From: pearl hewett
Sent: Friday, July 03, 2015 10:08 PM
To: zSMP
Subject: Fw: SMP Reminder of comments on the Law

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From: pearl hewett

Sent: Friday, July 03, 2015 10:05 PM
Subject: SMP Reminder of comments on the Law

A Clallam County SMP comment
Reminder of comments on the Law
Pearl Rains Hewett

Regarding the Precautionary Rule or No Net Loss:

"**Regulation Cannot Be Based On Precautionary Principle**
While it is often politically expedient to adopt overly precautionary measures, the precautionary principle is not science, and cannot satisfy the scientific requirements of the GMA or SMA. Expressed in its most basic form, the precautionary principle reflects the age-old adage: "better safe than sorry." See Frank B. Cross, Paradoxical Perils of the Precautionary Principle, 53 Wash. & Lee L. Rev. 851, 851 (1996). As a legal principle, the precautionary principle insists that the lack of full scientific certainty should not stand in the way of regulatory action. Cross, 53 Wash. & Lee L. Rev. at 851. The precautionary principle (as expressed in the Brennan and Culverwell study) suggests that government should act to protect the environment, even in the absence of clear evidence of harm and notwithstanding the costs of such actions. Cross, 53 Wash. & Lee L. Rev. at 851; see also AR V8, Tab 72, Index 776 at 20.

Proponents and critics of the precautionary principle agree that, when used as a decision-making tool, the principle is properly considered as a matter of policy, not science. See Holly Doremus, Precaution, Science, and Learning While Doing in Natural Resource Management, 82 Wash. L. Rev. 547, 558-60 (2007) (resort to the precautionary principle is a moral argument "that makes no pretense of value neutrality"); id. at 560 (citing Gail Charnley & E. Donald Elliott, Risk Versus Precaution: Environmental Law and Public Health Protection, 31 Envtl. L. Rep. 10,363, 10,365 (2002) (arguing that regulatory decisions adopted under the precautionary principle should disclose "that policy, not science, underlies those standards.")). A decision to adopt the policy-based precautionary solution will constitute an unjustified departure from BAS, and will be invalid. Swinomish, 161 Wn.2d at 430-31; Ferry County, 155 Wn.2d at 835."

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Buffers

Buffers may be an easy and common tool to regulate critical areas, but they are not required. See Swinomish Indian Tribal Cmty. v. W. Wash. Growth Mgmt. Hearings Bd., 161 Wn.2d 415, 430-31 (2007). Indeed, buffers that are too big are not necessary to protect the actual functions and values of critical areas, and constitute enhancement or restoration regulations exceeding the GMA's requirements. Swinomish, 161 Wn.2d at 427-31; Ferry County v. Concerned Friends of Ferry County, 155 Wn.2d 824, 835 (2005); Honesty in Envtl. Analysis Legislation (HEAL) v. Cent. Puget Sound Growth Mgmt. Hearings

Bd., 96 Wn. App. 522, 533-34 (1999); see also Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1028 (1992); James S. Burling, Private Property Rights and the Environment After Palazzolo, 30 B.C. Envtl. Aff. L. Rev. 1, 13 (2002) (The Lucas Court has "refuted the notion that a regulation designed to protect the public interest by preventing harm is automatically immune from takings liability.").

Both federal and state courts have held buffers subject to a takings analysis. Dolan v. City of Tigard, 512 U.S. 374, 380, 389 (1994); see also Lucas, 505 U.S. at 1018-19 (conservation easements and similar negative regulation deprive the landowner of a distinct property interest and may result in a taking); Isla Verde Int'l Holdings, Inc. v. City of Camas, 146 Wn.2d 740, 752-54 (2002) (invalidating open space requirement intended to protect the environment and provide critical habitat); Citizens' Alliance for Property Rights v. Sims, 145 Wn. App. 649 (2008), rev. denied, 203 P.3d 378 (2009) (invalidating open space set aside intended to protect against stormwater runoff under state statute incorporating Nollan/Dolan federal constitutional takings test). To survive a takings challenge, local government must demonstrate "a close causal nexus between the burdens imposed by the regulations and the social costs that would otherwise be imposed by the property's unregulated use." R. S. Radford, Of Course a Land Use Regulation That Fails to Substantially Advance Legitimate State Interests Results in a Regulatory Taking, 15 Fordham Envtl. L. Rev. 353, 390 (2004) (citing Nollan v. Cal. Coastal Comm'n, 483 U.S. 825, 838-39 (1984)); Burton v. Clark County, 91 Wn. App. 505, 521-22 (1998) (To establish nexus, the County "must show that the development . . . will create or exacerbate the identified public problem" and that its proposed condition "tends to solve, or at least to alleviate, the identified public problem."). It is this causal connection, "not a means-end fit, that offers real protection against the imposition of unjustified or disproportionate burdens on individual property owners." Radford, 15 Fordham Envtl. L. Rev. at 391. Once nexus is shown, local government must show that it engaged in "some sort of individualized determination that the required dedication is related both in nature and extent to the impact of the proposed development." Dolan, 512 U.S. at 391; See also Mark W. Cordes, Legal Limits on Development Exactions: Responding to Nollan and Dolan, 15 N. Ill. U. L. Rev. 513, 550 (1995) ("[O]ne clear principle that does emerge from Dolan is that most at risk will be those exactions that are imposed because the local government has already decided that it wants the land in question and uses the development approval process as a means to get it."). Thus, to impose buffers on private property, the County must do more than just rely on generalized studies.

Constitutional and statutory law prohibit the County from imposing excessive and inflexible buffers on shoreline properties. Any buffers adopted should include built-in flexibility to respond to site specific circumstances such that the buffer restrictions are reasonably necessary as a direct result of the proposed development or use of the property. See Dolan, 512 U.S. 374; Citizens' Alliance, 145 Wn. App. 649.

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SMP REGULATIONS MAY NOT UNREASONABLY BURDEN OR ABROGATE PROPERTY RIGHTS

The proposed update (expansion of buffers and re-designation of structures/uses as non-conforming) to the County's SMP, as applied to particular landowners, may contain significant constitutional and statutory flaws that should be remedied before the County considers the ordinance for final approval.

Our Supreme Court has repeatedly concluded that the SMA intended to strike a balance between the public interest in protecting shorelines and the property rights of shoreline landowners. See Biggers v. City of Bainbridge Island, 162 Wn.2d 683, 687 (2007) (the SMA seeks to balance protecting shorelines

with the rights of private property owners); accord, Buechel v. State Dept. of Ecology, 125 Wn.2d 196, 203 (1994); Nisqually Delta Ass'n v. City of Dupont, 103 Wn.2d 720, 726 (1985).

Washington's landowners have the fundamental right "to acquire and hold property, and to protect and defend the same." American Legion Post No. 149 v. Washington State Dept. Of Health, 164 Wn.2d 570, 607 (2008) (emphasis added); State v. Vander Houwen, 163 Wn.2d 25, 36 (2008); Grant County Fire Protection Dist. No. 5 v. City of Moses Lake, 150 Wn.2d 791, 812-13 (2004). Property is defined by state law, Board of Regents v. Roth, 408 U.S. 564, 577 (1972), and Washington has defined property in the broadest of terms:

Property in a thing consists not merely in its ownership and possession, but in the unrestricted right of use, enjoyment, and disposal. Anything which destroys any of these elements of property, to that extent destroys the property itself. The substantial value of property lies in its use. If the right of use be denied, the value of property is annihilated and ownership is rendered a barren right.

Ackerman v. Port of Seattle, 55 Wn.2d 400, 409 (1960) (emphasis added). The right to make reasonable use of one's private property is a constitutionally protected right. Government activities that invade or interfere with the right to use and enjoy property is a taking. Pruitt v. Douglas County, 116 Wn.App. 547, 559 (2003). Thus, even if title and possession of property remain undisturbed, a taking still may have occurred in the constitutional sense. See State ex. rel. Smith v. Superior Court, 26 Wash. 278, 287 (1901).

While government can adopt reasonable regulations to protect the public interest, it cannot "abrogate a property owner's constitutional right to protect his property." Vander Houwen, 163 Wn.2d at 36; Biggers, 162 Wn.2d at 697 (A complete prohibition on protective bulkheads would "conflict[] with [the] regulatory system established by the SMA.").

Washington's constitution prohibits government from enacting laws that take or damage private property without first paying just compensation. See Wash. Const. art. I, § 16 ("No private property shall be taken or damaged for public or private use without just compensation having been first made . . . ."); Dickgieser v. State, 153 Wn.2d 530, 534-35 (2005). It has long been established that government regulation that goes too far in interfering with the rights of landowners may result in a taking. See, e.g., Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 415 (1922). In other words, an ordinance is not insulated from a takings challenge merely because a sweeping legislative generalization has been made that the ordinance protects society from a conceived harm, whether it be public safety, environmental degradation, etc. Rather, the more pertinent question is where a permissible "regulation" ends and an unconstitutional "taking" begins. Goldblatt v. Hempstead, 369 U.S. 590, 594 (1962).

The Takings Clause operates to bar government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole. See Armstrong v. United States, 364 U.S. 40, 49 (1960); Mission Springs v. City of Spokane, 134 Wn.2d 947, 964 (1988). In other words, it assures fundamental fairness in the way that government treats its citizens and distributes the burdens of community life.

The lack of site-specific science poses a problem for the County because the SMA only requires that a county protect shorelines as critical areas from new harm; it does not require regulations to enhance or restore already degraded critical areas. See Swinomish Indian Tribal Cmty. v. W. Wash. Growth Mgmt. Hearings Bd., 161 Wn.2d 415, 427-31 (2007) (rejecting the argument that protection of critical areas required that the county "restore habitat functions and values that no longer exist"). Therefore, before adopting critical area regulations, it is incumbent on the County to include science that that actually identifies the existing functions and values of the critical area that will be threatened if use of the property is allowed. Swinomish, 161 Wn.2d at 430; Tracy v. City of Mercer Island, CPSGMHB No. 92-3-0001, at 25 (Final Decision and Order, Jan. 5, 1993) (The requirement to protect a critical area "presumes that the critical area presently exists.") (emphasis added).

In addition to constituting a taking, a land use regulation that too drastically curtails an owner's use of property may also effect a denial of substantive due process. Presbytery v. King County, 114 Wn.2d 320, 329 (1990); Orion Corp. v. State, 109 Wn.2d 621 (1987). Substantive due process and takings claims are alternatives, representing separate sources of constitutional protection. Id. While the Takings Clause limits government power by requiring just compensation when the government takes private property, the Due Process Clause protects citizens from government actions that are "arbitrary, unreasonable, and capricious." Pruneyard Shopping Center v. Robbins, 447 U.S. 74, 84-85 (1980). In Washington state, even if a regulation is insulated from a takings challenge, it still must withstand the due process test of reasonableness. Guimont v. Clarke, 121 Wn.2d at 608.

A three-fold inquiry is necessary to determine: "(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." Guimont, 121 Wn.2d at 609; see also, Orion Corp. v. State, 109 Wn.2d at 646-47; West Main Assocs. v. Bellevue, 106 Wn.2d 47, 52 (1986); Lawton v. Steele, 152 U.S. 133 (1894); Goldblatt v. Hempstead, 369 U.S. at 594-95.

Shoreline Regulations May Not Infringe On Property Rights

The SMA and its implementing regulations do not authorize the County to place the burden of shoreline restoration, enhancement or improvement on private property owners. Instead, the regulations adopted by the Department of Ecology to implement the SMA provide unequivocally that:

The policy goals of the act, implemented by the planning policies of master programs, may not be achievable by development regulations alone. Planning policies should be pursued through the regulation of development of private property only to an extent that is consistent with all relevant constitutional and other legal limitations (where applicable, statutory limitations such as those contained in chapter 82.02 RCW and RCW 43.21C.060) on the regulation of private property. Local government should use a process designed to assure that proposed regulatory or administrative actions do not unconstitutionally infringe upon private property rights.

WAC 173-26-186(5) (emphasis added). The regulations also state:

Local master programs shall include regulations and mitigation standards ensuring that each permitted development will not cause a net loss of ecological functions of the shoreline; local governments shall design and implement such regulations and mitigation standards in a manner consistent with all relevant constitutional and other legal limitations of the regulation of private property.

WAC 173-26-186(8)(b)(i) (emphasis added). Local government is instructed that if it cannot meet its "necessary" policy goals under constitutional and statutory limitations on the regulation of private property, then must purchase the property – it cannot simply take the property. See 90.58.240; WAC 173-26-191(1)(a).

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