An Introduction to Takings Law

by Christopher J. Duerksen, Esq. & Richard J. Roddewig, Esq.

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

With these few words, the framers of the United States Constitution enshrined in the Fifth Amendment one of the most fundamental of individual rights — to own property free of the threat of seizure by government, unless the government pays for it. This basic property right was derived from 17th and 18th Century English legal tradition that prohibited the king from taking a subject's property except by a duly enacted law of the land and with full indemnification.

Historical records show that what the drafters of the Bill of Rights had in mind when they adopted the "just compensation" or "takings" clause was to permit the government to take private property for public use — for example, land needed for a public highway — but only upon payment of compensation.

Today, we call this government action exercising the right of eminent domain or condemnation. Thus once again, the framers demonstrated their genius in balancing the rights of the individual with the clear need of the people — government — to undertake public projects for everyone's benefit.

It is hard to imagine how the nation could have grown or society would have functioned without the ability to judiciously exercise the power of eminent domain to build roads, dams, parks, and other projects. Indeed, hardly any reasonable person would quarrel with that notion.

Until the early 1900s, the "takings" clause was thought not to apply to regulatory actions of local governments. However, in a series of decisions in the 1920s, the U.S. Supreme Court held that if zoning regulations went too far in restricting the use of property, they could amount to a taking. *Historical Background.*

In literally thousands of cases over the next decades, state and federal courts established a series of broad tests to determine when a land use regulation amounted to a taking:

1. What is the economic impact of the regulation on the property owner?

The economic impact of a particular regulation is obviously an extremely important factor in determining whether the regulation has resulted in a taking.

> SIMPLY DENYING THE SO-CALLED "HIGHEST AND BEST USE" OF A PROPERTY DOES NOT GIVE RISE TO A TAKING.

It is clear, however, that there are no hard and fast numerical formulas to determine when a regulatory taking has occurred — it is a question that must be decided on a case-by-case basis depending on the facts of each situation. Indeed, several studies that attempted to identify a mathematical formula for the amount of loss in land value that courts will accept have proved unsuccessful and inconclusive.

Most courts in recent years have assessed the economic impact of a land-use regulation by determining whether the owner is left with a reasonable economic use of the property. Simply denying the so-called "highest and best use" of a property does not give rise to a taking. For example, if an historic building can be rented out profitably, denying the landowner the ability to demolish it to make way for a high-rise office, thereby reducing the parcel's speculative value, does not give rise to a taking.

What constitutes a reasonable economic use is determined on a case-by-case basis. Many courts have upheld strict floodplain and wetlands regulations because an owner is able to pursue farming and recreational uses that could produce a reasonable economic return. A few courts have struck down regulations in similar circumstances. The outcome will depend on specific facts: When were the regulations adopted? Did the owner know of the regulations when the property was purchased? Is the loss claimed by the owner the speculative value of future development? Could the owner make a reasonable return under the property's current use, or some other allowed use?

2. Does the regulation promote a valid public purpose?

In reviewing a health and safety, land-use, environmental, or similar regulation under the takings clause, courts pay heed not only to the economic impact on the owner but also to the public purposes being served by the regulation. In fact, some courts have combined these two inquiries into a single examination, often referred to as "balancing of public benefit against private loss."

Typically, courts grant great deference to elected officials in determining what is a valid public purpose for regulation. Attempts by property owners to hold governments to a more onerous standard or burden of proof have been almost uniformly rejected in a regulatory context (as opposed to instances of actual physical invasion).

Recent cases from the Supreme Court and the states show a continuing expansion of what are considered permissible public goals for land-use and environmental regulations.

These goals include open-space and agricultural land protection, landmark preservation and design controls, and protection of environmentally sensitive areas

such as wetlands and floodplains, all of which reflect society's growing concern about the impact of people's activities on our air, water, and land — and a determination to bequeath a healthy, livable environment to our children. Only in special instances, such as where land-use regulations are used to exclude from a community special groups like the mentally handicapped or group homes, have the courts insisted on a higher standard of proof.

3. What is the character of the government action?

Courts have been particularly sensitive to government regulations or actions that can be characterized as efforts to obtain public access to private property. For example, in *Allingham v. City of Seattle* (1988), the Washington Supreme Court upheld a lower court decision striking down a local greenbelt protection ordinance, heavily influenced by the fact that when the city ran out of funds for greenbelt acquisition, it resorted to a regulatory program to accomplish the same ends. Similarly, in *Kaiser Aetna v. United States* (1980), the U.S. Supreme Court held the government's attempt to require the property owner to allow public access to a private pond to be a taking.

At the same time, it is accepted practice nationally to require developers and landowners to provide public open space and trails on their property where their proposed developments create a corresponding need. These conditions to development have generally been upheld even though they have characteristics comparable to a physical "taking" — that is, by allowing public access to private land — so long as there is a sufficient relationship between needs created by a project and the amount of land or type of access required.

However, as illustrated by the recent Supreme Court decision, *Dolan v. Tigard* (1994), the courts will exercise an elevated degree of scrutiny of local government justifications for exactions where such a requirement involves mandatory public access.

In *Dolan,* the Court struck down a trail dedication condition on the ground that the city failed to show any link between the goal of floodplain protection and its requirement that the plaintiff not only set aside land along the creek to handle increased flows, but that the property be opened to the public as a trail corridor. Moreover, the Court found the city had not done sufficient homework to demonstrate that a public trail would offset

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Historical Background of Takings

Interestingly, early experience from England and Colonial America does not suggest that by simply regulating, the government could "take" someone's property. Indeed, there are many examples of strict government regulation of land during this period where there is no hint that anyone expected compensation to be paid. These cases reflect the American tradition of landowner responsibility to use property prudently. For example, after the great fire in Boston in the late 17th Century, a series of laws was enacted directing the use of brick or stone in buildings. No dwelling house could be constructed otherwise upon threat of serious fine. A later act declared that any building that did not meet these standards was a nuisance subject to demolition.

Where landowners sought compensation, courts typically were unsympathetic. For example, in *Hadacheck v. Sebastian* (1915), the City of Los Angeles banned brickmaking — an industrial operation that spewed "fumes, gases, smoke, soot, steam and dust" into the air — from certain areas of the city to protect surrounding residential neighborhoods, even though the plaintiff's brickyard was built before people moved into the area. The factory owner sued, arguing a taking had resulted because the value of his property was reduced from $800,000 to $60,000. The U.S. Supreme Court rejected this argument, balancing the needs of the public against the harmful or inappropriate use of land. The city was promoting a legitimate public need, and the property owner could still use the parcel, even if for a different purpose.

In *Village of Euclid v. Ambler* (1926), the Supreme Court gave its approval to an early zoning ordinance in a Cleveland suburb — despite an argument by the plaintiff landowner that the government should have to pay for prohibiting industrial development on his land, which reduced its value by 75 percent — from $10,000 to $2,500 per acre.

Shortly thereafter, however, in a case titled *Nectow v. Cambridge* (1928), the Supreme Court made it clear that under certain circumstances zoning ordinances may in fact go "too far." In that case the Court struck down a zoning ordinance that allowed only residential use for property that was under contract to be sold for industrial use. This time the Court said that, under the particular facts of the case, "no practical use [could] be made of the land in question for residential purposes," since "there would not be adequate return on the amount of any investment for the development of the property."

The Court went on the same year to uphold a Virginia law requiring the destruction of disease-carrying red cedar trees because of potential damage to nearby apple orchards — all without compensation. Having established the principle of considering both the economic impact of a regulation on a landowner and the need to protect or benefit the public, the Supreme Court then retired from the "takings" field for the next fifty years or so, leaving it to the lower federal and state courts to work out the rules on a case-by-case basis.

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increased traffic associated with expansion of the plaintiff's hardware store. In doing so, the Court distinguished the case before it from more typical land use regulations it had dealt with in earlier decisions by noting that "the conditions were not simply a limitation on the use petitioner might make of her own parcel, but a requirement that she deed portions of the property to the city."

Responding to the Takings Issue

There are a number of different ways in which communities concerned about fairness and balance for all citizens in addressing the takings issue can protect themselves against potential takings claims. These include the following:

• *Establish a sound basis for land-use and environmental regulations through comprehensive planning and background studies.*

A thoughtful comprehensive plan or program that sets forth overall community goals and objectives and which establishes a rational basis for land-use regulations helps lay the foundation for a strong defense against any takings claim. Likewise, background studies of development and pollution impacts can build a strong foundation for environmental protection measures.

• *Institute an administrative process that gives decision-makers adequate information to apply the takings balancing test by requiring property owners to produce evidence of undue economic impact on the subject property prior to filing a legal action.*

Much of the guesswork and risk for both the public official and the private landowner can be eliminated from the takings arena, by establishing administrative procedures for handling takings claims and other landowner concerns before they go to court.

These administrative procedures should require property owners to support claims by producing relevant information, including an explanation of the property owner's interest in the property, price paid or option price, terms of purchase or sale, all appraisals of the property, assessed value, tax on the property, offers to purchase, rent, income and expense statements for income-producing property, and the like.

> MAKE DEVELOPMENT PAY ITS FAIR SHARE, BUT ESTABLISH A RATIONAL, EQUITABLE BASIS FOR CALCULATING THE TYPE OF ANY EXACTION

• *Establish an economic hardship variance and similar administrative relief provisions that allow the possibility of some legitimate economically beneficial use of the property in situations where regulations may have an extreme result.*

These procedures help to avoid conflicts in the first place by allowing for early consideration of alternatives that may be satisfactory to all concerned. However, relief should be granted only upon a positive showing by the owner or applicant that there is no reasonable economic use of the property as witnessed by evidence produced as outlined above. Remember that the landowner has the burden of proof on hardship and takings issues, except, perhaps, where public access is being required to the property in question.

• *Take steps to prevent the subdivision of land in a way that may create economically unusable, substandard or unbuildable parcels.*

Subdivision controls and zoning ordinances should be carefully reviewed, and should be revised if they permit division of land into small parcels or districts that make development very difficult or impossible — for example by severing sensitive environmental areas or partial property rights (such as mineral rights) from an otherwise usable parcel. Such self-created hardships should not be permitted to develop into a takings claim.

• *Make development pay its fair share, but establish a rational, equitable basis for calculating the type of any exaction, or the amount of any impact fee.*

The U.S. Supreme Court has expressly approved the use of development conditions, exactions, and fees, so long as they are tied to specific needs created by a proposed development. The use of nationally accepted standards or studies of actual local government costs attributable to a project may help to establish the need for and appropriateness of such exactions.

• *Avoid any government incentives, subsidies, or insurance programs that encourage development in sensitive areas such as steep slopes, floodplains, and other high-hazard areas.*

Nothing in the Fifth Amendment requires a government entity to promote the maximum development of a site at the expense of the public purse or to the detriment of the public interest. Taxpayers need not subsidize unwise development. At the same time, consider complements to regulation such as incentive programs that encourage good development, when regulatory approaches cannot alone achieve necessary objectives without severe economic deprivation. While not a legal requirement, such programs can help take the sting out of tough, but necessary, environmental and land use controls. ◆

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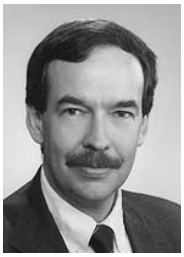

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Portions of this article were excerpted from Chris Duerksen & Richard Roddewig's, Takings Law in Plain English *(1994), prepared for the American Resources Information Network.*