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PROPERTY RIGHTS LAND STEWARDSHIP & THE TAKINGS ISSUE



The right to own and use private property is a cornerstone of the American dream. An urban home with a view of the dynamic city profile, a home on a quiet cul-de-sac in the suburbs, a residence on an acre or two in the countryside with quiet neighbors and breathing space, a farm or ranch sprawled along a river with opportunities to live a healthy life and earn a decent living from the land—most of us have had one or more of these visions and goals at some time in our lives.

However, the idea that we can use our property in any way we choose is not, and never has been, a constitutional right. On the other hand, the government cannot, in the name of the public welfare, enact and enforce any restriction it chooses on the use of private property.

There probably is no public policy issue more controversial today than the “takings issue,” especially in rural areas. But, what are the facts and what are the popular fictions regarding our constitutional rights to own and use property, and what are our land

stewardship responsibilities to others in our society? This publication discusses both sides of this question from the perspective of judicial interpretations of our Fifth Amendment rights.

The right to own and use property is embedded in the Fifth Amendment of the U.S. Constitution:

“ . . . nor shall private property be taken for public use, without just compensation.”

Fifth Amendment
U.S. Constitution

“No person shall be . . . deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.”

Judicial interpretation of the Fifth Amendment has been, for the most part, a history of

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clarifying and balancing our rights to use property with our social responsibilities. Limitations on how we may use our property act as statements of individual responsibility for the welfare of the society we all share, and limitations on government restrictions recognize that the rights of the majority do not always prevail over the rights of the individual.

The Fourteenth Amendment of the U.S. Constitution extends due process protection to state actions:

“No State shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.”

Like the Fifth Amendment, the Fourteenth Amendment also protects property owners by guaranteeing due process and equal treatment under the law.

The clearest land use application of the Fourteenth Amendment is in the prohibition of arbitrary and capricious zoning decisions. This means that all property owners must be given due legal process and that no single property can be singled out for special favorable or unfavorable treatment.

Originally, common law recognized that nuisances lawfully could be abated and banished. A nuisance is an unreasonable interference with the use and enjoyment of a property by uses of another property. Nuisances may include noise, smoke, smells, dangerous conditions, or polluted air or water.

Nuisance regulation was, and still is, used to prevent severe conflicts among uses, such as heavy industry locating in a residential area. After the 1920s, planning and zoning laws evolved from the early nuisance restrictions to provide broader and more explicit protection from conflicting land uses.

The Oregon Constitution, Article 1, section 18 provides:

“Private property shall not be taken for public use, nor the particular services of any man be demanded, without just compensation; nor except in the case of the state, without such compensation first assessed and tendered; . . .”

In this publication we focus on Fifth Amendment cases and principles. The format is that of a constitutional law expert responding to questions. These questions often have been raised at public forums. Responses are drawn from case law and publications and have been reviewed for accuracy by the persons noted in “Reviewers,” page 14. Citations for all cases and publications used are listed in “References,” page 13.

If the government wants to put a public project on your land, they have to pay a fair price for the land.

The Fifth Amendment and most state constitutions say that private property can't be taken by government. Doesn't that mean that the government cannot tell an individual what use can or cannot be made of property?

Not exactly. The key word is “taken.” When is property taken? “Taking” does not have a clear, consistent meaning. The U.S. Supreme Court and several state courts have looked at it in a variety of contexts for more than 100 years. Before 1922, there were two interpretations.

The first was a taking of title to a property to be used for a highway, building, or some other public use. The courts clearly said that such a taking cannot be done without just compensation. So, if the federal, state, or local government wants to put a public project on your land, they have to pay a fair price for it. This interpretation we now call “eminent domain.”

The second interpretation had to do with a physical “invasion” of private property; for example, flooding caused by a public water impoundment project. In *Pumpelly v. Green Bay County (1871)*, the U.S. Supreme Court found that a dam, authorized by a state statute to control flooding, destroyed a landowner's property value by flooding his land. This type of invasion was ruled a taking.

Before 1922, then, the individual property owner was due compensation for a taking only if one of these two conditions occurred. By inference, then, the government could severely restrict by regulation property owners' freedom to do as they wished with their property.

In fact, government did restrict or prohibit use to prevent nuisances. For example, in both the *Mugler v. Kansas* case in 1887 and the *Hadacheck v. Los Angeles* case in 1915, the U.S. Supreme Court upheld state laws and local ordinances which closed two businesses (a brewery and a brick-making operation) because of nuisances they imposed on society.

Before 1922, regulations for the public welfare were not subject to compensation under the interpretation of “taking.”

In 1908, the Maine Supreme Court advised the state legislature that the state could regulate cutting of trees on private property for erosion control and other environmental goals without paying compensation. The Court quoted from earlier decisions of the U.S. Supreme Court:

“We think it a settled principle . . . that every holder of property . . . may be so regulated that it shall not be injurious to the community.”

In summary, before 1922, regulations for the public welfare were not subject to compensation under the interpretation of “taking” in the Fifth Amendment. However, it should be noted that, compared to today, there were relatively few land use and environmental regulations.

While property may be regulated to a certain extent, if regulation goes too far, it will be recognized as a taking.

Pennsylvania Coal v. Mahon, 1922

What happened in 1922 to change this interpretation?

The *Pennsylvania Coal v. Mahon* case, involving the State of Pennsylvania and a coal company, worked its way up to the U.S. Supreme Court. The coal company was mining coal under houses built on land it had sold to individuals. The homes had started subsiding or falling into the mine shafts. The State of Pennsylvania passed a restriction on mining under houses. The coal company argued that, because they had retained mining rights, the state was “taking” their property.

In 1922, the U.S. Supreme Court issued an opinion in this case that changed the ground rules on regulations. Chief Justice Oliver Wendell Holmes wrote:

“As applied to this case the statute is admitted to destroy previously existing rights of property and contract. The question is whether the police power can be stretched so far. Government could hardly go on if to some extent values incident to property could not be diminished without paying for every such change in the general law **The general rule is that, while property may be regulated to a certain extent, if regulation goes too far, it will be recognized as a taking.**”

The implication of the ruling was to extend the test for a taking from confiscation or invasion of property toward the individual’s rights of protection from government rules that go “too far” in restricting use of property.

How far is “too far”?

That is the question that state and federal courts have been debating since 1922.

In the 1920s, cities started adopting zoning laws. In 1926, in *Village of Euclid v. Ambler Realty Co.*, the U.S. Supreme Court upheld a new zoning ordinance adopted by the city of Euclid, Ohio. As part of the new ordinance, Ambler’s property was “down-zoned” from industrial to residential. Ambler argued that they lost thousands of dollars, and thus the zoning constituted a taking.

However, the Court, in its interpretation of the balance between private property rights and the government’s powers of regulation, ruled that Ambler did not lose all beneficial use of its property. Even though the land now was worth less money, Ambler could still develop and sell it. So, therefore, it was not “taken.”

The court also established the “presumption of validity” principle, which means that unless a challenger can show that a legislatively adopted ordinance is arbitrary and unreasonable, the court will assume that it is valid.

Is that where we stand now?

Yes, basically, although other cases have refined the tests for a taking. As our society has grown, changed, and become more complex, government has played a larger role in defining and regulating nuisances and the way land is used.

Now, we rely on government regulations to protect our property values, views, water and air quality, wildlife, forests, and farmlands. Regulations have multiplied to cover more types of problems. While most of us probably can agree that we, as a society, need some regulations for our own and others’ benefit, we don’t always agree on specific regulations, their applications to individual cases, and society’s responsibility to property owners.

These disagreements increasingly lead to lawsuits and complaints that the restrictions constitute “taking” property under the Fifth Amendment. In fact, in recent years, there have been quite a few of these cases heard by the U.S. Supreme Court.

To summarize the history, the U.S. Supreme Court established an important new standard in 1922, remained silent for 50 years, and, then, during the past 20 years, refined that standard.

Key points, 1990s:

- Simply denying the most profitable use of land does not result in a taking. Denying all economic use generally would.
- The regulation must serve a valid public purpose.
- Public access to private property can be held to be a taking.

What is causing this recent activity by the Supreme Court?

Certainly, our increasingly complex land use and environmental regulations from both state and federal agencies have contributed to litigation. Property owners have challenged regulations on the basis of both reduction in value and validity of the public purpose. Some of the cases are somewhat convoluted in their issues and the court decisions less than decisive, but several key points emerge.

First, the economic impact of a regulation has importance in the takings tests. However, simply denying the most profitable use of land does not of itself result in a constitutional taking. Denying all economic use generally would. Decisions of the courts make it clear that, while the economic impact of a regulation may be severe, the owner must be left with a “reasonable economic use” of the property to avoid a taking.

Second, the regulation must serve a valid public purpose. Public purposes may be related to local health and safety, as in the case of nuisance regulations, but they also

may include general welfare considerations such as protection of air and water quality, agricultural and forest lands, wetlands, floodplains, and sites of historic or archaeological value. Furthermore, the public purpose must be linked clearly to the specific restriction or permit condition on a property.

Third, public access to private property can be held to be a taking.

Two recent U.S. Supreme Court cases, *Kaiser Aetna v. United States (1979)* and *Dolan v. Tigard (1994)*, have invalidated ordinances allowing access to private property.

In the first case, the government attempted to allow public access to a private waterway. In the second, the city required dedication of a bicycle path for public use as part of a development permit.

In both cases, the Court held that there must be a strong relationship, or **nexus**, between the exaction (condition of approval) and the impacts of the proposed land development in order to avoid a taking, especially when the right to cross over the property of another is allowed.

A major reduction in value does not constitute a taking, as long as the owner retains some economic value.

Penn Central v. New York City, 1978



What are the key court cases on the takings issue during the past 20 years?

Seven decisions by the U.S. Supreme Court stand out.

Penn Central v. New York City (1978)

In this case, the city of New York adopted a historic landmark zone, which precluded the development of a high-rise building on the Grand Central Terminal site. The U.S. Supreme Court upheld the regulation, reaffirming the principle that a major reduction in value does not constitute a taking, as long as the owner retains **some economic value in line with reasonable investment-backed expectations.**

Agins v. City of Tiburon (1980)

This case is important because the U.S. Supreme Court articulated two tests for a taking that were cited in later cases.

The city adopted an open space land use ordinance as required by state law. At time of purchase, the owner of a 5-acre parcel hoped to be able to build 20 homes, similar to the density allowed on some parcels in the area. Under the new ordinance, the parcel could qualify for 0.2–1 house per acre, depending on site impact studies. Although he had filed no development or impact plans, the plaintiff argued that the down-zoning was a taking.

The ordinance was upheld because the developer had not filed a development plan and the ordinance did allow some residential development on the property. The court held that the application of zoning standards to a parcel becomes a taking if:

1. The ordinance fails to “substantially advance legitimate state interests.”
- or
2. The ordinance “denies an owner economically viable use of his land.”

The court ruled that the ordinance did not constitute a taking under these tests.

Keystone Bituminous Coal Association v. DeBenedictis (1987)

The whole property must be considered in a takings claim.

Keystone Bituminous Coal Assn v. DeBenedictis, 1987

The circumstances of this case were similar to the 1922 Pennsylvania Coal case. The State of Pennsylvania passed a law requiring coal companies to leave 50 percent of coal beneath buildings and cemeteries to prevent collapse. The coal companies argued that the statute and rules and all their applications

were unconstitutional, because they could not use part of their property; they also argued that the Court should focus only on the restricted portion of their property in deciding their takings claim.

The Court rejected the coal companies’ argument and upheld the state law. **The Court held that, when the whole parcel was considered, the coal companies retained an economically viable use of their property.** The principle that the **whole** property must be considered in a takings claim became an important one.

First English Evangelical Lutheran Church v. County of Los Angeles (1987)

The church argued in this case that floodplain restrictions imposed by the county prevented them from rebuilding a handicapped children’s campground after a flood and was a taking for which compensation was due. The California Supreme Court denied the takings claim, based on its position that only invalidation of an ordinance or law, not compensation, is appropriate when a regulation goes too far.

The U.S. Supreme Court did not decide this case but remanded it back to the California court. It did rule that, if the California court found that a taking had occurred, **compensation for “temporary taking” would apply.** A “temporary taking” refers to the period during which the offending regulation applied but does not include normal delays in obtaining permits.

The California Court then ruled that no taking occurred, since the public necessity of preventing harm to the children outweighed the alleged economic impact to the landowner.

Nollan v. California Coastal Commission (1987)

Any exaction or other requirement must be directly related to the impact of the proposed project.

Nollan v. California Coastal Commission, 1987

This case involved exactions, the practice of requiring land or other contributions from a developer to help offset costs to taxpayers of new public facilities. To compensate for the loss of view and access to the beach caused by construction of the applicant's home on a beach-front lot, the state wanted public access across the private beach

in front of the house.

The U.S. Supreme Court struck down the exaction and established a new standard: the nexus requirement. **Any exaction or other requirement must be directly related to the impact of the proposed project.** If, for example, a subdivision needed an access road or park for its residents, these facilities could be part of the conditions for approval. Other unrelated public benefits could not be required.

Lucas v. South Carolina Coastal Council (1992)

After several hurricanes, the state adopted new shoreline regulations making it difficult or impossible for the owner to develop his waterfront lots. Other lots had been built upon before the

regulations were adopted. When Lucas bought the land, residential development was allowed. The new regulations prevented any use of the two Lucas lots. Although there was a clear and valid public purpose, the Court found that a taking did occur since the property owner was left with no economic use for the property. The Court did condition its finding by saying that **in the "relatively rare" instance when a regulation denies all economic use of a property, it generally will be considered a taking unless the prohibited use is "barred by existing rules or understandings" derived from background principles of property law or nuisance.** In other words, where a proposed land use would have constituted a nuisance or threat to public safety even before the new regulation that prohibited the use was passed, then the regulation does not amount to a taking.



Dolan v. City of Tigard (1994)

This case is another example of an exaction. The city required, as a condition for a permit to expand a hardware business, that the applicant dedicate a floodplain area to handle increased runoff and a bicycle path for public access. The bicycle path would connect with a city-maintained bicycle and pedestrian path.

The Court had no problem with the floodplain requirement but ruled that *the city failed to show how the impacts of the business were related in a rough proportion to the need for public access on a bicycle path*. Public access constituted an invasion, and there was no nexus established between the requirement and the impacts of the project.

Although the city later modified its exaction to require an easement in place of dedication for the floodplain area and bicycle path, in 1997, the Dolans were awarded \$1.5 million for takings compensation.

Summary of cases

While these cases all have different circumstances, the Court followed similar reasoning in making its decisions. Several important doctrines were developed in this series of cases.

- A taking can occur if a regulation goes “too far,” that is, if it does not substantially advance a public purpose or leaves a landowner with no reasonable economic use of the property.
- A taking may be found when a landowner is forced to allow public access to private property or when any other form of “invasion” occurs.
- A taking may occur when there is no direct connection between the impacts of a proposed project and the exactions required by government.
- The whole property must be considered to determine a taking. A loss in one part of a parcel does not lead to a taking if other parts of the property retain a reasonable investment-backed value.
- A reduction in value, even a significant reduction, does not necessarily constitute a taking.

- A regulation must be based on a valid public purpose. The courts have sustained a wide variety of purposes, including public health, safety, and welfare. Protection of resource and hazardous areas, as well as clean air and water, have been included in general welfare.
- To establish a judicial case for a taking, a developer first must have submitted a development plan to local or state agencies and have exhausted all administrative procedures before taking the case to court.
- If a taking is found to have occurred and the ordinance is repealed, a landowner can claim compensation for the time the property was restricted.

A takings finding generally requires that:

- There is no economic use of any of the property left.

or

- The regulation is not linked to a valid public purpose.

Could you clarify what the term “eminent domain” means?

Eminent domain refers to the power of government to condemn, or take, property for a public purpose, such as a highway. The legal process is known as condemnation, and a court usually decides how much compensation is fair to the landowner.

Because of early court cases, any property impacted by a public project that causes flooding, landslides, or other generally physical impacts that render the property valueless is now taken by eminent domain.

What does inverse condemnation mean?

This term refers to an action of government that inadvertently causes loss of all value in a property. This could happen when a dam floods private land or a zoning restriction results in loss of all economic value. In Oregon, if a taking is found to have occurred, the government agency has the choice of repealing the restriction or paying damages.

What is a temporary taking?

The U.S. Supreme Court ruled in *First English Evangelical Lutheran Church v. County of Los Angeles* that if a taking did occur and the government later decided to repeal the regulation, the owner had to be compensated for the period during which the regulation was in effect.

What is down-zoning?

Down-zoning is a change in zoning that allows less development and thereby lowers a property's value. A change from zoning that allows one dwelling unit per 5 acres to zoning that allows only one dwelling unit per 20 acres would be an example of down-zoning.

Is it required under the Constitution that landowners be compensated for down-zoning?

Generally not. Court decisions since *Euclid v. Ambler* in 1926 have held that down-zoning is a constitutional use of the power of government to regulate growth and development, as long as the owner retains a reasonable investment-backed value in the land. A taking may occur if the owner did not have any value left to the property, as happened in the Lucas case.

Is the U.S. Supreme Court changing its views on what constitutes a taking?

Yes, to some extent, although the Court's decisions have been quite consistent in recent years: regulations that cause loss of all beneficial use are a taking; exactions that do not have a direct connection to impacts of a project are invalid; reduction in value or loss of use of some part of a property is not a taking. In the *Key-stone* case, cited earlier, the U.S. Supreme Court said:

"Under our system of government, one of the state's primary ways of preserving the public weal is restricting the uses individuals can make of their property. While each of us is burdened somewhat by such restrictions, we, in turn, benefit greatly from the restrictions placed on others."

The "too far" test still applies to regulations. Some recent cases, such as *Nollan*, *Lucas*, and *Dolan*, have found in fact that regulations went too far. However, as the overall record of U.S. Supreme Court cases shows, a takings finding under the Constitutional property protections generally requires showing that:

- There is no economic use of any of the property left.
- or
- The regulation is not linked to a valid public purpose.

What have Oregon courts said about the takings issue?

In Oregon, the validity of a land use ordinance usually is decided first by the Land Use Board of Appeals (LUBA). Since the *Nelson v. Lake Oswego* case in 1994, however, Oregon courts have allowed direct challenges to regulations to be initiated in Circuit Court.

If not satisfied with a LUBA or Circuit Court decision, the party to a case would go to the Court of Appeals, and then to the Oregon Supreme Court. If an owner seeks compensation, then the case starts in a circuit court and can be appealed to the Court of Appeals, and then to the Oregon Supreme Court.

Three cases shed light on the Oregon Supreme Court's rulings on the takings issue. All three are inverse condemnation suits.

In *Fifth Avenue Corp. v. Washington County* (1978), in which the county had designated a parcel as future parkland, the Court held:

"... even if planning or zoning designates land for a public use and thereby effects some diminution in the value of his land, the owner is not entitled to compensation for inverse condemnation unless: (1) he is precluded from all economically feasible uses pending eventual taking for public use, or (2) the designation results in such governmental intrusion as to inflict virtually irreversible damage."

The court held that no taking occurred.

In *Suess Builders v. City of Beaverton* (1982), the plaintiffs alleged that the city had "taken" their property by designating it as a future park site in the city's comprehensive land use plan. The Oregon Supreme Court stated that the adoption of the comprehensive plan did not obligate the government to buy the land or allow the plaintiffs to sue for the price of the land since the city could change its mind, as it eventually did.

However, a taking could occur if the city's action froze the status of the land with no economic use left to the property owner. Since that did not occur, no taking was found.

In *Dunn v. City of Redmond (1987)*, the landowner claimed a taking because the city designated his parcel for a future park in the comprehensive land use plan and, he alleged, the city had engaged in bad faith negotiations to acquire his property. Under the plan, he was allowed to keep his existing residential use, and other uses were permitted under a conditional use process. The owner did not seek a conditional use. LUBA ruled that no taking had occurred, citing the *Fifth Avenue* and *Suess* cases.

The owner appealed to the Court of Appeals, which ruled that LUBA did not have jurisdiction and the owner needed to bring his case directly to the court system. The Oregon Supreme Court reversed the finding, holding that LUBA did have jurisdiction over the constitutionality of an ordinance, which was what the owner had challenged. However, if the owner had decided to seek compensation, the case then should have started in Circuit Court. The Supreme Court ruled that the Court of Appeals should rule on the appeal in this case.

The Court of Appeals affirmed the LUBA decision. The city has since purchased much of the land for the park in the area. As of January 1997, the landowner had not taken any other legal action.

The *Dolan v. City of Tigard* case was discussed earlier under U.S. Supreme Court cases. This case was found not to be a taking by the Oregon Supreme Court, a decision which later was overturned by the U.S. Supreme Court.

Other cases could be cited, but these important cases carry the tone and message of the Oregon courts. In general, it is difficult to win a takings claim in Oregon unless one of the two tests cited in *Fifth Avenue Corp. v. Washington County* can be shown to have occurred.

How can a property owner know whether there is a taking because of a zoning regulation?

There are two simple tests of whether a zoning restriction leads to a Fifth Amendment taking:

1. Does the ordinance advance a legitimate state interest? Is there a valid public purpose? The wider the state interest, the more valid the zoning ordinance. For example, compliance with statewide land use goals provides wider validity to local zoning ordinances.

2. Does the landowner retain an economically viable use of the land? As long as some economic value of all or part of the land remains, there generally is not a taking, even if the value is substantially reduced.

If a taking does occur, two actions are possible:

1. The owner can seek to have the regulation repealed, and the owner would be due compensation for the time the land was "taken."
2. The owner could seek compensation instead of repeal of the ordinance. If a taking is upheld, the government then has the choice of repealing the restriction or paying compensation.

When does a taking occur because of an exaction?

An exaction becomes a taking when there is no direct and roughly proportional relation between the exaction and the impacts of the proposed project. If public access over or through private property is part of the exaction, there is more likelihood that the courts will view this as an "invasion" and rule it a taking.

I'm more concerned about a taking because of environmental laws, such as the Endangered Species Act. How do we know if we have a case?

Environmental laws designed to protect air or water quality, wildlife species habitat, or other public resources often use regulations that restrict landowners' use of their land. A taking could occur if:

1. The law or regulation does not advance a valid public purpose.
- or
2. The owner is left with no economic value to the property.

Two landmark environmental cases are *Just v. Marinette County* and *Sweet Home Chapter of Communities for a Great Oregon v. Babbitt*. In the first case, the landowner filed a takings claim after he was denied a permit to fill a wetland in order to create a development site. The Wisconsin Supreme Court found that the wetland performed valuable functions within the local ecosystem and that the landowner "... **has no**

Landowners have an obligation to protect wildlife habitat under the Endangered Species Act, not just individual animals or their nests.

Sweet Home Chapter of Communities for Oregon v. Babbitt

absolute and unlimited right to change the essential natural character of his land . . .” The Court ruled that no taking occurred.

The second case concerned whether or not private landowners have an obligation under the Endangered Species Act to protect wildlife habitat or simply individual animals or their nests. The U.S. Supreme Court ruled that the Act does extend to habitat protection, leaving the landowners with the options of showing a species is not threatened or endan-

gered or that its range does not affect their property.

A third case was decided in 1997 by the U.S. Supreme Court regarding the Endangered Species Act. The suit was filed by Klamath County, Oregon ranchers and irrigation districts. Though not a Fifth Amendment case, it did establish a judicial doctrine that affected parties may sue under the Endangered Species Act to seek judicial review of the government’s opinion that an activity might affect an endangered species.

In this case, the activity was water withdrawal for irrigation. The government argued that it needed to limit withdrawals to protect two endangered fish species. The case did not overturn the government’s position; it did establish the water users’ right to a review of the necessity for the limitation.

I have heard someone talk about “givings” as a counter to takings. What does “givings” mean?

There has been debate for more than 20 years about landowners who benefit from government actions versus those who lose property values. These sides have been termed “winners and losers,” “windfalls and wipeouts,” and “givings and takings.”

The basic idea is that the “lucky” ones gain an increase in property value through taxpayer expenditures, such as extension of water and sewer lines; through a change in zoning; or through restrictions, such as wetlands regulations that may prevent other property from flooding. These financial gains by individuals could be taxed or otherwise used to compensate those who lose value in property by government action.

It seems that, under the U.S. and Oregon constitutions, private property can be restricted severely and still not be a constitutional taking, as long as all property is treated equally. While this may be legally sound, is it fair to landowners? Should they carry the financial burden imposed by zoning and environmental laws for the benefit of society?

That’s a tough question which requires more discussion than we can provide here. With the exception of Connecticut, all states and the U.S. Congress have considered legislation to assess the impact of proposed laws and regulations on property owners and/or to compensate landowners for loss in value beyond 20, 30, 50, or some other percentage.



Twenty states have passed legislation as of January 1997. Eleven of these states have enacted impact assessment laws. For example, Virginia requires the state planning office to do an assessment of the impact of regulations on the “use and value of private property.”

Five states have enacted a requirement that the state attorney general review proposed regulations for possible constitutional takings. Maine established a Land Use Mediation Program to provide a prompt and inexpensive local forum for review of takings claims.

Four states have enacted compensation laws. Florida passed a compensation law in 1995, which says a landowner must be compensated or given a waiver to a regulation for a government action that “inordinately burdens” the landowner. It is up to the mediation process or the courts to interpret when an action inordinately burdens the landowner.

The Washington State legislature passed a compensation law, subject to a vote of the citizens. The citizen referendum rejected it; one reason was the high cost of administering the law. Cost to taxpayers of preparing financial impact studies of regulations can be very high, as well as the actual costs of compensation.

Compensation legislation is, of course, a political answer to landowner concerns about environmental and zoning restrictions. Probably the word “taking” should be dropped to avoid confusion, since this type of compensation usually is not for a constitutional taking under the Fifth Amendment.

Instead, these laws compensate landowners for a reduction in property value, due to regulations, that in most cases would not qualify for a taking, by definition, under constitutional

interpretations. As our review of cases has shown, a 30, 40, or 50 percent reduction in value has not been held by the U.S. Supreme Court to be a taking.

The basic question is one of fairness. The legislatures of 20 states have expressed their concern that regulations not infringe unfairly on property owners.

On the other hand, if a constitutional taking has not occurred, some people question whether it is fair to

require that taxpayers pay compensation to maintain air and water quality or to preserve wetlands or habitat for an endangered species. They argue that land ownership includes land stewardship and social responsibility. If the increased costs to taxpayers of compensation or legal reviews prevent enforcement of environmental laws, then, in economic terms, this is “inefficient government behavior,” because environmental protection could be underprovided for the majority of citizens.

The fairness question sometimes is framed in the doctrines of “preventing a harm” versus “gaining a benefit.” If a regulation prevents a harm to the public, then no compensation is necessary. If the regulation gains a benefit to the public for which it normally has to pay, then compensation to a restricted landowner is fair. Of course, the problem is that people do not always agree on whether a regulation “prevents a harm” or “gains a benefit.”

Another approach to fairness is to recognize that some individuals do, in fact, get caught in the web of government agencies’ regulations. They may be unfairly restricted from certain activities on their own land.

However, instead of an across-the-board compensation law or financial impact requirement, which could shut down community and environmental protection laws and be very expensive to taxpayers, a variance procedure or a local mediation board could provide relief. A mediation board could hear the facts of the case and make exceptions or variances to the regulations.

For example, the Land Use Mediation Board in the state of Maine is a way to resolve problems without expensive litigation. These types of measures have been proposed by several national organizations.

Conclusion

The complexities of property rights and government regulations on land use continue to challenge private citizens, government agencies, and the courts. There are many sides to the question of fairness and several ideas for addressing it. This publication has discussed the constitutional issues of taking. By understanding the legal background of these issues, you’ll be better able to understand and participate in the ongoing debate about them.

Twenty states have passed legislation requiring an assessment of impact of proposed laws on property owners and/or compensation for loss in value.

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