



Questions and Answers About Wisconsin's Takings Law

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What is the takings issue all about?

The takings issue recognizes the need to balance two competing principles: respect for the property rights of individuals and the public's ability to further the interests of all citizens by regulating an individual owner's potential uses of land. Often these principles are expressed when one property owner argues: "I can do what I want with my property" while another property owner counters: "You cannot use your property in a way that will harm the interests of the community." It is difficult to draw an exact line separating the two interests. Instead, courts have developed various rules that attempt to balance private rights and public rights within the confines of both the United States and Wisconsin Constitutions. This balancing also occurs within the context of an increasingly complex society so the rules are constantly evolving.

What does the Constitution say about the relationship of private property rights to public rights?

The Fifth Amendment to the United States Constitution states "... nor shall private property be taken for public use, without just compensation." This phrase is known as the "Takings Clause." The Fifth Amendment to the United States Constitution is one of the ten amendments, known as the "Bill of Rights," added to the Constitution in 1791. The original purpose of the Takings Clause was to help define the basic relationship between private property and the federal government—the government can seize or take private property only when the government pays for it. The origins of the Takings Clause have been traced back over 750 years to the development of the Magna Carta in England. The Magna Carta included a provision to limit the King's seizures of land from the English nobles for his own use. The Fifth Amendment incorporated this English legal tradition into the United States Constitution.

For many years, the Takings Clause of the United States Constitution was a limitation on only the power of the federal government and not on the activities of the states. It was not until 1897 that the United States Supreme Court decided that the Fifth Amendment could apply to the states. The Wisconsin Constitution, however, has provided limitations on the taking of private property by the state and local governments since Wisconsin became a state in 1848. Article I, section 13, of the Wisconsin Constitution is similar in wording to the Takings Clause of the United States

PRINCIPLES OF TAKINGS LAW IN WISCONSIN:

A Brief Summary

- Private property is held in subordination to the rights of society. Although one owns property, they may not do with it as they please, any more than they may act according to their personal desires. As the interest of society justifies restraints upon individual conduct, so also does it justify restraints upon the use to which property may be devoted. *State v. Harper (1923)*.
- Property owners who are limited in the use of their property find compensation in the benefits accruing to them from like limitations imposed upon their neighbor. *State v. Harper (1923)*.
- A regulation will be upheld if it furthers a public purpose and leaves a property owner with some economically viable use of their property. *Zealy v. City of Waukesha (1996)*.
- While property owners have a right to the reasonable use of their property, neither the United States nor Wisconsin Constitutions guarantee the most profitable use. *Just v. Marinette County (1972)*.

Constitution and provides that "the property of no person shall be taken for public use without just compensation therefore."

Originally, the Takings Clause applied only to the direct appropriation of private property by the government usually through the power of eminent domain. The power of eminent domain is the power of the state to take private property without the consent of the property owner through a process known as condemnation. The government can condemn or take property as long as it is for a legitimate public purpose and the government pays the property owner for the loss of their land.

In the 1920s, the United States Supreme Court opened the door to the possibility of applying the Takings Clause to regulations enacted under government's police power in a case called *Pennsylvania Coal Co. v. Mahon* (1922). The police power is a vague concept that encompasses the power of promoting the public welfare by restraining and regulating the use of liberty and property. The Court in *Mahon* recognized that while governmental regulation of property was appropriate, if the regulation is too restrictive, it would be the same as if the government had taken the property through condemnation which requires compensation to the property owner for the loss. This aspect of the takings issue is known as "regulatory takings."

While courts recognize that both the United States and Wisconsin Constitutions place limits on the ability of the public to regulate private property, the courts still recognize the importance of the public's right to regulate private property to achieve a legitimate public purpose. In the case where the Wisconsin Supreme Court first decided that zoning land is not a "taking," the court stated that the right of government to protect and promote the public welfare outweighed those individual property rights protected by the Constitution. According to the court:

"Although one owns property, he may not do with it as he pleases, any more than he may act in accordance with his personal desires. As the interest of society justifies restraints upon individual conduct, so also does it justify restraints upon the use to which property may be devoted. It was not intended by these constitutional provisions to so far protect the individual in the use of his property as to enable him to use it to the detriment of society. By thus protecting individual rights, society did not part with the power to protect itself or to promote its general well-being. Where the interest of the individual conflicts with the interest of society, such individual interest is subordinated to the general welfare." *State v. Harper* (1923).

Is it a taking if a government regulation impacts the value of my property?

Not necessarily. The courts recognize that many regulations which impact the value of property are a cost of living in a civilized society. From a practical standpoint, the United States Supreme Court has acknowledged that "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." *Pennsylvania Coal Co. v. Mahon* (1922). In addition, while certain regulations may diminish the value of property, other regulations increase the value of private property. The Wisconsin Supreme Court has found that: "He who is limited in the use of his property finds compensation therefore in the benefits accruing to him from the like limitations imposed upon his neighbor." *State v. Harper* (1923).

As a result of these and many other factors that courts look at when faced with a lawsuit alleging a taking, courts have been reluctant to develop detailed criteria for evaluating taking claims based on the loss of value to property. Instead, the courts often engage in an analysis of the facts presented in the particular case and balance the public and private interests involved. The fact specific nature of the takings analysis requires that the facts of a case be developed as fully as possible, such as by insuring that all decisions have been made regarding how the regulations apply to the property in question, before the case is decided by a court.

Whether the impact of a regulation is so great as to constitute a taking is therefore often a question of degree based on the facts of a case. According to the Wisconsin Supreme Court, if a regulation impacts many property owners in a similar situation "and ought to be borne by the individual as a member of society for the good of the public safety, health or general welfare," then it will not be a taking. However, if the damage to an individual property owner is so great "that he ought not to bear it under contemporary standards, then courts are inclined to treat it as a 'taking' of the property." *Stefan Auto Body v. State Highway Commission* (1963). The United States Supreme Court has also stated that the Fifth Amendment to the United States Constitution is "designed to bar government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Armstrong v. United States* (1960).

When have the courts found that governmental actions constitute a taking of property?

On several occasions the Wisconsin and United States Supreme Courts have found that certain governmental actions are so intrusive that they are a taking of property requiring compensation. For example, many years ago the Wisconsin Supreme Court held that a state statute limiting the height of buildings around the state capitol in Madison was a taking. *Piper v. Ekern* (1923). The court has also held that damage to private property caused by a state prohibition on hunting on privately owned land was a taking. *State v. Herwig* (1962). In *Bino v. City of Hurley* (1955), the Wisconsin Court held that a local ordinance which denied a riparian owner of the use of a lake for swimming and boating because it was the city's drinking water source was a taking.

Generally, the courts have found that a governmental action will be a taking if it: (1) results in the physical occupation or invasion of property by the public, such as an easement, flooding caused by the construction of a dam, covering someone's property with dirt, or requiring the disclosure of confidential data; (2) results in the loss of the title to all or a part of land; (3) interferes with the right to pass on property to one's heirs; or (4) denies a land owner all economically beneficial or productive use of land.

What is meant by the denial of all economically beneficial use of land?

In order for there to be a taking, governmental activity generally has to deny a property owner all or almost all use of their property. Government regulations that deny only some of the uses or some of the value of property generally will not be a taking. In *Jefferson County v. Timmel*, (1952), for example, the Court held that a zoning ordinance which allegedly destroyed fifty percent of the value of the property at issue was not a taking. Nonetheless, the impact of a regulation on a property owner's reasonable investment-backed expectations for the property is important when measuring the remaining use or value of the property. These expectations do not include the speculative profits from future development.

Situations may also arise where a property owner wishes to take land, which may have limited value because of natural features such as wetlands, change the character of the land through filling and other means, and build a house or commercial building that destroys the wetland. If the property owner is denied the right to change the natural character of the land, the property owner might believe their property has been taken. The Wisconsin Supreme Court, however, has held that people do not have an absolute right to change the natural character of land and use it for a purpose for which it is not naturally suited. *Just v. Marinette County* (1972); *Zealy v. City of Waukesha* (1996). The economic impact of environmental regulations on property should therefore be based on the value of the land in its natural state and not the value that the land could potentially have after it is altered to something other than its natural condition. This applies to wetlands within a shoreland area, land within a primary environmental corridor, or an isolated swamp.

The United States Supreme Court has stated that even if a regulation denies someone all economically beneficial use of their land, government may not have to pay compensation if the regulation is consistent with limitations based on certain property and nuisance laws. *Lucas v. South Carolina Coastal Council* (1992).



Is it a taking if a regulation limits the use of only a part of my property?

No. When evaluating whether a regulation that impacts only a part of someone's property is a taking, the uses that can be made of the entire property must be considered. The restricted portion of the property should not be isolated from remaining property. *Zealy v. City of Waukesha* (1996). For example, a portion of land impacted by a requirement in a zoning ordinance that prohibits all development within a certain distance from a road is not a taking of that land if the property owner can still construct a house on land not impacted by that requirement.

If a governmental activity is a taking, can the government avoid paying for it?

No. When a governmental action is a taking, the public must compensate the property owner for the entire time that the action impacted the property. The government cannot avoid compensating the property owner by simply rescinding the regulation. *Zinn v. State (1983)*; *First English Evangelical Lutheran Church v. County of Los Angeles (1987)*. The government can, however, rescind the regulation to limit its liability.

What is meant by "vested rights"?

A concept related to the takings issue is that of "vested rights." "Vested rights" refers to the government's permission to develop property that cannot be taken back by a subsequent governmental act. A right vests at the point in time when a proposed development is protected from changes in local regulations, such as zoning, by the local governing body. Generally, an owner of undeveloped property does not have a vested right in the existing zoning of the property. For example, the governing body of the community may rezone an undeveloped parcel of property from commercial to single-family residential. The property owner, who has not applied to develop the property, has no vested right in the commercial zoning classification for that property. In Wisconsin, the right to the particular zoning of a parcel of property vests when the property owner applies for a building permit which complies with the regulations which apply to the property. *Lake Bluff Housing Partners v. City of South Milwaukee (1995)*.

Is it a taking if a community requires that a developer dedicate land to the public in a proposed subdivision?

No. The Wisconsin Supreme Court has recognized that it is appropriate for communities to require that developers dedicate land to the public or pay fees instead of dedicating land because of the beneficial actions taken by the community that make the development possible:

"The municipality by approval of a proposed subdivision plat enables the subdivider to profit financially by selling the subdivision lots as home building sites and thus realizing a greater price than could have been obtained if he had sold his property as unplatted lands. In return for this benefit, the municipality may require him to dedicate part of his platted land to meet a demand to which the municipality would not have been put but for the influx of people into the community to occupy the subdivision lots." *Jordan v. Village of Menomonee Falls (1965)*.

Nevertheless, there are limitations on the government's ability to exact land, fees, or place other conditions on the right to develop property. In order to avoid a taking, the "type" of condition imposed must address the same "type" of impact caused by the new development. For example, it is not a taking to impose storm water restrictions if the proposed development will cause storm water runoff impacts. In addition, the condition imposed must be roughly proportional to the impact created by the proposed development. In other words, if a proposed development will add forty trips per day to a community's roads, it is not appropriate to require that the developer pay the entire costs of a new road which will be used by many people throughout the entire community. ☺



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July, 1997