

THE SHORELINE MANAGEMENT ACT AND PUBLIC ACCESS

A Critique of Common Practices

and

Limitations on “Furthering Substantial Governmental Purpose” When Considering Public Access Requirements for Washington State Shorelines under the Shoreline Management Act

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A Critique of Common Practices

Many communities are in the process of updating Shoreline Master Programs, which are the regulatory tools used to enforce the Shoreline Management Act requirements throughout the State of Washington. This paper is addressed to the public access requirements of the Washington State Shoreline Management Act, Chapter 90.58 RCW, and the Shoreline Management Act guidelines adopted by the Washington Department of Ecology in 2003, Chapter 173-26 WAC.

Public access to state shorelines for use and enjoyment is a goal emphasized by WDOE in the guidelines, but one that must be tempered by legal limitations in the form of regulatory and constitutional limits on the ability of public agencies to require public access as a condition of developing on the state's shorelines. During the update process, local governments are often advised to emphasize the agency guidelines in providing for public access. In too many cases, however, the public access requirements in master programs are set forth in mandatory terms without processes or procedures designed to identify and implement regulatory and constitutional limits inherent in mandating public access to private property. The effect of this failure to adequately provide a process to temper the public demand for water access with private property rights to exclude others is to shift the burden of assuring private property interests are protected from the municipality adopting the program in advance of taking action, to the property owner forced to prove illegality of a required dedication after the condition has been imposed. The point of this paper is to assert that such burden shifting is contrary to the SMA guidelines, unlawful, and a sound basis to challenge the program of any jurisdiction that fails to address the "property rights" issues inherent in public access requirements at the outset.

As will be discussed below, local governments following the program of adopting required public access exactions without adopting clear guidelines as to when such requirements may be imposed are facing a variety of potential challenges, which may include:

As Written:

- The guidelines fail to comply with the policies of the Shoreline guidelines by which programs will be evaluated and may be challenged by property owners or groups adversely affected by the threat of unlawful requirements.

As Applied:

- When a local government seeks to impose a public access requirement as a condition of shoreline development, it is the local government which has the burden of proving both nexus and proportionality measured against the impacts of the proposal under review. The mere fact of development on the shoreline is not sufficient justification for conditioning approval by some form of public access. The local Government must tie any condition to the circumstances of the case, and has the duty to prove the condition is "reasonably necessary under the

circumstances. Conditions such as linear trails or direct access where none has existed before violate a fundamental right of property ownership—the right to exclude others and will be subject to successful challenge under many circumstances.

- Subdivision creates the potential for new homes and population that may increase the demand for access to waterfront property. Programs that treat the subdivision of waterfront properties differently from subdivision of upland properties, however, although both create similar demands on waterfront access attempt to impose a condition based on a distinction without rational justification and creates the potential for challenge on equal protection grounds.

I. Background

Securing public access to private property, even in the context of development, redevelopment, or modifications of shoreline property, is fraught with legal constraints and constitutional sideboards that limit the public's unrestricted right to command such access. The purpose of this paper is to explore the requirements and limitations on local authority to command public access to shorelines in connection with private development and to examine the various theories in which such access may be required and those instances where such requirements are unlawful under a variety of established doctrines.

As will be discussed in detail below, cities and counties must read the public access guidelines very carefully and understand that while the guidelines encourage public access where at all feasible, such encouragement does not mean that cities and counties may require access with impunity. The shoreline guidelines, corresponding city requirements, and legal commentary on each element of public access follow. As we review the statutory requirements, the administrative guidelines, and the local responses, it is well to remember a key legislative caveat concerning protection of property rights in developing shoreline policy stated in the Shoreline Management Act:

... coordinated planning is necessary in order to *protect the public interest* associated with the shorelines of the state while, at the same time, *recognizing and protecting private property rights* consistent with the public interest. ...

RCW 90.58.020, emphasis supplied.

As will be demonstrated by the language of the guidelines below, State Law imposes a duty on local governments to plan for the local master programs to provide mechanisms and processes that assure the protection of private property rights. The burden is on local governments to identify such a process in the master program itself, and not, as evident in so many programs, mandate public access as a condition of most or all shoreline developments under a variety of conditions,

and merely affirm but make no provision for providing the required protections or standards by which adequate protection of property rights may be measured administratively.

Instead, all too often the master plans leave the protection of property rights to the property owner forced to challenge a requirement to provide public access. It is this failure to provide a process to address and temper public access requirements with a recognition that the burden is on the municipality to demonstrate both nexus and proportionality as a condition to securing public access that is the material defect in the local planning programs. Ignoring the limits of municipal authority in the shoreline update, and shifting the burden to protect property rights to those who can afford appeals and litigation, violates the Shoreline Management Act and applicable guidelines and provides a sound basis for challenge if not corrected.

II. The Legislative Mandate--Local Governments are Required to Protect Property Rights During the Planning Process.

The analysis starts with the only legislatively mandated public access requirement in the Shoreline Management Act. The provision is set forth in the legislative declaration of policy, which states:

...local government, *in developing master programs for shorelines of statewide significance*, shall give preference to uses in the following order of preference which:

(5) Increase public access to publicly owned areas of the shorelines;

RCW 90.58.020, emphasis supplied.¹

The Legislature also recognized the inherent problem between the public's interest in access and the need to protect private interests.

The legislature further finds that much of the shorelines of the state and the uplands adjacent thereto are in private ownership; ... and, therefore, *coordinated planning is necessary ...while, at the same time, recognizing and protecting private rights consistent with the public interest.* ...

RCW 90.58.020.

It is important to note, first, that the legislative directive is aimed only at "shorelines of statewide significance" and second, and more importantly, that the directive is at the point where the local jurisdiction is "developing master programs" and that it is the "planning" for shoreline management that must make provision to accommodate and protect private property rights.

¹ A second and parallel provision calls for an increase in the recreational opportunities for the public "in the shoreline," but with no reference to whether that increase is related to public or private lands.

III. Regulatory Implementation

A. “Governing Principles”

Guidelines for “developing” master programs are found in Chapter 173-26 WAC and the initial assertion of responsibility to local governments for planning to protect private property during the development of the master program is set forth in WAC 173-26-186, “Governing Principles of the Guidelines.”

The governing principles listed below are intended to articulate a set of foundational concepts that underpin the guidelines, guide the development of the planning policies and regulatory provisions of master programs, and provide direction to the department in reviewing and approving master programs. ...

WAC 173-26-186.

The Governing Principles first specifically note that regulation is not the only technique by which the planning goals may be achieved:

(4) The *planning policies* of master programs (as distinguished from the development regulations of master programs) *may be achieved by a number of means, only one of which is the regulation of development*. Other means, as authorized by RCW 90.58.240, include, but are not limited to: The acquisition of lands and easements within shorelines of the state by purchase, lease, or gift, either alone or in concert with other local governments; and accepting grants, contributions, and appropriations from any public or private agency or individual. Additional other means may include, but are not limited to, public facility and park planning, watershed planning, voluntary salmon recovery projects and incentive programs.

WAC 173-26-186, emphasis supplied.

The Governing Principles also specifically note that the burden is on local government to develop a lawful approach to regulation of private property; not, as so many plans propose, to put the burden of protecting “protected rights” on the back of the property owner.

(5) The policy goals of the act, implemented by the planning policies of master programs, may not be achievable by development regulation alone. *Planning policies **should** be pursued through the regulation of development of private property **only to an extent that is consistent with all relevant constitutional and other legal limitations** (where applicable, statutory limitations such as those contained in chapter 82.02 RCW and RCW 43.21C.060) on the regulation of private property.*

WAC 173-26-186, emphasis supplied.^{2 3}

The section goes on to provide that local governments are required to develop a “process” by which such protection is assured.

... Local government should use a process designed to assure that proposed regulatory or administrative actions do not unconstitutionally infringe upon private property rights. ...

WAC 173-26-186(5).

B. Public access

The WDOE “Public Access” guidelines are found at WAC 173-26-221(4). (Copy attached as Attachment 1.) At the outset it should be noted that the guidelines expand the public access requirements consideration from the statutory “shorelines of statewide significance” noted above, to all shorelines.

(4) Public access.

(a) Applicability. Public access includes the ability of the general public to reach, touch, and enjoy the water’s edge, to travel on the waters of the state, and to view the water and the shoreline from adjacent locations. Public access provisions below apply to *all shorelines of the state* unless stated otherwise.

WAC 173-26-221(4).

There is no definition of “public access” in either the legislation or the definition section of the guidelines and as such the provisions above are the only guide to understanding the intended scope of the term.

² While the regulation uses the term “should,” the definitions in the guidelines, WAC 173-26-020, make it clear that in this context “should” is a mandate, excused only for good cause shown.

(32) “Should” means that the particular action **is required** unless there is a demonstrated, compelling reason, based on policy of the Shoreline Management Act and this chapter, against taking the action.

³ The statutory provision goes on to state: “A process established for this purpose, related to the constitutional takings limitation, is set forth in a publication entitled, “State of Washington, Attorney General’s Recommended Process for Evaluation of Proposed Regulatory or Administrative Actions to Avoid Unconstitutional Takings of Private Property,” first published in February 1992. The attorney general is required to review and update this process on at least an annual basis to maintain consistency with changes in case law by RCW 36.70A.370.” WAC 173-26-186(5). (See AGO 1992-23 attached, which addresses property rights issues under GMA and attaches a copy of the referenced guidelines.)

A key point of this provision, beyond addressing all shorelines, is to note that the term “public access” as used in the guidelines contemplates a variety of activities on and near shorelines:

- Reach, touch, and enjoy the water’s edge;
- Travel on the waters; and
- View the water and the shoreline from “adjacent” locations.

The section quoted does not identify when each is appropriate or whether one form of access is more important than others. Note that the regulations do expand public access objectives to all shorelines, not just those of shorelines of statewide significance. Having expanded the scope of the public access rules to cover all shorelines, not just those of statewide significance, the guidelines still reaffirm the duty of the **municipality** while developing its program to address competing interests in both gaining public access and protecting private property rights and focus specifically about access to waters “held in public trust”:

(b)(i) Promote and enhance the public interest with regard to rights to access waters held in public trust by the state *while protecting private property rights* and public safety.

WAC 173-26-221(4), emphasis supplied.

As will be discussed in detail below, the rights inherent in the “public trust doctrine” focus on the rights inherent in using the state’s waterways and the state’s regulatory authority over waterways and do not suggest or imply the ability to command public access on dry lands above the line of ordinary high water.

The guidelines then address a recommended “planning process” in which they note the difficulty in creating hard and fast rules for public access and instead recommend certain guidelines.

(c) Planning process to address public access. Local governments should plan for an integrated shoreline area public access system that identifies specific *public needs* and *opportunities to provide public access*. Such a system can often be more effective and economical than applying uniform public access requirements to all development. This planning should be integrated with other relevant comprehensive plan elements, especially transportation and recreation. ***The planning process shall also comply with all relevant constitutional and other legal limitations that protect private property rights.*** ...

WAC 173-26-221(4), emphasis supplied.

The guidelines emphasize public access to publicly owned properties:

At a minimum, the public access planning should result in public access requirements for shoreline permits, recommended projects, port master plans, and/or *actions to be taken to develop public shoreline access to shorelines on public property*.

WAC 173-26-221(4)(c), emphasis supplied.

But also recognizes the desirability to provide:

... a variety of shoreline access opportunities and circulation for pedestrians (including disabled persons), bicycles, and vehicles between shoreline access points, consistent with other comprehensive plan elements.

WAC 173-26-221(4)(c), emphasis supplied.

The guidelines then identify four standards, reproduced below that “should guide”⁴ public access provisions in local master programs.

(d) Standards. Shoreline master programs should implement the following standards:

(i) **Based on the public access planning** described in (c) of this subsection, establish policies and regulations that protect and enhance both physical and visual public access. The master program **shall address public access on public lands**. The master program **should seek to increase the amount and diversity of public access to the state’s shorelines consistent with the *natural shoreline character, property rights, public rights under the Public Trust Doctrine, and public safety***.

(ii) [Public access to publicly owned shorelines].

(iii) Provide *standards for the dedication and improvement of public access in developments* for water-enjoyment, water-related, and nonwater-dependent uses and *for the subdivision of land into more than four parcels*. In these cases, **public access should be required except**:

(A) Where the local government provides more effective public access through a public access planning process described in WAC 173-26-221 (4)(c).

⁴ Remember the mandatory nature of “should” unless the community can demonstrate why the guideline cannot be achieved. See footnote 2, p. 6, *supra*.

(B) Where it is demonstrated to be *infeasible due to reasons of* incompatible uses, safety, security, or impact to the shoreline environment or due to *constitutional or other legal limitations that may be applicable*.

In determining the infeasibility, undesirability, or incompatibility of public access in a given situation, *local governments shall consider alternate methods of providing public access*, such as offsite improvements, viewing platforms, separation of uses through site planning and design, and restricting hours of public access.

(C) For individual single-family residences not part of a development planned for more than four parcels.

WAC 173-26-221(4), emphasis supplied.

As you read the guidelines, it is important to note that the direction is for local governments to put a program in place that achieves public access goals, but which also recognizes appropriate limitations on the public's ability to command public access from private property owners.

Unfortunately, many draft master programs simply copy the language of the guidelines as a short cut to describing public access policy in the local master programs. As a result, the local master programs often contain a mandate for public access and related improvements, with a statement about protecting private property rights, but make no effort to define how those rights are to be protected. In such cases in implementing the master program, then, the community follows its own rules, insists on the identified public access in connection with specified developments and leaves to the property owner the cost and effort necessary to protect their private property rights where such access is not legally authorized. As noted above, such programs turn the guidelines on their head. It is the local government, through its planning process, that is to define a program that in fact protects private property rights in advance of a mandate for public use of private property, not force each individual property owner to assert such rights or lose them.

In examining your local draft program you may be able to identify a number of problems that may exist in seeking to push public access requirements as part of the shoreline update. We will explore these specific defect types in the section that follows.

To reiterate the salient point of this paper, in developing planning policies and regulations dealing with public access, the burden is on the local government to pursue such regulation requirements in the development of their master programs "only" to the extent that such regulation is consistent with "all relevant constitutional and other legal limitations," *Ibid*, and provide a mechanism for dealing with the issue during the permit review process.

A problem with deferring evaluation of legal limits to public access conditions to the appeal stage of the permit process is that hearing examiners and City Councils will often decline to consider

issues of constitutional import, as will the Shoreline Hearings Board, which is a required administrative appeal before judicial review is warranted.⁵

Thus, property owners, upon whom unlawful requirements have been imposed, will be forced through several levels of expensive administrative litigation in which projects with unlawful conditions are likely held up while they must make the necessary record in forums that will likely refuse to decide the constitutional question. Only after administrative appeals are exhausted and judicial review is sought can the property owner seek real relief for the unlawful action. As noted above, the thesis of this paper is that the guidelines did not contemplate shifting the burden of proving violation of property rights in public access cases to the property owner in after-the-fact appeals. The law does not presume the validity of such conditions, and as will be discussed in detail below, the courts have made it very clear that a municipality seeking to impose public rights on private lands that intrude on the property right to exclude others has a heavy burden to prove entitlement to such conditions. As such, where master programs fail to make early and clear definition where public access conditions may lawfully be imposed, and a contemporary provision for protection of private rights in the process, those participating in the master program update process should challenge such efforts and seek to have local governments follow the program requirements in advance and not shift the burden to the property owner.

A more detailed discussion of the legal framework in which master program conditions must be viewed follows.

IV. The Constitution and Legal Limitations to Public Access

A. Private property is a recognized as a fundamental right under the Washington State Constitution and U.S. Constitutions

Any analysis of the authority of a Washington city or county to command public access to lands abutting the shoreline must first begin with the understanding of fundamental principles set forth in the State's constitution:

A frequent recurrence to fundamental principles is essential to the security of individual right and the perpetuity of free government.

Article 1, section 32, Washington State Constitution.

⁵ See e.g. *William Walker v. Point Ruston LLC*, SHB Nos. 09-013, 09-016 (Consolidated), Order on Summary Judgment, "The Board also concludes that its de novo review authority cures any process issues, and that to the extent Petitioner's claims raise constitutional challenges they are beyond the jurisdiction of the Board." p. 3.

In a treatise on the origins and meanings of section 32, the author noted the core principle in the state constitution to be the protection of individual rights, which as will be seen included property rights.

At the heart of the Washington Constitution is the emphasis on protecting individual rights. Washington, like other states, begins its constitution with a Declaration of Rights. The Declaration of Rights sets the tone for Washington's government by proclaiming the paramount purpose of government; "governments ... are established to protect and maintain individual rights

Brian Snure, *A Frequent Recurrence To Fundamental Principles: Individual Rights*, 67 Washington Law Review 669, July, 1992.

The author discusses the "natural law" origins of Article I, section 32 and a much earlier article on natural law that recognized three fundamental attributes of individual rights:

To Blackstone the three absolute rights which proceed from the law of nature are the right of personal security, the right of personal liberty and **the right of private property**.

Yale Law Journal, *The Law of Nature in State and Federal Judicial Decisions*, 25 YLJ 617, June, 1916.

Examining both federal and state jurisprudence on shoreline cases related to the recognition and protection of competing rights at the shoreline reveals a significant difference between public rights below the line of ordinary high water and the limitation on public rights to lands abutting the shoreline but above the line of high water, commonly referred to as fast lands.

B. Private property at the shoreline—Riparian lands vs. fast lands—the federal perspective

The ability of the public to regulate shorelines has been a topic of much jurisprudence through the country's history. The defining feature is that the public owned and could regulate without compensation the navigable waters of the U.S., but could not regulate without compensation those "fast lands," being defined as lands abutting shorelines above the line of ordinary high water.

A case addressing the accepted doctrine along navigable shorelines is *U.S. v. Willow River Power Co.*, 324 U.S. 499, 65 S.Ct. 761 U.S., 1945, in which the Court reviewed the historic rights of riparian owners vis-à-vis the public along the shorelines. Quoting a recognized author on the topic the court noted:

The owner of the bank has no jus privatum, or special unfructuary interest, in the water. He does not from the mere circumstance that he is the owner of the bank, acquire any special or particular interest in the stream, over any

other member of the public, except that, by his proximity thereto, he enjoys greater conveniences than the public generally. To him, *riparian ownership brings no greater rights than those incident to all the public, except that he can approach the waters more readily, and over lands which the general public have no right to use for that purpose.*

324 U.S. at 507-508, emphasis supplied.

The key distinction in the historic shoreline cases was a recognition of a very different set of rules affecting properties along the shorelines. Below the line of ordinary high water on navigable waters—the “riparian” area—the public had an interest in the navigable stream that could be exercised without compensation to the abutting land owner in most circumstances. But above the line of ordinary high water, the public’s right to act to interfere with the owner’s rights came with a duty to compensate the private owner for interference, as the public had no inherent rights on fast lands. *U.S. v. Kansas City Life Ins. Co.*, 339 U.S. 799, 70 S.Ct. 885 U.S. 1950.

A final case that deals with the issue of navigability and public rights was *Kaiser Aetna v. U. S.*, 444 U.S. 164, 100 S.Ct. 383 U.S. Hawaii, 1979, in which the court was asked to deal with the issue of whether a private pond subsequently connected to a navigable water, created not only jurisdiction for the U.S. under USCOE permit authority over navigable waters, but also a right of the public to use the previously private pond.

The case summary provided a helpful overview:

Mr. Justice Rehnquist, held that although marina fell within definition of “navigable waters of the United States” when owners dredged it and then connected it to a bay in the Pacific Ocean, so as to be subject to regulation by Corps of Engineers, acting under authority delegated it by Congress in Rivers and Harbors Appropriation Act, *Government could not require owners to make marina open to the public without compensating the owners.*

The language of the case is instructive on the limits of public authority over private property connected with shorelines.

The navigational servitude, which exists by virtue of the Commerce Clause in navigable streams, gives rise to an authority in the Government to assure that such streams retain their capacity to serve as continuous highways for the purpose of navigation in interstate commerce. . . . But none of these cases ever doubted that *when the Government wished to acquire fast lands, it was required by the Eminent Domain Clause of the Fifth Amendment to condemn and pay fair value for that interest.*

444 U.S. at 177.

In this case, we hold that the “right to exclude,” so universally held to be a fundamental element of the property right, FN11 falls within this category of interests that the Government cannot take without compensation.

444 U.S. at 179-180.⁶

Significantly, at issue in the *Kaiser* case was access by water and ability to force the owner to accept public moorage at its marina on the formerly private pond, not access across the private lands owned by Kaiser.

For purposes of evaluating Shoreline Master Programs, the key point is that the Federal case law concerning lands abutting shorelines, the superior public interests stop at the line of ordinary high water, and in no instance give rights to public access across private property without compensation. The recognition of the private property right to “exclude others” is a fundamental principle of property ownership and applies to fast lands abutting the shoreline as well as others, and any state action abridging such rights would be subject to very close scrutiny as violating Federal constitutional rights.

C. Federal limitations on state actions

Three principles are well established in connection with private rights on lands along shorelines. While often discussed, it is useful to look at cases that are commonly referred to in the context of “nexus,” “proportionality” and “equal protection,” as each may bear on analysis of a particular local requirement.

1. Nexus: *Nollan v. California Coastal Commission*, 483 U.S. 825, 107 S.Ct. 3141 U.S.Cal., 1987.

The first case is *Nollan*, which is referred to in short hand for the doctrine of “nexus” or reasonable relationship between the condition imposed and the burdens created by the project under review. The case involved a condition that the property owners dedicate a public trail across the ocean frontage of their property as a condition of securing permission to tear down a small cabin and build a 1,600 square foot home. It is instructive in that case to review the specific rationale relied upon by the state and why such rationalizations were rejected by the court, as the state approach may be found behind many “public access” demands in local master programs.

⁶ [FN 11]. As stated by Mr. Justice Brandeis, “[a]n essential element of individual property is the legal right to exclude others from enjoying it.” [citations omitted] Thus, if the Government wishes to make what was formerly Kuapa Pond into a public aquatic park after petitioners have proceeded as far as they have here, it may not, without invoking its eminent domain power and paying just compensation, require them to allow free access to the dredged pond.

In *Nollan* the court visited the public authority on privately owned shorelines in which the Nollans would be required to accommodate a linear trail along the beach to facilitate public traffic. The state argued the trail was permissible in connection with legitimate public interests.

The Commission argues that among these permissible purposes are *protecting the public's ability to see the beach*, assisting the public in *overcoming the "psychological barrier" to using the beach* created by a developed shorefront, and *preventing congestion on the public beaches*. We assume, without deciding, that this is so-in which case the Commission unquestionably would be able to deny the Nollans their permit outright if their new house (alone, or by reason of the cumulative impact produced in conjunction with other construction) FN4 would substantially impede these purposes, unless the denial would interfere so drastically with the Nollans' use of their property as to constitute a taking.

483 U.S. at 835-36.

But the court pointed to two doctrines that emphasize the burden is on the public to show a real justification for a condition requiring interference with standard property rights. The mere fact of proximity to the water is not sufficient justification standing alone to intrude on private rights. The footnote referred to above provides the first caution:

FN4. If the Nollans were being singled out to bear the burden of California's attempt to remedy these problems, although they had not contributed to it more than other coastal landowners, the State's action, even if otherwise valid, might violate either the incorporated Takings Clause or the Equal Protection Clause. One of the principal purposes of the Takings Clause is "to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole."

483 U.S. at 836.

The second note of caution comes from the court's view that the right of exclusion is a right to be protected from excessive regulatory control. Specifically, the requirement for a linear pathway in connection with an otherwise permissible shoreline development had no connection to the interest in view corridors and therefore constituted an impermissible condition. In the language of the court:

We have repeatedly held that, as to property reserved by its owner for private use, "the right to exclude [others is] 'one of the most essential sticks in the bundle of rights that are commonly characterized as property.'" [citations omitted] In *Loretto* we observed that where governmental action results in "[a] permanent physical occupation" of the property, by the government itself **or by others**, [citation omitted], "our cases uniformly

have found a taking to the extent of the occupation, without regard to whether the action achieves an important public benefit or has only minimal economic impact on the owner,” [citations omitted] We think a “***permanent physical occupation***” has occurred, for purposes of that rule, where individuals are given a permanent and continuous right to pass to and fro, so that the real property may continuously be traversed, even though no particular individual is permitted to station himself permanently upon the premises.

483 U.S at 831-32, emphasis supplied.

The court noted that the ability to deny all building to achieve a legitimate public purpose could give rise to certain restrictions, including a view corridor. But without some direct connection to the legitimate purpose:

... unless the permit condition serves the same governmental purpose as the development ban, the building restriction is not a valid regulation of land use but “an out-and-out plan of extortion.”

483 U.S at 837.

The court also made it clear that mere ad hoc references to “legitimate public purposes” was not sufficient to satisfy the test of validity and due to the interests at stake. A heightened scrutiny was warranted to assure that any conditions imposed that introduce public access to private property are in fact based on a “substantial advancement “of the public interests to be protected and not merely a rationalization for avoiding compensation where compensation should be required:

We view the Fifth Amendment’s Property Clause to be more than a pleading requirement, and compliance with it to be more than an exercise in cleverness and imagination. As indicated earlier, our cases describe the condition for abridgement of property rights through the police power as a “substantial advanc[ing]” of a legitimate state interest. *We are inclined to be particularly careful about the adjective where the actual conveyance of property is made a condition to the lifting of a land-use restriction, since in that context there is heightened risk that the purpose is avoidance of the compensation requirement, rather than the stated police-power objective*

483 U.S at 841, emphasis supplied.

In the context of the Shoreline updates, where public access is being required in the context of the development or redevelopment of a shoreline property, the questions to be asked are:

- Is there a legitimate public interest identified that is being adversely affected by the development in question, and

- Does the public access requirement imposed “substantially advance” the “legitimate” public interest adversely affected by the development?

Where, as in *Nollan*, there is no indicia of a public right to cross private lands to reach the water, where the interests involved were at best the “view of the water” from the public right of way, and where the condition imposed goes beyond protecting the protected public interest, the condition lacks the necessary “nexus” with the protected public interest and is an unlawful exercise of regulatory authority without the exercise of eminent domain (taking) authority.

2. Proportionality: *Dolan v. City of Tigard*, 512 U.S. 374, 114 S.Ct. 2309 U.S.Or., 1994.

Seven years after *Nollan*, a second case was decided in which the court took the next step and addressed the issue of limitations on municipal authority where the necessary nexus between the public interests to be served and conditions imposed are found to exist. In *Dolan*, the property owner wanted to double the size of a commercial store adjacent to Fanno Creek in the City of Tigard. The project clearly increased the need for additional stormwater controls and increased traffic, which the record showed would be alleviated in part by encouraging the use of bicycles. As a result, the City looked to a City code provision that required a dedication of a “greenway” along Fanno Creek to deal with stormwater, but also provided additional public access, and required the improvement of a 15-foot trail system to accommodate bicycles. The provisions were upheld by the Oregon Courts by reason of the existence of the “nexus” with legitimate public interests required by *Nollan*.

But on appeal to the U.S Supreme Court, the Court examined the issue of the need for a reasonable relationship between the problem being affected and the condition imposed.

Under the well-settled doctrine of “unconstitutional conditions,” the government may not require a person to give up a constitutional right—here the right to receive just compensation when property is taken for a public use—in exchange for a discretionary benefit conferred by the government where the benefit sought has little or no relationship to the property.

512 U.S at 385.

The court reiterated the heightened scrutiny required when examining an exaction ostensibly tied to a condition that proposed public use as a condition of private development and concluded that in addition to “nexus” the reviewing agencies had to consider a second inquiry, the relationship between the impact created and the condition imposed and the need for some “reasonable relationship.”

The second part of our analysis requires us to determine whether the degree of the exactions demanded by the city’s permit conditions bears the required relationship to the projected impact of petitioner’s proposed development. *Nollan, supra*, [citations omitted] (“ [A] use restriction may

constitute a “taking” if not **reasonably necessary** to the effectuation of a of a **substantial government purpose**’ ”).

512 U.S at 388, emphasis supplied.

After a lengthy discussion of the different approaches to exactions from the most strict to a more general “reasonable relationship” test, the court concluded that federal law looks to mirror the states’ which have adopted the “reasonable relationship” test, but found the “reasonableness” test potentially confusing and concluded:

We think the “reasonable relationship” test adopted by a majority of the state courts is closer to the federal constitutional norm than either of those previously discussed. But we do not adopt it as such, partly because the term “reasonable relationship” seems confusingly similar to the term “rational basis” which describes the minimal level of scrutiny under the Equal Protection Clause of the Fourteenth Amendment. *We think a term such as “rough proportionality” best encapsulates what we hold to be the requirement of the Fifth Amendment.*

512 U.S at 391, emphasis supplied.

The court continued, pointing out that it is the municipality that carries a heavy burden of proof. On the issue of burden of proof, the language of the court is critical in evaluating how local master programs address the need for supporting findings as a condition of imposing any type of public access requirements:

Justice Stevens’ dissent takes us to task for placing the burden on the city to justify the required dedication. He is correct in arguing that in evaluating most generally applicable zoning regulations, the burden properly rests on the party challenging the regulation to prove that it constitutes an arbitrary regulation of property rights. *See, e.g., Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 47 S.Ct. 114, 71 L.Ed. 303 (1926). **Here, by contrast, the city made an adjudicative decision to condition petitioner’s application for a building permit on an individual parcel. In this situation, the burden properly rests on the city.** *See Nollan*, 483 U.S., at 836, 107 S.Ct., at 3148.

512 U.S at 391, Footnote 8, emphasis supplied.

In describing the inherent vagueness of a “reasonable” relationship the court said:

No precise mathematical calculation is required, but the city must make some sort of individualized determination that the required dedication is related both in nature and extent to the impact of the proposed development.

512 U.S. at 391, emphasis supplied.

In *Dolan*, the court found that there was no link between the desire to control flooding and the amount of land required to be dedicated to public access. The court found no nexus for the public access requirement in conjunction with a flood control condition. With respect to bicycles, the mere conclusory statement that the bicycle path “would alleviate traffic” was not sufficient.

... “[t]he findings of fact that the bicycle pathway system ‘*could* offset some of the traffic demand’ is a far cry from a finding that the bicycle pathway system *will*, or is *likely to*, offset some of the traffic demand.” 317 Ore., at 127, 854 P.2d, at 447 [emphasis in original]. No precise mathematical calculation is required, but the city must make some effort to quantify its findings in support of the dedication for the pedestrian/bicycle pathway beyond the conclusory statement that it could offset some of the traffic demand generated.

512 U.S. at 395-396.

After *Nollan* and *Dolan*, a community can no longer assert that the condition in question is simply required by city code and have the courts uphold the validity of the condition based on the presumption of validity of the city codes. The failure of most draft master programs to make that burden of proof clear in the process by which the city evaluates shoreline permits and requires varying degrees of public access as a condition of development is a point in which most draft programs fail to achieve the SMA guideline requirement to create a process protective of property rights.

3. Equal protection: *Nollan v. California Coastal Commission*, 483 U.S. 825, 107 S.Ct. 3141 U.S. Cal., 1987.

The *Nollan* court did not need to reach the equal protection issues because of the penultimate finding that sufficient nexus did not exist to warrant the requirements for a trail. In a footnote, however, they identified that equal protection is another concern when evaluating the requirement for a condition tied to shoreline access. As stated by the court:

If the Nollans were being singled out to bear the burden of California’s attempt to remedy these problems, although they had not contributed to it more than other coastal landowners, the State’s action, even if otherwise valid, might violate either the incorporated Takings Clause or the Equal Protection Clause. One of the principal purposes of the Takings Clause is “to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.” *Armstrong v. United States* [citations omitted]

483 U.S. at 835-36, FN 4.

Equal protection asks the question whether distinctions in the treatment of different properties are warranted by a rational basis for differentiation or simply an opportunistic requirement because of the property's location, but without any real justification for differentiating impacts. In *Village of Belle Terre v. Boraas*, 416 U.S. 1, 94 S.Ct. 1536, 39 L.Ed.2d 797 (1974), the court concluded that no equal protection violation will be found under a rational basis analysis if governmental action had some **rational relationship** to the permissible state objective. But given the heightened scrutiny applied to cases in which the right to exclude others is abridged by public access requirements, here again, the municipal requirement for public access to the shoreline must achieve a rational public interest and not be inequitably applied.

More recently in *Village of Willowbrook v. Olech*, 528 U.S. 562, 120 S.Ct. 1073 U.S., 2000, the court stated the rule in the following terms:

‘[t]he purpose of the equal protection clause of the Fourteenth Amendment is to secure every person within the State's jurisdiction against intentional and arbitrary discrimination, whether occasioned by express terms of a statute or by its improper execution through duly constituted agents.’ [Citations omitted]

528 U.S. at 564.

The Ecology guideline suggesting that all subdivisions in excess of four lots be forced to provide public access begs the question of equal protection violation. Yes it applies to all subdivided waterfront lots, but fails to address why a house on a lot created from the subdivision of a waterfront parcel created a demand for water access different from the house on an adjoining lot created out of a non waterfront lot—it does not. In fact by forcing the waterfront property owners to provide public access to their property with subdivision is to impose a double burden on the waterfront owner not paid by the upland owner. General community public access is paid for by property taxes. Generally waterfront property taxes are higher than non waterfront properties due to the value placed on waterfront. But the waterfront subdivider is given no break in their taxes by reason of alleviating the burden on the public by providing a portion of the City's public access. Instead, they are required to provide public access and still pay property taxes to provide the community public access—a distinction without rational basis for which challenge is certainly warranted.

D. Private property at the shoreline—Riparian lands v. fast lands—the state perspective

Washington law very much mirrors federal law in the recognition and protection of private property rights along the state's shorelines.

Washington courts have long recognized the “right to exclude” others is a fundamental attribute of private property. In an unreported case, *City of Bainbridge Island v. Brennan*, 128 Wn. App. 1046, Not Reported in P.3d, 2005 WL 1705767 Wn. App., Div. 2, 2005, the court was

comfortable reciting the basic tenants of Washington law in a footnote so well accepted that the case did not warrant publication:

FN 29. Property interests are not constitutionally created but are reasonable expectations of entitlement derived from independent sources such as state law. *Mission Springs, Inc.*, 134 Wn.2d at 962 n. 15 (citing *Bd. of Regents v. Roth*, 408 U.S. 564, 577, 92 S.Ct. 2701, 33 L.Ed.2d 548 (1972)). The right to exclude others is an essential stick in the bundle of property rights. *City of Sunnyside v. Lopez*, 50 Wn. App. 786, 795 n. 7, 751 P.2d 313 (citing *Kaiser Aetna v. United States*, 444 U.S. 164, 100 S.Ct. 383, 62 L.Ed.2d 332 (1979)), review denied, 110 Wn.2d 1034 (1988).

2005 WL 1705767 at 16.

In published decisions the Washington Courts have recognized that the property rights protected by the Washington State Constitution encompass the full range of rights inherent in property, *Orion Corp. v. State*, 103 Wn.2d 441, 693 P.2d 1369 (1985).

Washington State also has a substantial body of law dealing with riparian rights and the public trust doctrine, which mirrors the federal law on protecting navigability and ownership of the waters *below ordinary high water line* under the “public trust” doctrine:

According to the public trust doctrine, the State holds state shorelines and waters in trust for the people of Washington, and “the state can no more convey or give away this jus publicum [FN8] interest than it can ‘abdicate its police powers in the administration of government and the preservation of the peace.’ ”

FN8. Jus publicum refers to the principle that the public has an overriding interest in the navigable *waterways and the lands under them*. *Caminiti*, 107 Wash.2d at 668, 732 P.2d 989.

Samson v. City of Bainbridge Island, 149 Wn. App. 33, 202 P.3d 334 (2009).

But it is important to realize that the public trust doctrine deals with the navigable waterways “and the lands under them” and not the “fast lands” above the line of ordinary high water except to the extent that activities on the fast lands adversely affect the public interest in navigability. As we examine the cases, it is clear that the public trust doctrine does not translate into a public right to command public access over private lands abutting the shoreline.

1. The public trust doctrine and SMA.

Washington cases have held that the public trust doctrine is vital in the protection of state interests in navigable waters and the associated tidelands:

The public trust doctrine is expressed, in part, in article XVII, section 1 of the Washington constitution, which reserves state ownership in ‘the beds and shores of the state’s navigable waters.’ *Citizens*, 124 Wn. App. at 571 (citing *Rettkowski v. Dep’t of Ecology*, 122 Wn.2d 219, 232, 858 P.2d 232 (1993)); see also *Esplanade Properties, LLC v. City of Seattle*, 307 F.3d 978, 985 (9th Cir.2002), cert. denied, 539 U.S. 926 (2003). The doctrine is also reflected in Washington’s Shoreline Management Act, adopted in 1971. See *Esplanade Properties, LLC*, 307 F.3d at 985-86.

The public trust doctrine extends ‘beyond navigational and commercial fishing rights to include ‘incidental rights of fishing, boating, swimming, water skiing, and other related recreational purposes.’ *Orion Corp. v. State*, 109 Wn.2d 621, 641, 747 P.2d 1062 (1987) (‘*Orion II*’) (quoting *Wilbour v. Gallagher*, 77 Wn.2d 306, 316, 462 P.2d 232 (1969), cert. denied, 400 U.S. 878 (1970)), cert. denied, 486 U.S. 1022 (1988); see also *Johnson*, 67 Wash. L.Rev. at 567; *Longshore*, 141 Wn.2d at 427.

2005 WL 1705767 at 18.

But the public trust doctrine in this state, similar to the federal rights in navigation, are limited to the public interest in “the beds and shores” of the state’s navigable waters. As such, the authority to regulate uplands under the public trust doctrine is limited to protection of that interest. While such interests include interests in the recreational use of the water and the necessary need to access the water, the Shoreline Management Act limits the upland requirements for public access to “public access of publicly owned shorelines” and does not provide rationale or justification for public access across private lands outside traditional notions of nexus and proportionality recognized at the federal level.

2. Nexus and proportionality—a state requirement.

Nexus has been a well recognized limit on the right of Washington municipalities to impose conditions otherwise designed to serve the public interest. The leading case under constitutional constrains is *Unlimited v. Kitsap County*, 50 Wn. App. 723, 750 P.2d 651 (1988), in which the county attempted to require a property owner to extend a county road to a property that was not developing and which road was not used or necessitated by a small commercial development on another portion of the property. As noted by the Court of Appeals:

A property interest can be exacted without compensation only upon a proper exercise of government police power. Such power is properly exercised in zoning situations where the problem to be remedied by the exaction arises from the development under consideration, and the exaction is reasonable and for a legitimate public purpose. Unless these requirements are met, the exaction is an unconstitutional taking

50 Wn. App. at 727.

More recently the court in *Honesty in Environmental Analysis and Legislation (HEAL) v. Central*, 96 Wn. App. 522, 979 P.2d 864 (1999) reiterated the fundamental limits on permitting authority in language paralleling and citing *Nollan* and *Dolan*:

Simply put, the nexus rule permits only those conditions necessary to mitigate a specific adverse impact of a proposal. The rough proportionality requirement limits the extent of the mitigation measures, including denial, to those which are roughly proportional to the impact they are designed to mitigate. Both requirements have also been incorporated into the GMA amendments to RCW 82.02 authorizing development conditions.

96 Wn. App at 533-534.

The Washington nexus and proportionality requirements have been incorporated into a statute, RCW 82.02.020, which was the statutory basis for both *Isla Verde* and for *Benchmark*. A recent Court of Appeals case holds RCW 82.02.020 does not apply to shoreline master programs. The decision does not change the requirements, it merely shifts review to constitutional guidelines rather than statutory, but in practice, the end result is the same.⁷ Thus Washington cities and counties are limited when seeking to impose a public access condition on shoreline development, even one dictated by an adopted master program.

- Nexus: The municipality has the burden to prove that the condition is “reasonably necessary” to mitigate an existing problem created by the project under the facts of the particular case and may not simply rely on a boilerplate code provision to impose a limitation on property. *Isla Verde v. City of Camas*, 146 Wn.2d 740, 49 P.3d 867 (2002) and
- Proportionality: The municipality may not require the construction of a public facility to be developed far in excess of the burden imposed on a legitimate government interest. *Benchmark v. Battleground*, 146 Wn.2d 685, 49 P.3d 860 (2002).

Washington courts also recognize the equal protection concerns when a local government attempts to exact certain conditions from some but not all equally situate properties. *Samson v. City of Bainbridge Island*, 149 Wn. App. 33, 62, 202 P.3d 334, 349 (2009). A good summary of the tests and requirements were given by the Supreme Court in *Habitat Watch v. Skagit County*, 155 Wn.2d 397, 120 P.3d 56 (2005), in which the court said:

⁷ In *Citizens for Rational Shoreline Planning v. Whatcom County*, 155 Wn. App. 937, 230 P.3d 1074 (2010), the Court of Appeals, Dwyer, C.J., held that SMPs were not subject to statutory prohibition in RCW 82.02.020 on municipalities from imposing direct or indirect taxes, fees, or charges on development. The case did not diminish the constitutional considerations, simply that RCW 82.02.020 was not the appropriate vehicle to challenge SMP provisions.

The right to equal protection guarantees that persons similarly situated with respect to a legitimate purpose of the law receive like treatment. In order to determine whether the equal protection clause has been violated, one of three tests is employed. First, strict scrutiny is applied when a classification affects a fundamental right or a suspect class. Second, intermediate scrutiny is applied when a classification affects both a liberty right and a semi-suspect class not accountable for its status. The third test is rational basis. Under this inquiry, the legislative classification is upheld unless the classification rests on grounds wholly irrelevant to the achievement of legitimate state objectives.

155 Wn.2d at 413.

The guidelines on subdivision rules suggesting that the city or county should require dedication of public access for subdivisions on waterfront properties for projects in excess of four lots creates an apparent equal protection problem. In the first place, the guidelines assume that the creation of four or fewer lots does not create a burden on the shoreline and therefore does not have to provide public access. A plat of five or more units are typically required to provide public access. The problem with the provision, and local master programs adopting the language, is that the provision assumes that the creators of lots in the shoreline are required to provide “public access” a “public amenity, while an adjoining development, with exactly the same member of new units does not. This failure to treat equal properties equally raises significant equal protection issues, as a leading case noted:

The aim and purpose of the special privileges and immunities provision of article 1, section 12, of the State Constitution and of the equal protection clause of the Fourteenth Amendment of the Federal Constitution is to secure equality of treatment of all persons, without undue favor on the one hand or hostile discrimination on the other.

To comply with these constitutional provisions, legislation involving classifications must meet and satisfy two requirements: (1) The legislation must apply alike to all persons within the designated class; and (2) reasonable ground must exist for making a distinction between those who fall within the class and those who do not.

State ex rel. Bacich v. Huse, 187 Wash. 75, 59 P.2d 1101 (1936), rev'd on other grounds.

If the City had a park provision where a level of service for waterfront parks was established, and residential developers were required to pay a fee in lieu of park requirements (which met the test of *Trimen Dev't Co. v. King County*, 124 Wn.2d 261, 877 P.2d 187 (1994)), then a waterfront property owner may be permitted to choose to provide comparable water access as an alternative to paying the fee. But in such case, all developers are paying for water access for new homes, and the property owner with waterfront property is not required to shoulder the burden of providing

waterfront access for new subdivisions in a manner different from all other developers of residential lots. The distinction between upland and waterfront development is not the type of distinction sufficient to warrant a duty to provide public parks on one and not on the other and the master program conditions mirroring the WAC subdivision public access provisions will certainly be subject to challenge.

Shifting public burdens to private owners simply due to proximity to water is not a sufficient justification to create a discriminatory requirement others in the community do not share, and should provide a basis for complaint both as written and as applied where communities fail to recognize the concern.

D. Summary of Concerns

When participating in preadoption reviews of draft master programs, property owners and groups would do well to point out the provisions of the Governing Principles, WAC 173-26-186, and the provisions therein that specifically provide:

“A process established for this purpose, related to the constitutional takings limitation, is set forth in a publication entitled, “State of Washington, Attorney General’s Recommended Process for Evaluation of Proposed Regulatory or Administrative Actions to Avoid Unconstitutional Takings of Private Property,” first published in February 1992.

Washington State Attorney General (Eikenberry) articulated the basic elements of property rights protection in the context of the state’s Growth Management Act, in which he attached a copy of the AGO referenced in the shoreline Governing Principles and provided his own clarification. I have attached a copy of the AGO and attachment for reference purposes (Attachment 2). His summaries are not limited to GMA regulations and are equally applicable to shoreline-related ordinances. His summaries provide a useful checklist in the evaluation of any master program public access provision. The problem with too many draft programs presently in circulation is that the authors have not considered or have chosen to ignore the Attorney General’s advice, much to the ultimate peril of the local jurisdiction considering adoption.

The concept that private property shall not be taken for public use has its origins in the Fifth Amendment of the United States Constitution which provides in part that “[n]or shall private property be taken for public use, without just compensation.” This restriction is applied to the states through the Fourteenth Amendment to the United States Constitution. Article 1, section 16 (amendment 9) of the Washington Constitution provides the same right. *Sintra, Inc. v. Seattle*, 119 Wn.2d 1, 13, 829 P.2d 765 (1992).

In addition to outright physical appropriation of property, a taking can be accomplished by over-regulation. A taking by regulation is often called an inverse condemnation, because the condemnation is found by the court after it has already been implemented by the regulation.

AGO 1992 No. 23, see copy attached as Attachment 2.

After a detailed analysis of a variety of conditions and remedies, the Attorney General identified a series of warning signs that local governments should use in examining a rule or regulation that affects property rights. Three of the areas where caution was suggested were:

- Does the Regulation or Action Result in a Permanent Physical Occupation of Private Property?

Regulation or action resulting in a permanent physical occupation of all or a portion of private property will generally constitute a taking. For example, a regulation which required landlords to allow the installation of cable television boxes in their apartments was found to constitute a taking. *See Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982).

- Does the Regulation or Action Require a Property Owner to Dedicate a Portion of Property or to Grant an Easement?

If the dedication of property is not reasonably and specifically designed to prevent or compensate for adverse impacts of a proposed development on a legitimate public interest worthy of government protection, there may be a taking.

- Does the Regulation Deny a Fundamental Attribute of Ownership?

Regulations which deny the landowner a fundamental right of ownership, including the right to possess, exclude others and dispose of all or a portion of the property are potential takings.

AGO 1992 No. 23, pp. 12-13.

As we look at the implementation of public access guidelines in many draft master programs, the fact that the draft merely mirrors the WAC provisions for access, without providing a mechanism for limiting the requirements based on legal constraints, hits all target issues in creating a suspect requirement:

- They command the physical occupation of private property with a public amenity—a paved or surfaced trail to be maintained by the private property owner.
- They command that the rights of public access be permanent through legal encumbrance on title through restrictive covenant or easement.
- They deny the private land owner a fundamental attribute of ownership; that is, the right to exclude others.

- They treat waterfront subdivisions differently than upland subdivisions with the same density and projected population.

As noted by the Attorney General, the mere fact that the activity is suspect does not mean it is unlawful. However, the opinion did provide that upon review of a land use plan by the State Growth Management Hearings Board, the question of whether a land use plan was clearly erroneous was certainly appropriate for review. Since protection of private property rights was an issue to be considered in the preparation of land use plans under RCW 36.70A.020:

... with regard to property rights, a government entity is **not** in compliance with the GMA if **it fails to consider property rights in developing its plans** and regulations, or if it considers property rights in an arbitrary and discriminatory manner. The Boards have jurisdiction to consider these issues

AGO 1992 No. 23, p. 6. The absence of a local “public process” addressing the issue of protecting property rights is a “failure to consider” a required element of the SMA guidelines and as such would certainly be a valid grounds for challenging the shoreline master program, which are now reviewed for compliance with the guidelines by the Growth Board for those counties under GMA jurisdiction and the Shorelines Hearings Board for those jurisdictions not planning under GMA. WAC 173-26-130.

Thus, the fatal flaw in many city plans is that there is no identified process or administrative guidelines to square the specific requirements in the master program with the specific limitation in the master program guidelines that:

(b)(i) Promote and enhance the public interest with regard to rights to access waters held in public trust by the state *while protecting private property rights* and public safety

(c) Planning process to address public access. Local governments should plan for an integrated shoreline area public access system that identifies specific *public needs* and *opportunities to provide public access*. Such a system can often be more effective and economical than applying uniform public access requirements to all development. This planning should be integrated with other relevant comprehensive plan elements, especially transportation and recreation. ***The planning process shall also comply with all relevant constitutional and other legal limitations that protect private property rights.***

WAC 173-26-221(4).

Without the public process to identify and modify conditions appropriate to given conditions, local programs will be subject to challenge and critique as written, and local governments may not

be able to address excessive conditions as applied until after a long appeal process, in which the risk of damages for unlawful delay or wrongful conditions are very much a reality.

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LIMITATIONS ON “FURTHERING SUBSTANTIAL GOVERNMENTAL PURPOSE” WHEN CONSIDERING PUBLIC ACCESS REQUIREMENTS FOR WASHINGTON STATE SHORELINES UNDER THE SHORELINE MANAGEMENT ACT

In a recent presentation to the Tacoma City Planning Commission, the staff and City attorney latched onto the language of a Reporter’s head note in the case of *Nollan v. California Coastal Commission*, 483 U.S. 825, 107 S. Ct. 3141, 97 L. Ed. 2d. 677(1987), suggesting that public access could be required as a condition of a shoreline permit if the public access requirement “furthers a substantial government purpose.” Unfortunately, the City cherry picked the language of the decision and failed to look closely at arguments made by the California Coastal Commission in support of the public easement claimed in that case and the complete repudiation of those arguments by the Supreme Court in rejecting requirements for public access not directly tied to burdens created by the specific project, whether or not the requirement also furthered a substantial governmental purpose.

It is important in any case to look carefully at the full text of the case to understand the reasons the court reached the result it did. Such detailed analysis shows the “substantial public purpose” basis for imposing public access requirements for shoreline projects independent of specific burdens created by the project have been used time and again by planners seeking to secure public rights above and beyond that directly attributed to a project, and time and again specifically rejected by the courts.

What follows is a detailed discussion of the language of the *Nollan* case (the law is not only what the Court said, but what they did on the facts of the particular case) and a discussion of a number of other cases where local governments attempted to impose conditions that went beyond those necessary to address immediate impacts to serve some other laudable public purpose, only to be told by the courts that the actions were unlawful as beyond the reach of police power and conditions on project-related permits.

The misconception that furthering substantial public purpose interest may provide an independent grounds for public access comes from a misreading of the *Nollan* case. The case must be read in its entirety and carefully because at the end of the day the Court in fact looked at rationales for public access requirements almost identical to those put forth by the City Planning Department and not only held the rationalizations invalid, but warned against seeking to use the guise of public benefit to attempt to acquire by condition that which they necessarily must acquire by condemnation.

There is no question the State’s Shoreline Management Act creates a substantial public interest in securing additional public access to the shorelines of the state. For that reason, the City master program should address means of securing additional public access, both from public and private owners. But the fact that public access “furthers a substantially governmental purpose” alone does not make it lawful to secure public access from private property owners absent some direct and immediate burden that needs to be addressed as a proximate result of the permit in question. We will see this theme repeated in a number of Washington state cases noted below, but it is helpful at the outset to review the precise actions before the Court in the *Nollan* case.

The Nollans live on a California coastline just south of Ventura California. They were seeking a permit to rebuild a substantially deteriorated summer cabin to create a 1,600 single-family home. As a condition of approving the permit to build, the California Coastal Commission (which issues permits for development on the shorelines of the California coast similar to our Shoreline permit process) included a condition that the Nollans provide a public pathway paralleling the shoreline to allow the public to pass in front of their home. The Nollans objected and appealed.

The California Coastal Commission relied on a host of findings and justifications to support the public access requirement. The fundamental interest articulated by the Commission was to improve public access to the beach and in this case to enable the public to walk from a state park located just north of the Nollan home to a public activity area just to the south.¹ The argument was that the expansion of the size of the home contributed to a “walling off effect,” which deprived the public of views of the water and access to the water (though no access from the highway to the water had ever existed here) and that the linear pathway would alleviate that “psychological barrier” to the waters the public had a right to enjoy.

The question before the Supreme Court was whether the Coastal Commission’s interest in advancing public access to the waters of the state warranted a condition for a public easement across the front of the Nollan property as a condition of the permit. The Supreme Court failed to find any connection between the walling effect of a row of houses and the need for a linear pathway on the waterfront and specifically rejected the Commission’s arguments for a public easement as having nothing to do with the identified problem (view blockage).

To understand why the substantial public interest in securing access to the water was insufficient to require the dedication or set aside of land for public access, it is important to look at both the facts and the language of *Nollan* carefully.

The Court began its analysis by noting that absent the request for a permit, the State of California could certainly secure a public path on private property, but it must do so by condemnation. The question then is what additional authority, derived from the police power to condition project permits, justifies a public access condition power in conjunction with a requested permit. The Court begins by acknowledging the ability of the government to condition permits to advance legitimate public interests. In the words of the Court:

We have long recognized that land-use regulation does not effect a taking if it “substantially advance[s] legitimate state interests” and does not “den[y] an owner economically viable use of his land,” ... (“[A] use restriction may constitute a ‘taking’ if not reasonably necessary to the effectuation of a substantial government purpose”). Our cases have not elaborated on the standards for determining what constitutes a “legitimate state interest” or what type of connection between the regulation and the state interest satisfies the requirement that the former “substantially advance” the latter. They have made clear, however, that a broad range of governmental purposes and regulations satisfies these requirements. See

¹ A picture of the coast line in question is attached, showing the approximate area of the Nollan home.

... (scenic zoning); ... (landmark preservation); ... (residential zoning). ...
The Commission argues that among these permissible purposes are protecting the public's ability to see the beach, assisting the public in overcoming the "psychological barrier" to using the beach created by a developed shoreline, and preventing congestion on the public beaches.
We assume, without deciding, that this is so-in which case the Commission unquestionably would be able to deny the Nollans their permit outright if their new house (alone, or by reason of the cumulative impact produced in conjunction with other construction) would substantially impede these purposes, [view blockage] unless the denial would interfere so drastically with the Nollans' use of their property as to constitute a taking.

483 U.S. at 834-36, citations omitted, emphasis supplied.

This is the language of the decision that was summarized in the head note relied upon by the City to support their arguments for a general right to demand public access to further the public interest expressed in the Shoreline Management Act for additional public access to the waters of the state.

But, in using the "substantially furthering a governmental interest which would warrant denial" as the basis for their position, the City has cherry picked language they find supportive of their desire to promote public access, and failed to read the rest of the decision and holding of the Court in that case that public access could not be required as a condition of increasing the size of the Nollan's coastal home.

If the City had taken a closer look at the decision, and what the Court did as well as said, they would find that the fact that the Shoreline Management Act supports a substantial public interest in public access does not justify a public requirement for the use and occupancy of private property along the shoreline as a condition of a development permit in the absence of creating specific need for the type of access required.

The language of the Court, omitted in the City presentation or discussion, is instructive in understanding the limitations in pursuing a governmental purpose in the absence of any direct connection with the problem created.

We have repeatedly held that, as to property reserved by its owner for private use, "the right to exclude [others is] 'one of the most essential sticks in the bundle of rights that are commonly characterized as property.' ... *where governmental action results in "[a] permanent physical occupation" of the property, by the government itself or by others, ... "our cases uniformly have found a taking to the extent of the occupation, without regard to whether the action achieves an important public ... benefit or has only minimal economic impact on the owner ...*

483 U.S. at 831-832.

The Court also rapidly dismissed the argument that an easement was not “permanent” occupation by the public.

We think a “permanent physical occupation” has occurred, for purposes of that rule, where individuals are given a permanent and continuous right to pass to and fro, so that the real property may continuously be traversed, even though no particular individual is permitted to station himself permanently upon the premises.

483 U.S. at 832.

Where the Court looked to a right to deny permits based on the governmental actions that furthered a substantial public interest, they cited cases approving residential zoning (*Euclid*), landmark preservation (*Penn Central*), and scenic zoning (*Agins*). Another common thread in all is that the restrictions advance a valid governmental interest (identified in each of the cases) and was grounds for denial of the permit if the conditions were not met. A common thread in all of the cases is that a right of the public to physically use and occupy the private property proposed for development was not at issue.

The City’s attempt to use the Shoreline Management Act’s expression of public interest in public access as justification for public access requirements as a condition of securing a permit for shoreline development independent of the need for access created by the project reveals a fundamental misunderstanding of the point the Court was trying to make. The Supreme Court recognized that there was a very important public purpose in securing public access to the shorelines. But the fact that the public interest was strong was not enough by itself to warrant a public access condition on private property independent of the burden created by the project.

A few of the arguments put forward by the Coastal Commission in support of the public access requirement, and rejected by the Court, echo very closely the rationalizations put forward by the City using the Shoreline Management Act and Public Trust Doctrine as providing the “public interest” sufficient to support a public access mandate in all shoreline cases.

The key fact in the case and principal rationale of the Coastal Commission was that California had a shoreline park to the north of the Nollan property, and a shoreline park to the south of the Nollan property and the State of California had a substantial public interest in providing public access between the two, which would alleviate the psychological barrier to the water caused by the larger house. As a rationale for the imposition of the pathway connection the Commission specifically found:

- that the new house would increase blockage of the view of the ocean,
- ...contributing to the development of “a ‘wall’ of residential structures”
- ...prevent the public “psychologically ... from realizing a stretch of coastline exists nearby
- *that they [the public] have every right to visit,*” emphasis supplied
- The new house would also increase private use of the shorefront.

These effects of construction of the house, along with other area development, would cumulatively “*burden the public’s ability to traverse to and along the shorefront.*”

As a consequence the Commission argued the public interest in access to the shoreline gave right to an ability to impose the linear path condition. As argued by the Commission:

[they] could properly require the Nollans to offset that burden by providing additional lateral access to the public beaches in the form of an easement across their property ...

483 U.S. at 829.

The Commission also argued that they had imposed such conditions on more than 40 properties, as if the fact of historical use justified the practice. The Court would have none of it. In reversing the Court of Appeals, which had upheld the Commission’s rationale, the Court said:

The Commission’s principal contention to the contrary essentially turns on a play on the word “access.” *The Nollans’ new house, the Commission found, will interfere with “visual access” to the beach.* That in turn (along with other shorefront development) will interfere with the desire of people who drive past the Nollans’ house to use the beach, thus creating a “psychological barrier” to “access.” *The Nollans’ new house will also, by a process not altogether clear from the Commission’s opinion but presumably potent enough to more than offset the effects of the psychological barrier, increase the use of the public beaches, thus creating the need for more “access.” These burdens on “access” would be alleviated by a requirement that the Nollans provide “lateral access” to the beach.*

483 U.S. at 838.

But as the Court concluded, seeking public access on private property is more than a simple manipulation of language to express a public benefit. The Court is scathing in its rejection of tortured rationale used by the Commission to achieve a result they find absolutely beyond the reach of regulatory exaction.

Rewriting the argument to eliminate the play on words makes clear that there is nothing to it. It is quite impossible to understand how a requirement that people already on the public beaches be able to walk across the Nollans’ property reduces any obstacles to viewing the beach created by the new house. It is also impossible to understand how it lowers any “psychological barrier” to using the public beaches, or how it helps to remedy any additional congestion on caused by construction of the Nollans’ new house. We therefore find that the Commission’s imposition of the permit condition cannot be treated as an exercise of its land-use power for any of these purposes.

483 U.S. at 838-839.

This paragraph expresses the very limited scope the “nexus” requirement faces when looking at imposing a regulatory condition. The important language in the decision for our purposes was that the condition imposed had to address a burden created by the Nollans’ new permit, not simply an exercise in rationalization to secure new public access. It is this connection or “nexus” that is required for a valid condition and completely overlooked in the Planning Department’s justification for public access beyond that created to respond to demand or burden created by the specific project.

The Supreme Court had previously noted:

Had California simply required the Nollans to make an easement across their beachfront available to the public on a permanent basis in order to increase public access to the beach, rather than conditioning their permit to rebuild their house on their agreeing to do so, we have no doubt there would have been a taking.

483 U.S. at 381.

Having rejected the public desire to make public access more convenient, and finding construction of the house had nothing to do with interfering with that desire, the Court recited a number of cases that had held that the public right to navigation and fishing did not give right to trespass on any private lands. Finally, and in direct rejection of the notion put forward by the City that the public may “trade” a permit for construction on the water in exchange for a concession on public access due to the public’s significant interest in that access, the Court held:

...the right to build on one’s own property—even though its exercise can be subjected to legitimate permitting requirements—cannot remotely be described as a “governmental benefit.” And thus the announcement that the application for (or granting of) the permit will entail the yielding of a property interest cannot be regarded as establishing the voluntary “exchange,”

483 U.S. at 833.

The Court conceded that a home could create a view blockage, and that a reasonable condition to protect existing views could pass constitutional muster. But it could find no connection between the burden—view blockage—and the remedy—a linear path. As noted by the Court, the essential nexus required before a public access condition could be imposed was not between the public’s substantial interest in using the shoreline and the request to build on private property, but rather some direct connection between the construction and the problem sought to be cured by the condition. This is a point completely missed by staff when they said that *Nollan* was simply a case of not stating the public interest in using the shoreline strongly enough, and that under their analysis of the case mitigating direct impacts was only one basis for requiring public access.

Reading the *Nollan* case closely, not only what the Court said, but what it did, proves the fallacy of the City position. The public has no right to pursue other public interests, no matter how important, if the construction in question does not directly burden that interest. As the public has

no “right” to access the waters of the state over private property, the mere request to develop property that does not give rise to additional public demand to access the water or deny access previously present means the City is utterly without authority to pursue its public access plan—except through condemnation.

The Court cautioned that particularly where a City was attempting to secure public rights over private lands, the activity is to be viewed with suspicion and that clever wording of the declaration of public interest will not substitute for a substantial connection between activity and condition. As stated:

*We view the Fifth Amendment’s Property Clause to be more than a pleading requirement, and compliance with it to be more than an exercise in cleverness and imagination. As indicated earlier, our cases describe the condition for abridgement of property rights through the police power as a “substantial advanc[ing]” of a legitimate state interest. **We are inclined to be particularly careful about the adjective** where the actual conveyance of property is made a condition to the lifting of a land-use restriction, since in that context there is heightened risk that the purpose is avoidance of the compensation requirement, rather than the stated police-power objective.*

481 U.S. at 841, emphasis supplied.

And finally, the language of reversal at the end of the decision is a direct and immediate repudiation of the City of Tacoma’s expressed justification for the proposed plan—that because public documents exist expressing a great and pressing interest in public access, that creates sufficient justification for public access requirements.

“Finally, the Commission notes that there are several existing provisions of pass and repass lateral access benefits already given by past Faria Beach Tract applicants as a result of prior coastal permit decisions. The access required as a condition of this permit is part of a comprehensive program to provide continuous public access along Faria Beach as the lots undergo development or redevelopment.” App. 68.

*That is simply an expression of the Commission’s belief that the public interest will be served by a continuous strip of publicly accessible beach along the coast. The Commission may well be right that it is a good idea, but that does not establish that the Nollans (and other coastal residents) alone can be compelled to contribute to its realization. Rather, California is free to advance its “comprehensive program,” if it wishes, by using its power of eminent domain for this “public purpose,” see U.S. Const., Amdt. 5; but if it wants an easement across the Nollans’ property, **it must pay for it.***

483 U.S. at 841-42, emphasis supplied.

In the final analysis the *Nollan* case stands for precisely the opposite result of that argued by the City. As stated by the Court and transferred to the City fact pattern, if the City of Tacoma wishes to extend the right of public access across private industrial properties, and a proposed development **does not** increase the demand for that type of public access, the City may not condition the permit on a requirement to provide the desired access, “it must pay for it” independent of the strength of the public purpose to be served.

A quick summary of related cases, where a city attempted to secure the dedication or reservation of private lands for public purposes without some direct connection, shows that the courts have continually rejected municipal efforts to acquire public rights in private lands not directly tied to cause and effect resulting from the specific project.

Dolan v. Tigard.² There was a substantial public purpose in allowing the City to continue its public pathway along Fanno Creek as called out in City plans. But the Court could find no link between the need of additional stormwater and additional parking (both tied to the business expansion) and a requirement to allow the public to use the land along the creek. The Court found no evidence of a connection and emphasized that the burden was on the public agency to prove the connection exists.

Unlimited v. Kitsap County,³ *Burton v. Clark County*⁴ and *Benchmark v. Battle Ground*.⁵ In each of these cases there is a clear legitimate public purpose in connected streets and safe streets. But in each case the condition imposed was not related to a problem created by the project under review. The condition was imposed simply because the property was there and the government wanted the additional benefit of an amenity not related to the project. In each case, absent a clear connection between the project proposed and the need to use the streets in question, the “substantial public interest” in safe and connected streets could not be advanced by a condition not directly tied to an impact to the project under review.

Isla Verde v. Camas.⁶ The City had a public interest in providing open space for wildlife. But in *Isla Verde*, the Supreme Court made it clear that merely because there is a general public interest expressed in a particular objective (in this case protecting wildlife), even one embedded in statute or local regulation, the local government must demonstrate the condition is reasonably necessary, in this location, to ameliorate an impact caused by the particular project under review. Failure to specifically demonstrate the necessary connection rendered the condition under review unlawful.

² *Dolan v. City of Tigard*, 512 U.S. 374, 114 S. Ct. 2309, 129 L. Ed. 2d 304 (1994).

³ *Unlimited v. Kitsap County*, 50 Wn. App. 723, 750 P.2d 651, review denied, 111 Wn.2d 1008 (1988).

⁴ *Burton v. Clark County*, 91 Wn. App. 505, 958 P.2d 343 (1998), review denied, 137 Wn.2d 1015, 978 P.2d 1097 (1999).

⁵ *Benchmark Land Co. v. Battle Ground*, 146 Wn.2d 685, 49 P.3d 860 (2002).

⁶ *Isla Verde v. City of Camas*, 146 Wn.2d 740, 49 P.3d 867 (2002).

Most recently in *Citizens v. Sims*,⁷ our Court of Appeals looked at a claim by King County that it had a substantial public interest in clean water to protect fishlife and for that reason could limit the amount of clearing on rural lands under its jurisdiction. In an “as written” as opposed to an “as applied” decision, the Court absolutely rejected the notion that a substantial public interest, no matter how worthy, justified imposing open space limitations on private property without the “particularized determination” that such conditions were reasonably necessary at the given location.

The City presentation made Wednesday night, boiled to its essence, is that the City has a public access program that mirrors the priorities of the Shoreline Management Act to secure additional public access to the waters of the state. In pursuit of that substantial public interest, therefore, the City may condition the mere use of the waterfront property by a requirement to provide public access. This is precisely the rationale set out in the final paragraphs of the Supreme Court decision and the basis for rejecting the City view—that such activity will be viewed with suspicion and that without a direct connection between the project and the need for specific access, the City goal, noteworthy as it is, may only be achieved through acquisition.⁸

Having listened to the presentation by the Tacoma City Staff, and reviewed the note of the City Attorney, my only conclusion is that the City’s attempt to further a “substantial public interest” by forcing private property owners to dedicate public access merely as a condition for permission to build along the privately owned shores of the City of Tacoma would be doomed to the same fate as what the California Coastal Commission tried on precisely the same rationale—complete failure.

Any community developing a public access program should adopt the following elements in its master program to assure that public access conditions will pass constitutional muster:

- The burden is on the applicant to prove compliance with the shoreline master program, but on the City to prove nexus and proportionality to impacts caused by the specific proposal before any requirement for public access in any form, direct or indirect, is imposed as a condition of the requested permit.
- The decision on any Shoreline permit that does include a requirement for public access in any form must make written findings that the proposed project specifically burdens a protected interest the public may have in that specific waterfront either by creating an additional demand for the specific access proposed to be required or by reducing access that is already present.

⁷ *Citizens Alliance for Property Rights v. Sims*, 145 Wn. App. 649, 187 P.3d 786 (2008) (cert. denied, 165 Wn.2d 1030, 203 P.3d 378).

⁸ I note that the City slide show copied a syllabus at the beginning of the decision as the basis for its presentation to the Planning Commission. Care must always be used in attempting to use a syllabus as a substitute for reading an entire case. As the decision notes:

The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader.

483 U.S. at 825.

- The decision must make written findings demonstrating how the condition imposed is directly linked to and designed to resolve the interference or increased burden identified as a direct and proximate result of the permit under review.
- The decision must make written findings demonstrating how the condition recommended is reasonably proportional and designed to resolve the problem created by the project and not advance any other unrelated “public objective.”

The City is spending a great deal of time and resources following a public access program that is not consistent with the goals and guidelines of the Shoreline Management Act discussed in my prior paper and should turn its attention to fixing the problem early and not create a “we/they” tension with its important industrial waterfront owners.

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