

Fiscal Note & Local Impact Statement

122nd General Assembly of Ohio

BILL: Am. Sub. H.B. 294

DATE: October 22, 1997

STATUS: As Passed by the House

SPONSOR: Rep. Batchelder

LOCAL IMPACT STATEMENT REQUIRED: Yes

CONTENTS: Requires a process by which state agencies and local governments review and assess their government actions that may result in a taking of property

State Fiscal Highlights

STATE FUND	FY 1998	FY 1999	FUTURE YEARS
Attorney General - General Revenue Fund and other funds			
Revenues	- 0 -	- 0 -	- 0 -
Expenditures	Potential \$17,500 to \$25,000 increase	Potential \$35,000 to \$50,000 increase	Potential \$35,000 to \$50,000 increase
Environmental Protection Agency – General Revenue Fund and other funds			
Revenues	- 0 -	- 0 -	- 0 -
Expenditures	Potential \$19,170 to \$24,975 increase or more	Potential \$38,340 to \$49,950 increase or more	Potential \$38,340 to \$49,950 increase or more
Other affected state agencies - General Revenue Fund and other funds			
Revenues	- 0 -	- 0 -	- 0 -
Expenditures	Potential increase	Potential increase	Potential increase

- The Attorney General’s office may incur a \$35,000 to \$50,000 annual expenditure increase through the addition of one Assistant Attorney General to manage an increase in state agency representation that may coincide with increased litigation as a result of this bill.
- Each affected state agency may incur expenditure increases when and if they review and prepare a written assessment of their governmental actions, and share the expense of any potential alternative dispute resolution activities. Additionally, the Environmental Protection Agency may potentially incur a \$38,340 to \$49,950 annual expenditure increase for the addition of one position specializing in property valuation.

Local Fiscal Highlights

LOCAL GOVERNMENT	FY 1998	FY 1999	FUTURE YEARS
Counties, municipalities, townships and other political subdivisions			
Revenues	- 0 -	- 0 -	- 0 -
Expenditures	Potential increase depending upon volume of activity and current staffing levels	Potential increase depending upon volume of activity and current staffing levels	Potential increase depending upon volume of activity and current staffing levels



- This bill may result in expenditure increases to local governments through the process of reviewing and producing written assessment of their actions as required under the bill. Additional expenditures could be incurred by county boards of revision, which shall review property values when it has been determined that a taking has occurred. The expenditures may include additional staff, or moving other duties around to perform the valuation, as well as all associated costs for public hearings.

Detailed Fiscal Analysis

An Overview of the Bill

Under the bill, the General Assembly finds that governmental action shall evoke the protection afforded private property owners through Section 19 of Article I of the Ohio Constitution and the Fifth and Fourteenth Amendments of the United States Constitution, and that the enhanced attentiveness of the impact of government action on the value of private property will facilitate the protection of private property, through the review process set forth under this bill. To this end, the bill sets forth that government agencies review their government actions in terms of their impact on private property. A government action occurs when the General Assembly, any department, division, commission, board or similar body of the executive branch of state government, or a municipal corporation, county, township, or other political subdivision, in relation to real property or interests therein¹:

- *enacts or amends a statute;*
- *adopts or amends an administrative rule;*
- *issues a permit, license, authorization, variance, or exception that limits the use of property as a condition of issuance or that requires a developmental exaction as a condition of issuance unless the owner of the affected property agrees to the condition, limitation, or developmental exaction;*
- *denying a permit, license, authorization, variance or exception.*

These governmental actions apply to a municipal corporation, county, township or other political subdivision, but are limited to the areas of (1) zoning codes; (2) subdivision regulations; (3) building codes; (4) urban sediment rules; (5) health codes; (6) fire codes; and (7) annexation.

Government agencies will review their action based upon a written summary of case law prepared annually by the Ohio Attorney General (AG). This summary will advise agencies on the constitutional provisions afforded private property and the law administering government actions. If there have been no changes in existing case law since the distribution of the last written summary, it is sufficient for the AG, when distributing to all government agencies, to only note that there have been no case law changes. Agencies will utilize the summary to help in

¹ Government action does not include the process by which property is taken and compensated for (i.e. eminent domain) under ORC 163.01 to 163.22; actions that lessen the impact of prior governmental actions; law enforcement activities; orders that an agency is authorized by the revised code, local ordinance or local resolution issued in response to a violation of the revised code, local ordinance, local resolution or agency rule, or other applicable laws; governmental actions required by specific statutory or regulatory criteria required to be applied by applicable federal, state or local law; the approval or denial of a planned unit development.

the identification of actions that may require compensation to a private property owner. The legal advisor of each agency shall counsel the agency on methods used to eliminate any taking of private property. The written summary shall not be considered legal advice.

If, through the review process, the agency determines that the action would probably result in a taking and would probably require compensation, the agency must prepare a written assessment which shall: (1) describe how the action may affect the use or value of private property; (2) identify the purpose of the governmental action; (3) consider alternatives to the proposed governmental action that would ensure that the governmental action would probably not result in a taking of private property; and (4) estimate the potential cost to the agency if the action requires compensation. No government action that may result in a taking can be finalized unless the assessment is completed and submitted to the appropriate authorities (except in the case of an immediate threat to health, public safety and general welfare in which the process may be completed after the action has been taken). The government agency shall not be required to prepare a written assessment if the agency specifically reviews the governmental action to determine whether or not a takings has occurred and a notation of the determination is included as a public record.

Before implementing a governmental action that requires the completion of a written assessment, copies of the written assessment must be sent: (1) to the Governor, Office of Budget and Management and Attorney General - if the state, General Assembly, or any agency, department, division, commission, board or similar body of the executive branch is implementing the action; and (2) to the appropriate legislative office and legal advisor of the subdivision - if a municipal corporation, county, township, or other political subdivision is implementing the action.

If a plaintiff in a civil action against an agency establishes that a governmental action resulted in a taking, which requires compensation to a private property owner, the court shall award reasonable attorney's fees and the court costs of bringing the action. However, if the governmental agency, in a civil action, stipulates that their action resulted in a taking, the court shall not award reasonable attorney's fees and the court costs of bringing the action, unless the court finds that the governmental agency acted in bad faith as evidenced by the amount of the offer of compensation for the taking. The court shall notify the county auditor, in the county in which the property is located, of any change in the property's value and forward a copy of the judgment entry to the county auditor where the property is located, and the value of the property shall be adjusted accordingly.

If a dispute arises as to whether a governmental action is a taking, and both parties agree, the issue may be resolved by alternative dispute resolution through either arbitration or mediation. Each party shall pay its own attorney and expert witness fees and shall split the costs of the mediator or arbitrator.

Background Information: What have other states done?

State laws relating to the takings issue abound in the United States. Different states have developed different approaches of how to adequately and fairly compensate private property owners when a taking occurs. Unfortunately, any degree of uniformity in state laws is quickly tossed aside by examining only a handful of these laws. In fact, state takings laws are so varied that the United States Congress was moved to introduce legislation. The federal legislation

introduced in the House of Representatives in 1995 would attempt to statutorily interpret the takings clause of the U.S. Constitution. In addition it would expand the definition of a regulatory taking to include certain governmental actions which reduce the market value of land by more than 20 percent.² The U.S. Senate is contemplating an even more comprehensive bill.

According to the National Conference of State Legislatures (NCSL), 12 states passed laws pertaining to the takings issue in 1995. Two other pieces of legislation were defeated in Oregon and Washington by the governor and the electorate, respectively. (Washington passed a law in 1991 that is similar to H.B. 533.)³ That leaves newly enacted legislation in Arizona, Florida, Idaho, Kansas, Louisiana, Mississippi, Montana, North Dakota, Oregon, Texas, Virginia and Wyoming.⁴

Most of the state legislation passed in 1995 can be categorized as general legislative guidelines. That is, these states enacted bills that contained provisions related to creating a prescribed format for local or state agencies to follow when proposing a governmental action. In Idaho, for instance, House Bill 290 required local governments to follow state guidelines when passing ordinances, laws or rules. Under the state guidelines, the Idaho Attorney General established a guide and checklist for state agencies to use whenever they were promulgating rules. Similar legislative acts were passed in Kansas, Louisiana, Montana, North Dakota, Virginia, Texas and Wyoming.

Laws passed in Florida and Oregon implemented a certain economic threshold upon which a property would be compensated. Laws passed in Louisiana, North Dakota and Texas, although containing general legislative guidelines, also contained provisions overlapping this category. A governmental action that diminishes the economic value of private property would, therefore, constitute a taking. Louisiana, North Dakota and Texas each prescribe guidelines for state or local governments to use when proposing a governmental action such as a regulation. In North Dakota, state agencies must prepare a written assessment of any proposed rules that might limit the use of private real property. Under North Dakota's law, a "regulatory taking" would include a reduction in property value of more than 50%. In Louisiana the threshold is 20% and in Texas it is 25%.

Generally, a government must prove that a legitimate public purpose exists or that the restriction is roughly proportional to the impact of the proposed land use. Of the 12 laws enacted last year, only Arizona's primarily pertained to this type of takings issue. The legislation basically authorized a property owner to appeal a restriction placed on their private property by a local government. In the appeal process, the local government would then have to prove that its restriction is roughly proportional to the impact of the proposed land use and that an essential nexus between the regulation and the government purpose exists.

² Ely, James W., "A Breather on the Takings Issue," ABA Journal, January 1996, p. 44.

³ Morandi, Larry, "State 'Takings' Legislation Update," National Conference of State Legislatures, December 31, 1995, p. 2.

⁴ The Oregon Legislature passed two bills. One of which was vetoed by the governor and the other which related to the State Board of Forestry and the harvest of trees on private property and was enacted.

By way of comparison, this bill could be categorized under “general legislative guidelines.” Most of the provisions in this bill pertain to the Attorney General establishing a format or set of guidelines for local and state agencies to follow when proposing governmental actions. Economic thresholds, similar to those created in Louisiana, North Dakota or Texas, do not exist in this legislation. Written assessments of takings would be performed by following the AG’s format.

State Fiscal Effects

The bill has fiscal impacts on the state level in two ways: (1) potential expenditures to the Ohio Attorney General’s (AG) office, specifically through an increase in representing state agencies in takings litigation; and (2) potential expenditures to state agencies that issue governmental actions, through the review and preparation of written assessments of their governmental actions, and, to increase staff expertise in the area of property valuation, and potential costs of alternative dispute resolution.

The Attorney General’s Office

Under the bill, the AG must annually provide a written summary of takings case law that will help government agencies judge if their actions constitute a taking. How will these responsibilities impact the AG? A good starting point is to review how other states’ AG offices, with similar types of law already in the books, have prepared their summaries.

Idaho

Under Idaho’s law, state and local governments must evaluate proposed regulations to assure that they do not constitute a taking of private property that would require compensation.⁵ In the review process, the affected governments must follow guidelines prepared by Idaho’s Attorney General office. Idaho’s AG has carried out its responsibilities by preparing an “Advisory Memorandum,” which will assist agencies “...to develop an orderly, consistent internal management process for state agencies and local governments to evaluate the effects of proposed regulatory or administrative actions on private property.”⁶ The Advisory Memorandum goes on to state that this is only a recommended process, not a formal Attorney General opinion. Furthermore, agencies should only use the guidelines to identify situations in which further assessment by legal counsel is warranted. In general, the guidelines discuss background principles pertaining to the constitutional basis of takings, and the case law that has and continues to evolve around takings. Then, the guidelines pose a series of questions, in context with an appropriate case history(s), for government agencies to utilize as they assess if their actions may contain constitutional implications and warrant further legal review.

Washington

In 1991, the Washington State Legislature passed the Growth Management Act requiring that state’s AG to “...develop an orderly, consistent process that better enables state agencies and local governments to evaluate proposed regulatory and administrative actions to assure that such

⁵ Morandi, Larry, “State ‘Takings’ Legislation Update,” National Conference of State Legislatures, p. 2.

⁶ Attorney General of Idaho, “Idaho Regulatory Takings Act Guidelines,” October 1995, p. 4.

actions do not result in unconstitutional takings of private property.”⁷ Washington’s AG set up a strikingly similar framework to Idaho’s, in that the advisory memorandum is only a recommended process and “...should not be construed as an opinion by the Attorney General on whether a specific action constitutes a taking or a violation of substantive due process.”⁸ Additionally, their guidelines also contain general principles, including information on the history of the takings clause, substantive due process and remedies; and warning signals, which contain questions, with appropriate corresponding case law, that the reviewing government agency should ask itself before implementing an action.

Impact on Ohio’s Attorney General

Again, under the bill, the Ohio AG must prepare a takings case law summary that will help government agencies judge if their actions constitute a taking. If the Ohio AG utilizes the same framework as Idaho and Washington in preparing their guidelines, it appears that fiscal impact of developing the summary would be minimal.

However, according to a spokesperson from the AG’s office, they may incur expenditure increases stemming from increased time and resources spent on representing state agencies. The spokesperson stated that this bill may result in increased litigation with regard to takings issues. Therefore, they believe that an increase in takings litigation will require the AG to take on a larger number of cases in which they are the representatives of state agencies in a court proceeding. *The AG’s Office estimates that it would cost approximately \$10,000 per jury trial to represent a state agency. These costs include salaries for at least two attorneys, their travel expenses, and expert witness and deposition costs. Total expenses are not known because the actual number of cases that would end up in trial cannot be determined. However, according to NCSL, in states with a similar law in place there has been a negligible number of new cases* (please see “**Impact on Litigation**” for more discussion of caseload estimates). In estimating the fiscal impact to the AG, the spokesperson stated that it would be necessary to add one Assistant Attorney General, responsible for assisting in the increased number of cases in which they would represent a state agency. The estimated annual expenditure for an additional Assistant Attorney General range between \$35,000 and \$50,000, depending upon the extent of experience that would be required. The AG has also stated that

The Attorney General’s Office has also expressed concern over potential trial costs. If They have estimated that it will cost approximately \$10,000 per jury trial. AG’s Office appears concerned that if a significant increase in the number of takings cases being contested and sent to a jury trial.

The Fiscal Impact on State Agencies

⁷ “State of Washington Attorney General’s Recommended Process for Evaluation of Proposed Regulatory or Administrative Actions to Avoid Unconstitutional Takings of Private Property,” April 1993, p. 1.

⁸ *Ibid.*, p. 3.

The bill states that a governmental action does not include those actions that are required by specific statutory or regulatory criteria required to be applied by applicable federal, state or local law. This language, then, would eliminate from the requirements of the bill the issuance of permits, that are mandated by federal, state or local law. Additionally, language in the bill also states that a governmental action does not include when a property owner agrees to a condition, limitation, or developmental exaction. Finally, the bill states that government agencies do not have to prepare a written assessment, if they make a determination as to whether or not a taking has occurred, and include that determination as a public record. These three sections of the bill appear to substantially lessen the instances in which an affected state agency would be required to review and prepare a written assessment, but, because the language does not completely eliminate the instances in which these state agencies would have to fulfill the requirements of the bill, these state agencies could still incur a minimal expenditure increase to fulfill the bill's requirements.

According to a spokesperson for EPA, the bill may result in some expenditure increases, especially for the review and preparation of written assessments for permits that are not mandated by a specific federal, state or local law. The spokesperson also stated that assessing property values as part of the written assessment is a concern for the agency because this is something that is not a part of their current permitting process, and that information on property values of an area related to the permit, as well as surrounding areas, is not readily accessible. Therefore, EPA believes that some level of staffing increase, possibly the addition of one FTE with expertise in property evaluation, will be necessary. An approximation of the type of position EPA may require is a Realty Specialist that is employed at the Department of Transportation (DOT). According to a DOT employee classification report, a Realty Specialist 1 averages \$13.66/hour (\$28,400 annually) and a Realty Specialist 3 averages \$17.77/hour (\$37,000 annually). Increase these annual estimates by an additional 35 percent, to encompass benefits, and the potential annual expenditure to EPA to hire one Realty Specialist ranges from \$38,340 (\$28,400 x 1.35) to \$49,950 (\$37,000 x 1.35)

Local Fiscal Effects

Due to the complexity and varied judicial rulings involved in the takings issue, determining the fiscal impact on local governments from this legislation is difficult. Upon review of this bill, it appears that additional paperwork requirements and potential court costs surface as two areas of fiscal concern. Under this bill, the Attorney General would establish a written summary of takings case law for governmental agencies to follow when considering a governmental action (see "***An Overview of the Bill***" section for more detail). Under the bill, a governmental action, as it pertains to local government, triggers the requirements under the bill if the action occurs in one of seven areas: (1) zoning codes; (2) subdivision regulations; (3) building codes; (4) urban sedimentation plans; (5) health codes; (6) fire codes; and (7) annexation. If a governmental action is determined, according to the Attorney General's summary, to potentially result in a taking, then the local government would submit copies of the assessment to the appropriate legislative authority and legal advisor of the subdivision. Any preparatory time and copying charges associated with these requirements would appear to increase local government expenditures.

The other potential local government fiscal impact is court costs. In this bill, civil actions can be brought against a governmental agency. A plaintiff can file an action against a local government that they believe wrongfully took private property without providing due

compensation. Local governments would potentially incur additional costs, related to time and personnel devoted to either challenging or settling a claim. In addition, if a plaintiff successfully establishes that a governmental action resulted in a taking, the local government which promulgated the action would have to pay the cost to remedy the taking, including attorney's fees and court costs. However, if the local government stipulates that their action results in a taking, it would have to pay the plaintiff's reasonable attorney's fees and court costs of bringing the action to court, only if the court determines that the local government acted in bad faith. The bill appears to place additional duties on a board of revision, which must review the value of each parcel in which a court has determined that a taking has occurred.

Local governments tend not to have large staffs. The requirements of this bill contain provisions that appear to increase the workload of local government staff, particularly with the review and preparation of written assessments. Will some local governments be able to absorb these responsibilities with the current staffing level? Probably. But there would appear to be other local governments that will not have the staff or the expertise on takings issues to adequately fulfill the requirements under the bill. As far as legal costs are concerned, an expenditure increase may occur in local governments that do not have adequate expertise to either hire or contract out for additional legal staff. Additionally, if a government action is deemed to be a taking, the local government will have to compensate for a taking and, if the government was found to be acting in bad faith, the costs of the plaintiff's attorney's fees and the court costs of bringing the action. Potentially mitigating the latter cost, however, is the extent to which local governments will not implement a government action if it is deemed a taking under the AG's summary.

Impact on Litigation

One issue surrounding this bill centers on how it may affect the number and subsequent cost of litigating takings cases. The National Conference of State Legislatures (NCSL) has determined that in states adopting laws similar to that in Ohio, they have yet to find any additional litigation brought by landowners due to actions implemented by government agencies. NCSL believes that there are three reasons, either taken separately or collectively, for this initial finding: (1) agencies are completing assessments of their actions, and modifying them in some way that is acceptable to all parties involved; (2) none of the actions implemented by agencies are being construed as a taking in the first place, and therefore, agencies have not had to alter their behavior; and (3) agencies are ignoring the requirements (or do not know about the requirements), because they do not believe that they issue actions that constitute a taking or they do not have the funds to complete assessment. Therefore, based on preliminary research gathered by NCSL, it does not appear that the state or local governments will incur additional litigation costs, on top of what may be occurring at the present time. NCSL has yet to determine what reason is responsible for their initial finding, because it is difficult to interpret any conclusions based upon the agencies' written assessments. As mentioned earlier, the AG believes that an additional position would be required to take on increased litigation. This statement may prove to be true. How this bill will ultimately impact litigation, however, will remain unclear until more data can be collected and the laws already in effect in other states continue to play out.

LBO staff: *Tony Mastracci, Budget/Policy Analyst*
 Rick Graycarek, Budget/Policy Analyst

H:\FN122\HB0294Hp.doc

APPENDIX - Case Law and Takings

The Fifth Amendment to the United States Constitution does not allow for the taking of private property “for public use, and without just compensation.”⁹ This component of the Fifth Amendment is often called the “Takings Clause” and applies to the states through the Fourteenth Amendment¹⁰ of the United States Constitution. Regulatory takings achieved constitutional status in 1922, in which the court, in *Pennsylvania Coal Co. V. Mahon*, 260 U.S. 393 (1922), recognized that intensive land use regulation of property could amount to a taking, or inverse condemnation.¹¹

After *Mahon*, the court continued to treat taking cases in an ad hoc manner. In *Penn Central Transportation Co. V. New York City*, 438 U.S. 104 (1978), the court identified that the extent of economic impact of a regulation on a claimant must be gauged to determine if a regulatory action is compensable by government. This was furthered, in *Agins v. Tiburon*, 447 U.S. 255 (1980), to where the court determined that a land use regulation is not a taking if it substantially advances legitimate state interests and does not deny the owner economically viable use of the land.¹² Thus, the court determined that the decision on whether a taking has occurred, required an individual, factual assessment of each case and a weighing of private and public interests.

Regulatory actions that require government compensation *without* the weighing of the public interest occur when the property owner suffers a “physical invasion” of their property. In *Loretto v. Teleprompter Manhattan CATV Corp* (1982), the court held that permanent invasions of property were compensable no matter how small the intrusion nor how lofty the regulation’s public purpose. Expanding upon this, in *Lucas v. South Carolina Coastal Council*, 112 S. Ct. 2886 (1992), the court held that a regulation that denies a land owner of all economic use of the land is equal to a physical appropriation and requires compensation.¹³

In *First English Evangelical Lutheran Church v. Los Angeles County*, 482 U.S. 304 (1987), the court considered if a person could recover damages from the time of adoption of land use regulation until the time it is determined that the regulation required compensation, i.e. the notion of temporary takings.¹⁴ The court held that “...where the government’s activities have already worked a taking of all use of property, no subsequent action by the government can relieve it of the duty to provide compensation for the period during which the taking was

⁹ U.S. Constitution amend. V: 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.

¹⁰ U.S. Constitution amend. XIV, sec. 1: [N]or shall any State deprive any person of life, liberty, or property, without due process of law...

¹¹ Ely, James W., “A Breather on the Takings Clause,” *ABA Journal*, January 1996, p. 42.

¹² Research Memorandum, R-121-0514, Legislative Service Commission, May 5, 1995, p. 3.

¹³ *Ibid*, p. 4.

¹⁴ Research Memorandum, R-121-0514, Legislative Service Commission, May 5, 1995, p. 4.

effective.”¹⁵ The court noted that this decision was limited to the facts before them, and that while in this case the landowner was denied all economic use of their property, it is not apparent that the temporary deprivation of less than all of their property is compensable under *First English*.¹⁶

In some relatively recent court case decisions, the court began to take a look at cases involving executions - where a condition is placed upon a development - and have coined the terms “essential nexus” and “rough proportionality” into the takings jargon. In *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987), the court established that an essential nexus must exist between the condition that government is seeking to regulate and the measures implemented that effect private property owners.¹⁷ In this case, a land owner’s permit was approved upon the condition that, when the house is built, a public easement must pass across their beach. The government’s interests for including the easement in the permit included protecting the public’s ability to see the beach and preventing beach congestion.¹⁸ The court concluded that the none of the government’s purposes were fostered by condition imposed on the permit, and that “...there is no essential nexus between the end advanced and the justification for the regulation...”¹⁹

The essential nexus test was furthered to include a rough proportionality test described in *Dolan v. City of Tigard*, 129 L. Ed. 304 (1994). In this case, a permit was granted to Dolan to expand her store as long as she dedicated a portion of her land, within a 100 year floodplain, as a greenway and provide an additional 15 foot strip as a bicycle/pedestrian pathway. The court applied the essential nexus test and held that the prevention of flooding along the creek and reduction of traffic congestion were legitimate public purposes. Then, in order to determine the degree of the conditions and the projected impact on the development, the court used a rough proportionality test in which “...no precise mathematical calculation is required, but the city must make some sort of individualized determination that the required dedication is related both in nature and extent to the impact of the proposed development.”²⁰ The permit conditions were struck down because the city never indicated why a public greenway was better than a private greenway for flood control. Furthermore, “...the findings on which the city relies do not show the required reasonable relationship between the floodplain easement and the proposed new development,” and “...the city must make some effort to quantify its findings in support of the dedication for the pedestrian/bicycle pathway beyond the conclusory statement that it could offset some of the traffic demand generated.”²¹ The *Dolan* decision, then, placed a greater

¹⁵ Duerksen, Christopher and Roddewig, Richard, “Takings Law in Plain English,” American Resources Information Network, 1994.

¹⁶ Research Memorandum, R-121-0514, Legislative Service Commission, May 5, 1995, p. 4.

¹⁷ Ely, James W., “A Breather on the Takings Clause,” *ABA Journal*, January 1996, p. 43.

¹⁸ Research Memorandum, R-121-0514, Legislative Service Commission, May 5, 1995, p. 5.

¹⁹ *Ibid.*

²⁰ Ely, James W., “A Breather on the Takings Clause,” *ABA Journal*, January 1996, p. 43.

²¹ Research Memorandum, R-121-0514, Legislative Service Commission, May 5, 1995, p. 6.

burden on local governments to rationalize land dedication requirements, especially those that mandate public access, but did not alter the basic takings analysis used by the court.²²

The court distinguishes between exactions (i.e. a permit with a condition, such as those found in the *Nollan* and *Dolan* cases) and other types of land use regulations. Exaction cases are measured using the essential nexus and rough proportionality tests, because the limitation on the person's use of their property requires a deed of a portion of their property. On the other hand, land use regulations classify areas and limit the use of property in those areas. Land use regulations, then, are determined on whether the regulation substantially advances legitimate state interests, a less stringent standard than the essential nexus and rough proportionality tests.²³ Furthermore, the court has stated that in a land use regulation, the burden of proving that the regulation of the property is arbitrary (i.e. does not advance legitimate state interests), rests on the property owner, whereas in exaction cases, the government must prove that an essential nexus and rough proportionality exist between the condition placed upon the permit and the proposed development.²⁴

²² Duerksen, Christopher and Roddewig, Richard, "Takings Law in Plain English," American Resources Information Network, 1994.

²³ Research Memorandum, R-121-0514, Legislative Service Commission, May 5, 1995, p. 6.

²⁴ *Ibid*, p. 7.