

One Page Takings Summary U.S Constitution and Local Land Use

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I. Constitutional Law.

*“...[N]or shall private property be taken for public use, without just compensation.”
Fifth Amendment, US Constitution.*

This is a critical question at the intersection of a multitude of public interests of society and a multitude of private interests of individuals. This question is at the center of the “social contract” where each member of society gives up certain freedoms for the protection and structure of society. The key question is how much freedom should be given up, under what circumstances, and at what price. Until 1922, takings cases were limited to physical invasion of property. More recently, takings analysis focuses on the loss of economic use of the property in question. Remedy: economic damages, or “just compensation” for the property taken.

“...the right....to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures.” Fourth Amendment, US Constitution.

Fourth amendment focuses on reasonable expectations of privacy, particularly in the home. Relates to the reasonable expectation of land purchasers to use their property. Remedy: invalidate seizure, or elimination of regulation limiting use of land or return of land in question.

“...nor shall any person...be deprived of... property without due process of law...” Fifth and Fourteenth Amendments, US Constitution.

Due Process Clause – extends the protections of the Fourth and Fifth Amendment to state and municipal actions. Key issue is that property is not taken unless open and fair process for decisionmaking. Some cases have suggested the need of an appropriate relationship between the purpose of government regulation and the means of regulation to achieve those ends.

II. Takings -- Two contexts:

Condemnation – explicit taking of private property by government through its sovereign power of eminent domain. Government institutes a condemnation action and pays just compensation. Still need due process in decisionmaking.

Takings action – government does not acknowledge taking. Property owner files a “reverse condemnation” action accusing government of taking, seeking just compensation. Takings cases usually involve a temporary invasion of property, or restriction on use of property – which is called a “regulatory” or “constructive” taking.

III. Rules of Thumb:

Land use restrictions that are designed to abate nuisances, or to prevent threats to public health or safety are less likely to be considered takings. Government police power includes broad authority to protect public health. Landowners do not have held the right to cause pollution or other damage to public resources or adjoining properties. However, land use restrictions that are to secure a benefit for society are more likely to be considered a taking that is due compensation. A subset of society should not be forced to bear the cost of a benefit for the larger society. Key issues:

1. Define legitimate state interest in protecting a public health issue (water quality and quantity).
2. Define the threat to public health from existing laws and trends.
3. Define how change to laws protects public health. Changes should be “proportional” to problem.
4. Afford all procedural rights in an open and public process.
5. Do not limit all economic uses of land, and document efforts to provide assistance and support to the subject of this protective regulation.

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For more information, see Metz, Merriam and Frank, [The Takings Issue](#) (Island Press, 1999) or www.envpoly.org/takings.