HB

154

CS FOR HOUSE BILL NO. 154(CRA)

IN THE LEGISLATURE OF THE STATE OF ALASKA

NINETEENTH LEGISLATURE - FIRST SESSION

BY THE HOUSE COMMUNITY AND REGIONAL AFFAIRS COMMITTEE

Offered:
Referred:

Sponsor(s): REPRESENTATIAVES KOHRING, Rokeberg, Kott

A BILL

FOR AN ACT ENTITLED

"An Act requiring the Department of Law to provide guidelines regarding state and municipal takings of private property; relating to state and municipal regulations, ordinances, and actions relating to private property; relating to compensation for, access to, and taxation of private property taken by state or municipal action; relating to actions for state or municipal takings of private property or for certain violations; prohibiting certain regulations; and providing for an effective date."

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF ALASKA:

* Section 1. AS 09.10.030 is amended to read:

Sec. 09.10.030. ACTIONS TO RECOVER REAL PROPERTY IN 10 YEARS. Except as otherwise provided under AS 34.50.190, a [A] person may not bring an action for the recovery of real property [,] or for the recovery of the possession of it unless the action is commenced within 10 years. An action may not be maintained for

the recovery unless it appears that the plaintiff, an ancestor, a predecessor, or the grantor of the plaintiff was seized or possessed of the premises in question within 10 years before the commencement of the action.

* **Sec. 2.** AS 09.10.070 is amended to read:

Sec. 09.10.070. ACTIONS FOR TORTS AND CERTAIN STATUTORY LIABILITIES TO BE BROUGHT IN TWO YEARS. **Except as otherwise provided by AS 34.50.190, a** [A] person may not bring an action (1) for libel, slander, assault, battery, seduction, false imprisonment, or for any injury to the person or rights of another not arising on contract and not specifically provided otherwise; (2) upon a statute for a forfeiture or penalty to the state; or (3) upon a liability created by statute, other than a penalty or forfeiture; unless the action is commenced within two years.

* **Sec. 3.** AS 34.50 is amended by adding new sections to read:

ARTICLE 2. GOVERNMENT TAKINGS.

Sec. 34.50.100. GOVERNMENT TAKINGS GUIDELINES. The Department of Law shall develop and submit guidelines to the lieutenant governor each year for publication in the Alaska Administrative Code to assist state agencies, municipalities, and the public to identify and evaluate governmental action that may result in a taking of private real or personal property. The guidelines must be based on current law as articulated by the United States Supreme Court and the state supreme court and the principles stated in AS 34.50.110. The guidelines may not be construed to enlarge or reduce the scope of private property protection provided by the state or federal constitution.

Sec. 34.50.110. PRINCIPLES FOR GOVERNMENTAL ACTION. A governmental entity shall follow the following principles when considering and taking governmental action affecting private property:

(1) to avoid imposing unanticipated or undue additional burdens on the public or on the public treasury, a governmental entity shall be sensitive to, anticipate, and account for the obligations imposed by the fifth and fourteenth amendments to the United States Constitution and art. I, sec. 18, Constitution of the State of Alaska when planning and carrying out governmental action;

(2) the assertion that a public health and safety purpose is involved is

insufficient to avoid a taking, and governmental actions that are purportedly designed to protect public health and safety may not be taken unless they

(A) are taken only in response to real and substantial threats to public health and safety;

(B) are designed to significantly advance the purpose of health and safety; and

(C) do not exceed the governmental action that is necessary to achieve the health and safety purpose;

(3) the governmental entity responsible for taking the governmental action has the burden of proving the criteria under (2) of this section;

(4) a governmental entity shall avoid undue delay in its governmental processes; although normal governmental processes do not ordinarily constitute takings, undue delays in some decision-making may create a taking, and, in addition, a delay in processing may increase significantly the size of compensation due to the owner of the private property if a taking is later found to have occurred;

(5) the constitutional protections against taking private property are self-executing and require compensation regardless of whether the underlying authority for the action contemplated a taking or authorized the payment of compensation;

(6) the source of all compensation is the budget of the governmental entity that took the action that resulted in the taking.

Sec. 34.50.120. RESTRICTIONS ON GOVERNMENTAL ACTION. (a) A governmental entity may not adopt, amend, or repeal a regulation or ordinance relating to private property, or impose a restraint on private property use unless the regulation, ordinance, or restraint has the least possible effect on private property and still accomplishes the necessary public purpose, and unless a statement complying with (b) of this section is prepared by the governmental entity and made available to the public at least 30 days before the adoption of the regulation or imposition of the restraint by the entity.

(b) The statement required by (a) of this section must contain a full analysis of the total economic effect of the regulation, ordinance, or restraint, an analysis of the economic effect of all reasonable alternatives to the regulation, ordinance, or restraint,

and an identification of the manner in which the proposed regulation, ordinance, or restraint will substantially advance the purpose of protecting public health and safety from identifiable public health or safety risks created by the use of the private real property.

Sec. 34.50.130. FULL COMPENSATION REQUIRED. (a) A governmental entity may not take governmental action that results in a taking of private property, unless the governmental entity pays full compensation for the taking to the owner of the private property.

(b) The full compensation required by (a) of this section shall be paid to the owner within three months after the adoption of the regulation or ordinance that results in the taking, or within three months after the restraint on private property use that results in the taking. The compensation shall be measured as of the date of the adoption of the regulation or ordinance, or the imposition of the restraint. Interest at the London Interbank Offering Rate plus 3.5 percent shall be paid on the amount due the property owner from the time that the regulation or ordinance is enforced as to the private property, or from the time the restraint is imposed on the private property, until the time payment is received by the owner.

Sec. 34.50.140. PROHIBITION AGAINST VALUE DEFLATION. A governmental entity may not deflate the value of private property by suggesting or threatening to take action that would avoid the entity's paying full compensation to the owner.

Sec. 34.50.150. WAIVER PROHIBITED. A governmental entity may not require the owner of private property to waive the full compensation required by AS 34.50.130 as a condition of approving a use of the person's property, including receiving a permit or subdividing real property.

Sec. 34.50.160. ACCESS REQUIRED. In addition to the full compensation required by AS 34.50.130, a governmental entity that adopts a regulation or ordinance, or imposes a restraint on private property use shall also, at the governmental entity's expense, provide an alternate access to the property or purchase the inaccessible property, if the regulation, ordinance, or restraint deprives the owner of the property of access to the property.

Sec. 34.50.170. PROHIBITION AGAINST IMPOSING COSTS. A governmental entity may not require an owner of private property to provide or pay for studies, maps, plans, reports, or other information used in the governmental entity's decisions to adopt a regulation or ordinance relating to private property, or to impose a restraint on private property use.

Sec. 34.50.180. STATE RESPONSIBILITY FOR COMPENSATION. The state shall compensate municipalities for the full compensation that the municipalities are required to pay under AS 34.50.130 for taking private property by governmental action if the municipality's governmental action is required by state law.

Sec. 34.50.190. TIME FOR BRINGING ACTION. A person may not commence a civil action for a taking of the person's private property by governmental action unless the action is commenced within five years after the taking has occurred.

Sec. 34.50.200. ADJUSTMENT OF VALUE FOR PROPERTY TAX. (a) If a determination has been made that there has been a taking of private property by governmental action, a municipality that levies a tax on the property shall adjust valuation of the property for the purposes of the tax and notify the owner of the new tax valuation. The new tax valuation must be reflected and identified in the next tax assessment notice.

(b) If the property owner contests the reduction in valuation, and if the property owner secures an independent appraisal of the property from a person who has a valid real estate appraiser certificate issued under AS 08.87.110, the appraisal provided by the independent appraiser shall be the valuation used by the municipality when taxing the property.

Sec. 34.50.210. ENFORCEMENT. A person who owns property that is affected by a provision of AS 34.50.100 - 34.50.250 may enforce the provision in the superior court against a governmental entity that fails to comply with the provision. If the person prevails in an action brought under this section, the owner may recover, to the extent awarded by the court, the owner's attorney fees and costs from the budget of the governmental entity involved in the governmental action on which the court action was based.

Sec. 34.50.220. REGULATIONS PROHIBITED. A state agency may not

adopt regulations to implement AS 34.50.100 - 34.50.250.

Sec. 34.50.250. DEFINITIONS. In AS 34.50.100 - 34.50.250, unless the context clearly requires otherwise,

(1) "full compensation" means the monetary value of the reduction in the fair market value of private property, if the reduction is caused by a taking by governmental action;

(2) "governmental action" means action by a governmental entity, including the adoption of a regulation or ordinance, or a restraint on private property use, but does not include

(A) the formal exercise of the power of eminent domain;

(B) seizure of private property by law enforcement agencies as evidence of a crime for violations of law or forfeiture ordered by a court;

(C) orders issued by a state agency, an agency of a municipality, or a court that result from a violation of law and that are authorized by law; or

(D) the discontinuation of state government programs or the government programs of a municipality;

(3) "governmental entity" means a state agency or a municipality;

(4) "personal property" means tangible property other than real property, but including merchandise, stock-in-trade, machinery, equipment, furniture, fixtures, vehicles, boats, and aircraft;

(5) "private property" means real or personal property that is not owned by the state, a municipality, or the federal government;

(6) "real property" includes land, an interest in land, improvements on land, proprietary water rights, and crops, forest products, or resources capable of being harvested or extracted;

(7) "restraint on private property use" means an action, requirement, or restriction imposed by a governmental entity that limits the use of private property;

(8) "state agency" means a department, institution, board, commission, division, authority, public corporation, or other administrative unit of the executive branch of state government, including the University of Alaska, the Alaska Railroad

Corporation, the Alaska Housing Finance Corporation, the Alaska Aerospace Development Corporation, and the Alaska State Pension Investment Board;

(9) "taking" includes

(A) a regulation or other governmental action that regulates or imposes a restraint on private property use for public benefit, including restraints on wetlands fish or wildlife habitat or the creation of buffer zones unless the regulation is necessary to avoid or correct a public nuisance;

(B) governmental action that results in a physical invasion or occupancy of private property or that denies an owner any or all economic or other use of the person's private property; or

(C) governmental action that results in less than a complete deprivation of all use or value of private property, or of all interest in the property, even if the action is only temporary in nature.

* Sec. 4. AS 29.25.020(b) is amended to read:

(b) The following procedure governs the enactment of all ordinances, except emergency ordinances:

(1) an ordinance may be introduced by a member or committee of the governing body, or by the mayor or manager;

(2) an ordinance shall be set by the governing body for a public hearing by the affirmative vote of a majority of the votes authorized on the question;

(3) **if applicable, a notice containing the statement under AS 34.50.120 shall be given;**

(4) at least five days before the public hearing a summary of the ordinance shall be published together with a notice of the time and place for the hearing;

(5) [(4)] copies of the ordinance shall be available to all persons present at the hearing, or the ordinance shall be read in full;

(6) [(5)] during the hearing the governing body shall hear all interested persons wishing to be heard;

(7) [(6)] after the public hearing the governing body shall consider the ordinance, and may adopt it with or without amendment;

(8) [(7)] the governing body shall print and make available copies of an ordinance that is adopted.

* Sec. 5. AS 29.25.040 is amended to read:

Sec. 29.25.040. CODES OF REGULATION. The governing body may in a single ordinance adopt or amend by reference provisions of a published code of municipal regulations. The procedure under AS 29.25.020 applies to an ordinance adopted under this section, except that neither the ordinance or its amendments must be distributed to the public or read in full at the public hearing. For a period of 15 days before adoption of an ordinance under this section, at least five copies of the code of regulations shall be made available for public inspection at a time and place set out in the hearing notice. Only the ordinance must be printed after it is adopted under this section. The governing body shall provide for an adopted code of regulations to be made available to the public at no more than cost. **Notwithstanding the other provisions of this section and if applicable, the adoption of a published code of regulations under this section shall comply with AS 34.50.120.**

* Sec. 6. AS 29.45.110 is amended by adding a new subsection to read:

(d) When assessing the full and true value of property, the assessor shall comply with AS 34.50.120.

* Sec. 7. AS 44.62.130(a) is amended to read

(a) The lieutenant governor shall provide for the continuing compilation, codification, and publication, with periodic supplements, **of the guidelines developed by the Department of Law under AS 34.50.100 and** of all regulations filed by the lieutenant governor's office, or of appropriate references to any regulations the printing of which the lieutenant governor finds to be impractical, such as detailed schedules or forms otherwise available to the public, or **that** [WHICH] are of limited or particular application. The publication of **the guidelines and the** compiled regulations is the Alaska Administrative Code. The periodic supplements to it are the Alaska Administrative Register. The code and register must contain appropriate annotations to judicial decisions and opinions of the attorney general.

* Sec. 8. AS 44.62.200(a) is amended to read:

(a) The notice of proposed adoption, amendment, or repeal of a regulation

must include

(1) a statement of the time, place, and nature of proceedings for adoption, amendment, or repeal of the regulation;

(2) reference to the authority under which the regulation is proposed and a reference to the particular code section or other provisions of law that are being implemented, interpreted, or made specific;

(3) an informative summary of the proposed subject of agency action;

(4) other matters prescribed by a statute applicable to the specific agency or to the specific regulation or class of regulations;

(5) a summary of the fiscal information required to be prepared under AS 44.62.195;

(6) if applicable, the information required by AS 34.50.120.

*** Sec. 9.** SEVERABILITY CLAUSE. If a provision of this act or the application of this Act to a person or circumstance is held to be invalid, the remainder of this Act and the application of this Act to other persons or circumstances is not affected.

*** Sec. 10.** INITIAL GUIDELINES. The Department of Law shall prepare the initial guidelines required by AS 34.50.100, enacted by sec. 3 of this Act, by January 1, 1996.

*** Sec. 11.** This act takes effect July 1, 1995.

9-LS0602\K
Bannister
3/9/95

CS FOR HOUSE BILL NO. 154( )

IN THE LEGISLATURE OF THE STATE OF ALASKA

NINETEENTH LEGISLATURE - FIRST SESSION

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Offered:
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Sponsor(s): REPRESENTATIVES KOHRING, Rokeberg

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New Text Underlined [DELETED TEXT BRACKETED]

the recovery unless it appears that the plaintiff, an ancestor, a predecessor, or the grantor of the plaintiff was seized or possessed of the premises in question within 10 years before the commencement of the action.

* **Sec. 2.** AS 09.10.070 is amended to read:

Sec. 09.10.070. ACTIONS FOR TORTS AND CERTAIN STATUTORY LIABILITIES TO BE BROUGHT IN TWO YEARS. **Except as otherwise provided by AS 34.50.190, a** [A] person may not bring an action (1) for libel, slander, assault, battery, seduction, false imprisonment, or for any injury to the person or rights of another not arising on contract and not specifically provided otherwise; (2) upon a statute for a forfeiture or penalty to the state; or (3) upon a liability created by statute, other than a penalty or forfeiture; unless the action is commenced within two years.

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Sec. 34.50.100. GOVERNMENT TAKINGS GUIDELINES. The Department of Law shall develop and submit guidelines to the lieutenant governor each year for publication in the Alaska Administrative Code to assist state agencies, municipalities, and the public to identify and evaluate governmental action that may result in a taking of private real or personal property. The guidelines must be based on current law as articulated by the United States Supreme Court and the state supreme court and the principles stated in AS 34.50.110. The guidelines may not be construed to enlarge or reduce the scope of private property protection provided by the state or federal constitution.

Sec. 34.50.110. PRINCIPLES FOR GOVERNMENTAL ACTION. A governmental entity shall follow the following principles when considering and taking governmental action affecting private property:

(1) to avoid imposing unanticipated or undue additional burdens on the public or on the public treasury, a governmental entity shall be sensitive to, anticipate, and account for the obligations imposed by the fifth and fourteenth amendments to the United States Constitution and art. I, sec. 18, Constitution of the State of Alaska when planning and carrying out governmental action;

(2) the assertion that a public health and safety purpose is involved is

insufficient to avoid a taking, and governmental actions that are purportedly designed to protect public health and safety may not be taken unless they

(A) are taken only in response to real and substantial threats to public health and safety;

(B) are designed to significantly advance the purpose of health and safety; and

(C) do not exceed the governmental action that is necessary to achieve the health and safety purpose;

(3) the governmental entity responsible for taking the governmental action has the burden of proving the criteria under (2) of this section;

(4) a governmental entity shall avoid undue delay in its governmental processes; although normal governmental processes do not ordinarily constitute takings, undue delays in some decision-making may create a taking, and, in addition, a delay in processing may increase significantly the size of compensation due to the owner of the private property if a taking is later found to have occurred;

(5) the constitutional protections against taking private property are self-executing and require compensation regardless of whether the underling authority for the action contemplated a taking or authorized the payment of compensation;

(6) the source of all compensation is the budget of the governmental entity that took the action that resulted in the taking.

Sec. 34.50.120. RESTRICTIONS ON GOVERNMENTAL ACTION. (a) A governmental entity may not adopt, amend, or repeal a regulation or ordinance relating to private property, or impose a restraint on private property use unless the regulation, ordinance, or restraint has the least possible effect on private property and still accomplishes the necessary public purpose, and unless a statement complying with (b) of this section is prepared by the governmental entity and made available to the public at least 30 days before the adoption of the regulation or imposition of the restraint by the entity.

(b) The statement required by (a) of this section must contain a full analysis of the total economic effect of the regulation, ordinance, or restraint, an analysis of the economic effect of all reasonable alternatives to the regulation, ordinance, or restraint,

and an identification of the manner in which the proposed regulation, ordinance, or restraint will substantially advance the purpose of protecting public health and safety from identifiable public health or safety risks created by the use of the private real property.

Sec. 34.50.130. FULL COMPENSATION REQUIRED. (a) A governmental entity may not take governmental action that results in a taking of private property, unless the governmental entity pays full compensation for the taking to the owner of the private property.

(b) The full compensation required by (a) of this section shall be paid to the owner within three months after the adoption of the regulation or ordinance that results in the taking, or within three months after the restraint on private property use that results in the taking. The compensation shall be measured as of the date of the adoption of the regulation or ordinance, or the imposition of the restraint. Interest at the London Interbank Offering Rate plus 3.5 percent shall be paid on the amount due the property owner from the time that the regulation or ordinance is enforced as to the private property, or from the time the restraint is imposed on the private property, until the time payment is received by the owner.

Sec. 34.50.140. PROHIBITION AGAINST VALUE DEFLATION. A governmental entity may not deflate the value of private property by suggesting or threatening to take action that would avoid the entity's paying full compensation to the owner.

Sec. 34.50.150. WAIVER PROHIBITED. A governmental entity may not require the owner of private property to waive the full compensation required by AS 34.50.130 as a condition of approving a use of the person's property, including receiving a permit or subdividing real property.

Sec. 34.50.160. ACCESS REQUIRED. In addition to the full compensation required by AS 34.50.130, a governmental entity that adopts a regulation or ordinance, or imposes a restraint on private property use shall also, at the governmental entity's expense, provide an alternate access to the property or purchase the inaccessible property, if the regulation, ordinance, or restraint deprives the owner of the property of access to the property.

Sec. 34.50.170. PROHIBITION ACAINST IMPOSING COSTS. A governmental entity may not require an owner of private property to provide or pay for studies, maps, plans, reports, or other information used in the governmental entity's decisions to adopt a regulation or ordinance relating to private property, or to impose a restraint on private property use.

Sec. 34.50.180. STATE RESPONSIBILITY FOR COMPENSATION. The state shall compensate municipalities for the full compensation that the municipalities are required to pay under AS 34.50.130 for taking private property by governmental action if the municipality's governmental action is required by state law.

Sec. 34.50.190. TIME FOR BRINGING ACTION. A person may not commence a civil action for a taking of the person's private property by governmental action unless the action is commenced within five years after the taking has occurred.

Sec. 34.50.200. ADJUSTMENT OF VALUE FOR PROPERTY TAX. (a) If a determination has been made that there has been a taking of private property by governmental action, a municipality that levies a tax on the property shall adjust valuation of the property for the purposes of the tax and notify the owner of the new tax valuation. The new tax valuation must be reflected and identified in the next tax assessment notice.

(b) If the property owner contests the reduction in valuation, and if the property owner secures an independent appraisal of the property from a person who has a valid real estate appraiser certificate issued under AS 08.87.110, the appraisal provided by the independent appraiser shall be the valuation used by the municipality when taxing the property.

Sec. 34.50.210. ENFORCEMENT. A person who owns property that is affected by a provision of AS 34.50.100 - 34.50.250 may enforce the provision in the superior court against a governmental entity that fails to comply with the provision. If the person prevails in an action brought under this section, the owner may recover, to the extent awarded by the court, the owner's attorney fees and costs from the budget of the governmental entity involved in the governmental action on which the court action was based.

Sec. 34.50.220. REGULATIONS PROHIBITED. A state agency may not

adopt regulations to implement AS 34.50.100 - 34.50.250.

Sec. 34.50.250. DEFINITIONS. In AS 34.50.100 - 34.50.250, unless the context clearly requires otherwise,

(1) "full compensation" means the monetary value of the reduction in the fair market value of private property, if the reduction is caused by a taking by governmental action;

(2) "governmental action" means action by a governmental entity, including the adoption of a regulation or ordinance, or a restraint on private property use, but does not include

(A) the formal exercise of the power of eminent domain;

(B) seizure of private property by law enforcement agencies as evidence of a crime for violations of law or forfeiture ordered by a court;

(C) orders issued by a state agency, an agency of a municipality, or a court that result from a violation of law and that are authorized by law; or

(D) the discontinuation of state government programs or the government programs of a municipality;

(3) "governmental entity" means a state agency or a municipality;

(4) "personal property" means tangible property other than real property, but including merchandise, stock-in-trade, machinery, equipment, furniture, fixtures, vehicles, boats, and aircraft;

(5) "private property" means real or personal property that is not owned by the state, a municipality, or the federal government;

(6) "real property" includes land, an interest in land, improvements on land, proprietary water rights, and crops, forest products, or resources capable of being harvested or extracted;

(7) "restraint on private property use" means an action, requirement, or restriction imposed by a governmental entity that limits the use of private property;

(8) "state agency" means a department, institution, board, commission, division, authority, public corporation, or other administrative unit of the executive branch of state government, including the University of Alaska, the Alaska Railroad

Corporation, the Alaska Housing Finance Corporation, the Alaska Aerospace Development Corporation, and the Alaska State Pension Investment Board;

(9) "taking" includes

(A) a regulation or other governmental action that regulates or imposes a restraint on private property use for public benefit, including restraints on wetlands fish or wildlife habitat or the creation of buffer zones unless the regulation is necessary to avoid or correct a public nuisance;

(B) governmental action that results in a physical invasion or occupancy of private property or that denies an owner any or all economic or other use of the person's private property; or

(C) governmental action that results in less than a complete deprivation of all use or value of private property, or of all interest in the property, even if the action is only temporary in nature.

* Sec. 4. AS 29.25.020(b) is amended to read:

(b) The following procedure governs the enactment of all ordinances, except emergency ordinances:

(1) an ordinance may be introduced by a member or committee of the governing body, or by the mayor or manager;

(2) an ordinance shall be set by the governing body for a public hearing by the affirmative vote of a majority of the votes authorized on the question;

(3) **if applicable, a notice containing the statement under AS 34.50.120 shall be given;**

(4) at least five days before the public hearing a summary of the ordinance shall be published together with a notice of the time and place for the hearing;

(5) [(4)] copies of the ordinance shall be available to all persons present at the hearing, or the ordinance shall be read in full;

(6) [(5)] during the hearing the governing body shall hear all interested persons wishing to be heard;

(7) [(6)] after the public hearing the governing body shall consider the ordinance, and may adopt it with or without amendment;

(8) [(7)] the governing body shall print and make available copies of an ordinance that is adopted.

* Sec. 5. AS 29.25.040 is amended to read:

Sec. 29.25.040. CODES OF REGULATION. The governing body may in a single ordinance adopt or amend by reference provisions of a published code of municipal regulations. The procedure under AS 29.25.020 applies to an ordinance adopted under this section, except that neither the ordinance or its amendments must be distributed to the public or read in full at the public hearing. For a period of 15 days before adoption of an ordinance under this section, at least five copies of the code of regulations shall be made available for public inspection at a time and place set out in the hearing notice. Only the ordinance must be printed after it is adopted under this section. The governing body shall provide for an adopted code of regulations to be made available to the public at no more than cost. **Notwithstanding the other provisions of this section and if applicable, the adoption of a published code of regulations under this section shall comply with AS 34.50.120.**

* Sec. 6. AS 29.45.110 is amended by adding a new subsection to read:

(d) When assessing the full and true value of property, the assessor shall comply with AS 34.50.120.

* Sec. 7. AS 44.62.130(a) is amended to read

(a) The lieutenant governor shall provide for the continuing compilation, codification, and publication, with periodic supplements, **of the guidelines developed by the Department of Law under AS 34.50.100 and** of all regulations filed by the lieutenant governor's office, or of appropriate references to any regulations the printing of which the lieutenant governor finds to be impractical, such as detailed schedules or forms otherwise available to the public, or **that** [WHICH] are of limited or particular application. The publication of **the guidelines and the** compiled regulations is the Alaska Administrative Code. The periodic supplements to it are the Alaska Administrative Register. The code and register must contain appropriate annotations to judicial decisions and opinions of the attorney general.

* Sec. 8. AS 44.62.200(a) is amended to read:

(a) The notice of proposed adoption, amendment, or repeal of a regulation

must include

(1) a statement of the time, place, and nature of proceedings for adoption. amendment, or repeal of the regulation:

(2) reference to the authority under which the regulation is proposed and a reference to the particular code section or other provisions of law that are being implemented, interpreted, or made specific;

(3) an informative summary of the proposed subject of agency action;

(4) other matters prescribed by a statute applicable to the specific agency or to the specific regulation or class of regulations;

(5) a summary of the fiscal information required to be prepared under AS 44.62.195;

(6) if applicable, the information required by AS 34.50.120.

*** Sec. 9.** SEVERABILITY CLAUSE. If a provision of this act or the application of this Act to a person or circumstance is held to be invalid, the remainder of this Act and the application of this Act to other persons or circumstances is not affected.

*** Sec. 10.** INITIAL GUIDELINES. The Department of Law shall prepare the initial guidelines required by AS 34.50.100, enacted by sec. 3 of this Act, by January 1, 1996.

*** Sec. 11.** This act takes effect July 1, 1995.

FISCAL NOTE

STATE OF ALASKA
1995 LEGISLATIVE SESSION

BILL NO. HB 154

Revision Date:
Title: "...requiring the Department of Law to provide guidelines...unconstitutional...takings..."
Sponsor: Representative Kohring
Requester: Representative Kohring

Dept. Affected: Department of Law
BRU: Legal Services
Component: Operations

COMPONENT SERIAL NO. 0093

Expenditures/Revenues (Thousands of Dollars)

OPERATING EXPENDITURES	FY 96	FY 97	FY 98	FY 99	FY 00	FY 01
PERSONAL SERVICES						
TRAVEL						
CONTRACTUAL						
SUPPLIES						
EQUIPMENT						
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING	*****	*****	*****	*****	*****	*****
CAPITAL EXPENDITURES						
CHANGE IN REVENUES ( )						

FUND SOURCE (Thousands of Dollars)

1002 Federal Receipts						
1003 GF Match						
1004 GF						
1005 GF/Program Receipts						
1006 GF/MHTIA						
Other						
TOTAL	*****	*****	*****	*****	*****	*****

Estimate of any current year (FY95) cost: $ 0.0

POSITIONS

FULL-TIME	*****	*****	*****	*****	*****	*****
PART-TIME						
TEMPORARY						

ANALYSIS: (Attach a separate page if necessary)

This bill would require the Department of Law to develop and submit guidelines to the lieutenant governor each year for publication in the Alaska Administrative Code to assist state agencies, municipalities, and the public to identify and evaluate government action that may result in an unconstitutional taking of private real property. The bill further requires that the guidelines must be based on current law as articulated by the United States Supreme Court and the state supreme court. The bill also provides that the guidelines may not be construed to enlarge or reduce the scope of private property protection provided by the state or federal constitutions.

United States Supreme Court decisions regarding takings are extremely fact-specific. For instance, in Penn Central Transportation Co. v. New York City, the court acknowledged that it finds the question of what constitutes a taking for purposes of the Fifth Amendment to be a problem of considerable difficulty. And the Court admitted to its inability to develop any "set formula" for determining when "justice and fairness" require

Richard L. Peques

Prepared by: Richard I. Peques, Director — Phone: 465-3672
Division: Administrative Services Division — Date: 2/19/95

Richard L. Peques /FOR/

Approved by Commissioner: Bruce M. Botelho, Attorney General — Date: 2/19/95
Agency: Department of Law

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ANALYSIS CONTINUATION:

injuries caused by public action to be compensated by the government, rather than be disproportionately concentrated on a few persons. The Court frequently has observed that 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." In Andrus v. Allard the Court said that resolution of each case ultimately calls as much for the exercise of judgment as for the application of logic. The Court has identified standards that it uses for guidance in its determination of whether a taking has occurred. However, these standards are somewhat broad. For example, in cases involving land use regulation, the Court will hold that the regulation can effect a taking if it does not substantially advance legitmate state interests or denies an owner economically viable use of his land. Even if neither of these standards is met, a regulation still may constitute a taking if it interferes sufficiently with "reasonable investment expectations" or where it is of an extraordinary nature. But none of this can be determined without a thorough examination of the facts and the particular circumstances involved.

Because the Court bases its takings determinations on individual factual inquiries, the Department of Law would be forced to speculate about factual situations that have not occurred, if the department provided guidelines that ventured beyond a simple compilation of the Court's current takings decisions. This would be problematic for two reasons.

First, any form of interperative guidelines prepared by the Department of Law could mislead the public into either taking action when they should not, or not taking action when they should, in response to government action. It is the courts' role, and not the department's, to interpret the law on behalf of the public.

Second, the department, which does have responsibility for interpreting the law for state agencies, could be placed in a position of furnishing "legal advice" to members of the public who may rely on that advice in an adverse action against a state agency, whom the department has the responsibility of defending. This is a conflict that could not be overcome, probably requiring the use of outside counsel in the state's defense. The cost for such counsel cannot be predicted in advance, but it could be very expensive.

Consequently, if intrepretative guidelines are to be provided, this bill could cause a significant undetermined cost for the Department of Law. The department could produce a compilation of current Court decisions at a small additional cost. About two months of attorney time would be required to prepare the initial compilation in the first year, and a few weeks of attorney time would be required each year thereafter to prepare annual updates.

STATE OF ALASKA
1995 LEGISLATIVE SESSION

FISCAL NOTE

BILL NO: HB 154

Revision Date: February 13, 1995
Dept. Affected: Community & Regional Affairs
Title: An Act requiring the Department of Law to provide guidelines regarding unconst.
BRU: none
Component: none
Sponsor: Representative Kohring
Requestor: House C & RA Committee
COMPONENT SERIAL NO.

Expenditures/Revenues: (Thousands of Dollars)

OPERATING	FY 96	FY 97	FY 98	FY 99	FY 00	FY 01
PERSONAL SERVICES						
TRAVEL						
CONTRACTUAL						
SUPPLIES						
EQUIPMENT						
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING	0.0	0.0	0.0	0.0	0.0	0.0
CAPITAL	0.0	0.0	0.0	0.0	0.0	0.0
REVENUE FUND SOURCE:						

FUNDING: (Thousands of Dollars)

1002 Federal Receipts						
1003 GF Match						
1004 GF						
1005 GF/Program Receipts						
1006 GF/MHTIA						
Other						
TOTAL	0.0	0.0	0.0	0.0	0.0	0.0

POSITIONS:

FULL-TIME	0	0	0	0	0	0
PART-TIME						
TEMPORARY						

Estimate of current (FY94) impact $ none

ANALYSIS: (Attach a separate page if necessary)

There is no fiscal impact on DCRA from this bill.

Prepared by: Remond Henderson, Director — Remond Henderson — Phone: 465-4708
Division: Division of Administrative Services — Date: 2/13/95
Approved by Commissioner: — Date: 2/13/95
Agency: Community & Regional Affairs

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FISCAL NOTE

STATE OF ALASKA
1995 LEGISLATIVE SESSION

BILL NO. HB 154

Revision Date:
Dept Affected: Natural Resources
Title: An Act relating to the unconstitutional taking of private real property.
BRU: Resource Development
Component: Land Development
Sponsor: Rep Kohring
Requestor: Community and Regional Affairs Committee
Component Serial No. 431

Expenditures/Revenues (Thousands of Dollars)

OPERATING EXPENDITURES	FY96	FY97	FY98	FY99	FY00	FY01
PERSONAL SERVICES						
TRAVEL						
CONTRACTUAL						
SUPPLIES						
EQUIPMENT						
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING	0.0	0.0	0.0	0.0	0.0	0.0
CAPITAL EXPENDITURES	0.0	0.0	0.0	0.0	0.0	0.0
CHANGE IN REVENUES ( )	0.0	0.0	0.0	0.0	0.0	0.0

FUND SOURCE (Thousands of Dollars)

1002 Federal Receipts						
1003 GF Match						
1004 GF						
1005 GF/Program Receipts						
1006 GF/MHTIA						
Other						
TOTAL	0.0	0.0	0.0	0.0	0.0	0.0

Estimate of any current year (FY95) cost: $

POSITIONS

FULL-TIME	0	0	0	0	0	0
PART-TIME	0	0	0	0	0	0
TEMPORARY	0	0	0	0	0	0

ANALYSIS: (Attach a separate page if necessary)

Requires the Department of Law to provide guidelines regarding unconstitutional state and municipal taking of private real property when there is not adequate compensation.

This bill has no impact on DNR as we do not have eminent domain authority and AS 38 specifically excludes private land from any action or decision we may make on adjacent state land.

Prepared by: Ron Swanson
Phone: 762-2692
Division: Land
Date: 8-Feb-95
Approved by Commissioner:
Date: 2/10/95
Agency: Natural Resources

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Juneau, Alaska 99801-1182
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REPRESENTATIVE VIC KOHRING
DISTRICT 26

MEMORANDUM

DATE: April 20, 1995

TO: Representative Alan Austerman, Co-chair
House Community & Regional Affairs Committee

FROM: Representative Vic Kohring

SUBJ: Report on House Bill 154

In the interest of moving this important legislation along, I have attempted to answer the subcommittee's concerns. I believe that many of these concerns can be addressed to the committee's satisfaction and have attempted to do so. Since many of these concerns seem to be of a legal nature it would seem logical for the Judiciary Committee to be the proper place to study this bill in more depth.

Questions:

1. What constitutes a regulatory "taking" of economic value of property?

The U.S. Supreme Court ruled in Lucas v. S. Carolina Coastal Council that "the Fifth Amendment is violated when land-use regulation does not substantially advance legitimate state interests or denies an owner economically viable use of his land." They continue by holding "regulations that leave the owner of land without economically beneficial or productive options for its use . . . carry with them a heightened risk that private property is being pressed into some form of public service under the guise of mitigating serious public harm." The Court has also held in Nollan v. California Coastal Commission that a property regulation which does not substantially advance its avowed governmental purpose also constitutes a taking.

The U.S. Congress and many other states have differing proposals on the percent of decrease that constitutes a compensable taking, varying from 1% to 33%. CSHB 154 uses a standard that requires any loss in value to be compensated.

2. Who defines what is the reasonable use of private property?

Sec. 34.50.110, subsection (3) states that "the government entity responsible for taking the governmental action has the burden of proving the need for the governmental action." In other words, the government entity must prove that their action is necessary to avoid or correct a public nuisance.

3. Who decides what is the most profitable use of the land?

The most profitable use of any property, be it real or personal (this includes money) is best decided by the person who owns it.

4. What is the effect of this bill on:

Pollution prevention, public safety, design controls and resource protection are addressed in section 3, AS 34.50.110, page 2, line 31 - page 3, line 8 and section 3 AS 34.50.250, page 7, lines 3 through 7. These sections allow governmental actions that are designed to protect public health and safety. Scenic views are an altruistic pastime, purely a subjective matter on the part of the individual. To limit the value or use of a person's property based upon this criteria without compensating that person is unfair.

5. How will municipal and state governments handle the fiscal impact of compensating property owners?

State and local governments will have to be very prudent in their determinations of what use of land is in the public interest. Currently, the power of eminent domain is used very sparingly. The reason for this is because a monetary value is placed upon the property which is being condemned, thus effectively limiting its use, due to the fiscal impact. The purpose of this bill is to apply the same prudence upon these governmental agencies in regard to regulatory takings. Despite some recent court rulings, a property owner prevailing in a regulatory case is the exception rather than the rule. Consequently, takings litigation today is a long and arduous process that only the most well-financed and dedicated property owner can endure. The scales of justice are unfairly tipped in favor of the government when citizens are faced with the threat of losing their property because of regulatory burdens.

6. Where will these disputes be settled: in the regulatory agency or in the court?

Section 3, AS 34.50.100, page 2, line 14 - 22 of the bill are very specific in this regard. A governmental agency will review the potential impact of a regulatory or administrative action on specific property, using the guidelines set up by this bill. It is expected that the guidelines supplied by the Attorney General' Office will give wise guidance upon this subject for the enlightenment of the several agencies. Of course, the person who is affected always has the option of going to court.

7. How will a government resolve secondary challenges from property owners who believe their property values are diminished by a government's decision not to enforce a regulation on a neighbor?

This is a matter of equity and the decision of the individual property owners to decide whether or not they feel their grievances are sufficient enough to pursue in court is subject to them.

8. Are there significant numbers of regulatory appeals and lawsuits which point up the need for this legislation?

In the last 5 years, there have been 121 administrative appeals of state natural resource agency permit decisions. These include ADF&G, DEC, DNR, as well as DGC (Division of Governmental Coordination). The Alaska Courts have their record system on paper and they also do not seem to have these cases sorted by category instead of case record number. We do not have the time or resources to comb through these files. As presented to the committee in earlier testimony, we have copies of 15 Alaska Supreme Court cases relating to regulations and regulatory takings.

9. What is the financial burden to other states that have enacted similar laws?

According to Larry Morandi with NCSL, only 3 states have passed legislation with stringent compensation requirements. None have provided fiscal notes showing a large financial burden.

10. What section of HB 154 speaks to "retroactivity?"

The bill sponsor has indicated a willingness to add a section to the bill that would state, in very clear terms, that no portion of this bill is retroactive.

Alaska Environmental Lobby, Inc.
P.O. Box 22151 Juneau, Alaska 99802
Phone: 907-463-3366
Fax: 907-463-3312

HB 154: Regulatory Takings of Private Property

The Alaska Environmental Lobby opposes HB 154:

* HB 154 offers a hollow and misleading promise. HB 154 neither increases nor decreases the constitutional protection guaranteed owners of private property (P. 2, Line 18-20). This measure appears innocuous, but is an attempt to negate health, safety and environmental regulation by saddling enforcement agencies with untenable costs. In addition, HB 154 could undermine municipal and local laws covering everything from building heights to occupancy limits in restaurants.

* HB 154 will add another layer of bureaucratic review to the regulatory process. The consequence of this bill becoming law is that governmental programs will be less efficient and more costly. HB 154 represents movement in the **wrong** direction at a time when there is a manifest need for government to be more efficient and less costly.

* Private property owners are entitled to "just compensation" when their property is taken by government action. The US. Constitution offers Fifth Amendment protection and delivers this right. HB 154 is based on the premise that meaningful takings analysis can be done in the abstract, without reference to a specific piece of property.

* We believe that takings issues are the appropriate jurisdiction of the courts. Legislation would have far-reaching implications for state and local zoning, land management, and public health. The idea that property owners can demand government compensation on the grounds of perceived limitations for health, safety, and other laws and regulations is constitutionally unsound and dangerous.

February 21, 1995

REPRESENTATIVE ALAN AUSTERMAN Alaska State Legislature

P.O. Box 2368, Kodiak, Alaska 99615 (907) 486-5930 • Session: State Capitol, Juneau, Alaska 99801 465-2487

MEMORANDUM

TO: Representative Ivan Ivan, Co-Chair
House Community & Regional Affairs Cmte.

FROM: Representative Alan Austerman, Chair
Subcommittee on House Bill 154

DATE: April 11, 1995

RE: Report on House Bill 154

The Subcommittee on House Bill 154 met on Thursday, March 30th to address concerns brought forth by the full committee. It was decided by the subcommittee, that because of the far reaching aspects of this legislation; the fact that "takings legislation" was currently being considered at the federal level and the limited time available this session, that the full committee address the following issues during the interim:

1. What constitutes a regulatory "taking" of economic value of property?

   --What percent of decrease in the property's value applies?

2. Who defines what is the reasonable use of private property, the private property owner or the state of municipal government?

3. Who decides what is the most profitable use of the land?

4. What is the affect of this bill on:

   - pollution prevention
   - public safety
   - scenic views
   - design controls
   - resource protection (e.g. salmon habitat on the Kenai River)?

5. How will municipal and state governments handle the fiscal impact of compensating property owners?

6. Where will these disputes be settled: in the regulatory agency or in the court?

   - If in the courts, will these cases get jammed up in an overburdened judicial system?

7. How will a government resolve secondary challenges from property owners who believe their property values are diminished by a government's decision not to enforce a regulation on a neighbor?

8. Are there significant number of regulatory appeals and lawsuits which point up the need for this legislation?

9. What is the financial burden to other states that have enacted similar laws?

10. What section of HB 154 speaks on "retroactivity"?

These are some of the questions that have brought some concern among subcommittee members and various state agencies.

AA/spp

cc: All C&RA Committee members
Representative Kohring
Dept. of Fish & Game
Dept. of Public Safety
Dept. of Law
Ak. Environmental Lobby

DIVISION OF LEGAL SERVICES
LEGISLATIVE AFFAIRS AGENCY
STATE OF ALASKA

(907) 465-3867 or 465-2450
FAX (907) 465-2029
Mail Stop 3101

130 Seward Street Suite 409
Juneau, Alaska 99801-2105

MEMORANDUM March 9, 1995

SUBJECT: Sectional Summary of CSHB 154 ( ) (Work Order No. 9-LS0602\K)

TO: Representative Vic Kohring
Attn: Craig Lyon

FROM: Theresa Bannister TB
Legislative Counsel

You have requested a sectional summary of the above-described bill.

As a preliminary matter, note that a sectional summary of a bill should not be considered an authoritative interpretation of the bill and the bill itself is the best statement of its contents.

Section 1 amends the section limiting how long a person has to begin a court action to recover real property. Conforms the section to new sec. 34.50.190 in sec. 3 of the bill.

Section 2 amends the section limiting how long a person has to begin a court action for certain torts and certain statutory liabilities. Conforms the section to new sec. 34.50.190.

Section 3 adds a new article on government takings.

Sec. 34.50.100 directs the Department of Law to prepare and submit certain guidelines to the lieutenant governor each year. The purpose of the guidelines is to assist state agencies, municipalities, and the public to identify and evaluate governmental action that may result in a taking of private property. The guidelines are to be published in the Alaska Administrative Code.

Sec. 34.50.110 directs governmental entities to follow the principles listed in the section when considering and taking governmental action affecting private property.

Sec. 34.50.120 prohibits a governmental entity from taking certain actions, e.g. adopting regulations relating to private property, unless the action has the least possible effect on private property and still accomplishes its public purpose and unless an analysis, as described in (b), of the action is made available to the public at least 30 days before the action.

Sec. 34.50.130 prohibits a governmental entity from taking governmental action that results in a taking of private property without paying full compensation to the owner. Establishes when the compensation is to be paid, when the compensation is measured, and what interest is to be paid.

Sec. 34.50.140 prohibits a governmental entity from deflating private property value by suggesting or threatening to take action to avoid having to pay the full compensation.

Sec. 34.50.150 prohibits a governmental entity from requiring a private property owner to waive the full compensation requirement in order to obtain approval for a use of the owner's property.

Sec. 34.50.160 requires that if a governmental entity that takes certain governmental action, e.g. adopting a regulation, that removes access to private property, the governmental entity must provide alternate access to the property or purchase the property.

Sec. 34.50.170 prohibits a governmental entity from requiring a private property owner to provide or pay for certain information used by the entity when it makes certain decisions affecting private property.

Sec. 34.50.180 requires the state to reimburse municipalities for the compensation they have to pay under sec. 34.50.130 for their takings, if the municipalities' actions are required by state law.

Sec. 34.50.190 prohibits a person from beginning a civil court action for a taking of private property by governmental action unless the action is begun within five years after the taking.

Sec. 34.50.200 requires a municipality to adjust the valuation of private property for property tax purposes if a determination has been made that there has been a taking of the property by governmental action. Requires the municipality to notify the owner of the new valuation. Requires the new valuation to be shown in the next tax notice. Requires the municipality to use an independent appraisal obtained by the owner to set the valuation, if the property owner contests the valuation and secures the independent appraisal.

Sec. 34.50.210 permits a property owner to enforce the provisions of the new article in court. Allows a prevailing owner to collect its awarded attorney fees and costs from the budget of the governmental entity involved in the violation of the article.

Sec. 34.50.220 prohibits a state agency from adopting regulations to implement the new article.

Sec. 34.50.250 defines terms for the new article.

Section 4 amends the main section governing the enactment of ordinances to include the statement required under sec. 34.50.120.

Section 5 amends the section relating to municipal adoption of published codes of regulations to require compliance with AS 34.50.120.

Section 6 amends the statute that generally requires municipal assessors to assess property at its full and true value. Requires the assessor to comply with new sec. 34.50.120.

Section 7 amends a section on the Alaska Administrative Code to provide that the code includes the guidelines developed by the Department of Law under new sec. 34.50.100.

Section 8 amends the section governing what is included in a notice of a proposed adoption, amendment, or repeal of a regulation to include, if applicable, the information required by sec. 34.50.120.

Section 9 provides a severability clause for the Act.

Section 10 directs the Department of Law to prepare the initial governmental takings' guidelines by January 1, 1996.

Section 11 makes the Act effective July 1, 1995.

If I may be of further assistance, please advise.

TLB:lmb:glc
95-144.lmb

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STATE OF ALASKA

(907) 465-3867 or 465-2450
FAX (907) 465-2029
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130 Seward Street, Suite 409
Juneau, Alaska 99801-2105

MEMORANDUM February 9, 1995

SUBJECT: Sectional Summary of HB 154 (Work Order No. 9-LS0602\C)

TO: Representative Vic Kohring
Attn: Craig

FROM: Theresa Bannister
Legislative Counsel

You have requested a sectional summary of the above-described bill.

As a preliminary matter, note that a sectional summary of a bill should not be considered an authoritative interpretation of the bill and the bill itself is the best statement of its contents.

Section 1 amends the section limiting how long a person has to begin a court action to recover real property. Conforms the section to new sec. 09.57.020 (proposed in sec. 3 of the bill).

Section 2 amends the section limiting how long a person has to begin a court action for certain torts and certain statutory liabilities. Conforms the section to new sec. 09.57.020 (proposed in sec. 3 of the bill).

Section 3 adds a new chapter on government takings.

Sec. 09.57.010 directs the Department of Law to prepare and submit certain guidelines to the lieutenant governor each year. The purpose of the guidelines is to assist state agencies, municipalities, and the public to identify and evaluate government action that may result in an unconstitutional taking of private real property. The guidelines are to be published in the Alaska Administrative Code.

Sec. 09.57.020 prohibits a person from beginning an civil court action for an unconstitutional taking of private real property by government action, unless the action is begun within five years.

Sec. 09.57.030 requires a municipality to take into consideration for property tax purposes a reduction in value of private real property, if a court determines that there has been an

unconstitutional taking of the property by government action and if the taking has reduced the property's value.

Sec. 09.57.090 defines certain terms for the new chapter.

Section 4 amends the statute that generally requires municipal assessors to assess property at its full and true value. Requires the assessor to comply with new sec. 09.57.030.

Section 5 amends a section on the Alaska Administrative Code to provide that the code includes the guidelines developed by the Department of Law under new sec. 09.57.010.

Section 6 gives the provisions in the bill an effective date of July 1, 1995.

TLB:glc:klb
95-129.glc

Alaska State Legislature

HOUSE OF REPRESENTATIVES

Representative Vic Kohring

Official Business

State Capitol
Juneau, AK 99801-1182

Sponsor Statement

HB 154, An Act relating to regulatory takings of private property

HB 154 would help provide relief for private citizens who have had their property "taken" through regulatory means. In many cases environmental regulations restricting the use of land have the same consequences for the property owner as a physical "taking" of the land under eminent domain, (such as for a highway) which requires compensation. I don't believe that a landowner should have to bear the costs of environmental benefits enjoyed by all citizens.

This legislation would require the Department of Law to provide guidelines to assist state agencies, municipalities, and the public to identify and evaluate government action that may result in an unconstitutional taking of private real property. If such a taking has occurred which results in a decrease in the value of the property, this legislation would require such a reduction be taken into consideration when assessing the value of the property for tax purposes.

I believe that passage of HB 154 will provide the public with protection from the government of any unconstitutional taking of their private property without at least some form of compensation. I respectfully request favorable consideration of this legislation by the committee.

jon isaacs and associates . 2418 forest park drive . anchorage, alaska . 99517 . (907)274-9719 . fax 276-6117

Facsimile Cover Sheet

FACSIMILE COVER PAGE

To:	ivan ivan	From:	
Time:	15:02:11	Date:	3/27/95
Pages (including cover):	4		

To: Honorable Representative Ivan
From: Jon Isaacs, APA

Enclosed is written testimony on HB 154 that suppots my oral testmony before your committee on March 25. Could you please distribute a copy to other committee members? Thank you for consideration of this matter.

TESTIMONY BEFORE HOUSE COMMUNITY AND REGIONAL AFFAIRS COMMITTEE
HOUSE BILL 154

Testimony of Jon Isaacs
Alaska Chapter, American Planning Association

Mr. Chairman, committee members, I appreciate the opportunity to testify today. My name is Jon Isaacs, and I represent the Alaska Chapter, of the American Planning Association. My office address is 308 G street, suite 313, Anchorage, Alaska 99517, and my phone number is 274-9719. The APA is an association of planners and resource managers working for local, state, and federal government, and private industry. Members work for communities across the state such as Valdez, Wasilla, Juneau, and the Kodiak Island and Mat-Su Boroughs. In the past, the association has worked to develop constructive solutions to problems facing Alaskan communities, including changing current federal wetlands permitting practices.

Position on HB 154

The APA supports the legislative intent that insupportable and excessive taking of property by state and local government should be avoided. In particular, developing guidelines for avoiding the taking of property meets a real need. However, the legislation as written is excessively broad and vague with regard to defining government action subject to consideration, and determination of adverse effect. As a result, implementation would be subject to diverse legal interpretation and subsequent challenge in courts at the cost of both the property owner, government, and residents as a whole, which seems to defeat the legislation's purpose. We recommend that language changes take place before passing the bill out of committee.

Background

The taking of property, whether it be through acquisition, restrictions on use, or effect value, is an issue being discussed nation-wide. Of particular concern are instances where the taking of property appears arbitrary or capricious, is not clearly tied to approved regulations or planning processes, or occurs through a process without adequate public review. Land use laws and regulations must balance the 5th amendment protection of property rights with the protection of the community as a whole from

injurious or harmful effects of development, which include more than just health and safety issues, such as the economic value of adjacent property or resources such as salmon that are held in common for the benefit of the state. Alaskan communities are more attuned to property rights and the need for flexible development than most places in the country.

Without a doubt, government must take more responsibility in minimizing takings and providing fair compensation to property owners. Several solutions or remedies to unjustified takings currently exist. Laws, regulations, and plans must be developed and adopted through a public approval process, and receive adequate public review. Communities have the freedom to adopt minimal land use controls if they so desire. The national chapter of APA has recently developed guidelines on developing laws, regulations, and plans in a manner that avoids unjustified takings.

Appeal mechanisms are available through local and state governments and through the courts. Recent national court cases have found in favor of property owners in several takings issues. Undeniably, this puts an economic burden on the property owner, but appears to be working.

Problems with HB 154

There are several serious problems with the way this bill is currently constructed:

- *excessively broad and vague definitions of government action subject to consideration, and determination of adverse effect* - using the example of salmon streams and timber buffers, the landowner could sue over imposition of any buffer, the fisherman could sue over loss of fish, or both could sue simultaneously if dissatisfied. The same could occur with a rezoning to a noxious use, where the applicant could sue over restriction of use, and adjacent property owners suing over loss of property value.

- *a five year statute of limitations to file a claim allows a government to be blind-sided with a future claim, without any requirement to go through available appeal procedures* - the financial uncertainty could result in government afraid to take any action to protect the health and welfare of its citizens

- *method of assessing loss in value* - several municipal assessors have expressed

concerns regarding provisions for assessing loss in value

Those likely to bear the biggest cost of the legislation as written will be 1) property owners who will end up in court more frequently, 2) municipalities who will be liable for a broad category of claims and may hesitate to act at all, and 3) citizens who will who will face greater uncertainty about how their community will develop and how their property will be affected.

Recommendations

The Alaska chapter of the American Planning Association recommends that language changes take place before passing the bill out of the Community and Regional Affairs committee. It may be more appropriate to emphasize developing guidelines to avoid or minimize takings of property, rather than broadly allowing property owners affected by any government action be allowed to seek compensation on any effect on property value for up to five years after the action occurs. The APA would be glad to work with the committee and bill sponsors that addresses the problem without creating vastly greater ones.

CSHB154 - "Regulatory taking of Private Property"
Example of Impact Sec. 34.50.250 (9) . . . Buffer Zones

Last year an ANCSA village corporation, Klawock Heenya Corporation, told the board of forestry that they had left an estimated $20 million worth of standing timber in the 66 foot riparian buffers required by AS 41.14.116 on Type A water bodies. Village corporations received 23,040 acres. Regional corporations like Sealaska received hundreds of thousands of acres. Forestry has received advice that the variation process (AS 41.17.087) in which any tree can be logged if doing so would not cause significant harm keeps the requirement to leave trees standing from being a taking. Our guess would be that if HB154 were enacted and signed into law the requirements would protect fish habitat and water quality would continue to be in law. For example, the 10 habitat components in AS 41.14.115 would still be the test for determining which trees can be removed from buffers. However, if the state had to pay for those trees the value of the trees would certainly run into hundreds of millions of dollars.

Alaska Environmental Lobby, Inc.
P.O. Box 22151 Juneau, Alaska 99802
Phone: 907-463-3366
Fax: 907-463-3312

OPPOSE HB 154 REGULATORY TAKINGS

HB 154, Regulatory Takings , is an **overreaching** and **dangerous** piece of legislation. HB154 ensures that government programs will be less efficient and more costly. Instead of fine-tuning government, it would add a new layer of bureaucracy, cost the state millions of dollars, and render virtually useless the regulations which ensure we all have safe air and water, a healthy fishing economy, uncontaminated food to eat and safe working conditions.

IT WILL COST MILLIONS OF DOLLARS

In states with similar legislation, millions of dollars have been spent on administrative costs alone. Our State agencies would have to hire legions of attorneys and then come up with the money to pay thousands of claims. Consider how costly this legislation would be.

IT IS DANGEROUS

HB 154 would negate health, safety and environmental regulations by making it too expensive for State agencies to enforce them. While there is certainly a legitimate concern with over- regulation, most regulations serve the basic purpose of ensuring the public health and safety.

IT DESTROYS LOCAL CONTROL

HB154 would undermine municipal and local laws covering everything from zoning restrictions, labor laws and seafood handling.

The litigation would be endless. If my neighbor wants to build a porn shop on his property and sues to win exemption from zoning regulations, then it follows that I will then sue the government for compensation because MY property value will be diminished. Where will the line be drawn?

IN AN EXAMPLE GIVEN BY THE SPONSOR, OF THE LITTLE GUY VS GOVERNMENT Steve Noey wanted compensation for not being allowed to build an improper sewage disposal system for his subdivisi[illegible] on Kachamak Bay. He sought exemption from the waste disposal permitting process because, in his assessment, the guidelines regulating safe sewage treatment interfered with his profit margin. In Noey vs. DEC, a Dept. of Law trial brief states:

"DEC's engineers will testify that it would be appropriate to reject (Noey's) proposal because waste water would be discharged to the surface of the land, which in turn could impact adjoining property and pose a hazard to public health"

If HB154 were enacted, Noey would be either allowed exemption from DEC permitting, or, he would have the right to sue and make all the rest of us pay for the money he says he lost by not being able to build his 15 unit subdivision. (DEC did inform Mr. Noey of other options - an appropriate disposal system or subdividing to 5 lots , thus being able to bypass the permit that was the problem.)

In a state with the highest Hepatitis A rate in the country and high rates of other infectious disease, do we really want to weaken regulations that monitor sewage??

ALASKA'S CONSTITUTION PROTECTS US

The state constitution explicitly protects private property rights. In Article 8, section 16. It states, "No person shall be involuntarily divested of his right to the use of waters, his interests in lands, or improvements effecting either, except for a superior beneficial use or public purpose and then only with just compensation and by operation of law."

3/25/95

UNITED FISHERMEN OF ALASKA

211 Fourth Street, Suite 112
Juneau, Alaska 99801
907/586-2820
Fax: 907/463-2545
3/25/95

TESTIMONY ON CSHB 154
BEFORE THE HOUSE COMMUNITY & REGIONAL AFFAIRS COMMITTEE

My name is Riki Ott. I am a resident of Cordova. I am testifying on behalf of United Fishermen of Alaska as Chair of the Habitat Committee.

UFA opposes HB 154. While this bill purports to "avoid imposing unanticipated or undue additional burdens on the public or on the public treasury" (p. 2), it will in fact do exactly the opposite. We simply cannot afford this bill–nor would we want it even if we could afford it for the following reasons.

- The bill provides a powerful incentive for land developers to propose the most highly damaging uses of property in order to receive payments in exchange for more responsible use. Why not? The government would fund the difference. For example, a landowner wants to build a high density subdivision on his property but DEC is only willing to permit for family units because of concerns about sewage disposal. Under this bill, DEC would have to compensate the landowner for the difference in profit even if both uses would be profitable. Clearly, this throws the constitutional standard of takings and replaces it with a subsidy to land speculators.

- This bill opens the state treasury to unlimited liability for state and local government actions. While this bill seems to be targeting environmental regulation and law as being over burdensome, there are many other laws that would also apply. For example, a landowner wants to build an "adult" business next to a school or church. Such "adult" businesses are not considered public nuisances under state law and could also be highly profitable. Further, civil rights laws deprive real estate developers of the higher price bigots would pay to live in subdivisions with racially restrictive covenants. Under this bill, the state would have to compensate the landowners in these two cases if it denied the landowner the right to build the proposed businesses.

This bill also limits the state's ability to deny permits or impose conditions on permits for restaurants, seafood processing plants or food sanitation businesses (like small smokeries) for unsafe handling practices because of (1) cost to the state under the "takings" law, and (2) the proposed standard that government action may only be taken in response to "real or substantial threats to public health and safety" (p. 3). This could result in unsafe food reaching the market and a subsequent backlash for the seafood or other food industries. In order to achieve preventative as well as sufficiently protective action, the government would have to pay the property owner!

Clearly, if the government were required to pay compensation in all such cases, either we would need to have few laws and allow property owners to do as they please despite the social, environmental and economic consequences or we could resign ourselves to allocating a large portion of our state budget to fill all the demands for "just compensation."

- This bill subverts the appropriations process. Without clearly appropriating funds to pay for newly authorized property rights claims and for increased agency staff, the bill allows unelected bureaucrats within resource and public health agencies to cancel or cut other state programs because there won't be time or funds for everything.

- The state government would be required to pay enterprises not to pollute. For example, the state's water quality standards limit the amount and types of pollutants that may be discharged into public waterbodies. Under the proposed bill, a mining company or oil industry could argue that if it had to cease polluting, it would become unprofitable and the state would have to pay the industry not to pollute.

- This bill is unbalanced as does not consider the **benefits** to landowners, other industries, and society from government takings. For example, property in Anchorage adjacent to and near the Coastal Trail increased in value and generated more tax revenue. "Greenways" such as this attract tourism and outdoor recreation to further benefit the economy.

- Finally, this bill amounts to a backdoor effort to undermine the state's environmental legislation. But the rights of property owners in the above examples are no different in principle from, for example, a timber company that is required to leave trees in a buffer to protect fish and wildlife habitat. They are all being deprived of some of the market value of their property in order to prevent harm to society.

The only reason to require compensation for the timber company, or the mining or oil company, but not for other property owners, would be a belief that the state laws protecting Alaska's water, land, air and natural resources are not legitimate or are, n the words of the sponsors, only "purportedly designed to protect public health and safety" (p. 3).

All Alaskans, not just those involved in the seafood industry, depend upon healthy, productive fisheries for diversifying and stabilizing the state's economy through harvest of a renewable resource. Healthy, productive fisheries are in turn dependent upon management of both public and private lands in ways that adhere to applicable laws such as the Clean Water Act and the Forest Practice Act.

If the supporters of this bill believe environmental laws are not legitimate, they should challenge the laws directly rather than bury the challenge in abstract notions of property rights that go beyond what the Fifth Amendment requires. This bill would not work if consistently applied to all forms of property, or even if it was only applied when laws affect the value of the land.

HB 154 protects only landowners at the expense of the public and other resource users--please do not let it pass.

MEMORANDUM
DEPARTMENT OF NATURAL RESOURCES

DIVISION OF [illegible]
Coastal Regional Office

TO: Patty Bielawski
Special Assistant

DATE: March 15, 1995

FILE NO.:

PHONE: 465-2491

FROM: Tom Boutin
State Forester

SUBJECT: CS For HB 154

The DOF opposes House Bill 154 as written for the following reasons:

Sec. 34.50.250 (a) defines taking in terms such that the provisions of the Alaska Forest Resources and Practices Act as revised in 1990 requiring private landowners to leave 66 foot buffers along certain defined waterbodies (AS 41.17.116) would now be considered a taking.

AS 41.17 as now written and enforced by this agency provides for a process of selective removal of many of the most valuable trees within these 66 foot buffers, however 90 percent or more of all trees within these buffer areas on hundreds of miles of protected waterbodies on private lands throughout the state remain standing. The harvest of these trees is now prevented by AS 41.17. The estimated value of these trees to the private landowners, who are primarily native village and regional corporations, would be in the hund eds of millions of dollars at todays prices.

This division was advised by the Department of Law, specifically Assistant Attorneys General Jim Wanamaker, Robert Nauheim and John Baker, that in order to prevent a successful challenge concerning "taking" the variation process, AS 41.17.087, which allows for the selective harvest within the buffer areas must be workable. The state has done this since 1991 through a rigorous but fair process.

Sec. 34.50.110 (4) provides that a governmental entity shall avoid undue delay in its processes. The Forest Practices Act does have built in time constraints causing the state to take timely action. This is however dependent upon adequate funding for forest practices enforcement.

ce of The Times

In California, a landowner loses again

By GIDEON KANNER

LOS ANGELES — Richard K. Ehrlich, a California developer, has just learned the hard way that his First Amendment rights and a victory in the U.S. Supreme Court can take a back seat to the whims of municipal bureaucrats. In doing so, he has confirmed the assessment of Richard Babcock, the late dean of the nation's land-use bar, who said: "In California, the courts have elevated government arrogance to an art form."

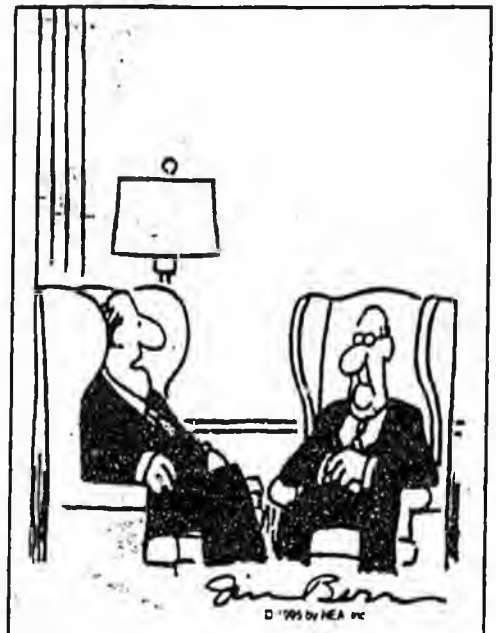
In 1988, Mr. Ehrlich sought to build 30 townhouses on the vacant site of a failed private tennis club in Culver City. The city denied his request on the grounds that since the defunct tennis club had once provided "recreational facilities," no other use would be permitted, even though the only recreation the lot then provided was watching weeds grow.

A lawsuit and a partial settlement followed, allowing Mr. Ehrlich to build, provided he paid a $280,000 "mitigation fee" for the loss of the recreational facilities. Additionally, he was to pay a $30,000 "in lieu park fee," plus a $33,220 "in lieu art fee" — the latter to pay for public art to be placed on Mr. Ehrlich's property, subject to the city's approval.

The "in lieu art fee" was based on the city's bizarre finding that as development of land and urbanization go on, "the opportunity for creation of cultural and artistic resources is diminished," and that alternative sources for cultural and artistic outlets should therefore be provided with developers' funds. All told, this came to $11,400 extra per proposed new townhouse, which goes a long way toward explaining why young people, confronted with the incompatibility of their entry-level salaries with prevailing housing costs, are turning up on their parents' doorsteps inquiring if their old bedrooms are still available.

Mr. Ehrlich exercised his right to litigate the validity of these exactions, and in 1990 Los Angeles County Superior Court Judge John Zebrowski struck down the mitigation fee. He reasoned that a landowner is free to go out of the private tennis club business, and the city may not demand payment as a condition of exercising one's freedom to do so.

In the ensuing appeal, California Court of Appeal Associate Justice Margaret Grignon disagreed. She delivered the astonishing ruling that the $280,000 mitigation fee was proper because it compensated the city "for the benefit conferred on the developer by the City's approval of the townhouse project and for the burden on the community resulting from the loss of recreational facilities."



"Mother tells me you've been sticking pins in an Alan Greenspan doll."

But the law does not permit exactions to be based on benefits to the landowner. That would be tantamount to a sale of municipal favors. In its 1987 decision, Nollan v. California Coastal Commission, the U.S. Supreme Court held that exactions must bear a reasonable relationship to the burden imposed on the community by the private development. Government demands beyond that, said the court, are an "out-and-out plan of extortion."

In other words, every landowner acts in pursuit of private benefit when seeking to build, but that hardly justifies extortion of money by the government as some sort of a quid pro quo for the "favor" of permitting lawful, productive use of the applicant's own land, or worse, for the "privilege" of discontinuing an unprofitable private business.

As for the city's demand that Mr. Ehrlich pay the "in lieu art fee," Justice Grignon opined that requiring a landowner to install municipally approved art on his land against his wishes or to pay the city an in lieu fee, was no different than a requirement to put in landscaping. So much for decades of First Amendment law that holds artistic expression to be constitutionally protected speech.

Last August, the U.S. Supreme Court summarily vacated the Ehrlich opinion and remanded the matter back to the California Court of Appeal for reconsideration.

Anywhere else the Supreme Court's order would have been the end of the story. But not in California. On remand last month, Justice Grignon reached the same result all over again. Her majority opinion defiantly reiterates that the city's demand on Mr. Ehrlich was not related to any public burden on the community flowing from his project, but, rather, was imposed to compensate the city for having "lost" the now defunct private tennis club which, of course, was never the city's in the first place.

Remarkably, the court ordered that its opinion not be published, which means that under California rules it cannot be cited in future cases. This is inconsistent with the importance of a case that has been reviewed on the merits by the U.S. Supreme Court.

The upshot of the Court of Appeal's decision in Ehrlich is that once California landowners devote property to a particular private use, they become subject to municipal conscription as involuntary operators for the indefinite future, even after that use ceases to be beneficial. To get back their freedom to make new, economically rational uses of their land, they may be required to pay ransom to the city in the form of exactions or in lieu fees.

The remarkable thing is that Judge Grignon's Ehrlich opinion produced no outcry in California. These days such draconian treatment of productive citizens is par for the course in that state, where the whim of municipal bureaucrats is the supreme law of the land, readily enforceable by compliant state courts. No wonder that businesses are continuing their exodus from California, that the cost of local housing remains one of the highest in the nation, and that the once proud Golden State has been reduced to running booster ads in newspapers, carrying on a childish quarrel with Texas, which is attracting more and more disgusted California entrepreneurs.

It remains to be seen whether the U.S. Supreme Court will tolerate this unabashed nullification of its decision. Stay tuned.

Gideon Kanner is professor of law emeritus at Loyola Law School in Los Angeles.

STATE OF WASHINGTON ATTORNEY GENERAL'S RECOMMENDED PROCESS AND ADVISORY MEMORANDUM FOR EVALUATION OF PROPOSED REGULATORY OR ADMINISTRATIVE ACTIONS TO AVOID UNCONSTITUTIONAL TAKINGS OF PRIVATE PROPERTY

MARCH 1995

The Office of the Attorney General is required under the Growth Management Act to advise state agencies and local governments on an orderly, consistent process that better enables government to evaluate proposed regulatory or administrative actions to assure that such actions do not result in unconstitutional takings of private property. RCW 36.70A.370.

This process must be used by state agencies and local governments that are required to or choose to plan under RCW 36.70A.040. A private party, however, does not have a cause of action against an agency for failure to utilize the recommended process. The Act also provides that "[t]he process used by government agencies shall be protected by attorney client privilege". *See* RCW 36.70A.370(4).

The Attorney General's recommended process and advisory memorandum was initially published and circulated in February 1992, with a subsequent edition in April 1993. This memorandum has been updated to reflect recent court decisions.

Attorney General's Recommended Process

1. The Attorney General's Office prepares and distributes an advisory memorandum to all government agencies which exercise regulatory authority impacting private property rights. This advisory memorandum includes discussions of the most recent Supreme Court decisions, along with examples of specific types of situations which raise constitutional questions.

2. Local governments and state agencies should review the advisory memorandum with their legal counsel and distribute it to all decision makers and key staff. Government sensitivity regarding private property rights can be further increased if agency decision makers at all levels of government have consistent, authoritative guidance on the applicable constitutional limitations. This is particularly important for potential property uses which may be subject to the regulatory jurisdiction of multiple agencies.

3. Local governments and state agencies should use the warning signals in the advisory memorandum as a checklist to determine whether a proposed regulatory action may violate a constitutional requirement. The warning signals are phrased as questions. If there are affirmative answers to any of these questions, the proposed regulatory action should be reviewed in detail by staff and approved by counsel.

4. State agency and local government actions implementing the Growth Management Act programs, such as planning under the Growth Management Act, should be assessed by both staff and legal counsel. Examples of these actions include the adoption of development regulations and designations for natural resource lands and critical areas, and the establishment of policies or guidelines for conditions, exactions, or impact fees incident to permit approval. This assessment should also be used for the issuance or denial of permits for land use development.

5. The assessment should be incorporated into the agency's review process. Since the extent of the assessment necessarily depends on the type of regulatory action and the specific impacts on private property, the agency should have some discretion to determine the extent and the form of the assessment. For some types of actions, the assessment might focus on a specific piece of property. For others, it may be useful to consider the potential impacts on types of property or geographic areas. It is strongly suggested, however, that any government regulatory actions which involve warning signals be carefully and thoroughly reviewed by legal counsel. As mentioned above, the Legislature has specifically indicated that the process used shall be protected by attorney client privilege. The agencies, therefore, have the discretion to determine the extent of distribution and publication of reports developed as part of the recommended process.

STATE OF WASHINGTON ATTORNEY GENERAL'S ADVISORY MEMORANDUM FOR EVALUATION OF PROPOSED REGULATORY OR ADMINISTRATIVE ACTIONS TO AVOID UNCONSTITUTIONAL TAKINGS OF PRIVATE PROPERTY

The purpose of this advisory memorandum is to provide a tool to assist state agencies and local governments in evaluating whether proposed administrative or regulatory actions may violate constitutional limitations. Government agencies, exercising regulatory authority which impacts the use of property, must be sensitive to the constitutional limits on their authority, and thereby respect private property rights. The failure to recognize these constitutional limits erodes public confidence in government. It may also subject the government agency to liability for costs and damages associated with the invalidation of the government regulatory action, or the imposition of an obligation to pay compensation for the taking of the property.

The memorandum outlines some general legal principles derived from cases which have interpreted the constitutional provisions in specific fact situations. Most of the cases involving regulatory takings issues have discussed the takings clause of the United States Constitution. Some opinions also refer to a substantive due process right under the Constitution. Both constitutional provisions are discussed. The memorandum also includes a list of warning signals, i.e., situations which may involve constitutional issues and should be further assessed by staff and legal counsel. Some important cases are described briefly in Appendix A.

This memorandum is intended as an internal management tool for agency decisionmakers. It is not a formal Attorney General's Opinion under RCW 43.10.030(7), and should not be construed as an opinion by the Attorney General on whether a specific action constitutes a taking or a violation of substantive due process. Legal counsel should be consulted for advice as to any particular action which may involve a constitutional taking or due process violation.

I. GENERAL PRINCIPLES

Government has the authority and responsibility to protect the public health, safety, and welfare. This is an inherent attribute of sovereignty. Pursuant to this authority, the government may properly regulate or limit the use of property.

Accordingly, government may abate public nuisances, terminate illegal activity, and establish building codes, safety standards, or sanitary requirements. The government may limit the use of property through land use planning, zoning ordinances, setback requirements, and environmental regulations.

The government may also establish conditions or requirements for potential uses of property which may have adverse impacts. Conditions may include the granting of easements or donation of property for public use.

Courts have recognized, however, that if government regulation goes "too far", it may constitute a taking of property. The next section of the memorandum outlines the general principles courts use to determine whether a given government regulation effects a "taking" under the Constitution.

A. Takings Clause

The Fifth Amendment to the United States Constitution provides that private property shall not be taken for public use without just compensation. Article 1, section 16 of the Washington State Constitution provides that "[n]o private property shall be taken or damaged . . . without just compensation". The government may not, therefore, take property except for public purposes within its constitutional authority and only upon payment of just compensation.

When the government seeks to use private property for a public building, a highway, or some other public purpose, it must compensate the property owner. Government historically acquires property and compensates landowners through a condemnation proceeding.

The government may also become liable for the payment of just compensation to private property owners whose land has been either physically occupied or invaded by the government on a permanent basis. This is generally referred to as an inverse condemnation.

Most comprehensive land use regulation does not, in itself, constitute a taking of property. Zoning and other comprehensive regulations are a legitimate exercise of the government's police power. The regulation, however, must advance a legitimate public interest and not deprive the owner of all economic or beneficial use of the property. Also, a regulation which destroys a fundamental property right, such as the right to possess, exclude others from, or dispose of property, could, on its face, constitute a taking.

A regulation which prohibits all economically viable or beneficial uses of property is not a taking if the government can demonstrate that the proposed uses are prohibited by laws of nuisance or other preexisting limitations on use of property. Limitations on the use of tidelands under the public trust doctrine would be an example of a preexisting limitation on use of property which might insulate government from takings liability.

When government may deny a land use, it may condition a permit to engage in that use. For example, the government may condition a development permit on measures to mitigate adverse impacts of the development. However, a permit condition which imposes substantial costs or limitations on property use could be a taking. In assessing whether a regulation or permit condition constitutes a taking in a particular circumstance, the courts will consider the public purpose of the regulatory action along with the extent of reduction in use of and economic impact on the property. The burden on the property owner must be roughly proportional to the adverse public impact sought to be mitigated.

One factor in assessing the economic impact of a permit condition is the extent of interference with a property owner's reasonable investment-backed development expectations. For instance, in determining whether a taking has occurred, a court would, among other things, weigh the extent of a condition's impact on vested development rights against the government's interest in promulgating the regulation.

B. Substantive Due Process

The Fourteenth Amendment to the United States Constitution has been interpreted by courts to include a right of substantive due process which protects an individual's property from arbitrary regulation. There is also a due process clause in article 1, section 3 of the Washington State Constitution. Recent Washington Supreme Court decisions state that, in addition to the takings clause, the substantive due process limitation protects landowners from unduly oppressive regulation. The court described a balancing test similar to the takings analysis involving the nature of the government interest and the extent of the impact on private property rights.

C. Remedies

The violation of constitutional limits on the scope of regulatory authority may have financial consequences to government agencies. The specific remedy depends on the nature of the government action and the impact on the property owner.

The government must pay just compensation to the property owner if property has been taken and used for a public purpose. In determining just compensation, the court will consider the impact on the value of the property.

If a court determines there has been a regulatory taking, the government has the option of either paying just compensation or withdrawing the regulatory limitation. Even if the regulation is withdrawn, the government might be obligated to compensate the property owner for the temporary taking of the property before the regulation was withdrawn.

The remedy for a violation of the substantive due process requirement is the invalidation of the regulation. The government agency should be aware that if the regulation is invalidated under this constitutional provision and the landowner proves that the agency's actions were irrational or invidious, damages and reasonable attorney's fees may be recovered under the Federal Civil Rights Act.

Government agencies should also be aware that, under state law, a property owner who has filed an application for a permit has a cause of action for damages to obtain relief from agency actions which were arbitrary, capricious, or made with the knowledge that the actions were in excess of lawful authority. *See* RCW 64.40. This state law also provides relief for failure to act within the time limits established by law.

A person challenging an action or ordinance generally must exhaust available administrative remedies before seeking court review and has the burden of proving that the action or ordinance violates the constitutional provision.

II. WARNING SIGNALS

The following warning signals are examples of situations which may raise constitutional issues. The warning signals are phrased as questions which agency staff can review regarding the potential impact of a regulatory action on specific property.

Agencies should use these warning signals as a checklist to determine whether a regulatory action may raise constitutional questions and require further review.

The fact that a warning signal may be present does not automatically mean that there has been a taking. It means only that there could be a constitutional issue and that agency staff should carefully review the proposed action with legal counsel. If property is subject to regulatory jurisdiction of multiple government agencies, each agency should be sensitive to the cumulative impacts of the various regulatory restrictions.

1. Does the Regulation or Action Result in a Permanent Physical Occupation of Private Property?

   Regulation or action resulting in a permanent physical occupation of all or a portion of private property will generally constitute a taking. For example, a regulation which 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. 419 (1982).

2. Does the Regulation or Action Require a Property Owner to Dedicate a Portion of Property or to Grant an Easement?

   Regulations requiring the dedication of property or granting an easement should be carefully reviewed. The dedication of property must be reasonable and proportional, specifically designed to prevent or compensate for adverse impacts of the proposed development. A court will also review whether the action in question substantially advances a legitimate state interest.

   For example, the United States Supreme Court determined in Nollan v. California Coastal Comm'n, 483 U.S. 825 (1987), that compelling an owner of waterfront property to grant a public easement which does not substantially advance the public's interest in beach access constitutes a taking. Similarly, the Washington Court of Appeals determined in Unlimited v. Kitsap Cy., 50 Wn. App. 723, 750 P.2d 651, review denied, 111 Wn.2d 1008 (1988), that compelling the landowner to dedicate strips of property to allow commercial access to a public road from private property and to extend the road, constituted a taking. The Court held that the requirement of commercial access served no public purpose and that the acquisition of the land for an extension for which the County had no immediate plans to build was not necessitated by Unlimited's development. *See* The Luxembourg Group, Inc. v. Snohomish Cy., 76 Wn. App. 502 (1995) (cannot require developer to grant easement for land-locked property).

   On the other hand, state statutes require local governments to assure that adequate provisions have been made for the public health, safety and welfare before approving subdivisions. Miller v. Port Angeles, 38 Wn. App. 904, 909, 691 P.2d 229 (1984). The Court in Miller approved of the exaction of land to widen roads necessary to handle traffic generated by the proposed development.

3. Does the Regulation or Action Deprive the Owner of All Economically Viable Uses of the Property?

If a regulation or action prohibits all economically viable or beneficial uses of the land, it will likely constitute a taking. In this situation, the agency can avoid liability for just compensation only if it can demonstrate that the proposed uses are prohibited by the laws of nuisance or other preexisting limitations on the use of the property. *See* Lucas v. South Carolina Coastal Coun., 505 U.S. ___, 120 L. Ed. 2d 798, 112 S. Ct. 2886 (1992).

Unlike the impact of a physical invasion or other limitation on the right to exclude others, it is important here to analyze the regulation's impact on the property as a whole, and not just on a portion of the property. It is also important to assess whether there is any profitable use of the remaining property available. *See* for instance Florida Rock Industries, Inc. v. United States, 791 F.2d 893 (Fed. Cir. 1986). 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 factor in this assessment is the extent of interference with a property owner's reasonable investment-backed development expectations.

Regulations or actions requiring that all of a particular parcel of land be left substantially in its natural state should be carefully reviewed. A prohibition of all economically viable uses of the property could be vulnerable to a takings challenge. In some situations, however, there may be preexisting limitations on the use of property which could insulate the government from takings liability. Limitations on the use of tidelands under the public trust doctrine probably constitute a preexisting limitation on use of property such as to insulate government from takings liability. *See* Orion Corp. v. Washington, 109 Wn.2d 621, 747 P.2d 1062 (1987), cert. denied, 486 U.S. 1022 (1988).

4. Does the Regulatory Action Have a Severe Impact on the Landowner's Economic Interest?

A regulatory action, such as conditioning or denying a permit, which has a significant impact on the owner's economic interest, should be carefully reviewed. Courts will often compare the value of property before and after the impact of the challenged regulatory action. Although a reduction in property value alone may not be a taking, a severe reduction in property value often indicates a reduction or elimination of reasonably profitable uses. Another economic factor which courts will consider is the extent to which the challenged action impacts any development rights of the owner. As with warning signal 3, these economic factors are normally applied to the property as a whole.

5. Does the Regulation or Action Deny a Fundamental Attribute of Ownership?

Regulations or actions which deny the landowner a fundamental right 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 has held that requiring public access along a stream bank as a condition to obtaining a development permit is a taking. Dolan v. Tigard, 512 U.S. ___, 129 L. Ed. 2d 304, 114 S. Ct. 2309 (1994). The Washington Supreme Court has considered regulations which precluded houseboat moorage owners from terminating leases to regain possession as a taking. *See* Granat v. Keasler, 99 Wn.2d 564, 663 P.2d 830 (1983).

III. APPENDIX

Appendix A is a list some of the principal cases dealing with regulatory takings issues and a summary of the result in each case. These cases provide examples of how courts have resolved specific questions and may be helpful for assessing how courts might resolve analogous situations. There are, of course, a number of other cases which have discussed or resolved regulatory takings issues and some excellent law review articles on the subject.

Appendix A includes a brief summary of the recent United States Supreme Court decision in Dolan v. Tigard, 512 U.S. ___, 129 L. Ed. 2d 304, 114 S. Ct. 2309 (1994). This opinion should be carefully read in light of other United States Supreme Court opinions on the subject: Lucas v. South Carolina Coastal Coun., 505 U.S. ___, 120 L. Ed. 2d 798, 112 S. Ct. 2886 (1992), and Nollan v. California Coastal Comm'n, 483 U.S. 825, 97 L. Ed. 2d 677, 107 S. Ct. 3141 (1987). Also summarized are several State Supreme Court decisions issued since the last edition of this memorandum.

APPENDIX A

1. SUMMARIES OF RECENT SIGNIFICANT "TAKINGS" CASES

Dolan v. Tigard, 512 U.S. ___, 129 L. Ed. 2d 304, 114 S. Ct. 2309 (1994)

The owner of an electrical and plumbing supply business applied to the city for a permit to expand the facility, located on a parcel adjacent to a stream. The city approved the permit with several conditions. First, the owners were to be prohibited from developing within the 100 year floodplain of the stream. Also, the owners would have to grant an easement for public access along the floodplain. The city also required provision for a bike path across the parcel to connect to the city's path system.

The Supreme Court first was careful to distinguish between quasi-legislative comprehensive land use regulation and the more restrictive requirements for imposing permit conditions in an adjudicative context, as in this case. The Court then proceeded to consider whether the permit conditions were reasonably related to a legitimate public purpose, the essential nexus test. The ban on development in the floodplain was found to be reasonably related to mitigating surface water runoff from the project. The Court, however, found no legitimate purpose in the required public easement across the floodplain, a requirement which deprived the owners of the fundamental right to exclude others.

The Court also found that the bike path could be a reasonable requirement to mitigate the impact of increased traffic due to the expansion of the business. However, the Court was troubled by the lack of evidence on the magnitude of any traffic impact. The Court decided that in addition to meeting the reasonable relationship test, the city must show the permit requirement to be roughly proportional to the expected impact. The case was remanded to make that determination.

Guimont v. Clarke, 121 Wn.2d 586, 854 P.2d 1 (1993)

In 1989 the Legislature adopted the Mobile Home Relocation Assistance Act. In essence, the Act required owners of mobile home parks to establish a fund to financially assist tenants in moving their homes should the owner decide to close the park or change the property to another use. The Act was challenged by park owners on regulatory takings and due process grounds. In its first takings case since the United States Supreme Court's decision in Lucas, the State Supreme Court reviewed its Presbytery analysis and found the fundamental legal tests to still be appropriate. The Court concluded that the first step in analyzing a facial takings claim, as here, was to determine whether the statute deprived the owner of all economic value or caused a physical invasion. The Court found neither to be the case here. Owners could still evict tenants and change the use of the property.

The Court did, however, find the Act to violate the due process clause. The potential financial impact of the relocation reimbursement requirements of the Act, the Court reasoned, would be unduly oppressive on park owners. While the Act legitimately addressed the problem of declining space for mobile homes, the park owners, the Court reasoned, were not more responsible for the problem than the general public.

Margola Assoc. v. Seattle, 121 Wn.2d 625, 854 P.2d 23 (1993)

Apartment house owners challenged a city ordinance which required owners of buildings with more than one housing unit to register with the city and pay an annual inspection fee. Owners who did not register could not evict a tenant. The Court found that the ordinance did not constitute a regulatory taking. The city had a legitimate interest in ensuring compliance with its housing code. No taking had occurred because the ordinance neither deprived the owners of all economic value nor amounted to a physical invasion. The Court observed that the restriction on eviction was not, in effect, a physical

invasion, because the owners voluntarily rented the units. The Court also found that the owners had not been deprived of due process. The small annual fee, one-half of one percent of the average rent, was not, in the Court's view, an undue burden on the owners.

Buechel v. Department of Ecology, 125 Wn.2d 196, 884 P.2d 910 (1994)

The owner of a small waterfront lot on Hood Canal sought a variance from the Shorelines Management Act (SMA) to construct a residence on the undersized lot. The county granted the variance, but the Department of Ecology denied it. While the State Supreme Court asked for briefing on regulatory takings issues, the case was decided only on whether the variance was properly denied. The Court upheld the denial.

While this case was not decided on takings grounds, two aspects of the decision indicate how the Court might react to a ripe takings claim. The Court held that the owner could not assert that the SMA diminished the value of his property because he had acquired it after adoption of the SMA and any adverse impact was presumably reflected in the purchase price. The Court also found that denial of the variance did not result in no remaining economic value to the property because it still could be used for recreational purposes similar to other small lots along Hood Canal.

Sparks v. Douglas Cy., 72 Wn. App. 55, 863 P 2d 142 (1993), *review granted*, 124 Wn.2d 1017 (1994)

A property owner applied to short plat his property. The county granted the application on the condition that a portion of the property be dedicated to widening adjacent roads. The owner appealed. The Court of Appeals held that an owner may be required to dedicate a portion of his property to prevent or compensate for the adverse impact of the proposed development if done in a specific and proportional fashion. In this case, the Court found that a takings had occurred because the required dedication was in excess of the minimal traffic impact, and the county had no immediate plans to widen the roads.

The State Supreme Court has accepted review of this case. It is anticipated that the Supreme Court will analyze the case under the "rough proportionality" test recently adopted by the United States Supreme Court in Dolan v. Tigard.

The Luxembourg Group, Inc. v. Snohomish Cy., 76 Wn. App. 502 (1995)

A developer applied to subdivide a large parcel into residential lots. As a condition to approval, the county required the developer to grant an easement to a land-locked property owner. The Court found that the required nexus between any adverse impact of the development and easement requirement did not exist. The Court reasoned that the interior parcel would be land-locked regardless of whether the developer's property was subdivided or not.

2. SUBSTANTIVE DUE PROCESS ANALYSIS

Our State Supreme Court's approach to due process in a land use regulation context was first developed in Presbytery of Seattle v. King Cy., 114 Wn.2d 320, 787 P.2d 907, *cert. denied*, 111 S. Ct. 284 (1990), and refined in Guimont and Margola. These decisions emphasize that even if a regulation does not amount to a taking, it is subject to substantive due process requirements. In assessing whether a regulation has exceeded constitutional limitations, the Court considers three questions. First, is the regulation aimed at achieving a legitimate public purpose? There must be a public problem or "evil" for there to be a legitimate public purpose. Second, is the method used in the regulation reasonably

necessary to achieve the public purpose? The regulation must tend to solve the public problem. Third, is the regulation unduly oppressive on the landowner? If so, there may be a due process violation. The "unduly oppressive" inquiry involves balancing the public's interests against those of the regulated landowner.

Factors to be considered in analyzing whether a regulation is unduly oppressive include:

1. The nature of the harm sought to be avoided;

2. The availability and effectiveness of less drastic protective measures; and

3. The economic loss suffered by the property owner.

In assessing these three factors, the Court directed trial courts to the following considerations:

a. On the public's side—the seriousness of the public problem, the extent to which the owner's land contributes to it, the degree to which the proposed regulation solves it, and the feasibility of less oppressive solutions.

b. On the owner's side—the amount and percentage of value loss, the extent of remaining uses, the temporary or permanent nature of the regulation, the extent to which the owner should have anticipated such regulation, and how feasible it is for the owner to alter present or currently planned uses.

The Court has not established a specific mathematical test to determine whether there was a violation of substantive due process requirements. The remedy for a violation of substantive due process is invalidation of the regulation.

It should be noted that some other decisions have not utilized the "unduly oppressive" standard in evaluating substantive due process issues. Government agencies should review this issue with their legal counsel.

3. SUMMARIES OF OTHER SIGNIFICANT "TAKINGS" CASES (Arranged Alphabetically)

Buttnick v. Seattle, 105 Wn.2d 857, 719 P.2d 93 (1986)

A Seattle historic preservation ordinance required a building owner conducting repairs to replace a "parapet" in a manner approximating the original design. The building owner claimed that the property was unconstitutionally taken. The State Supreme Court ruled that the estimated cost of replacing the parapet would not be an undue hardship on the building owner, considering the market value and income producing potential of the building. The constitutional challenge to the historic preservation ordinance was, therefore, rejected.

Department of Natural Resources v. Thurston Cy., 92 Wn.2d 656, 601 P.2d 494 (1979).

Lake Lawrence, Inc., a lessee from the State, sought plat approval from Thurston County for a proposed residential development. The County denied preliminary plat approval on the basis that the proposed development would interfere with eagle perching and feeding areas. In response to a claim that

this was an unconstitutional taking of private property, the State Supreme Court held that it was not, primarily because the County had indicated that it would approve a less intensive development. (The County Commission had found no adverse impact from the development of 11 of the 22 lots proposed by the developer.) There was a strong public interest in protecting the eagles, and there had been no showing that all reasonably profitable uses of the property were foreclosed.

Florida Rock Indus., Inc. v. United States, 791 F.2d 893 (Fed. Cir. 1986), *opinion on remand*, 21 Cl. Ct. 153 (1990)

A mining company in 1972 purchased 1,560 acres of wetlands (formerly part of the Everglades, but now excluded by road, canal and levee) for the purpose of mining limestone. In 1980, the company applied to the U.S. Army Corps of Engineers for a "section 404" permit for the dredging and filling involved in the mining operation. The application covered only 98 acres, and the Court limited the case to that acreage. The Corps of Engineers denied the application, primarily for the purpose of protecting the wetlands. The courts indicated that actions under the Clean Water Act are not insulated from takings challenges. In this case, the denial of a permit by the Corps of Engineers reduced the property value by 95 percent, and eliminated all reasonably profitable uses, except perhaps holding the property for speculation (which was not deemed a reasonable use, given that nothing could be done with the property). Under these circumstances, the courts held that the United States had unconstitutionally taken the mining company's property, and required that the government compensate the company.

Granat v. Keasler, 99 Wn.2d 564, 663 P.2d 830 (1983)

A Seattle houseboat ordinance provided that the only reason that a houseboat moorage owner could evict a paying tenant would be for the purpose of using the moorage site for the owner's own non-commercial residence. When an owner appealed, the State Supreme Court, after reviewing its prior opinions on the subject, ruled that the Seattle ordinance was an unconstitutional taking of private property without just compensation. The Court's reasoning followed the reasoning of its earlier decision in Kennedy v. Seattle, 94 Wn.2d 376, 617 P.2d 713 (1980), where a similar ordinance was invalidated because it basically turned over perpetual occupancy rights of a person's property to another.

Hodel v. Irving, 481 U.S. 704 (1987)

Portions of Sioux Indian reservation land which had been "allotted" to individual tribal members had become fractionated, sometimes into very small parcels. Good land often lay fallow, amidst great poverty, because of the difficulties in managing property held in this manner. In 1983, Congress passed legislation which provided that any undivided fractional interest which represented less than 2 percent of the tract's acreage and which earned less than $100 in the preceding year would revert to the tribe. No compensation was to be provided tribal members whose property was lost under the statute. The statute was challenged by tribal members. The United States Supreme Court noted that under the balancing test traditionally applied to "takings" challenges, it might very well have held the statute constitutional. In this case, however, the character of the government regulation was "extraordinary" in that it destroyed "one of the most essential" rights of ownership—the right to devise property, especially to one's family. The Court held that such a step was an unconstitutional taking, regardless of the public interest which might favor the legislation.

Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982)

A New York State statute required landlords to allow the installation of cable television on their property. The owner of an apartment building in New York City challenged the statute, claiming an

unconstitutional taking of private property. The installation in question required only a small amount of space to attach equipment and wires on the roof and outside walls of the building. The United States Supreme Court ruled that the statute was unconstitutional, concluding that "a permanent physical occupation authorized by government is a taking without regard to the public interests that it may serve." The Court reasoned that an owner suffers a special kind of injury when a "stranger" invades and occupies the owner's property, and that such an occupation is "qualitatively more severe" than a regulation on the use of property.

Lucas v. South Carolina Coastal Coun., 505 U.S. ___, 120 L. Ed. 2d 798, 112 S. Ct. 2886 (1992)

Mr. Lucas bought two South Carolina beachfront lots intending to develop them. Before he initiated any development of the lots, the South Carolina Legislature enacted the Beachfront Management Act, which prevented development of the lots. The parties stipulated that the parcels had no remaining value. The United States Supreme Court held that a regulation which "denies all economically beneficial or productive use of land" is an unconstitutional taking unless the government can show that the proposed uses of the property are prohibited by nuisance laws or other preexisting limitations on the use of property. The Court noted that such total takings will be "relatively rare" and the usual balancing approach for determining takings will apply in the majority of cases.

Maple Leaf Investors, Inc. v. Department of Ecology, 88 Wn.2d 726, 565 P.2d 1162 (1977)

Maple Leaf Investors owned property along the Cedar River in an area subject to flood control regulations. These regulations prohibited construction for human habitation within the floodway channel; 70 percent of appellant's property lay within the floodway channel. On a challenge to the constitutionality of the flood control regulations, the Washington State Supreme Court examined the balance between the public interest in the regulations and the private interest in using the property without restriction. The Court found that the primary purpose of the regulations was not to put the property to public use, but to protect the public health and safety. The Court noted that the regulations prevented harm to persons who might otherwise live in the floodway, and also that structures built there might break loose and endanger life and property downstream. Further, since 30 percent of the property was still usable, there was no indication that the regulations prevented profitable use of the property. Finally, the Court noted that it was not the State which placed appellant's property in the path of floods. The Court upheld the constitutionality of the regulations.

Nollan v. California Coastal Comm'n, 483 U.S. 825 (1987)

The Nollans sought a permit to replace a bungalow with a larger house on their California oceanfront property. The property lay between two public beaches. The Nollans were granted a permit, subject to the condition that they allow the public an easement to pass along their beach. On appeal, the United States Supreme Court found this requirement to be a taking.

The Court reasoned that but for the permit requirement it clearly would have been an unconstitutional taking to have simply ordered the Nollans to give the public an easement. The question remained whether this was proper in the context of the Nollans' permit application.

A permit condition may be imposed, the Court noted, but it is only valid if it substantially advances legitimate state interests. The Court observed that if the Nollan's house would have blocked the public's view of the ocean from the street, a view easement would perhaps have been appropriate. But 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, therefore, no reasonable relationship, or "nexus", between

any public interest which might be harmed by the construction of the house, and the permit condition. Lacking this connection, the required easement was an unconstitutional taking.

Penn Central Transp. Co. v. New York City, 438 U.S. 104 (1978)

Grand Central Station was declared a "landmark" under the City of New York's historic preservation ordinance. Penn Central, the owner, proposed to "preserve" the original station while building a 55-story building over it. The city denied the construction permit. In response to Penn Central's takings claim, the United States Supreme Court noted that there was a valid public purpose to the city ordinance and that, so far as the Court could ascertain, Penn Central could still make a reasonable return on its investment by retaining the Station as it was. Penn Central argued that the landmark ordinance would deny it the value of its "pre existing air rights" to build above the terminal. The Court noted that it must consider the impact of the ordinance upon the property as a whole, not just upon "air rights". Further, under the ordinance in question, these rights were transferable to other lots, so they might not be lost. The Court upheld the constitutionality of the ordinance.

Presbytery of Seattle v. King Cy., 114 Wn.2d 320, 787 P.2d 907, *cert. denied*, 111 S. Ct. 284 (1990)

The State Supreme Court found that both the takings and due process clauses were implicated. The Court attempted to distinguish the two theories, and thereby provide an analytical framework for resolution of specific issues.

The Court first would consider whether a regulation safeguards the public interest in health, safety, the environment, or fiscal integrity of an area. If so, the regulation would not normally be a taking. The constitutional validity of such a regulation would then be analyzed by considering whether it violates substantive due process. The remedy for a violation of due process is normally invalidation of the ordinance.

On the other hand, if the regulation went beyond safeguarding those public interests and enhanced a publicly owned right in the property, or if it destroyed a fundamental attribute of ownership (the right to possess, to exclude others, and to dispose of property), then the regulation would be subject to analysis under the "takings" clause.

A taking analysis in a particular situation would first involve an assessment of whether the regulation substantially advances a legitimate state interest. If it did not, then there would be a taking. If the Court determined that the regulation substantially advanced a legitimate state interest, then it would be necessary to assess the extent of the economic impact on the property subject to the regulation. If the Court, after weighing and balancing the interests, found that there had been a taking, just compensation would be required.

Robinson v. Seattle, 119 Wn.2d 34, 830 P.2d 318 (1992)
Sintra, Inc. v. Seattle, 119 Wn.2d 1, 829 P.2d 765 (1992)

These related cases involved claims for damages arising from the City of Seattle's application of a provision in its housing preservation ordinance (HPO) to the development of plaintiffs' property. Each plaintiff wanted to develop and change the use of hotels which previously had been used for low-income housing. Seattle imposed a housing preservation assessment under the ordinance as a condition of development. While each application was pending, the King County Superior Court invalidated this provision of the ordinance on the basis that it was an unconstitutional tax. The State Supreme Court affirmed this decision.

Each plaintiff instituted a lawsuit seeking damages for the imposition of the HPO requirement on their proposed development. The lawsuits alleged both a violation of substantive due process and an unconstitutional taking. Plaintiffs sought both damages and an award of attorney's fees.

The superior court dismissed the claim for damages, but the State Supreme Court reversed. The Supreme Court ruled that even though the housing preservation ordinance served a legitimate public purpose, it violated substantive due process because it was unduly oppressive. The undue oppression arose from the fact that the HPO's burden of providing low-income housing fell entirely on regulated landowners. In order to recover damages for this violation, it would be necessary to prove that the City acted invidiously or irrationally in imposing the HPO condition on the plaintiffs. The cases were remanded for a determination of whether plaintiffs could make the required showing.

In Sintra, the case was also remanded for a determination of whether there had been a compensable taking of property. The Court felt that since the ordinance enhanced public interests under Presbytery, it was subject to a takings analysis. The Court felt that the plaintiff should have the opportunity to demonstrate whether there were any economically viable uses of the property even with the imposition of the HPO requirement.

Unlimited v. Kitsap Cy., 50 Wn. App. 723, 750 P.2d 651, *review denied*, 111 Wn.2d 1003, (1988)

A property owner, Unlimited, sought a planned unit development approval to construct a convenience store on part of its property. The County approved the application subject to two conditions which required Unlimited to (1) dedicate a 50-foot right-of-way to provide commercial access to the next door property, and (2) dedicate a strip of its property sufficient to extend a county arterial along the front of its property. Unlimited appealed these conditions. The Court of Appeals, relying upon the United States Supreme Court's decision in Nollan v. California Coastal Comm'n, 483 U.S. 825 (1987), stated that a private property interest can be exacted without compensation only where "the problem to be remedied by the exaction arises from the development under consideration, and the exaction is reasonable and for a legitimate public purpose". The Court ruled that providing commercial access to the adjacent private property served no public interest and that nothing in Unlimited's proposal caused the need to extend the arterial. Thus, the conditions imposed by the County were unconstitutional and the decision of the Court was reversed.

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STATE OF IDAHO ATTORNEY GENERAL'S ADVISORY MEMORANDUM FOR EVALUATION OF PROPOSED REGULATORY OR ADMINISTRATIVE ACTIONS TO IDENTIFY POTENTIAL TAKINGS OF PRIVATE PROPERTY

During the 1994 Session, the Idaho State Legislature added Chapter 80 to Title 67 of the Idaho Code. This new chapter requires the Attorney General to develop an orderly, consistent internal management process for state agencies to evaluate the effects of proposed regulatory or administrative actions on private property. I.C. § 67-8003(1).

This is the Attorney General's recommended process and advisory memorandum. It is not a formal Attorney General's Opinion under I.C. § 67-1401(6), and should not be construed as an opinion by the Attorney General on whether a specific action constitutes a "taking." Agencies shall use this process to identify those situations requiring further assessment by legal counsel. Appendix A contains a brief discussion of some of the important federal and state cases that set forth the elements of a "taking."

State agencies must use this procedure to evaluate the impact of proposed administrative or regulatory actions on private property. I.C. § 67-8003(1). Local governments are encouraged but not required to follow the same procedure. I.C. § 67-8003(2).

General Background Principles

The Fifth Amendment to the United States Constitution provides that private property shall not be taken for public use without just compensation. Article I, § 14 of the Idaho State Constitution provides as follows:

> Private property may be taken for public use, but not until a just compensation, to be ascertained in the manner prescribed by law, shall be paid therefor.

Thus, under both the federal and state constitutions, private property may not be taken for public purposes without payment of just compensation.

Courts have recognized three situations in which a taking requiring just compensation may occur: (1) when a government action causes physical *occupancy* of property, (2) when a government action causes physical *invasion* of property, and (3) when government *regulation* effectively eliminates all economic value of private property. A "taking" can be permanent or temporary.

The most easily recognized type of "taking" occurs when government physically occupies private property. Clearly, when the government seeks to use private property for a public

building, a highway, a utility easement, or some other public purpose, it must compensate the property owner.

Physical invasions of property, as distinguished from physical occupancies, may also give rise to a "taking" where the invasions are of a recurring or substantial nature. Examples of physical invasions include, among others, flooding and water related intrusions and over flight or aviation easement intrusions.

Like physical occupations or invasions, a regulation that affects the value, use or transfer of property may also constitute a "taking" if it "goes too far." Although most land use regulation does not constitute a "taking" of property, the courts have recognized that when regulation divests an owner of the essential attributes of ownership, it amounts to a "taking" subject to compensation.

Regulatory actions are harder to evaluate for "takings," because government may properly regulate or limit the use of private property relying on its authority and responsibility to protect public health, safety and welfare. Accordingly, government may abate public nuisances, terminate illegal activity, and establish building codes, safety standards, or sanitary requirements generally without creating a compensatory "taking." Government may also limit the use of property through land use planning, zoning ordinances, setback requirements, and environmental regulations.

If a government regulation, however, destroys a fundamental property right -- such as the right to possess, exclude others from, or dispose of property -- it could constitute a compensable "taking." Similarly, if a regulation imposes substantial and significant limitations on property use, there could be a "taking." In assessing whether there has been such a limitation on property use as to constitute a "taking," the court will consider both the purpose of the regulatory action and the degree to which it limits the owner's property rights.

One important factor in evaluating each action is the degree to which the action interferes with a property owner's reasonable investment-backed development expectations. For instance, in determining whether a "taking" has occurred, a court might, among other things, weigh the regulation's impact on vested development rights against the government's interest in promulgating the regulation.

If a regulation prohibits all economically viable or beneficial uses of property, there may be liability for just compensation unless government can demonstrate that laws of nuisance or other pre-existing limitations on the use of the property prohibit the proposed uses.

If a court determines there has been a regulatory "taking" the government has the option of either paying just compensation or withdrawing the regulatory limitation. If the regulation is withdrawn, the government may still be liable to the property owner for a temporary "taking" of the property.

Attorney General's Recommended Process

1. State agencies must use this evaluation process whenever the agency contemplates action that affects privately owned property. Each agency must also use this process to assess the impacts of proposed regulations before the agency publishes the regulations for public comment. In Idaho, real property includes lands, possessory rights to land, ditch and water rights, mining claims (lode and placer), and free standing timber. I.C. §§ 55-101, 63-108. In addition, the right to continue to conduct a business may be a sufficient property interest to invoke the protections of the just compensation clause of the Idaho Constitution.

2. Agencies must incorporate this evaluation process into the agency's existing review process. It is not a substitute, however, for that existing review procedure. Since the extent of the assessment necessarily depends on the type of agency action and the specific nature of the impacts on private property, the agency may tailor the extent and form of the assessment to the type of action contemplated. For example, in some types of actions, the assessment might focus on a specific piece of property. In others, it may be useful to consider the potential impacts on types of property or geographic areas.

3. Each agency must review this advisory memorandum and recommended process with appropriate legal counsel to ensure that it reflects the specific agency mission. It should be distributed to all decision makers and key staff.

4. Each agency must use the following checklist to determine whether a proposed regulatory or administrative action should be reviewed by legal counsel. If there are any affirmative answers to any of the questions on the checklist, the proposed regulatory or administrative action must be reviewed in detail by staff and legal counsel. Since the Legislature has specifically found the process is protected by the attorney-client privilege, each agency can determine the extent of distribution and publication of reports developed as part of the recommended process. However, once, the report is provided to anyone outside the executive or legislative branch, the privilege has been waived.

Attorney General's Checklist Criteria

Agency staff must use the following questions in reviewing the potential impact of a regulatory or administrative action on specific property. While these questions also provide a framework for evaluating the impact proposed regulations may have generally, takings questions normally arise in the context of specific affected property. The public review process used for evaluating proposed regulations is another tool that the agency should use aggressively to safeguard rights of private property owners. If property is subject to regulatory jurisdiction of multiple government agencies, each agency should be sensitive to the cumulative impacts of the various regulatory restrictions.

Although a question may be answered affirmatively, it does not mean that there has been a "taking." Rather, it means there could be a constitutional issue and that agency staff should carefully review the proposed action with legal counsel.

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. 419 (1982).

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 grant 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. A court also will 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 Comm'n, 483 U.S. 825 (1987), that compelling an owner of waterfront property to grant a public 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* green way, as opposed to a private one, did not substantially advance protection of a floodplain, and was a "taking." Dolan v. City of 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 situation, the agency can avoid liability for just compensation only if it can demonstrate that the proposed uses are prohibited by the laws of nuisance or other preexisting limitations on the use of the property. *See* Lucas v. South Carolina Coastal Coun., 112 S. Ct. 2886 (1992).

   Unlike 1. and 2. above, it is important to analyze the regulation's impact on the property 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 factor in this assessment is the degree to which the regulatory action interferes with a property owner's reasonable investment-backed development expectations.

Carefully review regulations requiring that all of a 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 the challenged regulation. Although a reduction in property value alone may not be a "taking," a severe 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. As with 3. above, these economic factors are normally applied to the property as a whole.

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 recreational purposes where the harm to be prevented was to the flood plain was a "taking." In finding this to be a "taking," the Court stated:

> The city never demonstrated why a public green way, 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, 114 U.S. 2309 (June 24, 1994). The United States Supreme Court has also held that barring the inheritance (an essential attribute of ownership) of certain interests in land held by individual members of an Indian tribe constituted a "taking." Hodel v. Irving, 481 U.S. 704 (1987).

6. Does the Regulation Serve the Same Purpose that Would be Served by Directly Prohibiting the Use or Action; and 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, 107 S. Ct. 3141 (1987); Dolan v. City of Tigard, 114 U.S. 2309 (June 24, 1994).

In Nollan, the United States Supreme Court held that it was an unconstitutional "taking" to condition the issuance of a permit to land owners 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.

Likewise, regulatory actions that closely resemble, or have the effects of a physical invasion or occupation of property, are more likely to be found to be takings. The greater the deprivation of use, the greater the likelihood that a "taking" will be found.

APPENDIX A

Appendix A is a summary of some of the principal federal and state cases dealing with regulatory takings issues. These cases provide examples of how courts have resolved specific questions and may be helpful for assessing how courts might resolve analogous situations.

Appendix A also includes a copy of an earlier Attorney General Opinion that summarizes several eminent domain principles.

SUMMARIES OF SIGNIFICANT FEDERAL "TAKINGS" CASES

Dolan v. City of Tigard, 114 S.Ct. 2309 (June 24, 1994).

The city council conditioned Dolan's permit to expand her store and pave her parking lot upon her agreement to dedicate land for a public green way and a pedestrian/bicycle pathway. The expressed purpose for the public green way requirement was to protect the floodplain. The pedestrian/bicycle path was intended to relieve traffic congestion. The United States Supreme Court held that the city had to make "some sort of individualized determination that the required dedication [was] related both in nature and extent to the impact of the proposed development" in order to justify the requirements and avoid a "takings" claim. In this case, the Court held that the city had not done so. It held that the public or private character of the green way would have no impact on the flood plain and that the city had not shown that Dolan's customers would use the pedestrian/bicycle path to relieve congestion.

Lucas v. South Carolina Coastal Coun., 112 S. Ct. 2886 (1992).

Lucas was a challenge to the 1988 South Carolina Beach Front Management Act. The stated purpose of this Act was to protect life and property by creating a storm barrier, providing habitat for endangered species and to serve as a tourism industry. To accomplish the stated purposes, the Act prohibited or severely limited development within certain critical areas of the state's beach-dune system.

Before the Act's passage, David Lucas bought two South Carolina beach front lots intending to develop them. As required by the Act, the South Carolina Coastal Council drew a "baseline" that prevented Mr. Lucas from developing his beach front property. Mr. Lucas sued the Council alleging its actions under the Act constituted a "taking" requiring compensation under the Fifth Amendment. The trial court agreed, awarding him $1,232,387.50. A divided South Carolina Supreme Court reversed, however, holding that the Act was within the scope of the nuisance exception.

The United States Supreme Court reversed. Justice Scalia's majority opinion held that a regulation which "denies all economically beneficial or productive use of land" will be a "taking" unless the government can show that the proposed uses of the property are prohibited by nuisance laws or other preexisting limitations on the use of property. This opinion noted that such total takings will be "relatively rare" and the usual balancing approach for determining takings will apply in the majority of cases.

Hodel v. Irving, 481 U.S. 704 (1987).

Where the character of the government regulation destroys "one of the most essential" rights of ownership -- the right to devise property, especially to one's family -- this is an unconstitutional "taking" without just compensation.

In 1889, portions of Sioux Indian reservation land were "allotted" by Congress to individual tribal members (held in trust by the United States). Allotted parcels could be willed to the heirs of the original allottees. As time passed, the original 160-acre allotments became fractionated, sometimes into very small parcels. Good land often lay fallow, amidst great poverty, because of the difficulties in managing property held in this manner. In 1983, Congress passed legislation that provided that any undivided fractional interest that represented less than 2 percent of the tract's acreage and which earned less than $100 in the preceding year would revert to the tribe. Under the statute, tribal members who lost property as a result of this action would receive no compensation. Tribal members challenged the statute. The United States Supreme Court held this was an unconstitutional "taking" for which compensation was required.

Nollan v. California Coastal Comm'n, 107 S. Ct. 3141 (1987).

The United States Supreme Court held that it was an unconstitutional "taking" to condition the issuance of a permit to land owners on the grant of an easement to the public to use their beach.

James and Marilyn Nollan, the prospective purchasers of a beach front lot in California, sought a permit to tear down a bungalow on the property and replace it with a larger house. The property lay between two public beaches. The Nollans were granted a permit, subject to the condition that they allow the public an easement to pass up and down their beach. On appeal, the United States Supreme Court held that such a permit condition is only valid if it substantially advances legitimate state interests. 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. (The Court noted that protecting views from the highway by limiting the size of the structure or banning fences may have been lawful.)

Loretto v. Teleprompter Manhattan CATV Corp., 102 S.Ct. 3164 (1982).

The United States Supreme Court ruled that a statute that required landlords to allow the installation of cable television on their property was unconstitutional. The Court concluded that "a permanent physical occupation authorized by government is a 'taking' without regard to the public interest that it may serve." The Court reasoned that an owner suffers a special kind of injury when a "stranger" invades and occupies the owner's property, and that such an occupation is "qualitatively more severe" than a regulation on the use of the property. The installation in question required only a small amount of space to attach equipment and wires on the roof and outside walls of the building.

Penn Central Transp. Co. v. City of New York, 98 S.Ct. 2646 (1978).

The United States Supreme Court upheld the constitutionality of a New York City historic preservation ordinance under which the city had declared Grand Central Station a "landmark." In response to Penn Central's takings claim, the United States Supreme Court noted that there was a valid public purpose to the City ordinance, and that Penn Central could still make a reasonable return on its investment by retaining the Station as it was. Penn Central argued that the landmark ordinance would deny it the value of its "pre-existing air rights" to build above the terminal. The Court found that it must consider the impact of the ordinance upon the property as a whole, not just upon "air rights." Further, under the ordinance in question, these rights were transferable to other lots, so they might not be lost.

Florida Rock Industries, Inc. v. United States, 18 F.3d 1560 (Fed. Cir. 1994).

This is a Clean Water Act case. There have been several court decisions and the most recent one affirms the holding that in the absence of a public nuisance, economic impact alone may be determinative of whether a regulatory "taking" under the Fifth Amendment has occurred. If the regulation categorically prohibits *all* economically beneficial use of land, destroying its economic value for private ownership, and the use prohibited is not a public nuisance, this court held that regulation has the effect equivalent to permanent physical occupation, and there is, without more, a compensable "taking."

Factually, in 1972, a mining company purchased 1,560 acres of wetlands (formerly part of the Everglades, but now excluded by road, canal and levee) for the purposes of mining limestone. In 1980, the company applied to the U.S. Army Corps of Engineers for a "section 404" permit for the dredging and filling involved in the mining operation. The Corps of Engineers denied the application, primarily for the purpose of protecting the wetlands. While several courts had previously held that the United States had unconstitutionally taken the mining company's property, and required the government compensate the company, the Federal Circuit recently ruled that the evidence did not support a finding that the permit denial prohibited *all* economically beneficial use of the land or destroyed its value.

SIGNIFICANT IDAHO "TAKINGS" CONSTITUTIONAL PROVISION AND CASE LAW

Idaho Constitutional Provision

Article I, §14. Right of Eminent Domain

> The necessary use of lands for the construction of reservoirs or storage basins, for the purpose of irrigation, or for rights of way for the construction of canals, ditches, flumes or pipes, to convey water to the place of use for any useful, beneficial or necessary purpose, or for drainage; or for tramways, cuts, tunnels, shafts, hoisting works, dumps, or other necessary means to their complete development, or any other use necessary to the complete health of its inhabitants, is hereby declared to be a public use, and subject to the regulation and control of the state.
>
> Private property may be taken for public use, but not until a just compensation, to be ascertained in the manner prescribed by law, shall be paid therefor.

Idaho Case Law

There are very few Idaho cases addressing the issue of whether there has been a "taking" subject to the protections of the state constitution. Those significant ones are summarized below.

Hayden Pines Water Co. v. Idaho Public Utilities, 122 Idaho 315, 834 P.2d 873 (Idaho 1992).

Without extensive discussion, the Idaho Supreme Court held that an Idaho Public Utilities Commission order requiring a water company to perform certain accounting functions (at an estimated cost of $15,000 per year) without considering those costs in the rate proceeding was an unconstitutional "taking."

Coeur D'Alene Garbage v. Coeur D'Alene, 114 Idaho 588, 759 P.2d 879 (Idaho 1988).

The just compensation clause of the Idaho State Constitution, Id. Const., art. 1, § 14, requires compensation be paid by a city where that city either by annexation or by contract prevents a company from continuing service to its customers. The Idaho Supreme Court held that a company has a property interest protected by the Idaho Constitution in continuing to conduct business. In this case, a garbage company already operating in the city and providing garbage service to customers lost the right to continue its business when the city entered into an exclusive garbage collection contract with another company, only permitting that company to operate within the annexed areas.

County of Ada v. Henry, 105 Idaho 263, 668 P.2d 994 (Idaho 1983).

The Idaho Supreme Court held that property owners had no "takings" claim where the owners were aware of zoning restrictions before they purchased the property, even though the zoning ordinance reduced their property's value.

Dawson Enterprises, Inc. v. Blaine County, 99 Idaho 506, 567 P.2d 1257 (Idaho 1977).

A zoning ordinance that deprives an owner of the highest and best use of his land is *not*, absent more, a taking. There are two methods for finding a zoning ordinance unconstitutional. First, it may be shown that it is not "substantially related to the public health, safety, or welfare." Second, it may be shown that the "zoning ordinance precludes the use of . . .property for *any* reasonable purpose."

State ex rel. Andrus v. Click, 97 Idaho 791, 554 P.2d 969 (Idaho 1976).

The Idaho Supreme Court held that where statutory or regulatory provisions are reasonably related to an enactment's legitimate purpose, provisions regulating property uses are within the legitimate police powers of the state and are not a "taking" of private property without compensation. In this case, the court upheld the permit, bonding, and restoration requirements of the dredge and placer mining protection act. It found that they were reasonably related to the enactment's purpose in protecting state lands and watercourses from pollution and destruction and in preserving these resources for the enjoyment and benefit of all people.

Boise Redevelopment Agency v. Yick Kong Corporation, 94 Idaho 876, 499 P.2d 575 (Idaho 1972).

The Idaho Supreme Court held that the Idaho Constitution grants a power of eminent domain much broader than that granted in most other state constitutions. According to the Idaho Supreme Court, even completely private irrigation and mining businesses can use eminent domain. It held that the state, both through the power of eminent domain and the police powers, may protect the public from disease, crime, and "blight and ugliness."

Unity Light & Power Co. v. City of Burley.

Once a supplier of a service lawfully enters into an area to provide that service, annexation by a city does not authorize an ouster of that supplier from that area without condemnation.

Johnston v. Boise City, 87 Idaho 44, 390 P.2d 291 (Idaho 1964).

Where government exercises its authority under its police powers and the exercise is reasonable and not arbitrary, a harmful effect to private property resulting form that exercise alone is insufficient to justify an action for damages.

Rourk v. City of Caldwell, 87 Idaho 557, 394 P.2d 641 (Idaho 1964).

The Idaho Supreme Court held those height restrictions that limited use of private land adjacent to an airport to agricultural uses or to single family dwelling units was an unconstitutional "taking" if no compensation was provided. The Court held that a landowner's property right in the reasonable airspace above his land cannot be taken for public use without reasonable compensation.

Mabe v. State, 83 Idaho 222, 360 P.2d 799 (Idaho 1961).

The Idaho Supreme Court held that destroying or impairing a property owner's right to business access to his or her property constitutes a "taking" of property whether accompanied by actual occupation of or confiscation of the property.

Nettleton v. Higginson, 98 Idaho 87, 558 P.2d 1048 (Idaho 1977).

In times of shortage, a call on water that allows water right holders with junior priority dates to use water while senior holders of beneficial use water rights are not allowed to use water is not a taking protected by the just compensation clause of the Idaho Constitution.

Anderson v. Cummings, 81 Idaho 327, 340 P.2d 1111 (Idaho 1959).

The Idaho Supreme Court recognized individual water rights are real property rights protected from "taking" without compensation.

Hughes v. State, 80 Idaho 286, 328 P.2d 397 (Idaho 1958).

The Idaho Supreme Court held that private property of all classifications is protected under Idaho's constitution just compensation clause.

Robinson v. H.& R.E. Local #782.

The Idaho Supreme Court held that the right to conduct a business is a property interest protected under Idaho's constitution just compensation clause.

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TESTIMONY IN SUPPORT
HB 154
MARCH 12, 1995

HB154addresses an issue that predates our State and Federal constitutions, the rights of the individual in the short term versus the best interests of society in the long term. Private property. To what extent can an individual make personal choices, and to what degree can government deny these choices.

In 1946 the State of Washington passed the first Forest Practices Act. In the act was a provision for the retention of a percentage of standing timber to be left in order to re-establish forest regeneration. The act was challenged by a man named Dexter as a "taking" of private property, and was argued in the U.S Supreme Court under "Dexter vs The State of Washington". The Court ruled in favor of the State, saying that it was proper for the State to require that Dexter defer his economic gain for the benefit of future generations. That since Dexter had the right to cut the remaining trees after forest regeneration had been established, no "taking" had occurred and the police powers of the State to assure a resource supply for future generations was a correct exercise of State authority.

Since Dexter and the end of the Second World War, there has been an explosion of local, State and Federal laws and regulations that restrict the rights of private property owners. From the standpoint of private property ownership, we have gone from Capitalism to Socialism. We can purchase property and pay taxes on it but most of the decisions regarding the use of private property are made by agents of the government. Physical takings by "eminent domain" have been replaced by "regulatory taking" as it is cheaper for the State, and does not require compensation. Some examples.

In the late eighties our company had purchased the timber rights on some private property near Cordova, Alaska. We had been working with the State by leaving standing timber near spawning streams for habitat enhancement, as we had been doing for many years. In 1990 the State revised the State Forest Practices act, requiring mandatory buffer zones of standing timber on all fish streams. Agents of the State marked a buffer zone along a creek where we were logging. We assessed the value of the timber that was taken and sent the state a bill which they refused to pay. After spending $70,000.00 on the "administrative review" process we decided that the "price of principle" was excessive, and dropped the issue. Our economic gain was not deferred, as was Dexters, but was taken - forever, and without compensation. We do not dispute the right of the State to exercise its police powers to take property for a perceived social need, however the State does have a Constitutional obligation to compensate the owner.

Corky Thompson is the owner of L Kanes store in Hoonah, Alaska. Part of her property contains a tank farm that holds an excess of 42,000 gallons of petroleum products that she sells as heating oil, gasoline, and diesel for the Hoonah fishing fleet. In the late eighties she had the property appraised, and it was valued in excess of a million dollars. To date she has been unable to sell her property because of the tank farm. Government regulations on petroleum products has turned an asset into a liability.

Of all the laws and regulations that have been passed over the last 40 years to restrict the use of private property, none has been more oppressive than the Endangered Species Act. The intent was noble, the execution disastrous, as it destroyed the livelihood of thousands of men and women in the fishing, timber and mining industries, caused untold hardship in small rural communities, wreaked businesses and devalued the assets of thousands of property owners. Even the threat of listing a species on the endangered list will be enough to cause chaos in industries and businesses that depend on natural resources. The threat of listing two questionable sub species of Goshhawk and Wolf on the Tongass National Forest, caused the Regional Forester to withdraw 600,000 acres of land and timber from an existing base of 1,700,000 acres of multiple use land in a National Forest that contains over 17 million acres of land and timber. This has already put loggers, roadbuilders and sawmillers that depend on public timber out of business. If the species are listed it will cost private landowners millions of dollars in lost assets, as the Endangered Species Act does not respect the rights of private property.

When I buy a piece of logging equipment then I get together with my shop foreman and the woods boss and we read the operations manual before we start using that piece of equipment. We read the instructions so that we will not cause damage to the machine. I recommend to our elected lawmakers that you start reading your instructions for using the machinery of government ,the Constitution of the State of Alaska. Laws and regulations that support and defend should be passed, laws that demean and avoid should be abolished or changed. The manual can only be changed by the manufacturer.

Keith Walker
Owner

Alaska State Legislature

HOUSE OF REPRESENTATIVES

Representative Vic Kohring

Official Business

State Capitol
Juneau, AK 99801-1182

MEMORANDUM

TO: Representative Ivan Ivan, Co-Chair
Representative Alan Austerman, Co-Chair
Community and Regional Affairs Committee

FROM: Representative Vic Kohring

DATE: February 7, 1995

SUBJ: Hearing Request

Please schedule HB 154, relating to regulatory takings, for a hearing at your earliest convenience. This bill would provide some relief for private citizens who have had their property "taken" through regulatory means.

This bill has further referrals to the Judiciary and Finance Committees.

ity, then from the two highest numbers on the list, the Senate shall choose the Vice President; a quorum for the purpose shall consist of two-thirds of the whole number of Senators, and a majority of the whole number shall be necessary to a choice. But no person constitutionally ineligible to the office of President should be eligible to that of Vice President of the United States.[20]

ARTICLE XIII.

§ 1. Slavery abolished. Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.

§ 2. Enforcement. Congress shall have power to enforce this article by appropriate legislation.[21]

ARTICLE XIV.

§ 1. Citizenship rights not to be abridged by states. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

§ 2. Apportionment of representatives in Congress. Representatives shall be apportioned among the several states according to their respective numbers, counting the whole number of persons in each state, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, representatives in Congress, the executive and judicial officers of a state, or the members of the legislature thereof, is denied to any of the male inhabitants of such state, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such state.

20. Proposed by Congress on December 9, 1803, and declared ratified on September 25, 1804.

21. Proposed by Congress on January 31, 1865, and declared ratified on December 18, 1865.

ARTICLE III.

Quartering of soldiers. No soldier shall, in time of peace be quartered in any house, without the consent of the owner, nor in time of war, but in a manner to be prescribed by law.[11]

ARTICLE IV.

Searches and seizures. The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.[12]

ARTICLE V.

Rights of accused in criminal proceedings; due process; eminent domain. No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall he be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.[13]

ARTICLE VI.

Right to speedy trial, witnesses, etc. In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusations; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.[14]

ARTICLE VII.

Trial by jury in civil cases. In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any court of the United States, than according to the rules of the common law.[15]

ARTICLE VIII.

Bails, fines, punishments. Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.[16]

ARTICLE IX.

Reservation of rights of the people. The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.[17]

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13. Proposed by Congress on September 25, 1789, and declared ratified on December 15, 1791.

14. Proposed by Congress on September 25, 1789, and declared ratified on December 15, 1791.

Generally speaking, courts have interpreted this protection from imprisonment for debt to apply only to debts arising from private contracts. Thus, for example, it does not apply to wilful avoidance of fines and similar criminal penalties, nor does it apply to the defiance of court orders to pay child support or divorce settlements.

Section 18. Eminent Domain

> **Private property shall not be taken or damaged for public use without just compensation.**

Eminent domain is the inherent right of government to take private property for a public purpose. However, Alaska's constitution here requires the state government to compensate fairly the owners of property it condemns under the power of eminent domain (see also Article VIII, Section 18). The Alaska Supreme Court has stated: ". . . the policy behind the constitutional provision [is] that the condemnee should not pay a higher price for a public improvement than do other members of the public" (*State v. Hammer*, 550 P.2d 820, 1976). Every state constitution and the U.S. Constitution (fifth amendment) require just compensation to the owner of property condemned by the government.

The most common eminent domain action is the acquisition of rights-of-way for road and highway construction, although the power is occasionally exercised to acquire land for schools, public buildings, pipelines and utility transmission lines. There is substantial statutory law governing its use (e.g., AS 09.55). The state has delegated its power of eminent domain to municipalities, public corporations, and public and private utilities, but all are bound by this requirement to pay just compensation.

"Property" taken by the state is usually land, but the term has been held to apply to personal property and even intangible property. For example, the Alaska Supreme Court ruled that a lawyer could not be required to provide counsel to an indigent defendant without reasonable compensation, as "labor is property" (*DeLisio v. Alaska Superior Court*, 740 P.2d 437, 1987). However, the court two years later denied a claim by state workers that the executive branch's unilateral increase of the work week from 37.5 to 40.0 hours after an impasse in bargaining over a labor agreement constituted an unlawful taking of property under this section (*Alaska Public Employees v. Department of Administration*, 776 P.2d 1030, 1989).

The definition of a "taking" of private property is not always a straight-forward matter. The state may do something that indirectly diminishes the value of private property, and the owners may demand compensation for this so-called "inverse condemnation." Here the problem is that governments routinely adopt regulations in the interest of public health and safety that indirectly cost people money. Zoning ordinances and building codes, for example, burden property owners economically. Can the exercise of the government's police powers constitute a "taking" of private property that must be compensated? It can if the effect is confiscatory or unduly heavy. These issues were presented in a suit brought after the state had changed to one-way the flow of traffic on a frontage road in front of a business that depended on easy accessibility to vehicle traffic. The Alaska Supreme Court, noting that "the difference between a noncompensable exercise of the police power and a compensable taking is often one merely of degree," did not consider the flow of traffic in front of a business a property right that required compensation under this section (*B & G Meats, Incorporated v. State*, 601 P.2d 252, 1979).

"Damage" to property by the state is to be compensated as well as taking of property (approximately half of the state constitutions include damage in their requirement for eminent domain compensation). There has been little judicial interpretation of this term. The Alaska Supreme Court has said, however, that it includes the temporary loss of profits from a business that must be relocated because of an eminent domain action by the state (*State v. Hammer*, 550 P.2d 820, 1976).

The Alaska Supreme Court has defined "just compensation" to mean fair market value: "The law in Alaska is that 'fair market value', or the price a willing buyer would pay a willing seller for property, is the appropriate measure of 'just compensation'" (*State v. Alaska Continental Development Corporation*, 630 P.2d 977, 1980). The property owner is entitled to an appraisal of fair market value at the highest and best use of the property, but not to a valuation based on a speculative future use. Nor may the property owner assert a value based on the use to which the property will be put by the state: "It is a basic tenet of eminent domain law that just compensation is determined by what the owner has lost and not by what the condemnor has gained" (*Gackstetter v. State*, 616 P.2d 564, 1980).