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IN THE SUPREME COURT OF THE STATE OF  
WASHINGTON

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JOSEPH LEMIRE

Respondent,

vs.

STATE OF WASHINGTON, DEPARTMENT OF ECOLOGY,

Appellant,

THE POLLUTION CONTROL HEARINGS BOARD,

Respondent Below

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RESPONDENT LEMIRE'S ANSWER TO BRIEF OF AMICUS  
CURIAE WASHINGTON STATE ASSOCIATION OF  
MUNICIPAL ATTORNEYS, WASHINGTON ASSOCIATION OF  
PROSECUTING ATTORNEYS, AND FUTUREWISE

---

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## I. INTRODUCTION

The takings issue in this case is narrow and straight-forward. The sole question presented is whether Administrative Order No. 7178's prohibition on historic farm use of riparian areas and installation of livestock exclusion fencing constituted a *per se* taking under the Washington Constitution article I, section 16. Associations now present a last minute request urging the court to use this case as a vehicle for rewriting our state's regulatory takings law.<sup>1</sup> This is not the case or time to revisit more than a century of constitutional interpretation and analysis.

Amici offer the argument that there should be identify between state and federal takings analysis should be identical. Ignored in the argument are clear differences in constitutional language; consistent judicial recognition that the state constitution affords broader protections to the citizens of this state; and the doctrine of *stare decisis*. Significantly, the argument also ignores this Court's analysis and holdings in *Manufactured Housing Communities of Washington v. State*, 142 Wn.2d 347, 13 P.3d 183 (2000)

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<sup>1</sup> Washington State Association of Municipal Attorneys (WSAMA), Washington Association of Prosecuting Attorneys (WAPA) and Futurewise (collectively "Associations") file an amicus curiae brief with the Court on October 12, 2012. Amici argue that well-established takings analysis should be overruled and replaced by an analysis suggested in a law review article authored by government's amici counsel. See Roger D. Wynne, *The Path Out of Washington's Takings Quagmire: The Case for Adopting the Federal Takings Analysis*, 86 Wash. L. Rev. 125 (2011).

and *Eggleston v. Pierce County*, 148 Wn.2d 760, 64 P.3d 618 (2003).<sup>2</sup> Associations' errors fall into two broad categories: (1) that article I, section 16 of the Washington Constitution does not provide greater protection of individual rights than the Fifth Amendment to the U.S. Constitution; and (2) that the "fundamental attributes" test is and should be an essential and important component of the *per se* takings test.

Finally, it is not necessary to overhaul takings analysis in order to decide this case. The issue presented in this case is whether the regulatory impositions constitute a *per se* or categorical taking. Any decision addressing takings law beyond the scope of the questions before the Court would be only dicta. *See State v. Louthan*, 158 Wn. App. 732, 752 (2010) (citing *Pedersen v. Klinkert*, 56 Wn.2d 313, 317 (1960) ("dicta" is language in an opinion that was not necessary to the decision in the case)). The court should avoid deciding constitutional issues where a case can be fairly resolved on other grounds. *See e.g. Community Telecable of Seattle, Inc. v. City of Seattle*, 164 Wn.2d 35, 41, 186 P.3d 1032 (2008).

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<sup>2</sup> Perhaps the Associations believe that *Manufactured Housing* is not precedential. However, *Manufactured Housing* was decided 6-3, and there should be no doubt about its status as precedent. *See* Richard B. Sanders, *Perspectives on Washington Takings Law*, ALI-ABA Continuing Legal Education: Inverse Condemnation and Related Government Liability, SF64 (May 2001) (no pagination) (Justice Sanders, who concurred in *Manufactured Housing*, writes that the case was "a six to three decision.").

## II. ARGUMENT

### A. **This Court is Not Constrained by Federal Precedent and Has Final Authority to Interpret the Washington Constitution.**

Associations begin from the erroneous proposition that the federal and state constitutions provide “functionally identical constitutional protections” and should be implemented through a “unified test.” *Amicus Brief* at 3. It is argued:

Because the U.S. Supreme; Court has dictated the steps a court must follow when analyzing a takings claim under the U.S. Constitution, *this Court must follow the federal analysis.*

*Id.* at 13. No authority is offered for this proposition.<sup>3</sup>

This case does not involve interpretation of the federal constitution. At issue is the interpretation and application of article 1, section 16 of the Washington Constitution. This Court is not obligated to follow federal analysis. In the leading case of *State v. Gunwall*, 106 Wn.2d 54, 59, 720 P.2d 808 (1986) this Court recognized the independent character of state constitutional protections and adopted the following statement:

Washington is one of many states that rely on their own constitutions to protect civil liberties. Since the recent retrenchment of the United States Supreme Court in this area,

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<sup>3</sup> Associations correctly note that this Court may not substitute its views on matters involving the interpretation of the federal constitution. *B.F. Goodrich Co. v. State*, 38 Wn.2d 663, 676, 231 P.2d 325 (1951). This case does not, however, involve interpretation of the federal constitution. The takings issues are presented under article I, section 16 of the Washington Constitution.

the appellate courts of a majority of the states have interpreted their state constitutions to provide greater protection for individual rights than does the United States Constitution.

*Id.* 106 Wn.2d at 59, citing Utter, *Freedom and Diversity in a Federal System: Perspectives on State Constitutions in the Washington Declaration of Rights*, 7 U. Puget Sound L. Rev. 491, 499 (1984). The United States Supreme Court has recognized broad authority in the states because each state has the “sovereign right to adopt its own Constitution individual liberties more extensive than those conferred by the Federal Constitution.” *Pruneyard Shopping Center v. Robins*, 447 U.S. 74, 81 (1984). This Court is the sole arbiter regarding the state constitution. *See e.g. Federated Publications, Inc. v. Kurtz*, 94 Wn.2d 51, 59, 615 P.2d 440 (1980) (“[I]t is beyond question that the Supreme Court has recognized that state courts are the ultimate arbiters of state law, unless a state courts’ interpretation restricts the liberties guaranteed the entire citizenry under the federal constitution.); *State v. Bartholomew*, 101 Wn.2d 631, 639, 683 P.2d 1079 (1984) (stating “in interpreting the due process clause of the state constitution, we have repeatedly noted that the Supreme Court’s interpretation of the Fourteenth Amendment does not control our interpretation of the state constitution’s due process clause.”).

The court is not bound by federal constitutional analysis but engages in an independent interpretation of state constitutional provisions. *State v.*

*Gunwall*, 106 Wn.2d 54, 60-61, 720 P.2d 808 (1986) (adopting six nonexclusive neutral criteria to determine whether the Washington State Constitution provides broader rights to its citizens than the United States Constitution). Independent application of state constitutional protections has been a hallmark of our jurisprudence. *State v. Martin*, 171 Wn.2d 521, 252 P.3d 872 (2011) (holding that article I, Section 22 of the Washington Constitution provided broader protections than the Sixth Amendment of the Federal Constitution); and *State v. Smith*, 150 Wn.2d 135, 151, 75 P.3d 934 (2003) (stating that the textual differences between the federal and state constitutions indicate the general importance of the right to jury trial in the Washington Constitution). The court in *Manufactured Housing* applied the *Gunwall* analysis to article I, Section 16 and concluded that it provided greater protections to citizens of this state. *Manufactured Housing*, 142 Wn.2d at 356-361. The court has also recognized structural differences between the state and federal constitutions. *Gunwall*, 106 Wn.2d at 58; *State v. Foster*, 135 Wn.2d 441, 458-59, 957 P.2d 712 (1998) (“our consideration of this factor is always the same; that is that the United States Constitution is a *grant* of limited power to the Federal Government, while the state constitution imposes *limitations* on the otherwise plenary power of the state.”)

**B. Article I, Section 16 of the Washington Constitution Provides Broader Protections to Citizens of this State Than the Federal Constitution.**

Associations begin with the erroneous argument that our jurisprudence “coordinated *equivalent* state and federal takings analysis ...” and that “... this Court has never concluded that the Washington Constitution offers greater protections to individuals against uncompensated takings for public use.” *Associations’ Brief* at 5-6. This proposition is simply incorrect. *Brown v. City of Seattle*, 5 Wash. 35, 41, 31 P. 313 (1892) (holding that additional word “damaged” provided protection beyond “taking”); *Manufactured Housing*, 142 Wn.2d 347 (holding that article 1, section 16 provides greater protections than federal constitution); and *Eggleston v. Pierce County*, 148 Wn.2d 760, 767, 64 P.3d 618 (2003) (“Article 1, section 16 is significantly different from its United States constitutional counterpart, and in some ways provides greater protection.”)

Article I, section 16 provides broader protections than the federal constitution. The beginning point for analysis is the language and text of the constitutional provisions. The Fifth Amendment of the Federal Constitution states only that, “nor shall private property be taken for public use, without just compensation.” The Washington Constitution is much more expansive and provides, in part, as follows:

*Private property shall not be taken for private use, except for private ways of necessity, and for drains, flumes, or ditches on or across the lands of others for agricultural, domestic, or sanitary purposes. No private property shall be taken or damaged for public or private use without just compensation having first been made . . . . Whenever an attempt is made to take private property for a use alleged to be public, 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: Provided, That the taking of private property by the state for land reclamation and settlement purposes is hereby declared to be for public use.*

(Italics Added.) This Court has noted “. . . a striking textual difference between these two constitutions. . . .” *Manufactured Housing*, 142 Wn.2d at 357.<sup>4</sup> It is axiomatic that the language of the Constitution is to be construed liberally so as to carry out and not defeat the purposes for which it was adopted. *King County v. Seattle Cedar Lumber Mfg. Co.*, 94 Wash. 84, 90, 162 P.27 (1916).

The court in *Manufactured Housing* proceeded with a *Gunwall* analysis and specifically concluded that the state constitution provides broader protections than the federal constitution with regard to regulatory

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<sup>4</sup> The Court has consistently focused on textual differences between related state and federal constitutional provisions. Additional language in the state constitution has led to greater protections of individual liberties. *See, e.g., State v. Brayman*, 110 Wn.2d 183, 201, 751 P.2d 294 (1988) (addition of gender and state equal rights amendment provides for more protection than federal equal protection clause); *State v. Bowland*, 115 Wn.2d 571, 580, 800 P.2d 1112 (1990) (additional language in state search and seizure clause provides greater protection than federal Fourth Amendment); and *Manufactured Housing Communities*, 142 Wn.2d at 188-89 (additional language in Article 1, Section 16 provides broader protection than federal constitutional counterpart).

takings. *Manufactured Housing*, 142 Wn.2d at 356-161.5 The court specifically noted: (1) the “striking textual difference between the two constitutions (*Id.* 142 Wn.2d at 357); (2) the additional words “or damaged” and prohibitions on takings for private use. (*Id.* 142 Wn.2d at 358-59); (3) a state constitutional history recognizing broader protections; (4) state and federal law distinctions between private/public “use” and purpose (*Id.* at 142 Wn. 2d at 359-360); (5) structural differences between the state and federal constitutions (federal grants enumerated powers while state “ ... serves to limit the otherwise plenary powers) (*Id.* 142 Wn.2d at 360-61); and (6) “... that taking private property for private use is clearly a matter of local concern.”) (*Id.* 142 Wn.2d at 361). Each factor supported a broader application and scope under the state constitution.

It is incongruous to assert harmonization of state and federal takings analysis where this Court has specifically recognized broader protections under state law. And such argument is inconsistent with more than a century of case authority. The distinction began more than a century ago with *Brown*, a case recognizing that the phrase “or damaged” provided more protection

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<sup>5</sup> The court in *Manufactured Housing* reversed the Court of Appeals’ decision in *Manufactured Housing Communities of Washington v. State*, 90 Wn. App. 257, 951 P.2d 1142 (1998). Division II specifically held that “... the *Gunwall* factors all favor a coextensive interpretation of the state and federal constitutions.” *Id.* 90 Wn. App. at 266. This Court disagreed with that proposition and specifically concluded that state constitutional

than the federal constitution. In *Brown v. City of Seattle*, 5 Wash. 35 (1892), Justice Theodore Stiles (a delegate to the Washington Constitutional Convention) authored the Court’s opinion rejecting Seattle’s argument that the “damaging” provision did not extend the scope of Washington’s Takings Clause: “Damaged does not mean the same thing as ‘taken,’ in ordinary phraseology . . . . [We] put the words ‘taken or damaged’ into our constitution and they must have their effect.” *Id.* at 40-41. *See also Wandermere Corp. v. State*, 79 Wn.2d 688, 693 (1971) (holding that there is a legally relevant distinction between “damaging” and “taking”); *Martin v. Port of Seattle*, 64 Wn.2d 309, 317-18, 391 P.2d 540 (1964) (holding that physical invasion or intrusion on property is not necessary to assert inverse condemnation claim based on “damage” to property from aircraft noise).

Article I, section 16 also provides broader protection by recognizing that “... private property shall not be taken for private use, ... .” *Manufactured Housing*, 142 Wn.2d at 357 (“What is key is article I, section 16’s absolute prohibition against taking private property for private use. The Fifth Amendment only provides similar protections by inference.”)

Washington’s Takings Clause finally provides that the public nature of the proposed use, if any, shall be a judicial question without deference to

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provisions provided broader protections than those afforded by the federal constitution.

legislative assertions. *See Manufactured Housing*, 142 Wn.2d at 358; and *In re Puget Sound Power & Light Co.*, 28 Wn. App. 615, 618 (1981), the Fifth Amendment has no such provision, and, in fact, federal cases defer to legislative findings on the public use question. *See Kelo v. City of New London*, 545 U.S. 469, 488-89 (2005) (“Just as we decline to second-guess the City’s considered judgments about the efficacy of its development plan, we also decline to second-guess the City’s determinations as to what lands it needs to acquire in order to effectuate the project.”).

**C. Washington Takings Analysis is Clear Premised Upon a Long History and Solid Analytic Foundation.**

Associations present a convoluted, inaccurate and incomplete summary of state regulatory takings analysis.<sup>6</sup> The analysis has developed over more than thirty (30) years and offers a clear direction to the courts, government and citizens of this state. And the analysis is not markedly different than federal takings analysis. It is simply further developed in the area of *per se* or categorical takings.

**1. State and Federal Takings Analysis Both Begin with an Assessment of Categorical or *Per Se* Takings.**

Both state and federal takings analysis begins with a determination as

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<sup>6</sup> Associations provide a short history of regulatory takings analysis ending with *Margola Associates v. City of Seattle*, 121 Wn.2d 625, 854 P.2d 23 (1993). Ignored in the argument is this court’s clear and thorough discussion and analysis of categorical or *per se* takings in *Manufactured Housing*, 142 Wn.2d, 347, 13 P.3d 183 (2000).

to whether the regulatory action constitutes a *per se* and categorical taking. *Guimont v. Clarke*, 121 Wn.2d 586, 601, 854 P.2d (1993).<sup>7</sup> *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 535 U.S.; 302 (2002) (holding that a temporary development moratorium did not constitute a categorical taking but rather would be analyzed applying the factors of *Penn Central Transportation Co.*). The analysis was synthesized in *Manufactured Housing Manufactured Housing*<sup>8</sup> as follows:

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<sup>7</sup> The court in *Guimont* restructured the State takings analysis in light of the Supreme Court's decision in *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992) (invalidating statutory prohibition on beach front development that resulted in loss of all economically viable use of the property). The analysis synchronized state and federal analysis and summarized the structure as follows:

This requirement of *Lucas* can easily be squared with our presbytery analysis by simply reordering the two questions of our threshold inquiry. Hereafter, the Court will begin the threshold inquiry by asking whether the regulation denies the owner a fundamental attribute of ownership. In the analysis of "physical invasions" or "total takings", including all facial challenges to land use regulations, will be analyzed at the outset under the first prong of the threshold test. If the Plaintiff proves a "physical invasion" or "a total taking" occurred, the Plaintiff may not proceed if the remainder of the presbytery analysis. However, if the regulation *does not implicate fundamental attributes of ownership*, the Court will proceed to the next threshold inquiry analyzing whether the regulation goes beyond preventing a public harm to producing a public benefit. If the purpose of the regulation is to produce a benefit, the Court will then proceed with balancing the legitimacy of the State's interest with the adverse impact on the landowner.

*Guimont*, 121 Wn.2d at 600-601. The initial inquiry was subsequently refined by the Court in *Manufactured Housing*, which identified a categorical or *per se* component to the analysis. *Manufactured Housing*, 142 Wn.2d at 355. The first step in the takings analysis is conceptually consistent with federal analysis.

<sup>8</sup> *Manufactured Housing* is important because it did not involve either a physical invasion or total taking. It involved the derogation of a fundamental attribute of property ownership –

Under existing Washington and federal law, a police power measure can violate amended article I, section 16 of the Washington State Constitution or the Fifth Amendment of the United States Constitution and thus be subject to a categorical ‘facial’ taking challenge when: (1) a regulation affects a total taking of all economically viable use of one’s property, *Lucas v. So. Carolina Coastal Council*, 505 U.S. 1003, 1019, 112 S. Ct. 2886, 120 L. Ed. 2d 798 (1992); or (2) the regulation has resulted in an actual physical invasion of one’s property, *Loretto v Teleprompter Manhattan CATV Corp.*, 58 U.S. 419, 102 S. Ct. 3164, 73 L. Ed. 2d 868 (1982); or (3) a regulation destroys one or more of the fundamental attributes of ownership (the right to possess, exclude other and to dispose of property), *Presbytery of Seattle v. King County*, 114 Wn.2d 320, 330, 787 P.2d 907 (1990); or (4) the regulations were employed to enhance the value of publicly held property, *Orion Corp. v. State*, 109 Wn.2d 621, 651, 747 P.2d 1062 (1987).

*Manufactured Housing*, 142 Wn.2d at 355. This approach incorporates historic state analysis. See *Orion Corp. v. State*, 109 Wn.2d 621, 747 P.2d 1062 (1987); *Presbytery of Seattle v. King County*, 114 Wn.2d 320, 387 P.2d 907 (1990); *Sintra, Inc. v. Seattle*, 119 Wn.2d 1, 829 P.2d 765 (1992); *Robinson v. Seattle*, 119 Wn.2d 34, 830 P.2d 318 (1992); *Guimont v. Clarke*, 121 Wn.2d 586, 854 P.2d 1 (1993); and *Margola Associates v. City of Seattle*, 121 Wn.2d 625, 854 P.2d 23 (1993).

Under both Washington *and* federal law, a government regulation or exaction will effect a *per se* or “categorical” taking if:

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the “... right of first refusal is a part of ‘the bundle of sticks’ which the *owner* enjoys as a vested incident of ownership.” *Id.* 142 Wn.2d at 367.

(1) It eliminates all economically viable use of the property, *Manufactured Housing*, 142 Wn.2d at 355 (citing *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1019 (1992));

(2) It effects a physical invasion of the property, *Manufactured Housing*, 142 Wn.2d at 355 (citing *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982));  
or

(3) It forces an unlawful exaction of property as a permit condition, *Burton v. Clark County*, 91 Wn. App. 505, 516-21 (1998) (citing *Dolan v. City of Tigard*, 512 U.S. 374 (1994) and *Nolan v. Cal. Coastal Comm'n*, 483 U.S. 825 (1987)).

Additionally, this Court has found a categorical or *per se* taking in the following situations:

(4) A government act that destroys a fundamental attribute of property ownership, *Manufactured Housing*, 142 Wn.2d at 355 (citing *Presbytery of Seattle v. King Cnty.*, 114 Wn.2d 320, 330 (1990));

(5) A government act that transfers a property interest to another private party, *Manufactured Housing*, 142 Wn.2d at 369-70, 74-75;

(6) A government act that forces the enhancement of the value of publicly held property, *id.* at 355 (citing *Orion Corp. v. State*, 109 Wn.2d 621, 651 (1987)).

Federal constitutional law clearly supports these propositions. See e.g. *Kelo v. City of New London*, 545 U.S. 469, 477-78 (2005) (“the City would no doubt be forbidden from taking petitioner’s land for the purpose of conferring a private benefit on a particular private party.”); *Kaiser Aetna v. United*

*States*, 444 U.S. 164 (1979) (Unconstitutional for Corps of Engineers to impose requirement allowing public access for private marina).

The court in *Manufactured Housing* clarified the threshold principals in an effort to avoid confusion with respect to ad hoc inquiries and further predictive standards. The rationale was supported by the following reason derived from Professor Richard Settle's law review article:

That there are two categories of police power regulation that are subject to quite different takings standards. These categories divide regulations, on the basis of purpose and effect, into those that effectively deprive a property owner of a fundamental attribute of property and those that do not. ...

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. . . [r]egulations that *deprive an owner of a fundamental attribute of ownership generally are held to be takings without applying* the ripeness requirement or distinguishing between facial and as applied challenges; without balancing public gain and private loss; and without considering diminution in property value, disappointment of investment-backed expectations, whether value lost is offset by reciprocal benefits, and whether reasonable value remains. In short, such regulations are subject to essentially the same doctrine as that applicable to government exercise of eminent domain and government physical invasions traditionally characterized as inverse condemnations.

*Id.* 142 Wn.2d at 363, citing Richard L. Settle, *Regulatory Taking Doctrine in Washington: Now You See It, Now You Don't*, 12 U. Puget Sound L. Rev. 339, 386-87 (1989). Equivalency was sought with respect to government exercises of eminent domain and claims of inverse condemnation. This

principle adopts a logically consistent approach to takings that derive from a single constitutional mandate contained in article 1, section 16 of the Washington Constitution<sup>9</sup>

**2. Second Step in Takings Analysis is Inapplicable to This Proceeding.**

If a regulation does not infringe on a fundamental attribute of ownership, the Washington takings analysis proceeds with an examination of (1) whether the challenge regulation safeguards the public interest in health, safety, the environment or the fiscal integrity of an area, or whether the regulation seeks less to prevent a harm than to impose on those regulated the requirement of providing an affirmative public benefit; and (2) whether the regulation substantially advances a legitimate state interest. *Guimont*, 121 Wn.2d at 10. Associations' argue that these tests should be removed from the state takings analysis. Lemire agrees.

Lemire agrees that the "substantially advances" theory is inappropriate in this case. The United States Supreme Court held in *Lingle v. Chevron*

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<sup>9</sup> The courts of this State have clearly recognized that eminent domain and inverse condemnation process will invoke takings protections even though there has not been a physical invasion of the property or a loss of all economic use. See e.g., *Martin v. Port of Seattle*, 64 Wn.2d 309, 317-18, 391 P.2d 540 (1964) (holding that physical invasion or intrusion on property is not necessary to assert inverse condemnation claim based on "damage" to property from aircraft noise; *Keiffer v. King County*, 89 Wn.2d 369, 572 P.2d 408 (1977) (holding that "right of access" to abutting roadways is a compensable component in eminent domain proceeding); *State v. McDonald*, 98 Wn.2d 521, 525-26, 656 P.2d 1043 (1983) (compensation for injury to retained separate and independent parcels constitutes compensable damages in "partial taking" proceedings).

*U.S.A., Inc.*, 544 U.S. 528, 536 (2005), that the test was inappropriate in a takings analysis and that the theory resembles a due process claim. Numerous federal appellate courts have also recognized this rule. *See Alto Eldorado Partnership v. County of Santa Fe*, 634 F.3d 1170, 1175 (10th Cir. 2011) (recognizing that the substantially advances claim under the Takings Clause is defunct); *Guggenheim v. City of Goleta*, 638 F.3d 1111, 1135 (2010) (recognizing that the “substantially advances” theory is disapproved of in a takings claim). Furthermore, although this Court has not expressly said it, our Appellate Courts have recognized that the test has been abandoned at the federal level as part of the takings analysis. *See Thun v. City of Bonney Lake*, 164 Wn. App. 755, 760 n.4, 265 P.3d 207 (Div. II 2011); *City of Des Moines v. Gray Businesses, LLC*, 130 Wn. App. 600 (124 P.3d 324 (2005).

The Court may also chose to stop applying the “harm/benefit” inquiry to takings claims. The “harm/benefit” inquiry is rooted in the early U.S. Supreme Court decision, *Mugler v. Kansas*, 123 U.S. 623, 668-69 (1887), which pre-dates the Supreme Court’s seminal regulatory takings decision in *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922) (holding that regulations that “go too far” in restricting a property owner’s use constitute a taking.)<sup>10</sup> The *Mugler* principle became ensconced in Washington law in

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<sup>10</sup> *Mugler* held that a state statute banning the manufacture and sale of liquor did not effect a

*Orion Corp.*, 109 Wn.2d at 647, 654-57, and *Presbytery of Seattle*, 114 Wn.2d at 330, with this Court determining that it should look to whether the challenged regulation seeks more to prevent a public harm, or provide a public benefit at the property owner's expense, as one factor for determining whether a taking occurred.<sup>11</sup> However, in *Lucas*, the U.S. Supreme Court repudiated any inquiry into whether the regulation is designed more to prevent a harm or provide a public benefit. *Lucas*, 505 U.S. at 1024-26. This Court adopted *Lucas* in 1993 in *Guimont*, but did not repudiate the "harm/benefit" inquiry. *Guimont*, 121 Wn.2d at 601.

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taking the plaintiff's brewery because the statute was designed to safeguard the public health and safety. 123 U.S. at 668 ("A prohibition simply upon the use of property for purposes that are declared, by valid legislation, to be injurious to the health, morals, or safety of the community, cannot, in any just sense, be deemed a taking or an appropriation of property for the public benefit.").

<sup>11</sup> After *Mahon*, neither a physical appropriation nor a public use has ever been a necessary component of a "regulatory taking." *Tahoe-Sierra Preservation Council*, 535 U.S. at 326. In *Lucas*, the Court explained: "Prior to Justice Holmes's exposition in *Pennsylvania Co. v. Mahon*, 260 U.S. 393 (1922), it was generally thought that the Takings Clause reached only a 'direct appropriation' of property *Legal Tender Cases*, 12 Wall. 457, 551 (1871), or the functional equivalent of a 'practical ouster of [the owners] possession,' *Transportation Co. v. Chicago*, 99 U.S. 635, 643 (1879). . . . Justice Holmes recognized in *Mahon*, however, that if the protection against physical appropriations of private property was to be meaningful enforced, the government's power to redefine the range of interests included in the ownership of property was necessarily constrained by constitutional limits. 260 U.S. at 414-415. If, instead, the uses of private property was subject to unbridled, uncompensated qualification under the police power 'the natural tendency of human nature [would be] to extent the qualification more and more until the last private property disappear[ed].' *Id.*, at 415. These considerations gave birth in that case to the oft-cited maxim that 'while property may be regulated to a certain extent, if the regulation goes too far it will be recognized as a taking.' *Tahoe-Sierra*, 535 U.S. at 326 n.21.

**3. Federal and State Takings Analysis Apply the *Penn Central* Tests for Regulations That Do Not Constitute a *Per Se* or Categorical Taking.**

If a property owner cannot prove a *per se* categorical taking, both state and federal law recognize that the property owner may still prove a “partial” taking if a regulation places restrictions on land that “go too far”. The analysis is typically adjudicated by examining a “complex of factors including the regulation’s economic effect on the landowner, the extent to which the regulation interferes with reasonable investment-backed expectations, and the character of the government action.” *Palazzolo v. Rhode Island*, 533 U.S. 606, 617 (2001) (citing *Penn Central Transp. Co. v. New York City*, 438 U.S. 104, 124 (1978)). Primary among the relevant factors are (1) the economic impact of the regulation on the claimant and, particularly, (2) the extent to which the regulation has interfered with distinct investment-backed expectations. In addition, (3) the character of the governmental action may be relevant in discerning whether a taking has occurred. *Lingle*, 544 U.S. at 538-39. *See also Guimont*, 121 Wn.2d at 604. The Supreme Court has recognized that the *Penn Central* factors have “give rise to vexing subsidiary questions.” *Lingle v. Chevron, USA, Inc.*, 544 U.S. 528, 539 (2005).

It is not necessary to reach the *Penn Central* analysis. It is clear,

however, that the regulatory imposition on the Lemire property would result in a taking under the *Penn Central* test. The property has been exclusively applied to ranching operations for more than a century; the regulation eliminates use of the riparian area; the investment-backed expectation is for continued ranching operations; and the restriction was imposed with no proof that agricultural activities led to the deterioration of water quality. A partial taking of riparian rights is compensable in an inverse condemnation proceeding. *Litka v. City of Anacortes*, 167 Wash. 259, 9 P.2d 88 (1932) (riparian rights are recognized in law to be valuable property rights ... . Since riparian rights are property rights, they cannot be taken by a municipality for public purposes without just compensation to the owner).

**D. The “Fundamental Attributes” Test is a *Per Se* Takings Test in Washington.**

This Court has determined that a regulation that “destroys one or more of the fundamental attributes of ownership” constitutes a *per se* or *categorical* taking. *Manufactured Housing*, 142 Wn.2d at 355 and 369. The fundamental attribute test has been at the heart of Washington takings jurisprudence for decades. *See Manufactured Housing*, 142 Wn.2d at 369 (Mobile Home Parks Resident Ownership Act was a taking because it interfered with owners’ right to freely alienate property); *Guimont v. Clarke*, 121 Wn.2d at 602 (“[T]he court must first ask whether the regulation destroys

or derogates a fundamental attribute of property ownership: including the right to possess; to exclude others; or dispose of property.”); *Presbytery of Seattle*, 114 Wn.2d at 329-30 (“... the court should ask whether the regulation destroys one or more of the fundamental attributes of ownership – the right to possess, to exclude others and to dispose of property.”); *City of Des Moines v. Gray Bus., LLC*, 130 Wn. App. 600, 611-12 (2005) (holding there is a *per se* taking if regulation destroys or derogates a fundamental attribute of property ownership); and *Schreiner Farms, Inc. v. Smitch*, 87 Wn. App. 27, 34 (1997) (analyzing whether regulation deprived owner of fundamental attribute of ownership independent of a physical invasion or total taking).

An assessment of fundamental property rights has always been a component of takings analysis. *Great Northern Ry. Co. v. State*, 102 Wash. 348, 351, 173 P.40 (1918) (“The constitutional provision must have been intended to protect all essential elements of ownership which make property valuable”). “Property is not one single right, but is composed of several distinct rights, which each may be subject to regulation. The right of property includes four particulars: (1) right of occupation; (2) right of excluding others; (3) right of disposition, or the right of transfer in the integral right to other persons; (4) right of transmission.” *Manufactured Housing*, 142 Wn.2d

at 367. A fundamental attribute of property also includes “being able to make *some economically viable use* of property.” *Guimont*, 121 Wn.2d at 602 (basing extension on *Lucas*). The protections afforded “fundamental attributes of property” are recognized in federal law. *Loretto*, 458 U.S. at 435-36 (“property rights in a physical thing have been described as the rights ‘to possess, use and dispose of it’”). When government deprives a person of a fundamental right of property, “the government does not simply take a single ‘strand’ from the ‘bundle’ of property rights: it chops through the bundle, taking a slice of every strand.” *Id.*

The court in *Manufactured Housing* specifically addressed the “fundamental attributes” component. Washington has historically recognized the value and significance of “property” in the context of condemnation and eminent domain.

Property in a thing consists not merely in its ownership and possession, but in the unrestricted right of use, enjoyment and disposal. Anything which destroys any of these elements of property, to that extent destroys the property itself. The substantial value of property lies in its use. If the right of use be denied, the value of the property is annihilated and ownership is rendered a baron right.

*Akerman v. Port of Seattle*, 55 Wn.2d 400, 409, 348 P.2d 664 (1960); *Lange v. State*, 86 Wn.2d 585, 590, 547 P.2d 282 (1976). The United States Supreme Court has long held property consists of a “group of rights” inhering

in the citizens' relation to the physical thing, as the right to possess, use and dispose of it." *United States v. General Motors Corp.*, 323 U.S. 373, 378 (1945). Article I, section 16 was intended to protect all the essential elements of ownership which make property valuable. *Great Northern Ry. v. State*, 102 Wash. 348, 173 P. 40 (1918). There is no legal or logical basis to jettison the well-established fundamental attribute test.

**E. Amici Ask Court To Ignore *Stare Decisis*.**

The purpose of stare decisis "assures that citizens can rely on the rule of law in decision making." *1000 Virginia Ltd. Partnership v. Vertecs Corp.*, 158 Wn.2d 566, 595, 146 P.3d 423 (2006). It "helps make the system of justice one of unity, assuring that the decisions of courts of last resort are reliable and binding." *Id.* at 596. Without adhering to the doctrine of stare decisis, "law becomes subject to the whims of current holders of judicial office." *Id.* It acts as a protector of common-law liberty and acts as a restraint on judicial discretion. *Id.*

Under the doctrine of stare decisis, courts follow previous judicial decisions "unless they contravene principals of justice." *Id.* When this Court is persuaded to "abandon a long-established Washington doctrine and to adopt a new rule . . . stare decisis 'requires a clear showing that an established rule is incorrect and harmful.'" *Id.* (citations omitted). Here,

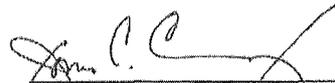
Associations have failed to show that Washington's well-established takings analysis is incorrect and harmful. Rather, the Washington takings analysis provides greater constitutional protection to Washington citizens and should not be abandoned. This Court's prior takings analysis does not "contravene principals of justice" and, therefore, should be followed. *See Id.*

### **III. CONCLUSION**

This is not the case to reexamine or revisit decades of takings analysis. Administrative Order No. 7178 clearly derogates a fundamental attribute of property ownership – historic use, possession and access to stock water rights. The rights are firmly established under current takings analysis and should be affirmed in this proceeding.

Respectfully submitted this 31<sup>st</sup> day of October, 2012.

**VELIKANJE HALVERSON P.C.**



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**CERTIFICATE OF SERVICE**

I, TORI DURAND, hereby state and declare as follows:

That I am a citizen of the United States of America, a resident of the State of Washington, over the age of eighteen (18) years, and not a party to the above-entitled action, that on the 31<sup>ST</sup> day of October, 2012, I caused to be served via the method indicated below, a true and correct copy of (1) this certificate of service; and (2) with proper postage affixed thereto to:

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MARC WORTHY Asst. Attorney General Attorney for Pollution Control Hearings Board 800 Fifth Avenue, Ste. 2000 Seattle, WA 98104	Via U.S. 1 <sup>st</sup> Class Mail Via Email: <a href="mailto:marcw@atg.wa.gov">marcw@atg.wa.gov</a>
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I DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON that the foregoing is true and correct.

DATED this 31<sup>st</sup> day of October, 2012.

  
TORI DURAND