16

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



Warning Signals

1. Does the Regulation or Action Result in a Permanent or Temporary Physical Occupation of Private Property?
2. Does the Regulation or Action Deprive the Owner of All Economically Viable Uses of the Property?
3. Does the Regulation or Action Deny or Substantially Diminish a Fundamental Attribute of Property Ownership?



Warning Signals

4. Does the Regulation or Action Require a Property Owner to Dedicate a Portion of Property, to Grant an Easement, or to Undertake Some Independent Financial Obligation?
5. Does the Regulatory Action Have a Severe Impact on the Landowner's Economic Interest?

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



Review Process Followed

To evaluate proposed regulatory or administrative actions to avoid unconstitutional takings of private property, the City:

1. Reviews and distributes Advisory Memorandum
2. Uses “warning signals”, such as the examples in the Advisory Memorandum to evaluate proposed regulatory actions
3. Applies an internal process to assess constitutional issues
4. Incorporates constitutional assessments into the City review process
5. Uses an internal process to respond to identified constitutional issues



Questions?

