

# Appendix A: Plans and Property Rights

A land use regulation or action must not be unduly restrictive so that it causes a “taking” of a landowner’s property without just compensation. The Fifth Amendment to the United States Constitution states that private property shall not be taken for public use “without just compensation”. In the land use context, the argument is that if the land use ordinance, regulation or decision is so restrictive as to deprive the owner of economically viable use of the property, then the property has for all practical purposes been taken by inverse condemnation.

## Federal Standard

The determination, as to whether or not a land use decision amounts to a taking as prohibited by the Fifth Amendment to the U. S. Constitution, has been a difficult task to resolve for the courts, including the U. S. Supreme Court. Determining when a government action amounts to a taking, requiring either the payment of compensation or invalidation of the action for violation of due process, is a complex undertaking. The U. S. Supreme Court itself has admitted candidly that it has been unable to develop a “set formula” to determine when “justice and fairness” require that economic injuries caused by public action be compensated by the government, rather than remain disproportionately concentrated on a few persons. Penn Central Transportation Co. v. City of New York, 438 U. S. 104, 124 (1978) (quoting Goldblatt v. Hempstead, 369 U.S. 590, 594 (1962)). Instead, the high court has observed that “whether a particular restriction will be rendered invalid by the government’s failure to pay for any losses proximately caused by it depends largely ‘upon the particular circumstances [in that] case.’” (Penn Central at 124) (alteration in original) (quoting U.S. v. Central Eureka Mining Co., 357 U.S. 155, 168 (1958)). The question of whether a regulation has gone too far and a taking has occurred has been an ad hoc, factual inquiry.

## State Requirements

In 1995, the Idaho State Legislature amended the Local Land Use Planning Act to include “[a]n analysis of provisions which may be necessary to ensure that land use polices, restrictions, conditions and fees do not violate private property rights, adversely impact property values or create unnecessary technical

limitations on the use of property . . .” Idaho Code § 67-6508 (a).

Although a comprehensive plan that contains such analysis does not provide an absolute defense to a taking claim, some courts give weight to comprehensive plans when they consider taking problems. Courts seem impressed by a municipality’s efforts to plan, and the usual planning process that strives to comprehensively balance land use opportunities throughout a given community.

In an effort to provide municipalities guidance with regards to “takings,” the Office of the Attorney General of the State of Idaho has prepared the following checklist in reviewing the potential impact of a regulatory or administrative action upon specific property.

### 1) Does the regulation or action result in a permanent or temporary physical occupation of private property?

Regulation or action resulting in a permanent or temporary physical occupation of all or a portion of private property will generally constitute a “taking.” For example, a regulation that required landlords to allow the installation of cable television boxes in their apartments was found to constitute a “taking.” (See Loretto v. Teleprompter Manhattan CATV Corp., 458 U. S. 419 [1982]).

### 2) Does the regulation or action require a property owner to dedicate a portion of property or to grant an easement?

Carefully review all regulations requiring the dedication of property or grant of an easement. The dedication of property must be reasonably and specifically designed to prevent or compensate for adverse impacts of the proposed development. Likewise, the magnitude of the burden placed on the proposed development should be reasonably related to the adverse impacts created by the development. A court will also consider whether the action in question substantially advances a legitimate state interest.

For example, the United States Supreme Court determined in Nollan v. California Coastal Comm’n

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483 U. S. 825 (1987) that compelling an owner of waterfront property to grant a public easement across his property that does not substantially advance the public's interest in beach access, constitutes a "taking." Likewise, the United States Supreme Court held that compelling a property owner to leave a public green way, as opposed to a private one, did not substantially advance protection of a floodplain, and was a "taking." (*Dolan v. City of Tigard*, 114 U. S. 2309 [June 24, 1994]).

### **3) Does the regulation deprive the owner of all economically viable uses of the property?**

If a regulation prohibits all economically viable or beneficial uses of the land, it will likely constitute a "taking." In this situation, the agency can avoid liability for just compensation only if it can demonstrate that the proposed uses are prohibited by the laws of nuisance or other preexisting limitations on the use of the property. (See *Lucas v. South Carolina Coastal Coun.*, 112 S. Ct. 2886 [1992].)

Unlike one, and two property available. (See *Florida Rock Industries, Inc. v. United States*, 18 F.3d 1560 [Fed. Cir. 1994]). The remaining use does not necessarily have to be the owner's planned use, a prior use or the highest and best use of the property. One factor in this assessment is the degree to which the regulatory action interferes with a property owner's reasonable investment-backed expectations.

Carefully review regulations requiring that all of a particular parcel of land be left substantially in its natural state. A prohibition of all economically viable uses of the property is vulnerable to a takings challenge. In some situations, however, there may be preexisting limitations on the use of property that could insulate the government from takings liability.

### **4) Does the regulation have a significant impact on the landowner's economic interest?**

Carefully review regulations that have a significant impact on the owner's economic interest. Courts will often compare the value of property before and after the impact of the challenged regulation. Although a reduction in property value alone may not be a "taking," a severe reduction in property value often indicates a reduction or elimination of reasonably profitable uses. Another economic factor courts will consider is the degree to which the challenged regulation impacts any development rights of the owner. As with three, above, these economic factors are normally applied to the property as a whole.<sup>5)</sup> Does the regulation deny a fundamental attribute of

ownership? Regulations that deny the landowner a fundamental attribute of ownership — including the right to possess, exclude others and dispose of all or a portion of the property — are potential takings. The United States Supreme Court recently held that requiring a public easement for recreational purposes where the harm to be prevented was to the flood plain was a "taking." In finding this to be a "taking," the Court stated:

The city never demonstrated why a public green way, as opposed to a private one, was required in the interest of flood control. The difference to the petitioner, of course, is the loss of her ability to exclude others . . . [This right to exclude others is "one of the most essential sticks in the bundle of rights that are commonly characterized as property."]

*Dolan vs. City of Tigard*, 114 U. S. 2309 (June 24, 1994). The United States\ Supreme Court has also held that barring the inheritance (an essential attribute of ownership) of certain interest in land held by individual members of an Indian tribe constituted a "taking." *Hodel v. Irving*, 481 U. S. 704 (1987).

### **6) Does the regulation serve the same purpose that would be served by directly prohibiting the use or action, and does the condition imposed substantially advance that purpose?**

A regulation may go too far and may result in a takings claim where it does not substantially advance a legitimate governmental purpose. (*Nollan v. California Coastal Commission*, 107 S. Ct. 3141 [1987]; *Dolan v. City of Tigard*, 114 U. S. 2309 [June 24, 1994]).

In *Nollan*, the United States Supreme Court held that it was an unconstitutional "taking" to condition the issuance of a permit to land owners on the grant of an easement to the public to use their beach. The Court found that since there was not indication that the *Nollans'* house plans interfered in any way with the public's ability to walk up and down the beach, there was no "nexus" between any public interest that might be harmed by the construction of the house, and the permit condition. Lacking this connection, the required easement was just as unconstitutional as it would be if imposed outside the permit context.

Likewise, regulatory actions that closely resemble, or have effects of a physical invasion or occupation of property, are more likely to be found to be takings.

The greater the deprivation of use, the greater the likelihood that a "taking" will be found.