

“COMBATING REGULATORY TAKINGS”

Regulatory Takings
Key Issues for Texas Communities and Property Owners
May 11, 2007

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General Comments

In contemplating our presentation before lawyers and planners concerning the topic of regulatory takings, I was prepared to present a legally technical argument concerning various aspects of the takings statute. But upon reflection I felt that those subjects had, and would be, covered in the presentations which you have had heretofore concerning these topics. The answer to questions concerning the ability of a municipality, a government agency or a political subdivision to appropriately regulate and at the same time recognizing the affect on private property has long been a perplexing area of uncertainty and speculation by planners, attorneys, and the Court system.

In reviewing the response to how to best evaluate a regulatory scheme and the effect that it has on personal property has social, political and legal components which are so intermingled and unclear as to be a riddle wrapped inside of an enigma. To quote William A. Fichler in his book on Regulatory Takings Law Economics and Politics, *"the issue is not much about the details of property laws as it is about the fairness of politics."*

While we cannot profess to know all or impart to you any great colone of wisdom or knowledge which will be a bellwether for you to refer to on every occasion to determine whether or not your regulatory land use ordinances and policies will constitute a taking, we have found that the state of Washington's Attorney General advisory memorandum on takings creates warning signals for a municipality to determine whether its regulatory scheme run afoul of constitutional regulatory taking. The principles that are set forth in this handbook

are generally based on United States Supreme Court Constitutional takings cases which form the basis of almost every states takings judicial decisions. With all due respect to Mr. McKenna, we have either paraphrased or quoted his advisory memorandum issued in December of 2006 as a guide post for planners and lawyers alike. Five major areas of evaluation which are as follows:

- (1) Does the regulation result in a permanent or temporary physical occupation of property?
- (2) Does the regulation deprive the owner of all economically viable of use?
- (3) Does the regulation deny or substantially diminish a fundamental attribute of the property ownership?
- (4) Does the regulation or action require a property owner to dedicate a portion of property or grant a property interest?
- (5) Does the regulation have a severe impact on the owner's economic interest?

There is nothing either novel or unique about the list and its analysis. It would appear to be nothing more on its face than statements made, various legal principles and various judicial opinions which have been rendered over the past 100 years. However, the arrangement of statements in a comprehensive placement is a systematic analysis of regulations which provide easy access to evaluate any municipal regulatory scheme through its zoning and other land use regulations.

Pay or Waive

A number of municipalities have undertaken to and have sought the pay or waive approach to either exactions and/or regulations which would have a possible severe economic impact on the value of property.

Planned Development

In contemplating the areas where we feel the possibility of these regulatory takings may reach their zenith, what we would call regular land use regulations, we have thought about the use of plan unit developments or planned developments as part of this scheme whereby cities attempt to mold and sculpture a zoning category which fits the needs of the community as well as provides the property owner or developer with an economically viable use of their land. In our practice in the Dallas/Fort Worth metroplex we have found that planned developments are often times the answer for the burdensome regulations which cities may impose as a result of its desire to landscape, have physically appealing structures, preserve natural habitats, open space and special vista corridors within their communities. These types of regulations have grown over the past two decades and therefore the typical Euclidean zoning determinations of appropriate use have expanded to additional areas of regulation in hopes to balance preserving the standards of living in a community and bring viable economic development to the community.

Composite Zoning

One project which we have been involved with is the use and development of what may be commonly termed as composite zoning. Under this

type of zoning each and every use has a cafeteria style choice of regulations which are reasonably related to the accessory uses and the main uses of a particular development and zoning category. We feel that this type of selective and narrowly focused regulations for each use and accessory uses for property is a institutionalized attempt to alleviate the effects of cookie-cutter type of regulations which lead to potential taking issues infiltrating the normal decision-making of plan and zoning commissions and city councils.

Site and Plat Review

As a land use attorney we have long professed the use of planned developments and special use permits as a legally viable alternative to make ad hoc land use regulation decisions which help alleviate the deleterious and onerous effects of regulations which the city, in good faith, wishes to implement in order to protect and promote an orderly and well planned community. In major metropolitan areas we find that large cities such as San Antonio, Dallas and Fort Worth by the sheer nature of the size and complexity of its community has a difficult time in responding to specific tracts of land. The use of Site Plan and Plat review with alternative choice development regulations would help alleviate taking issues or permit a systematic analysis.

Economic Development Incentives

Large undeveloped areas have, through the use of economic development incentives, also had a positive impact on relieving cities from the argument that its development regulations constitute a taking. While the municipality must be careful not to allow its development agreements to bloom into a contract zoning

case, many regulations which would constitute exactions or dedications of private land for public use as part of the planning process are addressed under these types of development tools. We would admonish all of our attendees today that specific communities and properties should be carefully evaluated and the city attorney or governmental attorney should carefully review each of these types of agreements and decision-making tools.

Special Use Permits

We would also, while not novel, encourage cities to look at the use of special use permit regulations or conditional use permits as an attempt to tailor the regulatory scheme of the community to alleviate the ill effects and possible regulatory taking claims that might be asserted by a particular property developer or owner.

Redevelopment

One of the more troubling aspects of land use regulations and the takings clause occur when the cities attempt to redevelop or use in-fill type regulations to change the character of areas of its community which have through time and economic and social circumstances require redevelopment. In these cases most of the property owners have a long standing economic use of their property. New updated regulations make new uses or updated development difficult. Under the new adopted standards that many of our communities are undertaking, old development many times cannot meet the size and development regulations which have been adopted for undeveloped tracts within growing communities. As a result, we would highly recommend that municipalities undertake specialized zoning district which meet the needs to encourage redevelopment and at the same time recognized long-standing use of property. These types of regulations go without saying as being difficult and taxing for communities. Depending on the size and nature of the areas, many municipalities have

responded by outright eminent domain proceedings. This was the case in the infamous Kelo circumstances with using eminent domain for “blighted” areas and it caused the redevelopment. As a result of recent Texas legislation, a municipality in Texas would have a difficult if not impossible time to respond to a *Kelo* type scenario with a private partner in a development. Moreover, we would suspect that many sophisticated developers would attempt to say that since the city can no longer, through use of its eminent domain, acquire property for potential economic development within their community that they could not use regulatory authority as an eminent domain tool. Thus, taking arguments which are the topic of discussions at this seminar may be made. As a result, a municipality might inadvertently be subject to takings claim.

Overlay Districts

Another area of potential controversy lies by the use of zoning overlay districts. Like the development requirements of older neighborhoods. This vista or specialized requirements for highways, street vista, water front requirements, or historical areas “add” regulations which have an arguable taking restriction.

Economic Evaluation

One area of potential planning which can be foreseen as necessary to combat taking claims is through economic impact analysis. Using an economist to provide testimony on the increase value which can be created through regulations in your cities comprehensive plans, regulations or policies would provide a rebuttal to claims of diminished value.