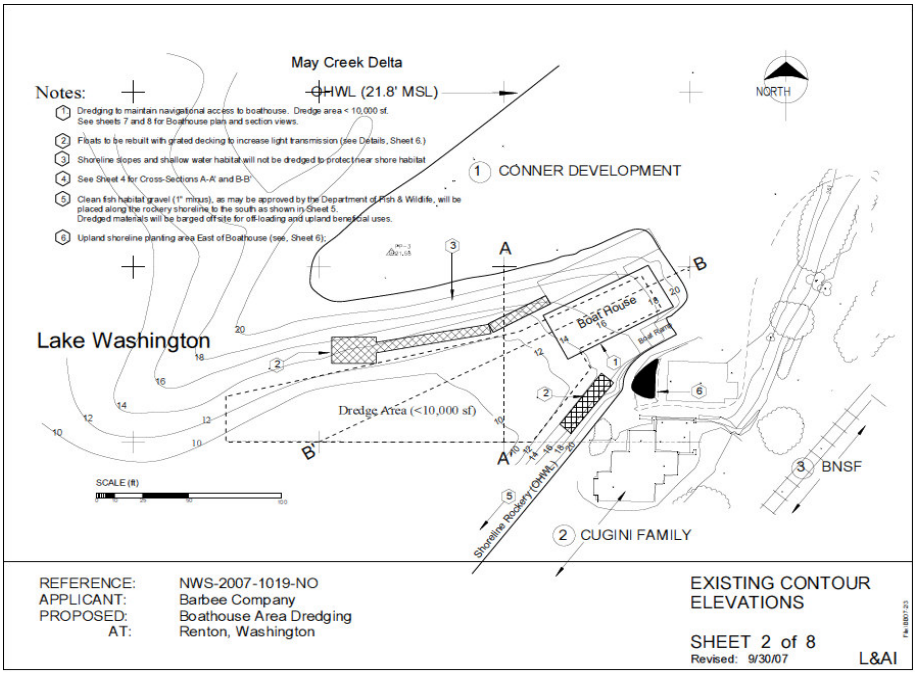
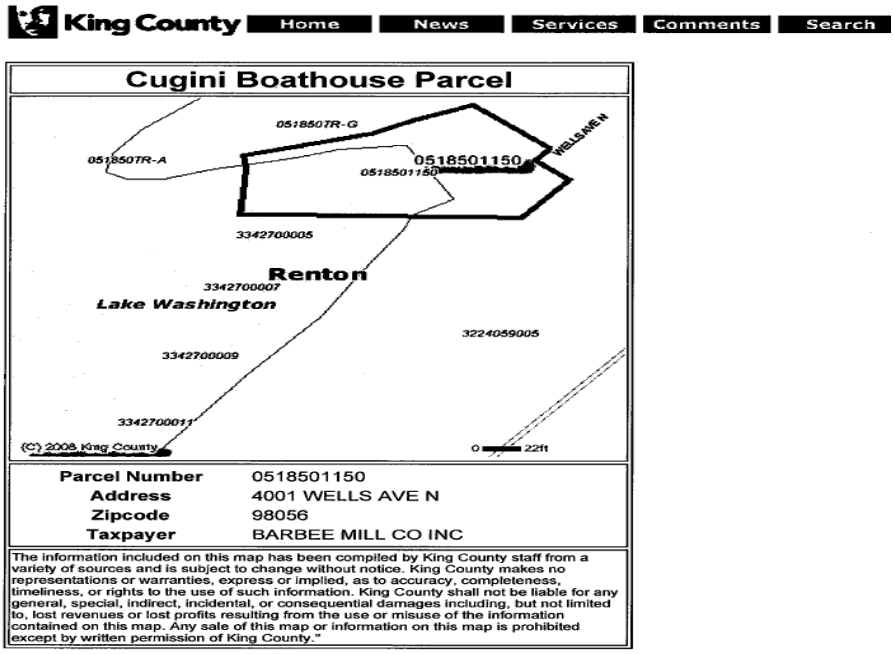
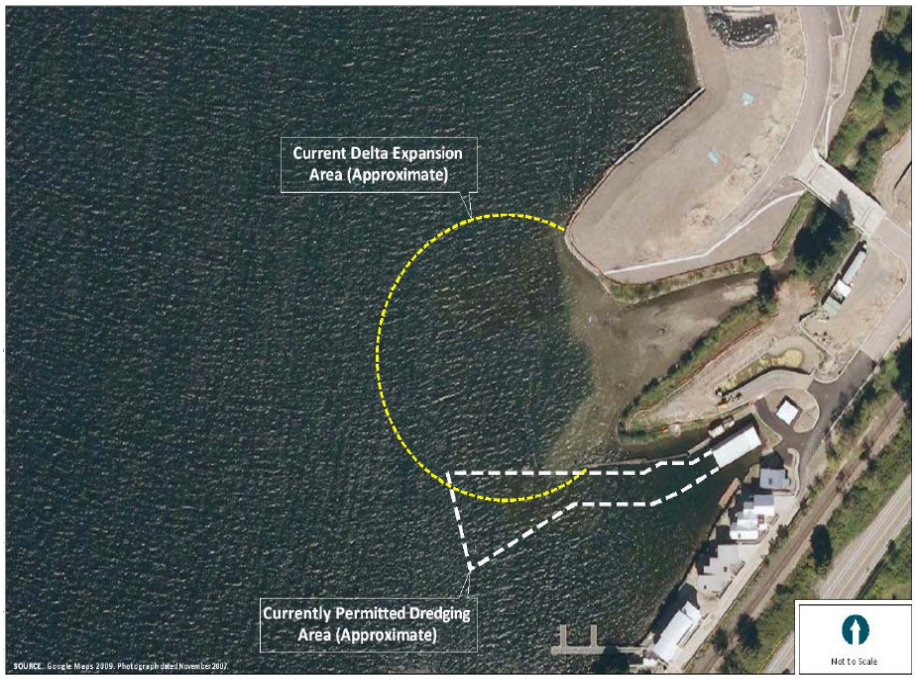
Jun 29, 2002
Image U.S. Geological Survey
Google
Imagery Date: Jun 2002
lat 47.528180° lon -122.205939°
Eye alt 1455 ft

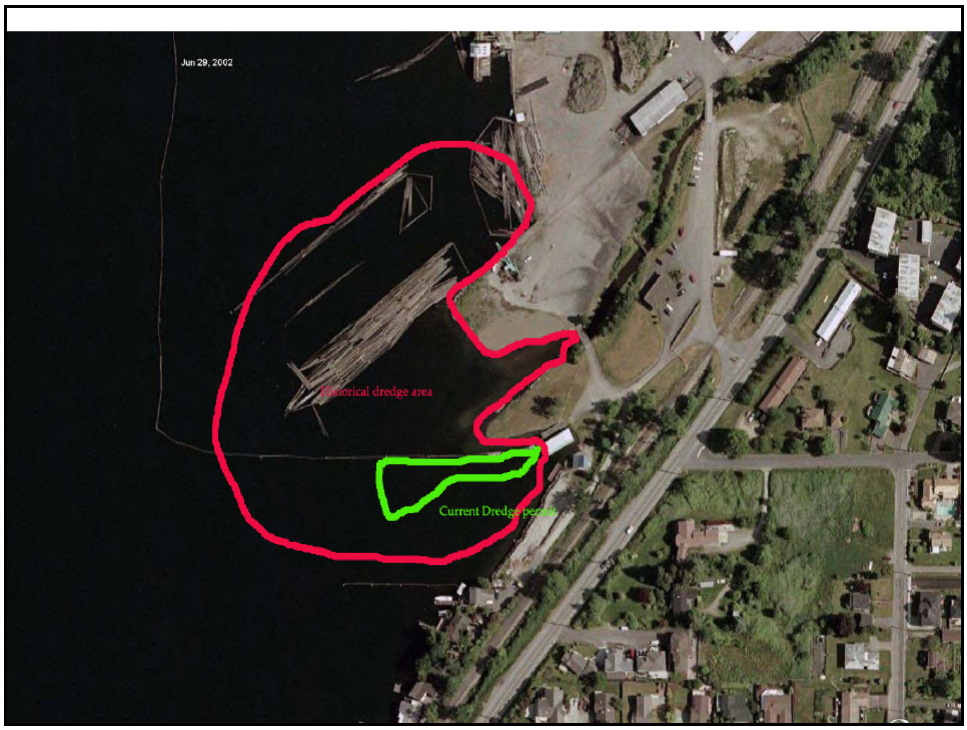
Nov 8, 2007
Image © 2008 City of Bellevue
Google
Imagery Date: Nov 9, 2007
lat 47.528180° lon -122.205939°
Eye alt 1455 ft

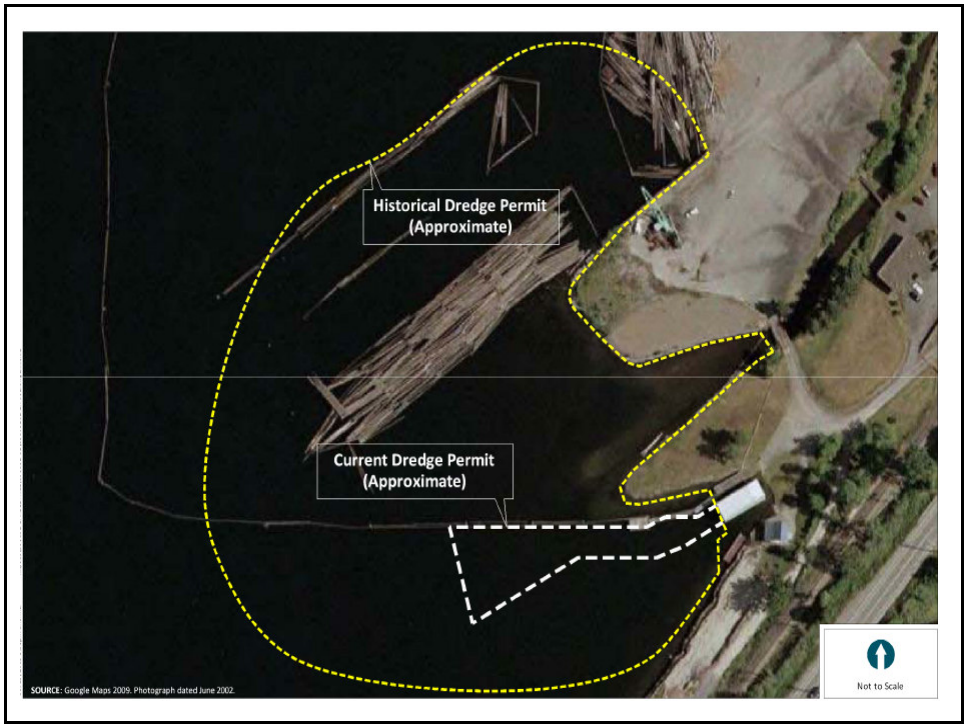

May Creek Delta
Notes:
1 Dredging to maintain navigational access to boathouse. Dredge area < 10,000 sf. See sheets 7 and 8 for Boathouse plan and section views.
2 Floats to be rebuilt with grated decking to increase light transmission (see Details, Sheet 6.)
3 Shoreline slopes and shallow water habitat will not be dredged to protect near shore habitat
4 See Sheet 4 for Cross-Sections A-A' and B-B'
5 Clean fish habitat gravel (1" minus), as may be approved by the Department of Fish & Wildlife, will be placed along the rockery shoreline to the south as shown in Sheet 5. Dredged materials will be barged off-site for off-loading and upland beneficial uses.
6 Upland shoreline planting area East of Boathouse (see, Sheet 6).
OHWL (21.8' MSL)
NORTH
1 CONNER DEVELOPMENT
Lake Washington
Dredge Area (<10,000 sf)
Boat House
Shoreline Rockery (OHWL)
2 CUGINI FAMILY
3 BNSF
SCALE (ft)
REFERENCE: NWS-2007-1019-NO
APPLICANT: Barbee Company
PROPOSED: Boathouse Area Dredging
AT: Renton, Washington
EXISTING CONTOUR ELEVATIONS
SHEET 2 of 8
Revised: 9/30/07
L&AI

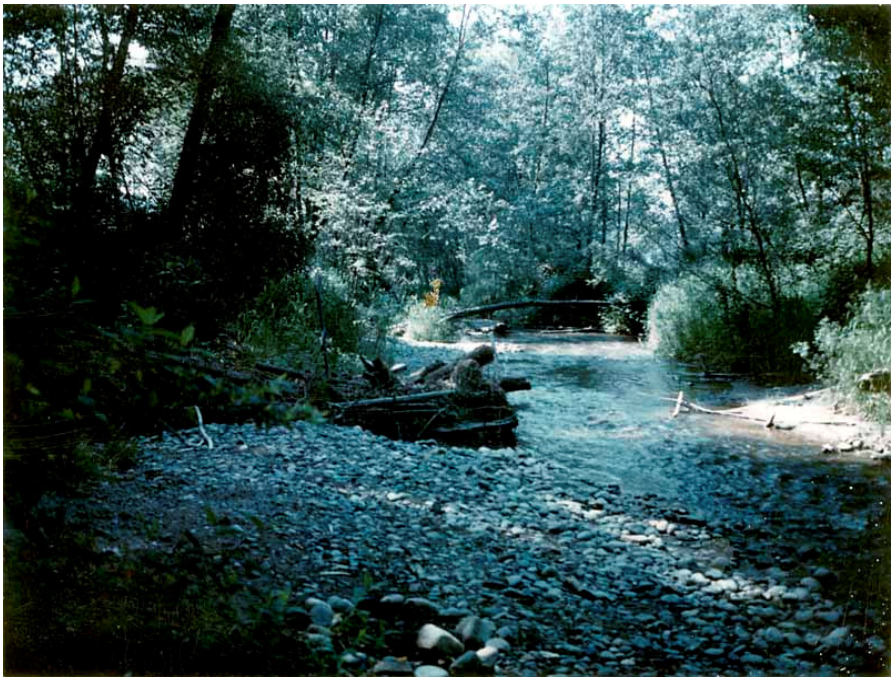

King County
Home
News
Services
Comments
Search
Cugini Boathouse Parcel
0518507TR-G
0518507TR-A
0518501150
WELLS AVE N
3342700005
Renton
3342700007
Lake Washington
3224059005
3342700009
3342700011
(C) 2008 King County
0 22ft
Parcel Number 0518501150
Address 4001 WELLS AVE N
Zipcode 98056
Taxpayer BARBEE MILL CO INC
The information included on this map has been compiled by King County staff from a variety of sources and is subject to change without notice. King County makes no representations or warranties, express or implied, as to accuracy, completeness, timeliness, or rights to the use of such information. King County shall not be liable for any general, special, indirect, incidental, or consequential damages including, but not limited to, lost revenues or lost profits resulting from the use or misuse of the information contained on this map. Any sale of this map or information on this map is prohibited except by written permission of King County."

Nov 8, 2007
1990
2009
Apfoximate current delta expansion area
from 2007 photo.
Image © 2009 City of Bellevue
2009
Google
Imagery Date: Nov 9, 2007
lat 47.528180°
lon -122.205939°
Eye alt 1455 ft

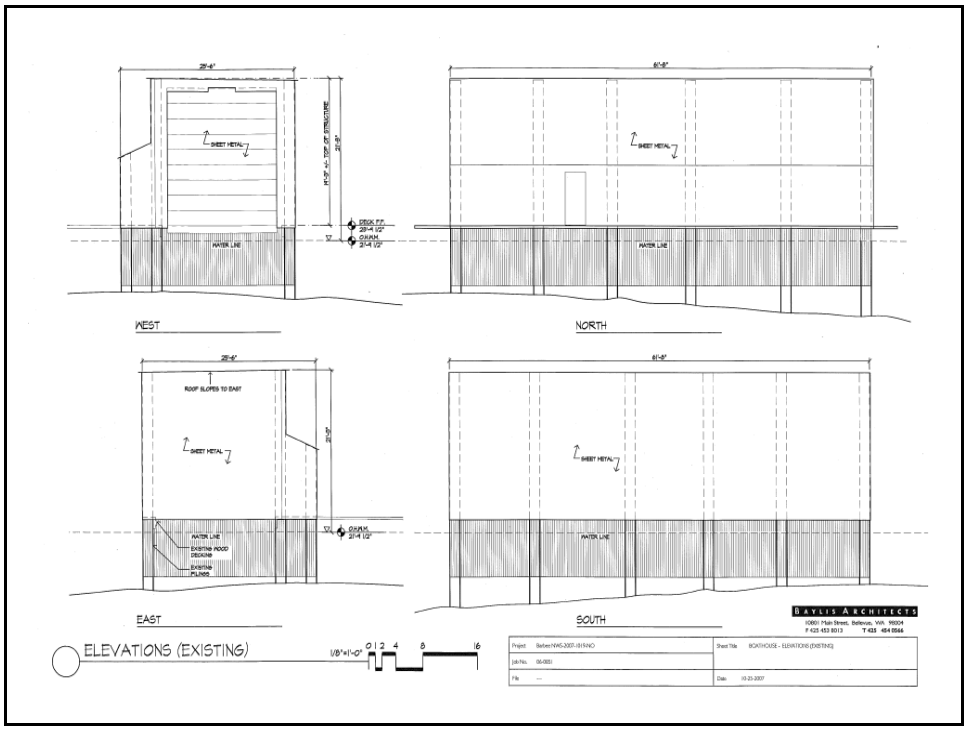

Current Delta Expansion
Area (Approximate)
Currently Permitted Dredging
Area (Approximate)
SOURCE: Google Maps 2009. Photographed November 2007.
Not to Scale

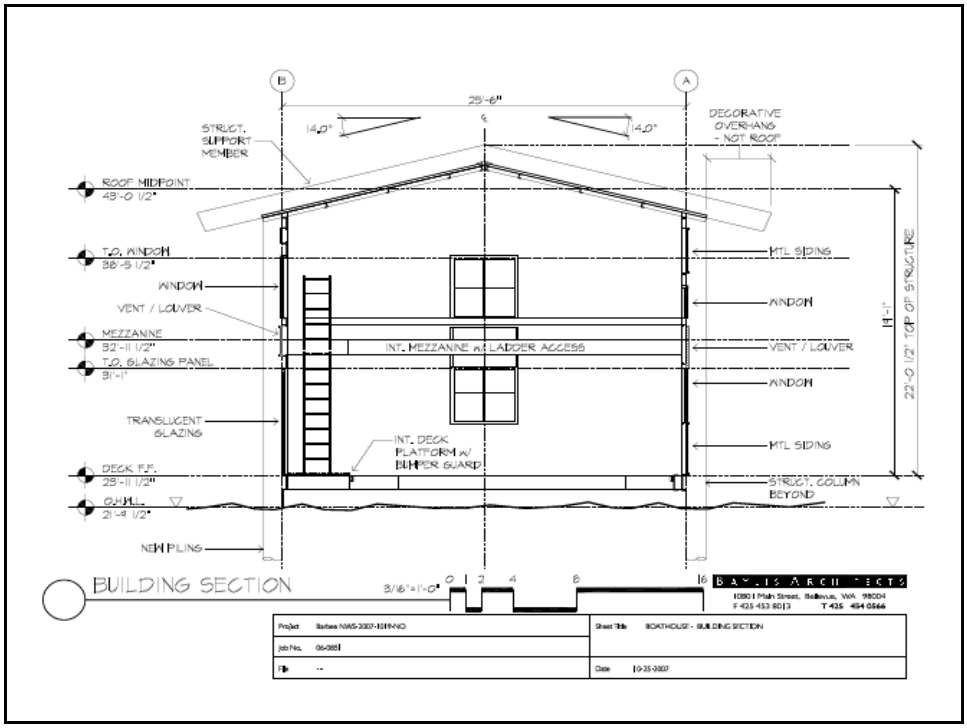

Jun 29, 2002
Historical dredge area
Current Dredge permit

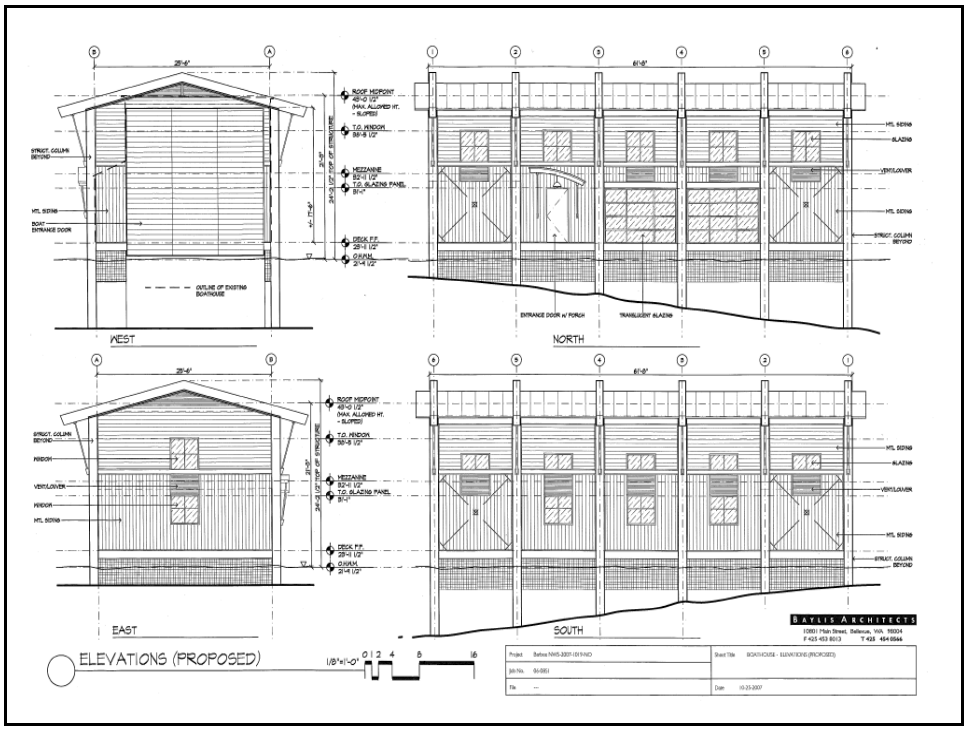

Historical Dredge Permit
(Approximate)
Current Dredge Permit
(Approximate)
SOURCE: Google Maps 2009. Photograph dated June 2002.
Not to Scale

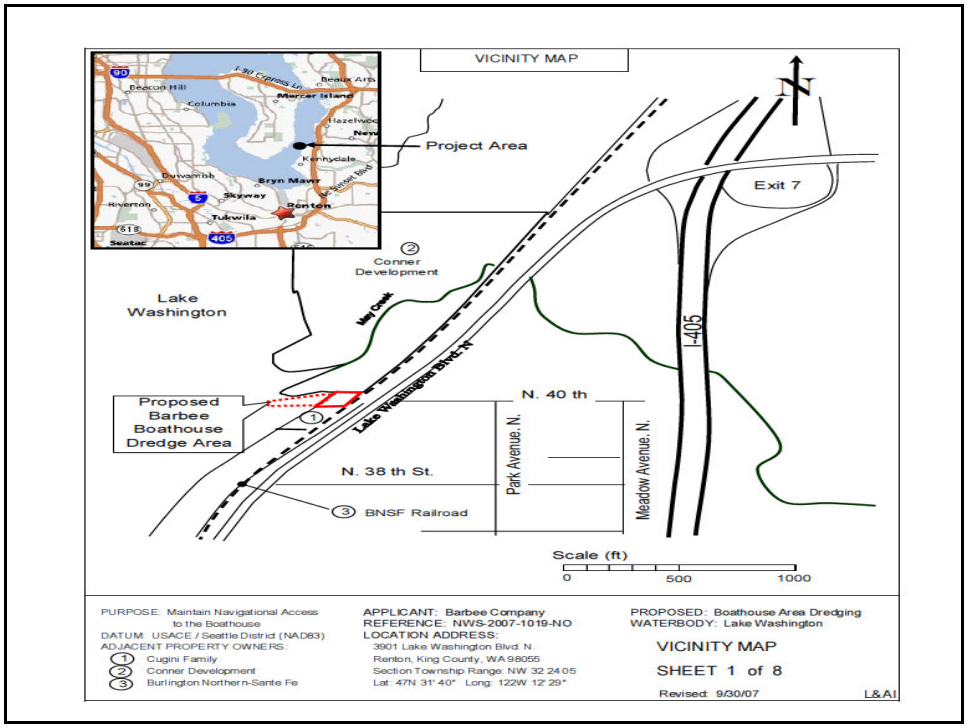


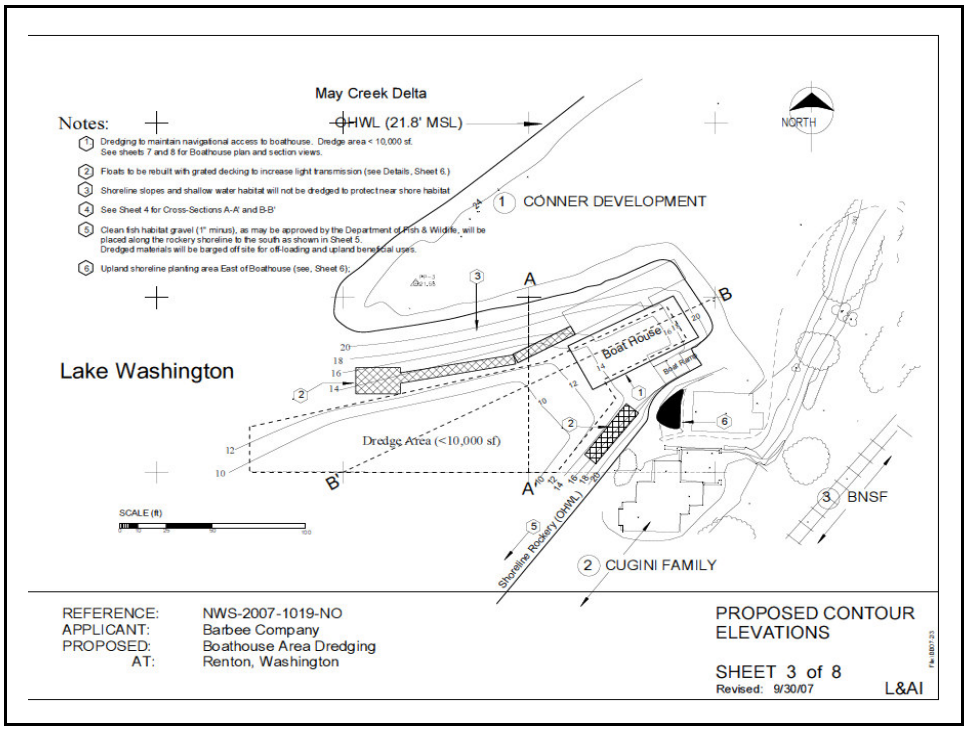
- May Creek Flooding - 1990

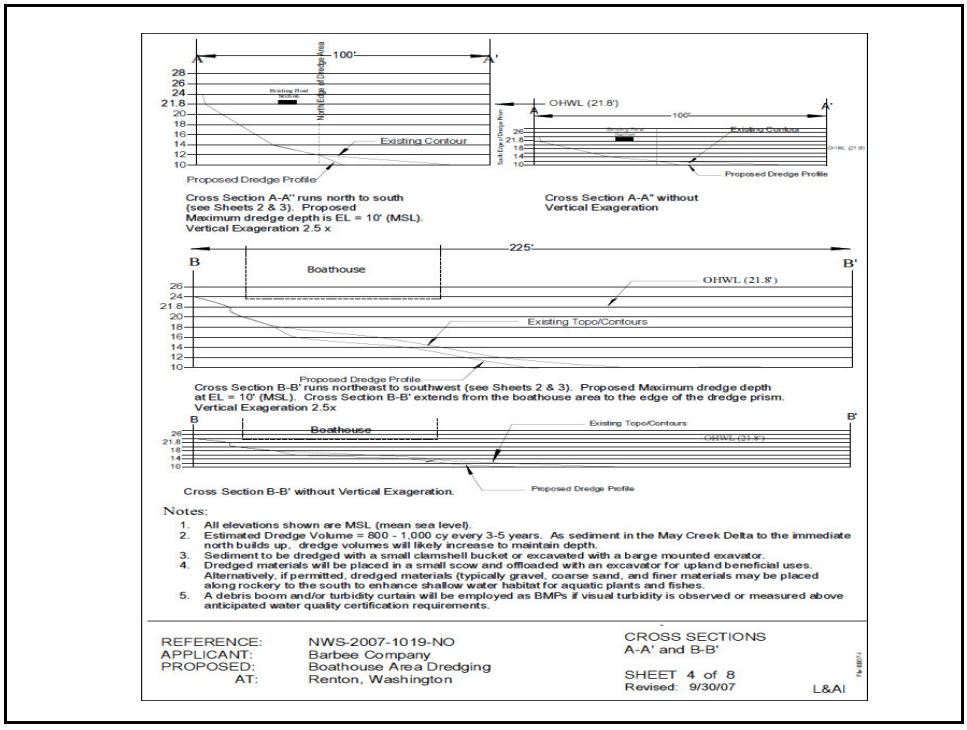

WEST
NORTH
EAST
SOUTH
SHEET METAL
WATER LINE
ROOF SLOPES TO EAST
EXISTING WOOD DECKING
EXISTING PILINGS
BAYLIS ARCHITECTS
ELEVATIONS (EXISTING)
1/8"=1'-0"

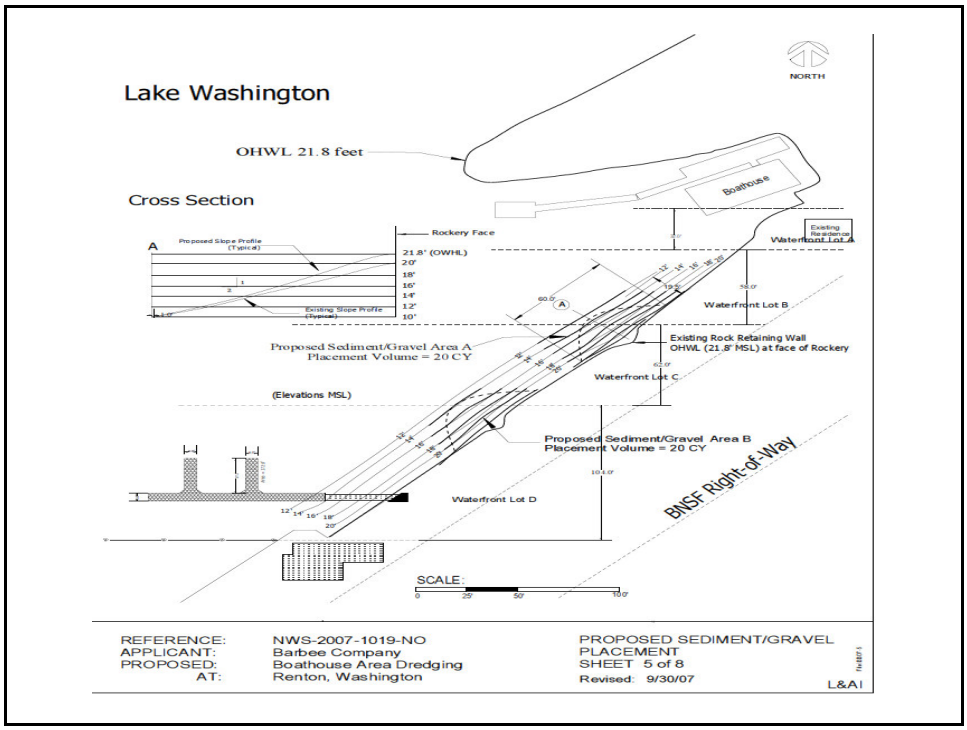

B
A
25'-6"
14.0°
STRUCT. SUPPORT MEMBER
DECORATIVE OVERHANG - NOT ROOF
ROOF MIDPOINT 43'-0 1/2"
T.O. WINDOW 38'-5 1/2"
WINDOW
VENT / LOUVER
MEZZANINE 32'-11 1/2"
T.O. GLAZING PANEL 31'-1"
TRANSLUCENT GLAZING
DECK F.F. 23'-11 1/2"
G.H.W.L. 21'-9 1/2"
NEW PILING
INT. MEZZANINE w/ LADDER ACCESS
INT. DECK PLATFORM w/ BUMPER GUARD
MTL SIDING
WINDOW
VENT / LOUVER
WINDOW
MTL SIDING
STRUCT. COLUMN BEYOND
22'-0 1/2" TOP OF STRUCTURE
BUILDING SECTION
3/16"=1'-0"
BAYLIS ARCHITECTS

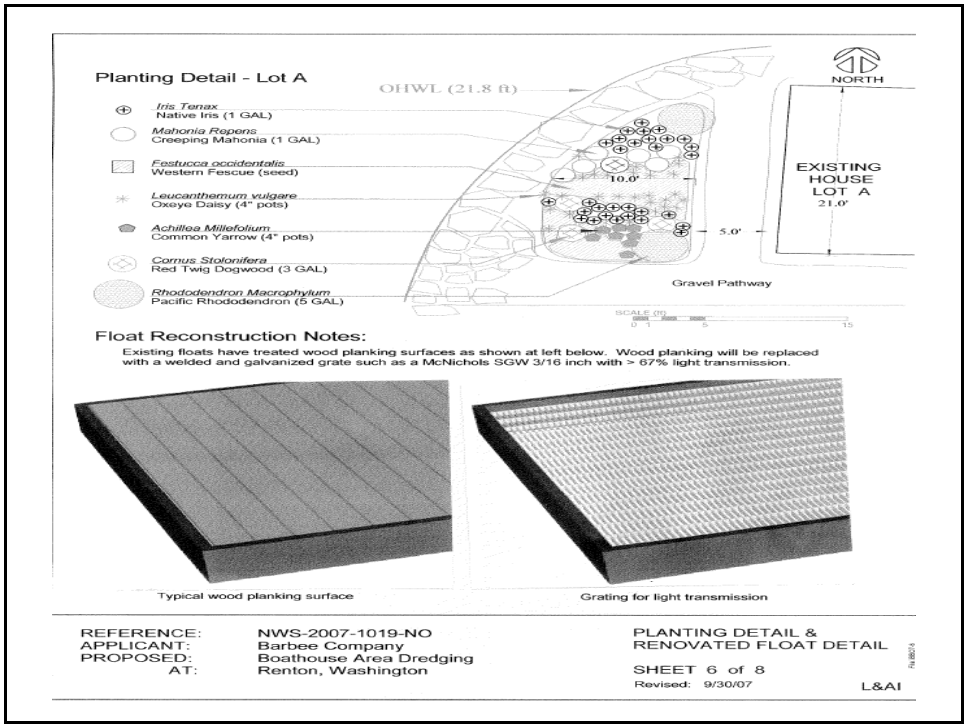

WEST
NORTH
EAST
SOUTH
ELEVATIONS (PROPOSED)
1/8"=1'-0"
BAYLIS ARCHITECTS

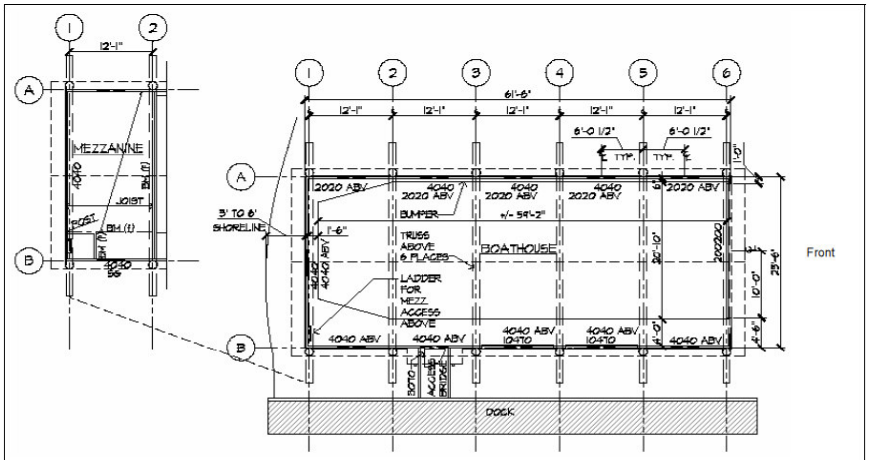

VICINITY MAP
Project Area
Exit 7
Conner Development
Lake Washington
May Creek
Lake Washington Blvd. N
I-405
Proposed Barbee Boathouse Dredge Area
N. 40 th
N. 38 th St.
Park Avenue, N.
Meadow Avenue, N.
BNSF Railroad
Scale (ft)
0
500
1000
PURPOSE: Maintain Navigational Access to the Boathouse
DATUM: USACE / Seattle District (NAD83)
ADJACENT PROPERTY OWNERS:
1 Cugini Family
2 Conner Development
3 Burlington Northern-Sante Fe
APPLICANT: Barbee Company
REFERENCE: NWS-2007-1019-NO
LOCATION ADDRESS:
3901 Lake Washington Blvd. N.
Renton, King County, WA 98055
Section Township Range: NW 32 24 05
Lat: 47N 31' 40" Long: 122W 12' 29"
PROPOSED: Boathouse Area Dredging
WATERBODY: Lake Washington
VICINITY MAP
SHEET 1 of 8
Revised: 9/30/07
L&AI


May Creek Delta
OHWL (21.8' MSL)
NORTH
Notes:
1 Dredging to maintain navigational access to boathouse. Dredge area < 10,000 sf. See sheets 7 and 8 for Boathouse plan and section views.
2 Floats to be rebuilt with grated decking to increase light transmission (see Details, Sheet 6.)
3 Shoreline slopes and shallow water habitat will not be dredged to protect near shore habitat
4 See Sheet 4 for Cross-Sections A-A' and B-B'
5 Clean fish habitat gravel (1" minus), as may be approved by the Department of Fish & Wildlife, will be placed along the rockery shoreline to the south as shown in Sheet 5. Dredged materials will be barged off site for off-loading and upland beneficial uses.
6 Upland shoreline planting area East of Boathouse (see, Sheet 6).
1 CONNER DEVELOPMENT
Lake Washington
Boat House
Dredge Area (<10,000 sf)
Shoreline Rockery (OHWL)
2 CUGINI FAMILY
3 BNSF
SCALE (ft)
REFERENCE: NWS-2007-1019-NO
APPLICANT: Barbee Company
PROPOSED: Boathouse Area Dredging
AT: Renton, Washington
PROPOSED CONTOUR ELEVATIONS
SHEET 3 of 8
Revised: 9/30/07
L&AI


100'
Existing Contour
Proposed Dredge Profile
Cross Section A-A" runs north to south (see Sheets 2 & 3). Proposed Maximum dredge depth is EL = 10' (MSL). Vertical Exageration 2.5 x
OHWL (21.8')
Cross Section A-A" without Vertical Exageration
225'
Boathouse
OHWL (21.8')
Existing Topo/Contours
Proposed Dredge Profile
Cross Section B-B' runs northeast to southwest (see Sheets 2 & 3). Proposed Maximum dredge depth at EL = 10' (MSL). Cross Section B-B' extends from the boathouse area to the edge of the dredge prism. Vertical Exageration 2.5x
Cross Section B-B' without Vertical Exageration.
Notes:
1. All elevations shown are MSL (mean sea level).
2. Estimated Dredge Volume = 800 - 1,000 cy every 3-5 years. As sediment in the May Creek Delta to the immediate north builds up, dredge volumes will likely increase to maintain depth.
3. Sediment to be dredged with a small clamshell bucket or excavated with a barge mounted exavator.
4. Dredged materials will be placed in a small scow and offloaded with an excavator for upland beneficial uses. Alternatively, if permitted, dredged materials (typically gravel, coarse sand, and finer materials may be placed along rockery to the south to enhance shallow water habitat for aquatic plants and fishes.
5. A debris boom and/or turbidity curtain will be employed as BMPs if visual turbidity is observed or measured above anticipated water quality certification requirements.
REFERENCE: NWS-2007-1019-NO
APPLICANT: Barbee Company
PROPOSED: Boathouse Area Dredging
AT: Renton, Washington
CROSS SECTIONS A-A' and B-B'
SHEET 4 of 8
Revised: 9/30/07
L&AI


Lake Washington
NORTH
OHWL 21.8 feet
Boathouse
Cross Section
Rockery Face
Proposed Slope Profile (Typical)
21.8' (OWHL)
20'
18'
16'
14'
12'
10'
Existing Slope Profile (Typical)
Existing Residence
Waterfront Lot A
Waterfront Lot B
Proposed Sediment/Gravel Area A
Placement Volume = 20 CY
Existing Rock Retaining Wall
OHWL (21.8' MSL) at face of Rockery
Waterfront Lot C
(Elevations MSL)
Proposed Sediment/Gravel Area B
Placement Volume = 20 CY
Waterfront Lot D
BNSF Right-of-Way
SCALE:
REFERENCE: NWS-2007-1019-NO
APPLICANT: Barbee Company
PROPOSED: Boathouse Area Dredging
AT: Renton, Washington
PROPOSED SEDIMENT/GRAVEL PLACEMENT
SHEET 5 of 8
Revised: 9/30/07
L&AI


Planting Detail - Lot A
OHWL (21.8 ft)
NORTH
Iris Tenax
Native Iris (1 GAL)
Mahonia Repens
Creeping Mahonia (1 GAL)
Festucca occidentalis
Western Fescue (seed)
Leucanthemum vulgare
Oxeye Daisy (4" pots)
Achillea Millefolium
Common Yarrow (4" pots)
Cornus Stolonifera
Red Twig Dogwood (3 GAL)
Rhododendron Macrophylum
Pacific Rhododendron (5 GAL)
10.0'
5.0'
EXISTING HOUSE LOT A
21.0'
Gravel Pathway
Float Reconstruction Notes:
Existing floats have treated wood planking surfaces as shown at left below. Wood planking will be replaced with a welded and galvanized grate such as a McNichols SGW 3/16 inch with > 67% light transmission.
Typical wood planking surface
Grating for light transmission
REFERENCE: NWS-2007-1019-NO
APPLICANT: Barbee Company
PROPOSED: Boathouse Area Dredging
AT: Renton, Washington
PLANTING DETAIL & RENOVATED FLOAT DETAIL
SHEET 6 of 8
Revised: 9/30/07
L&AI



Notes:

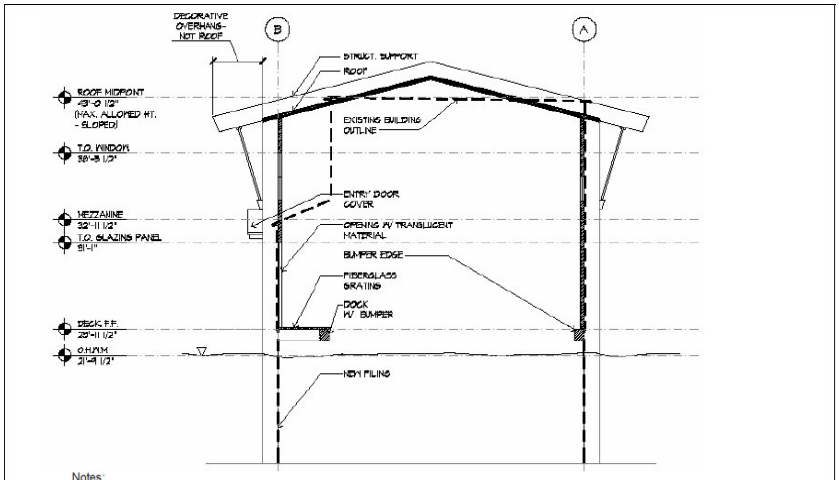
Existing structure is proposed for renovation in conjunction with boathouse area dredging for navigational access.
Renovated boathouse will not enlarge the boathouse footprint.
Translucent side panels will substantially increasing light transmission to shallow water habitat.
Building Permit application for renovation work currently with the City of Renton. See Sheets 2 and 3 for boathouse orientation

REFERENCE: NWS-2007-1019-NO
APPLICANT: Barbee Company
PROPOSED: Boathouse Area Dredging - Proposed Boathouse Renovation
AT: Renton, Washington

BOATHOUSE PLAN VIEW

SHEET 7 of 8

Revised: 9/30/07 Baylis Architects



Notes:

Depth from OHWL to existing and proposed sediment varies from front of boathouse to the back (see Sheets 3 and 3)
Renovated boathouse will not enlarge the boathouse footprint.
Translucent side panels will substantially increasing light transmission to shallow water habitat.
Building Permit application for renovation work currently with the City of Renton. See Sheets 2 and 3 for boathouse orientation

REFERENCE: NWS-2007-1019-NO
APPLICANT: Barbee Company
PROPOSED: Boathouse Area Dredging - Proposed Boathouse Renovation
AT: Renton, Washington

BOATHOUSE SECTION VIEW

SHEET 8 of 8

Revised: 9/30/07 Baylis Architects

From: Martin, Larry
Sent: Friday, September 11, 2009 5:10 PM
To: 'econkling@rentonwa.gov'
Cc: Martin, Larry; 'Robertc'
Subject: 13350438_1

13350438_1.DOC
(104 KB)

September 11, 2009

Via Electronic Mail

Ms. Erika Conkling
Renton Planning Commission
Renton City Hall Department of Community and Economic Development
1055 South Grady Way
Renton, WA, 98057

Re: Proposed Shoreline Master Program Amendments

Dear Ms. Conkling:

I am writing on behalf of the Cugini family who, through their family companies, Barbee Forest Products Company and Barbee Mill Company, own five parcels of Lake Washington waterfront property just south of the mouth of May Creek. The property includes water dependent uses and structures, including docks, a boathouse, a boat launch ramp and four single-family residential structures.

The docks and boathouse are a combination of old and new facilities. The boathouse and associated docks were constructed as legally permitted uses and structures in approximately 1950. From initial construction of the boathouse through the present time, the boathouse has been used by Mr. Alex Cugini and family members for moorage of various boats used for their personal recreation. Contrary to comments at your recent public meeting, the boathouse was never used to house small boats used in the Mill operations. Those boats were kept elsewhere on the Mill property. For the last twenty years, a 52-foot Ocean Alexander has been moored in the boathouse as it is today. A small caretaker's residence adjacent to the boathouse is also very old and was legally constructed prior to adoption of many, if not all or the regulations in place today.

Other improvements on the property are new. Three single family homes just south of the boathouse and caretaker's residence were permitted and constructed within the last several years as was the joint-use dock that

serves the three homes. That dock is located at the south end of the five parcels.

Since the 1940's dredging has caused contributed to flooding and interfered with navigation. The deposition of silt has increased dramatically over the years as poorly regulated upstream development intensified and sand and gravel mining operations were conducted. With the development of the Barbee Mill residential community to the north of May Creek which included substantial land filling, current concerns about flooding have been eased. However, the continued rapid build-up of sediments continues and deposits are beginning again to interfere with navigation to and from the Cugini docks and property.

The build-up of sediment is occurring much more rapidly than predicted in one or more technical reports submitted in this SMP Update process, and as predicted by unsupported statements at the Commission's last meeting. Dredging was last performed about three years ago. Sediment deposits encroaching onto submerged portions of the Cugini property are readily observable from the shoreline today. Significant deposits can be observed at the support for the osprey platform and nest. The Cuginis have already had to divert from their normal direct route in traveling by boat to or from the boathouse and dock to avoid shallow areas created by the sedimentation.

In anticipation of the need to again dredge on the submerged portions of their property in the near future, Robert Cugini has undertaken the years-long process of acquiring all state, federal and City of Renton permits required to continue the maintenance dredging. This permitting includes mitigation such as removal of creosoted pilings and replacement with metal pilings, replacement of solid docks with materials that allow light to penetrate into the water; placement of spawning gravel and other habitat enhancement along the waters edges. The City of Renton has issued permits for the dock remodel pursuant to regulations allowing improvements to legally non-conforming structures, and permits for the dredging.

Given the interests and actions summarized above, the Cugini family clearly has a very significant and vested interest in being able to continue to remove sediment that builds up on their property through maintenance dredging until a more permanent solution can be found. With this in mind, we submit the attached proposals for revisions to the draft SMP amendments and ask you to consider making the proposed changes set out in the attachment to this email.

Sincerely,

Davis Wright Tremaine LLP

Larry Martin

8.03 DREDGING

8.03.01 Principles
Removal of substrate from below the OHWM on streams and lakes can have substantial adverse impacts on geologic and hydraulic mechanisms important to the function of the water body, can disrupt elements of the food chain, and may result in sedimentation and water quality impacts. Dredging and dredge material disposal shall be done in a manner which avoids or minimizes significant ecological impacts and impacts which cannot be avoided should be mitigated in a manner that assures no net loss of shoreline ecological functions.
~~Dredging should be prohibited except where public benefits outweigh potential impacts and it is demonstrated that no net loss of ecological functions will occur.~~

[Reason for proposed change: The added language is a direct quote from Department of Ecolcogy (DOE) guidance on shoreline master programs (See Attachment 1).
The proposed deletion is required to recognize that actions needed to prevent losss of private benefits such as water access to privately owned shoreline lots and docks can serve as the basis to allow dredging—not only public benefit.]

8.03.02 Regulations
A. Dredging is permitted only in cases where the proposal, including any necessary mitigation, will result in no net loss of shoreline ecological functions and is limited to the following:

1. Establishing, expanding, relocating or reconfiguring navigation channels ~~designated by the US Coast Guard~~ where necessary to assure safe and efficient accommodation of existing navigational uses. Maintenance dredging of established navigation channels and basins shall be restricted to maintaining previously dredged and/or existing authorized location, depth, and width.

[Reason for proposed change: The deleted language is too restrictive. Coast Guard designation is not a factor identified in the relevant poriton of the DOE guideline which states:

"Dredging for the purpose of establishing, expanding, or relocating or reconfiguring navigation channels and basins should be allowed where necessary for assuring safe and efficient accommodation of existing navigational uses and then only when significant ecological impacts are minimized and when mitigation is provided. Maintenance dredging of established navigation channels and basins should be restricted to maintaining previously dredged and/or existing authorized location, depth, and width." (See Attachment 1).]

2. For flood control purposes, when part of a publicly adopted flood control plan.
3. For restoration or enhancement of shoreline ecological functions benefiting water quality and/or fish and wildlife habitat and approved by applicable local, state and federal agencies.
4. For development of approved water-dependent uses provided there are no feasible alternatives.
5. Dredging may be permitted where necessary for the development and

maintenance of public shoreline parks and of private shorelines to which the public is provided access. Dredging may be permitted where additional public access is provided.
6. Maintenance dredging of existing legally established boat moorage slips including public and commercial moorage and moorage accessory to single family residences, provided that deepening beyond the conditions present when the moorage was established is prohibited, and in the absence of eveidence of such conditons, ~~. D~~dredging may not be permitted to provide a draft for private boats in excess of three (3) feet~~. Dredging may be disallowed to maintain depths of existing private moorage where it may adversely affect ecological functions and where alternatives such as utilization of shallow draft access to mooring buoys is feasible~~.

[Reason for proposed change: The purpose of mainenance dredging is to preserve navigability and historical water access to shorelines. The DOE guidelines do not require that owners of shoreline property, moorage facilities and boats that are not "shallow draft" such as sailboats or larger boats with typical keel depth abandon the right to use that property. The relevant portion of the DOE guideline states:

"Maintenance dredging of established navigation channels and basins should be restricted to maintaining previously dredged and/or existing authorized location, depth, and width". (See Attachment 1).]

7. Minor trenching to allow the installation of necessary underground pipes or cables if no alternative, including boring, is feasible, and:
a. Impacts to fish and wildlife habitat are avoided to the maximum extent possible.
b. The utility installation shall not increase or decrease the natural rate, extent, or opportunity of channel migration.
c. Appropriate best management practices are employed to prevent water quality impacts or other environmental degradation.
8. Dredging is performed pursuant to a remedial action plan approved under authority of the Model Toxics Control Act, or pursuant to other authorization by the Department of Ecology, U.S. Army Corps of Engineers, or other agency with jurisdiction, after review of the proposed fill for compliance with the policies and standards of this Program.
9. Dredging is necessary to correct problems of material distribution and water quality, when such problems are adversely affecting aquatic life or recreational areas.
B. Dredging is prohibited in the following cases:
~~1. Dredging is prohibited within the deltas of the Cedar River and May Creek except for purposes of ecological restoration, for public flood control projects, or for water dependent public facilities~~
[Reason for proposed change: Dredging is tightly restricted by the proposed regulations. It is highly regulated by federal agencies and permitting that is required in addition to Renton permitting. A prohibition is not required by the DOE guideline. It is not consistent with

regulations and poliices of other jurisdictions (See Attachment 2). If the prohibition is retained, at a minimim, the exeptions to the prohibition should include "maintenance dredging consisitent with Section 8.03.02 (A)(6)".]

~~2~~1. Dredging is prohibited solely for the purpose of obtaining fill or construction material, which dredging is not directly related to those purposes permitted in Subparagraph .02.A above, is prohibited.
~~3~~2. Dredging for new moorage is prohibited.
~~4. Maintenance dredging is prohibited for facilities established for water dependent uses in cases where the primary use is discontinued unless the facility meets all standards for a new water dependent use.~~

[Reason for proposed change: The deleted language is ambiguous and may be inconsistent with Renton nonconforming use/structure regulations. Nonconformances should be regulated by one set of regulations rather than multiple conflicting regulations.]

C. Review Criteria
1. New development should be sited and designed to avoid or, if that is not possible, to minimize the need for new and maintenance dredging.
2. All proposed dredging operations shall be designed by an appropriate State licensed professional engineer. A stamped engineering report and an assessment of potential impacts on ecological functions shall be prepared by qualified consultants shall be submitted to the Renton Development Services Division as part of the application for a shoreline permit.
3. The responsibility rests solely with the applicant to demonstrate the necessity of the proposed dredging operation.
4. The responsibility rests solely with the applicant to demonstrate that
a. There will be no net loss of ecological functions including but not limited to adverse effect on aquatic species including fish migration.
b. There will be no adverse impact on recreational areas or public recreation enjoyment of the water.
5. Adjacent bank protection:
a. When dredging bottom material of a body of water, the banks shall not be disturbed unless absolutely necessary. The responsibility rests with the applicant to propose and carry out practices to protect the banks.
b. If it is absolutely necessary to disturb the adjacent banks for access to the dredging area, the responsibility rests with the applicant to propose and carry out a method of restoration of the disturbed area to a condition minimizing erosion and siltation.
6. The responsibility rests with the applicant to demonstrate the proposed dredging will avoid conditions that may adversely affect adjacent properties including:
a. Create a nuisance to the public or nearby activity.
b. Damage property in or near the area.
c. Cause substantial adverse effect to plant, animal, aquatic or human life in or near the area.
d. Endanger public safety in or near the area.

7. The applicant shall demonstrate control contamination and pollution to water, air, and ground through specific operation and mitigation plans.
8. The applicant shall demonstrate that the disposal of dredged material will not result in net loss of ecological functions or adverse impacts to properties adjacent to the disposal site.
a.. The applicant shall provide plans for the location and method of disposing of all dredged material.
b.. Dredged material shall not be deposited in a lake, stream, or marine waters except if approved as habitat enhancement or other beneficial environmental mitigation when the requirements of RMC 4-19-197 C (16) have been satisfied or part of a contamination remediation project approved
by appropriate State and/or Federal agencies or is approved in accordance with the Puget Sound Dredged Disposal Analysis (PSDDA) evaluation procedures for managing in-water disposal of dredged material by applicable agencies, which may include the U.S. Army Corps of Engineers pursuant to Section 10 (Rivers and Harbors Act) and Section 404 (Clean Water Act) permits, and Washington State Department of Fish and Wildlife Hydraulic Project Approval (HPA).

[Reason for proposed change: The regulations should not preclude use of dredged material such as clean sand and gravel in shoreline habitat enhancement projects not associated with remediation of regulated contamination. RMC 4-19-197 C (16) exempts the following from the requirement to obtain a substantial devleopment permit:

"16. A public or private project, the primary purpose of which is to improve fish or wildlife habitat or fish
passage, when all of the following apply:
a. The project has been approved in writing by the Department of Fish and Wildlife as necessary for the improvement of the habitat or passage and appropriately designed and sited to accomplish
the intended purpose.
b. The project has received hydraulic project approval by the Department of Fish and Wildlife pursuant to chapter 75.20 RCW.
c. The Development Services Division has determined that the project is consistent with this Master Program."]

c. In no instance shall dredged material be stockpiled in a shoreland area that would result in the clearing of native vegetation. Temporary stockpiling of dredged material is limited to 180 days.
d. If the dredged material is contaminant or pollutant in nature, the applicant shall propose and carry out a method of disposal that complies will all regulatory requirements.
e. Permanent land disposal shall demonstrate that:
i. Shoreline ecological functions will be preserved, including protection of surface and ground water.
ii. Erosion, sedimentation, floodwaters or runoff will not increase

adverse impacts to shoreline ecological functions or property.
iii. Sites will be adequately screened from view of local residents or passersby on public right-of-ways.
f. Dredging not associated with maintenance of existing facilities, water dependent uses, habitat enhancement; a remedial action plan approved under authority of the Model Toxics Control Act, or pursuant to other authorization by the Department of Ecology, U.S. Army Corps of Engineers, or other agency with jurisdiction, or public recreation facilities or uses shall require a Shoreline Conditional Use.

[Reason for change: Within Renton multiple environmentally degraded and/or contaminated shoreline sites have been identified. Remediation of these sites is highly encouraged and regulated by state and federal agencies. The added requirement of obtaining a Renton shoreline conditional use permit would not enhance environmental protection and would only add additional unnecessary process, delay and expense to environmentally beneficial, costly remedial actions.]

4-9-197 SHORELINE PERMITS

C. EXEMPTIONS FROM PERMIT SYSTEM:
The following shall not be considered substantial developments for the purpose of this Master Program and are exempt from obtaining a Shoreline Substantial Development Permit (SSDP) . An exemption from a SSDP is not an exemption from compliance with the Act or this Program, or from any other regulatory requirements.

1. Any project with a certification from the Governor pursuant to chapter 80.50 RCW.

2. Any development of which the total cost or fair market value does not exceed five thousand dollars
($5,000.00), if such development does not materially interfere with the normal public use of the water or shorelines of the State.
3. Normal maintenance or repair of existing structures or developments, including damage by accident, fire or elements.
a. “Normal maintenance” includes those usual acts to prevent a decline, lapse, or cessation from a lawfully established condition, inlcuding maintenance dredging in conformance with Section 8.03.02 (A)(6) when approved by all applicable state and federal agencies.

[Reason for proposed change: Dredging is highly regulated by federal and state agencies. Permitting literally takes years, involves detailed studies and mitigation and costs hundreds of thousands of dollars. Permitting for past and future mainenance dredging of May Creek sedimentation has substantially exceeded the cost of the work itself. Nothing would be added by requiring the additional step of a Renton Shoreline Substantial Development Permit. If the permit is required, at a miniumum the proivisions in the Master Program that place burdens of proof upon the applicant should be deemed to be satisfied by evidence that applicable federal and state permits have been obtained, and additional conditions should not be placed on the federal and state approvals by the City.]

b. “Normal repair” means to restore a development to a state comparable to its original condition, including but not limited to its size, shape, configuration, location and external appearance, within a reasonable period after decay or partial destruction, except where repair causes substantial adverse effects to the shoreline resource or environment.
c. Replacement of a structure or development may be authorized as repair where such replacement is the common method of repair for the type of structure or development and the replacement structure or development is comparable to the original structure or development including, but not limited to, its size, shape, configuration, location and external appearance and the replacement does not cause substantial adverse effects to shoreline resources or environment.

Proposed new section:

Maintenance dredging authorized by Section 8.03.02 for which all required state and federal approvals have been obtained shall not be subject to the provisions of RMC 4-4-060 Grading, Excavation And Mining Regulations.

[Reason for proposed change: As a matter of literal interpretation, dredging activities have been determined to fall withing the scope of Renton’s grading, excavation and mining regulations. In the case of dredging within shoreline areas regulated by extensive federal and state regulations, as well as Renton’s Shoreline Master Program, additional regulation under this section is not warranted and does not add meaningful regulatory oversight. Note, a change to the text of Section 8.03.02 to implement this exemption should also be made.]

4-9-197 SHORELINE PERMITS

F. REVIEW CRITERIA:

4. Burden of Proof on Applicant: The burden of proving that the proposed substantial development is consistent with the criteria which must be met before a permit is granted shall be on the applicant, provided that in the case of maintenance dredging that conforms to the terms and conditions of unexpired federal and state permits approving the dredging, conformance with such terms and conditions shall be deemed to constitute proof that the activity propertly avoids or minimizes significant ecological impacts, and in the case of impacts which cannot be avoided, that such impacts will be mitigated in a manner that assures no net loss of shoreline ecological functions.

[Reason for proposed change: Dredging is highly regulated by federal and state agencies. Permitting literally takes years, involves detailed studies and mitigation and costs hundreds of thousands of dollars. Permitting for past and future mainenance dredging of May Creek sedimentation has substantially exceeded the cost of the work itself. Nothing would be added by placing the additional burden upon the applicnt of re-justifying the proposed activity. Note, if the requirement of a substanial development permit is eliminiated in the case of federally and state approved maintenance dredging as we propose, this change is still required because the project must still meet all requiremnets of Renton’s SMP even though a pemit is not required. This

change would allow the applicant to be deemed to satisfy the identified requirements thorugh the federal and state permit terms and conditions.]

J. TIME REQUIREMENTS FOR SHORELINE PERMITS:

1. Applicability and Modification at Time of Approval:

a. The time requirements of this Section shall apply to all substantial development permits and to any development authorized pursuant to a variance or conditional use permit authorized under this Program, provided that in the case of maintenance dredging approved by all applicable state and federal agencies, time requirements of this Section, including time periods for commencement of the activity, completion of the acticity and duration of the approval, shall be as provided in such state and federal permits.

[Reason for proposed change: Maintenance dredging is by its nature an onoing activity, the frequency and duration of which is dictated by weather, stream flow, erosion caused by upstream existing and future development and other factors that are not subject to artificial time deadlines and that are out of the applicant's control. The high degree of investment of time and money required to obtain federal and state permits for this activity should not be devalued by impostion of time constraints that have not been deteermined in the context of the facts and analysis presented in those detailed state and federal processes.]

b. If it is determined that standard time requirements of subsections J2 and J3 of this Section should not be applied, the Development Services Division shall adopt appropriate time limits as a part of action on a substantial development permit upon a finding of good cause, based on the requirements and circumstances of the project proposed and consistent with the policy and provisions of this Master Program and RCW 90.58.143. If it is determined that standard time requirements of subsections J2 and J3 of this Section should not be applied, the Hearing Examiner, upon a finding of good cause and with the approval of the Department of Ecology, shall establish appropriate time limits as a part of action on a conditional use or variance permit. "Good cause" means that the time limits established are reasonably related to the time actually necessary to perform the development on the ground and complete the project that is being permitted.

c. Where specific provisions are not included to establish time limits on a permit as part of action on a permit by the City or the Department of Ecology, the time limits in subsections J2 and J3 of this Section apply.

d. Requests for permit extension shall be made in accordance with subsections J2 and J3 of this Section.

2. Construction Commencement:

a. Unless a different time period is specified in the shoreline permit as authorized by RCW 90.58.143 and subsection J1 of this Section, construction activities, or a use or activity, for which a permit has been granted pursuant to this Master Program must be commenced within two (2) years of the effective date of a shoreline permit, or the shoreline permit shall terminate, and a new
permit shall be necessary. However, the Development Services Division may authorize a single extension for a period not to exceed one year based on reasonable factors, if a request for extension has been filed with the Division before the expiration date, and notice of the proposed extension is given to parties of record and the Department of Ecology.

b. Construction activities or commencement of construction referenced in subsection J2a of this

Section means that construction applications must be submitted, permits must be issued, and foundation inspections must be completed before the end of the two (2) year period.

3. Construction Completion: A permit authorizing construction shall extend for a term of no more than five (5) years after the effective date of a shoreline permit, unless a longer period has been specified pursuant to RCW 90.58.143 and subsection J1 of this Section. If an applicant files a request for an extension prior to expiration of the shoreline permit the Development Services Division shall review the permit and upon a showing of good cause may authorize a single extension of the shoreline permit for a period of up to one year. Otherwise said permit shall terminate. Notice of the proposed permit extension shall be given to parties of record and the Department of Ecology. To maintain the validity of a shoreline permit, it is the applicant's responsibility to maintain valid construction permits in accordance with adopted Building Codes.

4. Effective Date:

a. For purposes of determining the life of a shoreline permit, the effective date of a substantial development permit, shoreline conditional use permit, or shoreline variance permit shall be the date of filing as provided in RCW 90.58.140(6). The permit time periods in subsections J2 and J3 of this Section do not include the time during which a use or activity was not actually pursued due to the pendency of administrative appeals or legal actions, or due to the need to obtain any other government permits and approvals for the development that authorize the development to proceed, including all reasonably related administrative or legal actions on any such permits or approvals.

b. It is the responsibility of the applicant to inform the Development Services Division of the pendency of other permit applications filed with agencies other than the City, and of any related administrative or legal actions on any permit or approval. If no notice of the pendency of other permits or approvals is given to the Division prior to the expiration date established by the shoreline permit or the provisions of this Section, the expiration of a permit shall be based on the effective date of the shoreline permit.

c. The City shall issue permits within applicable time limits specified in the Type III and Type VI review processes in RMC 4-8-080H. Substantial development permits for a limited utility extension as defined in RCW 90.58.140(11)(b) or for the construction of a bulkhead or other measures to protect a single family residence and its appurtenant structures from shoreline erosion shall be issued within twenty one (21) days of the last day of the comment period specified in RMC 4-9-197E3.

5. Review Period – Construction Authorization:

a. No construction pursuant to such permit shall begin or be authorized and no building, grading

or other construction permits or use permits shall be issued by the City until twenty one (21) days
from the date the permit was filed with the Department of Ecology and the Attorney General, or until all review proceedings are completed as were initiated within the twenty one (21) days of the date of filing. Filing shall occur in accordance with RCW 90.58.140(6) and WAC 173-27-130.
b. If the granting of a shoreline permit by the City is appealed to the Shoreline Hearings Board, and the Shoreline Hearings Board has approved the granting of the permit, and an appeal for judicial review of the Shoreline Hearings Board decision is filed, construction authorization may occur subject to the conditions, time periods, and other provisions of RCW 90.58.140(5)(b).

4-10-095 SHORELINE MASTER PROGRAM – NONCONFORMING USES, ACTIVITIES, AND STRUCTURES:

A shoreline use or development which was lawfully constructed or established prior to the effective date of the applicable Shoreline Master Program, or amendments thereto, but which does not conform to present regulations or standards of the program, may be continued ~~provided that:~~

~~**A. Nonconforming Structures:** Nonconforming structures shall be governed by~~subject to regulations set forth in RMC Chapter 4-10.~~ 050.~~

[Delete remainder of section]

[Reason for change: The proposed regulations are too complex and confusing to be understood by waterfront owners. They will be very cumbersome to administer. The City has experience administering its existing regulations. A single set of regulations for all nonconformances should govern whether the sturcure, use or lot is inside or outside of the shoreline zone.]

Attachment 1

Ecology Guidline: WAC 173-26-231(3)(f) Shoreline Modifications-dredging and dredge material disposal

(f) **Dredging and dredge material disposal.** Dredging and dredge material disposal shall be done in a manner which avoids or minimizes significant ecological impacts and impacts which cannot be avoided should be mitigated in a manner that assures no net loss of shoreline ecological functions.

New development should be sited and designed to avoid or, if that is not possible, to minimize the need for new and maintenance dredging. Dredging for the purpose of establishing, expanding, or relocating or reconfiguring navigation channels and basins should be allowed where necessary for assuring safe and efficient accommodation of existing navigational uses and then only when significant ecological impacts are minimized and when mitigation is provided. Maintenance dredging of established navigation channels and basins should be restricted to maintaining previously dredged and/or existing authorized location, depth, and width.

Dredging waterward of the ordinary high-water mark for the primary purpose of obtaining fill material shall not be allowed, except when the material is necessary for the restoration of ecological functions. When allowed, the site where the fill is to be placed must be located waterward of the ordinary high-water mark. The project must be either associated with a MTCA or CERCLA habitat restoration project or, if approved through a shoreline conditional use permit, any other significant habitat enhancement project. Master programs should include provisions for uses of suitable dredge material that benefit shoreline resources. Where applicable, master programs should provide for the implementation of adopted regional interagency dredge material management plans or watershed management planning.

Disposal of dredge material on shorelands or wetlands within a river's channel migration zone shall be discouraged. In the limited instances where it is allowed, such disposal shall require a conditional use permit. This provision is not intended to address discharge of dredge material into the flowing current of the river or in deep water within the channel where it does not substantially affect the geohydrologic character of the channel migration zone.

Attachment 2

King County Adopted Code (6-2008)

H. Excavation or dredging below the ordinary high water mark shall be permitted only:

1. When necessary for the operation of a water dependent or water related use;

2. When necessary to mitigate conditions which endanger public safety or fisheries resources;

3. As part of and necessary to roadside or agricultural ditch maintenance that is performed consistent with best management practices promulgated through administrative rules pursuant to the sensitive areas provisions of K.C.C. chapter 21A.24 and if:

a. the maintenance does not involve any expansion of the ditch beyond its previously excavated size. This limitation shall not restrict the county's ability to require mitigation, pursuant to K.C.C. chapter 21A.24, or other applicable laws;

b. the ditch was not constructed or created in violation of law;

c. the maintenance is accomplished with the least amount of disturbance to the stream or ditch as possible;

d. the maintenance occurs during the summer low flow period and is timed to avoid disturbance to the stream or ditch during periods critical to salmonids; and

e. the maintenance complies with standards designed to protect salmonids and salmonid habitat, consistent with K.C.C. chapter 21A.24; provided, that this paragraph shall not be construed to permit the mining or quarrying of any substance below the ordinary high water mark;

I. Disposal of dredged material shall be done only in approved deep water disposal sites or approved contain upland disposal sites;

J. Stockpiling of dredged material in or under water is prohibited;

K. Maintenance dredging not requiring a shoreline permit(s) shall conform to the requirements of this section;

L. Dredging shall be timed so that it does not interfere with aquatic life;

M. The county may impose reasonable conditions on dredging or disposal operations including but not limited to working seasons and provisions of buffer strips, including retention or replacement of existing vegetation, dikes and settling basins to protect the public safety and shore users' lawful interests from unnecessary adverse impact;

N. In order to insure that operations involving dredged material disposal and maintenance dredging are consistent with this program as required by RCW 90.58.140(1), no dredging may commence on shorelines without the responsible person having first obtained either a substantial development permit or a statement of exemption, though no statement of exemption or shoreline permit is required for emergency dredging needed to protect property from imminent damage by the elements;

O. Operation and maintenance of any existing system of ditches, canals or drains, or construction of irrigation reservoirs, for agricultural purposes are exempt from the shoreline permit requirement. (Ord. 16172 § 7, 2008: Ord. 13247 § 3, 1998: Ord. 5734 § 6, 1981: Ord. 3688 § 414, 1978).

Seattle SMP Update Process 9-2009

PROPOSALS FOR SMP UPDATE

Proposed Goals & Policies

Below are the proposed comprehensive plan goals and policies relating to dredging and filling:

Dredging should only be permitted where necessary for access to water-dependent or water-related uses, environmental mitigation or enhancement, clean-up of contaminated materials, and installation of utilities and bridges. Projects should be designed to minimize impacts to ecological function and should incorporate mitigation for dredging impacts to ensure no net loss of ecological function. Dredging and disposal of dredge materials shall be conducted in a manner that minimizes short and long-term environmental damage. (LU249)

Landfill on submerged land that does not create dry land should only be permitted where necessary for the operation of a water-dependent or water-related use, transportation projects of state-wide significance, installation of a bridge or utility line, disposal of dredged material in accordance with the Dredged Material Management Program, beach nourishment or environmental mitigation or enhancement. Landfill that creates dry land should only be permitted where necessary for transportation projects of statewide significance, repair of pocket erosion, beach nourishment, or environmental mitigation or enhancement. Projects should be designed to minimize impacts to ecological function and should incorporation mitigation for dredging impacts to ensure no net loss of ecological function. Fills shall be constructed in a manner that minimizes short and long-term environmental damage. (LU250)

Kent August 2009 draft

7. Dredging shall be permitted only:
a. For navigation or navigational access and recreational access;
b. In conjunction with a water-dependent use of water bodies or adjacent shorelands;
c. As part of an approved habitat improvement project;
d. To improve water quality;
e. In conjunction with a bridge, navigational structure or wastewater treatment facility for which there is a documented public need and where other feasible sites or routes do not exist;
f. To improve water flow or manage flooding only when consistent with an approved flood/storm water comprehensive management plan; or
g. To clean up contaminated sediments.
8. When dredging is permitted, the dredging shall be the minimum necessary to accommodate the proposed use.
9. New dredging activity is prohibited:
a. In shoreline areas with bottom materials which are prone to significant sloughing and refilling due to currents, resulting in the need for continual maintenance dredging, except by Conditional Use permit; and

b. In habitats identified as critical to the life cycle of officially designated or protected fish, shellfish or wildlife.

10. Dredging for the primary purpose of obtaining material for landfill is prohibited.

11. New development shall be located and designed to avoid or minimize the need for new or maintenance dredging where feasible.

12. Maintenance dredging of established navigation channels, public access facilities and basins is restricted to maintaining previously dredged and/or existing authorized location, depth, and width.

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Cugni Parcels

Parcel Number	0518501150
Address	4001 WELLS AVE N
Zipcode	98056
Taxpayer	BARBEE MILL CO INC

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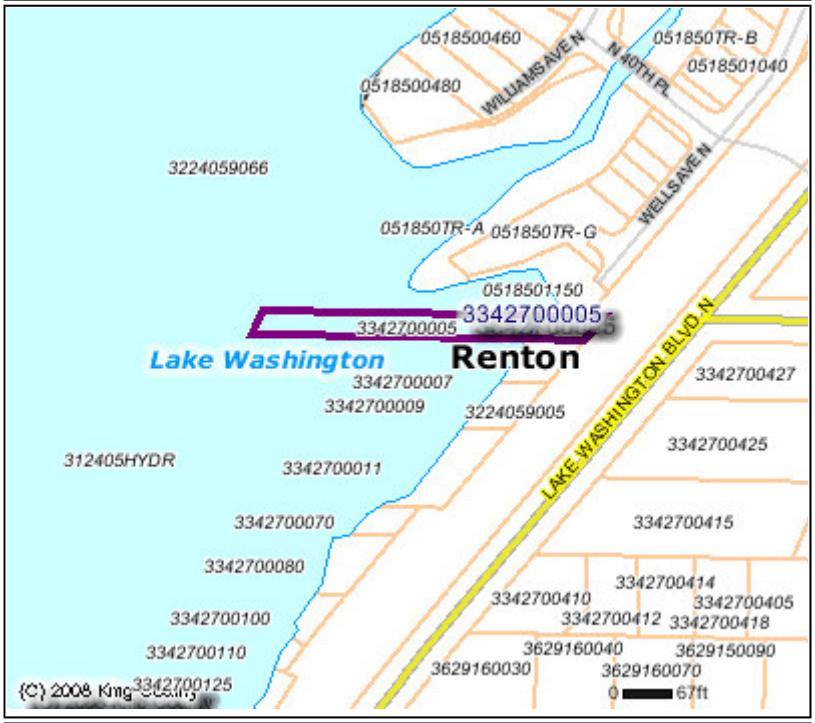
Cugini Parcels



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Address	3979 LAKE WASHINGTON BLVD N
Zipcode	98056
Taxpayer	BARBEE FOREST PRODUCTS INC

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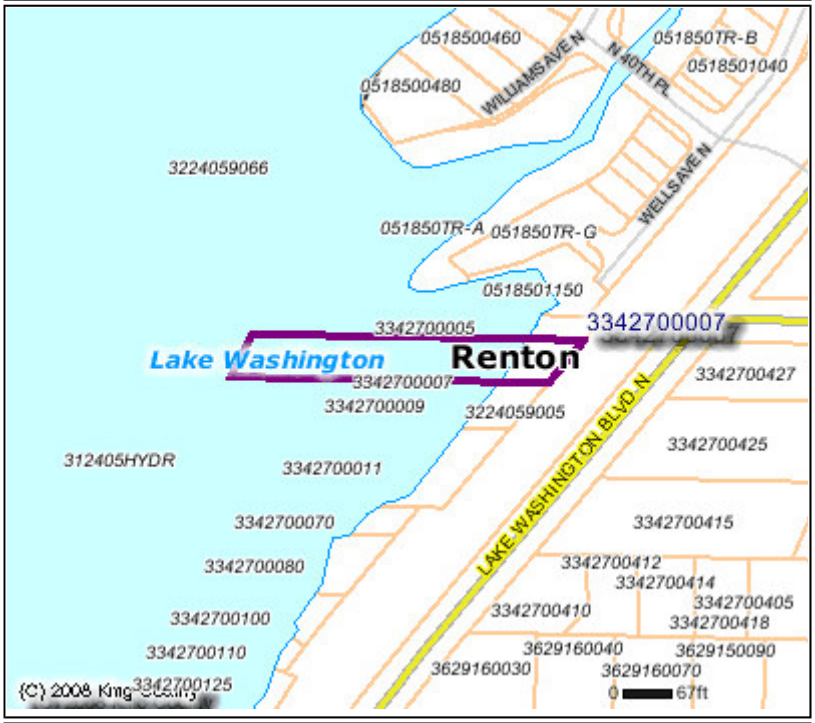

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Zipcode	98056
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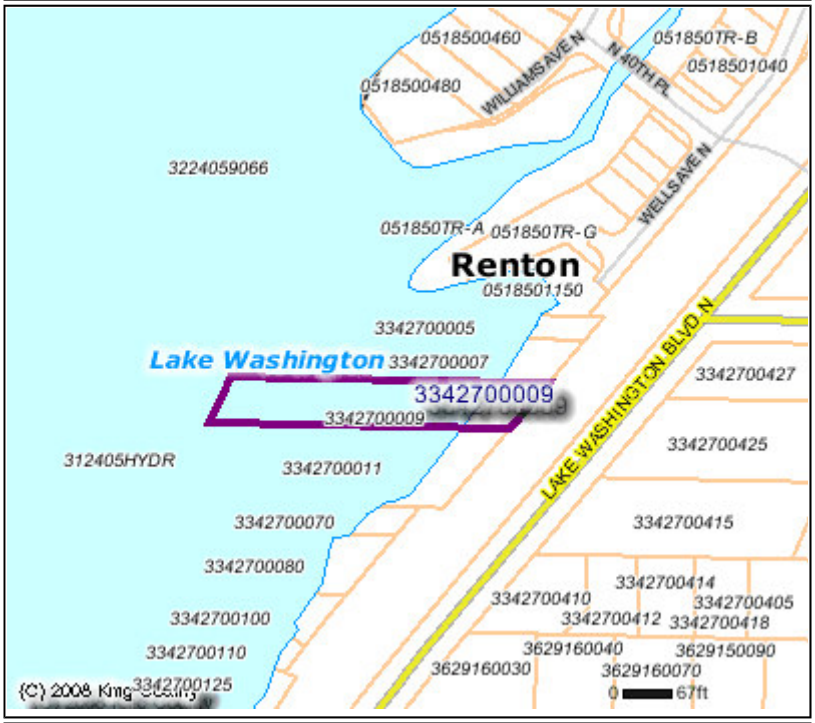

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Address	3907 LAKE WASHINGTON BLVD N
Zipcode	98056
Taxpayer	BARBEE FOREST PRODUCTS INC

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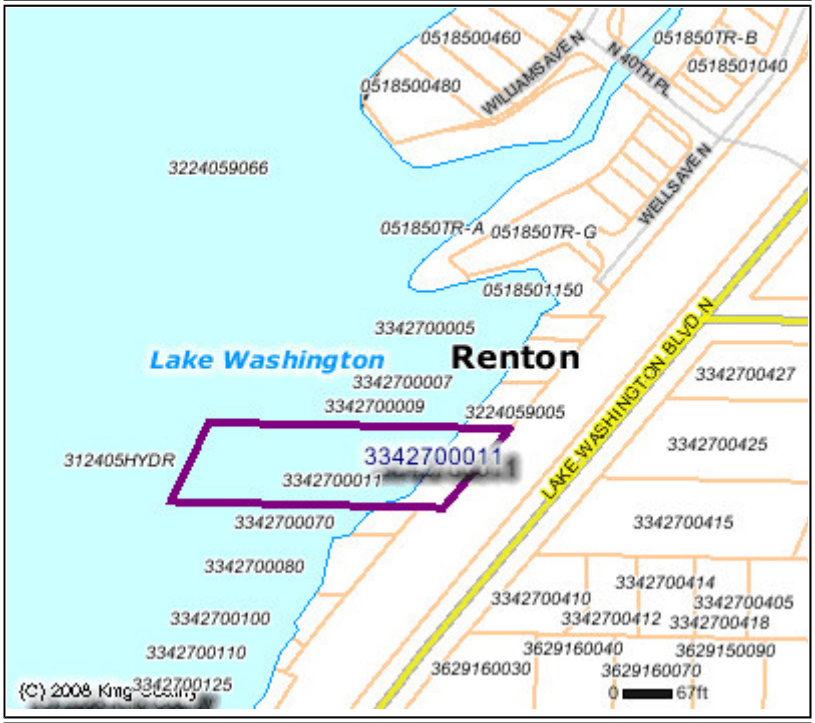
Cugini Parcels



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Address	3905 LAKE WASHINGTON BLVD N
Zipcode	98056
Taxpayer	BARBEE FOREST PRODUCTS INC

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BARBEE MILL CO., INC.
P.O. BOX 359 RENTON, WASHINGTON 98057
TELEPHONE: 226-3900

October 19, 2009

Dear Commissioners'

My name is Alex Cugini and I am the president of Barbee Mill Co. Inc. I operated the Barbee Mill on Lake Washington since my father and mother bought the Barbee mill property in 1945. I want to make clear that the use of the boat house on Lot 114 of the Conner Barbee Mill plat was NOT used for Mill operations of pond boats. This Boat house has continuously been used by me to house a pleasurecraft starting in the late 1950's with the boathouse construction. It has housed the same boat for the last 17 years since its purchase in 1992. The Cugini family made arrangements in the Barbee Mill plat and sale to retain the parcel now known as lot 114 for the specific purpose of retaining the rights and usage of that particular property. That lot and additionally the one south, which has the former guard house, and the 3 new houses to the south have been retained by the family for its use and are NOT part of the Barbee Mill Conner plat.

It is imperative to allow limited dredging to occur along the property line that would allow access to the the boathouse to be maintained. Failure to allow this dredging to be permitted will result in the eventual loss of use of the boat house and the dock to the south.

Alex Cugini Jr

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Rob McKenna
Attorney General

Advisory Memorandum: Avoiding Unconstitutional Takings of Private Property

December 2006

Prepared by:

Michael S. Grossmann, Senior Counsel
Alan D. Copsey, Assistant Attorney General
Katharine G. Shirey, Assistant Attorney General

On Behalf of:

The Takings Work Group,
Office of the Washington State Attorney General

STATE OF WASHINGTON
OFFICE OF THE ATTORNEY GENERAL

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

December 2006

Introduction

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

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

RCW 36.70A.370 Protection of Private Property.

(1) The state attorney general shall establish … an orderly, consistent process, including a checklist if appropriate, that better enables state agencies and local governments to evaluate proposed regulatory or administrative actions to assure that such actions do not result in an unconstitutional taking of private property….

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

…

Purpose of This Document

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

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

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

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

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

Prior editions of this document were published in February 1992, April 1993, March 1995, and December 2003. Those editions are superseded by this document.[†]

Organization of This Document

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

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

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

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

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

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

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

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.

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.*

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

involve warning signals be carefully and thoroughly reviewed by legal counsel. The Legislature has specifically affirmed that this assessment process is protected by the normal attorney-client privilege. RCW 36.70A.370(4).

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

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

A. Overview

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

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

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

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

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

goes so far as to acquire a public benefit (rather than preventing some harm) in circumstances where fairness and justice require the public as a whole to bear that cost rather than the individual property owner.

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

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

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

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

Courts have determined that substantive due process is violated when a government action lacks any reasonable justification or fails to advance a legitimate governmental objective. To withstand a claim that principles of substantive due process have been violated, a government action must (1) serve a legitimate governmental objective, (2) use means that are reasonably necessary to achieve that objective, and (3) not be unduly oppressive. Violation of substantive due process requires invalidation of the violating government action rather than the payment of just compensation.

B. Constitutional Principles Relating to the Regulation of Private Property

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

1. Constitutional Provisions

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

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

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

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

2. The Exercise of Eminent Domain - Condemnation Proceedings.

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

Government historically acquires property and compensates landowners through a condemnation proceeding in which the appropriate amount of compensation is determined and paid before the land is taken and used by government. The property generally may be condemned only for public use. Washington's Constitution has been interpreted narrowly in this regard and prohibits condemnation actions that are part of a plan to transfer property to private developers for redevelopment projects that involve private ownership of the developed property. The only exception to the public use requirement is that private property may be taken for private ways of necessity, and for drains, flumes, or ditches on or across the lands of others for agricultural, domestic, or sanitary purposes.

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

The Legislature has enacted a number of statutes specifying which state and local government agencies possess authority to acquire property through condemnation and

setting forth the procedures that must be followed during condemnation. *See* Title 8 RCW. Washington law provides that, in some cases, property may be taken immediately with compensation being determined and paid in a subsequent judicial proceeding or by agreement between the government and landowner. *See* RCW 8.04.090.

3. Inverse Condemnation.

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

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

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

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

The issue is how to identify just when a specific regulation may exceed constitutional limits. When there is a question of regulatory taking, the inquiry often focuses on the nature and purpose of the government regulation, the means used to

achieve it, and the effect of the regulation on legitimate and established expectations for the use of private property.

To better explain when a regulation unlawfully takes property, this section briefly describes three major types of regulatory takings challenges: (1) challenges alleging a categorical taking, (2) challenges that require a court to balance the governmental interest against the effect on particular private property, and (3) challenges to permit conditions that exact some interest in property.

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

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

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

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

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

If government has authority to deny a land use, it also has authority to condition a permit to engage in that use. For example, a local government may

condition a development permit by requiring measures that mitigate identifiable adverse impacts of the development. However, a permit condition that imposes substantial costs or limitations on the use of property could amount to a taking.

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

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

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

When government regulation has the effect of appropriating private property for a public benefit rather than to prevent some harm, it may be the functional equivalent of the exercise of eminent domain. In those cases the payment of just compensation probably will be required.

Washington's rather detailed test for evaluating takings claims was set out by the Washington State Supreme Court in *Guimont v. Clarke*, 121 Wn.2d 586, 854 P.2d 1 (1993). See the ***Appendix*** in part four of this ***Advisory Memorandum*** for a discussion of that case.

Note: Until recently, the takings analysis also asked whether the regulation of property substantially advanced a legitimate government interest. In *Lingle v. Chevron*, 544 U.S. 248 (2005), summarized in the ***Appendix***, the United States Supreme Court explained that this question is not relevant to a claim of taking by regulation. Instead, the issue of whether a regulation substantially advances a legitimate government purpose is better evaluated under principles of

substantive due process (discussed below). Washington's courts have not yet considered whether or how to modify the state's takings analysis in light of this recent U.S. Supreme Court precedent.

(3) *Challenges to Permit Conditions That Exact Some Interest in Property.* Sometimes a permit condition will attempt to extract some interest in property as mitigation for the adverse public impact of the proposed development. Courts have referred to these types of conditions as *exactions.* While such exactions are permissible, government must identify a real adverse impact of the proposed development and be prepared to demonstrate that the proposed exaction is reasonably related to that impact. The government also must be prepared to demonstrate that the burden on the property owner is roughly proportional to the impact being mitigated.

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

4. Substantive Due Process.

Under Washington law, even if a government action does not effect a taking, it may be unconstitutional if it violates principles of substantive due process. Substantive due process invokes the due process provisions of the Fifth and Fourteenth Amendments to the U.S. Constitution to invalidate flagrant abuses of government power – actions that authorize some manifest injustice or that take away the security for personal liberty or private property that our government was formed to protect. *Calder v Bull*, 3 U.S. 386 (1798). While the remedy for a government action that works a taking is just compensation, the remedy for a government action that violates substantive due process is invalidation of the violating government action.

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

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

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

public purpose. Second, is the method used in the regulation reasonably necessary to achieve the public purpose? The regulation must tend to solve the public problem. Third, is the regulation unduly oppressive on the landowner? Failing to consider and address each of these questions may lead to a substantive due process violation.

The "unduly oppressive" inquiry, which has been the decisive inquiry in most Washington substantive due process cases, involves balancing the public's interests against those of the regulated landowner. Factors to be considered in analyzing whether a regulation is unduly oppressive include (a) the nature of the harm sought to be avoided; (b) the availability and effectiveness of less drastic protective measures; and (c) the economic loss suffered by the property owner.

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

> On the public's side — the seriousness of the public problem, the extent to which the owner's land contributes to it, the degree to which the proposed regulation solves it, and the feasibility of less oppressive solutions.
>
> On the owner's side — the amount and percentage of value loss, the extent of remaining uses, the temporary or permanent nature of the regulation, the extent to which the owner should have anticipated such regulation, and how feasible it is for the owner to alter present or currently planned uses.

b. Substantive Due Process and Retroactive Legislation. A statute or regulation may attempt to impose new standards for previously-authorized conduct or may attempt to remedy newly-discovered impacts from conduct that was previously legal. The requirements of substantive due process do not automatically prohibit such retroactive legislative action so long as it serves a rational purpose. However, retroactive legislation is generally not favored because "elementary considerations of fairness dictate that individuals should have an opportunity to know what the law is and to conform their conduct accordingly; settled expectations should not be lightly disrupted." *Landgraf v. USI Film Products*, 511 U.S. 244, 265 (1994).

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

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

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

5. Remedies.

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

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

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

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

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

If a court determines there has been a regulatory taking, the government generally has the option of either paying just compensation or withdrawing the regulatory limitation.

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

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

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

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

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

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

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

In some cases a landowner may pursue a "facial challenge" to a law, claiming that the mere enactment of legislation results in a taking or violates due process. These are difficult cases to make because legislation is presumed constitutional and the landowner must demonstrate that under every conceivable set of facts the challenged legislation is constitutionally defective. *See Manufactured Housing Communities of Washington v. State*, 142 Wn.2d 347, 13 P.3d 183 (2000).

Part Three: Warning Signals

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

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

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

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

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

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

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

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

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

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

In some situations, pre-existing limitations on the use of property could insulate the government from takings liability even though the regulatory action ends up leaving the property with no value. For example, limitations on the use of tidelands under the public trust doctrine probably constitute a pre-existing limitation on the use of property that could insulate the government from takings liability for prohibiting development on tidelands. *See Esplanade Properties, LLC v. City of Seattle*, 307 F.3d 978, 983 (9th Cir. 2002); *Orion Corp. v. State*, 109 Wn.2d 621, 747 P.2d 1062 (1987), *cert. denied*, 486 U.S. 1022 (1988). A proposed land use that is precluded by principles of nuisance law is another example. However, the U.S. Supreme Court has made it clear that this principle does not apply simply because the property was acquired after a regulation prohibiting some land use was enacted. *See Palazzolo v. Rhode*

Island, 533 U.S. 606 (2001). A pre-existing limitation on the use of property must be a long-standing property or land use principle before it will effectively insulate the government from takings liability in those rare cases where the property is left with no value. The pre-existing nature of any regulation that limits the use of property may be an important consideration for other takings tests, however, because it may demonstrate whether the landowner had a reasonable expectation of using the property in some manner. This issue should be carefully evaluated with legal counsel.

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

4. Does the Regulation or Action Require a Property Owner to Dedicate a Portion of Property or to Grant an Easement? Regulation that requires a private property owner to formally dedicate land to some public use or that extracts an easement should be carefully reviewed. The dedication or easement that is required from the landowner must be reasonable and proportional — i.e., specifically designed to mitigate adverse impacts of a proposed development. Ultimately, the government must demonstrate that it acted reasonably, and that its actions are proportionate to an identifiable problem. Usually, the burden is on the government to identify the problem and demonstrate the reasonableness and proportionality of is regulation.

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

> ***a. Factors to Consider in a Regulatory Takings Analysis.*** Regulatory action that deprives property of all value constitutes a taking of that property. Where there is less than a complete deprivation of all value, a court will evaluate whether a taking has occurred by balancing the economic impact against two other factors: (1) the extent to which the government's action impacts legitimate and long-standing expectations about the use of the property; and (2) the character of the government's actions — is there an important interest at stake and has the government tended to use the least intrusive means to achieve that objective?

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

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

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

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

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

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

Conclusion

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

Part Four: Appendix

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

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

Before 1970

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

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

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

1970 – 1979

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

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

Grand Central Station was declared a landmark under New York City's historic preservation ordinance. Penn Central, the owner, proposed to "preserve" the original station while building a 55-story building over it. The city denied the

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

1980 – 1989

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

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

[In Lingle,[3] the Court abandoned the "substantially advance" test as part of takings analysis, recognizing it instead as an element of substantive due process.]

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

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

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

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

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

and occupies property and that such an occupation is "qualitatively more severe" than a regulation on the use of property.

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

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

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

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

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

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

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

The remedy for a regulatory taking of property is the payment of just compensation rather than simple invalidation of the regulation. If a regulation found to have "taken" property subsequently is repealed by the government, the property owner may be entitled to compensation for a "temporary taking" – the loss of value during the time the taking existed.

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

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

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

Portions of the Sioux Indian reservation that had been "allotted" to individual tribal members had become fractionated, sometimes into very small parcels. Good land often lay fallow, amidst great poverty, because of the difficulties in managing the property. In 1983, Congress passed legislation which provided that any undivided fractional interest constituting less than two percent of a given tract's acreage and earning less than $100 in the preceding year would revert to the tribe. No compensation was to be provided tribal members whose property was lost under the statute. Tribal members challenged the statute. The Court noted that, under the balancing test traditionally applied to takings challenges, the statute might be constitutional. In this case, however, the character of the government action was "extraordinary" in that it destroyed "one of the most essential" rights of ownership: the right to transfer property, especially to one's family. The Court held that such an action was a taking, regardless of the public interest that might favor the legislation.

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

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

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

Keystone's arguments that its coal had been appropriated for a public purpose, the Court reaffirmed that takings law does not compensate a landowner for every loss in value. The Court refused to consider the coal left behind as a separate piece of property and affirmed that takings law evaluates the impact of regulation on the entire property held by the landowner, not just the portion being regulated.

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

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

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

1990 – 1999

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

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

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

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

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

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

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

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

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

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

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

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

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

2000 –

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

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

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

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

taking claim; and (3) that no *Lucas* claim existed because the evidence showed at least one home could be built on the unfilled portion of the property.

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

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

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

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

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

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

of the property, or a physical segment of the property being regulated). The property must be considered as a whole when evaluating the impact of regulation.

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

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

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

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

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

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

The California Supreme Court, analyzing the takings claims under both the federal and California constitutions, denied both takings claims. San Remo then attempted to litigate its takings claims in federal court. The federal district

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

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

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

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

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

1970 – 1979

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

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

Maple Leaf Investors owned property along the Cedar River in an area subject to flood control regulations, which prohibited construction for human habitation within the floodway channel. Seventy percent of the property lay within the floodway channel. Considering a claim that the flood control regulations effected a taking, the Washington Supreme Court examined the balance between the public interest in the regulations and the private interest in using the property without restriction. The court found the primary purpose of the regulations was not to put the property to public use, but to protect the public health and safety: the regulations prevented harm to persons who might otherwise live in the floodway, and barred the construction of structures that might break loose during a flood and endanger life and property downstream. Further, since 30 percent of the property was still usable, there was no indication that the regulations prevented profitable use of the property. Finally, the court noted that it was nature, not the government, that placed Maple Leaf's property in the path of floods. The court rejected the taking claim.

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

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

A developer leasing property from the state sought plat approval from the county for a proposed residential development. The county denied preliminary plat approval, finding the proposed development would interfere with eagle perching and feeding areas. The developer claimed a taking of private property. The Washington Supreme Court held it was not a taking, primarily because the county had indicated it would approve a less intensive development. (The county commission had found no adverse impact from the development of 11 of the 22 lots proposed by the developer.) The court held there was a strong public interest in protecting the eagles, and there had been no showing that all reasonably profitable uses of the property were foreclosed.

1980 – 1989

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

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

Under a Seattle houseboat ordinance, the only reason a houseboat moorage owner could evict a paying tenant would be to use the moorage site for the owner's own non-commercial residence. A moorage owner appealed the ordinance. The Washington Supreme Court held the ordinance was a taking of private property without just compensation. The court's reasoning followed that of its earlier decision in *Kennedy v. Seattle*, 94 Wn.2d 376, 617 P.2d 713 (1980), where a similar ordinance was invalidated because it effectively conveyed perpetual occupancy rights of a landowner's property to another person.

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

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

A Seattle historic preservation ordinance required a building owner conducting repairs to replace a parapet in a manner approximating the original design. The building owner claimed its property was taken without compensation. Following the U.S. Supreme Court's analysis in *Penn Central*, the Washington Supreme Court held the estimated cost of replacing the parapet would not be an undue hardship on the building owner, considering the market value and income-producing potential of the building. The court rejected the taking challenge to the historic preservation ordinance.

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

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

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

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

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

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

The Orion Corporation was denied a shoreline permit to build a residential community on tidelands in Padilla Bay. Although the denial was issued pursuant

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

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

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

Unlimited sought a planned unit development approval to construct a convenience store on part of its property. The county approved the application subject to two conditions which required Unlimited to (1) dedicate a 50-foot right of way to provide commercial access to the next door property, and (2) dedicate a strip of its property sufficient to extend a county arterial along the front of its property. Unlimited appealed these conditions. The Washington Court of Appeals, relying upon the U.S. Supreme Court's decision in *Nollan*, stated that a private property interest can be exacted without compensation only where "the problem to be remedied by the exaction arises from the development under consideration, and the exaction is reasonable and for a legitimate public purpose." The court ruled that providing commercial access to the adjacent private property benefited a private person, rather than mitigating a public problem, and it found nothing in the proposed development that created a need to extend the arterial. The court held the conditions imposed by the county effected a taking.

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

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

After the county denied a master application for a proposed development, the developer challenged the denial and alleged a taking. The superior court rejected both claims, dismissing the taking claim as not ripe for review because no specific project had been proposed. The Washington Supreme Court affirmed, holding that a taking claim is not ripe for adjudication where a regulatory agency retains some discretion to allow profitable uses of land. Without a final regulatory disposition that clearly shows the economic impact of the regulatory program, it is not possible for the court to assess the extent to which the regulation interferes with reasonable investment-backed expectations. Ripeness is a question for the judge, not the jury. If the regulatory agency raises as a defense the landowner's failure to exhaust administrative remedies, the burden is on the

landowner to persuade the court that futility excuses exhaustion. The burden is on the landowner to demonstrate it would be futile to pursue available development alternatives, and this is a substantial burden.

1990 – 1999

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

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

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

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

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

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

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

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

A substantive due process claim rests on a showing that interference with property rights was irrational or arbitrary, not on a showing that no viable use of the property remains. Where money damages are sought for a substantive due

process violation under 42 U.S.C. § 1983, there also must be a showing that the land use regulation is invidious or irrational.

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

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

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

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

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

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

(1) The court begins with a threshold analysis, which applies the classic categorical or "*per se*" takings tests, in which the government's actions are not weighed against their financial impact. The court asks whether the challenged regulation deprives the owner of all economic value (*Lucas*), causes a physical invasion (*Loretto*), or otherwise destroys a fundamental attribute of

property ownership (the right to own property, exclude others, or dispose of the property). If so, a taking has occurred unless, in a Lucas-type claim, the background property limitation principle applies. If not, the court proceeds to a second threshold analysis.

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

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

In this case there was no taking because the landowners could still evict tenants and change the use of the property. However, the court held the statute violated substantive due process because the potential financial impact of the statute's relocation reimbursement requirements would be unduly oppressive on park owners.[4] While the statute legitimately addressed the problem of declining space for mobile homes, the court concluded that the park owners were not more responsible for the problem than the general public and should not be required to bear the entire responsibility for achieving the stated public goal. Following the test in *Presbytery*, the court invalidated the Act.

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

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

Apartment house owners challenged a city ordinance that required owners of buildings with more than one housing unit to register with the city and pay an annual inspection fee. Owners who did not register could not evict a tenant. Applying the analysis from *Guimont v. Clarke*, the court held the ordinance did not effect a regulatory taking, finding the city had a legitimate interest in ensuring compliance with its housing code and concluding the ordinance neither deprived

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

the owners of all economic value nor amounted to a physical invasion. Relying on the U.S. Supreme Court decision in *Yee*, the Washington Supreme Court rejected the argument that the ordinance's restriction on eviction effectively compelled a physical invasion of property, explaining that the owners had voluntarily rented the units and could continue to evict tenants by paying a small fee, so the owners' right to exclude others was not destroyed. The court also found the small annual fee (one-half of one percent of the average rent) was not an undue burden on the owners and held the owners were not deprived of substantive due process.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

To address problems facing low income and elderly mobile home tenants as space for mobile homes became increasingly scarce, the Washington Legislature enacted a statute that gave qualified mobile home tenant organizations a right of first refusal to purchase mobile home parks when the landlord decided to sell the land. The mobile home park owners complained that granting a right of first refusal would impair their power to negotiate the best sale of their property and that the enactment of the legislation took their property. The Washington Supreme Court agreed. It first conducted a *Gunwall* analysis[5] and held the opening portion of article I, section 16, of the Washington Constitution, which prohibits government from taking private property for a "private use," provides greater protection than the federal Constitution.

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

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

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

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

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

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

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

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

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

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

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

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

Joshi defended by arguing that the mineral estate had been destroyed when the zoning was changed and that Saddle Mountain's predecessor should have filed a takings claim against the city.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

City of Des Moines v. Gray Businesses, LLC,
130 Wn. App. 600, 124 P.3d 324 (2006)

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

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

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

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

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

Peste v. Mason County,
133 Wn. App. 456, 136 P.3d 140 (2006)

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

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

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

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

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

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