Merrill, Hannah

From: pearl hewett [redacted]
Sent: Friday, May 13, 2011 9:23 AM
To: zSMP
Subject: Fw: consistancy review Fw: Victory! Favorable decision

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Please add this as my #7 comment for the consistancy review and SMP Update.

Pearl Rains Hewett

----- Original Message -----
From: pearl hewett
To: earnest spees ; Jo Anne Estes ; Kai Ahlburg
Sent: Thursday, May 12, 2011 9:38 PM
Subject: Victory! Favorable decision

Pacific Legal Foundation

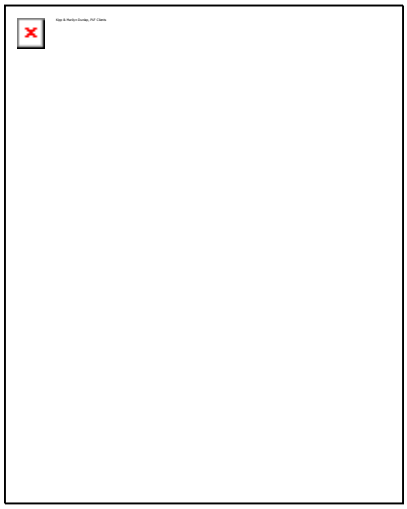
If government blocks access to your land, it has committed a taking

Dunlap v. City of Nooksack

Contact: Brian T. Hodges

Status: Victory! Favorable decision issued October 25, 2010. Motion to publish the opinion denied on December, 2010.

Summary:
Kipp and Marilyn Dunlap bought a small vacant residential lot in Nooksack, Washington with the dream of building a home there. But the city had other ideas.



Nooksack slough runs through the middle of the Dunlaps' lot, and the city declared that land adjacent to the stream an environmentally sensitive area. The city imposed mandatory buffers on both sides of the stream, making their property off limits to development without a variance. And the city stated that the only way it would consider granting the Dunlaps a variance would be if they redesigned their home to be triangular in shape, raised on stilts, and have a floor area no more than 480 square feet. The city would not allow the Dunlaps to put in a yard, garden, or even a fence.

The Dunlaps could not accept the city's demands, so the city denied the variance and the Dunlaps sued for inverse condemnation. After the trial court ruled in their favor, the city appealed, arguing its environmental regulations trumped the Dunlaps' exception that he could build a home on a lot zoned for residential use (and coincidentally surrounded by dense residential development).

In July 2010, PLF filed a friend of the court brief arguing that the city's actions constituted a categorical "total taking" under Lucas v. South Carolina Coastal Council, 505 U.S. 1003 (1992). Under Lucas, the city's designation of the Dunlap's property **as a sensitive area is irrelevant** - the city cannot strip away their right to build their home without first paying for the property. It has been nearly a decade since the Dunlaps first asked for permission to build their home. Their land

remains vacant and unusable. But this may soon end.

On October 25, 2010, the Court of Appeals agreed with the trial court, correctly concluding that the city's application of stream buffers resulted in a *Lucas* total taking. This case was significant for two reasons: **(1) Washington courts had not previously found a *Lucas* taking, and (2) this is the first case to PLF's knowledge where application of a buffer resulted in a per se taking.**