
APPENDIX F

“TAKINGS” CLAIMS CHECKLIST

In 1995, the Washington State Attorney General’s Office issued a memorandum which outlined a process for jurisdictions to use to evaluate regulatory action with regards to legal claims based on “takings.” The memorandum included a checklist to help jurisdictions determine whether a regulatory action may raise questions of constitutionality and may require review from legal counsel.

An affirmative answer to any of the questions in the following checklist does not automatically mean that a takings has occurred, but rather it indicates that there could be constitutional issues which may warrant consult with legal counsel.

1. Does the regulation or action result in a permanent physical occupation of private property?

A regulation or action that results in the permanent physical occupation of all or a portion of private property will generally constitute a taking.

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.

3. Does the regulation or action deprive the owner of all economically viable uses of the property?

A regulation or action that prohibits all economically viable or beneficial uses of the land will likely constitute a taking. Regulations or actions that require all of a particular parcel of land be left substantially in its natural state warrant careful review. However, a jurisdiction may be able to avoid liability for just compensation only if it can demonstrate that the proposed uses are prohibited by nuisance laws or other pre-existing limitations on the use of the property.

It is also important to analyze the regulation’s impact on the property as a whole, not just a portion of the property, and assess whether there is any profitable use of the remaining property available. 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. The assessment should take into consideration the extent of interference with a property owner’s reasonable investment-backed development expectations.

4. Does the regulatory action have a severe impact on the landowner's economic interest?

In determining if a taking has occurred, courts will often compare the value of a property before and after the impact of the challenged regulatory action. Although a reduction in property value alone may not constitute a taking, a severe reduction in property value often indicates a reduction or elimination of reasonably profitable uses.

5. Does the regulation or action deny a fundamental attribute of ownership?

Regulations such as the right to possess, exclude others and dispose of all or a portion of the property, or other actions or regulations which deny a landowner a fundamental right of ownership are potential takings.