

# **CHAPTER ONE - PROPERTY RIGHTS**



## **1.0 Introduction**

The issues regarding property rights are divided into two categories: Federal Standards and Idaho State Requirements. Federal decisions regarding the “Takings Issue” are explored in this chapter, such as *Kelo v. City of New London*, *Nollan v. California Coastal Commission*, *Dolan v. City Tigard*, *Lucas v. South Carolina Coastal Council*, *Florida Rock Industries, Inc. v. United States*, and *Tahoe-Sierra Preservation Council, Inc. et al v. Tahoe Regional Planning Agency et al*. These are some of the leading Federal and State law cases regarding property rights.

The chapter also includes a checklist from the Office of the Attorney General of the State of Idaho to help governments avoid “takings” when handling regulatory or administrative issues for property.

All citizens have property rights and when land use decisions are made, cities and counties must assure that an individual’s property rights are not being violated. A land use regulation or action must not be unduly restrictive so that it causes a “taking” of landowner’s property without just compensation.

The Fifth Amendment to the United States Constitution states “nor shall private property be taken for public use without just compensation.” In the land-use control context, 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.”

## **1.1 Federal Standards**

Whether or not a land use decision should be prohibited by the Fifth Amendment to the United States Constitution has been a difficult task for the courts, including the Supreme Court, to resolve. Determining when a government action amounts to a taking, requiring either compensation or invalidation of the action for violation of due process, is not a simple undertaking. The Supreme Court itself has candidly admitted that it has never been able 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. New York City, 436 U. S. 104 124 [1978]). Instead, the high court has observed “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” (id. at 488). The question of whether a regulation has gone too far and a taking has occurred has been an ad hoc, factual inquiry (id.).

## **1.2 State Requirements**

Idaho State Legislature amended Section 67-6508 of the Idaho Code to include “an analysis of provisions which may be necessary to insure that land-use policies, restrictions, conditions and fees do not violate private property rights, adversely impact values or create unnecessary technical limitations on the use of the property.” [67-6508 (a)].

Although a comprehensive plan that contains such language does not provide an absolute defense to a taking claim, some courts give weight to comprehensive plans when they consider Taking problems. They are 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.

## **1.3 State Changes to Taking Issues in response to Kelo v. City of New London**

The following is an abstract of this United States Supreme Court case:

Kelo v. City of New London

U.S. (June 23, 2005)

Docket Number: 04-108

Abstract

### **Facts of the Case**

New London, a City in Connecticut, used its eminent domain authority to seize private property to sell to private developers. The City said developing the land would create jobs and increase tax revenues. Kelo Susette and others whose property was seized sued New London in state court. The property owners argued the City violated the Fifth Amendment’s takings clause, which guaranteed the government will not take private property for public use without just compensation. Specifically the property owners argued taking private property to sell to private developers was not public use. The Connecticut Supreme Court ruled for New London.

### **Questions Presented**

Does a City violate the Fifth Amendment’s takings clause if the City takes private property and sells it for private development, with the hopes the development will help the City’s bad economy?

## **Conclusion**

No. In a 5- 4 opinion delivered by United States Justice John Paul Stevens, the majority held that the City's taking of private property to sell for private development qualified as a "public use" within the meaning of the takings clause. The City was not taking the land simply to benefit a certain group of private individuals but rather was following an economic development plan. Such justifications for land takings, the majority argued, should be given deference. The takings here qualified as "public use" despite the fact that the land was not going to be used by the public. The Fifth Amendment did not require "literal" public use, the majority said, but the "broader and more natural interpretation of public use as 'public purpose.' "

Spurred by the recent U.S. Supreme Court ruling, the State of Idaho, 2006 Idaho Legislature responded with 4 bills:

House Bill No. 555 was passed in the 2006 Idaho Legislature which stated that:

7-701 A LIMITATION ON EMINENT DOMAIN FOR PRIVATE PARTIES, URBAN RENEWAL OR ECONOMIC DEVELOPMENT PURPOSES.

- 1) This section limits and restricts the State of Idaho, its instrumentalities, political subdivisions, public agencies, or bodies corporate and politic of the state to condemn any interest in property in order to convey the condemned interest to a private interest to person as provided herein.
- 2) Eminent domain shall not be used to acquire private property:
  - (a) For any alleged public use which is merely a pretext for the transfer of the condemned property or any interest in that property to a private party; or
  - (b) For the purpose of promoting or effectuating economic development; provided however, that nothing herein shall affect the exercise of eminent domain:
    - (i) Pursuant to Chapter 15, Title 70, Idaho Code, and Title 42, Idaho Code; or
    - (ii) Pursuant to Chapters 19, 20 or 29, Title 50, Idaho Code, except that no private property shall be taken through exercise of eminent domain within the area of operation of a housing authority or within a competitively disadvantaged border community area unless the specific property to be condemned is proven by clear and convincing evidence to be in such condition that it meets all of the requirements:
      1. The property, due to general dilapidation, compromised structural integrity, or failed mechanical systems, endangers life or endangers property by fire or by other perils that pose a an actual identifiable threat to building occupants; and

2. The property contains specifically identifiable conditions that pose an actual risk to human health, transmission of disease, juvenile delinquency or criminal content; and

3. The property presents an actual risk of harm to the public health, safety, morals or general welfare; or

(iii) For those public and private uses for which eminent domain is expressly provided in the constitution of the State of Idaho.

3) This section shall not affect the authority of a governmental entity to condemn a leasehold estate on property owned by the governmental entity.

The rationale for condemnation by the governmental entity proposing to condemn property shall be freely reviewable in the course of judicial proceedings involving exercise of the power of eminent domain.

In addition, the three additional bills, **SB1243**, **SB1247** and **SB1429** were passed in 2006. These bills are described below.

**SB1243** - Requires condemners to clearly set forth in the complaint a description of the property and property rights to be acquired.

**SB1247** - Permits a “quick take” procedure to be used by condemning authorities to take possession of private property prior to trial. Also, all condemning authorities may now use this process, not just the State.

**SB1429** - Requires condemners to stand by their last pre-litigation offer and set that amount as a floor for just compensation.

## **1.4 Office of the Attorney General Checklist**

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

### **1. Does the Regulation or Action Result in a Permanent/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. [1982]).

The acquisition of private property through eminent domain authority is distinct from situations where a regulation results in the physical occupation of private property. The exercise of eminent domain authority is governed by the procedures in chapter 7, title 7, Idaho Code. Whenever a state or local unit of government, or a public utility, is negotiating to acquire property under eminent domain, the condemning authority must provide the private property owner with a form summarizing the property owner’s rights. Section 7-711A, Idaho Code, identifies the required content for the advice of rights form.

## **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 granting 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. The 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 Commission* 483 U.S. 825 (1987) that compelling an owner of waterfront property to grant an 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* greenway, as opposed to a private one, did not substantially advance protection of a floodplain and was a “taking.” *Dolan v. City 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 section, the agency can avoid liability for just compensation only if it can demonstrate that the proposed uses are prohibited by the laws of nuisances or other pre-existing limitation on the use of the property. See *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 112 S. Ct. 2886 (1992).

Unlike 1 and 2 above, it is important to analyze the regulation's impact as a whole, and not just the impact on a portion of the property. It is also important to assess whether there is any profitable use of the remaining 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 fact 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 the entire 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 pre-existing 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 challenged regulations. Although a 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. These economic factors are normally applied to the property as a whole.

A moratorium as a planning tool may be used pursuant to Idaho Code §67-6523 - Emergency Ordinances and Moratoriums (written findings of imminent peril to public health, safety or welfare; may not be longer than 120 days); and Idaho Code §67-6524 - Interim Ordinances and Moratoriums; (written findings of imminent peril to public health, safety or welfare; the ordinance must state a definite period of time for the moratorium). Absence of the written findings may prove fatal to a determination of the reasonableness of the government action.

The Idaho moratorium provisions appear to be consistent with the United States Supreme Court's interpretation of moratorium as a planning tool as well. In *Tahoe-Sierra Preservation Council, Inc et al. v. Tahoe Regional Planning Agency et al.*, (Slip Opinion No. 00-1167, April 23, 2002); the Court held that planning moratoriums may be effective land use planning tools.

Generally, moratoriums in excess of one year should be reviewed with skepticism, but should be considered as one factor in the determination of whether a taking has occurred. An essential element pursuant to Idaho law is the issuance of written findings in conjunction with the issuance of moratoriums. See Idaho Code §§67-6524.

## **5. 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 recreation purposes where the harm to be prevented was to the floodplain was a “taking.” In finding this to be a “taking,” the Court stated:

“The City never demonstrated why a public greenway, 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...[T]his right to exclude others is ‘one of the most essential sticks in the bundle of rights that are commonly characterized as property.’” *Dolan v. City of Tigard*, 512 U.S. 374, 114 S. Ct. 2309 (1994).

## **6. (a) Does the Regulation Serve the Same Purpose that Would be Served by Directly Prohibiting the Use or Action; and (b) 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*, 483 U.S. 825, 107 S. Ct. 3141 (1987); *Dolan v. City of Tigard*, 512 U.S. 374, 114 S. Ct. 2309 (1994).

In *Nollan*, the United States Supreme Court held that it was an unconstitutional “taking” to condition the issuance of a permit to landowners on the grant of an easement to the public to use their beach. The Court found that since there was no 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.

Similarly, 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 the use, the greater the likelihood that a “taking” will be found. See a detailed list of significant federal and state “taking” cases in the Attorney General’s website.

***<http://www.ag.idaho.gov/publications/legal/Manuals/RegulatoryTakings.pdf>***

## **1.5 Goals and Objectives and Strategies**

**Goal 1:**            **Preserve and protect private property rights within the bounds of Federal and State Law.**

**Objective 1:**    Ensure that all land use regulations and procedures are reviewed and follow due process of law.

STRATEGY 1:    The City should conduct an annual review of all applicable land use rulings.

STRATEGY 2:    The City should ensure that the reviews of all land use proposals are in accordance with the Attorney General’s Idaho Regulatory Takings Act Checklist as identified on pages 1- 4 through 1-7 of this chapter.

STRATEGY 3:    The City shall utilize the Idaho Regulatory Takings Analysis as requested by the public.