Taking Aim at Takings Claims

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Takings claims can create enormous potential liability for government and should not be taken lightly. It is just as important to recognize a valid takings claim as it is to know the ones that have no merit. In the following pages, I want to first provide an overview of basic principles, and then address some of the questions planning commissioners often have about takings.

Bear in mind that planning commissioners need to consult with their local counsel on an ongoing basis. My objective is to give you enough of a background so that you can make proper inquiry of your legal counsel. Remember, we actually have 51 constitutions in this country – one federal and 50 state. What might be legal under the federal Constitution may be unconstitutional under state law and vice versa. You need to know about both federal and state requirements.

Takings Basics

Fundamentally, the takings issue arises out of twelve simple words from the end of the Fifth Amendment of the Bill of Rights. "Nor shall private property be taken for public use without just compensation."

There are two major categories of takings. One is direct condemnation, such as when the government uses its eminent domain power to take private property for a public use. This was the subject matter of the recently-decided case of *Kelo v. New London*, which has resulted in a firestorm of federal and state reaction to limit the government's power to take private property for economic development. *Editor's Note: For more on the Kelo decision, see page 20.*

The other broad category is inverse condemnation, or regulatory takings. These are the takings most often of concern to planning commissioners.

Inverse condemnation takings come in three flavors:

First (but not foremost!) are the "physical invasion" cases where the government by regulation allows for public access to private property. A notorious case which made its way to the U.S. Supreme Court involved a woman who owned an apartment building, and was required by the state to provide space for a small junction box for cable television on the roof of her apartment building. The Court found that to be a physical invasion and consequently deemed it a *per se* (in itself) taking. Once a physical invasion by regulation has been found, the only question is how much the damages are.

> How far can you go in decreasing the development potential of property by regulation?

A second flavor of inverse condemnation is found in those regulation cases where the government so restricts a property that it is rendered valueless. There has been just one of these cases to make its way to the U.S. Supreme Court, *Lucas v. South Carolina Coastal Council*, and by my reckoning only two later cases in any court decided similarly. These are called categorical takings.

In the *Lucas* case, the property owner with two waterfront lots was prohibited by regulation from doing anything on them. When a categorical taking of this type is found, the analysis and remedy are exactly the same as they are for the physical invasion type of taking. Once it is demonstrated that the property has been rendered valueless, the only question is how much will be paid.

There are two minor exceptions which will exempt government from having to pay anything in a categorical taking case, but they are even rarer than the cases themselves. If the regulations are designed to prevent a public nuisance or the property owner never had the right to develop the property at all because of the existence of long-standing law (such as the public trust doctrine), compensation is not due.

Now, we get to the third and tastiest flavor, the partial regulatory taking. It is here that the courts have feasted. Nearly all regulatory takings are of this type. They are represented by one of the ultimate partial regulatory takings cases, *Penn Central Transportation Co. v. New York*, in which the Supreme Court held that it was not a taking when the New York City landmarks commission prohibited Penn Central from placing an office tower atop Grand Central terminal.

The *Penn Central* decision established a three-part test:

The first question that must be answered is the extent of the loss in value from the regulation, sometimes called the "diminution in value." Planning commissioners frequently ask me how much is too much. The answer is that it depends. There are cases where there has been over a 90 percent reduction in value and no taking found. It is safe to say that, barring any state statutes for takings compensation, reductions in value of 70 to 80 percent are routinely found not to create takings.[1] Once you get to that level, however, you need to be especially careful to find ways to offset the reduction in value caused by regulation.

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1 Several states have enacted laws providing that government actions triggering the reduction in a property's value over a certain percent (often 50 percent) automatically require either compensation or the rescission of the regulation.

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Offsetting compensation through regulation can include mechanisms such as allowing cluster development, so that the areas preserved by regulation do not result in a large reduction in density. Along similar lines, it is possible to provide for the transfer of some of a parcel's development potential to noncontiguous sites. Local governments can also offset the reduction in value by purchasing partial interests, such as easements over the property to preserve it. The idea is to get down below the threshold at which courts tend to find a taking on the basis of diminution in value.

The next question in any analysis is to what extent has the property owner invested in the development of the property. Are the property owner's expectations backed by reasonable investment? The investment can be in absolute terms or relative to the value of the property. It is typically monetary, but can include investment of time and effort, such as in clearing the land and pouring foundations. We call this second part of the test "investment backed expectations" or IBE.

More often than not, state statutes and judge-made law at the state level will determine the degree to which an interest in the existing regulatory scheme has been "grandfathered," or more properly, "vested." There are circumstances, however, where central to a taking claim will be the degree of investment backed expectations. To limit claims based on reasonable investment backed expectations, regulations should prohibit even pre-construction activity, such as clearing, grading, and installation of utilities, without an approval. Commissioners should be especially wary when they know that large sums of money have been invested and substantial construction has gone forward in reasonable reliance on the existing regulatory scheme. Courts will look to those facts and give more favorable consideration to a takings claim under those circumstances.

The third part to the analysis is the most subjective – what is the nature of the government's activity and especially the public benefit weighed against the private burden. If regulation prohibits a toxic waste storage site over a sole source aquifer, the court is likely to find no taking, so long is there is not an extreme diminution in value and substantial reasonable investment back expectations.

> WITH GOOD PLANNING AND THOUGHTFUL REGULATION ALL OR VIRTUALLY ALL TAKINGS CLAIMS CAN BE AVOIDED.

On the other hand, if an official map prevents development of large acreage without any definitive plan for the ultimate acquisition and development of a road system, a court is likely to be more critical of the government's regulation.

When it comes to balancing the public's interest against the private burden, the most successful defensive position is found where the government is involved in life, safety, and public health issues – as compared with "lighter weight" concerns, such as aesthetics.

These three factors under *Penn Central* are interactive. No single factor can necessarily win or lose a case, but they are considered in combination. Note the interplay. If there is little diminution in value, it is likely that the private burden is small compared to the public benefit. If there have been substantial reasonable investment back expectations, it is more likely that the private burden will be greater and the potential for loss in value will be large.

Takings-Related Questions

There are several issues which seem to come up again and again, all across the country.

One is the relationship between spot zoning and takings. Spot zoning occurs when a property is singled out for special benefit, or special burden. Contrary to popular belief, in most jurisdictions spot zoning is only weakly related to the size of the parcel rezoned. There have been cases with fractions of an acre rezoned that have been held not to be spot zoning and cases with many acres of land that have been held to be illegal spot zoning. Go figure.

The key is to look at the property rezoned in context. If the property is rezoned solely or principally to benefit or burden that property, with little or no regard whatsoever for the public's interest, then a finding of spot zoning is possible. However, as with takings, there are few cases finding illegal spot zoning compared to the many times the doctrine is invoked as part of the bluster during a hearing.

How far can you go in decreasing the development potential of property by regulation? The answer is largely found in the discussion above about diminution in value. I once represented a town where local officials thought any reduction in value would cause a taking. That is not so. All property is held subject to the police power to protect the public health, safety, and general welfare, and is subject to reasonable regulation based on permissible governmental objectives.

I'm sometimes asked whether it is important to recognize existing property interests by declaring them to be vested in the face of regulatory changes which would otherwise reduce the development potential and value. As noted earlier, state law creates sometimes complex rules about vesting. You can add more vesting at the local level if you wish. Often, as planning commissioners know to their dismay, a property owner will go off to the zoning board of appeals or board of adjustment and get a variance.

One intermediate approach, potentially available in many states, is to allow some type of relief at the planning and zoning level, short of going to the board of appeals.

This technique can be helpful in two respects. When wide area changes are made reducing development potential, individual properties – because of their unique circumstances – are sometimes

unintentionally rendered valueless or nearly so. To save someone from potentially damaging your zoning scheme by getting a variance and to keep everyone from ending up in the expensive and uncertain frolic known as litigation, a land use ordinance may have built into it the right to seek administrative relief when the property would be rendered valueless or nearly so through regulation.[2] This allows decision-makers to make decisions based on local knowledge and preserve the intent of the scheme of local regulation, rather than turning the decision over to a black-robed judge who may not know much about the municipality.

The other advantage to this technique is that it may create a first line of defense to takings claims by establishing what is called the "finality" requirement. The finality requirement is intended to ensure that the government has reached a final and determinative position as to what it will allow. When relief is given through these type of processes, sometimes the diminution in value is lessened and the taking eliminated. And even if there is a taking, partial government relief will help the court in establishing what compensation must be paid.

It is not necessary that the "highest and best use" of every property be permitted by public regulation. It would be virtually impossible, for example, to have transitional zones between high density and low-density uses, if all transition zones were required to "migrate" to the high impact district in order to be consistent with what one expert might find to be the "highest and best use."

Finally, we have noted many questions over the last couple of years since the U.S. Supreme Court's decision in the *Lake Tahoe* case about the use of moratoria. A moratorium should ordinarily be used only as a stopgap measure intended to fix some shortcoming in planning and regulation. A six month "planning pause" moratorium, used infrequently and for limited areas, should be defensible in most parts of the country. Just don't make it a habit.

Longer moratoria, sometimes for several years, have been successfully defended where there is an overriding life, safety, or public health issue, just as I noted above in the question of determining the balance between public benefit and private burden. If there is inadequate water and sewage disposal capacity, a moratorium might be absolutely required while the government scrambles to find financing and get the construction completed to accommodate reasonable development based on the existing plan and regulations.

Six factors come into play in determining the defensible moratorium: the extent to which it is enabled by state law; the burden on the private property owner; the length of time it is in place; the extent of uses remaining in the property; the importance of the public objective; and the availability of local administrative relief.

Summing Up:

With good planning and thoughtful regulation all or virtually all takings claims can be avoided. Strategies can also be put in place to mitigate against takings claims by reducing the likelihood that properties will face serious diminution in value. This can be accomplished by allowing for density to be shifted within a parcel or transferred to other parcels. If government limits its most stringent regulation to areas of the greatest public concern involving life safety and health, it is unlikely that a private impact will outweigh the public benefit. ◆

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2 The problem with relying on variances in these situations is that in the large majority of cases the property (despite suffering a huge loss in value) doesn't meet the practical difficulty and unnecessary hardship tests typically required for variances. *Editor's Note: for more on variance standards, see Robert Widner's "Basics of Variances," in PCJ #50 (available to order & download online at: <www.plannersweb.com/wfiles/w223.html>.*

Official Maps

Many municipalities, as authorized by state enabling legislation, have adopted what are termed "official maps." An official map is a precise delineation of the location of future streets, drainage ways, and similar public improvements. The goal of the official map is to prevent development from locating in these areas, and minimize the government's cost when it is ready to proceed with the improvements.

Takings Bluster

Some property owners think they can play the takings issue like a trump card, invoking it to gain advantage. In reality, there are very few good takings claims. The fact is in my career of almost 30 years as a land-use lawyer I have never lost a takings case when representing the government and have never won a takings claim for a property owner.

Good takings claims are as rare as good spot zoning claims. It is largely because the takings issue has become a battleground for the conflict between property rights advocates and those who support high levels of public regulation that the takings issue has become so prominent.

Nevertheless, it is important to be aware of the principles and rules of thumb that I discuss in this article – especially since the costs of losing a takings case can be high. But realize that applicants can use the "bluster" of arguing that local regulation will result in takings to try to derail proposed zoning changes. The important point for planning commissioners is not to be flustered by the bluster, and to draw on advice from your legal counsel when in doubt.