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SUPREME COURT OF THE STATE OF WASHINGTON

JOSEPH LEMIRE,

Respondent,

v.

STATE OF WASHINGTON, DEPARTMENT OF ECOLOGY,

Appellant,

THE POLLUTION CONTROL HEARINGS BOARD,

Respondent Below.

**ECOLOGY'S ANSWER TO BRIEF OF AMICI CURIAE
WASHINGTON STATE ASSOCIATION OF MUNICIPAL
ATTORNEYS, WASHINGTON ASSOCIATION OF
PROSECUTING ATTORNEYS, AND FUTUREWISE**

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 ORIGINAL

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I. INTRODUCTION

The Department of Ecology (Ecology) submits this brief in Answer to the brief filed by Amici Curiae Washington State Association of Municipal Attorneys, Washington Association of Prosecuting Attorneys, and Futurewise. Ecology does not disagree with the arguments made by the Amici and concurs with the overarching argument that this Court should expressly adopt the federal takings analysis when presented with an appropriate case for doing so. Ecology submits this Answer for the limited purpose of addressing the question of whether two or three types of *per se* takings are recognized under both federal and state law.

II. AUTHORITY AND ARGUMENT

A. The United States Supreme Court Recognizes Only Two Types Of *Per Se* Takings

In 2005, a unanimous United States Supreme Court succinctly and decisively articulated the current federal takings analysis. *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 125 S. Ct. 2074, 161 L. Ed. 2d 876 (2005). Relevant to the present case, the Court acknowledged that federal precedents recognize two types of *per se* takings: (1) permanent physical invasions; and (2) regulations that deprive an owner of all economically viable use of property. *Lingle*, 544 U.S. at 538 (citing to *Loretto v. Teleprompter Manhattan CTV Corp.*, 458 U.S. 419, 102 S. Ct. 3164, 73 L.

Ed. 2d 868 (1982) (establishing that a permanent physical invasion is taking), and *Lucas v. S.C. Coastal Coun.*, 505 U.S. 1003, 112 S. Ct. 2886, 120 L. Ed. 2d 798 (1992) (establishing that total deprivation of economic value is a taking)).

“Outside these two relatively narrow categories (and the special context of land-use exactions . . .),^[1] regulatory takings challenges are governed by the standards set forth in *Penn Central*”. *Lingle*, 544 U.S. at 538 (citing to *Penn Cent. Transp. Co. v. N.Y. City*, 438 U.S. 104, 98 S. Ct. 2646, 57 L. Ed. 2d 631 (1978)). Thus, if a property owner does not establish that government action constitutes a permanent physical invasion or deprives the owner of all economically viable use of the property, then the court analyzes whether a taking occurred under the three *Penn Central* factors.²

¹ The Court recognized that the case law involving land use exactions applies only where “government demands that a landowner dedicate an easement allowing public access to her property as a condition of obtaining a development permit.” *Lingle*, 544 U.S. at 546.

² The three factors are: (1) the extent of the regulation’s impact on the property; (2) the extent of the regulation’s interference with investment backed expectations; and (3) the character of the government action. *Lingle*, 544 U.S. at 538–39.

B. The Washington Supreme Court Also Only Recognizes Two Types Of *Per Se* Takings

1. *Guimont* Recognized Only Two Types Of *Per Se* Takings But Has Been Misinterpreted By The Court Of Appeals As Recognizing Three Types Of *Per Se* Takings

The seminal state case recognizing the two types of *per se* takings is *Guimont v. Clarke*, 121 Wn.2d 586, 854 P.2d 1 (1993). In *Guimont*, this Court was required to interpret and apply a recent United States Supreme Court decision that held, for the first time, that a categorical taking occurs when a government regulation deprives an owner of all economically viable use of her property. *Guimont*, 121 Wn.2d at 596–604 (citing to *Lucas*, 505 U.S. 1003). Specifically, the *Guimont* Court had to determine how the *Lucas* decision impacted the state regulatory takings analysis established in *Presbytery of Seattle v. King County*, 114 Wn.2d 320, 787 P.2d 907 (1990).

The *Presbytery* analysis established two threshold questions that needed to be answered before a Washington court would engage in the takings analysis. *Presbytery's* first threshold question was whether the regulation “seeks less to prevent a harm than to impose on those regulated the requirement of providing an affirmative public benefit.” *Guimont*, 121 Wn.2d at 594–95 (citing to *Presbytery*, 114 Wn.2d at 329). The second threshold question was whether the challenged regulation destroys a fundamental attribute of property ownership including the right to possess,

to exclude others, or to dispose of property. *Guimont*, 121 Wn.2d at 595 (citing to *Presbytery*, 114 Wn.2d at 329–30).

As a result of *Lucas*, the *Guimont* Court concluded that *Presbytery*'s two threshold questions needed to be flipped, so that now the first threshold question would be whether the challenged regulation destroys a fundamental attribute of ownership.³ *Guimont*, 121 Wn.2d at 600–01. The Court concluded that the flipping of the two questions was necessary in order to accommodate the two types of *per se* takings identified in *Lucas*. *Id.*

Throughout the *Guimont* opinion, the Court consistently recognizes only the two types of *per se* takings recognized in *Lucas*.⁴ The Court then sets forth the rule for analyzing the two types of *per se* takings:

If the landowner proves a “total taking” or “physical invasion” has occurred, and if the State fails to rebut that claim, the owner is entitled to categorical treatment under *Lucas*. In other words, the owner is entitled to just compensation without case-specific inquiry into the legitimacy of the public interest supporting the regulation. However, if the owner alleges a “physical invasion” or “total taking” and fails to prove that either has occurred,

³ In the present case, the superior court found Ecology's order was a *per se* taking and did not analyze the two threshold questions.

⁴ See, e.g., *Guimont*, 121 Wn.2d at 598 (“*Lucas* requires a reordering of the *Presbytery* threshold analysis to accommodate the two *Lucas* categories of takings that do not require case-specific analysis”); *Id.* at 600 (“Because the plaintiff must have the opportunity at the outset to prove a ‘physical invasion’ or ‘total taking’, *Lucas* necessitates that we reorder the first two steps of our *Presbytery* threshold test.”); *Id.* at 601 (“Thus, under *Lucas*, our takings analysis of land use regulations is revised to reflect the two categorical takings”).

then there is no per se constitutional taking requiring just compensation.

Id. at 602–03 (emphasis added) (citations omitted).

Subsequent decisions of the Court of Appeals have misinterpreted *Guimont* by erroneously identifying the first threshold question (whether the regulation destroys a fundamental attribute of property) as a third type of *per se* taking.⁵ See, e.g., *Schreiner Farms, Inc. v. Smitch*, 87 Wn. App. 27, 33–34, 940 P.2d 274 (1997); *Guimont v. City of Seattle*, 77 Wn. App. 74, 80, 896 P.2d 70 (1995). The present case presents an opportunity for this Court to correct the lower courts’ error and clarify that there are only two types of *per se* takings.

2. The Plurality Opinion In *Manufactured Housing Did Not Add New Categories Of Per Se Takings To Washington’s Jurisprudence*

In 2000, this Court issued a splintered takings decision that has contributed to the confusion over whether there are two or more types of *per se* takings. *Manufactured Hous. Cmty. of Wash. v. State*, 142 Wn.2d 347, 13 P.3d 183 (2000). The four justice plurality, apparently conflating *per se* takings with facial takings, identified four types of regulations “subject to a categorical ‘facial’ taking challenge.” *Manufactured Hous.*,

⁵ As noted in Ecology’s Opening Brief to the Court of Appeals, Washington courts have not been entirely clear on whether destruction of a fundamental attribute of ownership is a third type of *per se* taking. As several cases decided by the Court of Appeals have mentioned the third type of *per se* taking, Ecology analyzed the issue while recognizing the Court may conclude only two types of *per se* taking apply. Opening Brief at 29 n.16; 37–38.

142 Wn.2d at 355. One of the four types is “a regulation [that] destroys one or more of the fundamental attributes of ownership (the right to possess, exclude other[s] and to dispose of property).” *Id.* The plurality then invalidated a statute after concluding that the statute destroyed a fundamental attribute of property ownership and impermissibly transferred private property for private rather than public use.⁶ *Id.* at 364–73.

The plurality opinion did not explicitly or implicitly overturn the *Guimont* takings analysis which identified only two types of *per se* takings. For one thing, the identification of four types of “categorical facial takings” was unnecessary to the Court’s opinion and, therefore, is nonbinding dicta. *See, e.g., State v. Johnson*, 173 Wn.2d 895, 904, 270 P.3d 591 (2012).

However, even if this portion of the plurality opinion was not dicta, the opinion garnered only four votes. A fifth justice concurred in result only and a sixth justice concurred that the “statute unconstitutionally takes private property for private use” but then employed an alternative rationale to reach the conclusion that a taking had occurred.

⁶ On this latter point, the plurality concluded that article I, section 16 of the state constitution provides greater protection than its federal counterpart in terms of placing an “absolute prohibition against taking private property for private use” *Id.* at 357–58. However, this is the only aspect of article 1, section 16 that this Court has found to be more protective than the Fifth Amendment of the federal constitution. As noted in Amici’s brief, this Court has otherwise tried to harmonize the state takings analysis with the federal analysis. Amici Br. at 3–6.

Manufactured Hous., 142 Wn.2d at 375–84. As a general rule, a “plurality has little precedential value and is not binding.”⁷ *Johnson*, 173 Wn.2d at 904.

Manufactured Housing contains no majority rationale standing for the proposition that a claimant can establish a *per se* taking by showing that a regulation destroyed a fundamental attribute of property ownership. Therefore, the case is not binding and has limited precedential value. It is *Guimont* that controls, and *Guimont* only identifies the two types of *per se* takings.

III. CONCLUSION

For the reasons set forth above, as well as in Ecology’s prior briefing, Ecology respectfully asks the Court to clarify the current confusion and confirm that *Guimont*’s identification of two types of *per se* takings is the law in Washington. However, even if the Court does recognize three types of *per se* takings, no *per se* taking occurred in the

⁷ Despite the decision’s lack of precedential value, the Ninth Circuit recently cited to it for the proposition that destruction of a fundamental attribute of property ownership can constitute a taking in Washington. *Laurel Park Cmty. LLC v. City of Tumwater*, No. 11-35466, slip op. at 12974–77 (9th Cir. Oct. 29, 2012) (opinion submitted in the present case by amicus Pacific Legal Foundation as an additional authority). The court then proceeded to uphold the city ordinances being challenged on the basis that the ability to use property in a particular fashion is not a fundamental attribute of property ownership. *Laurel Park Cmty.*, slip op. at 12976–77.

present case because Mr. Lemire did not establish that a fundamental attribute of his property ownership has been destroyed.

RESPECTFULLY SUBMITTED this 31 day of October 2012.

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Pursuant to RCW 9A.72.085, I certify that on the 31st day of October 2012, I caused to be served a true and correct copy of Ecology's Answer to Brief of Amici Curiae Washington State Association of Municipal Attorneys, Washington Association of Prosecuting Attorneys, and Futurewise in the above-captioned matter upon the parties herein as indicated below:

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Dear Clerk,

Please find attached for filing in Case No. 87703-3, *Lemire v. The Pollution Control Hearings Board, et al.*, Ecology's Answer to Brief of Amici Curiae WSAMA, WAPA, and Futurewise filed by Laura J. Watson, phone 360-586-4614, WSBA #28452, email LauraW2@atg.wa.gov.

Thank you,

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