

TESTIMONIES OF A WASHINGTON STATE PROPERTY OWNER

The first (6) following testimonies are by a military service retiree Karl Duff who discovered that liberty he had been defending while on active duty was being stolen by local government. He became an activist. He co-founded Kitsap Alliance of Property Owners and also became politically active. As you read, you will see why. Testimonies of others are also added, plus lessons learned and matters of law ESSENTIAL for dealing with bureaucrats. They may otherwise steal your property or your rights to use your property. This is a process now well advanced, and largely unnoticed by the sleeping public.

REMEMBER: There is always ONE way you can give up your constitutional rights; that is through a freely consented contract. They cannot be legally extorted from you as a condition for a permit. See RCW 62A.1-207, copy it and use it! [See Attachment 1, for the language in the federal Uniform Commercial Code Section 1-207 and the Washington State RCW 62A.1-207.]

1. In 1961 I purchased two 2.5 acre lots on Whidbey Island. Intervening the two lots was an improved 30 ft. road, complete with storm ditches and culverts, used for access to other lots. In 1990, after retiring from the Navy, I decided to simplify life and sell one or both of the lots. I was informed that Whidbey Island had in the meantime “downzoned” legal lot sizes from 2.5 acres to 5.0 sizes and that my two separate lots were now considered a single contiguous 5.0 acre lot with the intervening road now serving other homes. It required me over a year and about \$6,000 attorney’s fees to track down and obtain affidavits from the (1) original seller, (2) the original surveyor and (3) the realtor (fortunately all still alive!) and obtain a judge’s ruling for deed reformation. The day after obtaining this, I placed one of the two lots in my wife’s name, making them no longer “contiguous”, which had been the key to the county’s ability to downzone my lots.

REMEMBER: Never retain common ownership of contiguous lots. ALWAYS place the deed ownerships in separate, personal, family trust or company names. You cannot have your grandfathering rights to legal sized lots removed through downzoning if you have taken this precaution.

2. In 1992 I purchased a riverfront lot in the Village of Alpentel, Snoqualmie Pass, WA. The village was already over 80% ‘built out’. Streets, curbs, water, power, sewer, phones and cable TV had already been long-completed. A year later King County passed a “Sensitive Areas Ordinance” (now called a Critical Areas Ordinance, or CAO) declaring a 150 ft. minimum building set-back from all riverfront. My lot was only 130 ft. deep, now legally unbuildable. I submitted a request for a grading permit. With lots of “posturing” King County Department of Community Development (DCD) informed that they could not prevent me from “using” my lot. BUT, it would require a “variance”, at a fee of \$8,000. To support the variance hearing would also require a \$7,000 Riparian Impact Study; i.e., \$15,000 to make my previously legal lot legal again.

I said “no!”, hired a land use attorney, contacted the cognizant King County Councilman for that district, and went to war with King County, while beginning to study land use law. After about a year of battle and \$3,000, King County agreed to do the riparian impact study for me and to lower the variance fee to \$600. I figured that was a good place to quit and sold the lot.

REMEMBER: It is important to fight for what is right and to do so before going into debt to make improvements. The least costly permit to uncover regulatory obstacles on your property is a “grading” permit, to see if you can legally move dirt around on your lot. Remember also the difference between a permit and a license. A property owner does not require a license to build improvements, but any contractor that he hires does. A contractor license requires that he agree in writing (i.e., by contract) to abide by all statutory regulations in effect, either now or later (or he won’t get his business license.) Permits cannot legally require such a contract from the recipient and are explicitly prohibited from placing additional conditions on improvement permits that are not integrally associated with your planned development and would be sought under regular eminent domain procedures. (See attached U.S. Supreme Court cases, *Nollan vs. California Coastal Commission* and *Dolan vs. City of Tigard*.)

3. Also early in my Navy career I purchased 40 acres on First Creek in Chelan County. After retirement, I decided to short-plat into four approximately 10-acre lots. Chelan DCD informed me that they had “upgraded” specifications for the First Creek Road, and could not approve my short-plat application unless I would agree to execute the road improvements for approximately \$1.8M. (I’m not making this up!) I listened to their reasons as to why this was necessary and they cited ‘safety’ and associated sight and stopping distances. I consulted American Highway Engineering Journal specifications, measured the 1.5 miles of road involved and prepared a reasonably professional report showing that all except one curve in the road were already legal and sufficient (except where the County had failed to clear brush). The remaining exception could be handled with a single posted ‘25 MPH’ sign. I was granted my short-plat within a week.

REMEMBER: It is worthwhile to study alleged problems and work to solve them. Most County employees are bureaucrats who will take you for a ride until they sense that you are standing on solid ground, with knowledge and willingness to contest their decisions.

4. A friend of mine with a lot in Mason County proposed we develop his lot under a partnership agreement. I became the legal owner for the purpose of carrying out the agreement. The lot included a 1/10 share ownership of a small community well. Mason County DCD informed me that they could not grant the building permit because we had not been granted a Washington State “water right”. This led to a phone conversation with the State water rights executive director that went roughly as follows: (1) We submitted our request for this three years ago. When can we expect to receive our State water right?

ANSWER: You can’t. We have no budget, no staff and no intention of granting any more water rights. (2) How did the rest of this neighborhood get their building permits?

ANSWER: They are vested in their water usage, because the State had not yet decided to place these restrictions upon water use....but you are not vested and I will not grant a permit to use your share of the well.

After about 15 minutes of this fruitless discussion I stated, “It appears to me that you have violated my Constitutional rights requiring you to compensate me for any of my property that you take without just compensation and further, that you are doing this under ‘color of law’ in violation of Code U.S. 42, section 1983. I therefore now have no choice but to sue you in

federal court, under which if you are found guilty, you are subject to 10 years in federal prison and a fine of \$250,000.”

From that point in the conversation, it only required the director approximately one minute to explain how to obtain my building permit. This was *all taken care of* within 48 hours.

REMEMBER: If you are informed and prepared to fight, either a bear or a human being can sense it and will usually back off. Do your homework, become knowledgeable and fight for your rights.

5. A beachfront rental property I owned was losing its bank under its front deck due to wave action erosion and required a bulkhead for protection. My first bulkhead permit request (requiring 40 days for approval) was ‘lost’ by Kitsap County (hmmm!), so I resubmitted a new permit request. After 20 days or so I returned to check on its status and I was informed that this request had been ‘lost’ also. I requested to see the director and was informed that he was ‘out’. I made it clear I would wait by the counter until he returned. Five minutes later the notorious lady behind all of this permitting came out with a signed, approved bulkhead permit in her hand and gave it to me.

There was a minor administrative approval required by the State fisheries agent. He came down and inspected the beach, and specifically approved the design in a brief closing conference and left. He had remarked at one point that a rock bulkhead would have been somewhat superior to the concrete bulkhead I had already planned. The lady began to seriously harass me to obtain MORE alternative bids. I had done this previously and I pointed out I’d found rock bulkheads were about 40% more expensive. I also had signed a contractor under competitive bidding, the design had been approved and time was being lost, especially due to the county’s loss of the first permit, etc.. About four or five times she kept saying, “But you heard what the fisheries guy said”.

She sounded thoroughly committed to a rock bulkhead. So, finally, I said, “Okay, Rene, I’ll do another round of solicitation and bids for a rock bulkhead if you’ll put into writing that I can’t build the bulkhead for which I have this signed permit.”

She got up and walked out of the room. A moment later her supervisor came in, shook my hand and wished me success on my concrete bulkhead!” I never saw or spoke to that lady again.

REMEMBER: Be faithful to your convictions. Most county bureaucrats are bluffing and may have reputation for toughness that is a mirage! Be prepared to go to a Hearing Examiner if necessary to obtain what is right and just under the law.

6. I short platted a 7.5 acre rental housing property and its surrounding fields into three 2.5 acre pieces just prior to Kitsap County’s down-zoning minimum lot sizes to 5.0 acres (which would have precluded such a short-plat.) The preliminary approval came back with eight (8) conditions assigned involving buffers, use restrictions and set-backs. I individually visited the various desks which had generated these proposed restrictions and got all of them rescinded, (except one to which I conceded to because I had won all the other discussions) based on common law and already existing use of the fields. I immediately placed the approved 2.5 acre lots into three different deed ownerships.

REMEMBER: Where statutory laws are not clear or don't exist, common law should prevail. This limits the discussion only to what public or personal safety and/or health issues OR contract are involved in your planned use. (Example: Although I had a large pond, it was one I had built myself; there were no legacy fish or wildlife considerations involved and none of the waters flowed onto other private or public property.)

Karl Duff

NOTE: Some of the following testimonies involve the county or municipality agreeing to grant a permit if a property owner will agree to “give up” or commit to something to which he is not obliged by law, with the county sometimes threatening fines or denying the permit. Typical are demands of unlimited government access to the property involved, a commitment not to seek further permitting, title to portions of land, easements or public access. Remember, such extortion is illegal and you are not obliged to make such concessions. However, if you make such an agreement, you are no longer entitled to your constitutional protections unless you have signed with a notation such as “U/D, RCW 62A.1-207” which records that you signed under duress. [See Attachment A.)

It is very useful TO BE INFORMED in some detail of the U.S. Supreme Court decisions regarding losing efforts by agencies and municipalities to extract through such permit extortion. Two such landmark cases are the attached “*Nollan vs. California Coastal Commission*” and “*Dolan vs. City of Tigard*”,. These require any demands for concession by the property owner to be VERY CLOSELY connected to the actual impact on the public that will result from the planned development. A summary set of what the Courts “held” in their findings is provided in Attachment B.

Pacific Legal Foundation (PLF) attorney Brian Hodges has successfully represented King County and Kitsap County (and other Washington counties) property owners in land use appeals in the Washington State Supreme Court and other lower courts. He has written an article provided on the following link: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1533574 illustrating some employment of the above court precedents. We recommend you ensure educating your local attorneys or work with Evergreen Freedom Foundation as to how these may be employed at (1) your local level, (2) Growth Management Hearings Boards level, and (3) Superior Court levels. Pacific Legal Foundation (PLF) is potentially available to handle your case at higher levels of appeal.

An additional set of other recent Court property rights decisions in the State of Washington is summarized in Attachment D. In addition the following papers, rich in a host of relevant court decisions, are recommended for procurement and study:

- (1) “Analysis – COUNTY IS NOT PERMITTED TO ADOPT SHORELINE REGULATIONS IN ITS CAO” by Brian Hodges, Managing Attorney, Pacific Legal Foundation www.pacificlegal.org, phone (425) 576-0484.
- (2) “A Background Paper on the Shoreline Master Program Updates and Critical Areas Ordinance Review: Effective Participation and Comment” by Dennis Reynolds for Washington REALTORS, May 2010. www.ddrlaw.com

- (3) “Shoreline Master Program Updates – Nonconforming uses and development guidance. State of Washington Department of Ecology (April 29, 2010)
- (4) “The Interplay/Overlay of Shoreline Master Plans, Critical Areas Ordinances, Floodplain Management and Wetlands or *Whatever Happened to “All Appropriate Uses”?* presented at Law Seminars International by A.W. Sandy Mackie January 28, 2010. Perkins Coie LLP, Seattle Washington

From the many educational points of these papers, two should stand out:

- (a) The burden of proof for conditions being placed on a permit or use of property is upon government and (b) The use of “precautionary principle” by government is illegal.

Following is a re-publication of a property assessor interview regarding non-conforming property:

When Homes Become "Non-Conforming"

by Paul Dossett

First published by the [Common Sense Alliance](#), Friday Harbor.

Brought forward by [Bainbridge Island Shoreline Owners](#).

The following is formatted as a **Q&A** with answers provided by Paul Dossett who has been a State Accredited Real Estate Appraiser for 25 years and who served five terms (20 years) as the former San Juan County Assessor.

Question: If government places a non-forming designation on property that previously had been considered conforming, does that change affect the value of the property both in terms of real estate value and assessed value for tax purposes?

Answer: Market value and assessed value (as of the date of the assessment) are of equal value. Many influences and attributes contribute to market value including a "bundle of rights" of conforming uses. If a valuable conforming use becomes non-conforming, then some of the bundle of rights has been diminished; therefore affecting the value of real property to a lower market value. Remember, real estate value is based on "highest and best use" of a parcel of land. If the property bundle of rights has been diminished, so has the highest and best use.

Question: Does the assessment process consider a change in status of property, from conforming to non-conforming when assigning assessed value to property?

Answer: When property is re-assessed for tax purposes, the established value for real property mirrors the real estate market value based on real estate sales. State law requires assessments to reflect 100% of market value. Yes, assessment(s) reflect the difference of parcels that are conforming compared to those that are non-conforming. If real estate sales reflect a non-conforming status value that is lower than a conforming status, tax assessments would also.

Question: Does your experience as Assessor in San Juan County lead you to believe that new restrictions on the use of real property embodied in a regulatory change from conforming to a non-conforming designation tend to reduce the overall value of the property?

Answer: Yes, any restriction to the "bundle of rights" associated with real property will affect the real estate market value negatively. Obviously, a regulatory change affecting real property from conforming to non-conforming is a restriction because the highest and best use and the bundle of rights have been diminished to the property.

Question: If a government regulatory decision creates additional new non-forming properties and if the value of those non-conforming properties is diminished, what affect does that have on the tax obligations for property not affected by such a value reduction? In other words, is there a tax shift and how does it tax shift work?

Answer: Yes, if non-conforming property causes diminished market value, there will be a tax shift to other taxpayers. An explanation is in order to understand this concept.

First this fact must be understood, taxing district property tax revenue is not affected by changes of the assessed value of the district unless the district is already collecting tax revenue at the district's highest tax rate allowed. The tax shift is reflected by the change of the district's tax rate (per \$1,000 assessed value) due to fluctuations in the total assessed value of the district.

If the taxing district revenue remains the same but district's assessed value decreases, the tax rate will increase causing a tax shift to other taxpayers in the district. It is the tax rate times the taxpayer's assessed value that determines the taxes to be paid to the taxing district and the amount of the tax shift by the taxpayers in the district.

SPECIAL NOTE: It was also my personal experience (another testimony!) that I was unable in the early 1990's to procure a watershare from a local municipal water company for an undeveloped waterfront lot after it had been 'downzoned' by Kitsap County to non-conforming. The County refused to cite the property as in good standing and buildable without my obtaining a variance. At the time, a variance only cost \$90, so I elected this solution rather than go to court to contest the County. If I had it to do over, I would take the matter to the county prosecutor, then if necessary, to court.

A testimony of a Mason County resident is instructive regarding the strong tendency of both citizens and county officials to "bend the law". This man had requested approval permit for an auxiliary dwelling unit. The procedure in Mason County is that ALL such permits must be also approved by the Hearing Examiner. Up to this time, the man had "jumped through all the hoops" and was on good relations with all his neighbors. At the opening of the hearing, the Examiner explained carefully that only information presented at the hearing could be considered, either at that time or in event of appeal of the decision. There was no adverse testimony. However, after the hearing was closed a neighbor showed up unexpectedly to oppose approval. After being told they would not be permitted to introduce their objections because the hearing was already closed, the neighbors wrote an impassioned letter to the Examiner requesting it be

reopened. Instead of standing his ground, the Examiner attempted to reopen the hearing and requested the owner's consent. His argument was that the plaintiffs "could probably force the hearing to be reopened if they took the matter to a judge."

However, the owner refused to re-open the door to the Examiner's request, and was granted his permit ruling the next day

Another Mason County testimony:

This is my testimony regarding how I benefited by learning some of the property rights protections principles taught me by the Kitsap Alliance of Property Owners:

I am a pastor in Kitsap County living in Mason County. About three years ago I sought permits for building a garage on my property with overhead storage that could someday be converted to an auxiliary dwelling unit nearing my retirement from ministry.

I had a great deal of difficulty in my permit being turned down for one reason or another. A year and a half passed. I was introduced by KAPO to my County Commissioner, and he was briefed, and only then was I able to obtain a permit after he told the legal department of the county to fix the roadblock, which they did by allowing me to sign an affidavit promising never to sue the county about slope issues.

Now that I could obtain a permit, I found that the county would not release the permit to me unless I signed (26) conditions to which I was required to consent. A few of these were practicable. Others, however, were simple extortion of my property rights. (Examples: Perpetual permission for county personnel to come onto my property any time, demand that current requirements to obtain additional permitting be adhered to even if changes were being planned for years in the future.)

KAPO advised how I could agree to sign-off on these conditions "under protest", preserving my constitutional rights. I wrote a letter to the prosecutor explaining how under *Nollan vs. California Coastal Commission* and *Dolan vs. City of Tigard*, the U.S. Supreme Court had ruled these actions by Mason County's DCD to be illegal. I also wrote in the same letter how the county was in violation of RCW 62A.1-207 when they refused to issue me the permit unless I removed my statements of "under protest, without prejudice" from each of the contracts I felt I was being extorted to sign.

The prosecutor then wrote an email (which I never saw but was informed had been written) to Mark Core, head of the Mason County building department, asking him to reword the "contracts" as necessary. After a two hour face-to-face meeting Mr. Core and I were able to come to agreement. I suspect (but don't know) that everyone else in the county is still subjected to signing contracts as they were written, which I consider extortion.

Mr. Core apologized to me that my permit had been withheld because of my refusal to sign contracts with the county unless I was allowed to reserve my rights by signing under protest, without prejudice per RCW 62A.1-207. It was clear that he was not aware of State and Federal laws, or the constitutional protections of our freedom. Like all bureaucracies, they are only interested in their control over the citizens. These controls will increasingly deprive the citizens of this once great country of the life, liberty and pursuit of happiness that many millions of souls have bled and died to purchase and retain for us. I pray this creeping crud of regulation and control will be thwarted so that their blood was not spilled in vain. Kevin Lea