Policy Guide on Takings

Land Use Regulations and the "Takings" Challenge

Adopted by a Chapter Delegate Assembly
Ratified by the APA Board of Directors, April 11, 1995 - Toronto, Canada

Background: the "Takings" Issue

The "takings" issue is addressed in the Fifth Amendment to the U.S. Constitution, which reads in part, "nor shall private property be taken for public use, without just compensation." In the context of the times that language was clearly directed toward the actual seizure of private property for public use. Modern methods of eminent domain embody the principles set forth in the Fifth Amendment, allowing governmental bodies to claim private property when necessary but requiring that those entities pay "just compensation" when they do so.

About seventy-five years ago, the U.S. Supreme Court extended that principle beyond the physical seizure of property, holding that "The general rule at least is that, while property may be regulated to a certain extent, if regulation goes too far, it will be recognized as a 'taking.'" Although the case involved was complex, the concept is not. Clearly if a government uses regulation to accomplish what it should do through eminent domain, the result should be the same as if the government had used eminent domain. For example, if the government were to issue regulations requiring that landowner permit a portion of her land to be used as part of a public road or that another landowner permit the public to enter onto his property to use it as a recreation area, the net result for the property owner is about the same as if the government had physically seized the property. Most rational citizens would support the affected landowner in a claim for compensation.

For roughly sixty years, if a court determined that a regulation amounted to an unconstitutional taking, it would simply invalidate the regulation--thus leaving the property owner free to do as he or she could have done before the new regulation was imposed. That was certainly a reasonable remedy for the local government--its unconstitutional action was simply made void, without other serious cost or penalty to the community or its citizens. The local government could then adopt a new regulation, presumably one that would respond to the court's adverse findings on the previous regulations. When that remedy was granted relatively swiftly and not appealed, it was also a reasonable result for the landowner. As delays in litigation have become more common (one "takings" case was in court for nine years before the U.S. Supreme Court more or less resolved it), the remedy of overturning the regulation became less acceptable to landowners. In that context, attorneys for landowners began asking the courts to treat an unconstitutional regulation as being equivalent to an action in eminent domain--thus requiring that the local government buy the regulated land. The Supreme Court in 1981 finally adopted a compromise position, accepting the notion that some damages might be due to the landowner but giving the governmental entity a choice between two options: buying the land as it would under an eminent domain

From Washington

A biweekly newsletter on federal legislative and public policy issues of interest to planners and communities.
View current issue
Sign up to receive From Washington via e-mail

Current Legislative Alert

House Support Triples for Community Character Act
Sign Up to Get Alerts
E-mail Jason Jordan and start receiving APA's legislative alerts right away.

Coalitions

APA works with other organizations on planning issues ranging from sprawl to transportation.
Browse a list of APA's coalition partners, and visit their websites.

APA AICP

Join APA

APA is an outspoken advocate for planners and planning.
Become a member and join thousands of people who share your dedication to building strong, vibrant communities.

EXHIBIT 1

proceeding; or repealing the unconstitutional regulation and then compensating the landowner for the loss of use of the property while the regulation was in effect. That is the law today.

Although that is a far less burdensome rule than an absolute mandate that a local government buy property, even the mandate that governments pay for a temporary "taking" is a sort of unfunded mandate. When a governmental agency enters into eminent domain proceedings, it typically does so in the context of a capital project budget (such as one for the construction of a road) and it has funds available to pay for the land taken. When it adopts a new regulation, a governmental agency is unlikely to set aside funds to buy the regulated property. Thus, a sudden court order requiring that it pay for land that it thought that it was simply regulating can be an unpleasant fiscal surprise for a governmental entity and its taxpayers.

Seeking at times to redress unfair actions of government and at other times perhaps to profit from an opportunity, landowners have brought many "takings" claims against entities of government. Recognizing the implications of such cases, the courts themselves have generally been quite cautious in finding "takings."

To date the Supreme Court has established four clear rules that identify situations that amount to a taking and one clear rule that defines situations that do not. The court has held that regulations simply intended to prevent or eliminate a nuisance cannot be considered a taking. It has found "takings" in the following circumstances:

1. where the landowner has been denied "all economically viable use" of the land;
2. where the regulation forced the landowner to allow someone else to enter onto the property (in this case a cable company, which wanted to attached its cables to an apartment building);
3. where the regulation imposes burdens or costs on the landowner that do not bear a "reasonable relationship" to the impacts of the project on the community; and
4. where government can equally accomplish a valid public purpose through regulation or through a requirement of dedicating property, government should use the less intrusive regulation, for example, prohibiting development in a floodplain property.

The first of those principles is one of fundamental fairness. The second simply reinforces principles against trespass that have evolved from the common law and that are reinforced by the Fifth Amendment. The third simply mandates that a community engage in good planning and then adopt regulations that uses that plan to apportion fairly the burdens and benefits of land development. The last of these is simply common sense. Although some planners have had some concern about the precise language used by the Supreme Court and about some of the facts of particular cases, the American Planning Association supports these reasonable principles, as do most of its members.

The Supreme Court has also said that were a regulation is intended merely to prevent a nuisance, it should *not* be considered a taking. Although that rule is some comfort for regulations that prevent serious air and water pollution that would clearly amount to nuisances if left unchecked, the police power has for seventy years extended beyond the mere prevention of nuisances. No reasonable court would hold that the definition of nuisance would include a high-rise apartment building or even a convenience store located in the middle of a neighborhood of single family homes; under the police power, however, local governments carry out the wishes of homeowners by preventing such uses in single-family neighborhoods. Thus, this lone exception to the "takings"

doctrine is logical and useful but not sufficient to protect the scope of normal activities carried out by many local governments to protect local citizens and property owners from unwanted intrusions into their neighborhoods.

Background: The Police Power

During the same period that "takings" law has evolved in the courts, so has the "police power." The concept of the police power is essential to government. As generally interpreted in the U.S., the police power is the right of government to interfere with private activity (or the use of private property) for the protection of the public health, safety and general welfare. Zoning is the most common use of the police power as it affects land, although related subdivsion regulations and building codes are also important exercises of the police power. The U.S. Supreme Court upheld the principle of zoning and expressly held that zoning did not amount to a taking just a few after determining that some regulation might go so far as to be a taking. In thousands of state and federal court cases, the courts have upheld the right of local government to intervene in private activity to protect the public health, safety and welfare.

It is the police power that allows the government to require a landowner to clean up a cesspool leaking onto a neighbor's property or to remove a junkpile that attracts vermin to a residential area. It is under the police power that a local government adopts zoning regulations that prohibit the operation of junkyards and auto repair shops in residential neighborhoods. Under the police power most local governments prohibit landowners from distracting motorists with flashing signs that look like traffic signals and that those same governments prohibit noisy or noxious businesses near residential areas.

As our society has become more populous, with more people living relatively close together, the police power has become more important. It is a sort of civilizing agreement among humans living in a community that allows them to live in peace. Communities depended upon the police power to separate heavy industry from homes and businesses during the first century of the industrial revolution. Today, other police power regulations require that industry eliminate most pollution, thus making it a better neighbor and making separation less important.

By the mid 1950s the Supreme Court recognized that government could legitimately use the police power to make a city "beautiful as well as healthy," and it is under that principle that today most communities prohibit billboards and large flashing signs in residential areas. The police power and regulatory "takings" law are not in conflict at all. They are complementary bodies of law that have evolved together. The "takings" decisions of the U.S. Supreme Court simply set limits on the extent of police power regulation. That is, of course, one of the important functions of courts in our three-part system of government.

Proposed "Takings" Legislation

Virtually every state in the country, as well as the U.S. Congress, has considered various forms of "takings" measures within the past two years. While ten states have passed some form of "takings" legislation, most have been rejected due to the onerous financial burdens that would have been placed on states and communities, and because states have recognized the sufficiency of existing constitutional protections. Some legislation proposed within the past several years has been the result of some legitimate concerns regarding the rights of property owners, an issue discussed elsewhere in this paper. Much of this legislation, however, is really anti-regulation legislation clothed in the fabric of private property rights. Care must be taken to distinguish between the two.[1]

The most common types of proposals are these:

- Compensation for reduction in economic value. Under these proposals, a governmental agency would be required to compensate a landowner for any reduction in value resulting from government regulation; most establish a baseline level of impact and require compensation for a loss in value exceeding that threshold (the baseline in one proposal in Congress is 10 percent). Some proposals would actually require that government buy the property, even if the loss in value is only slightly about the baseline, such as a 12 percent reduction in value.
- Economic assessment reviews. Under these proposals, any government proposing new regulations would be required to develop thorough economic impact statements, identifying and valuing the impacts of the proposed regulations on private property.

These proposals have a certain amount of surface appeal. They are extremely dangerous proposals, however--proposals that could destroy the quality of life in communities in the United States and bankrupt local and state governments. If adopted, they would also contribute significantly to future federal deficits.

Why? Consider the concept of compensating a property owner for any loss in economic value resulting from government regulation. First, remember that if the regulation denies the property owner "all economically viable use" of the property, the Supreme Court has already provided a remedy for that property owner. Thus, the extreme cases have already been resolved.

For other cases, this approach poses many problems. From what value is the loss to be measured? Every regulation that limits the use of property in any way has some theoretical impact on the value of that property. If the city refuses to let your next door neighbor store junk cars on her property, should she then be compensated for the difference in value between a commercial junkyard and a piece of residential property? If that becomes the legal rule, the city will probably have to allow the junkyard next door in order to avert bankruptcy. Should a property owner who wants to build high-rise apartments in a single-family neighborhood be compensated because he is not allowed to do so? Assuming that he is allowed to build a house, just like everyone else in the area, has he really been hurt? What about a regulation that prevents grocery stores near residential areas from selling liquor? The sale of liquor is very profitable for grocery stores, with a much better mark-up than most of the grocery items in the store. Should the store be compensated for the theoretical loss of business, just because it cannot sell liquor? Such rules theoretically reduce the value of property and would thus be subject to the compensation requirement under "reduction in value" approaches. It is important to remember in considering such arguments that a principal purpose of zoning is to protect property values.

Further, one needs to remember that property owners pay nothing to government for the gains that they enjoy when their property benefits from land use regulation. If a government increases the value of property by rezoning it from a zone allowing only farming to one permitting shopping centers and the property owners pays nothing for that, should the government have to pay that same property that owner if it theoretically reduces the value of the shopping center by refusing to allow the construction of a gasoline station at the entrance corner? One way to fund efforts to compensate landowners for every reduction in value caused by regulation is also to charge landowners for every increase in value caused by government action, such as regulating the use of adjacent property or construction a new highway. Most property owner groups, however, oppose this funding mechanism; they are unwilling to pay for their gains but they still expect to be compensated for their losses. Planners are not enthusiastic about such a system of payments for gains and benefits because it would require a complex bureaucracy to administer. The more conservative, easier approach is to continue the system

that has been in effect for the last seventy years with some enhancements -- providing relief for those who suffer great hardships but otherwise allowing property owners and the free market to deal with ups and downs without a lot of government intervention.

The Supreme Court, which has a majority of members who are committed to the protection of property rights, has adopted a rational approach to this issue. It has held that where a property owner is denied "all economically viable use" of a property, that falls within the "takings" doctrine. It has refused, however, to accept some property owners' arguments that the should be allowed the "most profitable use" of their property, regardless of the effect on neighbors and neighboring properties. Landowners have argued that government is "taking" their property because they cannot build on land that has been under water for hundreds of years and which they acquired essentially for free as part of the purchase of a larger parcel that also included dry, useable land. Other landowners have argued that the denial of a right to build a liquor store or an apartment building in the middle of a single-family neighborhood amounts to a taking. Landowners have gone so far as to argue that requiring front yards in residential neighborhoods or requiring parking spaces for cars amounts to an unconstitutional taking. Not surprisingly, courts have rejected such frivolous claims. Now advocates for some of these property owners want Congress to do what the courts have refused to do.

Cases about percentage losses in value invariably turn into battles of "your expert against my expert." The landowners' expert quite naturally testifies that the land is very valuable commercial property if only zoning were not in the way. The city's expert equally naturally testifies that the land sits in the middle of a residential area, has always been zoned residential and should be valued only as residential property. Then a judge or jury has to decide which expert to believe. Such a system typically enriches lawyers but not landowners. The Supreme Court's rule is better. It asks simply, "does the landowner have an economically viable use under the regulations?" That is a question that is much simpler to answer and one that judges and juries can evaluate more easily on their own. Because it is an easier question to answer, it is less likely to lead to litigation.

What is the ultimate effect of a requirement that the government compensate landowners for losses in value? In all probability it will be the abandonment of police power regulations that affect property--regulations that limit flashing signs in residential areas, that ban billboards in many areas of town, that ban junk cars and open-air auto repair in residential neighborhoods, that limit the location of bars and adult businesses, and that protect residential neighborhoods and shopping districts from intrusions by heavy industry. Local governments simply cannot afford to take the risk of having to pay compensation to everyone who claims that their property values have been reduced because they cannot have their very own convenience store with gas and beer, located at the end of a quiet residential cul-de-sac. If we allow that property owner to have a convenience store, however, we adversely affect the quality of life and the property values of all the families living on that cul-de-sac.

There are important issues of social equity to consider here. The wealthiest property owners may have little to fear from an abandonment of zoning and other land use controls. Upper-income neighborhoods in unzoned Houston are well-protected by deed restrictions. It is those in the middle class, those who are affluent enough to own homes but not affluent enough to control their own neighborhoods, who depend particularly on zoning to protect the value of their homes, largest investment that most of them will ever make. Those even further down the economic ladder depend on land use regulations to provide some semblance of a safe and sanitary neighborhood in which they can rent a

place to live. A system that results in a widespread reduction in the amount of regulation in reaction to the potential costs of compensation schemes will harm all property owners, but they will harm most those who have the least.

The proposed economic impact analyses appear to fall in the latter category, spending government money nonproductively. Planners should, of course, recognize the economic impacts of plans -- the economic impacts on landowners, on residents, on the public treasury and on the taxpayers who support it. That is an essential element of comprehensive planning. Asking planners to write a separate report about the economic impacts of regulations, particularly as they affect landowners, however, goes beyond good sense and creates unnecessary bureaucracy. That is like requiring an environmental or social impact statement on a plan. A good plan should be based on economic, social, environmental and other factors that influence the community and its future, but is neither necessary or useful to write a separate "impact" report on each of those issues. Producing the report accomplishes nothing to protect the landowner. All that it does is to take time and cost money. There is no point in that. Good planning dictates that planners and others involved in developing plans and regulations understand the general economic consequences of their actions. Specific relief for affected landowners should be addressed separately.

Conclusion

The American Planning Association strongly opposes most of the proposed "takings" legislation that its representatives have seen. Many of the bills introduced to date have the potential to bankrupt various entities of government. Many would add to bureaucracy and slow down the development process without really protecting private property. If bills introduced at the federal level are enacted, they would encourage state legislatures to do the same; in fact, by the date of the adoption of this policy, APA was aware of as many as 41 copy-cat bills in state legislatures.

That does not mean, however, that APA believes that the government is always right or that landowners should be left without remedies. Like individuals, governments sometimes make mistakes--mistakes that may have an unfair impact on a particular property owner. Although the democratic process generally ensures that the purpose of government regulations is a valid one, those regulations sometimes go awry in the implementation. Landowners and other citizens should absolutely have adequate and fair remedies to deal with both mistakes and intentional acts that result in unfair hardship for particular individuals.

The collective political forces that have joined in support of "takings" legislation have grossly distorted both the frequency and the intensity of the occurrence of hardship caused by government regulations. There is no question that such hardship situations can occur. Groups seeking horror stories who canvas the entire country can find such stories. When confronted with a request for details, however, advocates for some of the radical "takings" legislation are unable to provide details or documentation.

The fact is that in the average community in the typical state, the system is working well. Similarly, although there are some hardship situations under some federal regulations, most property owners function quite nicely under federal regulations and most also benefit from federal regulations that prevent other property owners from generating excessive air or water pollution. Most property owners accept the regulations imposed on their property and recognize that they must accept some limitations so that their neighbors will accept some limitations and they can all live together in relative harmony. Property rights advocates use a national collection of isolated horror stories in support of their arguments for drastic remedies to the so-called "'takings'

problem." They are proposing to "kill a fly on a picture window with a sledge hammer." Viewed differently, they have a long-held "solution" (the virtual elimination of government regulation of property) and they have simply been searching for a problem that they can use as an excuse for implementing that solution. The problem is that the proposed solution will do extraordinary harm to everyone who lives in communities, allegedly in order to remedy the problems of a few hardship cases.

Property rights advocates are waging a guerrilla war of sound-bites, misleading "spin-doctoring" and power politics which have characterized governments at every level as evil empires of bad intent. APA members, many of their professional colleagues and communities across the country, have been placed in a defensive mode, outflanked by advocates who wrap themselves in the flag and the distorted appearance of constitutional rights. Ultimately, a legitimate analysis will show that the vast majorities of communities and regulators take very seriously their responsibilities of protecting both the public interest and individual property rights.

The issue is as much one of remedies as of substance. Planners share with property owners concern about legitimate disagreements that may take years to resolve. Many of the cases filed in court (and sometimes even decided) as "takings" cases actually involve other Constitutional issues, such as substantive and procedural due process. "Takings" has become a sort of shorthand call for help.

At about the time that the U.S. Supreme Court first decided that a regulation might amount to a taking, a group of experts were preparing what would become model zoning laws for the entire country. Recognizing the possibility of occasional hardships and the necessity of providing prompt and effective remedies, those early legislative drafters included in the zoning legislation local variance and appeal procedures. Although those procedures are at times abused, the principle that there should be a simple and effective remedy where regulations create an unnecessary hardship. The problem is that today's regulatory environment has become much more complex, typically involving several sets of regulations besides zoning and often involving multiple entities of government. Bizarre hardship cases sometimes occur simply because someone gets caught between two different sets of regulations, adopted for two sets of good but very different reasons. Property owners are understandably frustrated when caught between conflicting government mandates or when confronted with regulations that are unreasonable as applied to them; the lack of an effective remedy increases that frustration.

That solution is not, however, to subject every government that tries to protect neighborhoods from blight to potential financial penalties. Placing at risk the police power regulations that make a complex and relatively compact society livable will impose incredible penalties on all who live in communities as a remedy for the unique problems of a few. Clearly less drastic remedies are needed. Although the details of such remedies are left to a related report of the American Planning Association, this Policy Guide outlines the principles that should guide the development and implementation of such remedies.

Adopted Policies

1. The American Planning Association and its chapters support the evolving law in this country that clearly recognizes both the importance of the police power to the protection of the public health, safety and welfare, and the limitations imposed upon that power under the U.S. Constitution to protect property rights.
    1. The American Planning Association and its chapters support property rights as guaranteed by the U.S. Constitution and the land use regulations that protect those rights for the benefit of

all property owners.
2. The American Planning Association and its chapters generally oppose "takings" legislation that expands the "takings" doctrines established by the Supreme Court to the detriment of the ability of local, state and federal governments to protect their citizens under the police power.
3. American Planning Association and its chapters believe that all regulation of land should be consistent with locally adopted comprehensive plans, approved state plans, and/or federal agency studies and plans (as applicable to the level of regulation). Comprehensive plans should address economic social, environmental and other issues affecting landowners, taxpayers and residents, and affecting the larger community.[2]
4. Because economic issues should be and generally are addressed in the comprehensive planning process, along with other issues, the American Planning Association and its chapter oppose legislation requiring the preparation of separate economic (or other) impact statements on proposed new regulations or laws.[3]

2. The American Planning Association and its chapters support regulations that avoid "takings" and other unnecessary and/or unintended hardships for particular landowners; they also support provisions that offer landowners appropriate relief, or, in appropriate cases, modification of regulations to accomplish that purpose.

At a minimum:

1. All entities of government imposing regulations under the police power should include in those regulations procedures for fast, inexpensive, and effective review of hardship situations by a body with the authority to grant appropriate relief, including the approval of development and the issuance of necessary permits and variances.
2. States should review their legislation to ensure that local governments have full authority to accomplish the goals of 2.A.
3. States should assign to existing bodies the authority to review and grant relief from hardships created for property owners by conflicts among the regulations of multiple entities; where such bodies do not exist, states should create them.[4] Such bodies should have the authority to grant relief that may include the approval of development and the issuance of necessary permits.
4. Congress should create or assign existing bodies with the authority to review and grant relief from hardships created for property owners by conflicts among the regulations of multiple federal entities or by federal regulations when considered in combination with state and local regulations. Such bodies should have the authority to grant relief that may include the approval of development and the issuance of necessary permits.

Optimally:

3. Congress should authorize and federal agencies should implement methods for quasi-judicial, consolidated appeals of matters affected by a combination of state and federal regulations.

1. The American Planning Association and its chapters recognize the need for fairness to all persons and entities of government under laws and regulations imposed by all levels of government.

At a minimum:

1. Laws or statues should make reference to the state or federal constitutional principles from which they derive their authority.
2. Regulations should make reference to the law or statue from which they derive their authority and should be applied and construed in accordance with those statues.

Additionally:

1. Regulations affecting the use and development of land should be limited in scope to avoid unintended effects on land values except as necessary to carry out the public purpose of the regulations under the police.[5]
2. Regulations affecting the use and development of land should permit reasonable flexibility to minimize hardship. In particular, regulations should permit alternative methods of compliance that may reduce or eliminate the economic costs of compliance while preserving the intent of the regulations.
3. Regulations affecting the use and development of land should be adopted only after a review process offering the opportunity for significant participation by affected governmental entities and persons, including property owners.
4. Regulations affecting the use and development of land should include appropriate procedural due process.
5. Economic analyses of regulations conducted in the context of the comprehensive planning process (or in any other context) should recognize the economic benefits of the regulations to other property owners and the community at large, as well as any economic burden to a particular property owner(s).

1. Although the American Planning Association believes that only a small percentage of landowners may find their land subject to a regulatory taking under existing Constitutional doctrine, the American Planning Association and its chapters support efforts to develop appropriate and effective remedies for all such landowners, with adequate consideration of the impacts of such remedies on government.
    1. The first step to limiting the cost of such remedies is by alleviating as many hardship situations as possible through fast, appropriate, and effective relief provisions established in accordance with principles set out in above. (See #2)
    2. Because of the dampening effect that monetary remedies may have on the legitimate exercise of the police power, the American Planning Association supports non-monetary remedies that are consistent with the purpose of the regulations.[6]
    3. In that limited number of cases where monetary remedies may be necessary or appropriate, the American Planning Association supports those remedies that are least costly to taxpayers.[7]
    4. The American Planning Association will, as part of its effort to develop model state land use planning legislation, offer model statues with innovative administrative mechanisms for providing landowners relief from land use regulations.

Ways to Avoid Potential "Takings" Claims

There are a number of different ways in which communities concerned about fairness and balance for all citizens in addressing the "takings" issue can protect themselves against potential "takings" claims. These include the

following:

1. Establish a sound basis for land use and environmental regulations through comprehensive planning and background studies. A thoughtful comprehensive plan or program that sets forth overall community goals and objectives and which establishes a rational basis for land use regulations helps lay the foundation for a strong defense against any "takings" claim. Likewise, background studies of development and pollution impacts can build a strong foundation for environmental protection measures.
2. Institute an administrative process that gives decision-makers adequate information to apply the "takings" balancing test by requiring property owners to produce evidence of undue economic impact on the subject property prior to filing a legal action. Much of the guesswork and risk for both the public official and the private landowner can be eliminated from the "takings" arena, by establishing administrative procedures for handling "takings" claims and other landowner concerns before they go to court. These administrative procedures should require property owners to support claims by producing relevant information, including an explanation of the property owner's interest in the property, price paid or option price, terms of purchase or sale, all appraisals of the property, assessed value, tax on the property, offers to purchase, rent, income and expense statements for income-producing property, and the like.
3. Establish an economic hardship variance and similar administrative relief provision that allow the possibility of some legitimate economically beneficial use of the property in situations where regulations may have an extreme result. These procedures help to avoid conflicts in the first place by allowing for early consideration of all alternatives that may be satisfactory to all concerned. However, relief should be granted only upon a positive showing by the owner or applicant that there is no reasonable economic use of the property as witnessed by evidence produced as outlined in No. 2, above. Remember that the landowner has the burden of proof on hardship and "takings" issues.
4. Take steps to prevent the subdvision of land in a way that may create economically unusable substandard or unbuildable parcels. Subdivsion controls and zoning ordinances should be carefully reviewed, and should be revised if they permit division of land into small parcels or districts that make development very difficult or impossible--for example by severing sensitive environmental areas or partial property rights (such as mineral rights) from an otherwise usable parcel. Such self-created hardships should not be permitted to develop into a "takings" claim.
5. Make development pay its fair share, but establish a rational, equitable basis for calculating the type of exaction, or the amount of any impact fee. The U.S. Supreme Court has expressly approved the use of development conditions and exactions, so long as they are tied to specific needs created by a proposed development. The use of nationally accepted standards or studies of actual local government costs attributable to a project, supplemented by a determination of the actual impact of a project in certain circumstances, may help to establish the need for and appropriateness of such exactions.
6. Avoid any government incentives, subsidies, or insurance programs that encourage development in sensitive areas such as steep slopes, floodplains, and other high-hazard areas. Nothing in the Fifth Amendment requires a government entity to promote the maximum development of a site at the expense of the public purse or to the detriment of the public interest. Taxpayers need not subsidize unwise development. At the same time, consider complements to regulation such as incentive programs that encourage *good* development, when regulatory approaches cannot alone achieve necessary objective without severe economic deprivation. While not a legal requirement, such programs can help take the sting out of tough, but necessary, environmental land use controls.

SUMMARY

APA supports private property rights as guaranteed by the U.S. Constitution and the land use regulations that protect those rights for the benefit of ALL property owners.

APA strongly opposes "takings" compensation and assessment bills because they would:

1. increase bureaucracy and red tape at every level of government
2. slow the development process and result in a decrease in jobs
3. result in significant but unpredictable costs to the public treasury
4. add to regulatory confusion at the state and local levels. State and federal laws are inextricably linked. " De-coupling" these laws would be a nightmare!
5. result in a proliferation of federal, state and local lawsuits

Although drafted with the best of intentions, the "takings" legislation introduced to date does NOT protect private property owners from big government. Good intentions do not necessarily make good law.

These bills would make it harder to protect the property values of ALL Americans.

Beware of waivers: A dangerous compromise is being discussed. Since the government does not have the funds to compensate all the takings claims that are expected, waivers are being proposed. Landowners would be waived or exempted from the law or regulation that caused the "takings." The result would be chaos. Regulations that protect neighborhoods would be worthless if they are waived whenever a landowner or developer balks. Community protections would constantly be in jeopardy. These waivers could be devastating since there is no mechanism to judge their cumulative effect.

Please vote against legislative language that provides exemptions from regulations without considering cumulative effects of waivers.

Endnotes

1. Of the 10 states that enacted "takings" legislation, nine enacted assessment type bills. Ariz. Rev. Stat. ?? 37-220-23 (1992); Del. Code Ann. tit ? 605 (1992); Idaho Code ? 67-8001 et. seq. (Supp. 1994); Ind. Code Ann. ? 4-22-2-32 (Burns Supp. 1994); Missouri SB 588 & HB 10909 (1994); Tenn. Code Ann. 1-2 (1994); Utah Code Ann. ? 78-34a-1 et. seq., ? 63-90-1 et. seq. (1994); Wash. Rev. code ? 36.70A.370 (Supp. 1993); W. Va. code ? 22-1A-1 et. seq. (Supp. 1994); Miss Code Ann. ? 11-46-1, 17-1-3, 17-17-1, 41-67-15, 49-2-9, 49-2-13, 49-17-17 & 95-3-29 (1994). R. Freilich and R. Doyle, "Taking Legislation: Misguided and Dangerous," *Land Use Law and Zoning Digest,* 46, No. 10 (October 1994), pp. 3-6.
2. APA supports active participation by professional planners in preparing data and analysis for such plans and studies and in developing the comprehensive plan and regulatory programs. APA acknowledges the important responsibility of planning professionals to conduct thorough research and analysis and provide decision-makers with appropriate

policy options supported by this data and analysis. Planners also have a responsibility to give regulatory advice based on adopted plan policies.

3. Note that this addresses only the issue of preparation of such statements incident to the adoption of regulations or laws; the preparation of economic, environmental and social impact statements on particular projects in contexts is entirely appropriate.
4. Examples include the Oregon Land Use Board of Appeals, as well as hearing examiners, mediators and other non-judicial appellate processes in several states.
5. Where government can equally accomplish a valid public purpose through regulation or through a requirement of dedicating property, government should use the less intrusive regulation.
6. These may include such techniques as transfers of development rights, clustering, alternative uses, and land trades.
7. Those may include phased payments under a system of compensable regulations, fee waivers, long-term pay-outs, or other techniques that allow local governments to incur the costs of such remedies as the public benefits accrue.
8. Christopher J. Duerksen and Richard J. Roddewig, *Takings Law in Plain English*, 2nd ed. (Clarion Associates, Inc., 1994), pp. 41-43.

Contact Us Privacy Statement Sitemap En Español Copyright 2002 APA All Rights Reserved
FAQ