

A SHORTCOURSE

ON LOCAL PLANNING

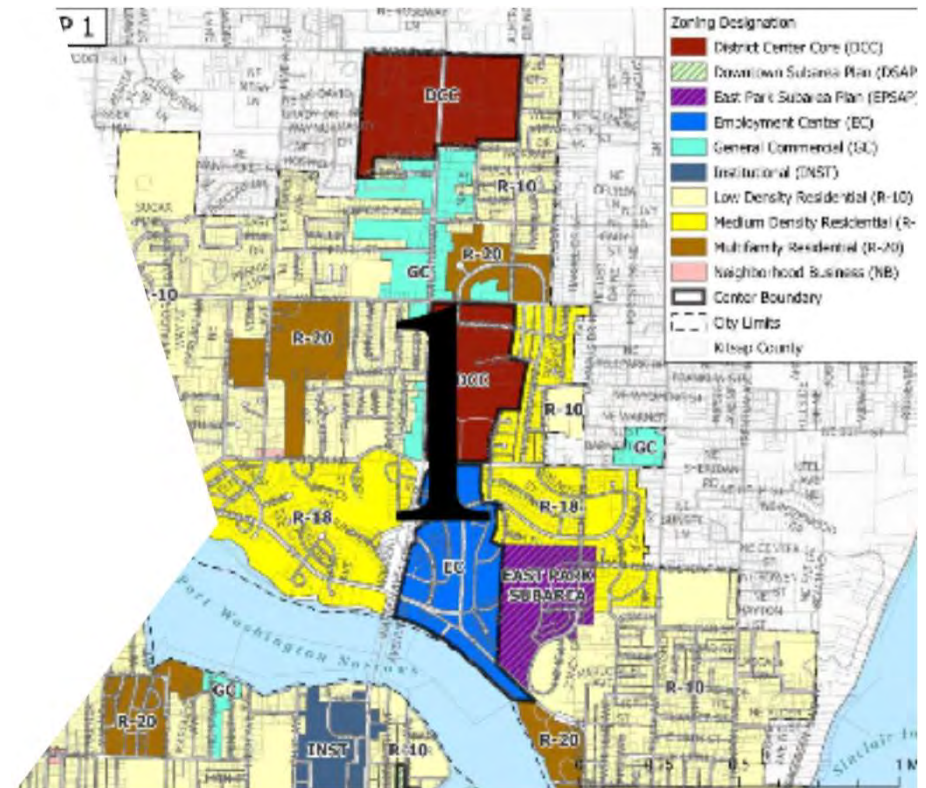
The Legal Basis of Planning in Washington State



Washington State
Department of
Commerce

Land use regulation

- Profound impact on life in the United States
- High stakes on all sides
- Often no easy answers
- Long-lasting consequences; shaping communities
- Land use decision making process / framework is critical
- Litigation frequently results



What we will cover

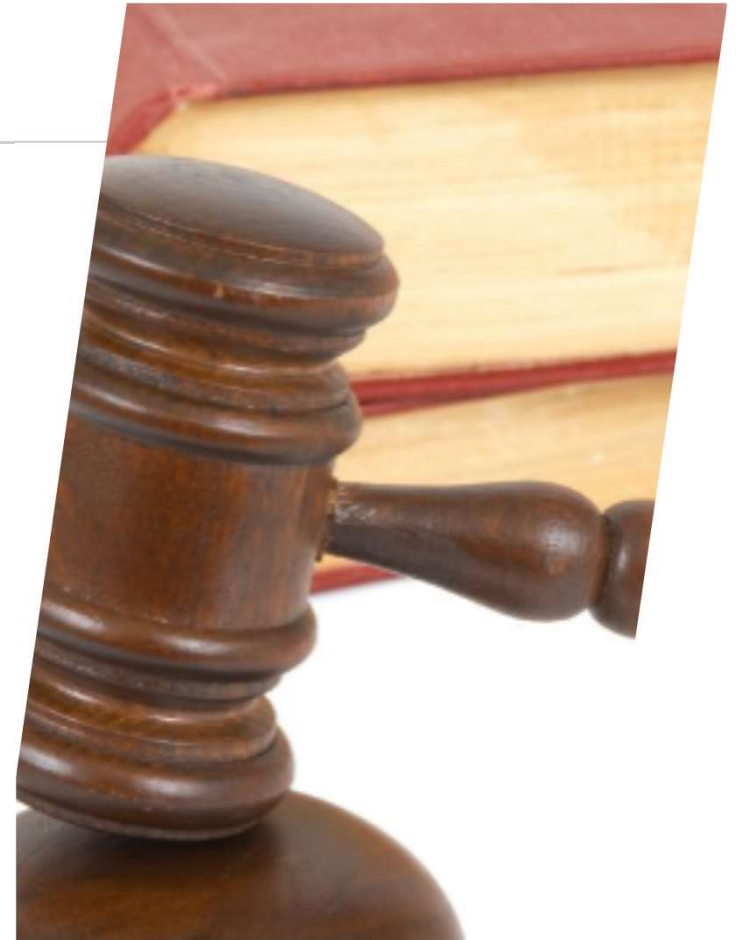
- Sources of Planning and Land Use Law
- Basics of Land Use Law Research
- Legal Basis for Planning in Washington State (Case Law & Constitution)
- Statutory Basis for Planning in Washington State
- Planning Commissions / Agencies / Hearing Examiner Authorization
- Due Process (Procedural & Substantive)
- Takings
- Reasonable Use Exceptions
- Vesting / Moratoria
- State Subdivision Act (Chapter 58.17 RCW)
- State Environmental Policy Act – “SEPA” (Chapter 43.21C RCW)
- Shorelines Management Act – “SMA” (Chapter 90.58 RCW)
- Growth Management Act – “GMA” (Chapter 36.70A RCW)
- Local Project Review Act (Chapter 36.70B RCW)
- Land Use Petition Act – “LUPA” (Chapter 36.70C)
- Constitutional Issues in Land Use Planning

Sources of planning and land use law

- **Constitutions (Federal & State)**
- **Statutes**
 - **Federal**
 - **State (Revised Code of WA “RCW”)**
 - **Federal Examples**
 - **Endangered Species Act (ESA)**
 - **Clean Water Act (CWA)**
 - **State Examples**
 - **Growth Management Act (GMA)**
 - **State Env Policy Act (SEPA)**
 - **Shoreline Management Act (SMA)**
 - **Open Public Meetings Act (OPMA)**
- **City Ordinances & Resolutions**
- **Comprehensive Plan & Updates**
 - **For jurisdictions planning under the GMA**
- **Administrative Regulations**
 - **Federal = Code of Federal Regulations (CFR)**
 - **State = Washington Administrative Code (WAC)**
- **Court Decisions**
 - **Federal**
 - **State**
- **Board, Agency and Commission Decisions**

The beginning of zoning

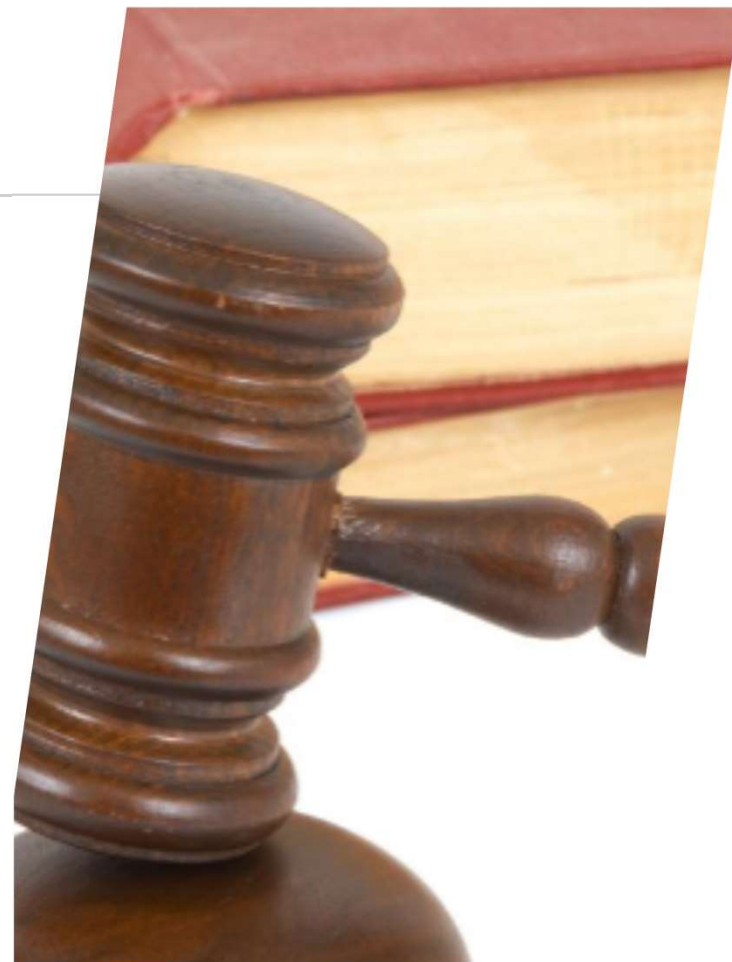
- ▶ **Village of Euclid v. Ambler Realty, 272 U.S. 365 (1926)**
 - ▶ Beginning of modern planning in US
 - ▶ Village adopted one of the first ever zoning regulations in US
 - ▶ Basic goal: set some very basic standards regarding:
 - ▶ classes of use
 - ▶ three classes of height
 - ▶ area restrictions
- ▶ **Ambler Realty applied for development approval that did not meet the standards, and upon denial, sued.**
- ▶ **Court Decision: US Supreme Court authorized cities and towns to establish different zone districts with specific regulations applicable**



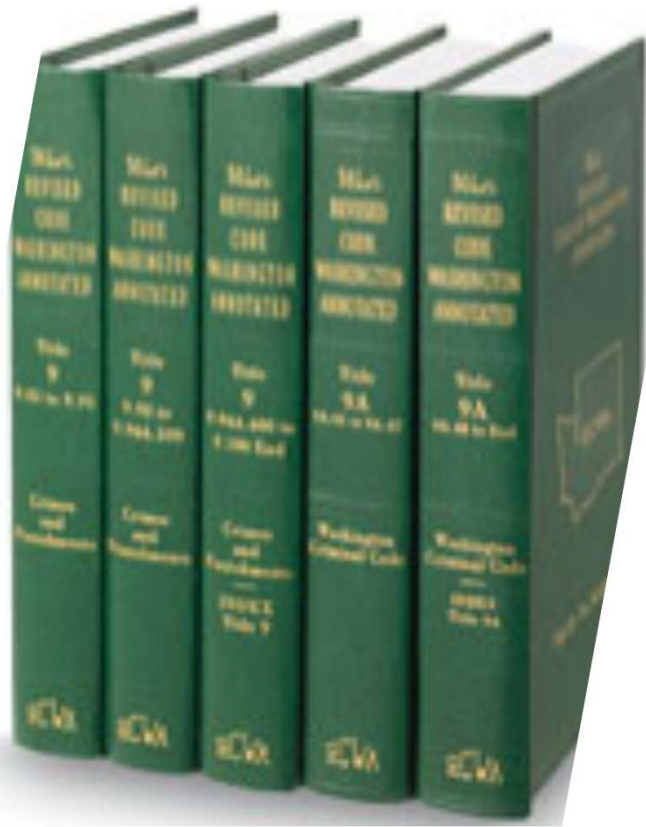
Zoning and the constitution

Washington Constitution, Article 11 § 11

- ▶ Legal authority for zoning and land use regulation is found under Washington Constitution, Article 11 § 11
 - ▶ Any city or town can establish police power zoning as long as not in conflict with general law:
 - ▶ “... any county, city, town or township may make and enforce within its limits all such police powers, sanitary and other regulations as are not in conflict with general laws...”



Statutory basis in the Revised Code of Washington



- ▶ **Planning Commission / Agency / Hearing Examiner Authorization:**
 - ▶ RCW 35A.63 (code cities);
 - ▶ RCW 35.63 (cities and towns)
- ▶ **Chapter 36.70 Planning Enabling Act**
- ▶ **Chapter 36.70A Growth Management Act “GMA”**
- ▶ **Chapter 36.70B Local Project Review Act**
- ▶ **Chapter 36.70C Land Use Petition Act “LUPA”**
- ▶ **Chapter 43.21C State Environmental Policy Act “SEPA”**
- ▶ **Chapter 58.17 - State Subdivision Act**
- ▶ **Chapter 90.58 Shorelines Management Act “SMA”**

1930s – 1960s:

Original Washington planning enabling statutes

Established the basis for planning that took place for the subsequent 60 + years

... established Planning Commissions

... specified elements required in comprehensive plans

... established the roles and participants in the process (hearing examiners, planners and staff, planning commissions, city councils ...

PLANNING COMMISSION ACT

1935 Original

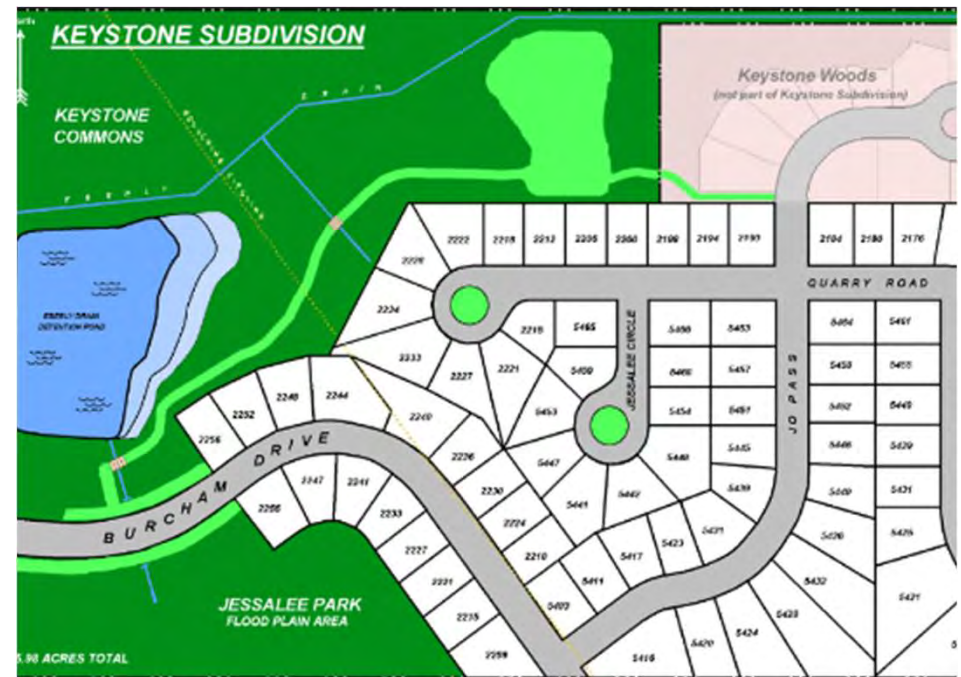
PLANNING ENABLING ACT

1959

Chapter 36.70 RCW (1935 and as subsequently amended)

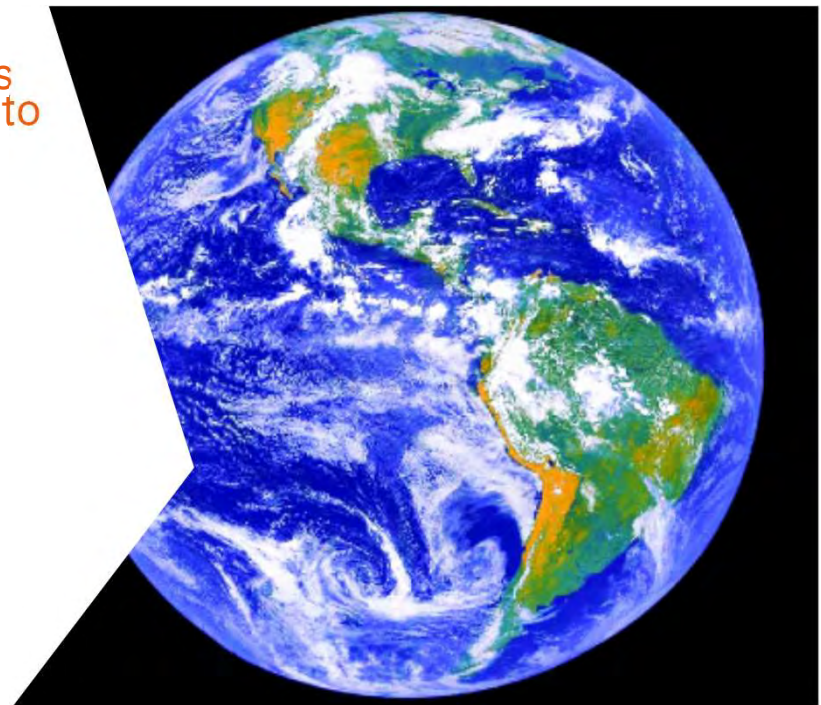
State Subdivision Act: Chapter 58.17 RCW

- ▶ Adopted 1969
- ▶ Established process for subdividing land for development
- ▶ Detailed process for investigating, reviewing and approving subdivisions for single family housing development
- ▶ Subdivision (generally 5 or more lots)
- ▶ Short subdivision (generally 4 or fewer lots)
- ▶ Binding Site Plans (concept to explore in the statute)
- ▶ Planned Unit Developments “PUDs” (typically multi-family / commercial)



State Environmental Policy Act (SEPA) Chapter 43.21 RCW

- ▶ Adopted 1971 (and as subsequently amended)
- ▶ Essentially provides a mechanism for decision makers such as planners, hearing examiners and city councils to have full information about projects in order to make well-founded decisions
- ▶ Extensive procedural statute – requires a number of steps and analysis – applies to both the built and the natural environment
- ▶ STEP 1: initial application (standardized “SEPA Checklist”)
- ▶ STEP 2: threshold determination (non-significance (DNS); mitigated DNS; Significance (would trigger Environmental Impact Statement “EIS” ... EIS process generally takes a year or more to generate the science and fact-based background related to the proposal
- ▶ SEPA review occurs concurrently with general project review, to ensure that all relevant information is available to the decision makers.



Shorelines Management Act (SMA)

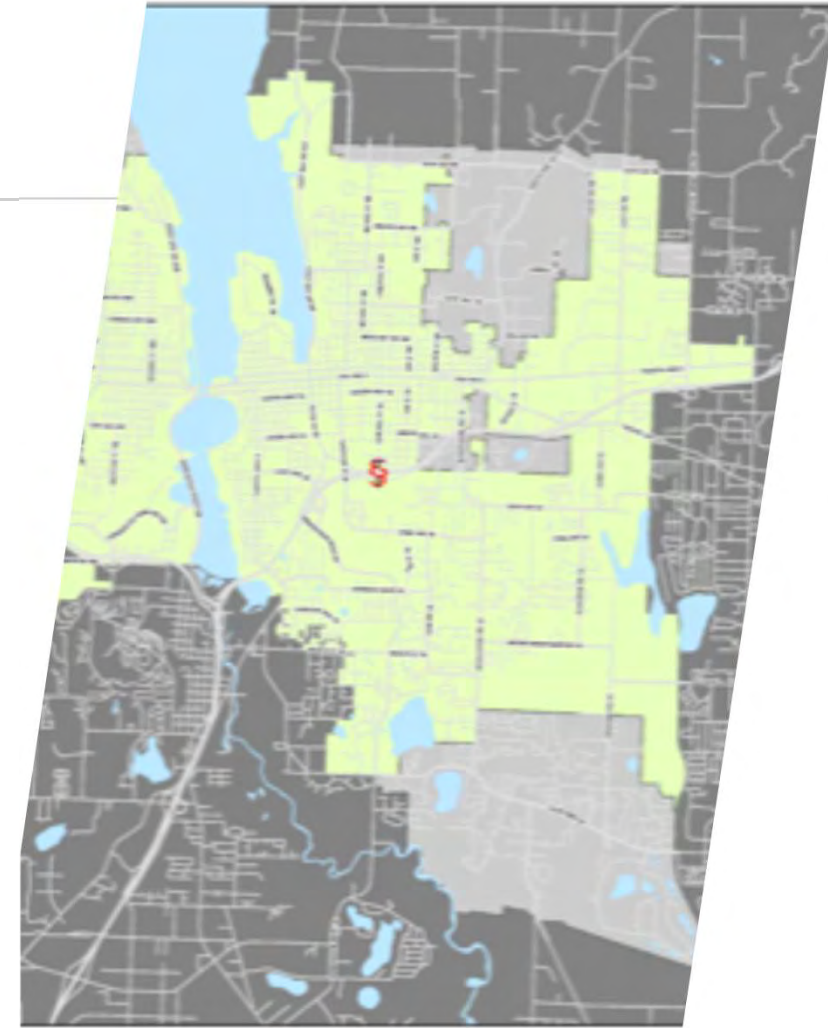
Chapter 90.58 RCW

- ▶ Adopted 1971 by citizen initiative (and as subsequently amended)
- ▶ Predicated upon a federal statute
- ▶ Purpose is to protect Washington shorelines in the context of development
- ▶ Goal: Shorelines to remain an attribute and amenity available to all citizens at all times
- ▶ Regulations updated to require “no net loss” of shorelines
- ▶ SMA also has detailed procedural process that may flow either concurrently or non-concurrently with the underlying application
- ▶ Local jurisdictions adopt local Shoreline Master Programs (SMPs) which inventory local shorelines, and identify and prioritize shoreline uses
- ▶ SMPs must be compliant with state regulations / reviewed by Department of Ecology
- ▶ Water dependent uses (such as marinas) are given priority



Growth Management Act (GMA) Chapter 36.70A. RCW

- ▶ Adopted 1990
- ▶ Establishes structure for comprehensive planning, concurrency / capital facilities, urban growth area (“UGA”) concept, critical area ordinances
- ▶ Cities and counties subject to the Act must plan on a 20-year horizon based on population growth projections
- ▶ Urban growth areas are drawn cooperatively between cities and counties based on population growth projections and needs analysis
- ▶ Required to be implemented at the local level
- ▶ Improvements that are necessary for development need to be in-place at the time the development is constructed; or funding sources need to be in-place to construct such improvements within a six-year horizon



Local Project Review Act Chapter 36.70B RCW

- ▶ Adopted 1995
- ▶ Legislative response to concerns regarding burdens and delays resulting from ever increasing number of environmental laws and development requirements
- ▶ See statute for significant timelines and required actions



Land Use Petition Action (LUPA) Chapter 36.70C.RCW

- ▶ Adopted 1995
- ▶ Requires and implements a streamlined process for appeals of land use decisions
- ▶ Purpose: reform process for judicial review of land use decisions
- ▶ Establishes uniform, expedited appeal procedures and uniform review criteria
- ▶ Act applies to judicial review of “land use decisions”
 - ▶ Such as: applications; interpretative or declaratory decisions; local jurisdiction’s enforcement of land use ordinances (with certain exceptions)

City of Kirkland

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5 **SUPERIOR COURT OF WASHINGTON FOR THE COUNTY OF KING**
6
7 POTALA VILLAGE KIRKLAND, LLC, a
Washington limited liability company, and
8 LOBSANG DARGEY and TAMARA AGASSI
DARGEY, a married couple,
9
10 Plaintiffs/Petitioners,
vs.
11 THE CITY OF KIRKLAND, a Washington
12 municipal corporation,

NO.
LAND USE PETITION AND
COMPLAINT FOR DECLARATORY
JUDGMENT, WRIT OF MANDAMUS,
CONSTITUTIONAL WRIT, AND
INJUNCTION

Constitutional issues in land use planning

- *Procedural due process*
- *Substantive due process*
- *First amendment issues*
 - Freedom of speech*
 - Freedom of expression*
 - Freedom of religion*
- *Fifth amendment*
 - Takings*
- *Fourteenth amendment*
 - Equal protection*



Procedural due process

Procedural process essentially means that people have a right to have issues fairly heard and decided

Key elements of due process are:

- **Notice of what is happening**
- **Opportunity to be heard**

Substantive due process

The question of substantive due process focuses on the outcome of the rules.

There are 4 basic questions to ask:

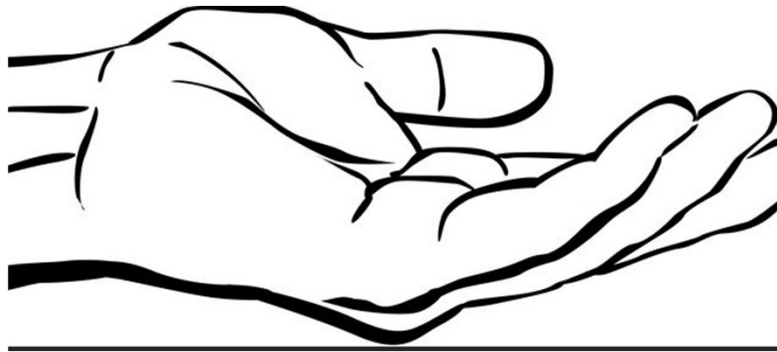
- Does the regulation have a legitimate purpose?
- Does the regulation appropriately accomplish the legitimate purpose – is there a rational basis between the legitimate purpose and the regulation?
- Is the regulation reasonable?
- Is the regulation clear and able to be understood?

**REMEDY FOR
DUE PROCESS
VIOLATION:**

**INVALIDATION
OF SUBJECT
ORDINANCE OR
REGULATION**

Takings

- 1) Just compensation must be paid before property is taken
- 2) Compensation must be paid even where property is not actually taken, but is damaged



US Constitution

- 5th Amendment

WA Constitution

Article I § 3

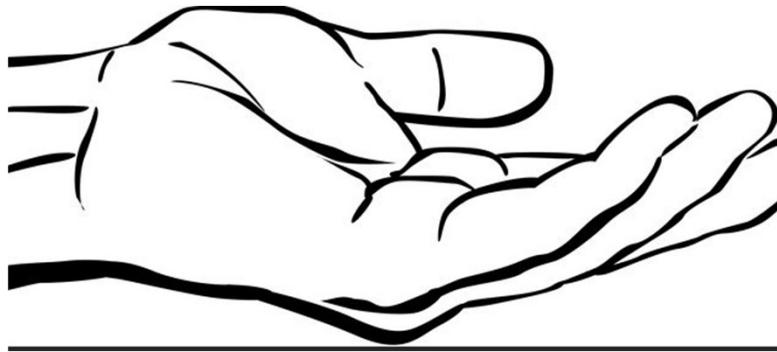
- personal rights

Article I § 16

- eminent domain

Takings

- 1) Physical Appropriation of Property
- 2) Regulatory Taking

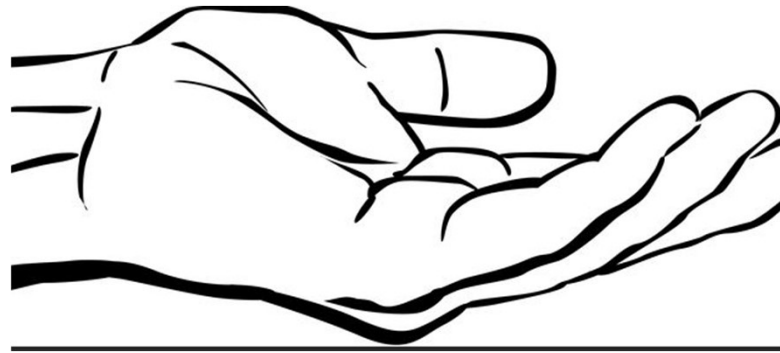


Regulatory takings can result when the use of property is substantially impaired by applicable regulations

Takings

Related Concepts:

- 1) Exactions
- 2) Dedications



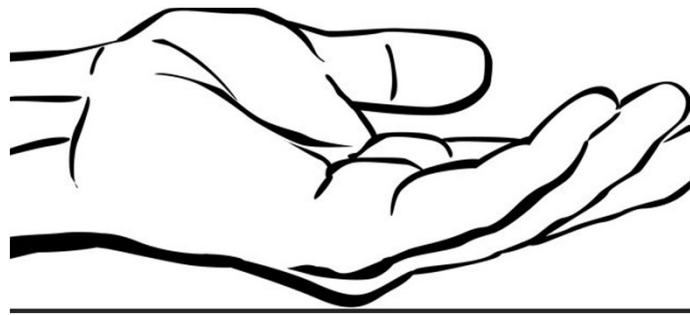
Exactions and dedications are essentially conditions placed on the development of property by the decision-maker approving the development

EXAMPLES: requirement to pay money outright; contribute or dedicate for things like open space and parks; traffic improvement requirements...

Takings

Related case law: Nollan / Dolan

Held that the government may not require a person to give up a constitutional right in exchange for a discretionary benefit conferred by the government where the property sought has little or no relationship to the benefit (“essential nexus”).



Nollan / Dolan standard

Allows governmental entities to condition approval of permits on the dedication of property to the public, so long as there is a “nexus” and “rough proportionality between the property that the government demands and the social costs of the applicant’s proposal

Reasonable use exceptions

If the regulations applied to property are so severe that they prohibit any use of the property,

a jurisdiction may allow a reasonable use of the property in order to avoid takings claim.



Vesting

Relates to the question of what specific set of regulations apply to a development application that may progress over time

- Common law roots (case law)

STATUTORY CODIFICATION

- State Building Code Act
- Development Agreement
- Plats and Subdivisions



Moratoria

This term refers to a hold placed on development to allow a specific time period (usually six months) for relevant issues to be appropriately analyzed

EX: RCW 35A.63.220



Conclusion

Complex and ever-changing

- Concepts are often grey and difficult to understand, as opposed to clear black and white
- Accept that land use practice is often grey, sometimes without answers that are clearly “right” or “wrong”
- Seek to fully analyze issues from all angles, develop a strong factual record, and show how facts fit within the legal framework to support a decision
- Familiarize yourself with the relevant framework and standards and procedures that apply to the particular subject matter and process

