



UNDERSTANDING PROPERTY RIGHTS AND TAKINGS

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America's economic system is based on the notion of ownership, productivity and opportunity. The protection of property rights insures these goals are achieved. It is important to understand the legal significance of property rights. This series of fact sheets introduce the reader to property rights. **Understanding Takings** is third in a three part series on property rights and provides insight into the basic legal elements of takings.

INTRODUCTION

Property rights and landowner responsibilities are important, but especially important to rural areas is the "takings" issue. A "taking" is defined in the 5th Amendment to the United States Constitution, which states in part "...*nor shall private property be taken for public use without just compensation.*" As with most legal issues, property rights are a balancing of our interests, those between the individual and society. A Court can look to the 5th Amendment of the United State Constitution for direction in settling potentially troublesome property rights issues. Originally, the 5th Amendment was created to ensure property owners that their land and affects were protected from federal seizure, whether physical or not, and that property should be compensated if taken. The importance of this idea is reflected in the 14th amendment that "*no state shall deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.*" Essentially, the 14th Amendment provides due process and equal treatment of the law to residents among the 50 states. Thereby treating citizens of the different states equally under the U.S. Constitution.

BRIEF HISTORY OF LAND USE LAW IN AMERICA

America's land use law has evolved during the 20th century. In the 1920s, planning and zoning laws evolved from the common law status of nuisance and trespass to the use of zoning ordinances to manage conflicting land uses. Local government zoning is part of its *police power* to provide for the public safety, health, welfare, and morals of a community. At times, police powers might be challenged as having gone too far in denying land use activities from an owner. Borrowing from former U.S. Supreme Court Chief Justice, Oliver Wendell Holmes, a *taking* is said to occur when a regulation goes "too far." It is this doctrine of "too far" that is briefly explored in this fact sheet.

When Does Regulation Go "Too Far ?"

Over the last 70 years, the U.S. Supreme Court has issued numerous opinions indicating when a regulation may have gone too far, as well as certain key points or tests to bear in mind that identify a "taking". These rulings give citizens and local governments some direction as to what the U.S. Supreme Court considers its interpretation of the 5th Amendment.

Probably the most important land use case in which the phrase "if regulation goes too far" is in *Pennsylvania Coal vs. Mahon* (1992). In the Pennsylvania Coal decision, a coal company was mining under houses built over land it had sold to the individuals. As a result of the mining activities, homes began to subside and fall into the mineshaft. To prevent houses from falling into the mineshafts, the State of Pennsylvania passed a law restricting mining for coal under residences. The coal company argued a "taking", claiming they had the mineral rights and could therefore

extract the coal. As Chief Oliver Wendell Holmes wrote “*the rule is that, while property may be regulated to a certain extent, if regulation goes too far, it will be recognized as a taking.*” Justice Holmes’ opinion, however, did little to define how far is “too far”, and this has been the leading question argued in property rights for the last 70 years.

Around the same time as *Pennsylvania Coal*, the U.S. Supreme Court upheld a zoning ordinance in the case *Village of Euclid vs. Ambler Realty Company* (1926). In this instance, the Village of Euclid re-zoned a property from an industrial use to a residential use, and Ambler, claiming the loss of thousands of dollars, argued that the zoning constituted a “taking”. However, the U.S. Supreme Court differed, and said that it is within the police power of the Village of Euclid to ensure ordered growth of its community. It is the Euclid case that has made the grounds for zoning and planning decisions across America possible today. Zoning undoubtedly benefits communities to ensure that certain land use activities are not located next to each other.

However, “takings” cases continually go before the U.S. Supreme Court, since the main argument is between common law remedies, established through judicial interpretation, and statutory decisions made by a legislative body. When these two ideas of common law and statutory law collide, what results is a conflict in land uses settled through litigation.

KEY COURT CASES DURING THE LAST 20 YEARS

The U.S. Supreme Court has set a relatively clear path dealing with the “takings” issue in court decisions made in the last 20 years. Beginning in 1978, the U.S. Supreme Court argued in *Penn Central vs. New York City* (1978) that a reduction in a property’s value does not constitute a taking as long as the owner has some economic value remaining for reasonable investment backed expectations. In 1980, in the case of *Agins vs. City of Tiburon*, the U.S. Supreme Court issued two tests for takings applied in later cases. In a discussion over a zoning ordinance, the Court established two criteria: (1) an ordinance is a taking if it fails to substantially advance legitimate state interests, or (2) denies an owner economically viable use of his land. And in *Agins*, the Court argued that the ordinance did not constitute a taking within these two tests.

In furtherance of the *Pennsylvania Coal* case of 1922, the U.S. Supreme Court in *Keystone Bituminous Coal Association vs. DeBenedictis* (1987) revisited the earlier coal mining case with a slight difference in circumstances. In this instance, the State of Pennsylvania passed a law that required that coal companies leave 50% of the coal beneath the buildings and cemeteries in order to prevent collapse or subsidence of these structures. The coal companies argued an unconstitutional taking, stating that they could not use part of their property. However, the Court held that the **whole property** must be considered in determining the economically viable use of property. Thus, the use of the whole property became an important element in citing takings cases.

A taking does not have to be a permanent situation in which a landowner is denied use of their land, but can be a temporary taking, as in the case of *First English Evangelical Lutheran Church vs. County of Los Angeles* (1987). A temporary taking is the period during which the offending regulation applied but does not include normal delays in obtaining permits. The U.S. Supreme did not decide this case, but they remanded it, or returned it, back to the California Court.

Another case that involved determining a zoning ordinance from a taking occurrence was in the case *Nollan vs. California Coastal Commission*. In Nolan, the Coastal Commission granted the right to develop property as long as the property owner allowed for public access across the private beach. Clearly the U.S. Supreme Court struck down this case and stipulated that any requirement for land use development must be directly related to the impact of the proposed project.

Along similar lines, in *Lucas vs. South Carolina Coastal Council*, the State Legislature declared a beach front management act, which established a regulation prohibiting development beyond a certain point along barrier islands. However, when the property owner, Lucas, bought the land, development was taking place. At the time the regulation was passed, it affected Lucas' use of his two lots. Even though there was a clear and valid public purpose involved, the U.S. Supreme Court declared that Lucas was denied all economic use of his property, and therefore a taking had occurred. The Court in this case reached an interesting conclusion in that they appeared to blend both the common and statutory law elements of property to develop a remedy. Language in their decision stated "when a regulation denies all economic use of a property, it generally will be considered a taking unless the prohibited use is barred by existing rules or understandings derived from background principles of property laws or nuisance." In essence, if the land use is a nuisance before passing a new regulation prohibiting its use, then the regulation does not amount to a taking. In this case, the U.S. Supreme Court did not consider the activity to be a nuisance.

Finally, in the case of *Dolan vs. City of Tigard* (1994), a hardware business wanted to expand, and the City, before granting the business' permit, asked that a bicycle path be built for public access to connect with the City's bicycle and pedestrian path. The city felt if the business wanted to expand near a busy pedestrian crowded area that the business should pay for a portion of a bike path. Rightly so, the U.S. Supreme Court said there was no connection between granting a permit for business expansion and establishing a bike path - this constituted a taking.

SUMMARY OF PROPERTY RIGHTS CASES

All of these cases are different for each situation. Though, the U.S. Supreme Court applied similar logic in arriving at its conclusions. More importantly, the U.S. Supreme Court developed several tests in which to determine whether a taking has occurred.

- If a regulation goes too far, then a taking can occur. Not answered is a taking goes "too far" at what point? Courts still must wrestle with this idea.
- There must be a clear nexus between the impacts of projects and government's requirement for the project.
- The whole property must be considered before determining a taking.
- If a property's value is reduced, it does not necessarily constitute a taking.
- Most regulations must have a valid public purpose, which provide for the public welfare and safety.
- Importantly, a developer must have submitted development plans and gone through the necessary legal and administrative requirements before taking a case to court.
- A landowner can seek redress from a temporary taking that denied a temporary use of private property.

WHAT ARE SOME SOLUTIONS OR IDEAS TO MINIMIZE PROPERTY RIGHTS DISPUTES

First, citizens and courts should rely on the common law of nuisance and trespass in arriving at decisions and enforcing property rights.

Second, state or local governments might want to consider cost-benefit analysis before undertaking any major government activity that may encroach or deny someone the use of their property.

Third, insuring that all citizens are heard and have due process before the law can minimize future conflicts. Often understanding the outcome and being flexible to both the individuals and societies needs results in win-win situa-

tions for both parties.

Lastly, governments should be careful in passing regulations that might deprive someone of their use of property. If so, governments should have the opportunity to compensate the landowner for the loss in the property rights.

ADDITIONAL RESOURCES

Edgens, Jeff. Understanding Private Property Rights FORFS 99-3 Department of Forestry, University of Kentucky Cooperative Extension Service.

Edgens, J. Property Rights and Landowner Responsibilities FORFS 99-4, Department of Forestry, University of Kentucky Cooperative Extension Service.

McEvoy, Thom. 1998. Legal Aspects of Owning and Managing Woodlands. Island Press: Washington, D.C.

United States Constitution especially the Fifth and Fourteenth amendments.

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