

## Does the LA-SMP unconstitutionally infringe upon private property rights?

After asking the above-listed question of the local government submitting an SMP for approval, Ecology refers the reader to the State Attorney General's Advisory Memorandum entitled "Avoiding Unconstitutional Takings of Private Property." It is a Memo created by the State Attorney General in December 2006. Ecology doesn't seem to mandate use of that Memo.

That Memo from the State Attorney General asks six questions in this regard. It is instructive solely for a "macro" view of the complex and nebulous legal arena of "takings." Jefferson County does not concede that the State AG has prepared the only or the best way to analyze whether a local regulation rises to the level of an unconstitutional "taking." The issue of whether a "takings" has occurred is much more likely to be crystallized in the context of an SMP permit or SMP permit condition. In fact, most of the familiar "takings" cases arise not from the enactment of a local regulation but by the application of a regulation to a particular landowner or applicant.

Therefore, and for illustrative purposes only, Jefferson County briefly and generally answers the six AG questions. See the matrix on the next two pages.

Nor is the matrix the entire response of Jefferson County to the question listed above. Please refer also to the listed sections of the LA-SMP where constitutional considerations and limitations are either reflected or discussed.

Question from the AG Advisory Memorandum	Answer to question with respect to LA-SMP
<b><i>Will the new LA-SMP amount to a permanent or temporary physical occupation of private property?</i></b>	No, since the government is not physically occupying any privately owned land. See <i>Loretto v. Teleprompter Manhattan CATV Corp.</i> , 458 U.S. 419 (1982).
<b><i>Will the new LA-SMP deprive the owner of all economically viable uses of their property?</i></b>	No, because the LA-SMP, as a creature of the SMA, fosters all reasonable and appropriate shoreline uses, including, for example, increasing both recreational opportunities and public access to the shorelines as well as allowing residential uses at the shoreline. See also the response to the FIFTH question in this matrix.
<b><i>Will the new LA-SMP deny or substantially diminish a fundamental attribute of property ownership?</i></b>	No, because after SMP adoption the landowner will still be the property owner and will continue to have the authority to exclude others from the property and to sell the property. Since those are the three “fundamental attributes” of property ownership that cannot be destroyed, the LA-SMP passes constitutional muster with respect to this question.
<b><i>Will the new LA-SMP require a property owner to dedicate a portion of their property to a public use or grant an easement?</i></b>	Since the LA-SMP regulations derive from the most current, accurate and scientific and technical information available, the LA-SMP satisfies the “nexus” and “rough proportionality” tests laid out in case law by the U.S. Supreme Court. Some specific uses are required to provide public access (either visual or physical access) as part of a proposed shoreline development, but there are numerous caveats that allow the provision to be waived when safety, cultural, cost, environmental, use conflicts or other issues are evident. The LA-SMP regulations at Article 6.3.B (p. 6-16 to 6-18) clarify that the requirement to provide access applies to multi-family residential/subdivisions, public entities, and commercial/industrial uses but does not apply to single family home development. When required, access may also be provided off-site if not feasible on-site.

<p><b><i>Will the new LA-SMP have a severe impact on the landowner's economic interest?</i></b></p>	<p>This question asks about so-called “regulatory takings.” For such allegations refer to the balancing test found in <i>Penn Central Transportation Co. v. New York City</i>, 438 U.S. 104 (1978). When an entire property impacted by the LA-SMP is considered rather than merely the portion subject to a prohibition, it becomes clear that the investment-backed expectations of the landowner have not been unconstitutionally “taken” by the LA-SMP.</p> <p>The LA-SMP recognizes and addresses priority uses consistent with state law. Residential development receives special status as a preferred shoreline use, along with business uses that are water dependent or water related and therefore require a shoreline location. Additionally, properties that are fully contained by SMP jurisdiction are afforded special options to allow preferred use/development (i.e. single family residential, water dependent commercial/industrial) not allowed for those properties that can meet requirements or locate a use/development outside jurisdiction.</p>
<p><b><i>Does the LA-SMP rise to the level of a substantive due process violation suffered by the landowner?</i></b></p>	<p>Since the LA-SMP aims to achieve a legitimate public purpose, uses reasonably necessary means and is not oppressive to the property owner, the answer to this question is “no.”</p>

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