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Have the U.S. Supreme Court's 5th Amendment Takings Decisions Changed Land Use Planning in California?

Executive Summary

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Purpose of the Study

The Fifth Amendment of the U.S. Constitution requires government to compensate citizens for the taking of private property. Under U.S. Supreme Court rulings, this constitutional takings clause can require government agencies to pay compensation to property owners for regulations that go too far in depriving owners of economically beneficial use of their property.

Beginning in 1987, the U.S. Supreme Court issued a series of decisions on regulatory takings that tended to strengthen these protections. The rulings expanded the ability of private property owners to seek compensation from government for regulations as well as for exactions imposed on them as a condition of approval for development projects.

Some observers have feared that these rulings would impose a “chilling effect,” forcing local governments to either retreat from reasonable use of their regulatory authority or else be overwhelmed by takings lawsuits. Others, more sympathetic to the property rights movement, have hoped the rulings would rein in excessive government regulation. Some have argued the rulings do not go far enough and that additional legislation is needed to protect property rights.

The purpose of this study is to bring some empirical evidence to bear on these issues. Through use of a questionnaire sent to local planning officials, supplemented by interviews and other research, I investigate what effects takings issues¹ are having on the practice of land use planning in California.

Importance of This Topic

There are several reasons why it is important to know what sort of impact the Supreme Court takings rulings are having.

- Exposure to takings liability could impose new fiscal burdens on governments.
- Takings restrictions on the power of exactions could be making it more difficult for local governments to finance infrastructure and services.
- Some have argued that fear of takings lawsuits could have a chilling effect, causing local governments to back away from appropriate regulation and planning of land use.
- Questions have been raised as to whether current laws and precedents on takings adequately protect property rights.

¹ Unless otherwise stated, the terms “takings issues” or “the takings issue” encompass both takings as a set of legal doctrines, and takings as a topic of discussion and debate in local land use planning.

Legal Background and Context

Local authority to regulate land use derives from both common law and the California Constitution. These authorities grant cities and counties a “police power” to enforce regulations to protect the public health, safety, and welfare. Cities and counties exercise this power through a variety of means, including:

- *General plans* that designate the types and intensity of land use allowed in different areas.
- *Zoning ordinances* that implement these standards for specific parcels.
- *Review and approval* of subdivisions, building permits, conditional use permits and variances.

Another important aspect of land use planning is the power of local governments to *exact fees or dedications* from property owners or developers as a condition of approval for their development plans. Fees and exactions of property or in-kind contributions have become an important way in which California’s cities and counties finance infrastructure and public services, in part because of Proposition 13 and other losses of local tax revenue. Takings constraints can thus affect not only how local governments plan their communities, but also how these governments use exactions to provide services and infrastructure.

The protection of natural resources has also become an important aspect of land use management. This is due to both the desires of local citizens and mandates from state and federal laws such as the Endangered Species Act and the California Environmental Quality Act.

The doctrine of regulatory takings places a limit on the police power, one rooted in the Fifth Amendment to the U.S. Constitution, which states, “nor shall private property be taken for public use, without just compensation.” In the 1922 *Pennsylvania Coal Co. v. Mahon* decision, the U.S. Supreme Court ruled that this “takings clause” could be applied not only to physical seizure of property, but also to land use regulation: “while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking.”

Subsequent decisions, such as those in the *Agins* and *Lucas* cases, have made it clear that a regulation totally eliminating economically viable use of a property will usually be considered a compensable taking. But much uncertainty has remained about the definition of a taking in other circumstances.

Against this background of uncertainty, a series of Supreme Court rulings beginning in 1987 greatly heightened the importance and scope of the takings clause. This study is primarily concerned with how these rulings have impacted land use planning during the

post-1987 period. Of particular importance were the *First English*, *Nollan*, and *Dolan* decisions.

The key principles established by these cases were:

- *Monetary damages for takings (the First English precedent)*: The government must pay monetary compensation for an unlawful taking, even a temporary one. Simply removing the offending regulation is not sufficient redress.
- *The “nexus” requirement (the Nollan precedent)*: In imposing exactions or other conditions on the approval of a development project, the government must show that there is an “essential nexus” that relates the public burden imposed by the development to the exaction or conditions imposed.
- *The “rough proportionality” requirement (the Dolan precedent)*: The magnitude of exactions imposed on a development project must be “roughly proportional” to the size of the public impact that the exactions are intended to mitigate.

The changing climate was reinforced in California with the passage in 1987 of the Mitigation Fee Act (AB 1600).² AB 1600 codified standards for the imposition of impact fees that closely resemble the nexus and rough proportionality standards required by the *Nollan* and *Dolan* decisions.³

Questions the Study Addressed

My research focused on the following questions:

- *Visibility of takings issues*: Are concerns about takings a prominent feature of land use issues today? To what degree have local governments taken notice of the Supreme Court rulings? Have the takings rulings created pressure on local governments to change their decisions, practices or policies?
- *What is the impact of takings on land use planning and regulation?* In what ways do takings issues exert an influence, and with what results? Have the takings rulings made local governments more cautious? Has the possibility of takings litigation created a chilling effect on regulation? How have local governments adapted to the changed legal climate?
- *Have the takings rulings had an impact on how local governments use fees and exactions?* Have they reduced the ability to use exactions as a tool for financing public infrastructure and services?
- *What are the policy implications of these changes?*

² California Government Code §§ 66000-66011.

³ Although AB 1600 predated *Dolan* by several years.

Research Methods

This study used two approaches: 1) a survey questionnaire for city and county planners, and 2) a series of six detailed case studies based on interviews and documentary research.

The Questionnaire

In mid-April 1999 the California Research Bureau (CRB) mailed a questionnaire to planning directors in all of California's 472 cities and 58 counties (see Appendix I of the full report for a copy of the questionnaire). The questions in the survey were organized around the themes mentioned earlier:

Visibility of Takings Issues

- To what extent are planners aware of the takings precedents?
- Are people raising objections to government policies and actions based on the takings clause?
- Are many people threatening to sue local governments based on takings claims?

Impact of Takings Issues on Land Use Planning and Regulation

- How common is it for local governments to be sued for alleged takings? Do governments have insurance coverage for costs associated with takings lawsuits?
- Has concern about takings issues caused local governments to make decisions or enact policies that are different from what they would have otherwise done?
- How are local governments adapting to takings issues?

Impact of Takings Issues on the Use of Fees and Exactions

- Have the takings precedents caused local governments to reduce their use of certain kinds of fees or exactions?
- Have local governments changed their policies or procedures with respect to fees or exactions?

Policy Implications of the Takings Issue

- How do the respondents assess the overall impact of the takings issue? Do they think the principles established by the takings precedents are consistent with good land use planning? Do they think the takings rulings and their impacts have interfered with their efforts to regulate land use in the public interest?

The Case Studies

In order to provide a more nuanced and detailed understanding of the issues raised by the survey, I prepared several case studies illustrating specific instances in which cities or counties changed policies, decisions, or procedures as a result of takings issues. I documented the case studies using interviews, archival and newspaper research, and site visits.

Results of the Survey

CRB received survey responses from 37 of California's 58 counties (64%) and 274 of California's 472 cities (58%). I performed follow-up interviews with numerous survey respondents. Below is a summary of the results. It is followed by a summary of the case studies and a discussion of the implications of this research.

Visibility of Takings Issues: Takings Objections

Takings is a source of contention in many cities and counties. In general, takings-related disputes appear to be more frequent at the county level than at the city level. Takings-related objections to policies and decisions arise often (at least once a year for 34% of cities and 64% of counties). Fifty-eight percent of counties and 35% of cities report that such objections arise in the context of fees or exactions. Such objections are particularly common for fees or exactions related to open space, parks, trails, transportation infrastructure, as well as school fees.

Visibility of Takings Issues: Exposure to Litigation and Litigation Threats

Takings litigation threats are reported to be a common occurrence (once a year or more) in 22% of cities and 49% of counties. Actual lawsuits related to takings were reported by 33% of cities and 46% of counties. Yet it appears that very few local governments have any insurance to cover liability arising from takings claims.

Impact on Land Use Planning, Regulation and Exactions

Nineteen percent of cities and 35% of counties reported that they reduced their use of some forms of fees and exactions. Among respondents who indicated what type of fees or exactions have been impacted by this change, the most commonly cited types were for roads and traffic-related infrastructure, open space, trails, or public access to natural resources.

A similar number of cities and counties (17% of cities and 33% of counties) reported that they could identify a specific policy or decision that was changed in response to takings precedents.

I defined the term “changed regulatory behavior” to apply to those respondents who *either*: (1) reduced their use of some types and exactions *or* (2) could identify a specific policy or decision that was changed in response to takings precedents. A total of 27% of cities and 49% of counties met this definition (i.e. they reported either reducing the use of some types of fees/exactions *or* could cite a substantive change in a policy or decision).

Cities and counties are adapting in various ways to takings issues. Fifty-five percent of cities and 89% of counties report that they have adopted new standards for creating written findings or an administrative record of land use decisions. Forty-five percent of cities and 42% of counties report having adopted new standards, guidelines or policies for the use of fees or exactions. About a quarter have performed project-specific AB 1600 studies. Some jurisdictions (16% of counties and 25% of cities) are using development agreements more often as a way of obtaining improvements from developers while avoiding takings litigation.

Implications of Takings: Attitudes of Planners

The survey asked respondents for their overall assessment of the takings issue in a couple different ways. Despite the fact that the *Nollan* and *Dolan* decisions place constraints on planners, a strong majority (74% of cities and 81% of counties) tended to agree that these precedents, when followed carefully, simply amount to good land use planning practice. However, a significant minority of planners (46% of cities and 39% of counties) tended to agree that the legal climate created by the takings issue has been detrimental to their efforts to manage land development for the public interest.

Overview of the Case Studies

The six case studies describe in detail specific instances in which policies or decisions were changed or significantly influenced by takings concerns.

- *City of Murrieta*: Takings objections from a developer forced the city to purchase land for a future freeway overpass rather than exact it as a condition of a shopping center development. This case illustrates how the takings rulings constrain some cities in their efforts to provide traffic infrastructure, particularly when the city tries to extract the improvements from a single developer who objects to paying for a need created in part by other developments besides his own.
- *Santa Cruz County*: This case concerned exactions for public trails. It illustrates how the mobilization of political pressure, rather than the threat of litigation, can be the decisive factor in the local government response to takings issues. Such broad, vocal opposition often arises when countywide or citywide land use policies are at issue.
- *Whaler’s Cove*: Takings disputes often arise over public access to recreational resources such as the coast. In this case, a property owner and her attorney used the *Nollan* precedent to persuade the County of San Mateo and the California Coastal

Commission to permit construction of a beachside bed and breakfast without securing a public access easement across her property.

- *El Dorado County*: The Planning Commission cited property rights concerns as one reason for a set of controversial changes in county land use policies during the general plan update process. This is an example in which takings was used not to force a reversal of policy, but rather as a justification for decisions made by officials who were sympathetic to property rights arguments. This case also illustrates how contentious the general plan process can be, and how the takings issue is often only one among many factors that influence the outcome.
- *City of West Sacramento*: The city decided not to exact an easement from a service station developer for a regional bike path, despite the fact that the city's bicycle master plan calls for such exactions. Here a decision was changed simply by a planner's awareness of takings precedent, without any outside pressure to do so.
- *City of Santa Rosa*: Concern about potential vulnerability to takings lawsuits lead the city to create a new capital facilities fee program. Santa Rosa illustrates how the takings rulings have made some local governments take a more formal, rationalized approach to planning, particularly in the context of developer fees.

Discussion of the Results

Visibility of Takings Issues

Many cities and counties regularly confront takings objections at nearly every stage of the planning process. Takings litigation threats are also a fairly routine occurrence in many cities and counties, as are takings lawsuits.

Although takings objections and litigation threats are often dismissed as mere rhetoric or "hot air," there is no doubt that local governments must often take the threat of takings litigation very seriously. This is especially true because, as the survey shows, it is very rare for local governments to have insurance coverage for the costs of defending, settling, or paying damages in such lawsuits.

Impact of Takings Issues on Land Use Planning and Regulation

While many jurisdictions have not substantively changed their regulatory behavior in response to the takings rulings, the survey data indicate a sizeable minority of them have done so. This effect is much more prevalent in counties than in cities. This might have to do with the fact that counties are more likely than cities to be in control of large areas of undeveloped land, leading to conflicts over sprawl, open space, habitat, agricultural preservation, and so forth. County governments often represent constituents that are widely dispersed both geographically and on the political spectrum.

The survey and case studies show that local governments are responsive to the threat of litigation. For example, cities that experience frequent litigation threats are more likely to have changed policies or decisions in response to the takings rulings.

Property owners, especially those with legal representation, can sometimes sway local governments by raising takings objections or litigation threats. The case studies and survey results provide many such examples. The many uncertainties in takings law often make it difficult to predict the outcome of a lawsuit. In some cases this encourages risk-averse cities and counties to settle lawsuits or change their regulatory practices rather than risk litigation.

There need not be the direct threat of litigation for takings concerns to have an impact. Often local governments make changes of their own volition, in order to comply with the law or avoid takings controversy. In some cases, the change in question is arguably salutary – the regulator backs off from a regulatory practice that is probably unfair to begin with.

At the same time, it must be remembered that a great many respondents reported *not* changing their regulatory behavior, even in jurisdictions that had experienced frequent takings litigation threats or lawsuits. A lawsuit is a very slow and costly process for all litigants. Both planners and developers know that few threats result in actual lawsuits, and local governments probably do not take the majority of such threats seriously.

As the case studies make clear, concern about takings is often one factor among several that influence a decision. Where takings considerations played a role in a policy debate, often there are political and economic factors as well. For example, a city may weigh both potential takings concerns and the economic impacts in considering whether to adopt a new development impact fee.

Impact on the Use of Fees and Exactions

The takings rulings and related concerns have had several impacts on the form and substance of exactions.

Takings Issue Can Encourage Rationalization of the Planning Process

The rules imposed by takings precedent can encourage the planning process to become more systematic, particularly with respect to exactions. The takings rules mean that decisions that are made in an ad hoc or improvisatory way will tend to be more vulnerable to legal challenge than those that are carefully formulated as part of a long-range policy.

As a result, there is a greater need to explicitly justify policies and decisions, and to back up those justifications with evidence and analysis that can withstand judicial scrutiny. As the survey shows, many jurisdictions are spending more time and effort on preparing

findings. Others have developed new policies, standards or studies in support of fees and exactions.

Increased Complexity and Red Tape

One unintended consequence of the takings rulings has been to increase the complexity of the planning process. In some respects, this can be viewed as a salutary effect. The increased attention to preparing thorough findings and the reassessment of impact fees and exactions policies are signs that the planning process has become in some jurisdictions more methodical, predictable and transparent.

As one survey respondent noted, this can make planning more of a science and less of an art. Along with that comes more paperwork, more workload for planners, and slower processing times. This can result in higher costs both for governments and developers. At the same time, however, developers can benefit from the increased transparency and predictability of the process, since one of the greatest risks of land development is the changeable regulatory environment.

Reduced Use of Some Types of Fees or Exactions

Most cities and counties say they have not reduced the use of any types of fees or exactions because of takings. However, the number who say they *have* done so (19% of cities and 35% of counties) is large enough to merit attention. For at least some cities and counties, takings issues are making it harder to provide public services and infrastructure.

The most commonly affected types of fees and exactions seem to be those for roads and traffic, trails, public access, habitat, open space and parks. There seem to be two main factors at work:

1) The problem of cumulative impacts.

Rough proportionality and nexus rules mean that a given developer can only be required to pay for infrastructure and services in proportion to the needs created by his or her own development project. Yet many infrastructure and public service needs are created by the accumulation of small development impacts. Fees and exactions cannot address these needs effectively unless a mechanism is in place for pooling small (proportional) contributions from multiple developers over a long period of time.

In response to the takings rulings, some cities and counties are modifying practices that would unfairly burden a single developer for more than their fair share. For example, the developer who happens to build next to the designated site of a future freeway interchange cannot be required to shoulder the entire cost of the interchange (assuming, as is likely, that the construction of the interchange will be a response to the accumulated impacts of years of growth in the community). These issues arise for all sorts of fees and exactions, ranging from fees for traffic improvements to dedications of easements for public trails.

2) Uncertainty about applying the nexus and rough proportionality standards.

There are rigorous and widely accepted methodologies for calculating certain kinds of development impacts. Traffic impact studies are a common example. But when it comes to other sorts of infrastructure and public goods, such as trails or open space, planners may be uncertain what the law permits and what methodologies can be used to establish nexus and quantify development impacts.

Impact on Fees and Exactions for Roads, Traffic, and Other Infrastructure

The problem of cumulative impacts has changed how many cities and counties handle fees and exactions for road and traffic improvements. For example, a number of cities have abandoned or reduced the practice of exacting right-of-ways from developers for road widening and other purposes because of concerns about rough proportionality. Some local governments have also become more careful about adopting development fees that burden new development with infrastructure needs created by old development. However, these changes can leave fiscally strapped cities and counties in a bind as to how to finance these needed improvements. The cumulative impacts problem also arises for other types of infrastructure, such as bikeways, sidewalks, and drainage.

Impact on Fees and Exactions for the Environment, Recreation, and Quality of Life

Some cities and counties have become more cautious or uncertain about fees and exactions for environmental, recreational and quality of life purposes. These include habitat or endangered species protection, protection of open space, and recreational trails.

The demand for these amenities reflects how the public's conception of local government infrastructure and services has expanded. But when these are provided through fees or exactions, uncertainties may arise about establishing nexus and rough proportionality. These amenities tend to serve community-wide needs and are not as easily linked directly to the impact of a particular development. In communities that are divided on issues such as environmentalism or growth control, these amenities may be inherently prone to controversy. In addition, the courts may tend to scrutinize these kinds of exactions more carefully, on the grounds that they provide benefits rather than mitigate a public harm.

The Problems of Project-Specific Exactions

The area in which takings issues seem to impose the strongest constraints is for project-specific dedications, such as the dedication of a right-of-way or easement. It was more common for respondents to report that they had backed off from a project-specific exaction than it was for them to report a successful challenge to a general fee structure. Ad hoc exactions are not as likely to be well supported by general policies and carefully worked out documentation of nexus and rough proportionality.

The takings rulings seem particularly sensitive to practices involving the exaction of land. This may be because the Court feels that such exactions go directly to the core values of property ownership: the right of private individuals to physically control their property and exclude the public from their land. This tends to arouse both property owner opposition and judicial scrutiny.

In addition, project-specific exactions of land tend to be scaled not to the impacts of the development, but instead to specific needs the local government has at the time. For example, a county might have its eye on a strip of land that would be very useful as a trail link or right-of-way. It would be tempting to require it as a dedication when the owner seeks to develop the land, but this may lead to nexus or rough proportionality objections unless the dedication is related to and proportional to the impacts of the project.

The Impact on Planning Outside the Fee/Exaction Context

Takings issues can also arise when local governments regulate the type or density of land use through general plans, zoning and subdivision approvals. The survey indicates that these stages of planning are often subject to takings objections, and a number of cities and counties are changing policies and decisions to avoid takings issues.

Unlike exactions, the nexus and rough proportionality standards do not apply to these areas of planning. The *Lucas* precedent establishes that a total wipeout of property value will be a compensable taking, but ambiguity remains about whether a takings occurs when there is a partial loss of property value. Local governments are generally considered to have considerable leeway to impose regulatory losses through downzoning or downplanning (reducing the allowable density of construction) without violating the takings clause.

Even without takings issues, land use planning can be very controversial and involve very high stakes. General plans, zoning and subdivision issues can involve large numbers of property owners and/or large amounts of land. They are often tied to potentially divisive issues such as growth control and environmentalism. Some of the changed regulatory behavior in this area may be attributable to a chilling effect – a desire to avoid the risk of takings litigation. But in many cases the reason is really political. Sometimes elected officials just sympathize with the position of property owners. Or, they may bow to the political pressure exerted by vocal constituencies.

Summing Up the Policy Implications

Constraints on Exactions as a Public Finance Tool

Takings rules and concerns about litigation can close off avenues of financing public infrastructure and services. For example, a city may see a piece of land being developed that it knows should be set aside for a future freeway interchange. Takings rules might prohibit it from being exacted, since such an exaction would be disproportionate to the

development's impacts. At the same time, budgetary constraints may prevent it from being purchased.

Similarly, new development cannot be fully burdened with the costs of infrastructure created in part by previous development. Yet the chance to exact the contributions from past development may already have come and gone. While the takings rules promote equity in these situations, there is still the unanswered question of how these infrastructure needs should be funded.

Furthermore, the takings rules raise subtle legal questions about the types of exactions that can be defended successfully. This may make some jurisdictions excessively cautious about using exactions to collect fees where they are concerned about the ability to quantify impacts or establish an airtight nexus between the mitigation measures and the development impacts. In part this reflects uncertainty about legal issues that can only be resolved by the courts. Yet it may also reflect a need for better sharing of information on fee methodologies and ordinances among local governments.

Exposure to Legal Liability Can Distort Planning Process

While litigation can be one way of holding government accountable, it is probably not desirable for city and county policy decisions to be based solely or mainly on the fear of litigation costs. How can the distorting effect of the takings legal climate be addressed?

Defending a lawsuit can be prohibitively costly even if the takings claim is not valid. Furthermore, takings law is notoriously unpredictable, and unexpected lawsuits or judgments are always a possibility. One issue that deserves further exploration is the lack of insurance among cities and counties.

However, the best way to reduce the distorting influence of takings litigation is to avoid disputes over takings altogether. For this reason, takings can provide strong incentives to plan more systematically, and to plan ahead more. Such changes would yield the most benefit in communities that still have some significant growth ahead of them.

The need for cities and counties to adopt rational, comprehensive fee structures as early as possible is one aspect of this approach. Some other examples:

- The best opportunity to guarantee public access to a beach or river may be years before a developer proposes to build next to it.
- Similarly, a city or county has a much better chance of preserving open space if low-density zoning in undeveloped areas is a feature of its general plan long before anyone proposes building on the land in question.
- A city is less likely to unexpectedly thwart a property owner's reasonable development expectations (a crucial element of many takings claims) if the permit and design review processes are closely integrated with their zoning ordinance.

- Land needed for freeway interchanges would ideally be secured before extensive development drives up property values.

In general, a cornerstone of any successful takings claim is the owner's contention that his or her "investment-backed expectations" were thwarted by a regulatory action (a principle enshrined in the U.S. Supreme Court's seminal *Penn Central* decision). Hence, a local government protects itself from takings claims by thinking long-term, laying the groundwork for project-specific findings with appropriate policies and goals in the general plan, specific plans, zoning ordinances, and so forth.

Areas for Further Research

This study leaves some important questions about the impact of the takings rulings unanswered, including:

- Why are takings issues and related changes more prevalent in counties than in cities?
- Takings litigation: what kinds of lawsuits are occurring? How significant are the judgments and settlements being paid out? How much money is being spent defending such cases? What sorts of situations and actions have given rise to the most costly lawsuits?

At the same time, this study has indicated some common themes and problems that arise in many cities and counties. This information can help to provide a basis for discussing possible responses to the takings issue. Among the possible lines for further inquiry:

- How should fees and other ordinances be structured to avoid takings problems?
- What is the state of the art for documenting nexus and rough proportionality for various kinds of fees? What methods and approaches should local governments feel safe using, and which methods and approaches are legally risky?
- What are the options for insuring local governments against takings claims?
- What options exist for funding infrastructure in cities and counties that are too built-out to raise significant capital through impact fees?
- How can strategies for avoiding takings disputes be incorporated into the routine practice of local land use planning throughout California?