Riparian Roundtable: Regulatory Takings in WA

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Overview: *Yim v. City of Seattle*

194 Wn.2d 651 (2019)

- Seattle's "first in time" rental rule upheld
- US Constitution, Fifth Amendment: "Nor shall private property be taken for public use, without just compensation"
- Washington Constitution, Article 1, Section 16: "No private property shall be taken or damaged for public or private use without just compensation having been first made."
- "While property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking."

Yim v City of Seattle

- Federal cases were “complex and at times inconsistent” but now clarified
- State regulatory takings test is the same as the federal test
- Disavows prior WA Supreme Court cases setting out 6-part test
- Two categories of “per se” taking: “Permanent physical invasion” of property (Loretto v. Teleprompter Manhattan CATV Corp (1982) – NY law requiring landowner to allow installation of TV cable on property)
- Regulations which “completely deprive an owner of ‘all economically beneficial use’” of property (Lucas v S Carolina Coastal Council (1992) – bar on constructing any permanent structures on existing
- beachfront lots)

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Yim v City of Seattle

- If no per se taking, decided on a case-by-case basis by application of "Penn Central factors" described in Penn Central Transportation Co. v. NY (1978) (landmark board's denial of 50-story office building over Grand Central Terminal not a taking)
  - Economic impact on property owner
  - Interference with investment backed expectations
  - Character of government action
- Unconstitutional conditions – "government demands that a landowner dedicate an easement allowing public access to her property as a condition of obtaining a development permit" – may also constitute a taking

Nexus: *Nollan v. California Coastal Com'n.*

Nollan v. 483 U.S. 825 (1987)

- CA Coastal Commission required property owners to grant a public easement across the beachfront on their property as a condition of permit to replace home
- Nexus requirement: Condition must be reasonably related to the impacts of the project
- Since house did not create need for lateral beach access, conditioning the permit on the owner's granting an easement to the public amounted to a taking of owners' property.

Proportionality: Dolan v. City of Tigard
512 U.S. 374 (1994)

- City conditioned commercial building permit to expand store and pave parking lot, requiring dedication of a portion of the property in the floodplain for flood control and a bike path.
- Proportionality requirement: Condition must be both related and roughly proportional to impacts of project
- Project would increase runoff and traffic, but City did not show why public rather than private flood control was needed, and did not show increased traffic caused the need for the bike path

Unconstitutional Conditions: Koontz v. St. Johns River Water Management Dist.

570 U.S. 595 (2013)

- Developer in Florida applied for a permit to build on wetlands, offered a plan for mitigation which would have deeded a conservation easement to the Water Management District for three-quarters of the property.
- District rejected the plan and denied the permit, stated it would only approve the permit if the project size was reduced/easement size was increased, or if developer hired contractors to do work on District property at a separate, unrelated site.
- Court held this consituted a taking under Nollan/Dollan. These cases apply if permit is denied and to monetary exactions.

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Critical Area/Shoreline Buffers

RCW 36.70A/RCW 90.58

- The Growth Management Act ("GMA") requires local governments to designate and protect "critical areas" (RCW 36.70A.130)
- Development regulations typically designate buffers which must be maintained in the course of developing properties with critical areas
- The Shoreline Management Act ("SMA") requires that local governments adopt Shoreline Master Programs ("SMPs") to, among other things, preserve the natural character of the shoreline (RCW 90.58.020)
- SMPs typically contain buffers or setbacks from the shoreline

Citizens' Alliance for Property Rights v. Sims

145 Wn.App. 649 (2008), review denied

- Landowner challenged a King County ordinance which limited the amount of clearing that a landowner could conduct on property zoned Rural Area ("RA") to between 35-50% depending on lot size.
- "Facial" challenge: no project involved
- Challenge was based on RCW 82.02.020 (which requires that a condition be reaonably necessary as a direct result of development); Court applied Nollan/Dolan standard
- Court determined there was nexus but no rough proportionality

Kitsap Alliance of Property Owners v CPSGMHB

160 Wn. App. 250 (2011), review denied, cert. denied

- Property owners made facial challenge to marine shoreline buffer of 50 feet in urban and 100 feet in semirural and rural areas.
- Court stated that buffers satisfied Nollan/Dolan, with limited analysis: County used best available science and a reasoned process in developing its shoreline critical areas ordinance, including buffers for urban, semirural and rural shorelines.
- Relied on HEAL v CPSGMHB, 96 Wn. App. 522 (2019), stating that if a local government fails to use best available science, its regulations may serve as the basis for conditions that are constitutionally prohibited.

Olympic Stewardship Foundation v. WWGMHB

199 Wn. App. 668 (2017), review denied, cert. denied

- Foundation brought facial challenge to SMP's adoption of a standard 150-foot marine buffer under Nollan/Dolan
- Court determined that Foundation failed to establish that Nollan/Dolan can be applied in a facial takings challenge. To make a facial claim, the landowner must show that the mere enactment of the regulation constitutes a taking, but the nature of the Nollan/Dolan test is fact specific
- Foundation did not show that the mere enactment of the buffer took its property under the Nollan/Dolan test

Questions?

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