



By Cornelia Griffin Farmer

An Historical / Legal Perspective on Takings

Introduction

“Government hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law.” A land use regulation does not effect a taking if it “substantially advance[s] legitimate state interests” and does not “den[y] an owner economically viable use of his land.”

— Chief Justice Rehnquist
in *Dolan v. City of Tigard*

The takings provision of the Oregon Constitution—“private property shall not be taken for public use, nor the particular services of any man be demanded, without just compensation”—parallels the Federal Constitution’s takings clause—“nor shall private property be taken for public use, without just compensation.” Measure 7, which would amend the Oregon Constitution to require government to compensate property owners whenever a governmental regulation applied to property results in loss of property value, would change this. Compensating every landowner for even minuscule diminution in value would be a revolutionary change in the meaning of property rights.

One of the concerns of federal and state constitutional takings law, particularly as it developed in the twentieth century, has been determining when “‘justice and fairness’ require that economic injuries caused by public action [must] be compensated by the government, rather than [being] disproportionately concentrated on a few persons.” *Penn Central* (1978). Along this line of reasoning, reciprocity dominates most land use regulations, which involve balancing benefits and burdens; land owners benefit from the burdens caused by restrictions on neighboring lands. This concept of

reciprocity of benefits is also central to other police power laws that protect the public health, safety and welfare. Despite sounding fair, Measure 7 ignores this reciprocity and, with it, centuries of property law.

Historical Background

Over the centuries, the balancing of rights and responsibilities associated with land ownership has changed; in the past, that change has been gradual and evolutionary. The nature of these changes reflects the dynamism of the law. Today, property ownership automatically includes the right to dispose of the land through sale, will, or inheritance. This was not always the case; our law developed from ancient English origins, when property holdings granted by the king, and property interest, returned to the king when the landholder died. Gradually, options grew to include inheritance by another, sale to another, and endowment of the land to another by will. The privilege of being a landholder has always carried with it many responsibilities. A thousand years ago, responsibilities

included providing military service to the king, keeping the land and structures in passable condition, and allowing the king to use or appropriate your land for hunting and fishing. Initially, exercise of the sovereign’s right to take land required no compensation, but by the 1500s Henry VIII was compensating property owners when he appropriated their land for hunting. By the time the colonists brought Anglo-Saxon legal traditions to America, property owners had the right to freely dispose of interest in land and were required to pay taxes, comply with land use regulations, and recognize the government’s inherent right to appropriate land for public uses.

In colonial America, land owners recognized the government’s right to protect public interest and to take land for public use (“the right of eminent domain”). For many years, these two governmental rights were considered separate. Government could exercise the right of eminent domain to use land for a road, a drainage system, a post office or a police or

fire station. Because of the requirement embodied in the Federal Constitution, as well as in many state constitutions, government land appropriation had to be for a public use and the government had to pay “just compensation” for it. Gradually, the concept of “public use” has been expanded so that it now includes “public purpose.”

American property interests have always been subject to regulation, even when regulation diminished property values. Because regulations did not appropriate land for public use, no compensation was required. However, valid regulations had to be enacted under the police power, to protect the public health, safety and public welfare; in other words, laws and regulations must advance a legitimate state interest. In 20th century America, a regulation that validly served the public interest, could be invalid if it excessively diminished the value of property. If such a regulation remained in effect, it would be considered a taking and compensation would have to be paid. Gradually, the concept of a regulatory taking developed—a regulation is a taking if it does not substantially advance legitimate state interests or if the regulation leaves no beneficial use/value of land. However, compensation for regulation that causes a minor diminution in value has never been required.

Twentieth Century Cases

In 1922, the U.S. Supreme Court for the first time indicated that a regulation can diminish value to an extent that it becomes a “taking”—equivalent to an exercise of eminent domain. In Pennsylvania Coal, a case

dealing with a subsidence act that prohibited extraction of coal beneath a residence, Justice Oliver Wendell Holmes, writing for the Court, recognized government’s inherent power to regulate without paying compensation. Rather than viewing a taking as an entirely separate matter, Justice Holmes said that in some cases a regulation can so diminish the property’s value as to be the same as a taking:

Government hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law. As long recognized, some values are enjoyed under an implied limitation and must yield to the police power. But obviously the implied limitation must have its limits. ...One fact for consideration in determining such limits is the extent of the diminution. When it reaches a certain magnitude in most if not in all cases there must be an exercise of eminent domain.

The idea that compensation should be paid when a regulation was so onerous as to effectively “take” property gained credibility, and in 1987, in First English, the Supreme Court ruled that a temporary regulatory taking that denies a landowner all use of his property requires compensation, and that “invalidation of the ordinance without payment of fair value for the use of the property during the time would be a constitutionally insufficient remedy.”

When should a regulation require compensation, and what constitutes a taking? In Penn Central, the Supreme Court dealt with a challenge to New York City’s historic preservation

laws. The laws prevented a proposed redevelopment of Grand Central Terminal but allowed the developer to sell its development rights to neighboring properties through a mechanism known as Transfer of Development Rights. In addressing the challenge, the Court stated that it had been unable to develop “set formula” to define a taking. Calling its taking decisions “essentially ad hoc, factual inquiries,” Brennan went on to identify “several factors that have particular significance” (Id. at 124). These factors include: (1) “the economic impact of the regulation on the claimant and, particularly, the extent to which the regulation has interfered with distinct investment-backed expectations,” and (2) “the character of the governmental action. A ‘taking’ may more readily be found when the interference with property can be characterized as a physical invasion by government

the common good.” “[G]overnment actions that may be characterized as acquisitions of resources to permit or facilitate uniquely public functions have often been held to constitute ‘takings.’ [e.g. overflights that destroyed the present use of land or repeated floodings caused by a water project.]” (Id. at 124-128).

Proponents of Measure 7 contend that it is only fair to compensate property owners for loss of their expectations. To some extent this is true. Justice Brennan stated that the extent to which governmental regulations interfere with “distinct investment-backed expectations” is a relevant factor in evaluating whether a taking has occurred. But he also rejected Penn Central’s claim that a taking could be shown because they were unable to “exploit a property interest that they heretofore had believed was available for development.” (Id. at 130). Justice Brennan noted that the



[as in the later Dolan case]... than when interference arises from some public program adjusting the benefits and burdens of economic life to promote

designation of Grand Central Terminal as a landmark

not only permits but contemplates that appellants may continue to use the property pre-

cisely as it has been used for the past 65 years: as a railroad terminal containing office space and concessions. So the law does not interfere with what must be regarded as Penn Central's primary expectation concerning the use of the parcel [particularly since the law permitted a reasonable return on Penn Central's investment] (*Id.* at 136).

Under this Supreme Court analysis, it is important to consider whether reasonable existing uses of property may continue.

Another set of takings cases has involved regulations that require a landowner to dedicate an interest in land to the public. The Court has protected property owner's right to exclude others and has been concerned with exactions, where the property owner was required to allow public access (*Nollan*, 1987) or to dedicate property in return for a building permit (*Dolan*, 1994).

In *Dolan*, the Court referred to the right to exclude others as "one of the most essential sticks in the bundle of rights that are commonly characterized as property." In *Nollan*, the court established the rule that an "essential nexus" must exist between a legitimate state interest and the permit condition, and in *Dolan*, expanded the rule to establishing the "rough proportionality" standard that "the city must make some sort of individualized determination that the required dedication is related both in nature and extent to the impact of the proposed development."

The consensus in regulatory takings cases is that a regulation that does not substantially advance a legitimate public interest or that eliminates all or practically all of the economic/beneficial value/usability of

the property constitutes a taking. The rule in recent takings cases echoes Justice Holmes' 1922 ruling: In some cases even an otherwise valid regulation results in such a complete loss of property value that the owner must be paid compensation. Measure 7 goes well beyond this principle by requiring compensation whenever a regulation imposed on property results in any loss of value,

tion for development. Until vesting, changes in regulations can be made, even if they severely diminish the value of land. This may be one area where the perception of "fairness" can be addressed by modifying the vesting rules.

Proponents of Measure 7 contend that ripeness rules require a wronged property owner to "pay multiple applica-

Measure 7 takes a hammer to what could be fixed with a small screw driver.

even if the loss in value is minimal, and even if there is no loss of the ability to exclude others.

Vesting and Ripeness Issues

Proponents have referred to cases in which people bought property with certain expectation about how they would use it and were denied that use because of a change in the law after they bought the property. These situations raise the question of when an owner is vested with the right to use property in a certain manner. *What happens when the government changes the rules after you purchase your land, and you can no longer use your property as you had planned?* It is generally held that a property owner does not have a vested interest in existing regulations. Under this rule, rules governing the use of land can be changed until the landowner takes some action that causes their rights to vest. Vesting may occur when an application is made, when a building permit is issued, or when the owner makes a substantial investment in prepara-

tion fees to the same government that changed the rules and took away all value of your property." A takings claim cannot be brought under the Federal Constitution until there has been a final decision by the entity implementing the regulation and until the landowner has exhausted its state remedies. Clearly, governments have at times overstepped the bounds of fairness (see *Del Monte Dunes*, a California case in which the community imposed increasingly more onerous conditions, over a five-year period). Proponents point to the amount of money wasted in these extended situations and in the ensuing litigation. However, Measure 7 takes a hammer to what could be fixed with a small screw driver.

Other Late Twentieth Century Developments

The Supreme Court's increased interest in takings issues in the last quarter of the 20th century did not occur in a vacuum. Although the focus of this article is the historical development of constitutional takings



law, a quick review of other recent private property rights laws and regulations may also be useful.

In 1988, President Reagan issued Executive Order 12630, 53 Fed. Reg. 8859 (1988) that required federal agencies to perform a “takings impact analysis” for proposed regulations. Several states have also passed legislation that requires takings analyses or that creates an ombudsman position or arbitration procedure to deal with private property owners’ takings concerns. Two states have passed laws which create statutory definitions of “takings,” essentially broadening the definition of a “regulatory taking” and the situations when a regulation may result in payment of compensation to private property owners. Florida legislation, passed in 1995, provides for relief, which may include compensation, when an action of a governmental entity “inordinately burden[s] an existing use of real property or a vested right to a specific use of real property.” “Inordinate burden” is defined as

an action of one or more governmental entities [that] has directly restricted or limited the use of real property such that the property owner is permanently unable to attain the reasonable, investment-backed expectation for the existing use of the real property or a vested right to a specific use of the real property as a whole, or that the property owner is left with existing or vested uses that are unreasonable such that the property owner bears permanently a disproportionate share of a burden imposed for the good of the public, which in fairness should be

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borne by the public at large...

Florida Stat. Ann. §70.001(1)(e). The Act also provides a claim and settlement procedure.

The Texas legislature expanded the definition of a taking to include situations where governmental action restricts the owner’s right to the property and “is the producing cause of a reduction of at least 25% in the market value...” Texas Gov’t Code §2007.02(5)(B). For those who believe that the constitutional takings law does not adequately protect private property interests, the Texas law creates an inflexible test.

Several other states have enacted property rights protection laws without redefining “taking.” For instance, Idaho provides a review process to assure that regulatory actions “do not result in an unconstitutional taking of private property,” and Utah requires assessment of constitutional takings implications of governmental actions and also creates a “private property ombudsman” with broad responsibilities to assist governmental entities and advise

private property owners on takings issues, and to mediate or aid in arbitration of takings disputes.

Conclusion

Despite the easy rhetoric of fairness, Measure 7 is a complicated measure with far-reaching implications. As currently drafted, Measure 7 is broader than other state property rights laws, and does not reflect the balancing of rights and responsibilities between individual property owners and governmental entities that has developed over the centuries. Reasonable and distinct “investment-backed expectations” include the knowledge that there is some risk, both on the upside and the downside, in investing in real estate; that property values vary with economic conditions, that public investments affect property values (usually in a positive manner) and that public regulations can cause an increase or a decrease in property values. If the citizens of Oregon are convinced that there are flaws in the current system, “fairness and justice” would best be served by a thorough discussion of the differing interests, with an understanding of the rights and responsibilities of both private property owners and governmental entities serving the public interest. For instance, the property rights protection laws adopted in other states seem to have a common theme that regulations affecting the economic viability of private property should be fair, be fairly enforced, and have an adequate mechanism to address those situations where an individual property owner is truly being asked to bear burdens which should be borne by the public as a whole.

While the full potential impact of Measure 7 is not known, it is clear that Measure 7 means enormous change to existing constitutional takings law; it goes much farther than private property rights protection measures enacted in other states, and ignores the reciprocal nature of benefits and burdens (the givings as well as the takings) associated with land ownership. As Justice Holmes might say, it “goes too far.”

—Cornelia Griffin Farmer



Connie Farmer is an attorney, admitted to practice in several states. She has taught Land Use Law at the University of Wisconsin-Milwaukee and at the University of Pittsburgh Graduate School of Public and International Affairs, and has served as a land use Hearings Official in Oregon. She is a graduate of Mount Holyoke College, Cornell University and Marquette University Law School.