



Wisconsin Briefs

from the Legislative
Reference Bureau

Brief 98-2

April 1998

TAKINGS: BALANCING PUBLIC INTEREST AND PRIVATE PROPERTY RIGHTS

INTRODUCTION

The legal term “takings” refers to the physical acquisition of private property by governmental bodies. It also applies when government regulation removes all economically viable use of private property in what the courts describe as a “regulatory” or “constructive” taking. The concept is based on the Fifth Amendment to the U.S. Constitution, which states that private property cannot “be taken for public use without just compensation”.

Under eminent domain powers, federal, state and local governments may acquire private property for roads, military bases, dams and many other projects, but the owners must be compensated. Government may seize property without compensation, however, if the property was obtained from or used to commit a crime or the property’s use has caused a “nuisance” such as substantially endangering public health.

Many argue that when a law or regulation significantly reduces private property values owners should be compensated. Obtaining compensation for a regulatory taking through the court procedures can be costly, lengthy and often unsatisfactory. As a result, property owners in at least 21 states have turned to their state legislatures in recent years for relief. Two important trends – in government regulation and private real estate development – have increasingly brought property rights conflicts to legislative attention.

Beginning with the 1970s, governmental regulation of land use has expanded to include preservation of endangered species, wetlands protection, shoreland and waterways conservation, natural hazard mitigation, historic preservation, and open space conservation. These public goals can conflict with private uses, including residential and commercial development, mining, logging, recreation and farming. In the private sector, following the decline in inflation and interest rates, a real estate boom, which began in the 1980s and continues to this day, has brought more property holders into conflict with environmental and other land use regulations.

TAKINGS AND THE U.S. SUPREME COURT

Although land use cases are local in nature, they may be heard by the federal courts when broad constitutional issues are raised. In deciding whether a government action constitutes a taking, the U.S. Supreme Court has considered several factors, including: 1) the extent to which the regulation interferes with the economically viable use of the property, 2) whether the regulation serves a valid public purpose, and 3) the need for the regulation versus the demands that it places on the owner. In its decisions, the Court sets standards for takings to be followed by lower federal courts or state courts.

Economic Impact. In *Pennsylvania Coal Company v. Mahon*, 260 U.S. 393 (1922), the Court, in its first major decision on the subject, accepted the concept that regulations could cause a taking although there was no physical invasion. Pennsylvania had passed a law prohibiting coal mining practices that could cause buildings or streets to subside into a mine. The Court declared the law unconstitutional because, while it served a valid public purpose, it did not authorize compensation. Speaking for the Court, Justice Oliver Wendell Holmes stated: “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.”

If a law or regulation removes all economic value from a property, it is a taking and the owner is eligible for compensation. In *Lucas v. South Carolina*, 505 U.S. 1003 (1992), the Court found that an owner of beachfront properties in South Carolina was entitled to compensation when he lost the right to build there because of state coastline regulations enacted after the purchase of the property.

The all-or-nothing aspect of the *Lucas* decision reaffirmed a 1978 decision (*Penn Central Transportation Company v. New York City*, 438 U.S. 104) in which the Court argued that an owner must be denied all reasonable use of a property for a taking to occur. Property owners could not, the Court explained, establish a taking “simply by showing that they have been denied the ability to exploit a property interest that they heretofore had believed was available for development.”

The Court has further held that damages might have to be paid even when the taking is temporary. In *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304 (1987), the church argued that interim floodplain restrictions that prohibited the reconstruction of a church-owned campground constituted a taking. The Court did not determine whether a taking had occurred in this case but agreed, in principal, that a remedy for a temporary taking might include compensation for the period it was in effect. In the same ruling, the Court stated that the compensation did not necessarily have to be for the entire value of the property.

If an owner loses the use of only a portion of the property, compensation is not due. The parcel has to be considered as a whole. In *Keystone Bituminous Coal Association v. DeBenedictis*, 480 U.S. 470 (1987), the coal company claimed that a state law that required coal operators to leave 50% of coal beneath public buildings, homes and cemeteries amounted to a taking. The Court determined the owners had not lost all “economically viable use” of their land and rejected the owners’ argument that the court should consider only that portion of the property where coal had to be left in the ground.

Valid Public Purpose. The Court has generally upheld zoning ordinances, historic preservation laws and ordinances, and various environmental regulations as a valid exercise of state and local police powers. Emphasis is placed upon the reciprocal benefits of private property regulation. In *Village of Euclid v. Amber Realty Co.*, 272 U.S. 365 (1926), a property owner argued that a zoning ordinance that prohibited industrial development on his parcel had diminished the market value of his undeveloped land by 75%, but the Court upheld the ordinance as a permissible exercise of the police power. It found the ordinance served a public purpose and was beneficial to other property owners. The Court has held in other cases, however, that merely proving that a regulation serves a valid public purpose does not necessarily mean there was no taking.

Need for Regulation vs. Burden on Owner. The relationship between the need for regulation and the burden placed on the landowner must be considered, particularly when an owner is asked to donate a portion of the property for public use. Such donations are termed “exactions”. In *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987), the Court ruled against a coastal commission decision to demand an easement for public beach access in exchange for a building permit to replace an existing residence. The Court held the commission failed to show an essential connection between the need for beach access and the denial of the permit. In *Dolan v. City of Tigard*, 512 U.S. 374 (1994), the Court ruled that requiring a public easement as a condition to expand or build on an existing property is an unconstitutional taking unless the governmental body can show a “rough proportionality” between the requirement and the particular harm posed by the development.

Congress and the Ripeness Doctrine. In addition to the three standards just described, the U.S. Supreme Court has generally held that a takings claim is not “ripe” for judicial review until the appropriate regulatory agencies have made their final decisions. This means an aggrieved property owner must exhaust all remedies with state and local agencies and the state courts before an appeal can be made to the federal courts.

In its current session, the U.S. Congress has proposed a different approach to the ripeness question. In October 1997, the House of Representatives passed H.R. 1534 designed to “simplify and expedite access to the federal courts”. The Senate is looking at similar legislation.

H.R. 1534 would permit a property owner whose proposal has been turned down on application and again upon appeal to take the case directly to a federal district court. The federal court then must assume jurisdiction unless an unsettled question of state law is involved. In the latter instance, the case can be certified to the federal district court as soon as a state appellate court makes its decision on state law.

TAKINGS DECISIONS IN WISCONSIN

As in many states, the Wisconsin Supreme Court has set its own standards and sometimes anticipated U.S. Supreme Court justifications for takings decisions. The Wisconsin court has affirmed government regulation of private property in an increasingly complex society, while recognizing constitutional limits to state and local police powers. In *Mehlos v. City of Milwaukee*, 156 Wis. 591 (1914), the court stated:

. . . the degree of [legislative] interference [with inherent property rights] within the boundaries of reason is for the legislature to decide, there being left in the end the judicial power to determine whether the interference goes so far as to violate some guaranteed right . . . (601)

The Wisconsin property owner is offered a variety of protections. An owner whose property is adversely affected by land use regulations may file an action under the “just compensation” clause of the Wisconsin Constitution, which duplicates the wording of the U.S. Constitution. Section 32.10, Wisconsin Statutes, authorizes a property owner to file an “inverse condemnation” claim when state or local government occupies property without exercising its powers of condemnation or when a governmental restriction or refusal to renew a license deprives a landowner of a significant portion of a property’s beneficial use.

In a 1923 case, *Piper v. Ekern*, 180 Wis. 586, the court held that a state statute limiting the height of buildings around the State Capitol constituted a taking and declared the law unconstitutional. The court affirmed that the state may regulate private property under its police powers when that regulation provides common or reciprocal benefits to property owners in the affected area. In this case, however, the court struck down the statute because it did not provide any reciprocal rights to affected property owners.

The court repeated in *Buhler v. Racine County*, 33 Wis. 2d 137 (1966) that the standard it has followed for many years is that a taking has occurred when a regulation “practically or substantially renders the land useless for all reasonable purposes”. The “reasonable purposes” standard, however, does not cover all anticipated potential uses. In *Just v. Marinette County*,

56 Wis. 2d 17 (1972), the court ruled that an owner of land “has no right . . . to use it for a purpose to which it was unsuited in its natural state, and which injures the right of others”.

In *Zealy v. City of Waukesha*, 201 Wis. 2d 365 (1996), the court adopted two standards that the U.S. Supreme Court had set for takings cases. The first is to assess the impact of the regulation on the entire parcel and not just on the affected portion. The second is to consider the current use of the land, rather than its potential use. If a regulation diminishes the value of property under its current use then the regulation could be a constructive taking. If, however, the regulation blocks a potential land use that would harm public rights, it is not considered a taking.

STATE TAKINGS LAWS – THREE APPROACHES

Twenty-one states passed some form of takings legislation from 1991 to 1997. In the case of Arizona and Washington, the laws were repealed by referendum. (The Arizona Legislature subsequently passed another law.) Although these laws vary widely in extent and application, they can be classified into three categories: assessment laws, compensation laws and conflict resolution laws.

Assessment Laws. Assessment laws require government agencies to examine their new regulations to see if they would create a “constitutional takings” as the courts now interpret that term. In essence, assessment laws are similar to environmental impact statements.

The scope of assessment laws vary from state to state. Among the various approaches, some states may: 1) require the attorney general to decide if agency regulations are in compliance; 2) allow state agencies to make their own determinations based on guidelines issued by the attorney general; 3) require a formal written analysis that includes approaches that may have less impact on property rights; 4) require an estimate of the cost of compensation to eligible property owners and the source of payments; or 5) require an assessment that contains an affirmative justification for the regulation. About half of the states with assessment laws require all their state agencies to submit assessments, but they do not place the same requirement on local governments. At least four states require most or all local governments to make assessments.

Compensation Laws. Five states have enacted compensation laws that require agencies to pay compensation when regulation actually reduces the market value of a piece of property. In four, the laws are triggered by a percentage decrease in value. Mississippi requires just compensation when a state regulation diminishes value of agricultural or forest land by 40%; in Louisiana the trigger is 20% for these land classifications. North Dakota defines a “regulatory taking” to be one in which a governmental action reduces the value of private property by

more than 50%. Texas requires compensation when a government action restricts or limits an owner's right to property and, as a result, its market value is diminished by 25%. Florida's procedures, which are described in detail below, involve a unique combination of compensation and conflict resolution and do not include a percentage trigger.

Conflict Resolution Laws. Several states, including Arizona, Florida, Maine and Utah, have conflict resolution laws that set up a formal procedure for negotiations between contending parties. Arizona and Utah provide for a private property ombudsman to consult with state agencies and local governments on takings guidelines and implications and advise private property owners who feel they have a claim against governmental units. Arizona's law also established an administrative appeals process where a property owner may appeal a municipal or county dedication or exaction of real property as a condition for its use or development. If the owner wins, the local government must withdraw the dedication or exaction. Florida's law provides for a master who attempts to reconcile the conflicting claims between property owners and regulators before a case goes to court.

THE FLORIDA APPROACH

Florida's law is unusual in several respects. It does not use a set percentage as the triggering point for compensation but rather considers the imposition of an "inordinate burden" on the owner. It also offers a legal remedy for cases that are less than a constitutional taking. Finally, it provides a procedure to settle conflicts between owners and governmental units, along with procedural guidelines for the courts to follow if the dispute reaches litigation.

The Florida act states:

[I]t is the intent of the Legislature that, as a separate and distinct cause of action from the law of takings, the Legislature herein provides for relief, or payment of compensation, when a new law, rule, regulation, or ordinance of the state or a political entity in the state, as applied, unfairly affects real property.

Inordinate burden, under this law, does not include temporary impacts, impacts caused by governmental prohibition or prevention of a public nuisance under common law, or a noxious use of private property.

The law provides for a 180-day notice period before an owner can file a court action against a public agency. During this time, the owner and the agency can attempt to work out a settlement of their differences. The agency must make a "written settlement offer" to the owner. If the owner accepts the offer, the action is submitted to circuit court for approval. If no settlement is made, the governmental unit must issue a written "ripeness" decision that identifies the allowable uses for the property in question. Otherwise, it is assumed that the prior action of the agency is a ripeness decision. A ripeness decision is the last prerequisite for judicial review.

The trial court decides whether the owner had a property right that is inordinately burdened, and, if so, it must ascertain the percentage of compensation due from each government agency involved. A jury decides the amount of compensation owed. Compensation may be based on the difference between the fair market value as it existed at the time of the governmental action and the fair market value of the property as burdened by the regulation. Settlement offers made by the public agency and rejected by the owner are also taken into account.

According to testimony given before the U.S. House Judiciary Committee in late 1997 by a former Florida legislator, few court cases have been filed since the passage of the act, and some of these involved regulations that predated the effective date of the law (May 1995). In over two years, 29 cases have been filed under the alternative dispute provisions, many of which have been settled or withdrawn.

A counsel to the Florida League of Cities, appearing before the same committee, argued that the act has had a “chilling effect” on actions by Florida’s cities. He claimed efforts to re-zone in accordance with state or regional requirements have been met with lawsuits or threat of lawsuits. However, none of the examples presented ended in compensation, and he stated that “the act has not opened the floodgates of litigation as originally predicted.”

TAKINGS LEGISLATION AND THE 1997 WISCONSIN LEGISLATURE

The 1997 Wisconsin Legislature considered the assessment approach to takings in 1997 Assembly Bill 806, which would have required the state and local governments to prepare an assessment if a proposed government action could result in a taking. AB-806 defined taking as a 50% or more reduction of the fair market value of private real property or an action that would require a governmental unit to compensate the owner under the Fifth and Fourteenth Amendments to the U.S. Constitution. The bill did not apply to the exercise of eminent domain, governmental actions mandated by federal or state law, or forfeiture of property resulting from declared nuisances or violations of the law.

Under AB-806, before carrying out an action that may result in a taking, the governmental agency would have to order an assessment of the affected property by private appraisers. If the agency contemplating the action were an elected body and the assessment showed a taking would result, the authorization of the taking would require a three-fourths vote by all members. In the case of a state administrative agency, that unit would not be allowed to submit or implement the proposed rule if an assessment indicated the rule would result in a taking.

The bill permitted a private property owner to ask the district attorney or the state Department of Administration (DOA) to file a suit to void a government action if a taking would result. It also allowed the DOA to file an action on its own initiative if it believed a taking had occurred or when public interests were at stake.

ARGUMENTS FOR AND AGAINST TAKINGS LEGISLATION

Supporters' Views. Supporters of compensation legislation argue that it is not fair for individual landowners to bear most of the burden of regulations that are designed to benefit society as a whole. Since wetlands protection, groundwater regulation, protection of endangered species or other similar regulation presumably benefits the whole community, supporters argue government should compensate landowners who are disproportionately harmed. They also point out that takings legislation prospectively targets new laws and regulations and not existing ones.

Advocates claim takings laws can assist the courts through clear definitions and establishing procedures by which property owners can receive prompt and fair compensation. They argue that courts alone cannot effectively protect property owners because they lack definitive tests for regulatory takings and court actions are prohibitively expensive and time consuming for the ordinary property holder. Another problem with court remedies, they argue, is the "ripeness" requirement. State courts will generally not take property cases unless the owner has exhausted all administrative remedies, and the federal courts will not act until all state remedies are tried. This, opponents assert, can mean property owners have no recourse if regulatory agencies postpone decisions.

Supporters contend that takings legislation will slow or halt government regulation of individual economic activity. At minimum, takings laws may force regulators to think twice before acting or promulgating rules.

Opponents Views. Opponents of takings legislation assert taxpayers will be exposed to billions of dollars of additional taxes if they have to reimburse owners for reduced property values, regardless of the purpose of the government regulation. Environmentalists argue that takings laws "pay people to pollute". They contend that, due to prohibitively high expense, government will find it difficult to enforce current environmental laws or deal with future environmental threats.

Those opposed to the legislative approach argue that property cases should be decided by the courts because the circumstances of each case are unique. In their view, establishing hard and fast rules would prevent the courts from weighing the economic impact of a particular law or regulation.

In their view, assessment laws merely add to governmental bureaucracy. They claim compensation laws, based on statutory percentages, are arbitrary, and they also question who should judge whether a regulation has decreased property value and the basis for such a decision.

Opponents warn that local governments will spend a disproportionate amount of time trying to avoid litigation, rather than protecting the general public. Local officials worry that takings legislation will dramatically increase litigation between municipalities and property owners.

ONGOING RESEARCH

The National Conference of State Legislatures (NCSL) recently published the results of a survey on the effects of state takings legislation through March 1997. Of the 21 states contacted, 15 responded. In most cases, their takings laws had been in effect for two years or less when the survey was conducted, and information on outcomes was not readily available.

In states having assessment laws, there seemed to be little impact on the regulatory process. State agency assessments are often informal and undocumented. Some states found it difficult to determine if a regulation would end in a taking until it was applied to a specific piece of property. It is difficult to obtain information from states where the attorney general advises state agencies on takings implications, since that advice may be protected by attorney-client privilege. Assessment requirements apparently have had only a minor impact on state agency costs and local government costs.

In states that require compensation, no court cases had been filed as of March 1997. More activity had taken place in states that adopted conflict resolution laws, especially Florida. The NCSL report found at least 30 cases filed in Florida, 28 of them against local governments. A minimum of five cases ended in a solution mutually acceptable to the owner and the governmental body. Under Maine's land use mediation program, one case had been filed and it was resolved satisfactorily. In Arizona, two cases were filed in which a city required dedications or exactions from owners. The city lost both cases and withdrew its demands.

The North American Program of the Land Tenure Center at the University of Wisconsin-Madison is conducting research on the impact of state-based private property rights legislation in selected states. In a September 1997 appearance before the U.S. House Judiciary Committee, UW-Madison Professor Harvey Jacobs, supervisor of the study, offered five preliminary conclusions based on ongoing studies:

- Takings laws are too new to have had any appreciable impact.
- The move to pass private property protection laws does not appear to relate to documented abuse of regulatory power.
- In some states, the existence of protection laws has had no impact at all, and, in a few cases, many interest groups and state agencies did not know about or have not paid much attention to the laws.
- In a few states, where development pressures are strong and regulatory practices can significantly curb private property rights, "the existence of

private property laws has had a chilling effect on the development of law, rules and regulations.”

- Private property protection laws may end up having the opposite effect their proponents intended. In some instances where the laws are being used, they may make small property owners more vulnerable, rather than more secure.

Professor Jacobs suggests that we are currently in the first generation of property rights legislation. Because of the difficulties in adopting compensation laws and implementing assessment laws, future laws may move in the direction of conflict resolution. Raising these issues, he suggests, is causing planners and regulators to look for more creative ways to “respect the integrity of private property” and yet achieve “public objectives” of environmental regulation and land use planning.

A recent report by Larry Morandi, Senior Fellow at the National Conference of State Legislatures (NCSL), suggests that state legislatures are devising alternative approaches to land use regulation that affect private owners. Washington, for example, has amended its Growth Management Act to provide greater advance notification and procedural safeguards for owners. Minnesota has revised its wetlands laws to provide greater flexibility in land use. Other states and local governments are looking at permit reviews, alternative zoning and relief measures.

Two recent NCSL reports, “Balancing Land Use Management with Protection of Property Rights and the Environment” and “Evaluating the Effects of State Takings Legislation”, both by Larry Morandi, are available through our library. Contact us to borrow these reports or for further information on the takings issue (266-0341).