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COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

NO. 30288-1

**COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON**

JOSEPH LEMIRE,

Respondent,

v.

STATE OF WASHINGTON, DEPARTMENT OF ECOLOGY,

Appellant,

THE POLLUTION CONTROL HEARINGS BOARD,

Respondent Below.

**APPELLANT STATE OF WASHINGTON'S ANSWER TO BRIEF
OF AMICUS CURIAE PACIFIC LEGAL FOUNDATION AND
WASHINGTON FARM BUREAU**

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I. INTRODUCTION

The Pacific Legal Foundation and the Washington Farm Bureau (collectively the “Amici”) assert both that destruction of a fundamental attribute of property ownership is a relied upon aspect of a per se takings test and that the right to use land for ranching purposes is an attribute of property ownership protected by the Washington courts. These arguments overstate the use by the Washington courts of the “fundamental attribute” test and seek to expand the concept of a fundamental attribute of property ownership in a way which conflicts with previous court decisions. The Amici also assert that a constitutional claim raised alongside an Administrative Procedure Act (APA) claim should be controlled by the APA in determining the remedy. There is no support for such an argument, especially as the courts have consistently determined that the remedy for per se taking is payment of just compensation.

In their briefing the Amici have failed to establish that the superior court’s invalidation of Ecology’s order as a per se taking was proper. The superior court’s invalidation of Ecology’s order should be reversed and the order should be reinstated.

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II. AUTHORITY AND ARGUMENT

A. Ecology's Order Is Not A Per Se Taking

The reason for a finding of a per se taking by the superior court in this case was not clearly explained, except for the statement that the taking determination is “further substantiated by the modicum of evidence that was cited to substantiate issuance of [Ecology’s order].” CP at 191. Mr. Lemire has argued that the requirement in Ecology’s order for exclusionary fencing keeping cattle from Pataha Creek constitutes a per se taking under the Washington Constitution, while acknowledging that Ecology’s order is not a “physical invasion” or a “total taking” of property interest. *See* Response Br. at 38–39. He claims that Ecology’s order destroys a fundamental attribute of property ownership. *Id.* The Amici repeat the argument that Ecology’s Order destroys a fundamental attribute of property ownership—namely Mr. Lemire’s right to use his property for ranch operations.¹ *See* Amici Br. at 8.

In determining if a per se taking has occurred, Washington courts have consistently looked at whether a regulation, as applied, is a “physical invasion” or “total taking.” The courts also mention that the per se test

¹ The Amici also contend that Ecology’s Order constitutes a taking by interfering with Mr. Lemire’s stock-water rights. As the superior court found, the record contains no evidence of a violation of a water right for stock-watering purposes. CP at 191; *see also* Appellant’s Reply Br. at 16–17 (describing the lack of evidence of the existence of, or an impairment to, a stock-water right).

includes a determination of whether the order destroys or derogates a fundamental attribute of property ownership, although this has not been used solely as justification to find a per se taking. In this case, no proof has been offered to show that Ecology's order is a physical invasion, or a total taking, or destroys or derogates a fundamental attribute of property ownership. Despite the claim of Mr. Lemire and the Amici, Washington courts have rejected the argument that the "right" to use property in a certain way is a fundamental attribute of ownership. Therefore no per se taking has occurred in this case.

- 1. In determining a per se violation of the taking clause, Washington courts have mentioned—but have not relied upon—whether the regulation “destroys a fundamental attribute of ownership.”**

Washington takings analysis employs three main elements. First the court asks whether the government has physically invaded private property. If the court finds no physical invasion, it poses a question of whether the government has committed a “total taking” (i.e., denying the property owner all economically viable use). The third element is whether the regulation destroys some other fundamental attribute of property ownership, such as the right to possess, exclude others, or dispose. As noted in Appellant's Opening Brief at 38, while the third element has been acknowledged by the courts, unlike the other two elements it has never been used as sole justification for finding a per se taking. It is interesting

to note that the “fundamental attribute[s] of property ownership” identified in *Guimont v. Clarke*, 121 Wn.2d 586, 602, 854 P.2d 1 (1993), are usually implicated as part of a “physical invasion” or “total taking.” For example, the right to possess property, exclude others, or dispose of property, is usually covered by a claim of taking by physical invasion. The right to make some economically viable use of property is covered by a claim of a total taking. *See Guimont v. City of Seattle*, 77 Wn. App. 74, 76 n.5, 896 P.2d 70 (1995) (noting fundamental attributes of ownership rights “are implicated by a total taking, a physical invasion or a regulation which denies the owner any beneficial use of his or her land”).

The closest the Court has come to basing a takings determination on an alleged destruction of a fundamental attribute of property ownership was in *Manufactured Housing Communities of Washington v. State*, 142 Wn.2d 347, 13 P.3d 183 (2000). *See* Appellants Opening Br. at 38, n.18. This case is unique as it did not involve the usual assertion of a taking remediable through compensation, but involved a facial challenge to the validity of a statute that gave qualified tenants the right of first refusal to purchase their mobile home parks. The plurality of the Court invalidated the statute because it purported to authorize the government to take property for a purpose not authorized by the Washington State Constitution. *Manufactured Housing*, 142 Wn.2d at 374. The Court

determined that a taking had occurred because the owner was deprived of a fundamental attribute of ownership and because the property right was statutorily transferred to a private party for an alleged public use. *Id.* at 369.

While court decisions have mentioned the “fundamental attribute” test, it has never been used as the sole basis for finding a per se taking. Even in the cases cited by Amici, the courts gave a quick review of the “fundamental attribute” test, but the decisions were primarily focused on whether there was a “physical invasion” or “total taking”. In *Borden v. City of Olympia*, 113 Wn. App. 359, 53 P.3d 1020 (2002), and *Kahuna Land Co. v. Spokane County*, 94 Wn. App. 836, 974 P.2d 1249 (1999), the court merely mentioned the “fundamental attribute” test when discussing what is reviewed as part of a takings review without further analysis. In *Ventures Northwest Ltd. Partnership v. State*, 81 Wn. App. 353, 914 P.2d 1180 (1996), and *Jones v. King County*, 74 Wn. App. 467, 874 P.2d 853 (1994), the court’s review of the takings analysis focused only on whether the property retained economic viability (a “total taking” issue).

Whether a fundamental attribute of ownership has been destroyed can be reviewed in the context of determining whether there was a “physical invasion” or “total taking.” Thus, the use of a stand-alone “fundamental attributes” test adds little value to the per se taking review.

It also creates a distinction from the federal takings analysis. For these reasons, it is appropriate for the Court to follow the example of the federal courts regarding per se taking analysis. *See, e.g., Lingle v. Chevron U.S.A., Inc.*, 544 U.S. 528, 537, 125 S. Ct. 2074, 161 L. Ed. 2d 876 (2005). Regardless, Mr. Lemire has not shown a per se taking occurred—even using the “fundamental attributes” test.

2. The right to use property in a specific way is not a recognized fundamental attribute of ownership.

Fundamental attributes of property ownership have been identified as the right to possess, exclude others, or dispose of property. *See Guimont*, 121 Wn.2d at 602. Amici attempt to expand these identified rights to include the right to use land for a particular purpose (in this case, ranching). Courts have consistently rejected the notion that the ability to use a property for its preferred purpose is a fundamental attribute of ownership. Appellant’s Reply Br. at 19–20. Instead, the test is whether the regulation destroys *all* economically viable use of the property. *See, e.g., City of Des Moines v. Gray Businesses, LLC*, 130 Wn. App. 600, 614, 124 P.2d 324 (2005) (“[b]ecause the ability to use or lease property for mobile home use is contingent, it is not a part of the ‘bundle of sticks’ which the owner enjoys as a vested incident of ownership. It is thus not a fundamental attribute of ownership.”)

Amici make a general argument that a right to use property derives from the right to possess property and the right to make economically viable use of property. Amici Br. at 8. They cite no authority for this claim and, as noted above, all authority points to the opposite conclusion. “[A] regulation that may impact the property’s highest and best use is not a taking.” *Ventures Nw.*, 81 Wn. App. at 366. However, even if it were, Mr. Lemire has not been deprived of the ability to use his property for ranching purposes. Rather, he has been directed to correct the conditions on his property that create a substantial potential to pollute state waters. No taking has occurred.

3. Mr. Lemire has presented no evidence that Ecology’s Order impacts stock-water rights.

Amici appear to argue that Ecology’s order denies Mr. Lemire access to water for stock-watering, and this destroys a fundamental attribute of ownership. First, the issue of whether Ecology’s order violates Mr. Lemire’s stock-water rights is a new issue not raised before the Pollution Control Hearings Board. *See* Appellant’s Reply Br. at 6–8. Further, the superior court expressly declined to reach the stock-water issue (CP at 191) and this determination was not cross appealed by Mr. Lemire. *Id.* The court should reject Mr. Lemire and the Amici’s attempt to raise the issue in this appeal.

The Amici claim that the right to access water is a historic right belonging to a riparian property owner. However, a property owner does not have a surface water right merely by owning property adjacent to a water body. After enactment of the state Water Code in 1917, landowners were required to apply for permits to obtain rights to surface water for stock-watering purposes. A property owner would either have a right established through the permitting process (water right permit or certificate) or would have filed a claim form under RCW 90.14 to assert any historical pre-code “riparian” right that might have been established prior to 1917. See RCW 90.03.240, .250, .290, .330; RCW 90.14.041–.121; Appellant’s Reply Br. at 16–17. Any “right” to access water would be contingent on the property owner having shown that a water right existed in the first place.

Additionally, while Ecology’s order prohibits Mr. Lemire from giving his cattle unfettered access to the creek, there is no proof that the requirements of the order impair Mr. Lemire’s access to the creek.

Amici’s attempt to analogize Mr. Lemire’s facts to those in which the United States Court of Federal Claims found a physical taking of vested water rights in *Estate of Hage v. United States*, 82 Fed. Cl. 202 (2008), should be rejected. As a threshold matter, Mr. Lemire has disclaimed any “physical invasion” taking theory. Second, *Hage* is

inapposite because it involved the government's active construction of fences on federal grazing land around streams in which the plaintiffs had established a vested water right, preventing the plaintiffs' cattle from accessing water under threat of trespass. *See Hage*, 82 Fed. Cl. at 211. The court of federal claims stated those actions "[c]learly . . . prevented Plaintiffs' access to the water and there was plainly a 'physical ouster' which deprived Plaintiffs of the use of their property." *Id.* Here, Ecology did not fence Mr. Lemire's property, otherwise physically block Mr. Lemire from accessing his property, or impose an easement requirement. Additionally, unlike with the Hages, there is no evidence that Mr. Lemire has a stock-water right or that his use of such a right is impacted by Ecology's order.

The situation is actually closer to that in *Iowa Assurance Corp. v. City of Indianola*, 650 F.3d 1094 (8th Cir. 2011). In this case, the City of Indianola adopted an ordinance requiring land on which cars (including racing cars) were stored to be enclosed by a fence if two or more cars were present outside. A property owner sued the city alleging a regulatory taking. The district court held the ordinance was not a taking and the Eighth Circuit affirmed. The court held that the ordinance did not require the owner to install a fence; it only required the owner to install the fence if he wanted to store two or more race cars on his property. So long as the

property owner could choose whether to build the fence or forgo placing more than one vehicle outside, he could not establish the required compliance necessary for a regulatory taking claim. *Iowa Assur. Corp.*, 650 F.3d at 1098.

In a similar manner, Ecology's order does not require Mr. Lemire to install a fence excluding cattle from the creek. He is only required to install the fence if cattle are kept in pasture with access to the creek. Ecology's order does not permit either Ecology or any third party to enter Mr. Lemire's property and install a fence. Therefore there is no erosion of the right to exclude others from the property.

B. Just Compensation Is The Remedy For A Takings Violation

Amici repeat Mr. Lemire's argument that invalidation of the order is a proper remedy under the APA. Amici Br. at 12. However, as noted in the reply brief, a taking is unconstitutional only if the taking occurs without just compensation. Appellant's Reply Br. at 23. Here, the court leapt over the issue of just compensation and simply invalidated the order. This was erroneous.

As the Supreme Court set out in *Guimont*, 121 Wn.2d at 603, 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 (i.e., the owner receives just compensation without case-specific

inquiry into the legitimacy of the public interest supporting the regulation). If the owner fails to prove either a physical invasion or total taking has occurred, then there is no per se constitutional taking requiring immediate payment of just compensation.

The Amici attempt to support the court's decision to invalidate the order by claiming plaintiffs may be entitled to invalidation of regulations in lieu of just compensation. To support this, they cite two U.S. Supreme Court cases which mention invalidation as an option under federal takings analysis.² However, when citing to the partial concurrence in *Palazzolo*, the Amici omit the portion of the quotation stating that whether to forego regulation altogether or to accompany regulation with compensation is a choice for the *State* to make. *Palazzolo v. Rhode Island*, 533 U.S. 606, 639 n.1, 121 S. Ct. 2448, 150 L. Ed. 2d 592 (2001). This is consistent with state takings jurisprudence that recognizes that the government may, *at its option*, amend or repeal a regulation to limit payment of compensation. *Orion Corp. v. State*, 109 Wn.2d 621, 668–69, 747 P.2d 1062 (1987).

² Amici also state that the Washington Supreme Court has invalidated a government act when it constitutes a taking, citing to *Manufactured Housing*, 142 Wn.2d 347. However, in that case the court was clear that the decision to invalidate was not based solely on takings claim but required invalidation because the property right was statutorily transferred. *Id.* at 369.

The *Nollan* case cited by Amici is factually distinct in that it involved a condition on a land use permit that was unrelated to any harm that would be caused by the development being permitted. *Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825, 107 S. Ct. 3141, 97 L. Ed. 2d 677 (1987). Specifically, the permit required the property owners to provide a path across their property to the public beach. In invalidating the condition, the *Nollan* court recognized that California has the authority to require an easement across the property, but that California would have to justly compensate the property owners rather than unilaterally impose the condition. *Nollan*, 483 U.S. at 841–42.

Under Washington regulatory takings jurisprudence, when a regulation results in a taking, the remedy is just compensation. See *Orion Corp.*, 109 Wn.2d at 649; *Presbytery of Seattle v. King Cy.*, 114 Wn.2d 320, 329–32, 787 P.2d 907 (1990); *Peste v. Mason Cy.*, 133 Wn. App. 456, 470, 136 P.3d 140 (2006). It is when the regulation violates substantive due process that the remedy is invalidation of the offending regulation. *Presbytery of Seattle*, 114 Wn.2d at 329–32. As the court noted in *Orion Corp.*, once a regulatory taking has occurred, invalidation “is not a sufficient remedy to meet the demands of the Just Compensation Clause.” *Orion Corp.*, 109 Wn.2d at 656 (quoting *First English*

Evangelical Lutheran Church v. L.A. Cy., 482 U.S. 304, 319, 107 S. Ct. 2378, 96 L. Ed. 2d 250 (1987)).

As both the substantive due process test and the regulatory takings doctrine conceptually apply to the problem of excessive regulation, the court can protect landowners from the “unfair burden” of shouldering an economic burden which the public should rightfully bear by invoking either the constitutional guaranty that property will not be deprived without due process of law or the constitutional requirement of just compensation whenever the state exercises its power of eminent domain to take private property for public use. As the *Orion Corp.* court noted, “[t]he crucial difference lies in the remedy to be applied: invalidation or the payment of just compensation.” *Orion Corp.*, 109 Wn.2d at 649. In this case, the superior court found a per se taking by Ecology’s order and the appropriate remedy would be required payment of just compensation. The superior court erred by ruling otherwise.

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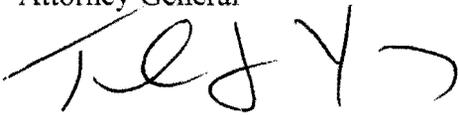
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III. CONCLUSION

Ecology respectfully asks the Court to reverse the superior court's decision invalidating Ecology's order, and affirm the Board's decision granting summary judgment to Ecology.

RESPECTFULLY SUBMITTED this 30 day of April 2012.

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CERTIFICATE OF
SERVICE

Pursuant to RCW 9A.72.085, I certify that on the 30th day of April 2012, I caused to be served a true and correct copy of Appellant State of Washington's Answer to Brief of Amicus Curiae Pacific Legal Foundation and Washington Farm Bureau in the above-captioned matter upon the parties herein as indicated below:

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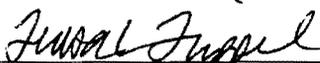
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