Michigan State University Extension
Land Use Series

A Behavioral Approach to Avoid Regulatory Takings

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How to Get in Trouble with Takings

A community may get in trouble with regulatory takings in three basic ways.

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A municipality can get in trouble with regulatory takings when it is greedy—when it wants something from a developer, such as a road, park, drain, bike path or new fire truck. The municipality gets in trouble when it wants more from the developer than the impacts from the particular project justify asking for.

"Thirty seven million acres is all the Michigan we will ever have"
William G. Milliken

This is a fact sheet developed by experts on the topic(s) covered within MSU Extension. Its intent and use is to assist Michigan communities making public policy decisions on these issues. This work refers to university-based peer reviewed research, when available and conclusive, and based on the parameters of the law as it relates to the topic(s) in Michigan. This document is written for use in Michigan and is based only on Michigan law and statute. One should not assume the concepts and rules for zoning or other regulation by Michigan municipalities and counties apply in other states. In most cases they do not. This is not original research or a study proposing new findings or conclusions.

For example, a developer wishes to develop six parcels along a lakefront road. The community tells the developer she must build a water line from the west to go along the front of the lots. The developer is also told she must extend the water line out to the east to complete a loop for improved water pressure. She is then told to extend the line east to west along the other side of the block to provide new service to properties on the other side of the block. Some of the above requests are reasonable. Others present a serious problem of regulatory takings.

Asking for improvements is okay if:

- The improvements demanded are necessary to serve the development or are reasonably related to the direct impacts created by the development. This is called nexus. The required improvements have a nexus with the impact of the project.
- The improvements are internal to the project. Extensive off-site improvements are usually not justifiable.[1]

Application of *nexus*:

- When the demanded improvements are required solely to serve the development, *nexus* exists. Requiring that the water line be extended from the west to go along the front of the six parcels has the required *nexus*. This extension is needed solely to provide water service to the six parcels the developer wants to sell.
- When the demanded improvements do not solely serve the development but are still a benefit to the development and the cost of paying for them is roughly proportional to the benefit, nexus might exist for some or all of the costs. For example, the requirement to extend the water line out to the east to complete the loop for improved water pressure would benefit land outside the development. The six parcels benefit, but so do others. The benefit may or may not be disproportionate to the costs of the loop. The community should conduct an analysis of the project and the improvements to measure the impacts of the project, the benefit to the developer, the benefit to the community, and the cost (whether it is roughly proportional to the benefit). Once this information is known, then the community and the developer can allocate a sharing of the costs based on relative benefit ("rough proportionality").
- When the demanded improvements do not have any relationship to the project, there is no *nexus*. For example, the requirement to connect both the west and east extensions of the water line along the other side of the block to provide service to the adjacent block gives no benefit to the developer. The community or the benefitted landowners should pay for this part of the project.

[1] *Arrowhead v. Livingston County Road Commission*, 92 Mich. App. 31 (1979)

Nothing is wrong with wanting and asking for something. A municipality can ask for reasonable improvements – as long as they are related to the impact of the development, and the developer's cost is proportionate to the benefit to or burden imposed by the development.

The municipality will get in trouble if it tries to make an applicant pay for improvements with no relationship to the development or pay more than the "roughly proportional" impact on (or benefit to) his or her development. It is not OK to demand oversized infrastructure that will service this project plus possible future development. If that is what is wanted or proposed, then the developer should be asked to pay only his or her fair share based on "rough proportionality." The municipality or other users would pay for the remainder of the improvement.

Exactions

An exaction is something a municipality requires a property owner to give to the community to obtain approval to develop land. The "something" can be land, money or other property, such as a fire truck.

In *Nollan v. California Coastal Commission*, 485 U.S. 825; 107 L.Ed. 2d. 3141 (1987), the U.S. Supreme Court held that the California Coastal Commission could not require a landowner to obtain a permit to build a new house on the property. The Supreme Court said there must be an essential *nexus* between the permit condition (i.e. the land dedication or exaction) and the burden imposed or benefit enjoyed by the new house. Because the access easement had nothing to do with the impact of building the new house, the permit condition was invalid even though the commission believed that a public walkway along the beach would serve the public interest.

In *Dolan v. City of Tigard*, 512 U.S. 374; 114 S. Ct. 2309; 129 L.Ed. 2d. 304 (1994), the U.S. Supreme Court confirmed that a municipality may not demand property or money unless there is an essential nexus between the exaction and the particular project. If there is some nexus, then the court must make an individualized determination that the required exaction is related both in nature and extent to the impact of the proposed development. General policy justifications will not suffice. The city's demands in the case were held to be disproportionate. After remand, the city agreed to settle with the Dolans by the payment of $1,500,000. The city also agreed to place a plaque memorializing the litigation in the pathway to be constructed along the site.

Several legal principles generally apply to exactions:

- Statutory authority for exactions must exist.
- The exaction must be reasonably related (have an essential or reasonable nexus) to the need created by the development. This should be documented by appropriate studies or reports.
- The exaction must not deprive the property owner of all reasonable use of the land.
- The primary purpose of the exaction must be related to the service being provided and not be for general revenue raising (i.e., a disguised tax).
- The degree of the exaction demanded must be roughly proportional to the impact of the proposed development (i.e., there must be a "rough proportionality.").

The municipality should document the need for any exaction with studies linking the police power objective to be achieved to the nature and extent of the condition being

imposed.

The municipality can avoid regulatory takings by making sure the municipality negotiates for improvements and pays its fair share for them. Regulatory takings claims are avoided by requiring payment for only those improvements that are essential and internal to the development project.

Second: Dumb Stuff, NIMBY (Regulatory Takings)

A municipality can get in trouble with regulatory takings when it allows the "not in my back yard" (NIMBY) mentality to rule the day. This is when a municipality does not want something that a developer is proposing even though the project complies with the governing rules. The municipality somehow still figures out a way to say "no."

For example, an applicant comes in asking to develop an 800-unit housing project on land in a zoning district that allows multiple uses with a density of 1,000 units, but the municipality does not want the project and says "no" to the development.

The process of saying, "Yes, it is zoned that way, but we do not want it," can take a number of forms:

- Implying that if the size of the development were reduced, the community would approve the project. The applicant comes back with a 600-unit development, and the municipality again says "no."
- Seeking and looking for minor technical excuses to delay or reject the proposal—e.g. "your site plan does not have a red seal as required by §9406.B.1.(f)(i)(I)(a)*x=mc2* of the zoning ordinance."
- Repeatedly tabling a decision on the application. Once an application is received, the municipality has a duty to proceed in good faith to process it and either approve, approve with modification or deny it. Not only is there the duty to act promptly, but delaying tactics will make the municipality look bad in court. Foot-dragging gives the developer a clear opportunity to make the government look bad.
- Creating delays while working to amend the zoning.

In these situations the municipality is failing to follow due process.

Every time a community says "no" to a plan or proposal that meets the requirements of the ordinances, it is taking the land or committing some other constitutional tort. It will lose in court, the developer will win with her project, and the community will pay for the delay.

Regulatory Takings

In 1992, in *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003; 120 L. Ed. 2d 798 (1992), the U.S. Supreme Court refined the rules applicable to regulatory takings. The court initially noted that its previous cases had never adopted any set formula for determining how far is too far, preferring instead to "engag[e] in ...essentially ad hoc factual inquiries (120 L. Ed. 2d at 812). The court then stated that two categories do not require ad hoc factual investigation. First, a regulation that compels a property owner to submit to a physical invasion of property requires immediate payment of compensation -*Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419; 73 L.Ed. 2d 868 (1982). Second, where the regulation denies all economically beneficial or productive use of land, compensation must be paid. Cases that involve regulations that fail to advance substantially any legitimate state interest and regulations that interfere with distinct investment-backed expectations can constitute takings but do require a factual inquiry into whether the

regulations are justifiable on the basis of the public interest that supports them.

The Michigan Supreme Court's decision in *K&K Constructions, Inc. V. Department of Natural Resources*, 456 Mich. 570; 575 N.W. 2d 535 (1998), sets forth a non-segmentation principle for determining what parcel of the owner's land should be considered for purposes of a takings analysis. In determining the denominator parcel, if the land is divided into parcels, a court will evaluate the contiguity of parcels, dates of acquisition, extent that the land is considered a unified parcel, and the extent to which the taken land benefits the value of the adjoining land.

If a municipality really does not want particular land to be developed in accordance with existing local ordinances, it has two lawful choices:

1. Buy the land.
2. Downzone the area (amend your zoning ordinance) **before** an application is filed to develop it.

So long as downzoning leaves some economically viable use of the land, it will withstand legal challenge. If the downzoning comes after the application is filed, the developer may end up using the land and recovering damages. If the community really wants the land to remain undeveloped, the best way to assure that is to buy the land.

Third: Mob Rule or The Government Crumbles (Due Process Violation)

A municipality can get in trouble with takings when it ignores the Al Haig syndrome: "I'm in charge here." This happens when a municipal meeting is run by those in the audience, mob rule or mobocracy, or when the attitude "we live here and you do not" prevails.

When the planning commission is reviewing a developer's application, it is important to remember that the planning commission, not the audience, has the legal responsibility to make the decision. Asking for and following a show of hands or allowing a meeting to be run by those in the audience is improper. Planning and zoning decisions are to be based on findings of fact, application of applicable law to those facts, and the rationale for the decision and applicable conditions to it. Such decisions should not be based on popular opinion. This is why planning and zoning issues should be handled by a separate entity with access to expert advice (planning commission, zoning board, appeals board) and not by a show of hands.

The municipality does not have the option of abdicating its responsibility to do its job. Therefore, when reviewing a developer's proposal, it must take particular care to do the following:

- Avoid discrimination.
- Make the legally correct decision, which means making a findings of fact, legal conclusions based on those facts, and formal statements of the action and conditions.
- Remember who is really in charge and who must make the decisions (the administrative body that has been delegated the task).

Giving in to the attitude "we live here and you do not" immediately deprives the developer of fair hearing and will lead to regulatory takings and other civil rights violations.

Another way the municipality can get itself in trouble with due process is for one of the members of the planning commission or board of appeals to fail to disclose he/she has a conflict of interest, and fail to

remove him/herself from voting, debate and discussion on the issue. When a conflict of interest occurs, the individual should publicly disclose that fact, physically leave the meeting table, and not participate in the debate or discussion, make motions or vote on the matter.

Due Process Challenges

The due process clause requires that a law or action by the municipality be neither unreasonable, arbitrary nor capricious and that the means selected have a relationship to the objective the municipality seeks to achieve. (See Fifth and 14th Amendments to the U.S. Constitution.) Denial of something which is non-discretionary under state law may constitute a denial of substantive due process. Even discretionary acts can create liability if they are performed in an arbitrary and capricious manner.

Federal law generally gives great deference to local decisions in local land use matters. Unfortunately, there is no clear definition of the standard for a substantive due process claim in the land use context. The standards vary by circuit. The U.S. Supreme Court has not yet decided what the standard will be.

If non-compliance with state or local notice or hearing requirements deprives the applicant of federally required minimum protections, a claim for deprivation of procedural process can be stated.

Care must be taken when local boards react to public opposition to an application. Although some cases hold that local governing bodies may take the public's desire into consideration, other cases have found this reaction to be arbitrary and capricious. Certainly, the public has a First Amendment right to express opinions, but the decision made by the local body should not appear to be based on politics but should be supported by legitimate, rational reasons.

When a local zoning board retaliates against an individual by denying an application because the application exercised his or her First Amendment rights, the retaliatory act is itself a violation of the First Amendment (*Duboc v. Green Oak Township*, 958 F. Supp. 1231 E.D. Mich. [1997]).

How to Avoid Problems With Takings Judgments

The most effective way to avoid takings is not to regulate at all, but this is impossible in most communities.

The next most effective way is to know what you are supposed to be doing, how to do it and how to keep proper records of what you did. First, read your ordinances so you understand them. Second, budget for and attend formal training more than once a year. Training is available from the Michigan Association of Planning,[2] Michigan State University Extension,[3] the Michigan Municipal League[4] and the Michigan

[2] Michigan Association of Planning, 219 S. Main, Suite 300, Ann Arbor, MI, 48104. Phone: (734)913-2000. Fax: (734)913-2061. www.planningmi.org.

[3] Contact your local county Michigan State University Extension Office. www.msue.msu.edu.

[4] Michigan Municipal League, 1675 Green Road, P.O. Box 1487, Ann Arbor, Michigan 48106. Phone: (734)662-3246. Fax: (734)231-8908. www.mml.org/.

Townships Association.[5] Third, subscribe to planning and zoning publications to keep up-to-date: Planning and Zoning News,[6] Michigan Planner (through membership with Michigan Association of Planning), MSU Extension Bulletins (formal and informal), and Planning (through membership with American Planning Association [APA][7]).

When you find yourself in a situation where you see greed, dumb stuff or mob rule appearing, use the following approaches:

Greed: When You Want Something

When your community is interested in getting something from a developer (e.g., building water lines), the first thing to do is forget what the municipality wants. Figure out what the developer wants, besides getting the project approved and making money. But some developers also want a good name, a good reputation, to be seen publicly as a benefactor of the community. Base your negotiation with the developer on your analysis of what that particular developer is looking for.

Next, analyze the developer's project. Determine what the real impacts of the development are on the community and what the costs are to mitigate those impacts. Second, list the conditions that would need to be met to be able to pay for that mitigation, the reasons why those conditions are necessary, and the conclusions about why the developer should pay for all (or a portion) of the mitigation. Keeping these lists in the record (minutes and attachments) is a community's best defense. The record should include:

- A finding of facts.
- Reasons for the action, based on the facts.
- A formal statement of the action—the conditions that must be met.

Creating and keeping minutes with those details are not only very important for defending the community in court, but also the most effective way to discourage someone from bringing a lawsuit in the first place.

Last, when the community wants something that is unrelated to the impact of the development, say so up front, then request it, do not require it. Negotiate to get it, and you might be surprised with the result.

Dumb Stuff: When You Do Not Want Something

If a municipality is about to say "no" to a proposed development, it should ask itself if it can defend its "no" answer. If not, it should take a different tack. When you find yourself saying an outright flat "no" to a site plan, special use permit or planned unit development request, you are looking for trouble. Figure out what the municipality can live with and work toward that, rather than saying an absolute "no."

If a set of defensible reasons exists for saying "no," it is important to state those reasons in the record. The analysis in the record should include:

[5] Michigan Townships Association, 512 Westshire Drive, P.O. Box 80078, Lansing, Michigan 48908-0078. Phone: (517)231-6467. Fax: (517)231-8908. www.mta-townships.org.

[6] Planning and Zoning Center, %Mark A. Wyckoff, Editor, http://www.pznews.net/.

[7] American Planning Association, 122 S. Michigan Avenue, Suite 1600, Chicago, Illinois 60603-6107. Phone: (312)431-9100. Fax: (312)431-9985. http://www.planning.org.

- Specific finding of facts and conclusions of law.
- A formal statement of the negative action.
- Reasons for the action based on the facts and conclusions with a statement explaining why they cannot be overcome.

Always provide the developer an opportunity to negotiate or change his/her proposal to try to mitigate the negative impacts of the development, if that is possible.

Remember, if the community is going to deny a project, state the real reasons for doing so. There are legal limitations on the community's authority to deny a project. The real reasons for denial must conform to those limitations.

The Federal Civil Rights Act, 42 USC § 1983

To state a claim under the Civil Rights Act, 42 USC § 1983, two elements must be shown: the conduct complained of must have been carried out under color of state law, and the conduct must have deprived the plaintiff of right, privilege or claim for a taking of property, denial of due process, or denial of equal protection. These claims may be asserted through the procedural mechanisms of the Civil Rights Act.

The Civil Rights Act is the proper procedural mechanism for setting forth a claim under the U.S. constitution and for securing damages when regulation results in undue interference with the use of land (*Lake County Estates, Inc. v. Tahoe Regional Planning Agency*, 440 U.S. 391 [1979]).

Actual attorney fees can be awardable to the "prevailing party" (42 USC § 1988).

Before the Civil Rights Act can be invoked, a property interest must be involved (*Warth v. Seldin*, 442 U.S. 490 [1975]). State law determines what is a "property interest" under 42 USC § 1983.

To assert any federal claim, there must be a federally protected property interest. This means the plaintiff must show a legitimate claim of entitlement or a justifiable expectation interest in what is sought. There is a right to a jury trial for a Civil Rights Act claim based upon a regulatory taking (*City of Monterey v. Del Monte Dunes*, 526 U.S. 687; 119 S.Ct. 1624; 143 L.Ed. 2d. 882 [1999]).

Mob Rule: Forgetting Who Is In Charge

Legal and planning principles should guide the decision-making process. Decisions should be made only by the public body with the authority to act. Rules should be applied evenhandedly. Do not let the mob overwhelm your better judgment.

Steps to Avoid Liability in Planning and Zoning Decisions

A. Periodically update your master plan and zoning ordinance, and base the zoning ordinance on the master plan.

B. Periodically review and update your zoning ordinance and all other ordinances to ensure they comply with current case law. A plan or zoning ordinance should be updated when:
   1. Something happens that had not been anticipated.
   2. The municipality was sued and lost.
   3. The municipality's attorney, planner or a judge says to do so.
   4. The other (zoning or plan) is updated.
   5. At least every five ± years.

C. Seek the opinion and advice of your municipal attorney. This is especially true when the landowner or developer appears with his or her legal counsel.

D. Do not react to public sentiment. Decisions based on political pressure or motivation, or personal motivations, are difficult to support. Although neighbors may object to proposed developments, try to base your decisions on the real issues and the facts presented.

E. Support your decision by fully articulating your reasons on the record. Keep detailed minutes of information presented during the public meetings. The basis of the decision must be found in the official record.

F. Train yourself and others who make land use decisions. The persons who sit on administrative boards are lay people who volunteer their time to the community. Help them properly perform their duties by training them.

G. Train the municipal staff. Make them aware of potential liabilities in land use litigation. Develop policies for handling of, review of and recommendations on land use requests.

H. Watch for conflicts of interest, and when they occur, do not conceal them. Remove any decision makers involved in a conflict of interest from all debate, discussion and voting on the issue.

Authors

This publication was developed in collaboration by:

- Joseph F. Galvin, *Esq.*, Miller, Canfield, Paddock and Stone, P.L.C.
- Kurt H. Schindler, AICP, Distinguished Senior Educator Emeritus, MSU Extension, Michigan State University

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To find contact information for authors or other MSU Extension experts use this web page: http://msue.anr.msu.edu/experts.