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MEMORANDUM

DATE:	December 12, 2008
TO:	Board Of County Commissioners
FROM:	E. Bronson Potter, Chief Civil Deputy Prosecuting Attorney
SUBJECT:	Takings and RCW 82.02.020 Analysis of Predevelopment Condition Requirement of NPDES Permit and County Ordinance

Commissioner Stuart expressed an interest in receiving an analysis of federal takings claims that might arise from requiring a development project to limit the rate of flow of stormwater leaving its site to a rate less than that which existed prior to the project.

The following analysis addresses exposures to takings and RCW 82.02.020 claims. It concludes that there is not a categorical takings exposure; that regulatory takings exposure is fact driven and cannot be conclusively addressed absent a factual context; and that RCW 82.02.020 exposure is present but it is not possible to state how a court will rule.

PRE-DEVELOPED CONDITION:

The Stormwater Management Manual for Western Washington and the Phase I NPDES stormwater permit require that, in designing stormwater flow control facilities, the discharge of stormwater from development in certain storm events match the pre-developed condition. The permit requires the assumption that the pre-developed condition is a forested condition unless there is evidence that the site was prairie prior to settlement.¹ Ecology bases this requirement on published scientific studies which concluded that the condition of streams in Western Washington degrade when stormwater runoff exceed the rate of runoff from the forested condition.

¹ While this memorandum has focused on the forested condition requirement, the same analysis would apply to the proposed county ordinance requiring limiting discharge to that based upon the site's least impervious condition since 1955.

CIVIL DIVISION

The permit requirement to regulate the discharge of stormwater (“flow control”) from development projects and redevelopment projects is intended to meet AKART under the permit and protect existing beneficial uses. The manual uses the presumptive approach under which it is presumed that if certain practices are followed, including flow control, further degradation of streams, wetlands and groundwater will not occur.

Matching peaks and duration of erosive flows for a forested condition is deemed by Ecology to be a scientifically-based standard for preventing degradation by a development project. Simplistically, the science from Western Washington published in peer reviewed journals states that when basins are changed from a forested condition, degradation of stream habitat begins to occur.

Even with matching peaks and duration of erosive flows to forested condition, each site that does not infiltrate will increase the total volume of runoff. This is because infiltration and evaporation losses in forests do not occur. The forested condition flow control requirement is imposed, in part, to mitigate for this increased volume of runoff. Even with the flow control restriction, in aggregate, this increase in volume, released at rates equivalent to the forested condition, will increase the amount of flow in streams beyond a forested condition.

For the purpose of this analysis, the bases of the requirement will be accepted.

I. TAKINGS CLAIMS²:

Takings claims are broadly characterized as being either “per se takings” or “regulatory takings.” A party challenging a governmental action as an unconstitutional taking bears a substantial burden. *Eastern Enterprises v. Apfel*, 524 US 498.

A. PER SE TAKINGS:

Per se takings involve physical invasions or diminution of rights of exclusive possession or denial of all economically viable uses of property. Flow control does not involve a dedication of property or denial of all economically viable uses and the per se takings exposure is inconsequential. It should be noted that the *Nollan-Dolan* rough proportionality test only applies to situations involving a forced dedication of property. *City of Monterey v. Del Monte Dunes*, 526 U.S. 687; *City of Olympia v. Drebeck*, 156 Wn. 2d 289; *Benchmark Land Co. v. City of Battle Ground*, 145 Wn. 2d 685; *Isla Verde Int’l Holdings v. City of Camas*, 146 Wn. 2d 740.³ However, proportionality does become relevant to a challenge based on RCW 82.02.020 as discussed below.

B. REGULATORY TAKINGS:

In a regulatory takings case, the proper inquiry is an ad hoc factual determination of whether the regulation has gone too far. In this context, the factors considered are 1) the character of the regulation; 2) the economic impact on the landowner; and 3) the extent of interference with investment-backed expectations. *Penn Central Transportation Co. v. City of New York*, 438 US 104.

² This memorandum does not address substantive due process claims. However, as stated in *Burton v. Clark County*, the treatment of those claims and regulatory takings claims “seem analytically identical.”

³ Division II of the Court of Appeals differs with the Washington Supreme Court on this point. *See, Benchmark Land Co. v. Battle Ground*, 103 Wn. App. 721

The character of the pre-developed condition regulation is to prevent degradation of streams and water quality and which addresses a public concern and is obviously a permissible governmental goal.

There is no formula through which the level of economic impact can be measured to determine if a taking has occurred. However, it can be said that before economic impact results in a regulatory taking, significant diminution in value must occur. The Supreme Court has rejected takings claims where 75% and 87.5% diminution in value have occurred. *Euclid v. Amber Realty Co.*, 272 US 365 and *Hadacheck v. Sebastian*, 239 US 394. The interference with investment-backed expectations factor looks to the uses allowed by the regulation and the extent to which the landowner might have reasonably expected the regulations to be imposed upon the use.

Because regulatory takings claims are so fact-dependent, courts refuse to consider such claims until there is a final permitting decision and all administrative remedies have been exhausted. It would be impossible to offer an opinion as to whether a regulatory takings claim is viable without a specific factual scenario. I can say that the fact that a development might have to reduce its runoff rate of discharge below the rate that comes off the site as it exists today does not, in and of itself, constitute a regulatory taking.

C. NUISANCE EXCEPTION

To determine if a takings is caused by government restricting the use of property, courts look to the restrictions that background principles of the State's law of property and nuisance already place upon land ownership. *Lucas v. South Carolina Coastal Council*, 505 US 1003, 1029. Courts are hesitant to find a taking of property when the government action merely restrains uses of property that are tantamount to public nuisances. "Property" is therefore often analogized to a bundle of sticks representing the right to possess, exclude, alienate, etc. One stick *not* in the bundle is the right to use one's property in a manner harmful to one's neighbor. Consequently restrictions designed to abate harmful uses or nuisances do not take "property" because there is no property right to do these things in the first instance, i.e., no property right for the government to take. *Eggleston v. Pierce County*, 148 Wn.2d 760. "[A]ll property in this country is held under the implied obligation that the owner's use of it shall not be injurious to the community, and the Takings Clause does not transform that principle to one that requires compensation whenever the State asserts its power to enforce it."

Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470 As the Nebraska Supreme Court has similarly stated, "In the exercise of the police power, public authority is empowered to require everyone so to use and enjoy his own property as not to interfere with the general welfare of the community in which he lives." *Simpson v. City of North Platte*, 206 Neb. 240, 292 N.W.2d 297, 300 (Neb. 1983) (quoting EUGENE MCQUILLIN, MUNICIPAL CORPORATIONS § 32.04 (3d ed. 1977)). *Simpson* is quoted and relied on in *Dolan*. See also *Sparks v. Douglas County* 127 Wn. 2d 901.

The impact addressed by the stormwater flow control regulation is the continuing degradation of streams when a site is more impervious than the forested condition. The proposed development may not have created this impact, but it is continuing it or, in many cases, exacerbating it (e.g. where the project site is bare ground and it's being converted to roofs or pavement). To the extent that the

regulation works to restrict a use of the property to prevent damage to neighboring properties and water bodies, the nuisance exception to takings may be applicable.

D. NAVIGATIONAL SERVITUDE DOCTRINE

The NPDES permit is issued under the authority of federal and state law. The federal Clean Water Act was adopted pursuant to Congress's commerce clause authority to protect waters of the United States. The navigational servitude doctrine provides that any property right (and takings claim) is superseded by Congress's authority to aid navigation. The doctrine has been applied to defeat takings claims for flood control requirements and filling of wetlands. *Coastal Petroleum*, 524 F. 2d 1206. If the flow control requirement of the NPDES permit is an exercise of that authority, takings claims may be defeated by the doctrine.

II. RCW 82.02.020:

The more difficult question is whether or not, in a hypothetical case where the runoff is currently being discharged at a rate greater than the forested condition prior to the development occurring, the requirement to reduce that rate to the rate associated with a forested condition violates RCW 82.02.020.

A. THE PROHIBITION

RCW 82.02.020 provides, in part:

... Except as provided in RCW 64.34.440 and 82.02.050 through 82.02.090, no county ... shall impose any tax, fee, or charge, either direct or indirect, on the construction or reconstruction of residential buildings, commercial buildings, industrial buildings, or on any other building or building space or appurtenance thereto, or on the development, subdivision, classification, or reclassification of land. However, this section does not preclude dedications of land or easements within the proposed development or plat which the county, city, town, or other municipal corporation can demonstrate are reasonably necessary as a direct result of the proposed development or plat to which the dedication of land or easement is to apply.

... PROVIDED FURTHER, That these provisions shall not be interpreted to expand or contract any existing authority of counties, cities, or towns to impose such charges.

Conditions imposed for development approval have been held to be indirect "taxes, fees or charges" subject to the limitations of RCW 82.02.020. *Isla Verde v. City of Camas*, 146 Wn. 2d 740. For the purpose of this analysis, it is presumed that flow control is an indirect charge subject to RCW 82.02.020. The burden of proving compliance with RCW 82.02.020 is upon the government. This is unlike a takings claim where the burden is upon the claimant. However, such conditions are valid when they are "reasonably necessary as a direct result of development."

Several issues complicate the application of this statute to the regulation of the rate of stormwater discharge. At least the following issues are involved:

What is meant by “reasonably necessary as a direct result of development”? On the one hand, the forested condition requirement does mitigate the erosive forces and degrading effects upon streams of stormwater runoff coming from the development. On the other hand, if stormwater is already leaving the site at a rate above the forested condition, is the development directly causing any impact? The requirement limits the discharge rate of stormwater leaving the development project as opposed to the entire property or other properties. So, it is focused upon the development and its impacts. The scientific basis for the requirement is that it is necessary to avoid further continuing degradation of streams.

In *Isla Verde*, the city required a 30% open space set aside. The city argued that its legislative determination of the need for subdivisions to provide for open space set asides to mitigate consequences of subdivision development *in and of itself satisfies its burden* of proving the required connection between the development and the open space 30% set aside condition. The court rejected this contention and compared it to *Trimen Development v. King Co.*, 124 Wn 2d 261, where the open space condition was based upon a report that showed a deficit of park acres in the area of the proposed developments and projected a greater deficit as population expanded. The open space condition in *Trimen* was upheld because it considered zoning, projected population, and the assessed value of the land that would have been dedicated or reserved and resulted in an amount of park land roughly proportional to that which the report showed would be needed for the developments' estimated population.

Development conditions must be tied to a specific, identified impact of *the* development on a community as opposed to all new development. *Isla Verde* at 761. The flow control regulations at issue here are based upon studies of the effects of stormwater runoff on streams in Western Washington generally, as opposed to streams that the proposed development discharges to specifically. However, the conditions imposed to satisfy the flow control limitation are specific to the development's characteristics such as the nature and amount of impervious surface, soil types, and other stormwater management practices used at the site.

Washington courts use the *Nollan-Dolan* analysis to determine if conditions of development approval are reasonably related to the impacts of development. In *Nollan*, the exaction of a public easement across private property to provide access between a beach and a park was invalidated because the project (the replacement of a bungalow with a 3 bedroom house) did not have any impact on the public's access to the beach. In *Dolan*, the exaction of a recreational easement across a property was invalidated because there was no showing that the project (the expansion of a retail outlet) created additional traffic sufficient to require dedication of an easement for pedestrians and bicyclists. In *Burton v. Clark County*, 91 Wn. App. 505, the court stated that “the necessary relationship will exist if the development will create or exacerbate the identified problem; but that the necessary relationship will not exist if the development will not adversely impact the identified public problem.” *Burton* at 521. The court found the nexus was established by showing that the proposed development (creation of 3 lots) would slightly exacerbate the problem of traffic congestion and circulation.⁴ In *Citizen's Alliance for Property Rights v. King County*, 145 Wn. App. 649, the court quoted from *Burton*, and found the necessary nexus between excessive clearing and restrictions on clearing. However, the court invalidated the regulation because it was not proportional given that the limit on clearing was based only on the size of the parcel and not upon

⁴ The court invalidated the ROW dedication because it found that there wasn't evidence of when the road would connect to other roads and, thus, didn't tend to solve or mitigate the problem.

the nature and extent of the proposed development. *CAPR* at 668-9. The design of the required stormwater flow control facilities is based on nature and the extent of the proposed development.

a. Nexus

In *Burton*, the court said that there must be a relationship (nexus) between the identified public problem and the development. It looked to whether the development created or exacerbated the problem. In most cases, development projects will exacerbate impacts of stormwater runoff by increasing the amount and rate of runoff. In redevelopment projects where pavement or buildings may be replacing pavement or buildings, the development project may not be exacerbating the impact but it will be continuing the problem. While no court has addressed the situation of a development continuing (versus creating or exacerbating) a problem, it seems that the nexus or relationship between the problem and the development exists because there is a relationship between the development and stream degradation. In coming to this conclusion, consideration is given to the fact that this is a situation of exercising police power authority to prevent public harm from runoff generated by the specific development as opposed to trying to exact dedications to obtain public benefit.

b. Rough Proportionality

Washington courts have applied rough proportionality to their analysis of RCW 82.02.020's requirement that conditions imposed be "directly related to the development." The rough proportionality analysis is very similar to the nexus analysis. If the stormwater flow control condition at issue required landowners to mitigate the impacts of runoff from properties other than the development project, the condition would not be proportional.⁵ Given that the requirement is limited to treating the development project, what degree of treatment is roughly proportional? In *Isla Verde*, at 761, the court stated that the "We have repeatedly held, as the statute requires, that development conditions must be tied to a specific, identified impact of a development on a community." In *Burton*, at 523, the court stated "the government must show that its proposed solution to the identified public problem is 'roughly proportional' to that part of the problem that is created or exacerbated by the landowner's development." A regulatory exaction must be "reasonably calculated to prevent, or compensate for, adverse public impacts of the proposed development." *Sparks v. Douglas County* at 907. The purpose of the proportionality requirement 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' while at the same time leaving government free to require a developer to rectify public problems insofar as the developer has created such problems." *Burton* at 523-4, quoting *Dolan* at 384.

A case which is relevant to whether it is permissible to require a landowner to correct deficiencies that existed before the development project is *Sparks v. Douglas County*, 127 Wn. 2d 901. In that case, the county required a developer to dedicate right of way for improvements to streets that were substandard before taking into consideration traffic from the proposed development. The landowner argued that the substandard conditions existed prior to their project and could not have been caused by the project. The court of appeals agreed and ruled the requirement invalid. The Supreme Court reversed the court of appeals holding it erred by applying the strict proportionality standard. Under strict proportionality, local government must show that the exaction is directly proportional to the specific need created by the development. In *Sparks*, the court noted that *Dolan* rejected this strict proportionality standard. The court upheld the exaction because the county established that the project would increase traffic on the substandard road (by 100%) and there was a

⁵ See, *Christopher Lake Development Co. v. St. Louis County* 35 F.3d 1269 (8th Cir. 1994).

reasonable relationship between the exaction and the impact caused by the development. Thus, it satisfied the *Dolan* roughly proportional standard.

It would be imprudent to opine on how a court will ultimately decide a RCW 82.02.020 challenge to the flow control requirements. The statute requires that conditions imposed upon development be “reasonably necessary” to offset the development’s impacts as opposed to being proven necessary to scientific exactitude. It can be said that validity is supported by the facts that a) the requirements are specifically related to the extent and nature of the development project and site conditions; b) they mitigate the impacts of increased runoff caused by the development; and c) they are intended to prevent further stream degradation caused by the development. The facts that the flow control requirements are based on studies of Western Washington generally and that they limit discharge rates to a rate below that occurring from the site in its condition prior to the development make the connection between the development impact and the requirements less direct.

B. STATE AUTHORITY AND PREEMPTION

RCW 82.02.020 prohibits certain actions of local, as opposed to state, government. The proposed county regulation of the discharge of stormwater is required by a condition of a state permit regulating discharges from the county stormwater system.

In *CAPR*, King County argued that RCW 82.02.020 should not apply to its clearing ordinance because it adopted that ordinance in response to the GMA requirement to protect critical areas. The court rejected this argument. The court noted that the GMA did not require the particular restrictions of the county ordinance. The court also noted the absence of any case supporting King County’s argument.

Unlike the general GMA-imposed duty to protect critical areas, the flow control requirement of the NPDES permit is much more specific. It cannot be stated whether or not a court would hold that factual difference distinguishes *CAPR* from the current situation.

C. NUISANCE

There is no case law addressing whether or not the nuisance exception to takings claims applies to RCW 82.02.020. However, takings analyses have been used by the courts to define the scope of what measures are reasonably necessary as a direct result of the development. In takings cases, as discussed above, the courts have not invalidated measures designed to protect the public from nuisances.

III. CONCLUSION

The stormwater flow control measures would not be the basis for a per se takings claim because they do not require a dedication of property. Regulatory takings claims are very dependent upon the facts of a given case and the economic impact on the landowner. It is impossible to pre-judge whether a regulatory takings would occur without the facts of the case. The exposure to RCW 82.02.020 liability is present; although the ultimate outcome of such a claim cannot be stated with any certainty.

Factors supporting the validity of the regulation are:

- The design of flow control facilities are specifically related to the development project and its site characteristics.
- The project is only required to limit the rate from flow coming of the project itself.
- One purpose of limiting the rate of discharge is to mitigate the increased volume of runoff generated by the project.

Factors supporting the invalidity of the regulation are:

- The impact of runoff is based upon studies of water bodies generally as opposed to the specific water body the project drains to.
- In most cases, the rate of discharge is limited to a rate lower than that occurring before project development.

Finally, the uncertainty of the outcome is also due to the fact that there isn't a case addressing whether or not the nuisance exception to takings claims applies to RCW 82.02.020 claims.