

Legal Issues for Washington HPCs



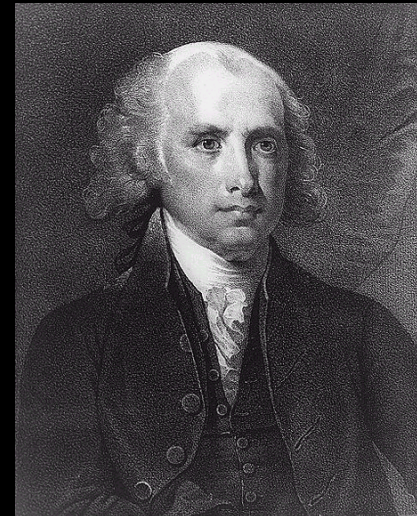
Dan Corson for NAPC

U. S. Constitution Bill of Rights

10th Amendment

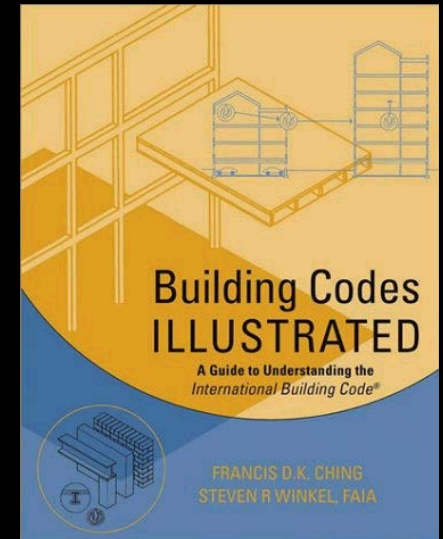
“The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.”

James Madison



Police Power

- The authority reserved to the states by the Tenth Amendment and, in turn, delegated to local governments, that enables states to regulate the activity of the individual, in particular in his or her use of property.
- Examples include: public health and building regulations, zoning ordinances, subdivision regulations, sign regulations, and pollution or environmental controls **AND HISTORIC PRESERVATION ORDINANCES.**



In general . . .

The police power may be exercised, provided it :



- is intended for the public good;
- is not aimed to affect only one individual or only one parcel of land;
- is not clearly arbitrary and unreasonable; and
- has a reasonable relation to the public health, safety, morals, peace and quiet or general welfare.





“If the board’s decision is unwise but does not violate substantive due process, plaintiff’s remedy lies in the political arena; simply put, if unhappy, plaintiffs may campaign to throws the rascals out.”

The People ex rel. Klaeren v. The Village of Lisle, 316 Ill. App. 3d 770, 786 (2000)



The Police Power and Land Use Control in Washington

- Cities and counties are generally granted broad police powers to enact ordinances with respect to any subject which appears necessary and proper for the security, general welfare and convenience of the municipality.
- Council-Manager Cities: Council may provide that the mayor may point, subject to council's confirmation, members of a city planning commission and other boards advisory to the city council.

The Police Power and Land Use Control in Washington

- Mayor-Council Cities: Mayor has specific authority to make appointments to appointive boards and commissions, members of which are considered officers of the city.
- Council-Manager Cities: Council may provide that the mayor appoints, subject to council confirmation, members of the city planning commissions and other boards and commissions advisory to the city council.

The Police Power and Land Use Control in Washington

- Mayor-Council Second Class Cities: Mayor makes appointments at the mayor's pleasure.
- Counties: In board of county commissioners counties, that board appoints advisory board members. In charter counties, the executive makes recommendations which the council reviews and makes the appointments.



Local Government Citizen Advisory Boards

Examples, options, and model practices
for the effective and efficient use of
advisory boards by local governments



Magna Carta



Constitutional Protection of Persons and Property

5th Amendment

“No person shall be . . . deprived of life, liberty, or property, without *due process of law* . . .”



14th Amendment

“ . . . Nor shall any state deprive any person of life, liberty, or property without *due process of law* . . . ”



Washington Constitution

Article 1, Section 3: No person shall be deprived of life, liberty, or property, without due process of law.

5th Amendment

. . . nor shall private property be taken for public use without just compensation.



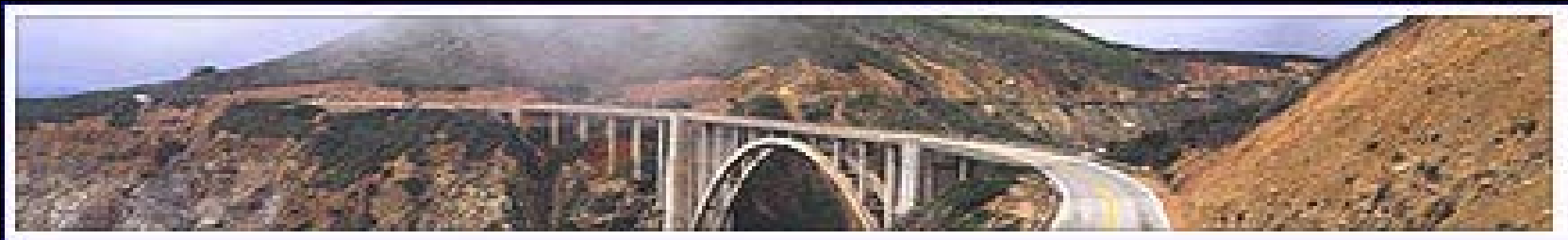
Washington Constitution

Article 2, Section 16: No private property shall be taken or damaged for public or private use without just compensation having first been made ...

Takings

Eminent Domain

- The legal process by which a public body (and certain private bodies) are given the legal power to acquire private property for a use that has been declared to be public by constitution, statute or ordinance



Eminent Domain and the U.S. Supreme Court

- The court has interpreted "public use" to include not only such traditional projects as bridges or highways but also slum clearance and land redistribution. Justice Stevens concluded that a "public purpose" such as creating jobs in a depressed city can also satisfy the Fifth Amendment.
- The court should not "second-guess" local governments, Stevens added, noting that "[p]romoting economic development is a traditional and long accepted function of government."

Kelo v. City of New London (2005)

Regulatory Takings



“The general rule, is that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking.

Pennsylvania Coal Co. v. Mahon (1922)

Justice Oliver Wendell Holmes

Regulatory Takings

“Government hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law. As long recognized, some values are enjoyed under an implied limitation and must yield to the police power.”

Pennsylvania Coal Co. v. Mahon (1922)



How Far Is Too Far?

“In 70-odd years [since Mahon], we have generally eschewed any set formula for determining how far is too far, preferring to engage in essentially ad hoc, factual inquiries.”

Lucas v. South Carolina Coastal Council



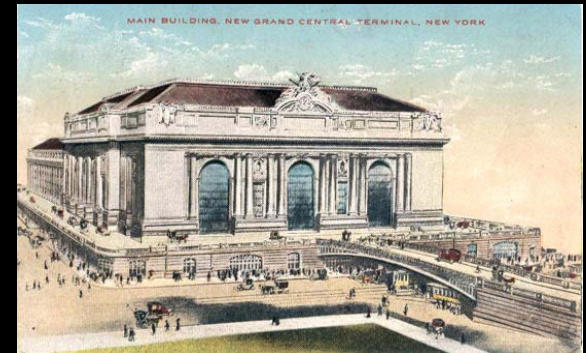
Photo by
William A.
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Penn Central Transportation Co. v. New York (1978)



Penn Central is the controlling U.S. Supreme Court case for analyzing takings claims.

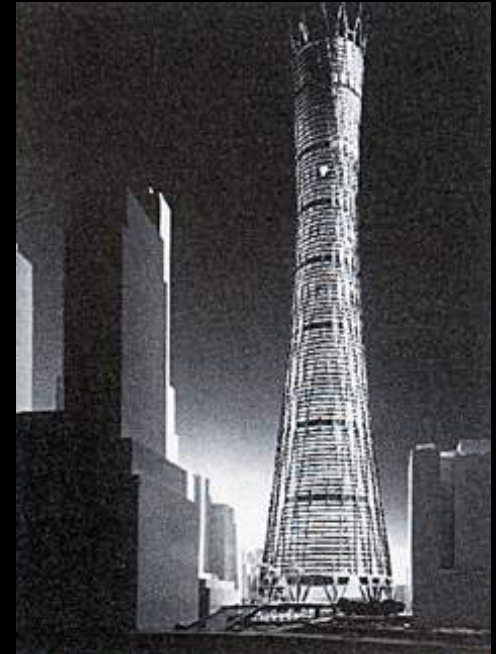
- Communities have the authority to adopt laws and regulations that are designed to protect and enhance the quality of life of their citizens



- The regulation of private property will not constitute a taking, as long as:
 - the regulation advances a legitimate governmental interest
 - the property owner retains some viable use of the property
- Property owners may *not* establish a taking “simply by showing that they have been denied the ability to exploit a property interest that they heretofore had believed was available for development.”

Penn Central

- In deciding whether a particular governmental action is a taking, a reviewing court must examine the effect of the regulation on the *entire* property, and not focus on any one specific segment or interest.



Penn Central's 3-Pronged Taking Analysis

1. The economic impact of the regulation on the property;
2. The extent to which the regulation interferes with distinct legitimate, investment-backed expectations;
3. The character of the government action — does it result in the equivalent of a physical invasion of the property or is it more a “public program adjusting the benefits and burdens of economic life to promote the common good.”



Is Penn Central Still Good Law?

“Our polestar . . .
remains the principles
set forth in Penn
Central . . .”

Justice Sandra Day O'Connor
Palozzolo v. Rhode Island
553. U.S. 606 (2001)



Substantive Due Process

- Substantive due process protects a person from being deprived of life, liberty, or property for arbitrary reasons.
- A land use ordinance is presumed valid without clear and convincing evidence that it violates this principle.

Procedural Due Process

“The history of liberty has largely been the history of the observance of procedural safeguards.”

Justice Felix Frankfurter, Nacogdoches, Texas
McNabb v. United States



14th Amendment

“ . . . [nor shall any state] deny to any persons within its jurisdiction the equal protection of the law.



Equal Protection

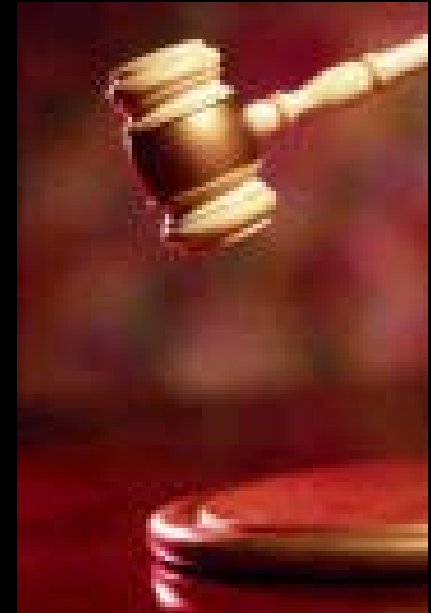


- Prohibits discrimination in application of laws
- Similarly situated property should be treated similarly under the law
- Different treatment of similar property will be upheld if reasonable grounds exist for the disparity.

What Process is Due?

Government Proceedings Must Be:

- orderly
- fundamentally fair
- judicious
- Impartial



[HOW YOU CONDUCT YOUR MEETINGS IS
YOUR NUMERO UNO ADVOCACY TOOL!]

Procedural Due Process

- Due process is flexible and calls for such procedural protections as the particular situation demands.
- Procedural due process contemplates notice, a reasonable opportunity to be heard, and a fair hearing before a legally constituted impartial tribunal.

What Procedure, Quasi-Judicial or Legislative? Does it make a difference?



- A body is acting in a legislative capacity when it “crafts rules of general application.”
- A body is acting in a quasi-judicial capacity when it “determines the legal rights, duties or privileges of specific parties in a hearing...relating to a development permit application.”
- RCW 42.36.010

What's the issue with this statement
[from a legal standpoint]?



"It's not like I'm trying to put a clock tower on the house, I'm asking for rounded stairs like some other homes in this historic neighborhood."

Owner Consent

Property owners have no right under the constitutions of the United States or any state to stop the local nomination or designation process simply because they object to landmark or district designation.



- Is requiring owner consent for designation an unlawful delegation of legislative authority?

Buttnick v. City of Seattle (1986)

- Pioneer Square HPB requirement to remove and replace a parapet/pediment was not an unconstitutional taking. Local governments may enact land use restrictions to enhance quality of life by preserving the character and desirable features of a city. Estimated cost is not an undue hardship based upon property's market value and income-producing potential.

Swinomish Indian Tribal Community v. Island County (1997)

- County violated its own Shoreline Management Mser Plan by issuing sewer permits without considering Indian archaeological sites.

City of Tacoma v. Zimmerman (2004)

- Court upheld validity of ordinance authorizing city acquisition of a historic structure through eminent domain under the Derelict Building Procedure.

Conner v. City of Seattle (2009)

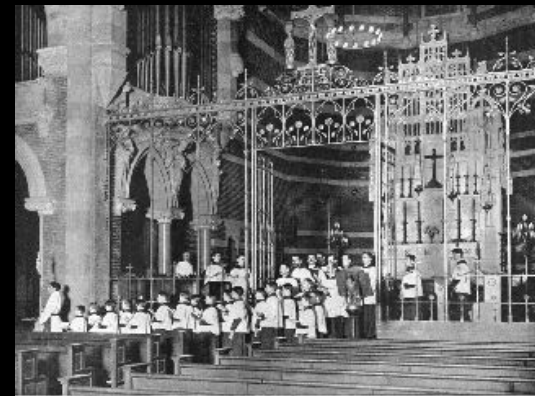
- Conner sought to demolish a landmarked structure. Court determined that the landmark preservation ordinance as not unconstitutionally vague as applied because each property is reviewed individually. The LPB's decision was not a takings. City need not prove a compelling interest.

RLUIPA: Religious Land Use and Institutionalized Persons Act



RLUIPA: Religious Land Use and Institutionalized Persons Act

- Unless there is a compelling public interest (such as health or safety) *AND* the regulation is the least restrictive means of furthering that interest . . .



RLUIPA: Religious Land Use and Institutionalized Persons Act

- Landmarking *cannot* substantially burden the free exercise of religion.



First Covenant Church of Seattle v. City of Seattle (1992)

- Requiring a certificate of approval for alterations is not compelling enough to justify an infringement on the free exercise of religion.

First Methodist Church of Seattle v. Hrg Examiner for Seattle LPB (1996)

- Landmark nomination preventing church to sell property and use the proceeds to advance its religious mission is invalid because the free exercise (of religion) clause of the U.S. Constitution prevents city government from having coercive effect on religious practice.

Mann v. Martin (1996)

- Demolition review of a property at least 50 years old or determined historic is an unlawful violation of the Catholic Church's right to demolish a school building once part of the religious ministry because it burdens the free exercise of religion.

WASHINGTON



THE EVERGREEN STATE

Greetings from

WASHINGTON

