

County Leaders Conference

HOT TOPICS IN LAND USE & ENVIRONMENTAL LAW

Tuesday, Nov. 15, 2022

Darren E. Carnell
King County Prosecuting Attorney's Office

Civil Division
516 3rd Ave, Ste. W554
Seattle WA 98104
206.477.1099
darren.carnell@kingcounty.gov



Hot Topics

- Legislative activity
- Mandatory Comprehensive Plan updates
- SEPA
- Free Exercise claims
- Takings
- Homelessness
- Sign Codes
- Cell Towers
- Water issues
- Damages Claims

A Few General Observations

- Land law is a mix of theoretical and technical issues
- Separation of Powers issues underlie many cases
- Legal construct is significantly administrative
- . . . and highly decentralized
- Core issues often involve limits on governmental (legislative and administrative) discretion
- Judicial decisions take a long time to trickle down and are not always what they initially seemed
- Courts want to do the right thing
- Trends at the federal and state level
- Few clear answers

Background on State Land Use Legislation

- GMA adopted in 1990, with incremental amendments since then
- 2019 - Ruckelshaus “Road Map” Report
- 2020 session (pre-COVID) - The Legislature identified four items for work during the Interim
 - GMA reform – substantive and procedural
 - Greenhouse Gas Emissions/SEPA
 - Net Ecological Gain
 - Water Banking
- 2021 session – Climate Commitment Act & Clean Fuel Standard

2022 State Legislation

- HB 1241 Comp Plan Updates
- HB 1717 GMA Tribal Participation
- HB 1812 Modernizing EFSEC
- HB 2001 Tiny Homes
- SB 5042 GMA Effective Dates
- SB 5275 LAMIRD Flexibility
- SB 5593 UGA Boundaries
- SB 5722 GHG Emissions in Buildings
- SB 5818 Housing SEPA

Issues for 2023 Session

- Revisiting 2022 bills that did not pass
 - HB 1099 – Climate change
 - HB 1117 – Salmon recovery
- Collaborative Roadmap Phase III
 - Process lead by Department of Commerce
 - Covers a broad range of planning topics
- Two significant pending issues
 - Riparian Corridors
 - *Confederated Tribes and Bands of the Yakama Nation v. Kittitas County*, GMHB Case No. 22-1-0002 (rejecting challenge based on WDFW guidelines)
 - Net ecological gain

Mandatory Comp Plan Update

- GMA requires periodic review and update of comprehensive plans
- Some specific review requirements
 - Critical areas regulations, including Best Available Science (RCW 36.70A.130(1)(c))
 - Urban Growth Areas (RCW 36.70A.130(3)(a))
 - Resource lands (RCW 36.70A.131)
 - Changes in the law
- Some update requirements apply to non-GMA counties
- Procedural Issues
 - Current schedule set by HB 1241
 - Requires local legislative action (RCW 36.70A.130(1)(a))

Capital Facilities

- The GMA requires comprehensive plans to include certain elements, including one involving capital facilities
 - Inventory of existing facilities
 - Forecast future needs
 - Plans for development and funding of new facilities
 - A requirement to stay consistent with the land use element
- *Futurewise v. Spokane Cnty.*, 517 P.3d 519 (Wash. Ct. App. 2022)
 - Requirement not limited to county-owned facilities
 - Can't simply rely on existing plans; must reanalyze the data
 - Must set level-of-service standards for all facilities

Essential Public Facilities

- The GMA requires jurisdictions to allow siting of Essential Public Facilities
- Two key requirements
 - Comprehensive Plans must include a process for identifying, and an inventory of, EPFs
 - Local governments must not preclude siting
- Prior litigation focused on the second requirement
- *Homeward Bound in Puyallup v. Cent. Puget Sound Growth Mgmt. Hearings Bd.*, 517 P.3d 1098 (Wash. Ct. App. 2022)
 - Puyallup significantly restricted siting of Day Centers
 - Court of Appeals held
 - Day Centers not necessarily an EPF
 - Siting was not “precluded”
 - Operator failed to go through city process of identifying EPFs

SEPA – Background & the Basics

- SEPA
 - Adopted in 1971 as gap filler and supplement to other land use and environmental laws
 - First and foremost, requires review and disclosure of information
- Procedural Steps
 - Lead agency
 - Is there a project or nonproject action?
 - Completion of checklist
 - Threshold determination – DNS, DS, and MDNS
- Environmental Impact Statements
 - Identifies impacts
 - Alternatives analysis
- EIS can support discretionary exercise of substantive authority
- Compare to National Environmental Policy Act (NEPA)

Pending SEPA Cases

- *Escala Owners Ass'n v. City of Seattle*, 22 Wash. App. 2d 1058 (2022)
 - Involves project-level SEPA review
 - Board language about relying on existing environmental documents
- *Friends of Sammamish Valley v. King County*, GMHB Case No. 20-3-0004c
 - Challenge to land use legislation
 - Required review of project-level impacts
 - Restricted use of existing SEPA documents

Regulation of Religious Uses

- Three paths to liability: U.S. Constitution, Washington Constitution, and RLUIPA
- *Calvary Chapel Bible Fellowship v. Cty. of Riverside*, 948 F.3d 1172 (9th Cir. 2020) (rejected RLUIPA claim)
- COVID cases
 - *S. Bay United Pentecostal Church v. Newsom*, 140 S. Ct. 1613 (May 2020) (5-4 denial of cert. petition challenging California regulations)
 - *Roman Cath. Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63 (Nov. 2020) (successful challenge to group occupancy)
 - *Tandon v. Newsom*, 141 S. Ct. 1294 (Apr. 2021) (successful challenge to in-home restrictions)
- Recent U.S. Supreme Court decisions on tension between Free Exercise and Establishment clauses

Takings

United States Constitution - Fifth Amendment

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

Wash 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"

- Takings claims generally fall into three categories:
 - Physical invasion (*Lorretto*)
 - Loss of all economic value (*Lucas*)
 - *Penn Central* balancing

U.S. Supreme Court Takings Decisions

- Williamson County (1985)
 - Federal Takings claim not ripe unless plaintiff obtains final decision and is denied state compensation
- Murr v. Wisconsin (2017)
 - Evaluating the relative burden on the property owner generally requires consideration of the claimant's entire site
 - Washington addressed this issue in Lemire (2013)
- Knick v. Town of Scott, Pennsylvania (2019)
 - Reversed Williamson County rule that a property owner must seek compensation through state procedures before bringing a federal Takings claim
- Cedar Point Nursery v. Hassid (2021)
 - Compelled right-of-entry for labor organizers constitute a per se Taking

Tenant Protections

- Just Cause Eviction
 - Recent history of local tenant protections litigated in Yim
 - Local just-cause eviction ordinances
 - ESHB 1236
- Legal Challenges
 - *Rental Housing Association of Washington v. Burien*, No.82782-1 (Wash. Ct. App.)
 - *Rental Housing Association of Washington v. Federal Way*, No.83327-8 (Wash. Ct. App.)

Homelessness

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

– U.S. Const. amend. VIII

- *Martin v. City of Boise*, 920 F.3d 584 (9th Cir. 2019)
- *Aitken v City of Aberdeen*, 393 F. Supp 3d 1075 (W.D. Wash. 2019)
- *Seattle v. Long*, 198 Wn.2d 136 (2021)
 - Homestead Act
 - Excessive Fines
- *Johnson v. City of Grants Pass*, 50 F.4th 787 (9th Cir. 2022).

Sign Codes

- Signs were historically regulated based on content-neutral categories
- *Reed v. Town of Gilbert*
 - Town of Gilbert has a sign code that subjects different categories of signs to different regulations
 - Supreme Court held that Town's regulations were content-based because one had to read the sign to identify the appropriate regulatory category
- Does *Reed* apply to commercial signs (See *Contest Promotions*)?
- How to reconcile with cases that require special treatment of some signs (e.g., *Collier*)?
- *City of Austin, Texas v. Reagan Nat'l Advert. of Austin, LLC*, 142 S. Ct. 1464 (2022)

Cell Towers

- Telecommunications Act of 1996
 - Preempts local regulation based on “radio frequency emissions”
 - Preempts local regulations that “have the effect of prohibiting . . . service”
- 2012 Spectrum Act
 - Additional preemption of the local process for new facilities
 - Preempts local regulation of cell tower modifications that do not “substantially change the physical dimensions” of the facility
- In 2018 FCC adopts rule expansively defining “substantially change” and providing a “deemed granted” remedy for local inaction
- Ninth Circuit rejected challenge to FCC rules (*City of Portland v. United States*, 969 F.3d 1020 (9th Cir. 2020))

Water Law – Some Background

- Prior Appropriation Doctrine
- Three sources of regulation
 - Washington Department of Ecology permitting; some projects exempt
 - GMA provisions regarding water quality and quantity
 - Private Litigation
- New challenges
 - Increasing concern about minimum instream flows -(Postema (2000); Swinomish (2013); Foster (2015))
 - Aggregated effect of exempt wells - Campbell & Gwinn (2002); Kittitas County v. Growth Board (2011)

GMA & Water Withdrawals

- *Whatcom Cnty. v. Hirst*, 186 Wash. 2d 648, 381 P.3d 1 (2016).
 - Involved the extent to which the GMA requires counties independently to regulate state-exempt wells
 - Washington Supreme Court, affirming the Growth Board, holds that that counties have broad obligations to regulate exempt wells
- 2018 Legislative Fix (ESSB 6091)
- Does Hirst suggest a broader change to judicial interpretation of Growth Board authority?
 - *Viking Properties*
- Planning and potential rulemaking remain

Damages

- *Schnitzer West v. City of Puyallup* (unpublished)
 - Puyallup City Council had adopted legislation that effectively rezoned Schnitzer property.
 - Long history of litigation about whether council action was proper
 - Schnitzer filed damages claim
 - Court of Appeals held that legislative immunity barred tortious interference claim and §1983 claim was untimely
- *Greensun II*
 - Greensun had had difficulty siting marijuana business
 - Remanded for trial based on tortious-interference claim
- *Church of the Devine Earth v. Tacoma*
 - City imposed a development condition later found unlawful
 - Remanded for trial based on RCW 64.40 claim

Public Duty Doctrine

- A duty to the general public is not enforceable by individuals. Or “a duty to all is a duty to no one.”
- Exceptions
 - Legislative intent to impose duty of care
 - Government has engaged in “volunteer rescue” efforts
 - Facts sufficient to support a “failure to enforce.”
 - Requires actual knowledge of a violation and a statutory duty to take corrective action
 - *Perillo v. Island Cty.*, 15 Wash. App.2d 618 (2020)
 - Where government has a “special relationship” with the plaintiff
 - Avoid making promises and use disclaimers

County Leaders Conference

HOT TOPICS IN LAND USE & ENVIRONMENTAL LAW

Tuesday, Nov. 15, 2022

Darren E. Carnell
King County Prosecuting Attorney's Office

Civil Division
516 3rd Ave, Ste. W554
Seattle WA 98104
206.477.1099
darren.carnell@kingcounty.gov

