

LandWatch
monterey county

*Our mission is to promote and inspire
sound land use legislation at the city,
county, and regional levels through
grassroots community action.*

A Handbook for the Community: Land Use Planning and the “Takings Clause”

*“... nor shall private property be taken for
public use, without just compensation.”*

From the Fifth Amendment to the United States Constitution



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Acknowledgements

“...our cases have long established that mere diminution in the value of property, however serious, is insufficient to demonstrate a taking...those who do business in [a] regulated field cannot object if the legislative scheme is buttressed by subsequent amendments to achieve the legislative end...legislation readjusting rights and burdens is not unlawful solely because it upsets otherwise settled expectations.”

U.S. Supreme Court, Concrete Pipe and Products v. Construction Laborers Pension Trust, 1993

“...a permanent deprivation of the owner's use of the entire area is a taking of 'the parcel as a whole,' whereas a temporary restriction that merely causes a diminution in value is not...the extreme categorical rule that any deprivation of all economic use, no matter how brief, constitutes a compensable taking surely cannot be sustained.”

U.S. Supreme Court, Tahoe-Sierra Preservation Council, Inc., ET. AL. v. Tahoe Regional Planning Agency, 2002

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Quotes From The Courts

There are literally hundreds or thousands of court cases that have discussed the “takings” clause. We hope, in this brief handbook, to have summed up the basic lesson:

Communities should never be afraid to use responsible land use regulations to achieve valid community purposes; in fact, adopting such regulations early on, in a community General Plan, will actually help prevent takings lawsuits.

Here are some of the things the courts have said, in their own words:

“Property owners may not claim a taking simply by showing that they have been denied the ability to exploit a property interest that they heretofore had believed was available for development.”

Supreme Court Justice Brennan, Penn Central Transportation Co. v. New York City, 1978

“...it was generally understood that the Takings Clause reached only a 'direct appropriation' of property or [its] functional equivalent...[a landowner] necessarily expects the uses of his property to be restricted, from time to time, by various measures newly enacted by the State in legitimate exercise of its police powers.”

Supreme Court Justice Scalia, Lucas V. South Carolina Coastal Council, 1992

“When an individual or corporate entity purchases personal property...to engage in a commercial venture the purchaser is taking a risk that government regulation will diminish the value of that property...Indeed, where the item purchased could potentially invoke environmental concerns the purchaser must be especially wary in these days of growing environmental concern.”

Federal District Court ruling, Burns Harbor Fish Co. v. Ralston, 1992

“Takings jurisprudence does not divide a single parcel into discrete segments and attempt to determine whether rights in a particular segment have been entirely abrogated. In deciding whether a particular governmental action has effected a taking, this Court focuses both on the character of the action and on the nature of the interference with the rights in the parcel as a whole.”

U.S. Supreme Court, Keystone Bituminous Coal Association v. DeBenedictis, 1987

Introduction

“...nor shall private property be taken for public use, without just compensation.”

From the Fifth Amendment to the United States Constitution

This phrase from the Fifth Amendment to the United States Constitution is known as the “takings clause.” Those seeking to achieve excellent land use planning for their communities need to understand it.

Just what did the framers of the Constitution mean by this clause? How are we to interpret “takings” today?

Understanding takings, and how courts have interpreted takings, is crucial to successful, visionary, community planning. And successful, visionary, community planning is the key to avoiding takings challenges.

This community handbook explains takings, explains how courts have interpreted takings, and provides strategies we can pursue if we want Monterey County to remain a beautiful, vibrant, economically vital community for all its residents.

What Is A "Taking"?

Courts have consistently ruled that takings occur only when a government irrevocably occupies an entire parcel of private land or deprives a landowner of all productive use of that land.

Only when a government physically and permanently seizes property, or when it deprives a property owner of all productive uses of that property, must the government compensate the property owner.

- When a government temporarily deprives a landowner of an economic use of his or her land, it is not a taking.
- When a government restricts development on a portion of a piece of land, while allowing the rest of the land to be developed, it is not a taking.
- When a government restricts certain kinds of development on a piece of private land, but does not deprive the owner of all economic uses of the land, it is not a taking.

Why Monterey County Residents Might Be Concerned About Takings

“Over the generations, Americans have joined forces time and time again to build clean, safe, and prosperous communities, and to protect our enjoyment of them. The fishermen who seek to save a river full of great bass, the neighborhood association which works to revitalize the area’s historic homes, and the activists who strive to give us cleaner air, all have the need and the right to use the legal tools which can keep our nation a decent and healthy place.”

Randall T. Shepard, Chief Justice, Indiana Supreme Court and Trustee, National Trust for Historic Preservation

Most Monterey County residents wish to live in clean, safe, economically vital communities. This means we want to stop unplanned urban sprawl.

- We want to preserve commercially productive agricultural land for agricultural uses.
- We want attractive, affordable housing for all county residents.
- We prize, and want to preserve, clean air, clean water, beautiful views, bountiful wildlife, an extensive park system, and the historic character of our communities.

City and county planners and politicians can design General Plans that help us achieve these goals. They can adopt land use regulations that prevent sprawl, protect agricultural land, and shape what affordable, distinctive communities will look like.

Local regulations, adopted by local governments, also help enforce state and federal mandates that preserve coastal resources and protect beautiful parkland.

The power to adopt local land use policies is one of the most important ways that local government can achieve community goals. Our local governments ought to represent the majority of the people, and that means they should be able to plan communities that work for everyone's benefit.

In recent years, members of the “wise use” or “property rights” movement have suggested that the government should pay private land owners who must curtail development on their land due to government regulations.

They argue, in effect, that the government should pay property owners to follow the rules that the community has established to achieve community goals.

What LandWatch Is Doing

LandWatch Monterey County is a nonprofit organization, founded in 1997. Our mission is to promote and inspire sound land use legislation at the city and county level through grassroots community action.

We are actively involved in building communities that respect private property rights while protecting the public's interest in prosperous, beautiful, well planned communities.

Here are some of the things that LandWatch is doing:

- LandWatch is helping to organize community groups that represent a diverse array of stakeholders.
- LandWatch is working with these community groups as they communicate to public officials, so that we may plan for and achieve the kinds of communities we all want.

- LandWatch is advocating that the County and city General Plans be informed by community vision and discussed in frequent, well-attended public forums.
- LandWatch is helping to ensure that the resulting County and city General Plans represent the best, most sound, and most representative thinking, and therefore form the best defense against frivolous takings claims.

Visionary communities need not fear takings lawsuits. In fact, citizens and residents can use the threat of such takings lawsuits to demand General Plan policies that represent maximum public input from all sectors of our county, and that clearly state the overall objectives of the community. Such policies will benefit the community and private property owners alike.

Building The Communities We Want In Monterey County

LandWatch believes that Monterey County is perfectly poised to build the future its residents most desire.

Right now, the County and the cities are designing 20-year General Plans that set the foundation for our communities' future. If these plans lay out sound principles to achieve broadly supported community goals, they will protect our municipalities from unwanted takings challenges.

General Plans provide excellent legal protection against takings lawsuits. Well-prepared General Plans provide the rationale for why the County or a city has decided to put restrictions on certain uses of private land, and the courts will respect and uphold those plans.

Further, not only will a local government usually win in court when it bases its land use decisions on a well-prepared General Plan, comprehensive, well founded General Plans also ward off lawsuits in the first place.

Landowners who understand that they will probably not win a takings lawsuit usually don't bring one.

For example, Monterey County has a much better chance of preserving fertile farmland in key locations if this goal is a specific feature of its General Plan, long before anyone proposes building on the land in question.

If citizens clearly and forcefully ask their public officials to plan for a sustainable future, those officials will listen. They want to fulfill their responsibilities to their constituents, and they want to keep their jobs.

Communities can view the threat of takings lawsuits as a win-win situation for all members of the community. Clear planning policies that have broad public support can help private landowners, since it directs them to use their land in ways that are consistent with community objectives.

Moreover, such policies are the foundation upon which to build more vital, safe, healthy, and beautiful places, and to create a community in which land retains its economic value.

To ward off takings lawsuits, citizens ought to demand the clearest possible planning documents that represent the broadest array of citizen input. Public meetings should be frequent and well attended. Citizens should demand that government regulations represent the public's wishes.

Resulting plans and regulations offer the clearest guidelines for private property owners. They justify and explain what kinds of development a community encourages and what kinds it prohibits.

When a government regulation prevents a property owner from doing whatever he or she wishes, that property owner may say that the government has "taken" their property. Sometimes, they sue the government for compensation, based on this claimed "taking."

As an example, if a county prevents a farmer from turning his or her fields into an auto mall, that farmer might decide to sue for takings compensation.

If a city regulates the height of buildings in a residential neighborhood, the developer who wishes to build a high-rise apartment building might sue the city, and claim loss of potential income.

If the State asks an owner of 100 acres of benchlands to preserve half of his or her land because an endangered butterfly makes its home there, that landowner might also sue for compensation, and claim a "taking."

As we will see below, the courts have consistently ruled that takings occur only when government occupation is permanent and physical, or if a governmental regulation has deprived a property owner of all economically productive uses of his or her land.

In other words, landowners who sue under the conditions we've just described do not typically have a valid claim to be compensated.

Legal battles, however, are costly. Most local governments cannot afford to fight lawsuits against takings claims. So when landowners threaten a lawsuit, government officials sometimes back down from enactments that would protect community interests.

Even the idea that a landowner might sue for takings violations makes some city or county officials more timid than they might be in putting into place protections the citizens desire. The threat of takings creates a chilling atmosphere for visionary and responsible land use planning.

What Rights Go With Property Ownership?

“All of us live downstream, downwind, or next door to property where pollution or unsuitable activities can harm our health, safety, or property values.”

Senator Patrick Leahy (D-VT) in opposing a federal takings bill.

If you own private property, you are not automatically entitled to do whatever you want with that property. Property ownership carries responsibilities as well as rights. Government officials who seek to respect property owners' rights must also recognize the government's responsibility to help maintain livable communities for all residents.

If you purchase 100 acres of oak trees, you are purchasing only that, 100 acres of oak trees. You have not purchased the right to cut down those trees and plant a vineyard.

If you own 100 acres of productive farmland, you have the right to continue to farm, but you have no right to turn all or part of that farmland into a housing development.

If you own a vacant lot in a residential neighborhood, you are not automatically entitled to open a gambling parlor or to erect a highrise apartment building on that lot.

Private property rights are defined as the right to enjoy your land in a way that does not harm your neighbors and to continue existing uses.

If the community deems that vineyards and housing developments and gambling parlors and highrises are desirable uses for the land you own, then the community might grant you permission, and give you a “permit” to develop your land as you would like.

But as a property owner, your right is only to ask the community for permission to change the use on land you own.

You do not have the right to do whatever you want with the land. If the community decides not to give you permission to change the use of your land, no taking of your property has occurred.

What Have Courts Ruled About Takings?

The courts have consistently ruled that a landowner must be deprived of all economic uses before takings compensations are justified.

The Supreme Court has found takings in two circumstances: when the government occupies a piece of land permanently or when government regulation forbids all economic uses of an entire piece of property.

The courts have consistently affirmed that the public has legitimate safety and health concerns that sometimes impinge on the rights of private landowners and the uses they can make of their land.

The courts have also said that while property owners have a right to a reasonable use of their land, the U.S. Constitution does not guarantee that the most profitable use will be allowed.

Courts have consistently ruled that even large losses of potential economic benefit do not constitute a taking, as long as the owner retains some economic use of some portion of his or her land.

The Fifth Amendment does not confer the right to use property in a manner that may harm the public health or welfare or damage the interests of neighboring landowners or the community as a whole.

Courts have ruled, for example, that regulations preventing wetlands destruction, preserving scenic views, protecting historic resources, or protecting endangered species on private land are crucial to public health and well being.

Requiring private landowners to help a community preserve wetlands, scenic views, historic resources, or rare species is a legitimate use of government authority.

Here is a point of special interest to those who wish to empower public officials to plan for excellent communities: Courts give tremendous leeway to local elected officials to determine what is appropriate public regulation. They leave it to local governments to determine how best to protect the health, safety, integrity, and beauty of a community.

Courts typically intervene only in extreme cases—for instance, when the civil rights of protected minorities are affected by local decisions. So, courts may intervene when official housing policies discriminate against a certain racial group, or when they do not protect the rights of handicapped people to gain access to public spaces.

But they are unlikely to intervene when governments regulate to preserve wetlands, farmlands, endangered species, or historic places.