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THANK GOODNESS YOU'RE HOME...

... THE CHRISTMAS TREE FAINTED.
Some Gross Oversimplifications:

1. *Hirst* – County comp plans have to address water availability, even for exempt wells.

2. *Kinderace* – No takings if make lot unbuildable with lot line adjustment.

3. *Alliance* – Only generally vest to uses disclosed in subdivision application.

4. *Schnitzer* – LUPA no place to appeal a City initiated rezone.

In a nutshell:

Counties have a duty under the GMA to make determinations of water availability and to protect water quality.

Counties cannot simply defer to *Ecology* rules to satisfy their duties.

Water is not available for withdrawal from permit-exempt wells if instream flow rules are not being met for all or part of the year.

Does not matter if instream flow rule does not regulate permit-exempt wells.
Whatcom County v. Hirst, Futurewise, et al. (WA Supreme No. 91475–3)

What is an instream flow rule?

The Department of Ecology is authorized by the Water Resources Act, RCW 90.54.020, to adopt instream flow rules to protect rivers, streams and other water bodies.

Instream flows are the stream flow levels intended to protect and preserve instream resources and values.

Once established in a rule, an instream flow is a water right for the stream and the resources that depend on it. It has a priority date like any other water right.
What is an instream flow rule?

State is divided into 62 Water Resource Inventory Areas (WRIAs). Ecology has adopted various rules governing new appropriations of water in these areas.

Currently, there are 26 instream flow rules in Washington.

Instream flow rules also establish closures, meaning Ecology determines that water is not available from certain waterbodies. Closures can be year-round or seasonal.

Some instream flow rules apply to permit-exempt well withdrawals, others do not apply to permit-exempt well withdrawals.
Permit-exempt Wells

RCW 90.44.050 authorizes permit-exempt wells.

Originally included in the Groundwater Code in 1945 to allow small uses of water where community supply was not available.

Up to 5000 gallons/day.

Although exempt groundwater withdrawals don’t require a water right permit, they are nevertheless subject to state water law. Withdrawal from an exempt well is not available if it interferes with prior or “senior” water rights, including instream flow rules.
FACTS:

Whatcom County adopted comp plan and development regulation amendments that address water availability by simply incorporating DOE standards by reference.

WRIA 1 covers most of Whatcom County and is subject to the “Nooksack Rule” (WAC 173-501), an instream-flow rule for the Nooksack River that was adopted in 1985.

Nooksack Rule was adopted at a time when DOE erroneously believed that groundwater appropriations wouldn’t affect instream flows.

The Nooksack Rule closed most stream basins in watershed to new water right permits, but allowed landowners to continue relying on permit-exempt wells for development, except where expressly stated otherwise.

Again, Whatcom County’s comp plan and regulations mimicked this rule.
FACTS, cont:

Evidence presented that instream flows in portions of the Nooksack River are not met an average of 100 days/year.

A large portion of the County is in year-round or seasonally closed watersheds.

Despite this, 1,652 permit-exempt well applications issued in otherwise closed basins since 1997, and an additional 637 applications were pending as of March 2011.

Evidence presented that there were water quality problems throughout the county.

GMHB held:

Whatcom County failed to comply with the GMA. Declined to impose invalidity.
GMHB looked at:

**RCW 36.70A.020(10)** GMA Goal: “[p]rotect the environment and enhance the state’s high quality of life, including air and water quality, and the availability of water.”

**RCW 36.70A.070(5)(c)** “[c]ounties shall include a rural element.” The rural element “shall include measures that apply to rural development and protect the rural character of the area, as established by the county, by ... [p]rotecting ... surface water and groundwater resources....”

**RCW 36.70A.030(15)(d) and (g)** provide that “‘Rural character’ refers to the patterns of land use and development established by a county in the rural element of its comprehensive plan” that, among other things, “are consistent with the protection of natural surface water flows and groundwater and surface water recharge and discharge areas.”
GMHB looked at:

**RCW 36.70A.070(1)** further provides that a county's comprehensive plan must “provide for protection of the quality and quantity of groundwater used for public water supplies.”

**RCW 19.27.097(1)** and **RCW 58.17.110** ensure an adequate water supply when local government approves a building permit or subdivision.
Counties must make a determination of water availability and demonstrate how they meet this GMA duty in their comprehensive plans and development regulations.

GMHB wrote:

“it is the local government– and not Ecology– that is responsible to make the decision on water adequacy as part of its land use decision, and in particular, with respect to exempt wells.” FDO at 23.

Held that Whatcom County’s comprehensive plan failed to comply with the GMA requirement to protect water availability.
Whatcom County v. Hirst, Futurewise, et al. (WA Supreme No. 91475–3)

In addition to a duty to make determinations of water availability, counties have a duty to protect water quality:

RCW 36.70A.070(1): “[t]he land use element shall provide protection for the quality and quantity used for public water supplies.”

RCW 36.70A.070(5)(c)(iv): “Counties shall include a rural element,” which “shall include measures that apply to rural development and protect the rural character of the area ... by ... [p]rotecting ... surface water and groundwater resources....”

GMHB found County policies fail to protect water quality because water protection standards didn’t apply throughout entire county and protection measures that allowed homeowners to do their own septic inspections instead of using professional inspectors were ineffective.
Court of Appeals reversed GMHB:

The Court of Appeals determined that a county could satisfy its duty to protect water availability by requiring compliance with DOE regulations. Counties are not required to make their own separate determinations on the adequacy of water availability.

Remanded issues relating to water quality protections based on conclusion that certain “authoritative resources” were improperly considered by the Hearings Board.
State Supreme Court Rejects Court of Appeals Ruling:

“We hold that the Board properly concluded that the GMA requires counties to make determinations of water availability. The language placing this burden on the county or local government is clear, consistent, and unambiguous throughout the act.”

“We hold that the County's comprehensive plan does not protect water availability because it allows permit-exempt appropriations to impede minimum flows.”
State Supreme Court Rejects Court of Appeals Ruling:

- Counties required by both building permit statute (RCW 19.27.097(1)) and subdivision statute (RCW 58.17.110(2)) to “receive sufficient evidence of an adequate water supply from applicants for building permits or subdivisions before the county may authorize development.”

- Relying on Nooksack Rule not sufficient because exempt permits allowed to appropriate water from basins with insufficient instream flows.

- Also agreed with GMHB that Whatcom County’s regulations failed to protect water quality. The standard imposed was not to “enhance” water quality, but to protect it.
Whatcom County v. Hirst, Futurewise, et al. (WA Supreme No. 91475–3)

So what does this all mean?

• From Ecology’s website:

“The case directly relates to Whatcom County, but appears to set legal precedent that could apply in other counties where there are instream flow rules that were not intended to regulate permit-exempt water uses. This includes counties that are only partially planning under the GMA. It is unclear how the decision affects areas of the state where there are no instream flow rules.”

• Some of the newer instream flow rules already regulate use of permit-exempt wells. Skagit County, for example, is impacted by a rule that prevents most of the rural landowners from obtaining building permits that rely on permit-exempt wells for water without a demonstration of mitigation.
Neil Caulkins, Chief Civil Prosecutor from Kittitas County, wrote a series of four blog posts for MRSC on the *Hirst* decision.

“…for counties not currently going through a periodic GMA update, there likely is some time to consider and develop an approach. Comprehensive plans and development regulations are deemed GMA-compliant upon adoption and remain so until the Growth Management Hearings Board says otherwise.”
His recommendations:

• Counties commence a water study to determine if there are water availability problems.

• If problems, develop code fixes for those county-specific problems.
What about issuing individual development permits relying on exempt-wells?

- Hirst is a GMA case. Did not pertain to issuance of individual permits.
- However, if building permit issued and water not actually legally and factually available, does the landowner risk losing the ability to use the well if it is shown to impair senior rights?
- Note, Ecology’s statement on its website:

  “We do not view this decision as affecting people who have built with legally obtained building permits. Anyone who intends to develop their property, including those landowners who have a well but haven’t yet obtained a building permit, should contact their county to determine how the county is responding to the court decision.”
Different Counties are responding differently.

- **Whatcom County**— enacted a moratorium on issuing development permits relying on permit-exempt wells in October and renewed recently.

- **Spokane County**— adopted interim regulations requiring applicants to show they will not impair existing water users.

- **Pierce County**— adopted a policy requiring an analysis by a licensed hydrogeologist for projects in parts of the county. The county’s Planning and Land Services Department will determine whether a building permit or subdivision has legal water based on the findings from the hydrogeologic study.

- **Okanogan County**— adopted an emergency ordinance requiring a public hearing by the Hearing Examiner for all land-use decisions, including building permits, that require a source of water. Applicants will have to show legal and physical water availability.
King County—

- Taken position *Hirst* is a GMA case that requires county action at the time of next periodic update required by the GMA, but nevertheless intends to address the water availability over the next couple years.

- However, understanding the uncertainties surrounding decision, the county has issued a special notice to applicants regarding use of private exempt wells.

- “Landowners should be aware that any permit approval by DPER is not a determination that water is legally available for property development and, their ability to develop property when relying on private (“exempt”) wells as the water source may be limited by a recent court decision.”
Whatcom County v. Hirst, Futurewise, et al. (WA Supreme No. 91475–3)
Will there be a legislative fix?

Proposed legislation would amend certain sections of the GMA to allow GMA planning jurisdictions to rely on Ecology’s rules when making determinations of water availability.

Other ideas being discussed and considered, such as the legislature giving counties some time to come up with a solution.
Regulatory taking doctrine is the most perplexing area of American land use law.

Holdings:

1. City's Critical Areas Ordinance (CAO) did not deprive property of all economically viable use (i.e. create a takings);

2. City did not necessarily determine that property was capable of being developed by approving boundary line adjustment.
The Facts
- Four property owners who own four adjoining lots use a couple developers to jointly develop the lots into a commercial center.
- Three of the lots are developed.
- One of the three developed lots is only developed with a stormwater detention pond. The pond is necessary to serve another one of the three lots.
- The detention pond lot was bifurcated with a stream and also had a portion of a wetland buffer.
- The detention pond lot initially had a significant portion still available for development, but the lot became non-buildable when the City Council subsequently adopted a new critical areas ordinance that added buffers to the stream.
- The developer subsequently excises the pond from the detention pond lot with a boundary line adjustment. The remaining lot is completely encumbered with stream and wetland buffers. The City approved the lot line adjustment with the caveat that approval “does not guarantee the lots will be suitable for development now or in the future.”
- The developer then sells the stream/wetland lot to another corporation. The corporation is at least in part controlled by the developer and his family.
- The new corporation then applies for a reasonable use exception and the City denies it.
Applicant’s Takings Argument: The CAO denies all economically viable use.

The United States Constitution, U.S. Const. amend. 5, provides in relevant part, “nor shall private property be taken for public use, without just compensation.”

Washington Const. art. 1, § 16, provides that “[n]o private property shall be taken or damaged for public or private use without just compensation having been first made....”
Applicant’s Takings Argument: The CAO denies all economically viable use.

In Washington, a land use regulation which too drastically curtails an owner's use of his or her own property can cause a constitutional taking.

In a regulatory takings claim, a compensable takings can be established if the property owner is able to prove that a regulation deprives him or her of all economically viable use of the property.
The Timing Arguments:

Trial court found economically viable use and no takings because at time that new stream buffer regulations were adopted, the lot in question had a stormwater pond. The pond was a reasonable use of property since it was critical to the approval of commercial development on an adjoining lot.

Applicant argued that trial court assessed economic viability too soon. Applicant argues trial court should have looked at economic viability of lot after the lot line adjustment approved. At that point, the lot was fully encumbered with CAO buffers and there was no detention pond so there was no viable economic use.
Making Lots Unbuildable via Lot Line Adjustment
Kinderace LLC v. City of Sammamish, Court of Appeals Case No. 73409-1-I

Ruling: No Takings Because Had Reasonable Use prior to Lot Line Adjustment

Ruling: Trial court correct. “We reject the argument that Kinderace can use a boundary line adjustment to isolate the portion of its already-developed property that is entirely constrained by critical areas and buffers, and then claim that the regulations have deprived that portion of all economically viable use.”

Appeals court agreed with trial court that impact of CAO should be assessed prior to lot line adjustment:

To hold otherwise would enable a property owner to subvert the environmental regulations by changing parcel boundaries to consolidate critical areas. Once an owner had delineated a parcel that was entirely constrained, he or she could claim deprivation of all economically viable use.
Applicant’s Binding Decision Argument – Approval of the lot line adjustment was a binding decision by the City that the resulting lot was buildable.

Applicant asserts that under RCW 58.17.040(6), City cannot approve a lot line adjustment unless the resulting lot is a building site.

RCW 58.17.040(6) authorizes adjustment of boundary lines “...which does not create any additional lot, tract, parcel, site, or division nor create any lot, tract, parcel, site, or division which contains insufficient area and dimension to meet minimum requirements for width and area for a building site”
Ruling: City regulations did not require a finding that lot resulting from lot line adjustment was buildable, therefore there’s no binding decision that lot is buildable.

“Because the statute does not define the term ‘building site,’ the applicable definition is established by local ordinance, here, SMC 19A.04.060.3 Under that ordinance, ‘building site’ is defined as an area of land either

(1) ‘[c]apable of being developed under current federal, state, and local statutes, including zoning and use provisions, dimensional standards, minimum lot width, shoreline master program provisions, critical area provisions and health and safety provisions;’ or

(2) ‘[c]urrently legally developed.”’
Making Lots Unbuildable via Lot Line Adjustment
Kinderace LLC v. City of Sammamish, Court of Appeals Case No. 73409-1-I

In dubious reasoning, Court determines that since lot was “legally developed” with detention pond at time of lot line adjustment, it qualified as a building site even though it wasn’t buildable after approval and city had to approve it.

But lot line statute requires that lot line adjustment not “create” an insufficient building site.
In dubious reasoning, Court determines that since lot was “legally developed” with detention pond at time of lot line adjustment, it qualified as a building site even though it wasn’t buildable after approval and city had to approve it.

But lot line statute requires that lot line adjustment not “create” an insufficient building site.
Takeaways:

In Assessing Viable Economic Use After BLA – Primary inquiry is whether (1) BLA caused loss of use or (2) the regulations caused the loss prior to BLA.

BLA Ordinances Shouldn’t Authorize Lots with No Reasonable Use.

Big Outstanding Issue: What if person applying for BLA had not been affiliated with developer but some third party purchaser 30 years later who paid the full purchase price for a developable lot?
What is a reasonable use?

Should be a constitutional safety valve by allowing waiver of regulations to prevent:

(1) Invalidation of regulations because unreasonably burdensome as violation of property owner’s due process rights under 5th Amendment; and

(2) Compensation for taking property without just compensation under 5th Amendment
5th Amendment:
No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.
Two Types of Regulatory Takings:

Categorical Takings: Deprived of all economically viable use.

Penn Central: Public benefit significantly outweighed by burden on property owner.
Categorical Takings Wetlands Case; *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001):

Palazzolo owns an 18-acre subdivision containing 74 undeveloped lots covered with wetlands.

Subsequent to the subdivision of the 18-acre parcel the Rhode Island Legislature adopted regulations that prevent Mr. Palazzolo from filling the wetlands.

Prior to adoption of the wetland regulations, Mr. Palazzolo’s could have developed a subdivision worth about $3.1 million.

After adoption of the regulations Mr. Palazzolo could only fill the upland portions of his parcel, which would only enable a development worth about $200,000.
**Palazollo Ruling:**

No categorical takings because still have some economically viable use (the upland site).

As noted in a footnote in *Lucas v. South Carolina Coastal Commission*, 505 U.S. 1003 (1992), for a categorical takings you need 100% reduction in property value. 95% doesn’t cut it.
Penn Central Takings:

Assuming regulation doesn’t infringe upon fundamental attribute of ownership and substantially advances a legitimate public purpose, a Penn Central takings involves a balancing of several factors including:

(1) Economic impact of the regulation on the claimant;
(2) Extent to which the regulation has interfered with distinct investment-backed expectations;
(3) Character of the governmental action.
Making Lots Unbuildable via Lot Line Adjustment
Kinderace LLC v. City of Sammamish, Court of Appeals Case No. 73409-1-I

Good Example of Penn Central Wetlands Takings Case:

Facts:
Property owner was denied a permit to fill wetlands in order to build a single-family home on a 2.5 acre waterfront parcel.

The only use remaining use the property owner had with the denial of the wetlands permit was access rights to the shoreline.

The denial of the permit devalued the property from $665,000 to $31,500 based upon the findings of the trial court as to what the property could be used for.

The value of the property would have been $50,000 if additional use rights alleged by the government defendant applied, such as the construction of a catwalk or moorage for a houseboat.
Good Example of Penn Central Wetlands Takings Case:

The New York Supreme Court applied federal constitutional takings case law and ruled that a takings occurred whether the property was valued at $50,000 or $35,000.

The Court reasoned that the property owner experienced either a 95% or 92.5% reduction in value and that in either case the reduction was significant. The Court found that the public benefit conferred by wetlands protection did not justify the taking of public property.

It noted that if there are no direct reciprocal benefits to the property owner, the property owner should not bear the burden of providing those benefits to the general public.

Due to the significant loss in value and the lack of reciprocity in the benefits of wetland protection, the Court found a takings
The only WA case applying “reasonable use”; *Buechel v. Department of Ecology*, 125 Wn.2d 196 (1994):

Applicant requests a variance based upon reasonable use criteria to build within a shoreline setback along Hood Canal.

Without the variance there was no space for a single-family home.

The subject lot only had 840 square feet of developable space because the rest of the 8,500 square foot lot was submerged.

The property was zoned for residential use.

Variance criteria required applicant to show “he cannot make any reasonable use of his property.”
Buechel Interpretation of “Reasonable Use”

“...land may have some economic value where the uses allowed are recreational [RV space, boat shed]. The size, location, and physical attributes of a piece of property are relevant when deciding what is a reasonable use of a particular parcel of land.”
Buechel Interpretation of “Reasonable Use”

“To some extent the reasonable use of property depends on the expectations of the landowner at the time of purchase of the property. If existing land regulations limit the permissible uses of the property at the time of acquisition, a purchaser usually cannot reasonably expect to use the land for prohibited purposes. Although not necessarily determinative, courts may look to the zoning regulations in effect at the time of purchase as a factor to determine what is reasonable use of the land. Presumably regulations on use are reflected in the price a purchaser pays for a piece of property. This landowner knew when he purchased this lot that it did not satisfy either the minimum lot size or the setback requirements of the MCSMP.”
Buechel Ruling:

Variance properly denied. Property owner knew of limitations on property when he purchased it, developable space was very small, numerous properties in area were limited to recreational use and shoreline setbacks serve important environmental function.
Good definition of Reasonable Economic Use:

The minimum use to which a property owner is entitled under applicable state and federal constitutional provisions in order to avoid a taking and/or violation of substantive due process. The minimum reasonable use of a residentially zoned lot which meets or exceeds minimum bulk and dimensional requirements is one single-family residence. Determination of “reasonable economic use” shall not include consideration of factors personal to the owner such as a desire to make a more profitable use of the site.
Making Lots Unbuildable via Lot Line Adjustment
Kinderace LLC v. City of Sammamish, Court of Appeals Case No. 73409-1-I

Mason County Code 17.01.150(E) – Reasonable House Size

“...the minimum reasonable use for a residence in a residentially zoned area shall be defined by the lesser of a) 40% of the area of the lot, or b) 2,550 square feet. ...”

The minimum above applies to the building footprint and associated decks as seen from a “birds eye view.”
Current Vesting Status of Subdivisions

Alliance Investment Group of Ellensburg v. Ellensburg, Court of Appeals, No. 32370-6-III
Facts:

Alliance files short plat application for nine lot industrial park.

City is generally aware that Alliance plans for industrial development of the industrial park.

The park was located in a floodplain area and the plat was reviewed for compliance with applicable flood plain regulations.

The year following approval of the plat, the City amended its floodplain regulations.

Alliance asked for a statement of restrictions confirming that the new floodplain regulations didn’t apply.

The City issue a statement concluding that the new floodplain regulations do apply and Alliance appealed to superior court.
Current Vesting Status of Subdivisions

Alliance Investment Group of Ellensburg v. Ellensburg, Court of Appeals, No. 32370-6-III

RCW 19.27.095(1):

A proposed division of land, as defined in RCW 58.17.020, shall be considered under the subdivision or short subdivision ordinance, and zoning or other land use control ordinances, in effect on the land at the time a fully completed application for preliminary plat approval of the subdivision, or short plat approval of the short subdivision, has been submitted to the appropriate county, city, or town official.

Noble Manor v. Pierce County, 133 Wn.2d 269 (1997): Vesting applies to more than just subdivision review. A complete subdivision application vests development with right to develop property in the manner disclosed in the application.
Alliance Ruling: Plats and their future development only vest to extent use disclosed (applying *Noble Manor v. Pierce County*). In this case, the floodplain regulations were only applied to the plat design so vesting only applies to plat design but not building design. Building design is subject to the new floodplain regulations.

The City was aware of the general industrial use contemplated for the lots, so vesting also applies to the types of uses allowed but not their specific development.
Nowhere to Turn? – City Initiated Site Specific Rezones
Schnitzer West LLC v. City of Puyallup, WA Ct. of Appeals, 47900-1-II
Ruling:

Land Use Petition Act doesn’t apply to City-Initiated Site specific rezones.
Facts:

Case involves a legal challenge to a site specific extension of an overlay zone.

In 2009, the City formally adopted an amendment to its comprehensive plan that created the “Shaw–East Pioneer Overlay Zone” (SPO), which the City considers to be a gateway area.

The City wanted to use the overlay zone to create additional performance standards to encourage quality development in that area while allowing flexibility and creativity, create a walkable, safe, and pedestrian-friendly community, and use low-impact development principles.
Facts:

When the City adopted the SPO zone, Schnitzer’s property, composed of three parcels totaling 22 acres, was located just outside city limits adjacent to the SPO zone.

Schnitzer’s three parcels was subsequently annexed along with 10 other commercially zoned properties, but the SPO overlay wasn’t extended to the annexation area upon annexation.

In 2013, a year after annexation, Schnitzer requested and was given a rezone to convert a portion of his property from Business Park to Limited Manufacturing so that Schnitzer could build a 470,000 square foot warehouse.
Facts:

In January 2014, following the election of two new city council members, the City adopted an emergency moratorium on all parcels within the recently annexed area, including the Schnitzer Property.

The stated purpose of the moratorium was to provide the City with sufficient time to consider whether to extend the SPO into all zones within the annexation area.

In Schnitzer's view, the City had ulterior motives. Schnitzer believed that, in reality, the proposed moratorium was a retaliatory measure designed to frustrate its development proposal.
Facts:

In April 2014, the planning commission reviewed the potential SPO expansion during the moratorium, and determined that there was no basis to extend the SPO into any portion of the annexation area, including the Schnitzer Property.

The City Council ultimately decided to only extend a modified version of the SPO zone to Schnitzer’s three parcels and no other part of the annexation area.

The modified SPO zone imposed numerous additional restrictions on Schnitzer’s property, including a maximum building size of 125,000 square feet.
Nowhere to Turn? – City Initiated Site Specific Rezones
Schnitzer West LLC v. City of Puyallup, WA Ct. of Appeals, 47900-1-II

Fall Out:

Schnitzel files judicial appeal of ordinance applying the modified SPO to his property under the Land Use Petition Act, Chapter 36.70C RCW.

Schnitzel’s complaint alleged that the City erroneously treated the SPO ordinance as a legislative action, when in fact it was a quasi-judicial permitting action that should have been subject to quasi-judicial permitting procedures and protections.

Schnitzer also contended that the City singled out his property and unfairly targeted it because the City's constituents disfavored the proposed project.
City defense: LUPA only applies to “land use decisions”. A City initiated site specific rezone isn’t a “land use decision.”

Controlling Issue:

Does a city/county initiated site specific rezone qualify as a “land use decision” under LUPA?
LUPA grants the superior court exclusive jurisdiction to review a local jurisdiction's land use decisions with the exception of decisions subject to review by bodies such as the Growth Management Hearings Board.  RCW 36.70C.030(1)(a)(ii).
Nowhere to Turn? – City Initiated Site Specific Rezones
Schnitzer West LLC v. City of Puyallup, WA Ct. of Appeals, 47900-1-II

RCW 36.70C.020(2):

“Land use decision” means a final determination by a local jurisdiction's body or officer with the highest level of authority to make the determination, including those with authority to hear appeals, on:

(a) An **application** for a **project permit or other governmental approval** required by law before real property may be improved, developed, modified, sold, transferred, or used, but excluding applications for permits or approvals to use, vacate, or transfer streets, parks, and similar types of public property; excluding applications for legislative approvals such as area-wide rezones and annexations; and excluding applications for business licenses;

(b) An interpretative or declaratory decision regarding the application to a specific property of zoning or other ordinances or rules regulating the improvement, development, modification, maintenance, or use of real property; and

(c) The enforcement by a local jurisdiction of ordinances regulating the improvement, development, modification, maintenance, or use of real property. However, when a local jurisdiction is required by law to enforce the ordinances in a court of limited jurisdiction, a petition may not be brought under this chapter.
Nowhere to Turn? – City Initiated Site Specific Rezones
Schnitzer West LLC v. City of Puyallup, WA Ct. of Appeals, 47900-1-II

RCW 36.70B.020(4):

“Project permit” or “project permit application” means any land use or environmental permit or license required from a local government for a project action, including but not limited to building permits, subdivisions, binding site plans, planned unit developments, conditional uses, shoreline substantial development permits, site plan review, permits or approvals required by critical area ordinances, site-specific rezones authorized by a comprehensive plan or subarea plan, but excluding the adoption or amendment of a comprehensive plan, subarea plan, or development regulations except as otherwise specifically included in this subsection.
Nowhere to Turn? – City Initiated Site Specific Rezones
Schnitzer West LLC v. City of Puyallup, WA Ct. of Appeals, 47900-1-II

Prior Ruling:

“[A] site-specific rezone is a change in the zone designation of a ‘specific tract’ at the request of ‘specific parties.’”


Dissent: The prior ruling was only dicta.
Decision:

No one applied for the SPO ordinance. It was a city initiated decision. Since there was no application, the SPO ordinance does not qualify as a “land use decision” under LUPA and LUPA does not apply. Case dismissed.
What recourse does a property owner have for a malicious City-initiated rezone?

1. The Growth Management Hearings Board only has authority to assess compliance with GMA and SEPA. The Board has specifically ruled it has no authority to adjudicate spot zoning issues.

2. LUPA statute (RCW 36.70C.030) and case law provides that damages claims can be brought independent of LUPA if the damages claim doesn’t depend upon the validity of the land use decision. See RCW 36.70C.030; Woods View II, LLC v. Kitsap County (2015) 188 Wash.App. 1, 352 P.3d 807, review denied 184 Wash.2d 1015, 360 P.3d 818.
Nowhere to Turn? – City Initiated Site Specific Rezones
Schnitzer West LLC v. City of Puyallup, WA Ct. of Appeals, 47900-1-II

Speaking of Spot Zone:

A spot zone is well described in *Narrowsview Preservation Association v. City of Tacoma*, 84 Wn.2d 416, 421 (1974):

“We have recently stated that illegal spot zoning is arbitrary and unreasonable zoning action by which a smaller area is singled out of a larger area or district and specially zone for use classification totally different from and inconsistent with the classification of the surrounding land, not in accordance with the comprehensive plan”
Judicial Rezone Criteria:

The proponents of a rezone must establish that conditions have substantially changed since the original zoning and that the rezone must bear a substantial relationship to the public health, safety, morals or welfare. *See Ahmann-Yamane, LLC v. Tabler*, 105 Wn. App. 103, 111 (2001). If a rezone implements the Comprehensive Plan, a showing that a change of circumstances has occurred is not required. *Id.* at 112.
Scenic Vistas Act
Sun Outdoor Advertising, LLC v. WSDOT, 195 Wn. App. 666 (Ct. of Appeals, 75231–6–I)
Facts:

In 2014, Sun Outdoor sought a permit from the Department to erect a billboard in Okanogan County on property along State Route 97.

It is undisputed that, absent an exception, the proposed billboard location is part of a designated “scenic system”.

The proposed location is zoned by the County as a “Minimum Requirement District” (MRD).

The Department denied Sun Outdoors' application. The Department found that the proposed location was not zoned for “predominantly commercial or industrial uses,” noting the stated purpose of the MRD zone is to “maintain broad controls in preserving rural character and protecting natural resources.”
Law:

RCW 47.42.030:

"Except as permitted under this chapter, no person shall erect or maintain a sign which is visible from the main traveled way of the interstate system, the primary system, or the scenic system..."
Law: RCW 47.42.020

“Scenic system” means (a) any state highway within any public park, federal forest area, public beach, public recreation area, or national monument, (b) any state highway or portion thereof outside the boundaries of any incorporated city or town designated by the legislature as a part of the scenic system, or (c) any state highway or portion thereof outside the boundaries of any incorporated city or town designated by the legislature as a part of the scenic and recreational highway system except for the sections of highways specifically excluded in RCW 47.42.025 or located within areas zoned by the governing county for predominantly commercial and industrial uses, and having development visible to the highway, as determined by the department.
Law: RCW 47.42.020

“Scenic system” means (a) any state highway within any public park, federal forest area, public beach, public recreation area, or national monument, (b) any state highway or portion thereof outside the boundaries of any incorporated city or town designated by the legislature as a part of the scenic system, or (c) any state highway or portion thereof outside the boundaries of any incorporated city or town designated by the legislature as a part of the scenic and recreational highway system except for the sections of highways specifically excluded in RCW 47.42.025 or located within areas zoned by the governing county for predominantly commercial and industrial uses, and having development visible to the highway, as determined by the department.
Controlling Issue: Do commercial and industrial uses “predominate” in MDR zone?

Outdoor argues that 95 of the 97 uses listed in the MDR zone are commercial in nature.
Ruling: Commercial/Industrial Uses don’t “predominate” in MDR zone.

Court reasons that it’s the category of use (e.g. residential/public/commercial/industrial) that needs to predominate, not just the number of uses identified. Court noted that the only uses prohibited in the MDR zone are “nightly rentals” and auto storage of more than five disabled automobiles. Given that anything goes, there’s no reason to conclude that commercial/industrial uses predominate in the zone.
Another Multiple Choice Exam!

What Decision Maker(s) Are Authorized by the Subdivision Statutes to Approve Final Plats?

A. City Council Only
B. City Council and Hearing Examiners.
C. City Council, Planning Commission or Hearing Examiner.
D. Anyone Designated by Ordinance.
RCW 58.17.170:

(1) When the legislative body of the city, town or county finds that the subdivision proposed for final plat approval conforms to all terms of the preliminary plat approval, ..., it shall suitably inscribe and execute its written approval on the face of the plat....
RCW 58.17.330(1):

As an alternative to those provisions of this chapter requiring a planning commission to hear and issue recommendations for plat approval, the county or city legislative body may adopt a hearing examiner system and shall specify by ordinance the legal effect of the decisions made by the examiner.