



A Chapter of the American Planning Association

Policy Guide and Statement on the Takings, Substantive Due Process, and Regulatory Takings Doctrines

Adopted October 5, 2005

Executive Summary

Background

Two powers inherent in our national and state governments since the founding of this country are the power of eminent domain and the police power. The federal government, which can only exercise those powers granted to it by the U.S. Constitution, has the power of eminent domain, but not the police power. The states, which are “plenary” powers and can exercise any power of government unless superseded by federal law, have both the power of eminent domain and the police power. The power of eminent domain allows a government to take title to private property against the owner’s wishes. The police power allows a state or local government to regulate private activities, including the use of private property, for the purpose of protecting public health, safety, morals, and the general welfare. Both of these powers are vital for the healthy functioning of a system of self governance, but both can be abused and are not absolute.

A defining characteristic of the U.S. system of constitutional democracy is that the federal and state constitutions protect individual liberties and property rights by limiting governments’ ability to use the power of eminent domain and the police power. The Fifth Amendment to the U.S. Constitution, along with parallel provisions in state constitutions, limits the power of eminent domain. The Fourteenth Amendment, along with parallel state constitutional provisions, limits the exercise of the police power. Through a long history of constitutional adjudication, the U.S. Supreme Court and the state supreme courts have developed sets of rules for interpreting and applying these protections, which are known as the “takings,” “due process,” and “regulatory takings” doctrines. *It is very important that local government officials, especially planners and planning commissioners, understand these three doctrines so that they can ensure that the plans and regulations they adopt are both reasonable and consistent with the constitutional protections the doctrines afford, which in turn will help ensure that their plans and regulations are defensible politically and legally.*

The *takings doctrine*, based on the Fifth Amendment to the U.S. Constitution, limits the exercise of the power of eminent domain. The courts have interpreted the takings clause to include two requirements: first, that private property can be taken only for some “public use” and, second, that government must provide “just compensation” when it takes the property. The courts have generally held that “just compensation” means fair

market value at the time that the government began condemnation proceedings. The “public use” requirement has been more troublesome. Here the courts have generally held that public use includes situations where the property in question will actually be made available for public use (i.e., either by the public agency or a private entity like a common carrier), such as a public road or railroad. The courts have also found the public use requirement satisfied when the taking is done as a way to address “exigencies” like blight. Recently, the U. S. Supreme Court held with regard to the U.S. Constitution’s takings clause that public use also encompasses a taking made for the public purpose of promoting economic development and revitalization, *so long as* it can be justified pursuant to a well-developed, comprehensive economic redevelopment plan. In one case where a state doctrine differs from federal doctrine, however, the Michigan Supreme Court recently held that under the *state’s* constitutional takings clause, “public use” does not extend so far. Specifically, in Michigan it does not allow takings that would be made solely for the purpose of advancing a general economic benefit.

The *due process doctrine* stems from the Fourteenth Amendment of the U.S. Constitution, which requires that life, liberty, and property cannot be taken (or regulated) without due process of law. This clause limits state and local governments’ ability to exercise the police power. Under this doctrine, the courts require that governmental regulation bear a “reasonable relationship” to a “legitimate” state purpose. In effect, courts enforcing this doctrine ask two questions: first, whether the burdens of the regulation are proportional to the ends to be achieved and, second, whether the end itself is one that the government is entitled to pursue. Because the U.S. Supreme Court is very reluctant to replace its determination for that of a legislature on whether a public policy is good or poor (i.e., legitimate), it is generally very deferential to legislative actions like local land use regulations, unless some fundamental constitutional issue is at stake. The use of private property for economic gain, by itself, does not rise to that level. State and local regulations relating to planning and land use regulation, therefore, are generally found permissible under the doctrine, unless they are clearly arbitrary and capricious. The Michigan courts have generally followed the U.S. Supreme Court’s approach in interpreting the state’s constitutional due process doctrine.

Finally, the *regulatory takings doctrine* was established by a U.S. Supreme Court ruling in the 1920s. It essentially converts a regulation—normally limited by the due process clause—into a “taking” when a court finds that a government has so restricted an owner’s use of the property that it has in effect taken it, but has done so through regulation rather than by taking title through a condemnation. One of the murkier areas of constitutional law, the doctrine incorporates several “categorical rules” that apply in extreme cases (i.e., when all economic value is taken or the regulation compels a property owner to allow others to use it). Beyond those extremes it requires a court to engage in a case-specific balancing for each complaint to determine whether the government has forced some property owner alone “to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.” If so, then the regulation will be deemed a taking and the government will be required to pay just compensation.