LAND USE CASE LAW UPDATE

2020-21

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Case Law Overview

Part I: Takings and Nonconforming Uses

Douglass Props. II, LLC v. City of Olympia – Burden of proof for challenging impact fee

Cedar Point Nursery v. Hassid – Requiring physical access can be takings

INA Tateuchi v. City of Bellevue – "Abandonment" of use requires intent; Council deliberation of conditional use exempt from OPMA.

Brown v. Mason County - Intent not required to establish "cessation" of nonconforming use.

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Case Law Overview

Part II: Stuff

Whidbey Envtl. Action Network v. GMHB – Critical Areas Ordinance validity.

Perillo v. Island Cnty – Government Negligence

Urban Bainbridge v. City of Bainbridge Island – Moratoria can be subject to GMHB review

Niesz v. West – Docks

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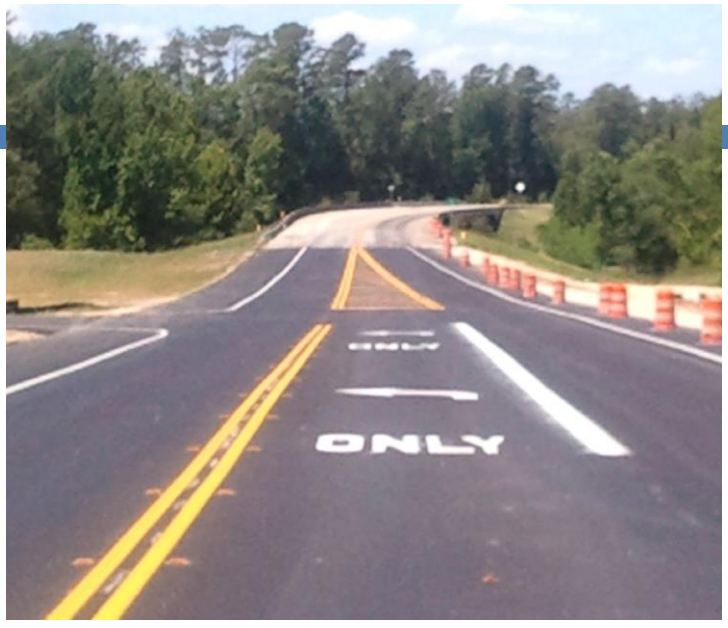
Shifty Burdens of Proof



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Douglass Props. II, LLC v. City of Olympia, 16 Wn. App. 158 (2021)

Holdings:

For traffic impact fees:

1. Impact fees not subject to takings restrictions
2. Burden of proof on Applicant if ordinance says it is
3. Assessed impact fees not excessive or disproportionate

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Douglass Props. II, LLC v. City of Olympia, 16 Wn. App. 158 (2021)

Facts:

Applicant seeks building permits for storage facility.

Applicant appeals fees assessed against one of the proposed storage buildings, totaling $167,580.

The City's impact fee ordinance set impact fees based upon a formula with several variables. In lieu of using the formula, the ordinance gave applicants the option of doing their own individualized fee assessment. The Applicant did not opt to do its own fee assessment.

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Douglass Props. II, LLC v. City of Olympia, 16 Wn. App. 158 (2021)

Who has the Burden of Proof on Impact Fees?

If Nollan/Dolan Applies, City has burden.

If Nollan/Dolan Doesn't Apply, Applicant has burden.

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Douglass Props. II, LLC v. City of Olympia, 16 Wn. App. 158 (2021)

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US Constitution

Fifth Amendment: "[N]or shall private property be taken for public use, without just compensation."

WA Constitution

Article I, section 16: "No private property shall be taken or damaged for public or private use without just compensation having been first made." WASH. CONST. art. I, § 16.

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Nollan Beach House

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A Teachable Moment – Nolan/Dolan Analysis

- *Nollan v. California Coastal Commission*, 483 US 825 (1987):
- **Nexus**. California Coastal Commission required public access across beachfront in return for converting bungalow to three-bedroom home. Court struck down condition since it wasn't reasonably related to the burden of the development – it failed to advance any legitimate state interest.

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A Teachable Moment – Nolan/Dolan Analysis

Dolan Bike Path

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A Teachable Moment – Nolan/Dolan Analysis

- *Dolan v. City of Tigard*, 512 US 374 (1994): **Proportionality**. Dedication of floodplain area required to handle increased stormwater runoff caused by plumbing store expansion. Court had no problem with this requirement, but found a takings when the City required that the floodplain space be developed for a bicycle and pedestrian trail. City had failed to show that access requirements were reasonably related in "rough proportion" to public access requirement.

- Court placed burden on City to show the relationship.

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A Teachable Moment – Nolan/Dolan Analysis

OMC 18.75.040F places burden of proof on Applicant in impact fee appeals:

The examiner shall only grant relief requested by an appellant upon finding that the appellant has established that …

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Douglass Props. II, LLC v. City of Olympia, 16 Wn. App. 158 (2021)

Land Use Petition Act Standards of Review; RCW 36.70C.130(1):

The court may grant relief only if the party seeking relief has carried the burden of establishing that one of the standards set forth in (a) through (f) of this subsection has been met. The standards are:

(a) The body or officer that made the land use decision engaged in unlawful procedure or failed to follow a prescribed process, unless the error was harmless;

(b) The land use decision is an erroneous interpretation of the law, after allowing for such deference as is due the construction of a law by a local jurisdiction with expertise;

(c) The land use decision is not supported by evidence that is substantial when viewed in light of the whole record before the court;

(d) The land use decision is a clearly erroneous application of the law to the facts;

(e) The land use decision is outside the authority or jurisdiction of the body or officer making the decision; or

(f) The land use decision violates the constitutional rights of the party seeking relief.

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Douglass Props. II, LLC v. City of Olympia, 16 Wn. App. 158 (2021)

Under clearly erroneous standard:

Court must be left with the definite and firm conviction that a mistake has been committed.

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Douglass Props. II, LLC v. City of Olympia, 16 Wn. App. 158 (2021)

Does *Nollan/Dolan* Apply to Impact fees?

Nollan and *Dolan* each applied to dedications of property, so some argued that it didn't apply to monetary exactions.

This changed in 2013 with *Koontz v. St. Johns River Water Mgmt. Dist*. 570 U.S. 595 (2013), which applied Nollan/Dolan to a condition that required an Applicant seeking to fill wetlands as mitigation to either dedicate a conservation easement or pay for improvements to noncontiguous land owned by the water district several miles away.

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Douglass Props. II, LLC v. City of Olympia, 16 Wn. App. 158 (2021)

Koontz now applied *Nolan/Dollan* to monetary exactions, but those exactions were direct mitigation fees, i.e. not generally applicable to all permit applicants

New issue: Does *Koontz* extend *Nolan/Dollan* to "*legislative prescribed development fees*" like impact fees that are generally applicable to all permit applicants?

Ruling: No. "*Koontz clearly intended to limit its application, by explaining that the funds there were linked to a specific, identifiable property interest.*"

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Douglass Props. II, LLC v. City of Olympia, 16 Wn. App. 158 (2021)

So, *Nolan/Dollan* doesn't apply, Applicant has burden of proof to establish that application of formula clearly erroneous.

City wins: City used ITE trip generation manual to determine three formula variables contested by Applicant. Examiner found that this was proper application of trip generation formula. Applicant's independent analysis rejected since Applicant didn't exercise independent fee calculation option under impact fee ordinance.

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Douglass Props. II, LLC v. City of Olympia, 16 Wn. App. 158 (2021)

Takeaways:

Make sure ordinance specifies burden of proof but leave room for Nolan/Dollan burden shifting.

Also, beware of "*guilty until proven innocent*" code enforcement procedures.

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Cedar Point Nursery v. Hassid (US Supreme Court, No. 20-107)

Holding:

Regulation requiring union rep access to private property can be a taking of property without just compensation.

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Cedar Point Nursery v. Hassid (US Supreme Court, No. 20-107)

Three Types of Regulatory Takings:

1. Exactions (*Nolan/Dollan*) – project mitigation

2. "*Penn Central*": *Penn Central Transportation Co. v. New York City*, 438 U. S. 104 (1978) – Balancing private v. public interest.

3. "Per Se Taking" -- No balancing if:
   a. Reg doesn't substantially advance legitimate public interest
   b. Reg denies owner of all "economically viable use of his land"
   c. Reg requires permanent occupation of land

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Cedar Point Nursery v. Hassid (US Supreme Court, No. 20-107)

Facts:

California regulation grants labor organizations a "right to take access" to an agricultural employer's property to solicit support for unionization up to three hours per day, 120 days per year.

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Cedar Point Nursery v. Hassid (US Supreme Court, No. 20-107)

US Supreme Court rules that regulations that just limit property use are subject to *Penn Central*. CA's access requirement doesn't just limit use, it appropriates property by occupying land. It takes a fundamental attribute of property ownership, the right to exclude. It is therefore a per se takings. Permanent occupation is not necessary to qualify as a per se takings.

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Cedar Point Nursery v. Hassid (US Supreme Court, No. 20-107)

Court carves out numerous exceptions:

1. Isolated physical invasions are just trespass.
2. "*long standing background restrictions on private property rights*"
3. Government may "*may require property owners to cede a right of access as a condition of receiving "certain benefits*" -- specifically mentioning government health and safety inspection regimes.

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Cedar Point Nursery v. Hassid (US Supreme Court, No. 20-107)

Takeaways:

Beware: Shoreline access requirements (although Nolan already a problem).

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Cedar Point Nursery v. Hassid (US Supreme Court, No. 20-107)

Takeaways:

Inspections more of a Fourth Amendment issue than Fifth

Access to Private Property by Administrative Agencies Deskbook:

Caution should be exercised to ensure that a court will consider the consent obtained through a regulatory permit consent clause or condition to be truly voluntary. Despite the widespread use of such consent clauses, there are very few cases directly addressing the issue.

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INA Tateuchi v. City of Bellevue, 15 Wn. App.2d (2021)

Facts:

Applicant gets approval of a conditional use permit in 2011 to operate a helistop on the rooftop of the Bellevue Place Bank of America Building

Site became operational in 2013. Applicant required to file usage reports with City. Applicant reported no flights except for one in 2015. However, Applicant continuously maintained and improved helistop, established necessary communications systems and submitted biannual reports to City attesting that the helistop remains fully operational.

Project opponent files request to revoke conditional use permit in 2016 based upon abandonment of use. Hearing examiner held hearing and denied request to revoke. City Council on appeal upheld examiner ruling after a closed door deliberation.

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INA Tateuchi v. City of Bellevue, 15 Wn. App.2d (2021)

Law:

BLUC 20.30B.170B authorizes the revocation of a conditional use permit if "*[t]he use for which the approval was granted has been abandoned for a period of at least a year*."

BLUC doesn't define "abandoned" so court looks to dictionaries:

Webster's: *"to cease to assert or exercise an interest, right, or title to especially with the intent of never again resuming or reasserting it."*

Black's Law Dictionary: *[t]he relinquishing of a right or interest with the intention of never reclaiming it.*

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INA Tateuchi v. City of Bellevue, 15 Wn. App.2d (2021)

Court also found that: *"The common law definition of "abandoned" most analogous to conditional land use is that used in the context of nonconforming land use."*

For "abandonment" under nonconforming use ordinances, the courts require (1) an intention to abandon; and (2) an overt act, or failure to act.

Project opponent argues against nonconforming use standard, arguing that nonconforming uses are vested property rights. Court doesn't find argument persuasive, since nonconforming uses are disfavored and the policy of zoning legislation is to phase them out.

Project opponent also argued that wording of abandonment in conditional use regulations was different from that in nonconforming use regulations. The court wasn't persuaded, noting that "*when the legislature uses a term well known to the common law, it is presumed that the legislature intended it to mean what it was understood to mean at common law*."

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INA Tateuchi v. City of Bellevue, 15 Wn. App.2d (2021)

Court found no abandonment since Applicant had been maintaining a fully operational permanent facility continually since the CUP was issued.

Court noted that in another case it was found that an empty duplex unit had not been abandoned just because it was unoccupied for a decade, because the owners maintained the structural capability for it to be used as a duplex unit. The period of nonuse did not qualify as an overt act of abandonment. *See Rosema v. City of Seattle*, 166 Wash. App. 293 (2012).

Holding: Denial of revocation sustained. Since Applicant has maintained structural capability of the land to operate as a permanent facility for helicopters, continued to comply with FAA regulations and attested in its biannual reports to the City that the helistop remains fully operational, it hasn't abandoned the use.

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INA Tateuchi v. City of Bellevue, 15 Wn. App.2d (2021)

Open Public Meetings Act

RCW 42.30.030:

All meetings of the governing body of a public agency shall be open and public and all persons shall be permitted to attend any meeting of the governing body of a public agency, except as otherwise provided in this chapter.

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INA Tateuchi v. City of Bellevue, 15 Wn. App.2d (2021)

Open Public Meetings Act Exemption

RCW 42.30.140(2) exempts "*[t]hat portion of a meeting of a quasi-judicial body which relates to a quasi-judicial matter between named parties as distinguished from a matter having general effect on the public or on a class or group*."

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INA Tateuchi v. City of Bellevue, 15 Wn. App.2d (2021)

What is quasi-judicial?

(1) whether a court could have been charged with the decision;

(2) whether the courts historically have performed that action;

(3) whether the action involves applying the law to particular facts for purposes of determining liability; and

(4) whether the action is similar to the ordinary business of the courts, rather than that of legislators or administrators.

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INA Tateuchi v. City of Bellevue, 15 Wn. App.2d (2021)

Takeaways –

Safe to deliberate quasi-judicial matters in closed door session

Quasi-Judicial Matters Subject to Appearance of Fairness –

Dangerous dog appeals
Business License Revocation
Code Enforcement

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Brown v. Mason Cnty., C20-5628 TSZ (W.D. Wash. June 7, 2021)

Facts:

Grump owns six contiguous parcels in Belfair, Washington.

Beginning around 1950, a portion of the property was used as a mine.

In 1996, the property was zoned as Rural Residential 5. A surface mine is not permitted on RR5 property.

There is currently a 1.18 acre gravel pit operated on the property

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Brown v. Mason Cnty., C20-5628 TSZ (W.D. Wash. June 7, 2021)

Facts II:

In 2017 Grump wanted to expand its mining operations within the 66 acres so applied for a reclamation permit.

Reclamation permit requires an SM-6 form.

SM-6 required the County to answer the following:

1. Has the proposed surface mine been approved under local zoning and land-use regulations?

2. Is the proposed subsequent use of the land after reclamation consistent with the local land-use plan/designation?

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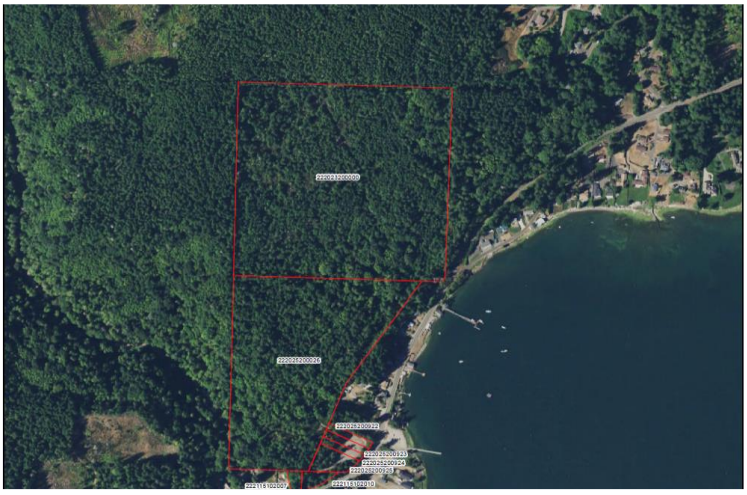
Brown v. Mason Cnty., C20-5628 TSZ (W.D. Wash. June 7, 2021)



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Brown v. Mason Cnty., C20-5628 TSZ (W.D. Wash. June 7, 2021)

Facts III:

County answered yes to both SM-6 questions, with footnote "**Found to be consistent with the diminishing assets doctrine*."

On April 7 and 9, 2019 Grump did some mining extraction. The County issued a stop work order because Grump hadn't yet acquired required county permits.

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Brown v. Mason Cnty., C20-5628 TSZ (W.D. Wash. June 7, 2021)

Facts IV

On January 28, 2020, the County issued an "Administrative Determination" rescinding the SM-6 ("SM-6 Rescission").

The County stated that since signing the SM-6, it had "*received additional information*" and it "*no longer maintains that current use of the property is legal nonconforming surface mining and acknowledges that the Diminishing Assets Doctrine does not apply to the subject properties*."

The County further cited MCC 17.05.016(a) and stated that "[c]urrent zoning does not support surface mining and any past surface mining has been abandoned for a period of more than two years."

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Brown v. Mason Cnty., C20-5628 TSZ (W.D. Wash. June 7, 2021)

Grump appeals rescission to Hearing Examiner.

Hearing Examiner issues two summary judgment orders:

1. In first order, SM-6 is ruled to be a final land use decision that can't be rescinded but that nonconforming use could still be lost through two years of inactivity that ended after issuance of SM-6.
2. In second order, examiner found there was outstanding material question of fact as to whether there was two years of inactivity. Examiner also found no showing of intent to abandon necessary, that County had burden of proof, and that mining means extracting minerals from the ground, as opposed to stockpiling.

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Brown v. Mason Cnty., C20-5628 TSZ (W.D. Wash. June 7, 2021)

What is mining?:

Undefined in Mason County Code, but MCC refers to Moskowitz, Harvey S. and Lindbloom, Carl G.; The New Illustrated Book of Development Definitions.

Moskowitz defines mining as "*[t]he extraction of minerals, including solids, such as coal and ores; liquids, such as crude petroleum; and gases, such as natural gases*."

Based on Moskowitz, Court found that extraction was a necessary part of surface mining and couldn't be limited to just stockpiling

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Brown v. Mason Cnty., C20-5628 TSZ (W.D. Wash. June 7, 2021)

Burden of proof for nonconforming uses:

The party asserting a nonconforming use has the initial burden of proving that the nonconforming use exists.

If the party meets this initial burden, the burden then shifts to the opposing party to prove abandonment or cessation of the nonconforming use. The burden of proving abandonment or cessation is "*not an easy one*."

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Brown v. Mason Cnty., C20-5628 TSZ (W.D. Wash. June 7, 2021)

Intent required?:

17.05.016 - Abandonment; reconstruction.

(*a) If any nonconforming use of land and/or building is abandoned, or ceases for any reason whatsoever (including destruction of the building) for a period of two years or more, then any future use of such land and/or building shall conform to the provisions of this chapter.*

Court reasons that have to give separate meaning to both "*abandoned*" and "*ceased*." Moskowitz doesn't define "ceased" therefore court looks to Black's Law Dictionary, which defines it as "*to stop, forfeit, suspend or bring to an end*".

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Brown v. Mason Cnty., C20-5628 TSZ (W.D. Wash. June 7, 2021)

Intent required?:

Choi v. Fife, 803 P.2d 1330 (1991)

Fife Ordinance: Nonconforming use terminated when it is "*vacated or abandoned for six consecutive months or eighteen months during any three-year period*."

Fife Court noted that when different words are used in the same ordinance, courts presume that a different meaning was intended for each word. Accordingly, "vacate" should not be required to include intent so that it would have a separate meaning from "abandon," citing Black's Law Dictionary's definition of "vacate," which did not include an intent element.

Fife Court also noted that an objective test is preferable as a matter of policy, because the subjective test "puts a premium on quasi-perjury" while not serving the judicial policy disfavoring nonconforming uses.

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Brown v. Mason Cnty., C20-5628 TSZ (W.D. Wash. June 7, 2021)

Intent required?:

Like *Choi*:

Black's Law Dictionary definition of "cease" doesn't include intent.

Mason Court rules that must give "cease" and "abandon" different meaning, therefore intent out for "cease." "Any reason whatsoever" suggests that the ordinance meant to encompass all instances where a party ceases its nonconforming uses and necessarily includes both intentional and unintentional reasons.

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Brown v. Mason Cnty., C20-5628 TSZ (W.D. Wash. June 7, 2021)

Examiner holds 20-hour hearing. Final Decision finds nonconforming use status lost.

RCW 36.70C.130(1)(c): *The land use decision is not supported by evidence that is substantial when viewed in light of the whole record before the court;*

When reviewing a challenge under subsection (c), the Court views the facts and inferences in the light most favorable to the party that prevailed in the highest forum exercising fact-finding evidence.

Under the substantial evidence standard, there must be a sufficient quantum of evidence in the record to persuade a reasonable person that the declared premise is true.

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Brown v. Mason Cnty., C20-5628 TSZ (W.D. Wash. June 7, 2021)

Courts finds Examiner correctly found use ceased for two years:

When reaching his decision that Grump had not engaged in mining between April 3, 2017, and April 3, 2019, the Examiner relied on expert testimony from Rick Glenn. Although Grump asserts that Glenn's testimony was not reliable, the Examiner acknowledged the flaws in Glenn's testimony and still found it to be credible. The Examiner additionally noted that testimony from neighbors living near or adjacent to the Property corroborated much of Glenn's testimony. Although it was unclear whether Glenn's observations extended to April 2019, the Examiner ultimately found that the combination of Glenn's testimony, the neighbors' testimony, and the historical infrequency of mining established, on a more likely than not basis, that no mining occurred in the two-year period, and that Grump's evidence failed to overcome the evidence of lack of mining.

Grump also claims that its evidence was uncontroverted, but the Examiner did not find its witnesses to be credible and determined their testimony was contradicted by other evidence, namely aerial pictures of the Property and testimony from neighbors. The Examiner was particularly troubled by the fact that none of Grump's evidence was independently verifiable and characterized Grump's evidence as "highly dubious." Moreover, other witnesses testified to the operational and economic infeasibility of the mining that Grump asserted it had done in April 2017, which the Examiner found persuasive. Similarly, the Examiner found that Grump's evidence on test pits was not reliable because digging test pits in the middle of a road was not industry standard and the area where the test pits were allegedly dug was impassable due to overgrowth.

Ultimately, Grump's arguments on this point go to the credibility and the weight of the evidence, on which the Court defers to the Examiner's assessments. Given the testimony about the lack of mining at the Property from Glenn and multiple neighbors, the Court concludes that substantial evidence supports the Examiner's Final Decision.

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Brown v. Mason Cnty., C20-5628 TSZ (W.D. Wash. June 7, 2021)

Takeaways:

Use “vacated” or “ceases for any reason” if want to remove intent.

But do you want to be that tough?:

-- Pandemic

-- Recession

-- Act of God (fire, flood, earthquake…)

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Whidbey Envtl. Action Network v. Growth Mgmt. Hearings Bd., No. 52923-8-II (Wash. Ct. App. Sep. 1, 2020)

Facts:

DFW regulations provide that Western Toad's "priority area" = "any occurrence"

"occurrence"" = "*fish and wildlife observation from a source deemed reliable by [DFW] biologists*."

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Whidbey Envtl. Action Network v. Growth Mgmt. Hearings Bd., No. 52923-8-II (Wash. Ct. App. Sep. 1, 2020)

Facts:

Island County CAO lists following toad habitat as protected:

1. All presently known and later identified breeding (wetland) sites.
2. Upland occurrences identified in DFW Priority Habitat Species data as of January 24, 2017

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Whidbey Envtl. Action Network v. Growth Mgmt. Hearings Bd., No. 52923-8-II (Wash. Ct. App. Sep. 1, 2020)

Facts:

Island County CAO also provides *"[w]hen a development proposal is located within 1,000 feet of a habitat for a protected species or an identified fish and wildlife habitat conservation area or its buffer . . . a biological site assessment . . . shall be required*."

Requirement can be waived if planning director determines development "*would result in only minor impacts*."

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Whidbey Envtl. Action Network v. Growth Mgmt. Hearings Bd., No. 52923-8-II (Wash. Ct. App. Sep. 1, 2020)

Facts:

County presented consultant report to Hearings Board that concluded that Toad likely to return to wetland breeding grounds it frequented, but not to uplands.

Board relied on report to conclude that the differences between breeding and upland habitat, the lack of understanding regarding the importance of upland habitat, and the relative abundance of upland habitat in the County, supported the County's decision to treat breeding sites and upland habitat differently in the ordinance.

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Whidbey Envtl. Action Network v. Growth Mgmt. Hearings Bd., No. 52923-8-II (Wash. Ct. App. Sep. 1, 2020)

Law (Duty to Protect Priority Species):

GMA requires cities and counties to adopt regulations to protect environmentally critical areas, which include habitats of priority species and species of local importance. RCW 36.70A.060(2)

Local governments should identify and designate "locally important habitats and species" by considering information regarding priority habitats and species identified by DFW. WAC 365-190-030(6)(a), -130(4)(b).

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Whidbey Envtl. Action Network v. Growth Mgmt. Hearings Bd., No. 52923-8-II (Wash. Ct. App. Sep. 1, 2020)

Law (Performance Standards):

Local governments should use maps and performance standards to designate critical areas, but performance standards are preferred. WAC 365-190-080(4).

WAC 365-190-040(5)(b) provides that government inventories and maps should indicate these designations, but "*where critical areas cannot be readily identified, these areas should be designated by performance standards or definitions, so they can be specifically identified during the processing of a permit or development authorization*."

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Whidbey Envtl. Action Network v. Growth Mgmt. Hearings Bd., No. 52923-8-II (Wash. Ct. App. Sep. 1, 2020)

Law (Best Available Science – What is it):

Local governments must use best available science when designating and protecting crucial areas. RCW 36.70A.172(1)

Best available science is generally interpreted to require local governments to analyze valid scientific information in a reasoned process. *Kitsap All. of Prop. Owners v. Cent. Puget Sound Growth Mgmt. Hr'gs Bd.*, 160 Wn. App. 250, 267, 255 P.3d 696 (2011).

GMA regulations expressly establish that DFW priority habit and species information qualifies as best available science.

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Whidbey Envtl. Action Network v. Growth Mgmt. Hearings Bd., No. 52923-8-II (Wash. Ct. App. Sep. 1, 2020)

Law (Balancing of Best Available Science):

Cities and counties must take best available scientific evidence and balance that evidence among the many goals and factors to fashion locally appropriate regulations based on the evidence not on speculation and surmise. *Ferry County v. Growth Mgmt. Hr'gs Bd.*, 184 Wn. App. 685, 734, 339 P.3d 478 (2014).

Cities and counties are not required to follow best available science; rather, they are required to include best available science in their record. A city or county may depart from best available science if it provides a reasoned justification. However, that departure should be rare.

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Whidbey Envtl. Action Network v. Growth Mgmt. Hearings Bd., No. 52923-8-II (Wash. Ct. App. Sep. 1, 2020)

Law (Precautionary Approach):

WAC 365-195-920(1): "*Where there is an absence of valid scientific information or incomplete scientific information relating to a county's or city's critical areas, leading to uncertainty about which development and land uses could lead to harm of critical areas*," counties and cities should follow a "'*precautionary or a no risk approach*'" to strictly limit development until the uncertainty is resolved.

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Whidbey Envtl. Action Network v. Growth Mgmt. Hearings Bd., No. 52923-8-II (Wash. Ct. App. Sep. 1, 2020)

Ruling – Must include future discovery of upland locations:

DFW designation of priority area as "any occurrence" is based on best available science.

"Any occurrence" = future sightings as well as past – "*an occurrence happens any time a reliable source makes a wildlife observation*"

Importantly, court also reasoned GMA regulations encourage performance standards

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Whidbey Envtl. Action Network v. Growth Mgmt. Hearings Bd., No. 52923-8-II (Wash. Ct. App. Sep. 1, 2020)

Ruling – Should use performance standards:

Maps only show static snapshot of toads dispersal at the time.

Although both maps and performance standards can be used to designate critical areas, "*because maps may be too inexact for regulatory purposes, counties and cities should rely primarily on performance standards to protect critical areas*." WAC 365-190-080(4)(a).

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Whidbey Envtl. Action Network v. Growth Mgmt. Hearings Bd., No. 52923-8-II (Wash. Ct. App. Sep. 1, 2020)

Ruling – precautionary approach:

The precautionary principle requires the County to take a "precautionary or no risk approach," but the County is taking the very real risk that upland western toad habitat discovered after 2017 may be destroyed or compromised by development before the County updates its designations in 2024, or later if the County is not timely with its update. And the fact that locations of upland occurrences are not currently known does not mean they should not be designated when they are located. Therefore, the Board's decision to uphold the ordinance misapplied the law by failing to apply the precautionary principle in this case.

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Whidbey Envtl. Action Network v. Growth Mgmt. Hearings Bd., No. 52923-8-II (Wash. Ct. App. Sep. 1, 2020)

Ruling – alternative policy considerations:

Court acknowledged that cities and counties don't have to always follow best available science if they have good policy basis not to do so, but Island County asserted it was following best available science and cited no policy not to do so.

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Whidbey Envtl. Action Network v. Growth Mgmt. Hearings Bd., No. 52923-8-II (Wash. Ct. App. Sep. 1, 2020)

Ruling – 1000 Foot BA Requirement Sufficient:

CAO requires biological assessment to be done for any development within 1000 feet of a habitat for a protected species or an identified fish and wildlife habitat conservation area or its buffer

WEAN argued 1000 feet not sufficient and too generic. Court found 1000 foot adequate because WEAN provided no evidence that it was insufficient and also because numerous other jurisdictions use the 1000 foot rule

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Whidbey Envtl. Action Network v. Growth Mgmt. Hearings Bd., No. 52923-8-II (Wash. Ct. App. Sep. 1, 2020)

Ruling – 1000 Foot Waiver Provision Insufficient:

CAO authorized planning director to waive BA if development impacts minor.

Court found waiver authority too undefined: *This waiver provision is contrary to law because, unlike a long list of other counties, Island County has failed to provide any guidelines or parameters to ensure county officials comply with the precautionary principle and adequately protect critical areas when evaluating waivers. See WAC 365-195-920.*

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Whidbey Envtl. Action Network v. Growth Mgmt. Hearings Bd., No. 52923-8-II (Wash. Ct. App. Sep. 1, 2020)

Ruling – 1000 Foot Waiver Provision Insufficient:

Court gave examples of other jurisdictions where there were sufficient waiver standards, e.g. Benton County Code 15.02.180c2:

County may waive required critical area report if it determines that the best available science shows that the proposed activity is "*unlikely to degrade the functions or values of the critical area*" and there is substantial evidence that "(i) *[t]here will be no alteration of the critical area or buffer; (ii) [t]he development proposal will not impact the critical area in a manner contrary to the purpose, intent, and requirements of [the county's critical area regulations]; and (iii) [t]he proposal is consistent with other applicable regulations and standards*.")

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Whidbey Envtl. Action Network v. Growth Mgmt. Hearings Bd., No. 52923-8-II (Wash. Ct. App. Sep. 1, 2020)

Takeaways:

Court will compare your CAO to others.

Precautionary approach can conflict with constitutional requirement requiring City/County to prove necessity for development exactions under Nollan/Dolan.

If takings is a concern, try citing GMA goal of protecting private property rights as departure from BAS "precautionary approach."

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Perillo v. Island Cnty., No. 80055-8-I (Wash. Ct. App. Nov. 30, 2020)

Public Duty Doctrine Case – i.e. When You Can be Successfully Sued for Making Mistakes.

66

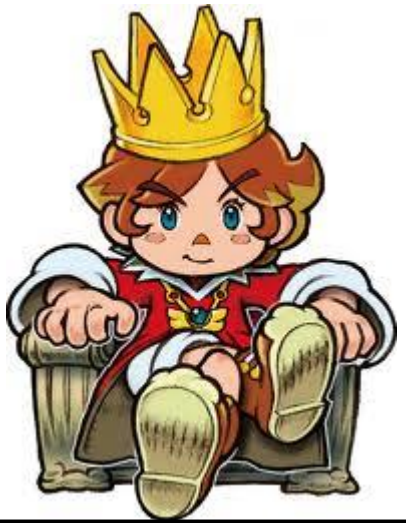
Perillo v. Island Cnty., No. 80055-8-I (Wash. Ct. App. Nov. 30, 2020)

Principles of Liability for Negligence by Local Government:

Prior to 1961: Sovereign Immunity – King Can Do No Wrong.

1961: Abolition of Sovereign Immunity, RCW 4.96.010(1) --
King Can Get Sued Just Like Everyone Else

Post 1961: Public Duty Doctrine --
A duty to all is a duty to no one
Exceptions to Public Duty Doctrine:
1) Failure to enforce
2) Legislative Intent to protect class of persons
3) Rescue doctrine
4) Special relationship



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Perillo v. Island Cnty., No. 80055-8-I (Wash. Ct. App. Nov. 30, 2020)

Facts:

Perillos purchase a home on Camano Island in 2017 that turns out to be so contaminated with methamphetamine that its uninhabitable and they have to demolish it.

The Perillos file a negligence claim against Island County for failure to inspect the property for hazardous chemical contamination as required under RCW 64.44.020.

Records from Island County Public Health (ICPH) and Island County Sheriff's Office (ICSO) revealed years of reports of drug activity on the property, including suspected manufacturing of methamphetamine.

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Perillo v. Island Cnty., No. 80055-8-I (Wash. Ct. App. Nov. 30, 2020)

Facts:

ICSO and ICPH received multiple calls and complaints regarding the Perillo house. Comments included identifying streams of people coming to and from the home so drugged they had to hold each other up, allegations of methamphetamine trafficking, such as including that the home was "saturated with meth."

The president of the HOA for the property had complained to the ICSO that the home was engaged in "suspected drug activity" and asked "why the drug task force was not doing anything about it."

ICPH had written an email to other ICPH employees, describing the property as "very complex" and "not a safe place."

ICPH and ICSO received complaints about strong chemical smells and drug manufacturing. One neighbor stated that meth was being cooked at the house. One person stated that the odors were so strong her eyes watered and she couldn't breathe when she ventured outside near the home.

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Perillo v. Island Cnty., No. 80055-8-I (Wash. Ct. App. Nov. 30, 2020)

Analysis:

Perillos argue Island County had a duty to address the contamination prior to their purchase under RCW 64.44.020:

*Whenever a law enforcement agency becomes aware that property has been contaminated by hazardous chemicals, that agency **shall** report the contamination to the local health officer. The local health officer **shall** cause a posting of a written warning on the premises within one working day of notification of the contamination and shall inspect the property within fourteen days after receiving the notice of contamination. . . . . If the property is contaminated, the local health officer **shall** post a written notice declaring that the officer intends to issue an order prohibiting use of the property as long as the property is contaminated.*

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Perillo v. Island Cnty., No. 80055-8-I (Wash. Ct. App. Nov. 30, 2020)

Analysis:

County argues that RCW 64.44.020 requires actual knowledge of contamination. Since County was only given notice of potential contamination, County didn't have duty to report to health department.

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Perillo v. Island Cnty., No. 80055-8-I (Wash. Ct. App. Nov. 30, 2020)

Ruling on "becomes aware" Part I:

RCW 64.44.020 requiring county report to public health when it "*becomes aware*" of contamination.

Websters: "Become" = "to come to exist or occur."

Websters: "Aware" = "marked by realization, perception, or knowledge: conscious, sensible, cognizant."

Court finds Websters doesn't demand actual knowledge. "…*once law enforcement comes to realization or perception that hazardous chemicals are polluting a property, it must report the contamination to local health officials*."

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Perillo v. Island Cnty., No. 80055-8-I (Wash. Ct. App. Nov. 30, 2020)

Ruling on "becomes aware" Part II:

> Requiring "actual knowledge" would undermine division of duties under RCW 64.44.020 – law enforcement has responsibility to give notice of potential contaminated sites so that public health can then investigate. If actual knowledge is first required of law enforcement, there would be no need for further testing by public health.

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Perillo v. Island Cnty., No. 80055-8-I (Wash. Ct. App. Nov. 30, 2020)

So Sheriff was supposed to report and didn't – does this failure create tort liability?

> To establish a claim in negligence, Perillos must show:

(1) the existence of a duty,
(2) breach of that duty,
(3) resulting injury, and
(4) proximate cause.

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Perillo v. Island Cnty., No. 80055-8-I (Wash. Ct. App. Nov. 30, 2020)

Public Duty Doctrine:

The public duty doctrine precludes liability for a public official's negligent conduct unless it is established that "`the duty breached was owed to the injured person as an individual and was not merely the breach of an obligation owed to the public in general.

Four "Exceptions" (ways to establish liability "even in the fact of performing otherwise public duties"):

(1) legislative intent to protect class of persons,
(2) failure to enforce,
(3) the rescue doctrine, and
(4) special relationship.

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Perillo v. Island Cnty., No. 80055-8-I (Wash. Ct. App. Nov. 30, 2020)

Perillos argue legislative intent to protect class:

Court: "*The exception applies when the terms of a statute show a clear legislative intent to identify and protect a particular class of persons*."

The court typically looks to the legislature's statement of purpose to determine intent. Purpose clause to Chapter 64.44 RCW identifies legislative concern as "*innocent members of the public*" who may be "*harmed by the residue left*" by contaminants. The court also noted that Chapter 64.44 RCW included requirements to notify members of the public about contaminated properties. Finally, legislative history (session laws) identified that the legislature stated contaminated properties must be cleaned up to "*prevent harm to subsequent occupants of the properties*."

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Perillo v. Island Cnty., No. 80055-8-I (Wash. Ct. App. Nov. 30, 2020)

Holding:

Perillos are within class of people Chapter 64.44 was intended to protect.

Public duty doctrine does not bar the Perillos negligence claim.

Case remanded to determine if County acted negligently.

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Perillo v. Island Cnty., No. 80055-8-I (Wash. Ct. App. Nov. 30, 2020)

Takeaways:

When there is any question, purpose clauses of ordinances should make clear that there's no intent to protect any particular class of persons, no intent to create liability to such classes for failure to act and that duty runs only to general public.

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Perillo v. Island Cnty., No. 80055-8-I (Wash. Ct. App. Nov. 30, 2020)

Example:

Renton Municipal Code Section 1-3-2 (part of purpose clause of code enforcement chapter):

Purpose: To protect and promote the health, safety, sanitation and aesthetics in the City of Renton …..

This code does not create or imply any duty upon the City or any of its officers, employees or volunteers that may be construed to be the basis of civil or criminal liability on the part of the City, its officers, employees, agents or volunteers, for any injury, loss, or damage resulting from any action or inaction on their part.

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Perillo v. Island Cnty., No. 80055-8-I (Wash. Ct. App. Nov. 30, 2020)

Two Other Pertinent Public Duty Exceptions in the Planning World:

Failure to Enforce: As to the performance of building code inspections, the failure to enforce exception to the public duty doctrine recognizes a duty where a public building official has **actual knowledge** of an inherently dangerous and hazardous condition, is under a duty to correct the problem and fails to meet this duty. *Atherton Condo Ass'n v. Blume Dev. Co.*, 115 Wn. 2d 506 (Wash. 1990)

Special Relationship: Where a relationship exists between the governmental agent and any reasonably foreseeable plaintiff, setting the injured plaintiff off from the general public and the plaintiff **relies on explicit assurances** given by the agent or assurances inherent in a duty vested in a governmental entity. *Rogers v. Toppenish*, 23 Wn. App. 554 (Wash. Ct. App. 1979)

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Perillo v. Island Cnty., No. 80055-8-I (Wash. Ct. App. Nov. 30, 2020)

One way to avoid special relationship liability:

RCW 35A.21.280. Statement of restrictions applicable to real property

- *(1) A property owner may make a written request for a statement of restrictions applicable to a single parcel, tract, lot, or block of real property to the code city in which the real property is located.*
- *(2) Within thirty days of the receipt of the request, the code city shall provide the owner, by registered mail, with a statement of restrictions as described in subsection (3) of this section.*
- *(3) The statement of restrictions shall include the following:*
- *(a) The zoning currently applicable to the real property;*
- *(b) Pending zoning changes currently advertised for public hearing that would be applicable to the real property;*
- *(c) Any designations made by the code city pursuant to chapter 36.70A RCW of any portion of the real property as agricultural land, forest land, mineral resource land, wetland, an area with a critical recharging effect on aquifers used for potable water, a fish and wildlife habitat conservation area, a frequently flooded area, and as a geological hazardous area; and*
- *…*

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Urban Bainbridge v. City of Bainbridge Island (Case # 20-3-0005c) Central Puget Sound Growth Management Hearings Board

Development Moratoria Can Qualify as de facto Development Regulations if Moratorium "*continuously and systematically extended*" for a significant period of time.

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Urban Bainbridge v. City of Bainbridge Island (Case # 20-3-0005c) Central Puget Sound Growth Management Hearings Board

RCW 36.70A.390, RCW 35A.63.220 and RCW 35.63.200 authorize cities and counties to adopt six-month moratoria and interim development standards without a prior public hearing by the planning commission/agency if a hearing is held within 60 days of adoption.

The moratorium/interim regulation can last for a year with adoption of a work plan.

The moratorium/interim regulations can be extended in six month increments if prior hearing held and findings made to support extension.

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Urban Bainbridge v. City of Bainbridge Island (Case # 20-3-0005c) Central Puget Sound Growth Management Hearings Board

Facts:

Bainbridge Island adopts blanket moratorium on January 9, 2018 to give time to implement its comprehensive plan amendments.

The moratorium is extended six times, with successive extensions narrowing the scope of the moratorium as new development regulations are adopted.

At the second extension on May 2, 2018, the Council authorized storage facilities in the Business Industrial Zone

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Urban Bainbridge v. City of Bainbridge Island (Case # 20-3-0005c)
Central Puget Sound Growth Management Hearings Board

Facts:

In response to public concern about storage facilities, Council adopts a six-month moratorium on storage facilities on November 26, 2019. This moratorium was extended an additional six months on May 12, 2020.

The Petitioner appealed to the GMHB, asserting that the overlapping moratoria constituted a de facto regulation banning storage facilities.

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Urban Bainbridge v. City of Bainbridge Island (Case # 20-3-0005c)
Central Puget Sound Growth Management Hearings Board

Ruling:

Moratoria can serve as de facto development regulations subject to GMHB review if "continuously and systematically extended."

Moratoria on storage facilities were only in effect for a year, which doesn't qualify as "continuously and systematically extended." The blanket moratoria adopted previously is not considered part of the extensions on the storage moratoria, because the "*record clearly indicates that the consideration of the emergency moratorium on self-service storage facilities was a substantively separate conversation for the City Council, and the Board cannot ascribe a connection between ordinances where the record clearly refutes any such connection*."

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Urban Bainbridge v. City of Bainbridge Island (Case # 20-3-0005c) Central Puget Sound Growth Management Hearings Board

In a past case, the GMHB found a moratorium qualified as a de facto development regulation because it had been extended 12 times at 6-month intervals. *See MBA/Camwest, v. City of Sammamish*, CPSGMHB No. 05-3-0027 (Final Decision and Order, August 4, 2005).

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Urban Bainbridge v. City of Bainbridge Island (Case # 20-3-0005c) Central Puget Sound Growth Management Hearings Board

Take-Aways

In addition to serving as a source of takings liability, moratoria that are extended too long can be subject to appeal to the GMHB as development regulations.

As development regulations, the moratoria would have to comply with all GMA requirements, such as accommodating urban growth, not precluding the siting of essential public facilities and being consistent with the comprehensive plan and county-wide planning policies.

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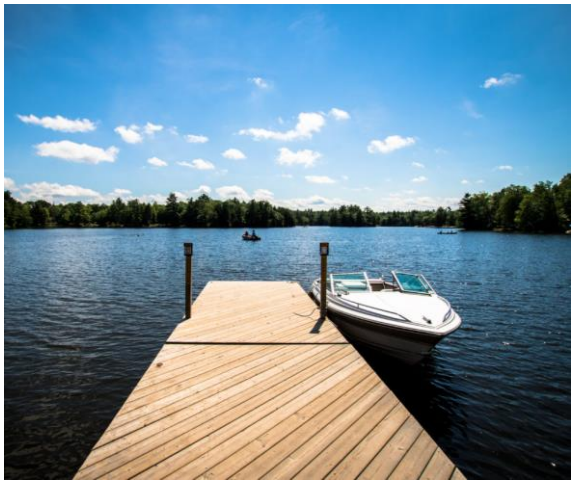
Niesz v. West, No. 52658-1-II (Wash. Ct. App. Aug. 4, 2020) **UNPUBLISHED OPINION**

Shoreline Substantial Development Permit (SSDP) case:

SSDP for dock properly denied by Shoreline Hearings Board because dock, as sole dock in 4.5 mile stretch of shoreline, would improperly interfere with public use of publicly owned tidelands and nearshore areas, would change natural character of the shoreline and would also create adverse cumulative impacts by setting precedent for future dock construction.

Denying proposal did not constitute a takings because applicants didn't own tidelands over which they were encroaching.



89

Niesz v. West, No. 52658-1-II (Wash. Ct. App. Aug. 4, 2020)

Facts:

Nieszes own residential property located on the southwest side of Fox Island in Pierce County.

There are no private docks along the entire southwest side of Fox Island. To the north of the Nieszes' property there are no docks or piers for a mile and a half, and to the south, the nearest dock or pier is three miles away.

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Niesz v. West, No. 52658-1-II (Wash. Ct. App. Aug. 4, 2020)

The Nieszes requested an SSDP for a 154-foot long dock, 150 of which was to be over-water.

Dock proposed for conservancy environment, which is "*designed to protect, conserve and manage existing natural resources and valuable historic and cultural areas in order to ensure continuous flow of recreational benefits to the public and to achieve sustained resource utilization*."

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Niesz v. West, No. 52658-1-II (Wash. Ct. App. Aug. 4, 2020)

A significant amount of testimony from neighboring opponents was provided to establish:

1. the shoreline area in front of the Niesz property was significantly used both in the nearshore and along the tidelands by the public;

2. that limited clearance below the dock would force persons to have to walk far out into the tidelands to get around it;

3. that neighboring property owners had no problem using a buoy instead of a dock outside of winter months; and

5. that the dock would set a precedent for other docks since that's what had occurred in another part of the island.

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Niesz v. West, No. 52658-1-II (Wash. Ct. App. Aug. 4, 2020)

The Court of Appeals upheld denial of the dock based upon inconsistency with several Shoreline Master Program policies including:

1. Important navigational routes or marine oriented recreation areas will not be obstructed or impaired;
2. Ingress-Egress as well as the use and enjoyment of the water or beach on adjoining property is not unduly restricted or impaired;
3. Public use of surface waters below ordinary high water shall not be unduly impaired;
4. The intensity of the use or uses of any proposed dock, pier, and/or float shall be compatible with the surrounding environment and land and water uses.

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Niesz v. West, No. 52658-1-II (Wash. Ct. App. Aug. 4, 2020)

In assessing the policy requiring compatibility, the Court of Appeals acknowledged a prior case that held that a dock can't be denied solely because it's the first dock in the area – see *May v. Robertson*, 153 Wn. App. 57, 87, 218 P. 3d 211 (2009). However, in this case there were several other reasons to deny due to obstruction of use of tidelands and shoreline waters:

"*The Board found that the proposed dock had incompatible intensity because of how much public use of the land and water the proposed project would impede and obstruct versus how much public land and water use the Nieszes' project would keep exclusively for the Nieszes. That monopolization of so much public use of land and water is the character of intensity that stands in stark contrast to the pristine and open existing land and water available to the public that would otherwise be unrestricted and impeded. The fact that there are no other docks in the area does amplify this contrast, but the restrictive and impeding nature of the proposed dock is ultimately what is dispositive here, based on the reasoning of the Board. The Board did not outright ban any new dock on this stretch of beach, but it did consider this particular proposed dock to be incompatible compared to the existing public use. The Board's reasoning suggests that had the Nieszes designed a less restrictive and less obstructive dock, or perhaps had that dock been joint-use, then perhaps the outcome may have been different for this criterion.*"

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Niesz v. West, No. 52658-1-II (Wash. Ct. App. Aug. 4, 2020)

Niesz alleged that the SSDP denial constituted a takings.

Court of Appeals ruled there was no takings because federal takings clause only applies to taking of private property. The *Niez* tidelands were not private. Article 27, Section 1 of the Washington State Constitution provides that tidelands are owned by the state.

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Niesz v. West, No. 52658-1-II (Wash. Ct. App. Aug. 4, 2020)

Niesz also stated they were denied a vested property interest as permit applicants.

Court of Appeals found no such interest, holding that a property interest arises for a permit applicant when there are articulable standards that constrain the decision-making process and those standards substantially limit the discretion of the decision-maker. Court found no such interest here because the Nieszes were never found to meet the permitting criteria and were never assured by any government agency that they were entitled to such a permit.

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