

BEFORE THE EDMONDS CITY COUNCIL

Re: Tom and Lin Hillman

APPEAL FROM FINAL DECISION UPON  
RECONSIDERATION, ENTERED BY  
EDMONDS HEARING EXAMINER PHIL A.  
OLBRECHTS APRIL 24<sup>th</sup>, 2013

ARGUMENT

PLN20120033

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Stephen C. Schroeder and Cheryl L. Beighle,  
1142 Vista Pl., Edmonds, WA 98020, Telephone  
# (425) 712-8694; and Todd  
and Candy Brown, 1135 Sierra Pl., Edmonds, WA  
98020, Telephone # (425) 672-4418; Parties of Record,  
Appellants.

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MAY 31 2013

DEVELOPMENT SERVICES  
COUNTER

## ARGUMENT

The Hillmans (Applicants) seek various variances from boundary setback requirements as well as from stream, wetlands and buffer restrictions found in the ECDC. Indeed, they are seeking permission to construct a single-family residence entirely within the buffers and the wetland itself.

County tax records reflect that Darryl and Shari Lewis purchased the property on May 28, 2003, for \$190,000. On August 7, 2003, the area in question was the subject of a Critical Area Study conducted for the City of Edmonds by Wetland Resources, Inc. As a result of that Study, the wetland and stream boundaries, and their buffers, were delineated. Those boundaries were substantially unchanged ten years later when Wetland Resources, Inc., performed a Critical Area Study and Wetland Mitigation Plan for the Hillmans [Attachment 8, Planning Division Report & Recommendation].

In 1905, the area in question was platted into five acre tracts, known as the Puget Sound Machinery Depot. Over the subsequent ninety years, the tracts were designated as R12 (12,000 square foot lots) for building purposes, and most of the lots were developed with single-family residences. With one exception (the Hachler property), all of the other properties could be developed without the granting of a variance from the wetlands protection statutes. It is significant that the property in question, 1139 Sierra Place, is, more than a hundred years after the filing of the original plat, the sole property designated therein that has not been developed. This is due to the obvious sensitivity of the lot and its general unsuitability for building, even before the enactment of the now customary statutory protection of such areas.

The City of Edmonds, recognizing its duty to maintain the public trust in wetlands, habitat, and other sensitive areas, enacted broad protections for these areas.

In 2000, the City Council adopted Ordinance 3318 updating its Shoreline Master Program. Currently found in ECDC 23.10.105.B, those provisions recognized the unique and valuable nature of certain sensitive areas:

*“2. Natural Environment. These are characteristically large undeveloped or sparsely developed areas exhibiting some natural constraints such as wetland conditions, frequently containing a variety of flora and fauna and in a natural or semi-natural state. The natural environment is intended to preserve and restore those natural resource systems existing relatively free of human influence and those shoreline areas possessing natural characteristics intolerant of human use or unique historical, cultural or educational features. These systems require severe restrictions on the intensities and types of uses permitted so as to maintain the integrity of the shoreline environment. This environment designation is intended to:*

*a. i. Maintain diverse natural resource systems, including wetlands, associated with or within the area of shoreline jurisdiction, particularly Puget Sound; and*

ii. Prevent the loss or degradation of the functional value of natural resources including primary food chain productivity, wildlife habitat, flood attenuation, water quality improvements, and vegetation community diversity; and

iii. Protect areas with unique or diverse natural characteristics from disruptive activities including human and domestic animal intrusion.

**ECDC 23.40.000.**, added by Ordinance 3527 on November 23, 2004, continued to recognize this duty.

*“C. The city of Edmonds finds that critical areas provide a variety of valuable and beneficial biological and physical functions that benefit Edmonds and its residents, and/or may pose a threat to human safety or to public and private property. The beneficial functions and values provided by critical areas include, but are not limited to, water quality protection and enhancement, fish and wildlife habitat, food chain support, flood storage, conveyance and attenuation of flood waters, ground water recharge and discharge, erosion control, wave attenuation, protection from hazards, historical, archaeological, and aesthetic value protection, and recreation. These beneficial functions are not listed in order of priority.”*

The same Ordinance added or amended other provisions dealing with the City’s duty under State law and public trust doctrines, namely 23.50 ( Wetlands), and 23.90 (Fish and wildlife Habitat Conservation Areas), among other sections of the ECDC.

In light of this history of regulation as well as the fact that this property remains undeveloped more than a hundred years after the plat was filed, the Applicants simply had no reasonable expectation that they would be allowed to develop it.

In the area of regulatory restrictions on private property, two separate clauses of the U.S. Constitution have been held to apply. First, the Fifth Amendment provides “nor shall private property be taken for public use, without just compensation.” The second applicable clause is found in the Fourteenth Amendment, which states, “nor shall any State deprive any person of life, liberty, or property, without due process of law. . . .”

The former, known as the takings clause, was long applied to eminent domain actions whereby a State asserted a physical presence on private property, ranging from a total condemnation of the land for a public purpose, to the reduction of an owner’s right to exclusive access, such as an easement or enforced right of entry.<sup>1</sup> Such physical invasions of property have long been treated as takings requiring compensation.

The second situation in which the U.S. Supreme Court held that a compensable taking might occur “is where regulation denies all economically beneficial or productive use of land.”<sup>2</sup> Even

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<sup>1</sup> Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982) (regulation that allowed cable company to attach small box to structure).

<sup>2</sup> Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1015 (1992).

then, the Court expressed the continued efficacy of the prior rule, which was stated in the disjunctive, i.e., “the fifth Amendment is violated when land-use regulation ‘does not substantially advance legitimate state interests *or denies an owner economically viable use of his land.*’”<sup>3</sup> The nature of those “legitimate state interests” was further revealed to include reasonable regulation of land use, thus: “Where the State seeks to sustain regulation that deprives land of all economically beneficial use, we think it may resist compensation only if the logically antecedent inquiry into the nature of the owner’s estate shows that the proscribed use interests were not part of his title to begin with. . . . It seems to us that the property owner necessarily expects the uses of his property to be restricted, from time to time, by various measures newly enacted by the State in legitimate exercise of its police powers.”<sup>4</sup>

Implicitly, the Lucas Court distinguished between restrictions that had been enacted prior to the owner’s acquisition of the property, and those newly enacted after her rights had vested. “Any limitations so severe (as to prohibit all economically beneficial use of the land) cannot be newly legislated or decreed (without compensation), but must inhere in the title itself, in the restrictions that background principles of the State’s law of property and nuisance already place upon land ownership.”<sup>5</sup>

This language concerning background principles of State law was a nod to the body of decisions that had held that government regulation of private property does not effect a taking if the regulation substantially advances legitimate state interests.<sup>6</sup> Under this line of cases, a valid exercise of the state’s police power to prevent harm and promote the public good could not amount to a taking no matter how onerous the restriction. Then in 2005, in a case out of Hawaii involving rent controls on oil company-owned service stations, the Supreme Court narrowed its apparent prior holding in Agins. The “substantially advances legitimate state interests” language, it now explained, was applicable to a Due Process analysis as to whether a regulation was a valid exercise of the police power. Even a regulation that passes muster under the Due Process Clause may amount to a taking if it “completely deprives an owner of ‘all economically beneficial use of her property.’”<sup>7</sup> After enunciating what seems, at first blush, to be a categorical rule, however, the Court went on to endorse the regulatory exception set forth in Lucas. “[T]he government must pay just compensation for such ‘total regulatory takings,’ except to the extent that ‘background principles of nuisance and property law’ independently restrict the owner’s intended use of the property.”<sup>8</sup>

A number of courts and commentators have subsequently concluded that “background principles of the State’s law of property” that limit an owner’s title, include a state’s land-use laws and

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<sup>3</sup> *Lucas at 1016*.

<sup>4</sup> *Id.* At 1027.

<sup>5</sup> *Id.* At 1029.

<sup>6</sup> Agins v. City of Tiburon, 447 U.S. 255 (1980). Accord, Presbytery of Seattle v. King County, 114 Wn.2d 320 (1990).

<sup>7</sup> Lingle v. Chevron U.S.A. Inc., 544 U.S. 528 at 538 (2005).

<sup>8</sup> *Id.*

regulations. See, e.g., Michael C. Blumm and Lucus Ritchie, *Lucas's Unlikely Legacy: The rise of Background Principles as Categorical Takings Defenses*, 29 Harv. Environ. L.Rev., 321 (2005).<sup>9</sup>

For example, one commentator has concluded that “despite complete elimination of use and/or value, a restriction is not a taking if it merely duplicates what could have been achieved under ‘background principles of the State’s law of property and nuisance’ existing when the plaintiff acquired the land. Such background principles limit the rights that the plaintiff acquired in the property. Plainly, there can be no taking when a government restriction eliminates a right the landowner never had.”<sup>10</sup>

In the Applicants’ case, it is not at all apparent that, even if in the unlikely event that they had a vested property right to build a house on the known wetland and its buffers, the regulations deprived them of all value. A land swap option seems viable whereby the development of the land could be swapped for development rights on less sensitive property. In addition, Mr. Brown, at the Hearing on this matter on March 14, 2013, indicated his willingness to purchase the property for what the Hillmans paid for it. This would allow them to avoid any loss in value on their rather speculative investment. Both the Court of Federal Claims and Federal Circuit have held that a plaintiff’s ability to recoup his cost basis (for unimproved land, purchase price) in the property under the challenged regulation is a valid consideration in a takings claim.<sup>11</sup>

In a case such as this, when the government interference falls short of completely eliminating use and/or value, the balancing test enunciated in Penn Central Transportation Co. v. New York City<sup>12</sup> is applied. Unlike the per se rule in *Lucas*, the Penn Central case identified three factors that are significant in determining whether a regulation effects a taking – the regulation’s economic impact on the property owner, the extent to which it interferes with the owner’s reasonable investment-backed expectations, and the character of the government action.<sup>13</sup>

As to the character of the government’s actions, the Court explained that a taking is much less likely to be found when a public program simply adjusts “the benefits and burdens of economic life to promote the public good.” As an example, the Court cited generally applicable zoning laws, which are generally viewed as permissible governmental action even when prohibiting the most beneficial use of the property.<sup>14</sup>

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<sup>9</sup> This helpful article can be accessed at [http://www.law.harvard.edu/students/orgs/elr/vol29\\_2/blumm.pdf](http://www.law.harvard.edu/students/orgs/elr/vol29_2/blumm.pdf)

<sup>10</sup> Robert Meltz, *TAKINGS LAW TODAY: A PRIMER FOR THE PERPLEXED*, 34 Ecology L.Q. 307 (2007), at 329.

<sup>11</sup> Florida Rock Industries, Inc. v. United States, 791 F.2d 893 (Fed. Cir. 1986); Walek v. United States, 49 Fed. Cl 248, 266-67 (2001).

<sup>12</sup> 438 U.S. 104 (1978).

<sup>13</sup> Penn Central, 438 U.S. at 124.

<sup>14</sup> *Id.*

Prior to 2001, a number of state and Federal courts seemed to hold that a regulatory taking claim would be defeated if the state's land use restrictions contained in laws and regulations were already in place when the claimant acquired title to the land. In a few cases, the court seemed to hold that a takings claim could be defeated if the adoption of such regulations after acquisition was foreseeable. Courts based the rule on either the investment-backed expectations factor of Penn Central or the background principles concept of Lucas. One noted expert stated categorically: "Regardless of whether the land use restriction is judicial or legislative in origin, as long as it takes effect before the purchase of the property interest that has allegedly been taken, the property owner is not entitled to payment for its inability to engage in the restricted use."<sup>15</sup>

In 2001, in Palazzolo v. Rhode Island,<sup>16</sup> the Supreme Court reviewed a decision of the Rhode Island Supreme Court, in which that court had ruled that a land owner had no right to challenge regulations that predated his acquisition of the property. The majority opinion of the U.S. Supreme Court rejected the per se rule embraced by the Rhode Island Supreme Court and some other lower courts, i.e., that a purchaser is barred from asserting a regulatory takings claim based upon a statutory restriction that existed at the time of his acquisition of the property.<sup>17</sup> The Court's Opinion left open the question of whether the fact that land was subject to the regulations in question at the time it was acquired might still be a factor in the takings analysis. In a separate concurrence, Justice O'Connor agreed that the preacquisition enactment of a use restriction should not *ipso facto* bar a takings claim based upon that restriction. She went on to observe, however, that "the regulatory regime in place at the time the claimant acquires the property at issue helps to shape the reasonableness of those [investment-based] expectations."<sup>18</sup> She went on to point out that, "if existing regulations do nothing to inform the analysis, then some property owners may reap windfalls and an important indicium of fairness is lost."<sup>19</sup>

In contrast to Justice O'Connor's measured approach to the issue, Justice Scalia, perhaps the most powerful advocate of the CATO Institute's absolute, fundamentalist view of property rights, also wrote a scathing, intemperate concurring opinion in which he opined that the timing of a land-use regulation was never relevant in a takings inquiry. During the course of his rather remarkable opinion, he seemed to characterize government land-use regulation as theft and malefaction. Fortunately for land-use regulation, his extreme view has not prevailed. It is noteworthy that the voters of this State have rejected such views, as well. In 2006, they defeated by a 59% vote Initiative 933, an effort by property rights absolutists to require compensation for any government regulation that resulted in any decline in value of the affected property.

Instead, Justice O'Connor's common-sense insights have carried the day. Subsequent decisions continue to give substantial weight to the timing of regulatory statutes. If a buyer knew or

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<sup>15</sup> Robert L. Glicksman, "Making A Nuisance of Takings Law," 3 Washington University Journal of Law & Policy 149, 186 (2000).

<sup>16</sup> 533 U.S. 606 (2001).

<sup>17</sup> Palazzolo at 627.

<sup>18</sup> *Id.*, at 633. Because Justice O'Connor was a member of the Five Justice majority, her defection from the Court's Opinion on this issue deprives that opinion of precedential value on the issue.

<sup>19</sup> *Id.* At 635.

should have known that the economic prospects of developing the land were problematical because of pre-existing restrictions, that buyer's investment-backed expectations are much less likely to be deemed reasonable. "Examples include a person who acknowledges at the time of purchase that regulatory approvals will be hard to obtain, who is or should be aware at such time of government planning affecting economic prospects, **or who pays substantially less for the parcel than its unregulated value.**"<sup>20</sup>

The Hillmans paid a modest sum – an amount substantially below the value of adjacent properties that were not similarly restricted -- for the chance to build a house on a piece of property that they knew was severely restricted by wetlands regulations. Given the need for substantial variances before a single family residence could be built, their prospects for success were highly problematic from the onset of their ownership. They had no **reasonable** investment-backed expectations. Indeed, their purchase of the property has the appearance of speculation. To quote the Superior Court of Rhode Island in the Palazzolo case after remand from the Supreme Court, "Constitutional law does not require the state to guarantee a bad investment," [Palazzolo v. State, 2005 WL 1645974, Superior Ct of R.I., July 5, 2005 (unpublished opinion)].

This case presents to the City Council an important opportunity to bring clarity and finality to the state of the regulation of streams, wetlands and their mandated buffers. Since at least 2000, this City has had on the books comprehensive regulations designed to protect, as part of the public trust, sensitive areas that represent assets of the community as a whole. While reasonable and proportional variances were also provided to protect against unfair or extreme impacts on properties that are unique from similarly-situated lots, those variances were clearly contemplated to be limited to measured and incremental exceptions to avoid unreasonable results. The Decision of the Hearing Examiner in this case goes too far. In allowing a house to be built entirely within protected areas and their buffers, it will set a precedent that will make the future enforcement of the wetlands ordinances difficult, and is likely to subject the City to law suits from landowners and developers, as in the previously cited cases, who subsequently acquire restricted properties and then assert a right to build houses on them. The decision of the Hearing Examiner in this case would amount to an exception that consumes the rule.

Given the history of this piece of land, the City Council is urged to find that, having purchased the property knowing that it was subject to wetlands and stream restrictions, the Applicants had no reasonable investment-based expectations. In addition, as the Hearing Examiner found, they have failed to prove that the footprint of their proposed structure constitutes the minimum necessary to grant relief from the City's critical area regulations. The Application for variances in this matter ought to be denied.

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<sup>20</sup> Meltz, supra note 9, at 340-41, and cases cited (emphasis added).

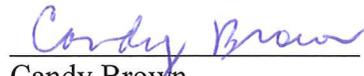
We have read this argument and believe the contents to be true.

Dated this 31 day of May, 2013,

  
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Stephen C. Schroeder

  
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Cheryl L. Beighle

  
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Todd Brown

  
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Candy Brown