

## **Fair and Balanced Approaches to the Property Rights Issue in Washington State**

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*"No person...shall be...deprived of life, liberty, or property without due process of law; nor shall private property be taken for public use, without just compensation." Amendment V, Constitution of the United States.*

*"Government hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law." Justice Oliver Wendall Holmes for the Supreme Court of the United States Pennsylvania Coal Co. v. Mahon, 1922*

Many people feel that land use controls are more restrictive than necessary, that local government is unresponsive to their concerns, that small property owners are unfairly treated compared to large property owners, or that it is much too difficult to obtain a fair hearing when they believe their property rights have been infringed upon by their government or their neighbors. Many also feel their property values are unfairly diminished by zoning changes, and development conditions, such as required buffers, preservation areas and trails.

This has led individuals and legislators in a number of states and at the national level to seek changes in the law of regulatory takings that would require government to compensate property owners whenever a certain percentage of a property's value is diminished by land use controls.

Their proposals usually follow a formula something like this: if government land use controls lower a property's value by more than x percent, then it should pay compensation for any loss it has created above x. The x could be any value but those who suggest this approach usually place it somewhere between 50 and 75 percent.

Initiative 164 — the so-called Private Property Regulatory Fairness Act — is an extreme version of this approach. It would require, with few exceptions, compensation for any loss that is greater than zero. Moreover, despite claims to the contrary by its proponents, it would apply to most existing land use controls, from neighborhood zoning to new resource land and critical area regulations recently adopted under the Growth Management Act.

The property rights issue must be resolved in order to implement balanced and effective growth management over the long term in Washington State. However, the percentage of

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diminution approach is fundamentally flawed and other approaches are needed. Some of the larger defects in the diminution of value approach include the following:

- Whatever percentage is chosen would be arbitrary and there would be no relief for the property owner who suffers a loss of less than that value.
- Lawsuits involving property value are expensive, complicated, require owners to hire lawyers, involve an overburdened judicial system, complex law, and the use of competing expert witnesses.
- The diminution of value approach does not respond to the primary concerns of property owners which is not money but rather being able to use their property as they wish, wanting government to be responsive, and having a simple, quick and cost—effective way to deal with government.
- Mandatory compensation would almost certainly require higher-taxes. However local governments have limited capacity to raise the taxes and therefore many land use protections that are necessary to provide for the public health, safety and welfare, and required by state and federal law, may need to be abolished.
- The substantial curtailment of planning, zoning and development regulations that would be caused by the approach, would, itself, substantially diminish property values in many areas.
- Compensation for some would often be unfair to others. For example, controls that limit filling in floodways protect downstream landowners from loss of life and property. It is obviously unfair for downstream landowners to have to compensate those upstream to protect themselves from harm.

Many other ways of responding to the property rights issue are available, used elsewhere, and would better address property rights issues. Some of these are listed below. They are categorized according to the specific problems they are designed to address.

**1. Measures to make it easier for property owners to efficiently obtain development permission, protect their property rights, and obtain relief if a taking occurs.**

- 1.1. Prohibit unreasonable property inspections by state and local officials by requiring property owners to be notified in writing before inspectors can go onto private property and by requiring inspectors to carry and display suitable identification.
- 1.2. Broadly disseminate accurate information on property rights and responsibility.
- 1.3. Provide a Governmental Public Assistant or Ombudsman at state and local

levels to provide information about rights, responsibilities, and remedies, to guide citizens to and through governmental agencies and regulations, and to investigate allegations of wrongdoing.

- 1.4. Have the state appoint intermediators who could employ mediation techniques to resolve disputes and, if mediation fails, determine whether the impacts of regulations constitute a taking and, if so, recommend the action be adjusted, or as a last resort, that compensation be provided by purchase of interests in the property up to fee simple. Adjustment or compensation could be recommended based on pre-established criteria even though the action falls short of a constitutional taking. Adjustments could include reversing an action or amending it to mitigate its adverse effects through provisions such as density bonuses, density transfers, relief from impact fees, and other mechanisms.
  - 1.5. Allow plaintiffs to collect attorney's fees when they can show that government has infringed on their property rights. This is not intended to create a new cause of action.
  - 1.6. Provide damages to property owners who are unlawfully denied a permit that is required for a use of their property.
  - 1.7. Guarantee the right to develop under existing zoning for a given period of time (e. g. five years) after the zoning is adopted. In other words, prohibit zoning changes once zoning is adopted for a specified time.
  - 1.8. Help small property owners obtain development permits to which they are entitled by giving them a partial property tax credit for professional assistance they must retain in the permit process or by allowing them to choose to have government personnel conduct the necessary field studies and prepare the plans required to obtain development permission.
  - 1.9. Limit the fees that can be charged and the time that may be used for permit processing to levels that are appropriate to each given type of project.
  - 1.10. Review and where necessary improve notification procedures so that property owners and other interested parties are made aware and can comment upon proposed new development controls that affect them.
- 2. Measures that reduce a) the likelihood that property owner's will have their property taken without just compensation and b) the diminution of property values from necessary and legal development controls.**
- 2.1. Immediately adjust property taxes to reflect any loss or increase in land values created by new regulations, provide state grants to counties that cannot afford to quickly reassess properties, give tax credits to compensate for losses from any delays and give tax credits for the difference between tax payments that would have been made under new regulations and those made previously since

the date a property was purchased but for no greater than 6 years prior to the change in regulation. Facilitate reassessments by requiring local jurisdictions that adopt regulations to notify assessors of the affected tax parcels.

- 2.2. Allow land owners to transfer development potential lost from critical area regulations to other portions of their property that are suitable for development and allow them to sell the lost development rights for use on other properties in appropriately located and sized projects. Guarantee property owners the right to increase densities by up to 25 percent over existing zoning if they acquire development rights for that purpose. This has the additional benefit of reducing urban sprawl and lowering housing prices. In order to protect community character, standards should be placed on transfers to prevent incompatible development. For example, there could be a limit of 25 percent on the amount by which minimum lot sizes could be reduced in areas that receive transfers.
- 2.3. Increase fee simple or less than fee simple acquisition of threatened, valuable and publicly beneficial sensitive environmental areas by public agencies or private conservancies. In addition to lowering burdens on land owners, this would provide more permanent protection to critical areas than development regulations. Acquisitions, could be financed from a number of sources including a portion (eg, 50%) of the 6.25 cents local option conservation futures tax, a share of the real estate transfer tax enabled by the Growth Management Act that is now reserved for capital facilities if they are used to acquire critical areas like wetlands that reduce the need for spending on infrastructure, storm water utilities and open space districts serving those benefiting from protected areas, proceeds from the development or trade of public lands acquired for that purpose, and investments by private land conservancies encouraged by tax incentives.
- 2.4. Provide for mitigation banking where appropriate to allow offsite mitigation of development that affects critical areas.
- 2.5. Allow farms and forests to create one small lot for each 10 to 20 acres of property on a one time basis after land is down zoned to conserve resource lands if the new lots are clustered in appropriately sized, buffered, and located projects.
- 2.6. Provide density bonuses- in urban areas in exchange for purchasing development rights from resource lands, and critical areas.
- 2.7. Allow vegetation and soil in critical areas and their buffers to be thinned or pruned when it can be shown that it is necessary to protect residents in dwellings built or approved before critical area regulations were enacted from environmental hazards (e.g. fires, landslides and floods). Prohibit new development that may be subject to unreasonable natural hazards associated with designated resource lands and critical areas.
- 2.8. Develop workable Transfer of Development Rights and Purchase of Development

Rights programs for the state or for selected model areas.

- 2.9. Allow property owners to exchange development rights lost to new regulations for the right to receive payments from a special state annuity account funded from the sale of property rights obtained through the exchange program.
- 2.10. Require that resource land be conserved and critical areas be protected through the use of the innovative tools referred to in the GMA on those parcels subject to significant development pressure. Such pressure would be indicated by formally adopted criteria such a recent and substantial increase in platting, prices, and land sales in the vicinity of a parcel, the accessibility of a parcel to highways and major arterials, and the close proximity of a parcel to urban services, urbanized area's and urban growth boundaries.

**3. Measures to reduce the creation of unreasonable expectations about development potential among land owners.**

- 3.1 Clarify the definition of highest and best use in WAC 458— 12—330 in order to ensure that property taxes are based on reasonably probable use rather than the sorting classification itself.
  - 3.2 Establish a much improved property disclosure statement. Compile a "check off list" for prospective land purchasers.
  - 3.3 Prohibit the creation of unusable lots, guarantee the right to build on buildable lots created under growth management plans subject to the availability of public services, and reserve public service capacity for new lots for up to six years.
  - 3.4 Replace traditional zoning on the urban fringe with performance—based approaches that establish development potential based on property characteristics and compatibility with neighboring land uses. Traditional zoning codes give standards for units per acre regardless of site conditions. They can leave the impression that more density will be permitted than is actually allowed when a specific site's conditions are evaluated. This idea would prevent unrealistic development expectations and inflated land prices.
  - 3.5 Where traditional zoning is used, ensure consistency of designations with the most likely result of the permitting process.
  - 3.6 Require storm water districts to map wetlands insofar as they contribute to storm water management and record the existence of wetlands on affected property records so the existence of regulated wetlands can be accounted for when land is bought and sold.
4. Measures to increase the responsiveness of local government to property owners.

- 4.1 Require the creation of elected Rural Community Councils in county government with responsibilities for local land use planning.
- 4.2 Require county planning commissions to include representation from small rural land owners. Encourage the creation of planning commissions in home rule counties.
- 4.3 Allow cities and counties in slow growing rural areas to opt over to a rural growth management option under the Growth Management Act.