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ULTRA VIRES LAND USE REGULATIONS: A SPECIAL CASE IN SUBSTANTIVE DUE PROCESS

*Daniel A. Himebaugh**

ABSTRACT

The U.S. Supreme Court's land use jurisprudence establishes that arbitrary land use regulations violate the doctrine of substantive due process. Ultra vires land use regulations—those regulations that exceed the delegated authority of the regulating agency under state law—represent a particular type of arbitrary land use regulation. Lower federal courts that have examined such regulations are split on the question whether they violate substantive due process. This article contrasts two federal court of appeals cases in which property owners alleged that a local government agency deprived them of property without due process of law by enforcing an ultra vires land use regulation against them. The article concludes that, consistent with Supreme Court precedent, ultra vires land use regulations must violate the substantive due process rights of the individuals whom they affect.

I. INTRODUCTION

It should be obvious that a government agency deprives a landowner of property without due process of law when the agency imposes a land use regulation that exceeds the limits of the agency's delegated authority under state law. Nevertheless, recent litigation has exposed a split among federal courts as to whether such ultra vires regulations do indeed violate the doctrine of substantive due process. This split should be

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resolved in favor of finding a violation. After all, the United States Supreme Court construes the Due Process Clause of the Fourteenth Amendment to protect individuals against arbitrary action on the part of state governments. A state or local agency which enacts a land use regulation that it lacks authority to enact appears to be acting arbitrarily. Applying such arbitrary policies to curb the ability of individuals to use their property appears to violate the basic due process principle prohibiting unjustified deprivations of property. Courts, however, do not always see things as they appear.

This article is presented in multiple parts. Part II discusses three historical land use cases through which the Supreme Court established a theory of substantive due process. Part III examines two recent federal court of appeals cases involving substantive due process challenges to ultra vires land use regulations—*Cine SK8, Inc. v. Town of Henrietta* and *Samson v. City of Bainbridge Island*. Part IV compares and contrasts those recent cases and finds that the Second Circuit’s opinion refusing to uphold an ultra vires permit decision in *Cine SK8* reflects the Supreme Court’s prevailing view of substantive due process,¹ while the Ninth Circuit’s decision upholding an ultra vires development moratorium in *Samson* is not consistent with Supreme Court precedent.² These cases reveal the disagreement among courts on this issue, but they also demonstrate that courts should see ultra vires land use regulations for what they are—deprivations of property without due process of law.

II. LAND USE AND SUBSTANTIVE DUE PROCESS AT THE SUPREME COURT

My first task is to establish a working definition of “substantive due process.” I will not exhaustively investigate the evolution of that doctrine here.³ For purposes of this surgical exploration, it will suffice to adopt the Supreme Court’s description of substantive due process as a constitutional doctrine which is “intended to secure the individual from the arbitrary exercise of the powers of government.”⁴ Thus, the

1. *Cine Sk8, Inc. v. Town of Henrietta*, 507 F.3d 778, 790 (2d Cir. 2007).

2. *Samson v. City of Bainbridge Island*, 683 F.3d 1051, 1061 (9th Cir. 2012).

3. For a more exhaustive investigation, see Timothy Sandefur, *In Defense of Substantive Due Process, or the Promise of Lawful Rule*, 35 HARV. J.L. & PUB. POL’Y 283 (2012) and Steven J. Eagle, *Property Tests, Due Process Tests and Regulatory Takings Jurisprudence*, 2007 BYU L. REV. 899 (2007).

4. *Daniels v. Williams*, 474 U.S. 327, 331 (1986) (quoting *Hurtado v. California*, 110 U.S. 516, 527 (1884)). The Court recognizes a substantive component to the Due Process Clause: “[B]y barring certain government actions regardless of the fairness of the procedures used to implement them, [substantive due process] serves to prevent

Fourteenth Amendment's Due Process Clause protects individuals from state actions which are arbitrary—*i.e.*, not sufficiently related to legitimate governmental purposes, such as safeguarding public health, safety, morals, or welfare.⁵ An act that does not meet this standard is invalid because it is not “law,” but only unlawful coercion masquerading as law.⁶

With that basic definition in mind, we can begin to trace the doctrine of substantive due process through the Supreme Court's land use

governmental power from being ‘used for purposes of oppression.’” *Id.* at 331-32 (quoting *Den ex dem Murray v. Hoboken Land & Imp. Co.*, 59 U.S. 272, 277 (1856)); *see Stop the Beach Renourishment, Inc. v. Fla. Dep't of Env'tl. Prot.*, 130 S. Ct. 2592, 2614 (2010) (Kennedy, J., concurring) (“And this Court has long recognized that property regulations can be invalidated under the Due Process Clause.”) (citing *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 542 (2005)); *Goldblatt v. Hempstead*, 369 U.S. 590, 591 (1962); *Demorest v. City Bank Farmers Tr. Co.*, 321 U.S. 36, 42-43 (1944); *Broad River Power Co. v. S.C. ex rel. Daniel*, 281 U.S. 537, 539 (1930); *Wash. ex. rel. Seattle Title Tr. Co. v. Roberge*, 278 U.S. 116, 121 (1928); *Nectow v. City of Cambridge*, 277 U.S. 183, 188 (1928); *Vill. of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 395 (1926); *Pa. Coal Co. v. Mahon*, 260 U.S. 393, 413 (1922)); *see also Dolan v. City of Tigard*, 512 U.S. 374, 409 (1994) (Stevens, J., dissenting) (characterizing Due Process Clause as protecting individuals against arbitrary state action); *PruneYard Shopping Ctr. v. Robins*, 447 U.S. 74, 85 (1980) (“[T]he guaranty of due process . . . demands only that the law shall not be unreasonable, arbitrary or capricious, and that the means selected shall have a real and substantial relation to the objective sought to be attained.”) (quoting *Nebbia v. New York*, 291 U.S. 502, 523, 525 (1934)); Daniel R. Mandelker, *Entitlement to Substantive Due Process: Old versus New Property in Land Use Regulation*, 3 WASH. U.J.L. & POL'Y 61, 66 (2000) (“Substantive due process provides the basis for reviewing claims that a municipality's land use decision does not serve legitimate governmental interests because the decision is arbitrary.”).

5. *See Vill. of Euclid*, 272 U.S. at 395. A concise yet powerful statement of the purpose of government is found in the Washington Constitution at Article I, Section 1: “All political power is inherent in the people, and governments derive their just powers from the consent of the governed, and are established to protect and maintain individual rights.” WASH. CONST. art. I, § 1. *Cf.* THE DECLARATION OF INDEPENDENCE para. 2-3 (U.S. 1776) (declaring that governments are instituted to secure individual rights).

6. *See State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 416-17 (2003) (citing *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 587 (1996) (Breyer, J., concurring); *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 846 (1992) (finding that the Fourteenth Amendment's Due Process Clause “has been understood to contain a substantive component . . . ‘barring certain government actions, regardless of the fairness of the procedures’” afforded, at least since 1887); *cf. Calder v. Bull*, 3 U.S. 386, 388 (1798) (“An ACT of the Legislature (for I cannot call it a law) contrary to the great first principles of the social compact, cannot be considered a rightful exercise of legislative authority.”).

jurisprudence.⁷ In the first Supreme Court case to address comprehensive zoning—*Village of Euclid v. Ambler Realty Co.*—the Court confronted the question whether the Village of Euclid’s zoning ordinance facially deprived property owners of liberty and property without due process of law.⁸ The ordinance limited Ambler’s undeveloped lot to residential use, and thereby reduced the property’s value because it forbade Ambler or any subsequent owner from using the property for more lucrative industrial purposes.⁹ The Court determined that the appropriate constitutional test was whether the zoning ordinance was “arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare.”¹⁰ The Court famously refused to strike down Euclid’s zoning ordinance because the Court believed that the law represented a legitimate exercise of the village’s police power to guard against the purported dangers of unregulated development.¹¹ However, the Court allowed that the ordinance *could* be arbitrary, and therefore unconstitutional, if applied to particular properties or conditions where it would not reasonably promote a legitimate governmental purpose.¹² *Euclid* is widely viewed as the Court’s seminal case on land use planning.¹³

Soon after *Euclid*, the Court decided *Nectow v. City of Cambridge*, a case in which the Court encountered the “as-applied” problem it had hypothesized in *Euclid*.¹⁴ Cambridge’s zoning ordinance limited part of Nectow’s lot to residential use.¹⁵ But Nectow’s property was surrounded by established industrial uses and was effectively rendered valueless by Cambridge’s zoning restriction.¹⁶ The Court held that the zoning restriction on Nectow’s property did not promote public health or safety because it was clear that the property could not reasonably be used for

7. The Court has applied substantive due process analysis to land use regulations for at least a century, but the Court’s opinions in this area are few and far between. See *Moore v. City of E. Cleveland*, 431 U.S. 494, 514 (1977) (Stevens, J., concurring) (“With one minor exception, between the *Nectow* decision in 1928 and the 1974 decision in *Village of Belle Terre v. Boraas*, this Court did not review the substance of any zoning ordinances.”).

8. *Vill. of Euclid*, 272 U.S. at 384, 397.

9. *Id.* at 384.

10. *Id.* at 395.

11. *Id.* at 394-95.

12. *Id.* at 395-97.

13. See, e.g., Robert G. Dreher, *Lingle’s Legacy: Untangling Substantive Due Process from Takings Doctrine*, 30 HARV. ENVTL. L. REV. 371, 372 (2006).

14. *Nectow v. City of Cambridge*, 277 U.S. 183, 185 (1928).

15. *Id.*

16. *Id.* at 186-87.

the residential purposes assigned to it by the city's zoning plan.¹⁷ Therefore, the ordinance represented a "serious and highly injurious" invasion to Nectow's property rights lacking any "necessary basis" in the police power.¹⁸ The ordinance was nothing more than an arbitrary restriction, meaning that it violated the Due Process Clause because it deprived Nectow of the use of his property without legitimate justification.¹⁹

The next important Supreme Court case involving substantive due process in a land use context was *Goldblatt v. Town of Hempstead*.²⁰ The question in that case was whether a town ordinance that prohibited excavation below the water table and required a permit for gravel mining violated the substantive due process rights of the owner of a long-established gravel pit.²¹ The Court found that the ordinance unquestionably prohibited a beneficial use to which the pit owner's property had been devoted previously.²² But the Court also found that the prohibition against excavation was a valid exercise of the police power because it was reasonably necessary for public safety.²³ *Goldblatt* affirmed the Court's reasoning in *Euclid* and *Nectow*, which boils down to the rule that a land use regulation is not arbitrary if it is sufficiently related to accomplishing a legitimate public objective.²⁴

These historic opinions serve as the doctrinal touchstone for applying substantive due process in land use cases.²⁵ In fact, the Supreme Court in the modern era continues to affirm the proposition that arbitrary land use regulations fail to satisfy the constitutional requirement of substantive due process because they unjustifiably deprive individuals of their property rights: "[A] regulation that fails to serve any legitimate governmental objective may be so arbitrary or irrational that it runs afoul of the Due Process Clause."²⁶

17. *Id.* at 188.

18. *Id.* at 188-89.

19. *Id.*

20. *Goldblatt v. Town of Hempstead*, 369 U.S. 590 (1966).

21. *Id.* at 592.

22. *Id.*

23. *Id.* at 595-96.

24. A word about regulatory takings—under the Supreme Court's precedent, even a regulation which satisfies the substantive due process test may result in a taking for which compensation must be paid if it too severely burdens the owner's property rights. *Lucas v. S.C. Coastal Council*, 505 U.S. 1003 (1992); *Penn Central Transp. Co. v. City of New York*, 438 U.S. 104 (1978).

25. *See, e.g., Moore v. City of East Cleveland*, 431 U.S. 494, 498 n.6 (1977).

26. *Lingle v. Chevron U.S.C., Inc.*, 544 U.S. 528, 542 (2005); *see also id.* at 548-49 (Kennedy, J., concurring) ("[It is possible] that a regulation might be so arbitrary or

irrational as to violate due process.”) (citing *E. Enters. v. Apfel*, 524 U.S. 498, 539 (1999) (Kennedy, J., concurring in judgment and dissenting in part)); *Kelo v. City of New London*, 545 U.S. 469, 503 (2005) (O’Connor, J., dissenting) (citing Lingle for the proposition that the Due Process Clause “prohibits irrational government action”); *San Diego Gas & Elec. Co. v. City of San Diego*, 450 U.S. 621, 656 n.23 (1981) (Brennan, J., dissenting) (explaining that a landowner may have a cause of action for damages for a Fourteenth Amendment due process violation when the government enacts regulation that does not further interest in public health, safety, morals or welfare); *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 263 (1977) (citing *Euclid* for the proposition that an individual has the “right to be free of arbitrary and irrational zoning actions”). The Supreme Court’s test for determining whether a land use regulation violates a property owner’s substantive due process rights has remained the same since the Court first began to articulate it. *See, e.g., Gant v. City of Oklahoma City*, 289 U.S. 98, 101 (1933) (applying an “arbitrary and unreasonable” test to an ordinance that required payment of bond as condition precedent to permitting oil and gas well drilling); *Wash. ex. rel. Seattle Title Tr. Co.*, 278 U.S. 116, 121 (1928) (“Legislatures may not, under the guise of the police power impose restrictions that are unnecessary and unreasonable upon the use of private property or the pursuit of useful activities.”); *Gorieb v. Fox*, 274 U.S. 603, 610 (1927) (upholding a setback requirement because the Court was “unable to say that the ordinance under review is ‘clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare’”) (quoting *Vill. Euclid v. Ambler Realty Co.*, 272 U.S. 365, 395 (1926)); *Zahn v. Bd. of Pub. Works*, 274 U.S. 325, 328 (1927) (upholding a zoning designation where it was not “clearly arbitrary and unreasonable”). The federal appellate courts, however, have adopted widely variant approaches to substantive due process in land use cases. *See* Paul D. Wilson & Noah C. Shaw, *The Judge as Cartoon Character Whose Hat Flies Into the Air: The “Shocks the Conscience” Standard in Recent Substantive Due Process Land Use Litigation*, 42 URB. LAW. 677 (2010); Rosalie Berger Levinson, *Time to Bury the Shocks the Conscience Test*, 13 CHAP. L. REV. 307, 320 (2010); Erica Chee, *Property Rights: Substantive Due Process and the “Shocks the Conscience” Standard*, 31 U. HAW. L. REV. 577, 584-601 (2009); Nisha Ramachandran, *Realizing Judicial Substantive Due Process in Land Use Claims: The Role of Land Use Statutory Schemes*, 36 ECOLOGY L.Q. 381, 392 (2009); J. Peter Byrne, *Due Process Land Use Claims After Lingle*, 34 ECOLOGY L.Q. 471, 477-80 (2007); Clifford B. Levine & L. Jason Blake, *United Artists: Reviewing the Conscience Shocking Test Under Section 1983*, 1 SETON HALL CIR. REV. 101, 112-17 (2005); Parma Mehrbani, *Substantive Due Process Claims in the Land-Use Context: The Need for a Simple and Intelligent Standard of Review*, 35 ENVTL. L. 209, 229-36 (2005). Much of the confusion stems from the Supreme Court’s opinion in *Lewis v. County of Sacramento*, 523 U.S. 833 (1998), a police misconduct case that some courts have construed as establishing a rule that land use decisions will not violate substantive due process unless they “shock the conscience.” *See* *United Artists Theatre Circuit, Inc. v. Twp. of Warrington*, 316 F.3d 392, 400 (3d Cir. 2003); *but see id.* at 406-07 (Cowen, J., dissenting) (“[T]ossing every substantive Due Process egg into the nebulous and highly subjective ‘shocks the conscience’ basket is unwise. It leaves the door ajar for intentional and flagrant abuses of authority by those who hold the sacred trust of local public office to go unchecked. ‘Shocks the conscience’ is a useful standard in high speed police misconduct cases which tend to stir our emotions and yield immediate reaction. But it is less appropriate, and does not translate well, to the more mundane world of local

III. TWO CASES ON ULTRA VIRES LAND USE REGULATIONS

One way in which a land use regulation may be arbitrary is if it is ultra vires.²⁷ It is axiomatic that government agencies may act only according to the powers delegated to them by the people.²⁸ So when a government agency engages in an activity that is not included in the authority conferred upon it, the government acts ultra vires.²⁹

An ultra vires act cannot advance a legitimate governmental purpose because the government's purposes are *per se* illegitimate when it acts outside the bounds of its delegated authority.³⁰ Thus, an ultra vires land use regulation is arbitrary in the sense that it is not relevant to any legitimate governmental purpose, such as safeguarding the public health or safety. And this arbitrariness means that an ultra vires land use regulation violates the due process rights of the individuals whom it affects, according to the Supreme Court's reasoning in cases like

land use decisions, where lifeless property interests (as opposed to bodily invasions) are involved."); *Eagle*, *supra* note 3, at 955-56 ("It is understandable that the Supreme Court would be reluctant to impose liability for split-second close calls in life or death matters on police officers and their departments. However, it is not apparent that the same standard should apply to situations where government officials have substantial periods of time to consider their actions and the court generally has power to put the plaintiff in the same position he was in before the complained of government action."). *Lewis*, moreover, applies only to executive actions and does not govern cases where the challenged act is legislative in nature. *Cnty. Concrete Corp. v. Town of Roxbury*, 442 F.3d 159, 169 (3d Cir. 2006); *Rector v. City & Cnty. of Denver*, 348 F.3d 935, 948-49 (10th Cir. 2003).

27. BLACK'S LAW DICTIONARY 30 (2d pocket ed. 2001) ("Unauthorized; beyond the scope of power allowed or granted by a corporate charter or by law . . .").

28. *See, e.g., Ganim v. Smith & Wesson Corp.*, 780 A.2d 98, 130 (Conn. 2001) ("[I]t is equally settled that a municipality, as a creation of the state, has no inherent powers of its own, and has only those powers expressly granted to it by the state or that are necessary for it to discharge and carry out its purposes."); *Green River Cmty. Coll. v. High Educ. Pers. Bd.*, 622 P.2d 826, 829 (Wash. 1980) ("[A]n agency has only those powers either expressly granted or necessarily implied from statutory grants of authority.").

29. *See Davis v. Reed*, 462 F. Supp. 410, 412 (W.D. Okla. 1977) ("[Ultra vires] acts are beyond the official's statutory authority, acts taken pursuant to constitutionally void powers, or acts exercised in a constitutionally void manner.") (citing *Dugan v. Rank*, 372 U.S. 609 (1963)).

30. I emphasize here that the term "ultra vires" describes a situation in which a government agency takes action not encompassed within its delegated authority. I am not referring to agency action that affirmatively violates other provisions of law; rather, I am referring to agency action that is invalid for no other reason than that the agency lacks authority in the first place.

Euclid.³¹ However, ultra vires land use regulations are the source of some confusion in the courts. Two cases—one from the Second Circuit and one from the Ninth Circuit—demonstrate that courts differ in their understanding of ultra vires land use regulations in a substantive due process analysis.

A. Case 1: Cine SK8, Inc. v. Town of Henrietta

In *Cine SK8, Inc. v. Town of Henrietta*, the owners of a family recreation business called Fun Quest obtained a special use permit to host youth dances at their facility.³² Fun Quest's business quickly grew to the point that it attracted over six hundred teenage customers every night.³³ One night a very large group of teenagers arrived at Fun Quest.³⁴ They came from a nearby movie theater that had lost power.³⁵ It was a cold night in Henrietta, New York, so most of the teenagers began elbowing their way into Fun Quest's foyer.³⁶ The crowd became so dense that ingress and egress were cut off and the fire marshal was summoned to the scene.³⁷ Thousands of people were trying to push their way into Fun Quest by the time the fire marshal arrived and cleared the area with the help of police.³⁸

Days later, one of the Henrietta town supervisors sent a letter to the owners of Fun Quest asking that they immediately discontinue teen dances.³⁹ The letter threatened to revoke or amend Fun Quest's special use permit if the owners did not comply.⁴⁰ Town officials held a special meeting the next day at which they reviewed the overcrowding incident.⁴¹ The Town Board then held its regular meeting and passed a resolution calling for a public hearing to consider the revocation or

31. *Supra* Part II.

32. *Cine SK8, Inc. v. Town of Henrietta*, 507 F.3d 778, 779 (2d Cir. 2007).

33. *Id.* at 780.

34. *Id.*

35. *Id.*

36. *Id.*

37. *Id.*

38. *Id.* at 780-81. Despite the crowd, Fun Quest's owners maintained that the number of people who were inside the building at any given time that night never exceeded the limit set by their occupancy certificate. *Id.* at 781.

39. *Id.* at 781.

40. *Id.*

41. *Id.* at 781-82. The Second Circuit found that there was credible evidence that at least one board member suggested that the overcrowding problem was related to the minority race of many of Fun Quest's customers. *Id.* at 785-89.

amendment of Fun Quest's special use permit.⁴² After a contentious hearing, the Board voted unanimously to adopt a resolution amending Fun Quest's special use permit to forbid teen dances.⁴³ Fun Quest later went bankrupt and had to close because the dance ban destroyed its business.⁴⁴

The owners sued the town for violating their substantive due process rights because, they argued, the Board did not have authority to amend a validly issued special use permit under town regulations.⁴⁵ The Second Circuit concluded that the appropriate question to ask in this situation was whether the town infringed on the owners' property rights in an arbitrary or irrational manner.⁴⁶ The court examined the town regulations and discovered that the Board could approve, deny, suspend, or revoke a special use permit, but nowhere did the code provide that the Board had the authority to amend a duly issued special use permit and place limitations on it.⁴⁷ The Second Circuit thus agreed with the property owners: "[I]f the Town Board did not have authority for the actions it took regarding Fun Quest's permit—as it appears it did not—the Board's actions were ultra vires and, as a result, sufficiently arbitrary to amount to a substantive due process violation."⁴⁸ The Second Circuit reversed the lower court's award of summary judgment to the town, and remanded the case to allow Fun Quest's owners to proceed on their substantive due process claim.⁴⁹

B. Case 2: Samson v. City of Bainbridge Island

The Ninth Circuit adopted a different approach to ultra vires land use regulations in *Samson v. City of Bainbridge Island*.⁵⁰ The City of Bainbridge Island encompasses an island located due west of Seattle in

42. *Id.* at 782-83.

43. *Id.* at 783.

44. *Id.* The appellate court reported that the owners had spent millions of dollars renovating the center to make it suitable for hosting dances. *Id.* at 785.

45. *Id.* at 784.

46. *Id.* (citing *Harlen Assocs. v. Inc. Vill. of Mineola*, 273 F.3d 494, 503 (2d Cir. 2001)).

47. *Id.* at 789-90.

48. *Id.* at 789.

49. *Id.* at 790-93. A district court in the Second Circuit recently described *Cine SK8* as embracing "the proposition that any government action taken outside the scope of the [government's] authority, i.e., an 'ultra vires' act, is 'sufficiently arbitrary to amount to a substantive due process violation.'" *TZ Manor, LLC v. Daines*, 815 F. Supp. 2d 726, 745 (S.D.N.Y. 2011) (quoting *Cine SK8*, 507 F.3d at 789).

50. *Samson v. City of Bainbridge Island*, 683 F.3d 1051 (9th Cir. 2012).

the Puget Sound.⁵¹ The city has forty-eight miles of shoreline, which are subject to various regulations under Washington's Shoreline Management Act and the city's Shoreline Master Program (SMP).⁵² In 2001, Bainbridge Island adopted an ordinance which imposed a one-year moratorium on new shoreline development in the city's Blakely Harbor area.⁵³ The city stated that the moratorium would allow it to maintain the environmental status quo while city officials revised the SMP.⁵⁴ A few months after adopting the moratorium, the city amended it to include a ban on new overwater structures and shoreline armoring.⁵⁵

Shoreline property owners sued the city after the city amended the moratorium.⁵⁶ They alleged that the city had exceeded the scope of its police power under the state constitution.⁵⁷ Undeterred, the city extended the moratorium for an additional seven months almost a year after the property owners filed suit.⁵⁸

The Kitsap County Superior Court ruled in favor of the property owners, holding that the city had overstepped its constitutional authority when it enacted the moratorium.⁵⁹ The city appealed, obtained a stay, and extended the moratorium again while the appeal was pending.⁶⁰ The city lost the appeal in 2004, and petitioned for review to the Supreme Court of Washington, which granted review in 2006 in a case called *Biggers v. City of Bainbridge Island*.⁶¹ While litigation dragged on, the property owners were all-the-while blocked from applying for permits needed to build and maintain structures that would prevent their properties from washing into the sea.⁶²

The Washington Supreme Court issued an opinion in 2007 holding that the moratorium exceeded the city's delegated authority.⁶³ Shoreline

51. See *Biggers v. City of Bainbridge*, 169 P.3d 14, 18 (Wash. 2007).

52. *Id.*; see also Wash. Rev. Code §§ 90.58.010 - 90.58.920q. (2014); Bainbridge Island Mun. Code 16.12.010-16.12.420 (2013).

53. *Samson*, 683 F.3d at 1055.

54. See *id.*

55. See *id.*

56. *Id.* (citing *Biggers*, 169 P.3d at 17-19).

57. *Biggers*, 169 P.3d at 18-19.

58. *Samson*, 683 F.3d at 1055-56.

59. *Id.* at 1056.

60. *Id.*

61. *Biggers*, 169 P.3d at 19-20 (citing *Biggers v. City of Bainbridge Island*, 124 Wash. App. 858 (2004)); see *Samson*, 683 F.3d at 1056.

62. See *Biggers*, 169 P.3d at 17.

63. The court held that the moratorium violated Article XI, Section 11 of the Washington Constitution. *Biggers*, 169 P.3d at 17, 25; see WASH. CONST. art. XI, § 11 ("Any county, city, town or township may make and enforce within its limits all such

local police, sanitary and other regulations as are not in conflict with general laws.”). The lead opinion, signed by four justices, held that *all* local shoreline development moratoria violated Article XI, Section 11 because such moratoria conflicted with various provision of state law, including constitutional provisions granting regulatory authority over shorelines to the state, and the Shoreline Management Act. *Biggers*, 169 P.3d at 20-24. State law was designed to allow property owners to construct water-dependent facilities through the timely processing of permits, and moratoria are inconsistent with that goal. *Id.* Justice Chambers did not join the four, but wrote separately to concur that the city “overstepped its constitutional limits” by enacting the moratoria. *Id.* at 25 (Chambers, J., concurring). He found the particular moratoria at issue represented an unreasonable use of the police power, emphasizing that the “rolling” nature of the moratoria caused burdensome delay and created uncertainty for shoreline property owners. *Id.* at 25-27. He did not mince words: “[I]t is arrogant, high handed, and beyond the pale of any constitutional authority for a stagnant government to deny its citizens the enjoyment of their land by refusing to accept building permits year after year based on a ‘rolling’ moratorium.” *Id.* at 27. But rather than holding that *all* shoreline moratoria everywhere were invalid, Justice Chambers held that only Bainbridge Island’s rolling moratoria violated Article XI, Section 11. *Id.* at 26. Justice Chambers’ concurring opinion represents a logical subset of the four-judge plurality which invalidated all shoreline moratoria, and the narrowest position supporting the judgment to strike down Bainbridge Island’s moratoria. See Michelle E. DeLappe, *The Legality of Washington Shoreline Development Moratoria in the Wake of Biggers v. City of Bainbridge Island*, 84 WASH. L. REV. 67, 85 (2009). The rule for interpreting plurality opinions provides that “[w]hen a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, ‘the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest ground.’” *United States v. Kilbride*, 584 F.3d 1240, 1253-54 (9th Cir. 2009) (quoting *Marks v. United States*, 430 U.S. 188, 193 (1977)); see *Washington v. Valdez*, 224 P.3d 751, 758 (Wash. 2009); *W.R. Grace & Co. v. Dep’t of Revenue*, 973 P.2d 1011, 1016-18 (Wash. 1999). Courts need not identify a legal position that a majority joined, but merely “a legal standard which, when applied, will necessarily produce results with which a majority of the Court from that case would agree.” *United States v. Williams*, 435 F.3d 1148, 1157 (9th Cir. 2006) (quoting *Planned Parenthood v. Casey*, 947 F.2d 682, 693 (3d Cir. 1991), *aff’d in part and rev’d in part on other grounds*, 505 U.S. 833 (1992)). The opinion of one concurring Justice may therefore constitute the holding of the court, so long as that opinion is “a logical subset of the plurality’s and . . . adopt[s] a holding that would affect a narrower range of cases than that of the plurality.” *Williams*, 435 F.3d at 1157 n.9. Therefore, the court held in *Biggers* that the city’s rolling moratoria represented an ultra vires exercise of the police power and were unconstitutional and void under Article XI, Section 11 of the Washington Constitution. See *Biggers*, 169 P.3d at 25-27 (Chambers, J., concurring in result); see also *Parkland Light & Water Co. v. Tacoma-Pierce Cnty. Bd. of Health*, 90 P.3d 37, 40 (Wash. 2004) (“A local regulation that conflicts with state law fails in its entirety.”). The state court victory in *Biggers* was short-lived. Two years after the Washington Supreme Court’s decision, the Washington Court of Appeals upheld the city’s permanent ban on new docks in Blakely Harbor, and the Washington Supreme Court denied review of that decision. *Samson v. City of Bainbridge Island*, 149 Wash. App. 33 (2009), *review den.*, *Samson v. City of Bainbridge Island*, 218 P.3d 921 (Wash. 2009).

owners then pressed on with separate litigation in federal court seeking damages for the long period of time during which they had been barred from applying for permits that would have allowed them to improve and protect their properties.⁶⁴

The United States District Court for the Western District of Washington issued an opinion in 2010 acknowledging that the Supreme Court of Washington had declared the city's moratorium to be "invalid," but the district court concluded that the property owners were not entitled to damages.⁶⁵ The owners appealed to the Ninth Circuit, which characterized the case as requiring the owners to show "that Bainbridge's ordinances establishing and extending the moratorium were 'clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals or general welfare.'"⁶⁶

The shoreline owners argued that the city's conduct infringed on their property rights in violation of due process due to the Washington Supreme Court holding that the moratorium was ultra vires in *Biggers*.⁶⁷ The Ninth Circuit rejected that claim and concluded that the city had acted wisely—not arbitrarily—because the moratorium protected the shoreline from a "wave" of "ad hoc" development.⁶⁸ After years of living under a moratorium that prevented them from taking care of their properties, and then winning a state court victory which declared the moratorium to reside beyond the city's delegated powers, the *Samson* plaintiffs came away empty-handed.⁶⁹

IV. *CINE SK8*, *SAMSON*, AND SUPREME COURT PRECEDENT

Though they addressed different circumstances, the *Cine SK8* and *Samson* cases are remarkably similar. Each case presented the same essential question: when a local government acts in a manner that exceeds its delegated authority under state law and infringes on individuals' property rights, must a court conclude that the government

64. *Samson*, 683 F.3d at 1053.

65. *Samson v. City of Bainbridge Island*, 683 F. Supp. 2d 1164, 1173, 1178 (W.D. Wash. 2010).

66. *Samson*, 683 F.3d at 1058 (quoting *Kawaoka v. City of Arroyo Grande*, 17 F.3d 1227, 1234 (9th Cir. 1994)).

67. *Samson*, 683 F.3d at 1058.

68. *Id.* at 1060.

69. The shoreline owners won no damages. The United States Supreme Court denied certiorari, *Samson v. City of Bainbridge Island*, 133 S. Ct. 652 (2012), and the development moratorium had taken the form of a permanent ban by the time the Ninth Circuit issued its opinion in 2012, *Samson*, 683 F.3d at 1061.

has deprived the affected individuals of property without due process of law? In *Cine SK8*, the town board passed an ultra vires resolution that amended Fun Quest's special use permit and caused the property owners to go bankrupt.⁷⁰ In *Samson*, the city council enacted an ultra vires development moratorium that cost shoreline property owners the reasonable use of their property for an extended period of time.⁷¹ The local governments' actions in both cases were outside the bounds of their respective authority; however, each reviewing court adopted a different understanding of the consequences that flowed from that fact.

The *Cine SK8* court recognized that a government agency does not act reasonably when it ventures beyond the limits of its delegated authority. This is not a monumental conclusion because the law is clear that ultra vires acts are void.⁷² On the other hand, the *Cine SK8* court can be seen as swimming against the current because it equated an action that was ultra vires under state law with a due process violation under the United States Constitution.⁷³ The *Cine SK8* court could have chosen to view the town's decision to amend Fun Quest's permit merely as a commonsense way to prevent another overcrowding incident. If viewed in that light, the town's actions would have fallen in line with the basic rule that allows local governments to infringe upon private property rights when necessary to safeguard the public.⁷⁴ But the *Cine SK8* court did not take that path, because upholding the town's decision to amend the permit would have required the court to uphold an act that the town supervisors were never authorized to perform.⁷⁵ Thus, the court

70. *Supra* Part III.

71. *Id.*

72. 56 Am. Jur. 2d Mun. Corp. §179 (2013) ("Acts beyond the scope of the powers conferred on a municipality are 'ultra vires' and are void.").

73. It is no secret that a property owner will have difficulty prevailing in federal court if he alleges that a land use regulation violates his substantive due process rights. In fact, some commentators have described substantive due process claims in land use cases as the "most unlikely to succeed" because they are commonly analyzed under low-level scrutiny by courts that want to avoid becoming entangled in "local" disputes. Joseph D. Richards & Alyssa A. Rugs, *Most Unlikely to Succeed: Substantive Due Process Claims Against Local Governments Applying Land Use Restrictions*, 78 FLA. BAR J. 34 (2004); see Byrne, *supra* note 26, at 475 ("In the lower federal courts, judges lately have been adamant in the repugnance they feel toward entertaining due process land use claims."). *But see* Mandelker, *supra* note 4, at 94 (opining that judicial review should be available for arbitrary land use decisions).

74. *See supra* Part II.

75. *Cine SK8, Inc. v. Town of Henrietta*, 507 F.3d 778, 789 (2d Cir. 2007).

concluded that the town's ultra vires decision was sufficiently arbitrary to violate the property owners' due process rights.⁷⁶

The *Cine SK8* court's conclusion is consistent with the Supreme Court precedent discussed in Part II.⁷⁷ The applicable rule, going back to *Euclid*, is that a land use regulation which fails to advance or promote the public health, safety, morals, or welfare is arbitrary and invalid.⁷⁸ The town board's decision to amend Fun Quest's permit did not promote public health or safety because the residents of Henrietta never granted the board authority to amend a special use permit in pursuit of those purposes.⁷⁹

In contrast to *Cine SK8*, the *Samson* court did not hold that the City of Bainbridge Island's ultra vires development moratorium deprived shoreline owners of property without due process of law.⁸⁰ It would have been logical for the Ninth Circuit's holding in *Samson* to mirror *Cine SK8*, but there are two possible reasons why the *Samson* court went in a different direction. First, the *Samson* court endorsed the environmental ethic of the city's moratorium and found that it weighed in favor of upholding the moratorium. Second, the court failed to see the importance of the Washington Supreme Court's opinion in *Biggers*, which had invalidated the moratorium because it constituted an ultra vires act.⁸¹

In support of its opinion, the Ninth Circuit leaned on *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, a case in which the Supreme Court described development moratoria as "essential tool[s] of successful development."⁸² The *Samson* court believed that *Tahoe-Sierra* bolstered its conclusion that Bainbridge Island's moratorium was "positively sensible" because the moratorium supposedly prevented a "stampede" of property owners from applying for permits to improve their properties before the new SMP went into effect.⁸³ In the *Samson* court's eyes, the moratorium was consistent with the city's "legitimate interests in protecting wildlife and preserving the development status quo."⁸⁴

76. *Id.*

77. *See supra* Part II.

78. *See id.*

79. *Cine SK8*, 507 F.3d at 789.

80. *Samson v. City of Bainbridge Island*, 683 F.3d 1051, 1060 (9th Cir. 2012).

81. *Biggers v. City of Bainbridge*, 169 P.3d 14, 17, 25 (Wash. 2007).

82. *Samson*, 683 F.3d at 1058 (quoting *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 535 U.S. 302, 338 (2002)).

83. *Id.* at 1058 n.8.

84. *Id.* at 1058.

However, the court's comfort with the general idea of a development moratorium led it to misapply the *Tahoe-Sierra* case. In *Tahoe-Sierra*, the Supreme Court issued a narrow opinion under the regulatory takings doctrine—not substantive due process—concluding that development moratoria at Lake Tahoe should be evaluated under the framework established in *Penn Central Transportation Co. v. City of New York*.⁸⁵ *Tahoe-Sierra* did not hold that all development moratoria are sensible policies, or that such policies are immune from constitutional challenge.⁸⁶ In fact, *Tahoe-Sierra* acknowledged that long-term moratoria may violate property owners' constitutional rights.⁸⁷ The *Samson* court did not address those concerns, leading it to assert broadly that a development moratorium is a smart policy choice for planners.⁸⁸

More to the point, the *Samson* court's focus on questions of policy caused it to overlook an enormous problem: the city did not possess legal authority to enact the shoreline moratorium in the first place, according to the Washington Supreme Court's decision in *Biggers*.⁸⁹ Yet the Ninth Circuit chose not to grapple with *Biggers*.⁹⁰ This, it seems, is the crucial difference between *Cine SK8* and *Samson*. The *Cine SK8* court's opinion rested on the finding that the board's decision to amend the special use permit was ultra vires.⁹¹ If the *Samson* court had undertaken the same threshold analysis to determine whether Bainbridge Island's moratorium was ultra vires, the court should have concluded that the moratorium was arbitrary and violated the shoreline owners' substantive due process rights. However, by ignoring that important first step, the *Samson* court determined that the city had not acted arbitrarily, even though the highest court to consider the legality of the moratorium under state law concluded that the city had acted ultra vires when it enforced the moratorium against the shoreline property owners.⁹²

85. *Tahoe-Sierra Pres. Council*, 535 U.S. at 342.

86. *See id.* at 341-42.

87. *Id.*

88. *See Samson*, 683 F.3d at 1059.

89. *Id.* at 1056, 1058, 1060; *see also Biggers v. City of Bainbridge*, 169 P.3d 14, 23 (Wash. 2007) (holding that “[t]he City’s imposition of moratoria was ultra vires and in conflict with the SMA’s regulatory framework”). Even the “best” public policies must be enacted in conformity with constitutional authority. *Cf. New York v. United States*, 505 U.S. 144, 187 (1992) (“[T]he Constitution protects us from our own best intentions: It divides power among sovereigns and among branches of government precisely so that we may resist the temptation to concentrate power in one location as an expedient solution to the crisis of the day.”).

90. *Samson*, 683 F.3d at 1060.

91. *See supra* Part III.

92. *Samson*, 683 F.3d at 1059.

The opinion in *Samson*, unlike that in *Cine SK8*, is not consistent with the Supreme Court's rulings on substantive due process claims in land use cases. A land use regulation generally complies with the Due Process Clause if it is sufficiently related to promoting the public health, safety, morals, or welfare.⁹³ But a local government that institutes an ultra vires moratorium on development is not advancing any legitimate governmental purpose because it is acting outside the scope of its delegated authority. Property owners who cannot reasonably use and enjoy their property as a result of such a policy have been deprived of constitutionally protected property rights without due process of law.

V. CONCLUSION

The Fourteenth Amendment provides that no state shall "deprive any person of life, liberty, or property, without due process of law."⁹⁴ The Supreme Court has interpreted that constitutional provision in land use cases as requiring the government to act in a non-arbitrary manner, in pursuit of legitimate governmental objectives.⁹⁵ The government cannot pursue legitimate governmental objectives through ultra vires land use regulations.⁹⁶ The split among federal courts on this issue demands Supreme Court review in the next case where the question is presented. In the meantime, lower courts should embrace the idea that ultra vires land use regulations are a form of arbitrary government action, and that such regulations deprive affected individuals of property without regard for due process.

93. *See supra* Part II.

94. U.S. CONST. amend. XIV, § 1.

95. *See supra* Part II.

96. *See supra* Part III.