

PROTECTING PROPERTY RIGHTS TO REDUCE LIABILITY



Local boards and officials who act to protect their communities from flood hazards may face two types of legal challenges. An owner of land in a floodplain may challenge zoning or other regulations limiting the use of that land as an unconstitutional “taking.” Other land owners, whose property has been damaged by flooding, may claim that the municipality is liable for the damage because it was caused by municipal action or inaction. Careful local planning and regulation is the best defense to either challenge.



Courtesy of www.archives.com

The “Takings” Clause

The Fifth Amendment to the United States Constitution guarantees that private property shall not be taken by the federal or a state or local government for public use without just compensation (the “Takings Clause”). Chapter I, Article 2, of the Vermont Constitution provides a similar protection. In deciding cases under either Constitution, the Vermont Supreme Court looks to the U.S. Supreme Court’s Fifth Amendment decisions. See *Chioffi v. City of Winooski*, 165 Vt. 37, 676 A.2d 786 (1996) (U.S. Constitution) and *Killington, Ltd., v. State*, 164 Vt. 253, 668 A.2d 1278 (1995) (Vermont Constitution).

Regulations that “take” *some* of what citizens think are their property rights are often derided as being unconstitutional “takings”. Many attempts at even mild land use regulation run aground against angry landowners or developers arguing that they have an absolute, constitutional right to build on property. But, while claims like this may sound scary to volunteer local officials, there is no such absolute constitutional right.

What is a Taking?

Eminent Domain. In the classic Takings Clause case, the government condemns and takes title to property for a public use by eminent domain under a law that provides a method of determining the compensation to be paid. For example, under 10 V.S.A. §§ 958-959, the Vermont Department of Environmental Conservation may use eminent domain proceedings to take land necessary for a flood control project.

What is a Taking? (cont'd)

Regulatory Takings. Courts also recognize that a regulation that doesn't involve eminent domain proceedings may have such a significant effect on property that it is a taking under the Fifth Amendment. The landowner may be compensated for such a "regulatory taking" by bringing a court action for "inverse condemnation." In the recent case of *Lingle v. Chevron*, 544 U.S. 528 (2005), the United States Supreme Court significantly narrowed the opportunity for regulatory takings challenges, saying that a regulatory taking would be found only when the effect on the property owner was the "functional equivalent" of the actual taking of title by eminent domain.



Courtesy of www.supremecourtus.gov

The Court defined four categories of regulatory takings as identified in its prior decisions:

1. Government has physically occupied the property permanently (*Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982)). For example, a municipal activity diverting water that floods private land. See *Sargent v. Town of Cornwall*, 130 Vt. 323, 292 A.2d 818 (1972) (diversion of natural stream by clogged culvert).

2. Government regulation or action has denied all economically viable use of the property (*Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992)). For example, regulations denying the right to build or conduct any activity in a flood plain. The landowner must prove that there is no alternative use that would preserve some value for the land. Courts have found various alternative uses that sustain floodplain regulation. See *Gove v. Zoning Board of Appeals*, 444 Mass. 754, 831 N.E.2d 865 (2005) (open space). Moreover, under *Lucas* even where regulation deprives land of all economically beneficial use, no compensation may be due if the purpose is to prevent a dangerous use. See *Mansoldo v. New Jersey*, 187 N.J. 50 (2006).

3. Government action has a significant economic impact on the land owner and also has an effect on the owner's "investment-backed expectations" or imposes an undue burden on the landowner (*Penn Central Transp Co. v. New York City*, 438 U.S. 104 (1978)). For example, regulations that permit only certain uses in a flood plain. Courts have recognized the public hazard created by developing flood prone areas, to the occupants, to up and downstream owners, and to the public generally because of increased costs and have generally held that mitigation of this hazard outweighs reduction in property value. See *Gove v. Zoning Board of Appeals* and *Mansoldo v. New Jersey*, cited above; *Krahl v. Nine Mile Creek Watershed District*, 283 N.W.2d 538 (Minn. 1979) (filling would create flood danger).

4. Government action imposes conditions on the grant of a permit that are not linked to the governmental power to deny a permit (*Nollan v. California Coastal Commission*, 483 U.S. 825 (1987)) and not “roughly proportional” to the purpose impact of the development (*Dolan v. Tigard*, 512 U.S. 374 (1994)). For example, a requirement of an easement for flood waters. See *Smith v. Town of Mendon*, 4 N.Y.3d 1 (2004) (approving conservation easement restricting development in flood hazard area).



Courtesy of www.mass.gov

Should I Worry? Not for the reasons you may think.

Developers and landowners may attempt to use takings litigation (or the mere threat of litigation) to persuade government officials to relax or abandon land use controls designed to regulate development in a flood hazard area. However, as the previous discussion suggests, the threat of takings liability is more myth than reality. In reality, courts will support carefully drafted and applied floodplain regulations against Takings Clause challenges.

State and local governments are more likely to be successfully sued for engaging in activity (such as failing to enforce regulations, or in a few states, allowing development) that causes or exacerbates damage in future floods than for prohibiting such development. See, for example, *Bragg v. City of Rutland*, 70 Vt. 606 (Vt. 1898) (city liable for damages resulting from drain obstruction); *Alger v. Department of Labor & Industry*, 917 A.2d 508, 2006 VT 115 (2006) (failure to enforce housing code could be taking); *Hutcheson v. City of Keizer*, 8 P. 3d 1010 (Ore. 2000) (liability for approval of subdivision plans that led to flooding).

Notwithstanding the rhetoric of the property rights debate, local officials are the true defenders of property rights. The overwhelming majority of property owners in the United States are homeowners whose interests are protected and property values enhanced by local zoning and other land use controls.

Communities should be more concerned about liability for assisting or permitting poorly planned development that harms others than the risk of being sued for preventing that harm in the first place.

If towns build a proper record of the adoption of their regulations and actions on permit applications; work closely with the municipal attorney, the state floodplain coordinator, your regional planning commission, and other land use experts to address real hazards; avoid unduly severe economic hardships; and proceed in a fair and equitable manner, you should prevail in court or avoid costly litigation altogether.

Meeting Minimums is Not Enough

Community leaders may believe that adopting the minimum regulatory standards under the National Flood Insurance Program will protect them from liability from both fronts of concern: developers threatening takings litigation and landowners at possible risk of damage in the next flood. Unfortunately, they may be wrong on both counts.

FEMA itself supports the adoption of higher regulatory standards than it promulgates. Communities may adopt such higher standards without incurring takings liability if they carefully follow the procedural steps suggested above. Communities that fall back on just the minimum federal standards may allow diversion of floodwaters onto other properties, loss of channel conveyance and storage, and an increase in erosive velocities, all of which may make the community liable under the Takings Clause or for negligence.

*Ultimately, any new development that is allowed to adversely impact other properties may make **the community liable**, even if minimum standards are met. Therefore, it is incumbent upon local officials to adopt flood regulations that truly do protect their communities, then administer these fairly and consistently, and enforce them when need be.*

Additional fact sheets include:

- #1 Floodplain Basics
- #3 Living with Inadequate Maps
- #4 Using Freeboard and Setbacks to Reduce Flood Damage
- #5 No Adverse Impact Floodplain Management
- #6 Protecting Lives & Property Through the NFIP Community Rating System.

For more information, contact:

VTDEC River Management Program

www.vtwaterquality.org/rivers/htm/rv_floodhazard.htm

Vermont Law School's Land Use Institute

<http://www.vermontlaw.edu/elc/landuse/>

Two Rivers-Ottawaquechee Regional Commission

www.trorc.org

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