KITSAP ALLIANCE OF PROPERTY OWNERS

A Property Rights Discussion Paper
Presented to
The PSRC Growth Management Policy Board
July 2012

WHEN SHOULD GOVERNMENTS USE THER POLICE POWER TO "TAKE" PRIVATE PROPERTY FOR PUBLIC USE?

Property is defined as: "Every species of valuable right or interest that is subject to ownership, has an exchangeable value, or adds to one's wealth or estate. Property describes one's exclusive right to possess, use, and dispose of a thing, as well as the object, benefit, or prerogative which constitutes the subject matter of that right" (Barron's Law Dictionary, 6th edition).

Property includes the commonly understood elements of land and anything growing on, attached to, or erected on it (i.e. real property), raw material, structures, equipment, personal possessions, and intellectual property. (This discussion paper focuses on policies related to real property.) Property accrues to an individual primarily through the fruits of their personal efforts or those of their ancestors.

The opportunity for individuals to own property is well established as an unalienable *right*, not a privilege. This is acknowledged in both the federal and Washington State constitutions, both of which established the protection of the rights associated with property as a primary function of government.

The underlying principle rests on over 700 years of Western common law history, where private property has been recognized as the basis for the creation of wealth, the base of a sound national economy, and the primary element of personal liberty and freedom.

Because property has value, it is essential to our free market economy and our ability to generate wealth. It is this value of property that allows business transactions, either by individuals, or corporations owned by individuals, where *both* parties expect to benefit and gain wealth. In his book *Basic Economics*, Thomas Sowell says: "The powerful incentives created by a profit-and-loss economy depend on the profits being private property."

Indeed, the ability to create equity through property ownership is essential to the wealth-creating ability of a country. In the United States, equity loans on personal homes provide the funding for fully 70 percent of all small business starts.

It is this wealth creating ability that has given us the standard of living we enjoy, including the world's best health care, and the resources to protect our natural environment.

When property is removed from private ownership and placed under government control it looses its free market ability to create wealth. Michael Coffman says that: "When the state gains control over private property rights, the ability to create wealth stagnates or even declines, thereby creating poverty and misery rather than freedom and wealth."

Internationally recognized Peruvian economist Hernando de Soto says that the inability to own property is the primary cause of poverty in much of the world. He notes that: "The poor inhabitants of these nations — five-sixths of humanity — do have things, but they lack the process to represent their property and create capital. They have houses but not titles; crops but not deeds; businesses but not statutes of incorporation." De Soto concludes that" "The total value of property held, but not legally

owned, by the poor of the developing nations and former communist countries is at least *$9.3 trillion*! If this "dead capital" was legalized, it could be used as collateral for investment loans, just like it is in the West – eliminating poverty overnight."

Our Constitution's Bill of Rights, which specifies what our government cannot do to its citizens, protects against improper search and seizure, deprivation of property without due process, and the forced housing of soldiers. The Fifth Amendment specifically says: "No person …shall be deprived of *life*, *liberty*, or *property*, without due process of law; nor shall private property be taken for public use without just compensation."

These constitutional restraints are the basis for viewing property rights as a bundle of rights – the right to possess the property, the right to control the use of the property, the right to exclude others, the right to enjoy the property, and the right to dispose of the property as desired – all with minimal government interference.

Over time, the government has increasingly used its Police Power to take sticks from the private owner's bundle for a "public benefit", asserting their responsibility to protect the public health, safety and welfare. However, as noted above, our founding documents granted government only a very limited authority to "take" private property for public use. Assumptions that government, at any level, has somehow been granted a global authority to restrict the free exercise of rights associated with private property, or to acquire private property for the "common good", are simply not based in historical fact. The fundamental question therefore is: "When do these government regulations go "too far?"

Washington State's Growth Management Act, with its fourteen "non-prioritized" comprehensive land use planning goals is a case in point. These goals are summarized as:

(1) Encourage development in urban areas
(2) Reduce sprawl.
(3) Encourage efficient multimodal transportation systems.
(4) Encourage the availability of affordable housing.
(5) Encourage economic development.
(6) Protect private property rights.
(7) Process permits in a timely and fair manner.
(8) Maintain and enhance natural resource-based industries.
(9) Retain open space.
(10) Protect the environment
(11) Involve citizens in the planning process.
(12) Ensure adequate public facilities to support development.
(13) Historic preservation of lands, sites, and structures.
(14) Incorporates the goals and policies of the Shoreline Management Act.

Of these fourteen goals, it should be noted that only one, "(6) Protect private property rights", is specifically included in our Washington Constitution as a duty of the state. Article 1, Section 1 provides that "All political power is inherent in the people, and governments derive their just powers from the consent of the governed, and are established to protect and maintain individual rights." When this is combined with Article 1, section 3, which states: "No person shall be deprived of life, liberty, or property, without due process of law." and with Article 1, Section 29, which states: "The provisions of this Constitution are mandatory, unless by express words they are declared to be otherwise." – it becomes clear that the protection of private property rights takes precedence, and must be an overarching consideration, when executing the GMA provisions. The remaining thirteen legislated "goals" may be considered on an equitable, non-prioritized basis, but their implementation must not violate constitutional property rights.

It should also be noted that the Washington State Constitution is more protective of property rights than the federal Constitution. For example, our state constitution says that: "No private property shall be taken *or damaged* for public or private use without just compensation having been first made, or paid into court for the owner,…" -- whereas the federal Constitution only says: "…nor shall private property be taken for public use without just compensation." The Washington State Constitution also says that: "…the question whether the contemplated use be really public shall be a judicial question, and determined as such, without regard to any legislative assertion that the use is public…"

A number of the GMA goals, as implemented, are clearly in competition with each other and, indeed, some of them infringe on property rights. For example, the goals involving retaining open space, reducing sprawl, and encouraging development in urban areas, as implemented in policy, clearly impact private property ownership -- as do the legislative restrictions placed on the use or development of privately owned land to protect the environment. As will be shown later, policies designed to attain some of these goals actually work against the needs of a healthy city and a healthy region.

The Growth Management Act itself recognizes the potential for the abuse of constitutionally protected property rights and, in RCW 36.70A.370, requires that "Private property shall not be taken for public use without just compensation having been made" (a paraphrase of Article 1, Section 3 of the state constitution) and that "The property rights of landowners shall be protected from arbitrary and discriminatory actions." The GMA further requires that the Attorney General establish an orderly and consistent process to ensure that regulatory or administrative actions do not result in an unconstitutional taking of private property, and stipulates that this process must be used by state agencies that plan under the GMA.

The resulting process is prescribed in the Attorney General's Advisory Memorandum of December, 2006. It was intended that this memorandum be widely distributed to decision makers and key staff at all levels of local governments and state agencies. And it was intended that these agencies and local governments use the Memorandum to develop internal processes for assessing constitutional property rights issues that could arise from actions, such as the development of land use regulations and the conditioning or denial of permits for land use.

The problem, which is acknowledged in the AG Memorandum and its references, is that various court decisions have reshaped the clear language of the constitution – to the point where, in some jurisdictions, a property owner today must essentially be *denied all reasonable use* of a property for a legally recognized "taking" to have occurred (the key case was the 1978 Penn Central Transportation Company v. New York City). As a result, some courts now typically require an almost total elimination of value before they will find a regulatory taking.

Here in Washington State, it is not necessary to show a loss of *all* economically viable use. It is, however, necessary to show a substantial restriction of the right to develop or use the land. More and more that comes down to exacting a public benefit (e.g. imposing a large buffer to protect a stream). The courts judge whether the public benefit exacted should, in all fairness, be borne by all of society, such as to justify compensation to the affected property owner.

Another outcome of the courts reshaping constitutional language is that the courts today tend to give great deference to elected officials in determining what is a valid public purpose for land use regulation.

Yet there are limitations. The Supreme Court, in its 1987 Nolan v. California Coastal Commission decision, required that an imposed development condition (e.g. mitigation) must be reasonably related to the burden imposed by the development. And the 1994 Supreme Court ruling in Dolan v. City of Tigard established that an imposed development condition must be in "rough proportion" to the impact caused.

And the AG memorandum contains the following caution:

> "The public problem must be proven. In assessing whether a regulation has exceeded substantive due process limitations and should be invalidated, the court considers three questions.
> First, is the regulation aimed at achieving a legitimate public purpose? There must be a public problem or "evil" that needs to be remedied for there to be a legitimate public purpose. Second, is the method used in the regulation reasonably necessary to achieve the public purpose? The regulation must tend to solve the public problem. Third, is the regulation unduly oppressive on the landowner?
> Failing to consider and address each of these questions may lead to a substantive due process violation."

The AG memorandum also says:

> "There may be times where the government does not intend to acquire property through condemnation, but the government action nonetheless has a significant impact on the value of property.
> In some cases, the government may argue that its action has not taken or damaged private property, while the property owner argues that a taking has effectively occurred despite the fact that a formal condemnation process has not been instituted. This dispute may lead to an "inverse condemnation" claim, and the filing of a lawsuit against the government, in which the court will determine whether the government's actions have damaged or taken property.
> If a court determines that the government's actions have effectively taken private property for some public purpose, it will award the payment of just compensation, together with the costs and attorneys fees associated with litigating that inverse condemnation claim.
> Inverse condemnation cases generally fall into two categories: those involving physical occupation or damage to property; and those involving the impacts of regulation on property."

Another federal Supreme Court decision, Daubert v. Merrell-Dow Pharmaceuticals, Inc., may come into play, although it has not been tested in a property rights case. The taking of land and other controls to protect the environment for the public welfare is often defended as justified by scientific information presented by agencies or local governments. Yet much of this so-called "science" does not meet the minimum standards of the scientific method. All too much of it is based on assumptions or opinions, rather than testable and reproducible hypothesis. And a close look shows that the underlying basis for at least some of the agency "science" is the mistaken assumption that people and the environment are not compatible and they must be separated from each other wherever possible.

An example of poor science is the assertion that shoreline bulkheads in Puget Sound harm the nearshore habitat. Despite various papers presented at conferences, this assumption is not actually backed up with data obtained from peer-reviewed science. In fact there are several published studies with data that shows the habitat in front of bulkheaded shorelines is as healthy as the habitat in front of non-bulkheaded shoreline. No Puget Sound studies have been presented with data showing otherwise. Indeed, a paper by Dr. Casimir Rice of NOAA on the Biological Effects of Shoreline Armoring, presented to the 2009 Shoreline Armoring Workshop, states in its first sentence: "Human alteration of Puget Sound shorelines is extensive yet its biological consequences are largely unknown." Yet, despite the acknowledged lack of scientific justification, current public policy strongly advocates the global elimination of residential bulkheads throughout Puget Sound.

Another example: Some agencies assert that private residences on the marine shoreline pose harm to the nearshore environment – necessitating large native vegetation buffer zones for protection – essentially taking private land for a public use. Yet these agencies cannot produce peer-reviewed science to support their assertions. In fact, the actual data and peer-reviewed scientific information on the impact of shoreline development on the nearshore habitat, in general, is extremely sparse, with most studies

representing a single point in time -- lacking the needed continuity of data that would be associated with a well-designed, ongoing, comprehensive monitoring effort that would document cause-and-effect changes over time.

Policies to limit energy use are also on shaky scientific ground. Sustainability advocates hold that the use of energy, which is essential to wealth generation and a high standard of living, is bad and try to convince you that we are unsustainably depleting scarce resources and poisoning the environment -- things that real data show are simply not true. The resulting policies to reduce energy use, by limiting vehicle miles traveled (VMT), and similar restrictions, have a direct impact on the use of property – as they are used as justification to force new development into urban areas.

The 1993 Daubert v. Merrell-Dow Pharmaceuticals, Inc. case, mentioned above, established criteria for scientific evidence presented by experts, such as whether the science presented has been tested; whether it has been subject to peer review; the known or potential rate of error, the controlling standards, and the general acceptance of the theory and methodology. Much of the agency environmental science will not pass these tests – yet it is extensively used as justification to take private property for public use. It deserves to be challenged.

Some cite the *Precautionary Principle* as a reason to implement stringent land use controls to protect against environmental degradation when there is not enough scientific information to assess a potential threat. However, applying this principle to the broad range of activities that could have some environmental impact was never the intent of those who drafted Principle 15 of the 1992 UN Rio Declaration on Environment and Development. They clearly stated that it should be limited to situations: "Where there are threats of *serious or irreversible damage*…" Even these authors understood the absurdity of applying the principle wherever uncertainty exists. In practice it would allow almost anyone to derail a land use permit application by raising even the slightest environmental concern. 2012 SB 6369, introduced by Sen. Maralyn Chase to enact the Precautionary Principle as Washington State law, didn't even get out of committee. Nevertheless, Washington State courts, in cases such as Citizens' Alliance for Property Rights v. Sims, have shown a tendency to favor precaution over causation when deciding environmental regulation cases – despite the nexus requirement of the federal Supreme Court Nolan decision.

The *Public Trust Doctrine* is sometimes also cited as justification for taking private property for public use. The doctrine holds that certain resources are preserved for public use, and that the government is required to maintain them for the public's reasonable use. This originates from English Common Law and, despite being a popular reference for taking private property, actually has limited legal application in this country – with established legal precedence applicable to public access to the state's navigable waters, waters influenced by the tides, and areas where such waters have been filled to provide new land.

It seems fair to ask why the balance between protecting private property rights and the regulatory taking of private property for a public purpose has shifted so dramatically? At least part of the answer lies in a philosophical battle. John Locke held that man has a natural right to life liberty and estate, and that government has no other end than the preservation of property. His views strongly influenced our founding fathers and our constitution. On the other hand, John Jacques Rousseau, who had a strong influence on the French Revolution and, subsequently, the various –isms, including European soft-socialism, held that individuals should submit to the authority of the general will of the people as a whole in a social contract.

Today we see this playing out in the property rights arena where it has become popular to believe that "sustainable" development depends on government control of the land. Some of this philosophy can be traced to United Nations documents such as the UN report on Habitat I, the 1976 United Nations Conference on Human Settlements, held in Vancouver, BC. The preamble to the section on land states, in part: "Land, because of its unique nature and the critical role it plays in human settlements, cannot be treated as an ordinary asset, controlled by individuals and subject to the pressures and inefficiencies of the

market. Private land ownership is also a principal instrument of accumulation and concentration of wealth and therefore contributes to social injustice; … Public control of land use is therefore indispensible to its protection as an asset and the achievement of the long-term objectives of human settlement policies and objectives."

Maurice Strong, the godfather of the environmental movement who organized the U.N.'s 1992 environmental summit in Rio de Janeiro, said "...Isn't the only hope for the planet that the industrialized civilization collapse? Isn't it our responsibility to bring that about?" (WEST magazine interview, 1990)

This misguided philosophy permeates much of the land use policy promulgated by the U.N. in international treaties such as *The Convention on Biological Diversity*, *The Framework Convention on Climate Change*, and *Agenda 21*. These treaties were signed by Gorge H.W. Bush in Rio in 1992, but were not accorded Senate ratification. Agenda 21, however, was subsequently implemented by Bill Clinton as EO 12852, and by subsequent executive orders. It is a sustainable development philosophy embraced by ICLEI and the American Planning Association – who, along with other advocates, have strongly influenced federal, state, and local governmental land use legislation -- and the PSRC vision.

But the proof is in the pudding. After two decades of applying these policies using the GMA, Vision 2040, and countless local ordinances, the question is: Are these strategies, that use the government's police power to forcibly take private land for public use, actually achieving their objectives of supporting sustainable economic development, and improving the health, safety, and quality of life enjoyed by the residents of this state. The facts suggest that, in most cases, they are not.

For example, the policies to prevent sprawl and to limit VMT are problematic. Internationally recognized public policy consultant Wendell Cox says that: "Cities are important because they are the economic drivers of society." He points out that cities cannot effectively exist without their suburbs or without the automobile, the only form of mobility that actually works. Indeed, he notes, it was the introduction of the automobile that originally made large urban areas possible, and automobiles are the key to metropolitan job growth today.

Cox points out that public transportation, as advocated by sustainable development, can't do the job – only about 7% of Seattle jobs are accessible by transit in 45 minutes. The public is forced to drive because transit doesn't work for them – with over 95% of daily trips made by car. But, under sustainable growth policies, 63% of transportation spending is on transit -- trying to force people out of their cars -- not on eliminating congestion to facilitate mobility.

And what about sprawl? As Robert Bruegmann explained in his book "Sprawl", sprawl is not bad. The suburbs are natural and essential extensions of a healthy city. Despite the government's best efforts to limit "sprawl" virtually all recent "urban" growth, has been in the suburban areas. For example, in the Seattle area, in the decade from 2000 to 2010, 76.3% of the growth was in the suburbs. And 60% of this growth was in detached housing – the clear preference of most homeowners.

Efforts to limit sprawl only serve to make affordable housing matters worse. Limiting the land available for development artificially drives the cost of housing upward – limiting the potential buyers that can afford a home. When the median house prices exceeds three times the median household income, homes become unaffordable. In the Seattle area, the additional cost of a home due to land regulation was estimated at $200,000 in a UW study (a number that was challenged by the American Planning Association, whose report was subsequently rebutted by Wendell Cox in an article previously provided by the Kitsap Alliance to the Growth Management Policy Board.)

Before sustainable growth, about half of the prospective buyers in the Seattle area could afford to buy a home. Today, thanks largely to *sustainability* and *smart growth* policies, only about one out of five qualify. However, in states that did not implement smart growth legislation, the data shows the median house prices generally remained below three times the median household income – and remain so today.

A question that should be raised, particularly in this period of home value deflation and economic recession, is: What role did government regulations play in the unsustainable rise of housing costs and the eventual failure of the housing market? Wendell Cox states: "Two critical and related factors created the current crisis. First, profligate lending which allowed many people to buy overpriced properties that they could not, in reality, afford. Second, the existence of excessive land use regulation which helped drive prices up in many of the most impacted markets." He then goes on to say: "Without Smart Growth, World Financial Losses Would Have Been Far Less." He backs up his contentions with data.

And it should be noted that we are not running out of land. Only about 5% of Washington State is developed to urban or suburban densities. And 42% of the State is already owned by the government!

So the real question then is: What balance of private control of property vs. public control of property works for the betterment of society? Is it a balance favoring government control, or is it one that minimizes government control and allows individual people to pursue their own self-interests and manage their own property without significant government interference.

Real-world data clearly shows it is the latter. Indeed, studies by land management experts such as Mark Van der Pol show that private owners are far better managers of the land than the government – as clearly shown in photographs of private lands adjacent to government lands.

But the real story is the impact of smart growth on individual people's lives. The rules that govern land use and permitting have exploded in volume, frustrating an individual who wants to build or update a home. Getting through the tortuous permitting process requires significant time and money, often requiring professional assistance (which begs the question of how smart growth policy actually facilitates GMA Goal 7 -- to process permits in a timely and fair manner). All too often the owner is forced to obtain a variance or go through a conditional use permitting process – because what they desire doesn't meet a zoning requirement or a critical areas limitation. And there are often onerous conditions exacted in exchange for permit approval – such as tearing out lawns and replanting with native vegetation. The process all too often results in heartbreak, misery, and financial loss.

A typical story began in January 2006 when Navy Chief Petty Officer Shaun Mullenix and his wife Alida purchased a 1.21-acre property off Perry Avenue in Kitsap County near the Ilahee community, where they planned to build a nice one-story home. However, when they applied for a building permit they found that most of the land was considered unbuildable because of critical areas that included a small seasonal stream and wetlands. Shaun applied for and was granted a variance, which was then challenged by an Ilahee citizens organization. The county then said he could only build a small two story home in one corner of the property, which was not acceptable due to Alida's health needs. Shaun, who is now a civilian working for the Navy shipyard in Bremerton, has exhausted his life savings trying to reach a satisfactory solution – with no success to date, nor has he been able to sell his property.

When Doug Nelson built his home on the Crystal Springs shoreline of Bainbridge Island, he was required to place a restriction on the title to his property dedicating 25% of his property to create a native vegetation zone on the shoreline for public benefit. He was also required to create a 30% side yard view corridor. Doug was permitted a single 3-foot hand-constructed path across his own property to access the beach. He can't have a path around his house. Now, the city is revising it's code and proposes to increase the native vegetation zone requirement from 50 feet to 150 feet – essentially making every waterfront home and every yard a non-conforming use – to be eliminated over time.

And even the straightforward building of a new deck is becoming problematic – particularly if there is an "environmentally sensitive" area next to the home site. A land use consultant in Kitsap County notes that a deck permit that should cost no more than $500 now may cost as much as $10,000 just for the permission to build. The homeowner may be required to pay thousands of dollars to have studies performed analyzing the impact of the deck on the environment.

All of this suggests that elected officials have an obligation to return to the state's constitutional principles they have taken an oath to uphold. The Constitution does not say governments are established to protect public rights or environmental rights. Instead, government's primary function is to protect *individual* rights, including the individual's fundamental right to possess, use, and dispose of property with minimal government interference.

The PSRC, therefore, has an obligation in its "vision" for the Puget Sound Region, to represent the proper relationship between the fundamental constitutionally protected rights of property owners, and the intrusion onto, or the outright taking of, private property for a legitimate public use.

This requires an honest discussion of: Under what specific circumstances is it essential and appropriate that government exercise its police power authority under eminent domain, or under a regulatory taking, to acquire private property for "public use"? How should government minimize its impact on the private exercise of property rights while meeting its overall obligations of public safety and health? Is there a real limit on the reach of government over the rights of private property ownership that remains consistent with Constitutional protections? Is it in the best interest of our economy for government to become a major holder of property and to remove it from the overall equation for economic growth and vitality?

This discussion should also address the actual effectiveness and accomplishments of the policies and regulatory implementation of GMA and PSRC "visions". For over 20 years the state has attempted to achieve a level of sustainability through a central planning process that significantly impacts private property ownership. The GMA goals have been implemented in countless revisions to local policies and comprehensive plans. Unfortunately, and partly because of a lack of any meaningful and measurable metrics, there is no clear evidence that any of the goals have actually been achieved or that any substantive progress has been made toward their achievement.

For example, in an honest assessment, it would be hard to argue that substantive progress has been made in effective multimodal transportation, when people still rely on automobiles as the primary means of transportation. The current housing market and the previous escalation of housing prices would belie any evidence that affordable housing has been realized. The record of business starts and business failures accompanied by the departure of numerous major businesses from the region and the state do little to support a perception of a successful economic growth policy.

It is thus recommended that:

1) The PSRC, in an interim revision to Vision 2040 and Transportation 2040, include a detailed description of property rights and a discussion of the relationship of these constitutionally protected rights with the other GMA goals – and that these revisions be promulgated to all participating jurisdictions to caution them against overreaching implementation of land use regulations that would violate property rights.

2) The PSRC, in the interim revisions, require that local governments, in their comprehensive plans and other land use plans, include these cautions in their internal processes for assessing constitutional property rights issues that could arise from actions such as the development of land use regulations and the conditioning or denial of permits for land use (which are stipulated in the Attorney General's Advisory Memorandum of December 2006).

3) The PSRC hire a nationally-recognized, entirely independent, and unbiased auditing firm to evaluate whether the current PSRC policies are actually achieving their goals and, where they are not, to recommend the needed policy changes (State Auditor Brian Sontag should be consulted).

If adopted, these recommendations would equip local governments with the balanced information they need to avoid going “too far” with their police power when considering the taking of private property for public use – ostensibly to protect public health, safety, and welfare.

A closing quote: "Government is not reason, it is not eloquence, it is force; like fire, a troublesome servant and a fearful master. Never for a moment should it be left to irresponsible action.”
George Washington

Bob Benze
Member, Kitsap Alliance Board of Directors
Member, PSRC Growth Management Policy Board