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CHALLENGING LAND USE ACTIONS UNDER SECTION 1983: WASHINGTON LAW AFTER *MISSION SPRINGS, INC. v. CITY OF SPOKANE*

Eric Jenkins

Abstract: Federal law, 42 U.S.C. § 1983, provides a cause of action against persons who use state or local law to deprive individuals of constitutional rights. Federal circuit courts have been reluctant to apply § 1983 to commonplace land use grievances because of the local character of land use planning and a belief that only the most egregious misuse of zoning power can implicate a party's substantive due process rights. To limit the number of claims that can be brought under § 1983, the federal circuits have narrowly defined what property rights are protected by the Fourteenth Amendment and have held that allegations of due process violations must be based on more than the arbitrary and capricious denial of land use permits. The Washington Supreme Court has struggled to determine an appropriate standard to apply to § 1983 land use claims. In *Mission Springs, Inc. v. City of Spokane*, the court departed from its previous adherence to a stricter standard derived from the federal circuits. This Note examines the implications of that decision and argues that the stricter standards applied in the federal circuits are appropriate for § 1983 land use claims. Section 1983 was intended to protect fundamental constitutional rights rather than to provide a means of transforming distinctly local matters into federal constitutional claims.

In 1995 the Spokane City Council voted to delay issuance of building and grading permits associated with developer Mission Springs's previously approved Planned Unit Development (PUD).[1] Citing the long delay between PUD approval and permit application and the need to reexamine potential traffic problems, the Spokane City Council decided to commission a traffic study before granting final approval for the permits.[2] In so doing, the city council ignored advice given by the Spokane City Attorney that its actions would amount to a charter violation and possibly give rise to liability under state and federal law.[3] Mission Springs responded by filing suit in state court, alleging that the Spokane City Council's actions violated both state law and federal statute 42 U.S.C. § 1983.[4]

Mission Springs, Inc. v. City of Spokane[5] is representative of a class of local land use claims often brought under § 1983. Section 1983 is a

1. *See* Mission Springs, Inc. v. City of Spokane, 134 Wash. 2d 947, 952–54, 954 P.2d 250, 252–53 (1998).
2. *See id.* at 955–57, 954 P.2d at 253–54.
3. *See id.*
4. *See id.* at 951, 954 P.2d at 250.
5. 134 Wash. 2d 947, 954 P.2d 250.

Reconstruction Era statute prohibiting persons from using state law to deprive individuals of rights protected by the U.S. Constitution.[6] As in *Mission Springs*, the federal issue in § 1983 land use actions is usually a claimed violation of either the due process or equal protection provisions of the Fourteenth Amendment.[7] Although the asserted federal interest is often tenuous at best, the benefits of litigating under § 1983 provide a powerful incentive to pursue claims under federal law.[8]

Federal circuit courts have been reluctant to extend federal law to encompass routine disputes over land use permits.[9] This attitude reflects not only the distinctly local character of zoning, but also a trend in federal jurisprudence away from providing substantive due process protection to all but a narrow strand of fundamental rights.[10] To limit litigation of land use claims under § 1983, federal circuit courts have adopted strict tests for determining what property rights are worthy of Fourteenth Amendment protection,[11] and they have narrowly defined the government misconduct that can support a substantive due process claim.[12] The First Circuit has held that § 1983 will be available to those aggrieved by a local land use decision only if the violation of due process is so egregious as to be "shocking or violative of universal standards of decency."[13]

State courts have concurrent jurisdiction to hear and decide § 1983 claims.[14] Washington courts, like the federal circuits, have struggled to define the circumstances under which a local land use dispute can give rise to a federal cause of action.[15] Although at times the Washington State Supreme Court has applied standards derived from the federal

6. *See* 42 U.S.C. § 1983 (1994).

7. *See Mission Springs*, 134 Wash. 2d at 963–64, 954 P.2d at 257–58.

8. In addition to providing the option of litigating in a federal forum, § 1983 actions provide for the award of attorney fees and enable individuals to pursue damages against decisionmakers in their individual capacities. *See* 42 U.S.C. §§ 1983, 1988 (1994).

9. *See* Amsden v. Moran, 904 F.2d 748, 757 (1st Cir. 1990).

10. *See* Armendariz v. Penman, 75 F.3d 1311, 1318–19 (9th Cir. 1996) (suggesting that extension of substantive due process to economic and property rights has been largely discredited).

11. *See, e.g.*, Jacobs, Visconsi & Jacobs v. City of Lawrence, 927 F.2d 1111, 1119 (10th Cir. 1991); Yale Auto Parts, Inc. v. Johnson, 758 F.2d 54, 59 (2d Cir. 1985).

12. *See, e.g.*, Pearson v. City of Grand Blanc, 961 F.2d 1211, 1222 (6th Cir. 1992); Creative Env'ts, Inc. v. Estabrook, 680 F.2d 822, 833 (1st Cir. 1982).

13. *Amsden*, 904 F.2d at 757.

14. *See* Felder v. Casey, 487 U.S. 131, 139 (1988).

15. *See, e.g.*, Lutheran Day Care v. Snohomish County, 119 Wash. 2d 91, 829 P.2d 746 (1992); R/L Assocs., Inc. v. City of Seattle, 113 Wash. 2d 402, 780 P.2d 838 (1989).

circuits, in other cases the court has examined § 1983 claims using a standard of review derived from the state administrative law context.[16]

This Note examines the impact of the Washington State Supreme Court's decision in *Mission Springs, Inc. v. City of Spokane*[17] on Washington case law relating to § 1983. Part I briefly describes § 1983 and the Due Process Clause, examines the treatment of § 1983 in the federal circuits, and discusses Washington's treatment of § 1983 prior to *Mission Springs*. Part II considers the facts and holding of *Mission Springs*. Part III analyzes the effect of *Mission Springs* and concludes that it draws an already inconsistent body of case law further into conflict with the approaches federal courts have taken to § 1983. Finally, Part IV argues that Washington should adopt a stricter standard than that used in *Mission Springs*.

I. FEDERAL AND STATE ANALYSIS OF § 1983 CLAIMS

A. Section 1983

Section 1983 was originally enacted as part of the Civil Rights Act of 1871.[18] Known widely as the Ku Klux Klan Act of 1871, § 1983 was intended to provide a federal cause of action against persons attempting to use state law to deprive others of rights guaranteed by the federal constitution.[19] Section 1983 provides:

> Every person who, under color of any statute, ordinance, regulation, custom or usage, of any State or Territory . . . subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, or suit in equity, or other proper proceeding for redress.[20]

16. *See infra* notes 85, 88, and accompanying text.

17. 134 Wash. 2d 947, 954 P.2d 250 (1998).

18. Civil Rights Act, ch. 22, § 1, 7 Stat. 13 (1871) (current version at 42 U.S.C. § 1983 (1994)); *see also* Allen v. McCurry, 449 U.S. 90, 97 (1980).

19. *See Mission Springs*, 134 Wash. 2d at 979, 954 P.2d at 265–66.

20. 42 U.S.C. § 1983 (1994).

Section 1983 does not itself confer additional substantive rights, but rather serves as a vehicle by which individuals can seek redress for the violation of federal constitutional rights elsewhere conferred.[21]

B. The Due Process Clause

The application of § 1983 to land use issues is made possible by the Fourteenth Amendment's requirement that individuals not be deprived of liberty or property without due process.[22] The Due Process Clause not only mandates adherence to minimum procedures when government action infringes upon property or personal liberty, but also contains a substantive component that prohibits certain types of arbitrary or unreasonable government conduct no matter what procedures are used.[23] Land use claims brought under § 1983 usually involve allegations that arbitrary application of local zoning laws violated a property owner's substantive due process rights.[24]

Substantive due process has been widely condemned as a "treacherous field"[25] in which the limits of judicial intervention too often depend merely upon the predilections of individual judges.[26] This attitude reflects a pronounced shift in federal jurisprudence since the era of *Lochner v. New York*, during which an activist Court often invalidated even purely economic legislation on substantive due process grounds.[27] It is now well established that substantive due process defines only the extreme outer limits of government conduct.[28] Government action violates substantive due process only if it "offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental."[29] Recent U.S. Supreme Court substantive due

21. *See* Graham v. Connor, 490 U.S. 386, 393–94 (1989) (citing Baker v. McCollan, 443 U.S. 137, 144 n.3 (1979)).

22. *See* U.S. Const. amend. XIV, § 1 ("nor shall any State deprive any person of life, liberty, or property without due process of law").

23. *See* Pearson v. City of Grand Blanc, 961 F.2d 1211, 1220 (6th Cir. 1992) (quoting Zinermon v. Burch, 494 U.S. 113, 125 (1990)).

24. *See* Creative Env'ts, Inc. v. Estabrook, 680 F.2d 822, 833 (1st Cir. 1982) (characterizing typical land use case as one involving allegations of misapplication of local zoning laws).

25. Armendariz v. Penman, 75 F.3d 1311, 1318 (9th Cir. 1996) (citing Moore v. East Cleveland, 431 U.S. 494, 502 (1977)).

26. *See* Moore v. East Cleveland, 431 U.S. 494, 502 (1977).

27. *See Armendariz*, 75 F.3d at 1318.

28. *See* Patterson v. New York, 432 U.S. 197, 202 (1977).

29. *Id.* (quoting Speiser v. Randall, 357 U.S. 513, 523 (1958)).

process decisions have focused on protecting "matters relating to marriage, family, procreation, and the right to bodily integrity."[30]

C. *Federal Approaches to Land Use Claims Under § 1983*

While the federal circuits have myriad approaches to hearing substantive due process claims, all agree that the use of substantive due process to reach land use decisions under § 1983 should be strictly limited.[31] This restrictive philosophy is based on the notion that zoning is principally a matter of local concern and that only the most egregious abuse of a local entity's zoning powers can rise to the level of a substantive due process violation.[32] The federal circuits follow two principal approaches in limiting the number of land use claims that can be brought under § 1983. One group of circuits, led by the Second Circuit, concentrates on narrowly defining what property interests are protected by the Fourteenth Amendment.[33] The remaining circuits, while recognizing that a protected property right must be involved, focus their analysis on the government action that gives rise to due process concerns.[34] Under this approach, the challenged action does not violate the U.S. Constitution unless it is "shocking to the conscience," "truly irrational," or generally on a wholly different level than the conduct required to set aside an administrative agency decision as arbitrary or capricious.[35]

30. Albright v. Oliver, 510 U.S. 266, 271–72 (1994).

31. *See* Pearson v. City of Grand Blanc, 961 F.2d 1211 (6th Cir. 1992) (summarizing approaches of all circuits to entertaining challenges to land use decisions under § 1983).

32. *See, e.g.*, Village of Belle Terre v. Boraas, 416 U.S. 1, 13 (1974) (Marshall, J., dissenting); *Pearson*, 961 F.2d at 1222.

33. *See, e.g.*, Jacobs, Visconsi & Jacobs v. City of Lawrence, 927 F.2d 1111, 1116 (10th Cir. 1991); Yale Auto Parts, Inc. v. Johnson, 758 F.2d 54, 59 (2d Cir. 1985).

34. *See, e.g.*, G.M. Eng'rs & Assocs. v. West Bloomfield Township, 922 F.2d 328, 332 (6th Cir. 1990); Coniston Corp. v. Village of Hoffman Estates, 844 F.2d 461, 467 (7th Cir. 1988); Creative Env'ts, Inc. v. Estabrook, 680 F.2d 822, 833 (1st Cir. 1982).

35. *See Pearson*, 961 F.2d at 1221 (noting that arbitrary and capricious in constitutional sense has entirely different meaning than it has in state administrative law context).

1. *Circuits That Narrowly Define Property Interests*

The Second Circuit has been highly influential in defining what property interests are entitled to Fourteenth Amendment protection.[36] The "clear entitlement" test used in the Second Circuit recognizes a property right in a sought-after land use permit only if the discretion of the issuing authority is so narrowly circumscribed that, absent arbitrary conduct, issuance of the permit is virtually certain.[37] In *Yale Auto Parts, Inc. v. Johnson*, the Second Circuit dismissed a claim involving denial of a permit to operate an automobile junkyard, finding that the licensing authorities had discretion to deny the permit.[38] The existence of discretion defeated the applicant's claimed property right in the permit and led the court to dismiss the plaintiff's claim despite acknowledging egregious misconduct by the defendants.[39]

A claim of entitlement sufficient to constitute a protected property interest must be distinguished from mere unilateral expectations of favorable action on the part of permit applicants. While state law gives permit applicants the right to expect that discretion in the permit application process will be exercised consistently, federal law does not automatically confer a similar right.[40] The simple fact that relevant factors and past practices create an expectation that discretion is likely to be favorably exercised is insufficient to create a property right protected by the Fourteenth Amendment.[41] If the sought-after permit could be denied on nonarbitrary grounds, a federal substantive due process claim is foreclosed by the "clear entitlement" test, whatever the true motives of the decisionmakers.[42]

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36. *See, e.g.*, RRI Realty Corp. v. Incorporated Village of Southampton, 870 F.2d 911, 915–18 (2d Cir. 1989); *Jacobs*, 927 F.2d at 1116. For cases citing Second Circuit precedent, see *New Burnham Prairie Homes, Inc. v. Village of Burnham*, 910 F.2d 1474, 1480 (7th Cir. 1990), and *Spence v. Zimmerman*, 873 F.2d 256, 259 (11th Cir. 1989).

37. *See Yale Auto Parts*, 758 F.2d at 59.

38. *See id.*

39. *See id.*

40. *See Pearson*, 961 F.2d at 1221 (explaining that while state court can set aside zoning decision as arbitrary or capricious if it is not supported by substantial evidence, "arbitrary or capricious" in federal constitutional sense is much narrower inquiry).

41. *See RRI Realty Corp.*, 870 F.2d at 918.

42. *See id.*

Key Ninth Circuit land use decisions suggest a correlation between the Ninth Circuit approach to § 1983 and that of the Second Circuit.[43] Like the Second Circuit, the Ninth Circuit emphasizes defining what constitutes a property right protected by the Fourteenth Amendment.[44] A claimant establishes a "legitimate claim of entitlement" in the Ninth Circuit if the statutory scheme for permit issuance places "significant substantive restrictions on the decision to grant a permit or license."[45] Just how narrowly circumscribed the discretion of the issuing authority must be, however, is not entirely clear. *Bateson v. Geisse*, the leading Ninth Circuit land use case, involved a situation in which issuance of a permit was mandatory upon the satisfaction of specified criteria.[46] The existence of some discretion on the part of issuing authorities will likely not negate a claimed property right in a land use permit.[47] The Ninth Circuit appears to have suggested in *Bateson* that a property right exists when the statutory scheme is sufficiently detailed such that the right to the permit is clearly established and a decisionmaker would understand the right is being violated.[48] Some state courts, however, have interpreted the Ninth Circuit approach to be nearly as restrictive as that used in the Second Circuit.[49]

If a legitimate claim of entitlement is demonstrated, the Ninth Circuit requires that the government action in question be "irrational or arbitrary" to violate the due process clause.[50] The "subjective good faith" of the issuing authority is not relevant to the question of whether a due process violation has occurred, and there is no requirement that the challenged action shock the conscience or be invidiously motivated.[51]

43. After *Armendariz v. Penman*, 75 F.3d 1311 (9th Cir. 1996), there remains some question of whether the Ninth Circuit's approach to land use claims brought under § 1983 will change, especially in light of the *Armendariz* court's statement that "the use of substantive due process to extend constitutional protection to economic and property rights has been largely discredited." *Id.* at 1318–19 (citations omitted).

44. *See* Bateson v. Geisse, 857 F.2d 1300, 1305 (9th Cir. 1988).

45. *Id.*

46. *See id.* at 1303.

47. *See id.* at 1304–05.

48. *See id.* at 1304.

49. *See* Clark v. City of Hermosa Beach, 56 Cal. Rptr. 2d 223, 240–41 (1996).

50. *See Bateson*, 857 F.2d at 1303.

51. *See id.* at 1304.

2. *Circuits Focusing on Government Conduct*

Although recognizing that a protected property right must be at issue to invoke the Fourteenth Amendment, a number of circuits limit the application of § 1983 in land use cases by focusing on the conduct that gives rise to the due process claim rather than relying solely on a "clear entitlement" test.[52] The common element of these approaches is that a challenged action does not violate substantive due process unless the decisionmaking was motivated by factors unrelated to land use planning.[53] There is not, however, a uniform approach for determining how unrelated to land use planning a motive for decisionmaking must be to fail the rationality test. While the First Circuit's standard is a virtual bar to substantive due process actions,[54] the Third Circuit has shown a greater willingness to entertain land use claims under § 1983.[55]

a. *Conduct That Shocks the Conscience: The First Circuit's Approach*

The essence of the First Circuit's position is that zoning disputes should be resolved under state law and cannot be transformed into federal constitutional claims by labeling the challenged action as a violation of "due process" or "equal protection."[56] In *Creative Environments, Inc. v. Estabrook*, the First Circuit suggested that every appeal of a land use decision necessarily involves some claim of disparate treatment or abuse of power.[57] Even when coupled with demonstrated violations of state law, however, an abuse of zoning authority will seldom give rise to a claim under the Fourteenth Amendment.[58]

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52. *See infra* notes 56, 64, 68, 72, and accompanying text.

53. *See, e.g.*, New Burnham Prairie Homes v. Village of Burnham, 910 F.2d 1474, 1481 (7th Cir. 1990); Coniston Corp. v. Village of Hoffman Estates, 844 F.2d 461, 467 (7th Cir. 1988); Bello v. Walker, 840 F.2d 1124, 1129 (3d Cir. 1988).

54. *See* Creative Env'ts, Inc. v. Estabrook, 680 F.2d 822, 833 (1st Cir. 1982).

55. *See, e.g.*, DeBlasio v. Zoning Bd. of Adjustment, 53 F.3d 592, 601 (3d Cir. 1991); *Bello*, 840 F.2d at 1129.

56. *See Creative Env'ts*, 680 F.2d at 833. The Sixth Circuit also follows the "shocks the conscience" standard. *See* Pearson v. City of Grand Blanc, 961 F.2d 1211, 1222 (6th Cir. 1992).

57. *See id.*

58. *See id.*

To violate the First Circuit's standard, the challenged action must be "egregiously unacceptable, outrageous, or conscience-shocking."[59] A bad faith refusal to abide by state law is insufficient by itself to raise a substantive due process claim.[60] In *Licari v. Feruzzi,*[61] the First Circuit gave some indication of what might be necessary to state a claim under § 1983. For purposes of the appeal, the court accepted as true that the municipal authority's actions amounted to a hostile attempt to coerce the plaintiff to reduce the size of its development.[62] Nonetheless, the court held that the plaintiff's § 1983 claim would be valid only if the municipality's actions had been directed at immutable characteristics such as religion or political affiliation.[63]

b. "Invidious or Irrational" Conduct: The Seventh Circuit's Approach

The Seventh Circuit's decision in *Coniston Corp. v. Village of Hoffman Estates* reveals that its "invidious or irrational" standard is similar in restrictiveness to the First Circuit's approach.[64] In *Coniston,* members of the city council sought to protect owners of existing office buildings from new competition by voting against a proposed development project.[65] The Seventh Circuit rejected the plaintiff's § 1983 claim and held that a violation of state or local law does not often rise to the level of a federal due process violation.[66] The court noted that the only example it had previously given of a zoning decision that would constitute "invidious or irrational" behavior, and therefore reach § 1983, was one based on race.[67]

c. "Arbitrary or Irrational" Conduct: Other Circuits' Approaches

Several circuits have developed "arbitrary or irrational" standards that are somewhat less hostile to § 1983 claims than the First Circuit or

59. Licari v. Feruzzi, 22 F.3d 344, 347 (1st Cir. 1994).

60. *See* PFZ Properties, Inc. v. Rodriquez, 928 F.2d 28, 32 (1st Cir. 1991) (citing Chiplin Enters. v. City of Lebanon, 712 F.2d 1524, 1528 (1st Cir. 1983)).

61. 22 F.3d 344.

62. *See id.* at 349.

63. *See id.*

64. 844 F.2d 461, 467 (7th Cir. 1988).

65. *See id.*

66. *See id.*

67. *See id.*

Seventh Circuit approaches. Use of the "arbitrary or irrational" terminology has focused on whether there is a rational relationship between the challenged decision and a legitimate zoning goal.[68] For example, the Eighth Circuit suggested in *Bituminous Materials, Inc. v. Rice County* that using zoning authority to punish a political opponent or denying a business license to protect the decisionmaker's competing business might qualify as truly irrational action.[69] The court stressed, however, that the "arbitrary or irrational" test is intended to be highly restrictive and limited to those situations in which the challenged action is truly irrational.[70] Violations of state or local law do not alone qualify as truly irrational action.[71]

The Third Circuit has been more willing than the Eighth Circuit to entertain land use claims under § 1983, yet even its "arbitrary or irrational" standard requires government action based on personal factors unrelated to land use planning. In *Bello v. Walker*,[72] the Third Circuit upheld a § 1983 claim based on municipal officials' interference with issuance of a land use permit for personal political reasons.[73] This personal motive was the critical factor cited by the court in distinguishing prior cases that rejected substantive due process claims.[74] The Third Circuit reaffirmed the importance of a personal motive in *DeBlasio v. Zoning Board of Adjustment*.[75] It held that the possibility that a personal financial motive may have influenced the decisionmaking process was sufficient to support a substantive due process claim under § 1983.[76]

Particularly significant is the fact that the Third Circuit's "arbitrary or irrational" standard is combined with a broad definition of what constitutes a protected property right under the Fourteenth Amendment. Rather than focusing on whether a property owner has a claim of entitlement to a permit, the Third Circuit considers the Fourteenth

68. *See, e.g.*, Bituminous Materials, Inc. v. Rice County, 126 F.3d 1068, 1070–71 (8th Cir. 1997); Bello v. Walker, 840 F.2d 1124, 1129–30 (3d Cir. 1988).

69. *See Bituminous Materials*, 126 F.3d at 1071.

70. *See id.* at 1070.

71. *See id.*

72. 840 F.2d 1124.

73. *See id.* at 1129.

74. *See id.*

75. 53 F.3d 592, 601 (3d Cir. 1995).

76. *See id.*

Amendment's protection to extend to any arbitrary interference with a landowner's use of property.[77] The right to a rational land use permitting process is viewed as one of the inherent rights of property ownership guaranteed by the Fourteenth Amendment.[78]

In summary, the predominant approaches in the federal circuits are highly restrictive and consistent with the notion that "[t]he heavy artillery of constitutional litigation is not available on . . . an indiscriminate basis."[79] The circuits generally agree that a valid due process claim under § 1983 requires two essential elements: first, there must be a sufficiently certain property interest at stake to invoke the protection of the Fourteenth Amendment; second, the party making a claim under § 1983 must demonstrate that a property interest was infringed by government actions more serious than those deemed arbitrary and capricious under state administrative law.[80]

D. *The Washington Approach to § 1983 Prior to* Mission Springs

The Washington Supreme Court has struggled to develop a consistent approach to § 1983 land use claims. Two very different standards of analysis have emerged from Washington's line of cases addressing § 1983. One set of cases has referenced Seventh Circuit case law and held that § 1983 is unavailable in land use actions absent "invidious or irrational" conduct.[81] The other approach uses the same standard for due process that is used in state administrative law, permitting § 1983 claims based on a showing of arbitrary and capricious decisionmaking.[82] Although based on a single Washington Supreme Court case, this approach has found support in state appeals court decisions.[83]

77. *See id.*

78. *See id.*

79. Steuart v. Suskie, 867 F.2d 1148, 1150 (8th Cir. 1989).

80. *See supra* notes 36–40 and accompanying text.

81. *See, e.g.*, Sintra, Inc. v. City of Seattle, 119 Wash. 2d 1, 23, 829 P.2d 765, 777 (1992); R/L Assocs., Inc. v. City of Seattle, 113 Wash. 2d 402, 412, 780 P.2d 838, 843 (1989).

82. *See* Lutheran Day Care v. Snohomish County, 119 Wash. 2d 91, 125, 829 P.2d 746, 763 (1992).

83. *See* Norquest/RCA-W Bitter Lake Partnership v. City of Seattle, 72 Wash. App. 467, 481, 865 P.2d 18, 26 (1994).

1. R/L Associates, Inc. v. City of Seattle: *"Invidious or Irrational"*

The Washington Supreme Court first considered the application of § 1983 to land use claims in *R/L Associates, Inc. v. City of Seattle.*[84] This 1989 case appeared to have conclusively recognized the fundamental distinction between conduct that can give rise to a federal substantive due process claim under § 1983 and conduct that is merely improper under state law. The Washington Supreme Court explicitly adopted the "invidious or irrational" test developed by the Seventh Circuit.[85] Despite adopting the "invidious or irrational" test, however, the court stressed that it dismissed the § 1983 claims because there were no allegations of "arbitrary or capricious" conduct.[86]

2. Lutheran Day Care v. Snohomish County: *"Arbitrary and Capricious"*

In *Lutheran Day Care v. Snohomish County,*[87] decided three years after *R/L Associates*, the Washington Supreme Court focused on the "arbitrary or capricious" language from *R/L Associates*. Disregarding the previously adopted "invidious or irrational" standard, the court cited the same "arbitrary and capricious" standard used in the administrative law context to determine that denial of a conditional use permit violated the claimant's substantive due process rights.[88] No allegation of purposeful discrimination or knowing or reckless conduct was made.[89] Indeed, the trial court originally dismissed Lutheran Day Care's § 1983 claims because the lack of knowing or reckless conduct failed to satisfy what the court believed was a higher standard applicable to the federal cause of action.[90] The Washington Supreme Court, however, considered this blanket finding of arbitrary and capricious conduct sufficient to satisfy

84. 113 Wash. 2d 402, 780 P.2d 838 (1989).

85. *See id.* at 412, 780 P.2d at 843–44 (citing Harding v. County of Door, 870 F.2d 430, 431 (7th Cir. 1989); Coniston Corp. v. Village of Hoffman Estates, 844 F.2d 461 (7th Cir. 1988)).

86. *See R/L Assocs.*, 113 Wash. 2d at 412, 780 P.2d at 844.

87. 119 Wash. 2d 91, 829 P.2d 746.

88. The trial judge in *Lutheran Day Care* concluded that denial of the permit constituted "willful and unreasonable action without consideration and in disregard of the relevant facts and circumstances." *Id.* at 97, 829 P.2d at 748–49. This is the definition of "arbitrary and capricious" used in the state administrative law context. *See* Department of Corr. v. Personnel Appeals Bd., 92 Wash. App. 484, 490, 967 P.2d 6, 9 (1998).

89. *See Lutheran Day Care*, 119 Wash. 2d at 98, 829 P.2d at 749.

90. *See id.* at 125, 829 P.2d at 763.

not only the claimant's state causes of action, but the federal § 1983 action as well.[91]

Washington appellate courts interpreting *Lutheran Day Care* have likewise concluded that § 1983 claims do not demand a greater showing than the arbitrary and capricious decisionmaking necessary for an actionable claim under state law. For example, in *Norquest RCA-W Bitter Lake Partnership v. City of Seattle*,[92] the court relied on *Lutheran Day Care* to hold that the arbitrary or capricious standard used in state administrative law was also applicable to § 1983 land use claims.[93] It noted that if the court in *Lutheran Day Care* had intended that a higher standard be applied to § 1983 claims, "it would have likely ordered a limited remand to determine whether the facts satisfied the new standard."[94]

3. Sintra I: *"Invidious or Irrational"*

In *Sintra, Inc. v. City of Seattle (Sintra I)*,[95] the Washington Supreme Court further confused the meaning of *Lutheran Day Care*. Decided on the same day as *Lutheran Day Care, Sintra I* involved the City of Seattle's attempt to exact a financial penalty under Seattle's Housing Preservation Ordinance after an injunction had been entered against its continued enforcement.[96] Seattle's enforcement of the ordinance, which required developers to pay a fee when their development actions eliminated low-income housing, delayed the claimant's efforts to renovate a Seattle building, and eventually forced him to default on a loan.[97] In discussing the availability of money damages, the court

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91. *See id.* at 114–15, 829 P.2d at 757–58.

92. 72 Wash. App. 467, 865 P.2d 18 (1994).

93. The court stated:

> [A]n arbitrary and capricious denial of a building or conditional use permit automatically entitles one to § 1983 damages. Our reading of *Lutheran Day Care* indicates . . . that the Supreme Court did not modify or replace the traditional arbitrary and capricious standard. Rather, the court in *Lutheran Day Care* appears to have established that a finding of arbitrary and capricious governmental conduct under the traditional standard is sufficient, by itself, to violate substantive due process.

Id. at 481, 865 P.2d at 26.

94. *Id.* at 482, 865 P.2d at 27.

95. 119 Wash. 2d 1, 829 P.2d 765 (1992).

96. *See id.* at 8–9, 829 P.2d at 769.

97. *See id.* at 6, 829 P.2d at 768.

asserted that a land use decision denies substantive due process for § 1983 purposes only if that decision was "invidious or irrational."[98]

4. Sintra II: *"Invidious or Irrational" Reaffirmed*

In *Sintra, Inc. v. City of Seattle (Sintra II)*,[99] the conflict between *Lutheran Day Care* and *Sintra I* was arguably resolved in favor of the higher standard suggested in *Sintra I* five years earlier. The *Sintra II* court explicitly reaffirmed adherence to the "invidious or irrational" standard and stressed the importance of looking to federal case law to determine what constitutes a violation of federal substantive due process rights.[100] *Sintra II*, however, failed to distinguish the court's quite different holding in *Lutheran Day Care*.

In *Hayes v. City of Seattle*,[101] another land use case decided on the same day as *Sintra II*, Justice Madsen noted in a dissenting opinion the confusion caused by *Lutheran Day Care* and criticized the court for failing to resolve the conflict between the cases.[102] Justice Madsen suggested that the approach used in *Sintra I* was more appropriate and that federal case law should provide the limiting criteria for determining the availability of § 1983 in state land use actions.[103]

II. *MISSION SPRINGS, INC. v. CITY OF SPOKANE*

A. *Factual Background*

Mission Springs, a land development company, submitted an application for a Planned Unit Development (PUD) to the City of

98. *Id.* at 23, 829 P.2d at 777.

99. 131 Wash. 2d 640, 935 P.2d 555 (1997).

100. *See id.* at 654, 935 P.2d at 562–63.

101. 131 Wash. 2d 706, 934 P.2d 1179 (1997).

102. Justice Madsen stated:

> Recent criticism by the Court of Appeals that, read together, these two decisions create confusion has some merit . . . . [T]his court's analysis in *Sintra* requiring animus or a deliberate flouting of the law that trammels significant rights is in line with the approach of most recent federal decisions. Thus, until such time as the United States Supreme Court speaks to the contrary, *Sintra*, not *Lutheran Day Care*, should be followed by courts of this state.

Id. at 723–24, 934 P.2d at 1188 (Madsen, J., dissenting).

103. *See id.* (Madsen, J., dissenting).

Spokane in early 1992.[104] The City approved the PUD master plan in August 1992 together with the required grading and building permits.[105] Mission Springs, however, failed to use the building permits before they lapsed. In October 1994 the company submitted new applications, which became the subject of the *Mission Springs* case.[106] On June 22, 1995, Spokane's building officer informed the city council that the city was ready to issue the grading permit.[107] The city council, however, in response to complaints by citizen groups about possible project-related traffic problems, voted to instruct the city building officer to delay issuance of the permit until completion of a traffic study.[108]

Under the applicable Spokane Municipal Code, the administrative function of issuing building permits was vested in administrative staff to the exclusion of the city council.[109] Yet it was the city council that took the action that led to delay of the permits.[110] In an exchange between city council members and the City Attorney, quoted prominently in the *Mission Springs* decision, the council members disregarded the advice of the attorney that instructing the building officer not to issue the permits would constitute a charter violation.[111] However, the city council

104. *See* Mission Springs, Inc. v. City of Spokane, 134 Wash. 2d 947, 952–53, 954 P.2d 250, 252 (1998).

105. *See id.*

106. *See id.*

107. *See id.* at 954, 954 P.2d at 253.

108. *See id.* at 955–56, 954 P.2d at 253–54.

109. *See id.* at 970 n.17, 954 P.2d at 261 n.17.

110. *See id.* at 955–56, 954 P.2d at 253–54.

111. The court quoted from the City Council proceedings:

> [Council Member Phyllis] Holmes: If we were to direct Bob [Eugene] not to issue permits until the tunnels were improved, what would happen?
>
> [City Attorney James] Sloan: What would happen is that it would be the genesis of a cause of action by the developer against the city for unlawfully interfering with the issuance of a building permit and that is . . . a civil rights violation. The other issue is that it's a charter violation.
>
> . . . .
>
> [Council Member Holmes]: Well, I'm going to put a motion on the table and see where we go with this. I'm going to move that we request a current staff report on the traffic impact on the Thorpe tunnels of the additional units based on current traffic use. If there are any studies that we have would be old [sic] and *we delay issuance of that permit* until that report has been brought forward to the county.
>
> . . . .
>
> [Council Member Anderson]: You know, I guess I would add that . . . we owe an obligation to the other members of the community who have serious concerns about the traffic problems up in

members felt an obligation to the community to study the development's impact on traffic before permitting the project to proceed further.[112]

B. Holding and Analysis

The Washington Supreme Court, in a six-to-two opinion, held that the City of Spokane's decision to delay issuance of Mission Springs's building and grading permits violated Mission Springs's federal substantive due process rights.[113] The majority opinion utilized an "arbitrary or irrational" test, relying largely on the Ninth Circuit's opinion in *Bateson v. Geisse*.[114] Both the court's discussion of what property rights are entitled to Fourteenth Amendment protection, and the court's definition of its "arbitrary or irrational" standard, are significant.

1. Property Rights

In contrast to its previous cases, the Washington Supreme Court focused significant attention on the type of property rights that are entitled to protection under the Fourteenth Amendment. The majority opinion concluded that Mission Springs had a constitutionally protected property right in the permits it sought, due to the City Council's previous approval of its Planned Unit Development.[115] Once PUD approval is obtained, the developer has a right to build to the previously approved specifications unless the legislative body finds that a change in conditions creates a serious threat to the public health or safety in the subdivision.[116] The court determined that Mission Springs had satisfied

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> that area.... I guess too my feeling is, and I think this is a great motion. *We have the opportunity to put a stop to this and let's just see what happens. Let's see how confident they are. If they bring a suit, we can always turn around and issue the permit, that's an option still available to us.*

Id. at 955–56, 954 P.2d at 254–55 (emphasis in original).

112. *See id.*

113. *See id.* at 950, 954 P.2d 250.

114. *See id.* at 970, 954 P.2d at 261.

115. *See id.* at 958–59 n.12, 954 P.2d at 255 n.12 (quoting Wash. Rev. Code § 58.17.033: "A proposed division of land ... shall be considered under the subdivision or short subdivision ordinance, and zoning or other land use control ordinances, in effect on the land at the time a fully completed application for preliminary plat approval... has been submitted....").

116. *See id.* at 958–59, 954 P.2d at 255 (citing Wash. Rev. Code § 58.17.170).

all of the statutory criteria for issuance of the permits and was thus entitled to the permits as a matter of right.[117]

The court suggested, however, that a property right protected by the Fourteenth Amendment could be found upon a much lesser showing than that purportedly demonstrated in *Mission Springs*. The majority opinion cited Ninth Circuit case law for the proposition that property rights are created whenever limits are placed on a decisionmaker's discretion to deny a permit or license.[118] Moreover, there is some suggestion in *Mission Springs* that the right to use and develop property free from arbitrary conduct in the permitting process is itself a property right worthy of Fourteenth Amendment protection.[119]

2. "Arbitrary or Irrational" Standard

The *Mission Springs* decision did not specifically mention either the "arbitrary or capricious" standard of *Lutheran Day Care* or the "invidious or irrational" test affirmed in *Sintra II*. Rather, the court cited the Ninth Circuit's *Bateson* decision for the proposition that "arbitrary or irrational" conduct in the permit issuance process violates a party's federal substantive due process rights.[120] The court did not, however, rely on *Bateson* to define the contours of its new standard. Instead, it turned to *Black's Law Dictionary* to define "irrational" as "[u]nreasonable, foolish, illogical, absurd."[121]

Applying this test in practice, the court noted that two key aspects of the city council's actions as violating the rationality standard. First, the city council's involvement in the administrative process—by directing the City Manager to withhold issuance of the permits—violated local law.[122] Second, the court found that the failure to issue the permits despite prior PUD approval was a violation of state law.[123] Although the court noted that the rejection of the City Attorney's legal advice was an

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117. *See id.* at 959, 954 P.2d at 255.

118. *See id.* at 963, 954 P.2d at 257 (citing Jacobsen v. Hannifin, 627 F.2d 177, 180 (9th Cir. 1980)).

119. *See id.* at 962, 954 P.2d at 257 (citing Seattle Trust Co. v. Roberge, 278 U.S. 116 (1928) ("The right to use and enjoy land is a property right.")).

120. *See id.* at 970, 954 P.2d at 261.

121. *Id.* (quoting *Black's Law Dictionary* 829 (6th ed. 1990) (alteration in original)).

122. *See id.* at 970–71, 954 P.2d at 261.

123. *See id.* at 971, 954 P.2d at 261.

aggravating factor, the court held that the city council's failure to adhere to local and state procedural law objectively satisfied the irrationality requirement.[124]

III. THE FAILURE OF *MISSION SPRINGS* TO ADOPT THE STRICT FEDERAL APPROACH LEAVES AN INAPPROPRIATE, BROAD, AND CONFUSED STANDARD

Mission Springs is an unfortunate development in Washington's approach to land use claims brought under § 1983. The "arbitrary or irrational" inquiry of *Mission Springs* cannot be reconciled with the "invidious or irrational" inquiry that the court reaffirmed only one year previously in *Sintra II*. In *Mission Springs*, the Washington Supreme Court combined a vague and apparently broad definition of what property rights are protected by the Fourteenth Amendment with a lenient standard regarding the type of conduct that can violate an individual's federal due process rights. The resulting analysis permits precisely what the federal circuits strive to prevent: namely, the transformation of essentially state law issues into federal constitutional claims. Moreover, in adopting this analysis the *Mission Springs* court missed an opportunity to introduce much-needed consistency into its treatment of § 1983 land use actions.

A. *The Failure of* Mission Springs *to Reconcile Prior Decisions Leaves the Substantive Due Process Standard in Doubt*

In the wake of *Mission Springs*, perhaps the greatest deficiency in Washington's treatment of § 1983 remains the lack of a consistent standard specifying what must be demonstrated to establish that a landowner's federal substantive due process rights were denied. Rather than harmonizing the conflicting standards in the *R/L Associates* line of cases, *Mission Springs* introduced yet another new standard for § 1983 land use claims.[125] Not only did the court again fail to explain its prior holding in *Lutheran Day Care*, but it also ignored the "invidious or

124. *See id.*

125. *See supra* note 120 and accompanying text.

irrational" standard that was explicitly reaffirmed only one year earlier in *Sintra II.*[126]

Although the court in *Mission Springs* did not explicitly overrule prior cases applying the "invidious or irrational" standard, the court declined to draw from this line of cases when it adopted the new "arbitrary or irrational" standard. Rather, the *Mission Springs* court turned to the Ninth Circuit's decision in *Bateson v. Geisse.*[127] The court referred to the *Bateson* decision as "the leading and controlling case in this area," and suggested that "similar facts and identical law mandate the same result."[128] However, despite the fact that *Bateson* dates back to 1988, only once previously had the court cited its "arbitrary or irrational" standard, equating it with the Seventh Circuit's "invidious or irrational" test.[129]

Reliance on *Bateson* resulted in a markedly different approach to Washington's treatment of § 1983 land use claims. The Seventh Circuit's "invidious or irrational" standard required that an action be as egregious as race-based decisionmaking to violate a property owner's substantive due process rights.[130] The court in *Mission Springs*, however, concluded that the plaintiff's substantive due process rights were violated when the City of Spokane improperly delayed issuance of land use permits just six weeks for an inquiry into public safety issues.[131] The disparity between the "invidious or irrational" approach and the holding in *Mission Springs* questions the utility of any standard offered by the Washington Supreme Court as a means of predicting what conduct can support a § 1983 action.

B. Mission Springs*'s "Arbitrary or Irrational" Test Fails to Incorporate the Lessons of Federal Case Law*

The "arbitrary or irrational" test that emerges from *Mission Springs* fails to respect the central principles that have evolved as federal circuits have evaluated § 1983 land use claims. *Mission Springs* does not limit

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126. *See* Sintra, Inc. v. City of Seattle (Sintra II), 131 Wash. 2d 640, 654, 935 P.2d 555, 562–63 (1997) (reaffirming court's commitment to "invidious or irrational" standard).

127. *See Mission Springs*, 134 Wash. 2d at 970, 954 P.2d at 261 (citing Bateson v. Geisse, 857 F.2d 1300 (9th Cir. 1988)).

128. *Id.* at 968, 954 P.2d at 260.

129. *See* Robinson v. City of Seattle, 119 Wash. 2d 34, 60–61, 830 P.2d 318, 334 (1992).

130. *See* Coniston Corp. v. Village of Hoffman Estates, 844 F.2d 461, 467–68 (7th Cir. 1988).

131. *See Mission Springs*, 134 Wash. 2d at 975, 954 P.2d at 263.

§ 1983 to those actions that are egregiously bad or "truly irrational."[132] Neither does the "arbitrary or irrational" test recognize that the Fourteenth Amendment's protection does not extend to all aspects of property ownership.[133] In rejecting the lessons of federal case law, *Mission Springs*'s "arbitrary or irrational" test ignores the "overriding precept" that conduct violative of an individual's substantive due process rights must be on an entirely different level than that required to set aside an administrative decision as arbitrary or capricious.[134]

1. *"Arbitrary or Irrational" Conduct Is Broadly Defined*

To violate Washington's "arbitrary or irrational" test, conduct need only be "[u]nreasonable, foolish, illogical, [or] absurd."[135] The restrictive standards that have evolved in the federal circuits are premised on precisely the opposite conclusion: substantive due process does not encompass government action that is simply wrong or ill-advised.[136] Rather, the federal circuits have extended due process protection to challenged land use actions only when the decisionmaking is so far removed from that which is permissible as to be "truly irrational" or "shocking to the conscience."[137] In the federal circuits, action does not reach this level unless it is based on factors unrelated to any permissible zoning goals.[138] The Seventh Circuit's suggestion that only something akin to race-based decisionmaking could violate substantive due process indicates the type of violation required to implicate a party's federal substantive due process rights.[139] Likewise, the Eight Circuit's examples of using zoning power to punish a political opponent or to protect one's own business from competition are also very different than violating state law to investigate a potential traffic hazard.[140] In all of the federal

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132. *See supra* notes 69–71 and accompanying text.

133. *See supra* notes 36–39 and accompanying text.

134. *See supra* note 35 and accompanying text.

135. *Mission Springs*, 134 Wash. 2d at 970, 954 P.2d at 261 (quoting *Black's Law Dictionary* 829 (6th ed. 1990)) (alteration in original).

136. *See supra* notes 68–71 and accompanying text.

137. *See supra* notes 59, 69–70, and accompanying text.

138. *See supra* note 40, 63, 67–68, and accompanying text.

139. *See* Coniston Corp. v. Village of Hoffman Estates, 844 F.2d 461, 467–68 (7th Cir. 1988).

140. *See* Bituminous Materials, Inc. v. Rice County, 126 F.3d 1068, 1071 (8th Cir. 1997).

decisions, there is an element that goes beyond a decision that is merely "[u]nreasonable, foolish, illogical, [or] absurd."[141]

Application of the "arbitrary or irrational" standard to the facts of *Mission Springs* yielded an even more unsettling result: violations of state or local procedural law relating to permit issuance can conclusively establish the irrationality of the challenged government action.[142] Although the court in *Mission Springs* noted that rejecting the City Attorney's advice was an aggravating factor, the court stated that irrationality was "objectively established by departure from the mandatory legal process."[143] Taken at face value, this statement may open the door to future § 1983 claims based on little more than procedural irregularities in the permitting process. Under such a broad definition of irrationality, it is likely that any official departure from the mandatory legal process, except perhaps inadvertent administrative errors, would qualify as a substantive due process violation. The Spokane City Council was motivated by legitimate concerns about traffic safety when it voted to delay issuance of Mission Springs's permits.[144] If departure from the mandatory legal process in pursuit of legitimate public safety concerns violates due process, then violation of a statutory scheme for any other reason arguably would as well.

In so holding, *Mission Springs* ignored a central tenet of the federal approach to § 1983: a violation of state or local law is rarely a violation of an individual's federal due process rights.[145] In many ways, *Mission Springs* is similar to the Fourth Circuit's recent decision in *Love v. Peppersack*.[146] In *Peppersack*, police officers conducting a firearms background check refused to issue a firearms permit despite their inability to complete a full investigation in the seven-day period mandated by state law.[147] The *Peppersack* court held that such a violation of state law in pursuit of legitimate public safety goals was not a

141. Mission Springs, Inc. v. City of Spokane, 134 Wash. 2d 947, 970, 954 P.2d 250, 261 (1998) (quoting *Black's Law Dictionary* 829 (6th ed. 1990)) (alteration in original).

142. *See id.* at 971, 954 P.2d at 261.

143. *Id.*

144. *See id.* at 956, 954 P.2d at 254.

145. *See, e.g., Bituminous Materials*, 126 F.3d at 1070; Tri County Indus., Inc. v. District of Columbia, 104 F.3d 455, 459 (D.C. Cir. 1997); Coniston Corp. v. Village of Hoffman Estates, 844 F.2d 461, 467 (7th Cir. 1988).

146. 47 F.3d 120 (4th Cir. 1995).

147. *See id.* at 122.

violation of substantive due process.[148] The Fourth Circuit noted that state courts exist to address the misapplication of state law and that to hold otherwise would trivialize the Due Process Clause.[149]

2. Mission Springs *Suggests That a Broad Range of Property Rights Are Subject to Fourteenth Amendment Protection*

The danger in so loosely defining the type of conduct that can support a finding of a due process violation is enhanced by the court's broad definition of what property rights are protected by the Fourteenth Amendment. *Mission Springs* cites the Ninth Circuit's *Bateson* decision for the proposition that property rights are present in the permit issuance process whenever there are limits on the discretion of the issuing authority.[150] It is significant to note, however, that the *Bateson* decision stated that a "legitimate claim of entitlement" is required to confer property rights.[151] The *Bateson* decision involved an ordinance in which issuance of a land use permit was mandatory upon the satisfaction of specific criteria.[152] The *Bateson* court's discussion of the significance of discretion in the decisionmaking process was primarily mentioned as a reason for dismissing one of Bateson's other claims.[153] The California Court of Appeals has interpreted *Bateson* to mean that any discretion in the permit application process is sufficient to negate the existence of a property right.[154]

This is particularly significant with respect to the *Mission Springs* decision because the court appears to conclude that the discretion of municipal officials to respond to legitimate public health and safety issues is insufficient to negate a claim of entitlement in a sought-after permit.[155] RCW 58.17.170 permits planning authorities to alter the terms of a previously approved planned unit development if "the legislative body finds that a change in conditions creates a serious threat to the

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148. *See id.* at 123.

149. *See id.*

150. *See* Mission Springs, Inc. v. City of Spokane, 134 Wash. 2d 947, 963, 954 P.2d 250, 257 (1998) (citing Bateson v. Geisse, 857 F.2d 1300, 1304–05 (1988)).

151. Bateson v. Geisse, 857 F.2d 1300, 1305 (1988).

152. *See id.* at 1303.

153. *See id.* at 1305.

154. *See* Clark v. City of Hermosa Beach, 56 Cal. Rptr. 2d 223, 240 (1996).

155. *See Mission Springs*, 134 Wash. 2d at 965, 954 P.2d at 259.

public health or safety in the subdivision."[156] The right to respond to public health and safety concerns injects significant discretion into the permitting process. In *Mission Springs*, the court admitted the existence of this discretion, noting that denial of the permits would have been acceptable if the city council had first repealed its earlier approval of Mission Springs's PUD in response to a finding of changed conditions.[157] Under the Second Circuit's "clear entitlement" test, the ability of planning authorities to deny a permit application on any legitimate ground is sufficient to negate the existence of a property right protected by the Fourteenth Amendment.[158] Whether the ability of planning authorities to deny permits based on public health concerns would negate the existence of a "legitimate claim of entitlement" in the Ninth Circuit is at least an open question.[159]

C. The Cases Cited by the Washington Supreme Court Are Distinguishable from Mission Springs

To the extent that *Mission Springs* relied upon federal case law in developing its new standard, that reliance is misplaced. As support for the "arbitrary or irrational" standard, the majority opinion cited the Third Circuit's decision in *Bello v. Walker* in addition to the Ninth Circuit's *Bateson* decision.[160] Neither of these cases provides an adequate foundation for the result reached in *Mission Springs*.

Although the Third Circuit has demonstrated a greater willingness to extend substantive due process protection to land use claims than other circuits, the "arbitrary or irrational" standard used in the Third Circuit is still highly restrictive.[161] *Mission Springs* cited *Bello v. Walker* for the broad proposition that improper interference with the permit issuance process is arbitrary and violates property owner's substantive due process rights.[162] The Third Circuit, however, has limited § 1983 to situations in which the improper interference was motivated by factors

156. Wash. Rev. Code § 58.17.170 (1998).

157. *See Mission Springs*, 134 Wash. 2d at 965, 954 P.2d at 259.

158. *See supra* notes 38–42 and accompanying text.

159. *See supra* notes 47–49 and accompanying text.

160. *See Mission Springs*, 134 Wash. 2d at 965, 954 P.2d at 258.

161. *See supra* notes 72–76 and accompanying text.

162. *See Mission Springs*, 134 Wash. 2d at 965, 954 P.2d at 258 (citing Bello v. Walker, 840 F.2d 1124, 1129 (3d Cir. 1988)).

unrelated to any legitimate government goals.[163] In *Bello*, evidence suggested that the city council withheld permit approval in retaliation for the political activities of one of Bello's employees.[164] The existence of this personal motive was the critical factor noted by the court in distinguishing Bello's claim from claims of arbitrary conduct made in prior, unsuccessful § 1983 actions.[165]

The Ninth Circuit's decision in *Bateson v. Geisse* likewise is distinguishable from *Mission Springs*. The plaintiff in *Bateson* satisfied all ordinance criteria and, under the applicable municipal code, was entitled to issuance of his building permit as a matter of right.[166] The city council not only failed to provide any justification for denial of Bateson's permit, but also initiated a rezone of Bateson's land to frustrate his development plans.[167] The effect of the city council's actions was significant enough that Bateson joined an inverse condemnation claim with his § 1983 substantive due process claim.[168] In contrast, the Spokane City Council voted to delay Mission Springs's permits for only six weeks to determine the effect of the proposed development on public safety issues.[169] Moreover, *Mission Springs*'s use of *Black's Law Dictionary* to define its "arbitrary or irrational" standard resulted in a very different analysis than that used in *Bateson*.[170] The Ninth Circuit's "arbitrary or irrational" standard invalidates government action only if it has "no substantial relation to the public health, safety, morals, or general welfare."[171]

D. *The Supreme Court's Treatment of Substantive Due Process and § 1983 Mandates a Stricter Standard*

For the Washington Supreme Court's approach to § 1983 land use claims to be persuasive, the majority opinion must overcome not only the

163. *See* Bello v. Walker, 840 F.2d 1124, 1129–30 (3d Cir. 1988).

164. *See id.* at 1127.

165. *See id.* at 1129–30.

166. *See* Bateson v. Geisse, 857 F.2d 1300, 1302–03 (9th Cir. 1988).

167. *See id.* at 1302.

168. *See id.*

169. *See* Mission Springs, Inc. v. City of Spokane, 134 Wash. 2d 947, 975, 954 P.2d 250, 263 (1998).

170. *See supra* notes 121, 135, and accompanying text.

171. Patel v. Penman, 103 F.3d 868, 874 (9th Cir. 1996) (quoting Euclid v. Ambler Realty Co., 272 U.S. 365, 395 (1926)).

contrary positions of the federal circuits, but also the pronounced trend in federal jurisprudence away from using substantive due process to expand judicial power.[172] The court must demonstrate that the conduct at issue in *Mission Springs* "offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental."[173] This the court cannot do. Not only has the Supreme Court strictly limited the application of substantive due process to economic and property rights,[174] but it has likewise distinguished between the violation of state and constitutional rights in its treatment of § 1983.[175]

1. *Application of Substantive Due Process to Property Rights Is Disfavored*

The general judicial caution regarding use of substantive due process analysis has been applied with enhanced rigor to economic issues.[176] While the protection of private property may have deep historical roots, arbitrary interference with development rights has not attracted the attention of the U.S. Supreme Court.[177] In describing the Supreme Court's substantive due process jurisprudence, the Ninth Circuit stated in *Armendariz v. Penman* that "the use of substantive due process to extend constitutional protection to economic and property rights has been largely discredited."[178] As noted by Justice Talmadge, *Armendariz* raises the question of whether *Bateson*, the case upon which *Mission Springs* relies most heavily, is still valid.[179] The California Court of Appeals, in a recent land use case, questioned whether after *Armendariz* substantive due process analysis has any application whatsoever in routine land use

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172. *See* United States v. Carlton, 512 U.S. 26, 41 (1994) (Scalia, J., concurring) (describing Court's attempts to restrict substantive due process to only most fundamental liberty interests).

173. Patterson v. New York, 432 U.S. 197, 201–02 (1977) (quoting Speisor v. Randall, 357 U.S. 513, 523 (1958)).

174. *See Carlton*, 512 U.S. at 41–42 (Scalia, J., concurring).

175. *See* Monroe v. Pape, 365 U.S. 167, 196 (1961) (Harlan, J., concurring).

176. *Carlton*, 512 U.S. at 41 (Scalia, J., concurring).

177. *See* Kristiana L. Farris, Note, Seeley v. State: *The Need for Definitional Balancing in Washington Substantive Due Process Law*, 73 Wash. L. Rev. 669, 677 n.68 (1998) (noting that U.S. Supreme Court has not entertained substantive due process challenge to land use regulations since 1928).

178. Armendariz v. Penman, 75 F.3d 1311, 1318–19 (9th Cir. 1996).

179. *See* Mission Springs, Inc. v. City of Spokane, 134 Wash. 2d 947, 970 n.17, 954 P.2d 250, 271 n.17 (1998) (Talmadge, J., dissenting).

cases.[180] Though not deciding this question, the California court resolved the substantive due process issue using the First Circuit's "shocks the conscience" standard, ignoring the *Bateson* decision entirely.[181]

2. *Section 1983 Was Intended to Protect Fundamental Rights*

The history of § 1983 likewise suggests that the statute was never contemplated as a means of addressing routine zoning disputes. The original purpose of § 1983 was to counter the "corrupting influence of the Ku Klux Klan and its sympathizers on the governments and law enforcement agencies of the Southern States."[182] The "Jim Crow" laws that § 1983 was intended to reach represented flagrant attempts to repress a group that had been brutally discriminated against and for whom state law likely did not provide an effective remedy. Although the reach of § 1983 has certainly been extended beyond attempts to counter racial discrimination, the principle that it should address only the infringement of fundamental rights remains. Justice Harlan noted in *Monroe v. Pape* that § 1983 becomes no more than a jurisdictional provision if the deprivation of a constitutional right is not distinguished from the violation of a state right.[183] Violation of the constitutional right is entitled to a different remedy only because it is by nature of a wholly different magnitude.[184]

IV. WASHINGTON SHOULD ADOPT THE "SHOCKS THE CONSCIENCE" APPROACH TO § 1983 LAND USE CLAIMS

The decision in *Mission Springs* and the diversity of approaches in the federal circuits reflect the fact that the U.S. Supreme Court has yet to address the application of § 1983 to land use issues. Where the Court has applied substantive due process to individual government acts, as opposed to broad legislative enactments, it has used language very similar to the First Circuit's "shocks the conscience" standard.[185]

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180. *See* Clark v. City of Hermosa Beach, 56 Cal. Rptr. 2d 223, 243 (1996).

181. *See id.* at 244.

182. Allen v. McCurry, 449 U.S. 90, 98 (1980) (citing Monroe v. Pape, 365 U.S. 167, 174 (1961)).

183. *See* Monroe v. Pape, 365 U.S. 167, 196 (1961) (Harlan, J., concurring).

184. *See id.* (Harlan, J., concurring).

185. County of Sacramento v. Lewis, 118 S. Ct. 1708, 1712 (1998) (involving substantive due process challenge to high speed police chase that ended in death).

Adopting this standard in Washington would remedy much of what is wrong with Washington's approach to § 1983 land use claims without unduly subordinating the rights of property owners.

A. *The "Shocks the Conscience" Standard Is Supported by U.S. Supreme Court Precedent*

Although the U.S. Supreme Court has not considered the application of substantive due process to a challenged land use decision since 1928, the Court has entertained substantive due process challenges to both executive and legislative action.[186] In accord with its reluctance to invalidate legislative decisions on substantive due process grounds,[187] the Court noted in *County of Sacramento v. Lewis* that only the most egregious executive misconduct is arbitrary in the constitutional sense.[188] The *Lewis* court held that the relevant level "of executive abuse of power is that which shocks the conscience."[189]

The holding in *Lewis* reaffirmed the Court's earlier decision in *Collins v. City of Harker Heights*.[190] *Collins* involved a claim that the city's failure to properly train city personnel could implicate an employee's substantive due process rights.[191] In rejecting this claim, the Court noted that "arbitrary" in the constitutional sense means something different than in other contexts.[192] The Court was not persuaded that "the city's alleged failure to train its employees . . . [could] be properly characterized as arbitrary, or conscience shocking, in a constitutional sense."[193]

While neither *Collins* nor *Lewis* involved a challenge to the type of state administrative decisions at issue in zoning cases, they do provide insight into how the U.S. Supreme Court might approach this type of problem. The plaintiffs in *Mission Springs* and similar cases usually allege a violation of their substantive due process rights based on the

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186. *See* Farris, *supra* note 177, at 677 n.68.

187. *See* United States v. Carlton, 512 U.S. 26, 41 (1994) (Scalia, J., dissenting) (noting Court's attempts to limit substantive due process to certain fundamental liberty interests).

188. *See Lewis*, 118 S. Ct. at 1712.

189. *Id.*

190. 503 U.S. 115, 128 (1992).

191. *See id.*

192. *See id.*

193. *Id.*

assumption that substantive due process protects against arbitrary application of government power.[194] Both *Collins* and *Lewis* established, however, that the question of whether government action is arbitrary in the constitutional sense is an extremely narrow inquiry.[195] To be invalidated as arbitrary on substantive due process grounds, government conduct must literally "shock the conscience."[196] The Supreme Court thus provides compelling evidence that the First Circuit is correct in using a "shocks the conscience" standard to delineate between conduct that is arbitrary enough to violate the constitution and conduct merely improper under state law.

B. *Adopting the "Shocks the Conscience" Standard Would Provide Consistency Without Subordinating Property Rights*

Through adoption of the "shocks the conscience" test, the Washington Supreme Court can remedy the primary defects in Washington's approach to § 1983 without sacrificing the rights of property owners. While a bright line rule is seldom possible in substantive due process analysis, adherence to a strict standard would provide the consistency that has been lacking in Washington's treatment of § 1983 land use actions. The "shocks the conscience" test would bring Washington into step with federal case law and preserve the fundamental distinction between issues that should be resolved under state law and misconduct which is egregious enough to implicate an individual's federal constitutional rights.

Although adoption of the "shocks the conscience" test would significantly restrict the availability of § 1983, property owners would still have an adequate remedy in routine zoning disputes. RCW 64.40.020 empowers parties to seek damages against permitting authorities for conduct that is "arbitrary, capricious, unlawful, or exceed[s] lawful authority."[197] While RCW 64.40.020 does not authorize damages against decisionmakers in their individual capacities, it does provide for the award of attorney fees to the prevailing party.[198] RCW 64.40.020

194. *See* Mission Springs, Inc. v. City of Spokane, 134 Wash. 2d 947, 970, 254 P.2d 250, 261 (1998); *see also* Creative Env'ts, Inc. v. Estabrook, 680 F.2d 822, 833 (1st Cir. 1982).

195. *See supra* notes 188, 189, 192–93, and accompanying text.

196. *See supra* notes 189, 193, and accompanying text.

197. Wash. Rev. Code § 64.40.020(1) (1998).

198. Wash. Rev. Code § 64.40.020(2) (1998).

provides clearer and more appropriate guidelines to examine land use decisions than does the notion of substantive due process. The arbitrary or capricious standard embodied in RCW 64.40.020 explicitly guards against the type of conduct at issue in *Mission Springs*.[199] Restricting litigation of routine zoning disputes to RCW 64.40.020 would maintain the paramount distinction between conduct that is improper under state law and conduct that violates rights protected by the federal constitution.

C. *Application of the "Shocks the Conscience" Test to Washington Case Law*

Applying the "shocks the conscience" standard, neither the *Lutheran Day Care* nor *Mission Springs* courts should have found a violation of the plaintiffs' substantive due process rights. The plaintiff in *Lutheran Day Care* was three times denied a building permit as a result of conduct that the trial court found did not constitute willful discrimination or even reckless conduct.[200] The defendant council members in *Mission Springs* acted based on legitimate concerns about traffic safety.[201] Neither of these cases presented an invidious motivation or the shocking abuse of power that would make these actions arbitrary in the constitutional sense. The presence of a suspect class may not be a prerequisite to finding a § 1983 violation under the "shocks the conscience" standard; however the examples of race-based decisionmaking or using zoning laws to protect one's business from competition, demonstrate the level of irrationality that must be demonstrated to find a § 1983 violation.[202]

The City of Seattle's actions in *Sintra I* more closely approach the level of a substantive due process violation.[203] The City of Seattle sought payment of a fee under its Housing Preservation Ordinance despite the fact that an injunction had been entered against its continued enforcement.[204] In requiring payment of more than $200,000 as a

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199. The court in *Mission Springs* upheld a finding that RCW 64.40.020 was violated as well as § 1983. The court awarded attorney fees, which constituted the bulk of Mission Springs's, recovery without distinguishing between the rights provided by the respective statutes. *See Mission Springs*, 134 Wash. 2d at 972, 954 P.2d at 262.

200. *See* Lutheran Day Care v. Snohomish County, 119 Wash. 2d 91, 98, 829 P.2d 746, 749 (1992).

201. *See Mission Springs*, 134 Wash. 2d at 956, 954 P.2d at 254.

202. *See* Creative Env'ts, Inc. v. Estabrook, 680 F.2d 822, 833 (1st Cir. 1982).

203. *See* Sintra Inc. v. City of Seattle (Sintra I), 119 Wash. 2d 1, 829 P.2d 765 (1992).

204. *See id.* at 9–10, 829 P.2d at 769–70.

condition of processing Sintra's land use applications, the city abused its monopoly over land use authority to Sintra's significant detriment.[205] Moreover, in contrast to the public safety concerns that motivated the City of Spokane, the sole intent of the City of Seattle was to assure payment of a fee.[206] This fundamental abuse of permitting authority for reasons unrelated to any legitimate land use goal approaches the level of using zoning power for political purposes or some other examples the federal circuits have given of "truly irrational" action.[207] Whether or not the City of Seattle's actions could be characterized as conscience shocking, the conduct at issue was markedly different from that of the "run of the mill" zoning case.

V. CONCLUSION

The need for the Washington Supreme Court to adopt a clear and consistent approach to § 1983 land use actions is readily apparent. The line of cases concerning what constitutes a denial of substantive due process for purposes of § 1983 applies numerous and often contradictory standards that fail to clearly define what is necessary to state a claim under § 1983. The *Mission Springs* decision continues the inconsistency in this line of cases, returning Washington to a standard reminiscent of that espoused in *Lutheran Day Care*. Not only is the scope of property rights subject to Fourteenth Amendment protection broad under *Mission Springs*, but the range of conduct that can violate substantive due process is likewise expansive.

Section 1983 provides greatly enhanced remedies because it recognizes a fundamental distinction between conduct that is merely improper under state law, and that which is egregious enough to violate the federal constitution. The application of § 1983 to land use issues must be considered with reference to the vast body of federal case law restricting the use of substantive due process analysis. The use of substantive due process to expand judicial power has been discredited in large part because, as Washington's experience with § 1983 demonstrates, it is difficult to develop coherent standards to guide judicial action. The federal circuits have recognized this fact in their application of § 1983 to land use actions and have limited its application

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205. *See id.* at 7–8, 829 P.2d at 768–69.

206. *See id.*

207. *See* Bituminous Materials, Inc. v. Rice County, 126 F.3d 1068, 1070 (8th Cir. 1997).

to those instances in which fundamental rights are truly at stake. In most cases, Washington law should be more than adequate to address improper zoning decisions. Adopting the "shocks the conscience" test would bring Washington into conformity with federal case law and reserve § 1983 for situations that truly implicate fundamental constitutional rights.