Office of the
Attorney General

Idaho
Regulatory Takings Act
Guidelines

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State of Idaho
Office of Attorney General
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Dear Fellow Idahoans:

Property rights are most effectively protected when government and citizens understand their respective rights. The purpose of this pamphlet is to facilitate that understanding and provide guidelines to governmental entities to help evaluate the impact of proposed regulatory or administrative actions on private property owners.

One of the foundations of American democracy is the primacy of private property rights. The sanctity of private property ownership found expression in the 5th Amendment to the U.S. Constitution, written by James Madison, and in Article I, § 14 of the Idaho Constitution. Both provisions ensure private property, whether it be land or intangible property rights, and will not be arbitrarily confiscated by any agency of government.

Madison wrote in Federalist Paper 54, that "government is instituted no less for the protection of the property than of the persons of individuals." As your Attorney General, I feel a responsibility to ensure that the Constitution and state laws protecting the property rights of Idahoans are enforced. I am committed to ensuring that every state agency, department and official complies with both the spirit and letter of these laws.

In furtherance of this goal, the Idaho legislature enacted, and the Governor signed into law, Chapter 80, Title 67 of the Idaho Code. Originally passed in 1994, the law required the Attorney General to provide a checklist to assist state agencies in determining whether their administrative actions could be construed as a taking of private property. In 1995, the legislature amended the statute to apply to local units of government. Idaho Code § 67-6508 was also amended to ensure that planning and zoning land use policies do not violate private property rights. In 2003, Idaho legislators amended Chapter 80, Title 67 of the

Idaho Code, allowing a property owner to request a regulatory takings analysis from a state agency or local governmental entity should their actions appear to conflict with private property rights. Combined, these laws assure Idaho property owners that their rights will be protected.

My office has prepared this informational brochure for your use. If you have any questions, feel free to call your city or county prosecuting attorney.

LAWRENCE G. WASDEN
Attorney General

TABLE OF CONTENTS

Idaho Regulatory
Takings Guidelines

IDAHO REGULATORY TAKINGS LAWS

Idaho Constitutional Provisions

Article I, section 13. Guaranties in criminal actions and due process of law. In all criminal prosecutions, the party accused shall have the right to a speedy and public trial; to have the process of the court to compel the attendance of witnesses in his behalf, and to appear and defend in person and with counsel.

No person shall be twice put in jeopardy for the same offense; nor be compelled in any criminal case to be a witness against himself; nor be deprived of life, liberty or property without due process of law.

Article I, section 14. Right of eminent domain. The necessary use of lands for the construction of reservoirs or storage basins, for the purpose of irrigation, or for rights of way for the construction of canals, ditches, flumes or pipes, to convey water to the place of use for any useful, beneficial or necessary purpose, or for drainage; or for the drainage of mines, or the working thereof, by means of roads, railroads, tramways, cuts, tunnels, shafts, hoisting works, dumps, or other necessary means to their complete development, or any other use necessary to the complete development of the material resources of the state, or the preservation of the health of its inhabitants, is hereby declared to be a public use, and subject to the regulation and control of the state.

Private property may be taken for public use, but not until a just compensation, to be ascertained in the manner prescribed by law, shall be paid therefor.

Idaho Statutory Provisions

67-8001. Declaration of purpose. -- The purpose of this chapter is to establish an orderly, consistent review process that better enables state agencies and local governments to evaluate whether proposed regulatory or administrative actions may result in a taking of private property without due process of law. It is not the purpose of this chapter to expand or reduce the scope of private property protections provided in the state and federal constitutions. [67-8001, added 1994, ch. 116, sec. 1, p. 265; am. 1995, ch. 182, sec. 1, p. 668.]

67-8002. Definitions. -- As used in this chapter:

"Local government" means any city, county, taxing district or other political subdivision of state government with a governing body.

"Private property" means all property protected by the constitution of the United States or the constitution of the state of Idaho.

"State agency" means the state of Idaho and any officer, agency, board, commission, department or similar body of the executive branch of the state government.

"Regulatory taking" means a regulatory or administrative action resulting in deprivation of private property that is the subject of such action, whether such deprivation is total or partial, permanent or temporary, in violation of the state or federal constitution. [67-8002, added 1994, ch. 116, sec. 1, p. 265; am. 1995, ch. 182, sec. 2, p. 668; am. 2003, ch. 141, sec. 1, p. 409.]

67-8003. Protection of private property.

1. The attorney general shall establish, by October 1, 1994, an orderly, consistent process, including a checklist, that better enables a state agency or local government to evaluate proposed regulatory or administrative actions to assure that such actions do not result in an unconstitutional taking of private property. The attorney general shall review and update the process at least on an annual basis to maintain consistency with changes in law. All state agencies and local governments shall follow the guidelines of the attorney general.

2. Upon the written request of an owner of real property that is the subject of such action, such request being filed with the clerk or the agency or entity undertaking the regulatory or administrative action not more than twenty-eight (28) days after the final decision concerning the matter at issue, a state agency or local governmental entity shall prepare a written taking analysis concerning the action. Any regulatory taking analysis prepared hereto shall comply with the process set forth in this chapter, including use of the checklist developed by the attorney general pursuant to subsection (1) of this section and shall be provided to the real property owner no longer than forty-two (42) days after the date of the filing of the request with the clerk or secretary of the agency whose action is questioned. A regulatory taking analysis prepared pursuant to this action shall be considered public information.

3. A governmental action is voidable if a written taking analysis is not prepared after a request has been made pursuant to this chapter. A private real property owner, whose property is the subject of governmental action, affected by a governmental action without the preparation of a requested taking analysis as required by this section, may seek judicial determination of the validity of the governmental action by initiating a declaratory judgment action or other appropriate legal procedure. A suit seeking to invalidate a governmental action for noncompliance with subsection (2) of this section must be filed in a district court in the county in which the private property owner's affected real property is located. If the affected property is located in more than one (1) county, the private property owner may file suit in any county in which the affected real property is located.

4. During the preparation of the taking analysis, any time limitation relevant to the regulatory or administrative actions shall be tolled. Such tolling shall cease when the taking analysis has been provided to the property owner. Both the request for a taking analysis and the taking analysis shall be part of the official record regarding the regulatory or administrative action. [67-8003, added 1994, ch. 116, sec. 1, p. 265; am. 1995, ch. 182, sec. 3, p. 669; am. 2003, ch. 141, sec. 2, p. 409.]

67-6508. Planning duties. It shall be the duty of the planning or planning and zoning commission to conduct a comprehensive planning process designed to prepare, implement, and review and update a comprehensive plan, hereafter referred to as the plan. The plan shall include all land within the jurisdiction of the governing board. The plan shall consider previous and existing conditions, trends, compatibility of land uses, desirable goals and objectives, or desirable future situations for each planning component. The plan with maps, charts, and reports shall be based on the following components as they may apply to land use regulations and actions unless the plan specifies reasons why a particular component is unneeded.

(a) Property Rights -- An analysis of provisions which may be necessary to ensure that land use policies, restrictions, conditions and fees do not violate private property rights, adversely impact property values or create unnecessary technical limitations on the use of property and analysis as prescribed under the declarations of purpose in chapter 80, title 67, Idaho Code.

67-6523. Emergency ordinances and moratoriums. If a governing board finds that an imminent peril to the public health, safety, or welfare

requires adoption of ordinances as required or authorized under this chapter, or adoption of a moratorium upon the issuance of selected classes of permits, or both, it shall state in writing its reasons for that finding. The governing board may then proceed without recommendation of a commission, upon any abbreviated notice of hearing that it finds practical, to adopt the ordinance or moratorium. An emergency ordinance or moratorium may be effective for a period of not longer than one hundred eighty-two (182) days. Restrictions established by an emergency ordinance or moratorium may not be imposed for consecutive periods. Further, an intervening period of not less than one (1) year shall exist between an emergency ordinance or moratorium and reinstatement of the same. To sustain restrictions established by an emergency ordinance or moratorium beyond the one hundred eighty-two (182) day period, a governing board must adopt an interim or regular ordinance, following the notice and hearing procedures provided in section 67-6509, Idaho Code. [67-6523, added I.C., sec. 67-6523, as added by 1975, ch. 188, sec. 2, p. 515; am. 2003, ch. 142, sec. 6, p. 415.]

67-6524. Interim ordinances and moratoriums. If a governing board finds that a plan, a plan component, or an amendment to a plan is being prepared for its jurisdiction, it may adopt interim ordinances as required or authorized under this chapter, following the notice and hearing procedures provided in section 67-6509, Idaho Code. The governing board may also adopt an interim moratorium upon the issuance of selected classes of permits if, in addition to the foregoing, the governing board finds and states in writing that an imminent peril to the public health, safety, or welfare requires the adoption of an interim moratorium. An interim ordinance or moratorium shall state a definite period of time, not to exceed one (1) calendar year, when it shall be in full force and effect. To sustain restrictions established by an interim ordinance or moratorium, a governing board must adopt a regular ordinance, following the notice and hearing procedures provided in section 67-6509, Idaho Code. [67-6524, added I.C., sec. 67-6524, as added by 1975, ch. 188, sec. 2, p. 515; am. 2003, ch. 142, sec. 7, p. 415.]

ADVISORY MEMORANDUM

STATE OF IDAHO ATTORNEY GENERAL'S ADVISORY MEMORANDUM FOR EVALUATION OF PROPOSED REGULATORY OR ADMINISTRATIVE ACTIONS TO IDENTIFY POTENTIAL TAKINGS OF PRIVATE PROPERTY

The Office of the Attorney General is required 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. I.C. § 67-8003(1).

This is the Attorney General's recommended process and advisory memorandum. It is not a formal Attorney General's Opinion under I.C. § 67-1401(6), and should not be construed as an opinion by the Attorney General on whether a specific action constitutes a "taking." Agencies shall use this process to identify those situations requiring further assessment by legal counsel. Appendix A contains a brief discussion of some of the important federal and state cases that set forth the elements of a "taking."

State agencies and local governments are required to use this procedure to evaluate the impact of proposed administrative or regulatory actions on private property. I.C. § 67-8003(1). Upon the written request of an owner of real property that is the subject of such action, a state agency or local governmental entity shall prepare a written taking analysis concerning the action. Appendix B contains a form that can be used to request a taking analysis. Appendix C contains a sample form for completing a regulatory taking analysis. The written request must be filed ***not more than*** twenty-eight (28) days after the final decision concerning the matter at issue and the completed takings analysis shall be provided to the property owner ***no longer than*** forty-two (42) days after the date of filing the request with the clerk or secretary of the agency whose action is questioned. Idaho law also provides that "a regulatory taking analysis shall be considered public information." *See* I.C. § 67-8003(2).

Should a state agency or local governmental entity not prepare a regulatory taking analysis following a written request, the property owner may seek judicial determination of validity of the action by initiating legal action. Such a claim must be filed in a district court in the county in which the private property owner's affected real property is located. *See* I.C. § 67-8003(3).

General Background Principles

The Fifth Amendment to the United States Constitution provides that private property shall not be taken for public use without just compensation. Article I, section 14 of the Idaho State Constitution provides in relevant part:

> Private property may be taken for public use, but not until a just compensation, to be ascertained in the manner prescribed by law, shall be paid therefor.

Thus, under both the federal and state constitutions, private property may not be taken for public purposes without payment of just compensation.

Courts have recognized three situations in which a taking requiring just compensation may occur: (1) when a government action causes physical *occupancy* of property, (2) when a government action causes physical *invasion* of property, and (3) when government *regulation* effectively eliminates all economic value of private property. A "taking" may be permanent or temporary.

The most easily recognized type of "taking" occurs when government physically occupies private property. This may happen when the government exercises its eminent domain authority to take private property for a public use. Property owners must be paid just compensation when the government acquires private property through eminent domain authority. The types of public uses that may be the subject of eminent domain authority under state law are identified in Section 7-701, Idaho Code. Clearly, when the government seeks to use private property for a public building, a highway, a utility easement, or some other public purpose, it must compensate the property owner.

Physical invasions of property, as distinguished from physical occupancies, may also give rise to a "taking" where the invasions are of a recurring or substantial nature. Examples of physical invasions include, among others, flooding and water-related intrusions and overflight or aviation easement intrusions.

Like physical occupations or invasions, a regulation that affects the value, use, or transfer of property may also constitute a "taking," but only if it "goes too far." Although most land use regulation does not constitute a "taking" of property, the courts have recognized that when regulation divests an owner of the essential attributes of ownership, it amounts to a "taking" subject to compensation.

Regulatory actions are harder to evaluate for "takings" because government may properly regulate or limit the use of private property, relying on its authority and responsibility to protect public health, safety and welfare. Accordingly, government may abate public nuisances, terminate illegal activity, and establish building codes, safety standards, or sanitary requirements generally without creating a compensatory "taking." Government may also limit the use of property through land use planning, zoning ordinances, setback requirements, and environmental regulations.

If a government regulation, however, destroys a fundamental property right – such as the right to possess, exclude others from, or dispose of property – it could constitute a compensable "taking." Similarly, if a regulation imposes substantial and significant limitations on property use, there could be a "taking." In assessing whether there has been such a limitation on property use as to constitute a "taking," the court will consider both the purpose of the regulatory action and the degree to which it limits the owner's property rights.

An important factor in evaluating each action is the degree to which the action interferes with a property owner's reasonable investment-backed development expectations; in other words, the owner's expectations of the investment potential of the property and the impact of the regulation on those expectations. For instance, in determining whether a "taking" has occurred, a court might, among other things, weigh the regulation's impact on vested development rights against the government's interest in promulgating the regulation.

If a regulation prohibits all economically viable or beneficial uses of property, there may be liability for just compensation unless government can demonstrate that laws of nuisance or other pre existing limitations on the use of the property prohibit the proposed uses.

If a court determines there has been a regulatory "taking," the government has the option of either paying just compensation or withdrawing the regulatory limitation. If the regulation is withdrawn, the government may still be liable to the property owner for a temporary "taking" of the property.

Attorney General's Recommended Process

1. State agencies and local governments must use this evaluation process whenever the agency contemplates action that affects privately owned property. Each agency and local government must also use this process to assess the impacts of proposed regulations before the

agency publishes the regulations for public comment. In Idaho, real property includes land, possessors' rights to land, ditch and water rights, mining claims (lode and placer), and freestanding timber. I.C. §§ 55-101 and 63-108. In addition, the right to continue to conduct a business may be a sufficient property interest to invoke the protections of the just compensation clause of the Idaho Constitution. For example, see I.C. §§ 22-4501 to 22-4504.

2. Agencies and local governments must incorporate this evaluation process into their respective review processes. It is not a substitute, however, for that existing review procedure. Since the extent of the assessment necessarily depends on the type of agency or local government action and the specific nature of the impacts on private property, the agency or local government may tailor the extent and form of the assessment to the type of action contemplated. For example, in some types of actions, the assessment might focus on a specific piece of property. In others, it may be useful to consider the potential impacts on types of property or geographic areas.

3. Each agency and local government must review this advisory memorandum and recommended process with appropriate legal counsel to ensure that it reflects the specific agency or local government mission. It should be distributed to all decision makers and key staff.

4. Each agency and local government must use the following checklist to determine whether a proposed regulatory or administrative action should be reviewed by legal counsel. If there are any affirmative answers to any of the questions on the checklist, the proposed regulatory or administrative action must be reviewed in detail by staff and legal counsel. Since the legislature has specifically found the process is protected by the attorney-client privilege, each agency and local government can determine the extent of distribution and publication of reports developed as part of the recommended process. However, once the report is provided to anyone outside the executive or legislative branch or local governmental body, the privilege has been waived.

Attorney General's Checklist Criteria

Agency or local government staff must use the following questions in reviewing the potential impact of a regulatory or administrative action on specific property. While these questions also provide a framework for evaluating the impact proposed regulations may have generally, takings questions normally arise in the context of specific affected property. The public review process used for evaluating proposed regulations is another tool that the agency or local government

should use aggressively to safeguard rights of private property owners. If property is subject to regulatory jurisdiction of multiple governmental agencies, each agency or local government should be sensitive to the cumulative impacts of the various regulatory restrictions.

Although a question may be answered affirmatively, it does not mean that there has been a "taking." Rather, it means there could be a constitutional issue and that the proposed action should be carefully reviewed with legal counsel.

1. Does the Regulation or Action Result in a Permanent or Temporary Physical Occupation of Private Property?

Regulation or action resulting in a permanent or temporary physical occupation of all or a portion of private property will generally constitute a "taking." For example, a regulation that required landlords to allow the installation of cable television boxes in their apartments was found to constitute a "taking." *See* Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 102 S. Ct. 3164 (1982).

The acquisition of private property through eminent domain authority is distinct from situations where a regulation results in the physical occupation of private property. The exercise of eminent domain authority is governed by the procedures in chapter 7, title 7, Idaho Code. Whenever a state or local unit of government, or a public utility, is negotiating to acquire private property under eminent domain, the condemning authority must provide the private property owner with a form summarizing the property owner's rights. Section 7-711A, Idaho Code, identifies the required content for the advice of rights form.

2. Does the Regulation or Action Require a Property Owner to Dedicate a Portion of Property or to Grant an Easement?

Carefully review all regulations requiring the dedication of property or grant of an easement. The dedication of property must be reasonably and specifically designed to prevent or compensate for adverse impacts of the proposed development. Likewise, the magnitude of the burden placed on the proposed development should be reasonably related to the adverse impacts created by the development. A court also will consider whether the action in question substantially advances a legitimate state interest.

For example, the United States Supreme Court determined in Nollan v. California Coastal Comm'n, 483 U.S. 825, 107 S. Ct. 3141 (1987), that compelling an owner of waterfront property to grant a public

easement across his property that does not substantially advance the public's interest in beach access, constitutes a "taking." Likewise, the United States Supreme Court held that compelling a property owner to leave a *public* green way, as opposed to a private one, did not substantially advance protection of a flood plain, and was a "taking." Dolan v. City of Tigard, 512 U.S. 374, 114 S. Ct. 2309 (1994).

3. Does the Regulation Deprive the Owner of All Economically Viable Uses of the Property?

If a regulation prohibits all economically viable or beneficial uses of the land, it will likely constitute a "taking." In this situation, the agency can avoid liability for just compensation only if it can demonstrate that the proposed uses are prohibited by the laws of nuisance or other preexisting limitations on the use of the property. *See* Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 112 S. Ct. 2886 (1992).

Unlike 1 and 2 above, it is important to analyze the regulation's impact on the property as a whole, and not just the impact on a portion of the property. It is also important to assess whether there is any profitable use of the remaining property available. *See* Florida Rock Industries, Inc. v. United States, 18 F.3d 1560 (Fed. Cir. 1994). The remaining use does not necessarily have to be the owner's planned use, a prior use or the highest and best use of the property. One factor in this assessment is the degree to which the regulatory action interferes with a property owner's reasonable investment-backed development expectations.

Carefully review regulations requiring that all of a particular parcel of land be left substantially in its natural state. A prohibition of all economically viable uses of the property is vulnerable to a takings challenge. In some situations, however, there may be pre existing limitations on the use of property that could insulate the government from takings liability.

4. Does the Regulation Have a Significant Impact on the Landowner's Economic Interest?

Carefully review regulations that have a significant impact on the owner's economic interest. Courts will often compare the value of property before and after the impact of the challenged regulation. Although a reduction in property value alone may not be a "taking," a severe reduction in property value often indicates a reduction or elimination of reasonably profitable uses. Another economic factor courts will consider is the degree to which the challenged regulation

impacts any development rights of the owner. As with 3, above, these economic factors are normally applied to the property as a whole.

A moratorium as a planning tool may be used pursuant to Idaho Code § 67-6523—Emergency Ordinances and Moratoriums (written findings of imminent peril to public health, safety, or welfare; may not be longer than 182 days); and Idaho Code § 67-6524—Interim Ordinances and Moratoriums (written findings of imminent peril to public health, safety, or welfare; the ordinance must state a definite period of time for the moratorium). Absence of the written findings may prove fatal to a determination of the reasonableness of the government action.

The Idaho moratorium provisions appear to be consistent with the United States Supreme Court's interpretation of moratorium as a planning tool as well. In Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency, 535 U.S. 302, 122 S. Ct. 1465 (2002), the Court held that planning moratoriums may be effective land use planning tools. Generally, moratoriums in excess of one year should be viewed with skepticism, but should be considered as one factor in the determination of whether a taking has occurred. An essential element pursuant to Idaho law is the issuance of written findings in conjunction with the issuance of moratoriums. *See* Idaho Code §§ 67-6523 to 67-6524.

5. Does the Regulation Deny a Fundamental Attribute of Ownership?

Regulations that deny the landowner a fundamental attribute of ownership -- including the right to possess, exclude others and dispose of all or a portion of the property -- are potential takings.

The United States Supreme Court recently held that requiring a public easement for recreational purposes where the harm to be prevented was to the flood plain was a "taking." In finding this to be a "taking," the Court stated:

> The city never demonstrated why a public greenway, as opposed to a private one, was required in the interest of flood control. The difference to the petitioner, of course, is the loss of her ability to exclude others. . . . [T]his right to exclude others is "one of the most essential sticks in the bundle of rights that are commonly characterized as property." Dolan v. City of Tigard, 512 U.S. 374, 114 S. Ct. 2309 (1994).

The United States Supreme Court has also held that barring the inheritance (an essential attribute of ownership) of certain interests in land held by individual members of an Indian tribe constituted a "taking." Hodel v. Irving, 481 U.S. 704, 107 S. Ct. 2076 (1987).

6. (a) Does the Regulation Serve the Same Purpose That Would Be Served by Directly Prohibiting the Use or Action; and (b) Does the Condition Imposed Substantially Advance That Purpose?

A regulation may go too far and may result in a takings claim where it does not substantially advance a legitimate governmental purpose. Nollan v. California Coastal Commission, 483 U.S. 825, 107 S. Ct. 3141 (1987), Dolan v. City of Tigard, 512 U.S. 374, 114 S. Ct. 2309 (1994).

In Nollan, the United States Supreme Court held that it was an unconstitutional "taking" to condition the issuance of a permit to land owners on the grant of an easement to the public to use their beach. The Court found that since there was no indication that the Nollans' house plans interfered in any way with the public's ability to walk up and down the beach, there was no "nexus" between any public interest that might be harmed by the construction of the house, and the permit condition. Lacking this connection, the required easement was just as unconstitutional as it would be if imposed outside the permit context.

Similarly, regulatory actions which closely resemble, or have the effects of a physical invasion or occupation of property, are more likely to be found to be takings. The greater the deprivation of use, the greater the likelihood that a "taking" will be found.

APPENDIX A: SIGNIFICANT FEDERAL AND STATE CASES

Summaries of Significant Federal "Takings" Cases

Stop the Beach Renourishment, Inc. v. Fla. Dept. of Env. Prot., 130 S. Ct. 2592, 177 L. Ed. 2d 184 (2010).

The United States Supreme Court considered a judicial taking challenge to a decision by the Florida Supreme Court. A Florida state agency granted a permit under state law to restore a beach. The beach was eroded by hurricanes, and the permit would have allowed the restoration of the beach by adding sand to the beach. A non-profit corporation comprised of beachfront landowners challenged the agency decision in state court arguing the decision eliminated the littoral rights of landowners to receive accretions to their property and the right to have contact of their property with water remain intact. The Florida Supreme Court reversed a lower court and held the state law authorizing the beach restoration did not unconstitutionally deprive littoral rights. The non-profit corporation claimed the Florida Supreme Court's decision itself effectuated a taking of its members' littoral rights.

The United States Supreme Court unanimously held that the Florida Supreme Court did not take private property without just compensation in violation of the Fifth and Fourteenth Amendments. The Court recognized two property law principles under Florida law:

1. The State owned the seabed and was allowed to fill in its own seabed; and

2. When an avulsion exposes land seaward of littoral property that had previously been submerged, the land belongs to the State even if it interrupts the littoral owner's contact with water.

Therefore, when the State filled in previously submerged land for beach restoration, the State treated it as an avulsion for purposes of ownership. The non-profit members' right to accretions was therefore subordinate to the State's right to fill in its land. The United States Supreme Court did not reach a majority on the judicial taking question.

Kelo, et al. v. City of New London, Connecticut, et al., 545 U.S. 469, 125 S. Ct. 2655 (2005).

The United States Supreme Court held that a city's exercise of eminent domain power in furtherance of its economic development plan

satisfied the Constitution's Fifth Amendment requirement that a taking be for public use. To effectuate its plan, the city invoked a state statute that specifically authorized the use of eminent domain to promote economic development. The Court observed that promoting economic development is a traditional and long accepted governmental function that serves a public purpose. Although the condemned land would not be open in its entirety to actual use by the general public, the purpose of its taking satisfied the constitutional requirement that a taking be for public use.

In response to the Kelo decision, the Fifty-eighth Idaho Legislature enacted House Bill No. 555 adding a new section, 7-701A, to the Idaho Code that specifically prohibits the use of eminent domain power to promote or effectuate economic development except where allowed by existing statute.

Tahoe-Sierra Preservation Council, Inc., et al. v. Tahoe Regional Planning Agency, et al., 535 U.S. 302, 122 S. Ct. 1465 (2002).

The United States Supreme Court held that imposition of a moratorium lasting thirty-two (32) months restricting development within the Lake Tahoe Basin was not a compensable taking. The Court noted the importance of Lake Tahoe in that it is one of only three lakes with such transparency of water due in large part to the absence of nitrogen and phosphorous which in turn results in a lack of algae. The Court also noted the rapid development of the Lake Tahoe area. In noting this development, the Court recognized the uniqueness of the area, and the importance of planning tools to the preservation of Lake Tahoe. The Court further noted that the geographic dimensions of the property affected, as well as the term in years, must be considered when determining whether a taking has occurred. Finally, the interest in protecting the decisional process is stronger when the process is applied to regional planning as opposed to a single parcel of land. Noteworthy is the extensive process that was followed by the Tahoe Regional Planning Agency along with the uniqueness of the Lake Tahoe region. The balance of interests favored the use of moratorium.

Dolan v. City of Tigard, 512 U.S. 374, 114 S. Ct. 2309 (1994).

In this case, the United States Supreme Court held that reconditioning an issuance of a permit on the dedication of bond to public use violated the Fifth Amendment. The city council conditioned Dolan's permit to expand her store and pave her parking lot upon her agreement to dedicate land for a public greenway and a

pedestrian/bicycle pathway. The expressed purpose for the public greenway requirement was to protect the flood plain. The pedestrian/bicycle path was intended to relieve traffic congestion. The United States Supreme Court held that the city had to make "some sort of individualized determination that the required dedication [was] related both in nature and extent to the impact of the proposed development" in order to justify the requirements and avoid a "takings" claim. In this case, the Court held that the city had not done so. It held that the public or private character of the greenway would have no impact on the flood plain and that the city had not shown that Dolan's customers would use the pedestrian/bicycle path to relieve congestion.

Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 112 S. Ct. 2886 (1992).

Lucas was a challenge to the 1988 South Carolina Beach Front Management Act. The stated purpose of this Act was to protect life and property by creating a storm barrier, providing habitat for endangered species and to serve as a tourism industry. To accomplish the stated purposes, the Act prohibited or severely limited development within certain critical areas of the state's beach-dune system.

Before the Act's passage, David Lucas bought two South Carolina beach front lots intending to develop them. As required by the Act, the South Carolina Coastal Council drew a "baseline" that prevented Mr. Lucas from developing his beach front property. Mr. Lucas sued the council, alleging its actions under the Act constituted a "taking" requiring compensation under the Fifth Amendment. The trial court agreed, awarding him $1,232,387.50. A divided South Carolina Supreme Court reversed, however, holding that the Act was within the scope of the nuisance exception.

The United States Supreme Court reversed. Justice Scalia's majority opinion held that a regulation which "denies all economically beneficial or productive use of land" will be a "taking" unless the government can show that the proposed uses of the property are prohibited by nuisance laws or other pre existing limitations on the use of property. This opinion noted that such total takings will be "relatively rare" and the usual balancing approach for determining takings will apply in the majority of cases.

Hodel v. Irving, 481 U.S. 704, 107 S. Ct. 2076 (1987).

Where the character of the government regulation destroys "one of the most essential" rights of ownership -- the right to devise property, especially to one's family -- this is an unconstitutional "taking" without just compensation.

In 1889, portions of Sioux Indian reservation land were "allotted" by Congress to individual tribal members (held in trust by the United States). Allotted parcels could be willed to the heirs of the original allottees. As time passed, the original 160-acre allotments became fractionated, sometimes into very small parcels. Good land often lay fallow, amidst great poverty, because of the difficulties in managing property held in this manner. In 1983, Congress passed legislation that provided that any undivided fractional interest that represented less than two percent of the tract's acreage and which earned less than $100 in the preceding year would revert to the tribe. Under the statute, tribal members who lost property as a result of this action would receive no compensation. Tribal members challenged the statute. The United States Supreme Court held this was an unconstitutional "taking" for which compensation was required.

Nollan v. California Coastal Comm'n, 483 U.S. 825, 107 S. Ct. 3141 (1987).

The United States Supreme Court held that it was an unconstitutional "taking" to condition the issuance of a permit to land owners on the grant of an easement to the public to use their beach.

James and Marilyn Nollan, the prospective purchasers of a beach front lot in California, sought a permit to tear down a bungalow on the property and replace it with a larger house. The property lay between two public beaches. The Nollans were granted a permit, subject to the condition that they allow the public an easement to pass up and down their beach. On appeal, the United States Supreme Court held that such a permit condition is only valid if it substantially advances legitimate state interests. Since there was no indication that the Nollans' house plans interfered in any way with the public's ability to walk up and down the beach, there was no "nexus" between any public interest that might be harmed by the construction of the house and the permit condition. Lacking this connection, the required easement was just as unconstitutional as it would be if imposed outside the permit context. (The Court noted that protecting views from the highway by limiting the size of the structure or banning fences may have been lawful.)

Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 102 S. Ct. 3164 (1982).

The United States Supreme Court ruled that a statute that required landlords to allow the installation of cable television on their property was unconstitutional. The Court concluded that "a permanent physical occupation authorized by government is a 'taking' without regard to the public interest that it may serve." The Court reasoned that an owner suffers a special kind of injury when a "stranger" invades and occupies the owner's property, and that such an occupation is "qualitatively more severe" than a regulation on the use of the property. The installation in question required only a small amount of space to attach equipment and wires on the roof and outside walls of the building.

Penn Central Transp. Co. v. City of New York, 438 U.S. 104, 98 S. Ct. 2646 (1978).

The United States Supreme Court upheld the constitutionality of a New York City historic preservation ordinance under which the city had declared Grand Central Station a "landmark." In response to Penn Central's takings claim, the United States Supreme Court noted that there was a valid public purpose to the city ordinance, and that Penn Central could still make a reasonable return on its investment by retaining the station as it was. Penn Central argued that the landmark ordinance would deny it the value of its "pre existing air rights" to build above the terminal. The Court found that it must consider the impact of the ordinance upon the property as a whole, not just upon "air rights." Further, under the ordinance in question, these rights were transferable to other lots, so they might not be lost.

Florida Rock Industries, Inc. v. United States, 18 F.3d 1560 (Fed. Cir. 1994) *cert. denied*, 513 U.S. 1109, 115 S. Ct. 898 (1995) (Florida Rock IV).

This is a Clean Water Act case. There have been several court decisions, and the most recent one affirms the holding that in the absence of a public nuisance, economic impact alone may be determinative of whether a regulatory "taking" under the Fifth Amendment has occurred. If the regulation categorically prohibits *all* economically beneficial use of land, destroying its economic value for private ownership, and the use prohibited is not a public nuisance, the court held that regulation has the effect equivalent to permanent physical occupation, and there is, without more, a compensable "taking."

In 1972, a mining company purchased 1,560 acres of wetlands (formerly part of the Everglades, but now excluded by road, canal and levee) for the purposes of mining limestone. In 1980, the company applied to the U.S. Army Corps of Engineers for a "section 404" permit for the dredging and filling involved in the mining operation. The Corps of Engineers denied the application, primarily for the purpose of protecting the wetlands. While several courts had previously held that the United States had unconstitutionally taken the mining company's property, and required the government to compensate the company, the Federal Circuit ruled that the evidence did not support a finding that the permit denial prohibited *all* economically beneficial use of the land or destroyed its value. On remand, the Court of Federal Claims held that permit denial resulted in a compensable partial regulatory taking of property and that a "partial taking" occurs when a regulation singles out a few property owners to bear burdens, while benefits are spread widely across the community. Florida Rock Industries, Inc. v. United States, 45 Fed.Cl. 21, 49 ERC 1292 (1999).

Summaries of Significant Idaho "Takings" Cases

REGULATORY TAKINGS UPDATES

City of Coeur d'Alene v. Simpson, 142 Idaho 839, 136 P.3d 310 (2006).

The Idaho Supreme Court ruled that regulatory taking claims were ripe, even though the landowners had not sought a variance under the ordinance. A regulatory takings claim accrues when the burden of the ordinance on the landowners' property is known, not upon the enactment of an ordinance.

Generally, if an ordinance provides a procedure for a variance, the landowner must seek the variance before filing a regulatory takings claim. The Court explained that landowners' failure to seek a variance was not fatal here because the city did not have discretion under the ordinances to grant a variance. The requirement for a variance was not fatal because a variance in this situation could not have provided the property owners with relief under the stated purposes of the city's ordinances.

The Court also considered the valuation of property when the basis for regulatory takings claims is that an ordinance deprives the property of all economically productive or beneficial uses, or alternatively, that the value of the property is diminished by city ordinances. The Court explained that the task is to compare the value of the property taken with the value that remains in the property. This process requires identifying the property to be valued as realistically and fairly as possible in light of the regulatory scheme and factual circumstances. In this case, the property in question was divided during the course of the litigation, and the parcels owned by separate entities. The lower court concluded that the transfer of the property had no effect on valuation and dismissed the regulatory takings claims. The Idaho Supreme Court reversed and remanded, concluding that, based on the current record, it was improper for the district court to disregard the separate ownership of the parcels for the purpose of determining the property taken and the value of the property.

Inama v. Boise County, 138 Idaho 324, 63 P.3d 450 (2003).

Boise County was not obligated to compensate the plaintiff for the loss of his front end loader because the Idaho Disaster Preparedness Act of 1975 created immunity for a subdivision of the state engaged in

disaster relief activities following a declaration of disaster emergency. First, the Idaho Supreme Court rejects the plaintiff's argument that the scope of immunity granted by Idaho Code § 46-1017 is narrowed by Idaho Code § 46-1012(3), which provides for compensation for property "only if the property was commandeered or otherwise used in coping with a disaster emergency and its use or destruction was ordered by the governor or his representative." The Court held that the statute was "clear and unambiguous," and since Idaho Code § 46-1017 does not specifically limit the scope of immunity to damages compensable under Idaho Code § 46-1012, Idaho Code § 46-1017 grants Boise County immunity from damages. Second, the Court held that compensation is not allowed for inverse condemnation under art. I, sec. 14 of the Idaho Constitution because of the immunity granted under Idaho Code § 46-1017.

McCuskey v. Canyon County Comm'rs, 128 Idaho 213, 912 P.2d 100 (1996).

The Idaho Supreme Court held that when a regulation of private property that amounts to a taking is later invalidated, the subsequent invalidation converts the taking to a "temporary" taking. In such cases, the government must pay the landowner for the value of the use of the land during the period that the invalid regulation was in effect.

The Idaho Supreme Court also discussed the application of the statute of limitations to takings and inverse condemnation actions. The Court ruled that a taking occurs as of the time that the full extent of the plaintiff's loss of use and enjoyment of the property becomes apparent. As a result, the Court ruled that the statute of limitations begins to run when the plaintiff's loss of use and enjoyment of the property first becomes apparent, **even if** the full extent of damages cannot be assessed until a later date.

Sprenger Grubb & Assoc. v. Hailey, 127 Idaho 576, 903 P.2d 741 (1995).

The Idaho Supreme Court held that the City of Hailey's decision to rezone a parcel of land from "Business" to "Limited Business" was not a taking because some "residual value" remained in the property. The rezone reduced the value of the plaintiff's property from $3.3 million to $2.5 million. In addition, the Idaho Supreme Court held that the rezone did not violate the "proportionality" standard set out in Dolan v. City of Tigard, 512 U.S. 374, 114 S. Ct. 2309 (1994), because none of the plaintiff's property was dedicated to a public use.

Brown v. City of Twin Falls, 124 Idaho 39, 855 P.2d 876 (1993).

The Idaho Supreme Court held that the placement of road median barriers by city and state, which restrained business traffic flow to a shopping center, was exercise of police power and did not amount to compensable taking, since landowners had no property right in the way traffic flowed on streets abutting their property.

Hayden Pines Water Co. v. Idaho Public Utilities Commission, 122 Idaho 356, 834 P.2d 873 (1992).

Without extensive discussion, the Idaho Supreme Court held that an Idaho Public Utilities Commission order requiring a water company to perform certain accounting functions (at an estimated cost of $15,000 per year), without considering those costs in the rate proceeding, was an unconstitutional "taking."

Coeur d'Alene Garbage Service v. Coeur d'Alene, 114 Idaho 588, 759 P.2d 879 (1988).

The just compensation clause of the Idaho State Constitution art. I, sec. 14, requires compensation be paid by a city, where that city either by annexation or by contract prevents a company from continuing service to its customers. The Idaho Supreme Court held that a company has a property interest protected by the Idaho Constitution in continuing to conduct business. In this case, a garbage company already operating in the city and providing garbage service to customers lost the right to continue its business when the city entered into an exclusive garbage collection contract with another company, permitting only that company to operate within the annexed areas.

Ada County v. Henry, 105 Idaho 263, 668 P.2d 994 (1983).

The Idaho Supreme Court held that property owners had no "takings" claim where the owners were aware of zoning restrictions before they purchased the property, even though the zoning ordinance reduced their property's value.

Nettleton v. Higginson, 98 Idaho 87, 558 P.2d 1048 (1977).

In times of shortage, a call on water that allows water right holders with junior priority dates to use water while senior holders of beneficial use water rights are not allowed to use water, is not a taking protected by the just compensation clause of the Idaho Constitution.

Dawson Enterprises, Inc. v. Blaine County, 98 Idaho 506, 567 P.2d 1257 (1977).

A zoning ordinance that deprives an owner of the highest and best use of his land is *not*, absent more, a "taking." There are two methods for finding a zoning ordinance unconstitutional. First, it may be shown that it is not "substantially related to the public health, safety, or welfare." Second, it may be shown that the "zoning ordinance precludes the use of . . . property for *any* reasonable purpose."

State ex rel. Andrus v. Click, 97 Idaho 791, 554 P.2d 969 (1976).

The Idaho Supreme Court held that where statutory or regulatory provisions are reasonably related to an enactment's legitimate purpose, provisions regulating property uses are within the legitimate police powers of the state and are not a "taking" of private property without compensation. In this case, the Court upheld the permit, bonding, and restoration requirements of the Dredge and Placer Mining Protection Act. It found that they were reasonably related to the enactment's purpose in protecting state lands and watercourses from pollution and destruction and in preserving these resources for the enjoyment and benefit of all people.

Boise Redevelopment Agency v. Yick Kong Corporation, 94 Idaho 876, 499 P.2d 575 (1972).

The Idaho Supreme Court held that the Idaho Constitution grants a power of eminent domain much broader than that granted in most other state constitutions. According to the Idaho Supreme Court, even completely private irrigation and mining businesses can use eminent domain. It held that the state, both through the power of eminent domain and the police powers, may protect the public from disease, crime, and "blight and ugliness."

Unity Light & Power Co. v. City of Burley, 92 Idaho 499, 445 P.2d 720 (1968).

Once a supplier of a service lawfully enters into an area to provide that service, annexation by a city does not authorize an ouster of that supplier from that area without condemnation.

Johnston v. Boise City, 87 Idaho 44, 390 P.2d 291 (1964).

Where government exercises its authority under its police powers and the exercise is reasonable and not arbitrary, a harmful effect

to private property resulting from that exercise alone is insufficient to justify an action for damages. The court must weigh the relative interests of the public and that of the individual to arrive at a just balance in order that government will not be unduly restricted in the proper exercise of its functions for the public good, while at the same time giving due effect to the policy of the eminent domain clause of ensuring the individual against an unreasonable loss occasioned by the exercise of governmental power.

Roark v. City of Caldwell, 87 Idaho 557, 394 P.2d 641 (1964).

The Idaho Supreme Court held that certain height restrictions, which limited use of private land adjacent to an airport to agricultural uses or to single family dwelling units, was an unconstitutional "taking" if no compensation was provided. The Court held that a landowner's property right in the reasonable airspace above his land cannot be taken for public use without reasonable compensation.

Mabe v. State, 83 Idaho 222, 360 P.2d 799 (1961).

The Idaho Supreme Court held that destroying or impairing a property owner's right to business access to his or her property constitutes a "taking" of property whether accompanied by actual occupation of or confiscation of the property.

Anderson v. Cummings, 81 Idaho 327, 340 P.2d 1111 (1959).

The Idaho Supreme Court recognized individual water rights are real property rights protected from "taking" without compensation.

Hughes v. State, 80 Idaho 286, 328 P.2d 397 (1958).

The Idaho Supreme Court held that private property of all classifications is protected under the Idaho Constitution just compensation clause.

Robison v. Hotel & Restaurant Employees Local #782, 35 Idaho 418, 207 P. 132 (1922).

The Idaho Supreme Court held that the right to conduct a business is a property interest protected under the Idaho Constitution just compensation clause.

Recommended Form for:
REQUEST FOR TAKING ANALYSIS

Name: _____
Address: _____
City: _____ Zip Code: _____
County: _____

1. Background Information
   This form satisfies the written request requirement for a regulatory taking analysis from a state agency or local governmental entity pursuant to Idaho Code § 67-8003(2). The owner of the property subject to the government action must file this with the clerk or secretary of the agency whose act is questioned within twenty-eight (28) days of the final decision concerning the matter at issue. A regulatory taking analysis is considered public information. Such an analysis is to be performed in accordance with the checklist established by the Attorney General of the State of Idaho pursuant to Idaho Code § 67-8003(1). See page 7 of the *Idaho Regulatory Takings Act Guidelines* for a description of the checklist.

2. Description of Property
   a. Location of Property:
   _____
   b. Legal Description of Property:
   _____
   _____

3. Description of Act in Question
   a. Date Property was Affected:
   _____
   b. Description of How Property was Affected:
   _____
   _____
   _____
   _____
   c. Regulation or Act in Question:
   _____
   _____
   d. Are You the Only Affected Property Owner? ❑ Yes ❑ No
   e. State Agency or Local Governmental Entity Affecting Property:
   _____
   f. Address of Agency or Local Governmental Entity:
   _____
   _____

State of Idaho
Office of the Attorney General
Regulatory Takings Checklist

	Yes	No
1 Does the Regulation or Action Result in Either a Permanent or Temporary Physical Occupation of Private Property?		
2 Does the Regulation or Action Require a Property Owner to Either Dedicate a Portion of Property or to Grant an Easement?		
3 Does the Regulation Deprive the Owner of All Economically Viable Uses of the Property?		
4 Does the Regulation Have a Significant Impact on the Landowner's Economic Interest?		
5 Does the Regulation Deny a Fundamental Attribute of Ownership?		
6 (a) Does the Regulation Serve the Same Purpose That Would Be Served by Directly Prohibiting the Use or Action?		
(b) Does the Condition Imposed Substantially Advance That Purpose?		

Remember: Although a question may be answered affirmatively, it does not mean that there has been a "taking." Rather, it means there could be a constitutional issue and that proposed action should be carefully reviewed with legal counsel.

This checklist should be included with a requested analysis pursuant to Idaho Code § 67-8003(2).