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"Avoiding Takings Claims"

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I.
INTRODUCTION

"After all, if a policeman must know the Constitution, then why not a planner?" Justice

Brennan Dissenting, *San Diego Gas and Electric Co. v. City of San Diego*, 101 S.Ct. 1287 (1981).

"We are in danger of forgetting that a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change." *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922).

"These inquiries are informed by the purpose of the Takings Clause, which is to prevent the government from forcing some people to alone bear public burdens which, in fairness and justice, should be borne by the public as a whole." *Palazzolo v. Rhode Island*, (United States Supreme Court, June 28, 2001), *citing Armstrong v. United States*, 364 U.S. 40, 49 (1960).

More and more, we are seeing cities, small and large, grappling with property owners over zoning or land use disputes. More often than not, many of these zoning or land use disputes that we see turn into lawsuits against local governments can be avoided by implementing a comprehensive administrative process to address takings issues. The law of regulatory takings and land use is now, and has always been, complex. Not only do we see the common disputes about zoning classifications, variances, and permits, but we are now seeing a rise in new controversies as a result of the increased efforts of local governments to protect the environment, preserve historic landmarks and cultural heritage, and enrich the quality of life in growing neighborhoods. While there are a wide array of issues that encompass takings and land use law, this paper seeks to provide an overview of takings law, as well as provide a practical approach to avoiding takings claims and assist local governments in their approach to such issues.

II.
GENERAL OVERVIEW OF TAKINGS CLAIMS

Any discussion of takings claims must begin with the constitutional foundation of

takings law. Article I, Section 17 of the Texas Constitution provides that "[n]o person's property shall be taken, damaged or destroyed for or applied to public use without adequate compensation being made, unless by the consent of such person...." Tex. Const. Art. I, _ 17. The Just Compensation Clause of the Fifth Amendment of the U.S. Constitution similarly provides: "[N]or shall private property be taken for public use, without just compensation. U.S. Const. amend. V.

Both the Texas and United States Constitutions recognize a claim for a taking of property. There are three general categories of takings claims: (1) physical occupation; (2) exactions; and (3) regulatory takings. *Town of Flower Mound, Texas v. Stafford Estates Limited Partnership*, 135 S.W.3d 620, 630 (Tex. 2004); *Sheffield Development Company, Inc. v. City of Glenn Heights, Texas*, 140 S.W.3d 660, 671-72 (Tex. 2004); *Mayhew v. Town of Sunnyvale*, 964 S.W.2d 922, 933 (Tex. 1998).

The United States Supreme Court has determined that the first category, a physical invasion or a regulatory activity that produces a physical invasion, will support a takings claim without regard to the public interest advanced by the regulation or the economic impact upon the landowner. *See Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 505 U.S. 1003, 1015 (1992); *see also Mayhew*, 964 S.W.2d at 933 (recognizing physical takings as a takings category). For physical invasion, the government either occupies in fact or has given itself the right to occupy private property–without paying for the privilege. The physical invasion generally is not the result of natural causes or conditions, but rather is a physical occupation or condition

resulting from governmental action, even governmental action that forbids the removal of the invading material. *See Teegarden v. United States*, 42 Fed.Cl. 252 (1998) (failing to allocate firefighting resources to petitioner's property that was then destroyed by a wildfire, is not a compensable taking under physical invasion or any other theory). Physical takings occur when the government authorizes an unwarranted physical occupation of an individual's property. *Mayhew*, 964 S.W.2d at 933.

The second category of takings claims is found where an exaction, such as the required dedication of land, is made a condition of development approval. *See City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687, 704 (1999); *Dolan v. City of Tigard*, 512 U.S. 374, 391 (1994); *Nollan v. California Coastal Comm'n*, 483 U.S. 825, 836 (1987). A condition of approval will not result in a judicial determination of an unconstitutional taking if: (1) the condition furthers a substantial/legitimate governmental interest; (2) the condition is related to the interest that is served; and (3) the impacts of the development are roughly proportional to the condition imposed. *Dolan*, 512 U.S. at 391; *Nollan*, 483 U.S. at 836.

The third category of takings claims–regulatory takings–encompasses the majority of takings cases and involves the most complex analysis. A compensable regulatory taking occurs when a governmental agency imposes restrictions that either deny a property owner all economically viable use of his property or unreasonably interferes with the owner's right to use and enjoy the property. *City of Dallas v. Blanton*, 200 S.W.3d 266, 271 (Tex.App.–Dallas 2006, no pet.) (citing *Mayhew*, 964 S.W.2d at 935).

The United States Supreme Court has recognized a categorical rule where a regulation itself "denies all economically beneficial or productive use of land," finding that such regulation requires compensation without "case-specific inquiry into the public interest advanced in support of the restraint." *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1015-16 (1992). The Texas Supreme Court also recognized this rule in *Mayhew*, wherein it held that a compensable taking occurs when a governmental restriction "denies the landowner all economically viable use of the property or totally destroys the value of the property...." *Mayhew*, 964 S.W.2d at 935.

An "as applied" partial taking claim includes circumstances where the application of a regulation to particular property is a taking of some interest in property that is less than the whole, although the regulation may not effect a taking on its face. When a regulatory takings claim does not render property valueless, however, a taking may still result. To determine whether there is a taking under these circumstances, we apply the three factors promulgated in *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104 (1978), which require an examination of the following: (1) the character of the governmental invasion; (2) the economic impact of the regulation as applied to the particular property; and (3) the extent to which the regulation has interfered with the property owner's distinct investment backed expectations with respect to that property. *Lucas*, 505 U.S. at 1016-20; *Penn Central*, 438 U.S. at 122. The United States Supreme Court has consistently reaffirmed the viability of the *Penn Central* standards. *See Palazzolo v. Rhode Island*, 533 U.S. 606, 617 (2001) ("Where a regulation places

limitations on land that fall short of eliminating all economically beneficial use, a taking nonetheless may have occurred, depending on a complex of factors including the regulation's economic effect on the landowner, the extent to which the regulation interferes with reasonable investment-backed expectations, and the character of the government action.").

Inverse condemnation occurs when property is taken for public use without proper condemnation proceedings and the property owner attempts to recover compensation for that taking. *City of Abeliene v. Burk Royalty Company*, 470 S.W.2d 643, 646 (Tex. 1971); *Park v. City of San Antonio*, 230 S.W.3d 860, 867 (Tex. App.–El Paso 2007, pet. denied). To state a cause of action for inverse condemnation under the Texas Constitution, a plaintiff must allege (1) an intentional governmental act; (2) that resulted in his property being taken, damaged, or destroyed; (3) for public use. *General Services Commission v. Little-Tex Insulation Company, Inc.*, 39 S.W.3d 591, 598 (Tex. 2001); *Park*, 230 S.W.3d at 867.

III.
PROCEDURAL HURDLES AND DEFENSES IN LITIGATING TAKINGS CLAIMS

Prior to reaching the substance of any takings claims, there are a number of procedural obstacles which must be overcome before any takings claims clan be adjudicated. Initially, a court must determine whether a taking claim is in the proper forum and if so, whether that claim is ripe for review. It then must be determined

whether the takings question might be mooted or substantially narrowed by decision of the state law claims. If so, then federal precedents require abstention in order to avoid unnecessary conflict between state law and the federal Constitution. *San Remo Hotel v. City and County of San Francisco*, 145 F.3d 1095, 1101 (9th Cir. 1998). Finally, courts will also consider whether claim or issue preclusion doctrines would prohibit re-litigation of federal takings claims. These doctrines combined present serious hurdles for plaintiffs seeking to litigate takings claims in federal court.

The Takings Clause requires that a plaintiff first attempt to recover compensation under state law and state constitutional provisions before seeking compensation under the Fifth Amendment. This is because the Fifth Amendment only proscribes takings without just compensation. *Williamson County Regional Planning Comm'n v. Hamilton Bank*, 473 U.S. 172, 195 (1985). As the Supreme Court stated in *Williamson County*:

> Because the Fifth Amendment proscribes takings without just compensation, no constitutional violation occurs until just compensation has been denied. The nature of the constitutional right therefore requires that a property owner utilize procedures for obtaining compensation before bringing a Section 1983 action.
>
> *Williamson County*, 473 U.S. at 194 n.13.

Thus, even if a land use regulation "takes" property for Fifth Amendment purposes, no constitutional violation occurs until the state refuses to justly compensate the property owner. *Id*. Just compensation need not be paid in advance of, or contemporaneously with, the taking; all that is required is that a reasonable, certain and adequate provision for obtaining compensation exist at the time of the taking. If a state

provides an adequate procedure for seeking just compensation, the property owner cannot claim a violation of the Just Compensation Clause until it has used the procedure and been denied just compensation. *Williamson County*, 473 U.S. at 195.

The result is that claims in federal court cannot be stated unless and until the property owner makes use of the state procedures available to him for obtaining redress and the state thereafter denies him just compensation. Prior to that time, a taking claim cannot be adjudicated in federal court and should be dismissed for failure to state a claim.

A. Exceptions to State Compensation Requirement

There are, of course, always exceptions to the rule. There are certain instances when a plaintiff need not seek just compensation in state court prior to brining a claim in federal court.

1. *Inadequate State Remedies*

A plaintiff may be excused from exhausting state remedies if the plaintiff demonstrates that the state remedies are unavailable or inadequate." *Williamson County*, 473 U.S. at 197. Plaintiffs must show that seeking just compensation in state court would be futile. *Id.* at 194-195. A plaintiff's burden is not met by showing that the state procedures are untested or uncertain. "It must be certain that the state would not grant compensation under any circumstances. *Samaad v. City of Dallas*, 940 F.2d 925, 934 (5th Cir. 1991). A state procedure is "adequate even though its law is unsettled whether the claimant would be entitled to compensation." *Rolf*

v. City of San Antonio, 77 F.3d 823, 826-27 (5th Cir. 1996). State compensation procedures are inadequate only if they "almost certainly will not justly compensate the claimant." *Samaad v. City of Dallas*, 940 F.2d 925, 934 (5th Cir. 1991). Texas provides an "adequate procedure for seeking just compensation" for a taking through an inverse condemnation action under article I, section 17 of the Texas Constitution. Tex. Const. art. I, _ 17. *John Corp. V. City of Houston*, 214 F.3d 573, 580-81 (5th Cir. 2000); *Samaad*, 940 F.2d at 935 (holding procedures available in Texas state courts for obtaining just compensation under Texas Constitution are "adequate").

2. *Claims Based on Failure to Substantially Advance Legitimate State Interests*

As stated above, a regulatory action can be deemed a taking if it either fails to substantially advance legitimate state interests or deprives the landowner of the economically viable use of his land. Where a takings claim is based on the theory that a regulatory action does not substantially advance a legitimate state interest, denial of state compensation becomes irrelevant. *Richardson v. City and County of Honolulu*, 124 F.3d 1150, 1165 (9th Cir. 1997). The Supreme Court has stated that this type of claim "does

not depend on the extent to which [landowners] are deprived of the economic use of their...property or the extent to which [they]...are compensated...." *Yee v. City of Escondido*, 503 U.S. 519, 534 (1992) ("As this [premium argument] does not depend on the extent to which petitioners are deprived of the economic use of their particular pieces of property or the extent to which these particular petitioners are compensated, petitioners' facial challenge is ripe.") As legitimate state interest claims do not depend on the amount of compensation provided to the property owner, a claimant need not seek compensation from the state in order to state a takings claim. *San Remo Hotel*, 145 F.3d at 1102.

3. *Takings Claims in Federal Court Based on Diversity Jurisdiction*

Several courts have exempted plaintiffs from the state compensation requirement when diversity jurisdiction exists. *See Vulcan Materials Co. v. City of Tehuacana*, 238 F.3d 382, 386 (5th Cir. 2001); *Sinclair Oil Corp. v. County of Santa Barbara*, 96 F.3d 401, 408 (9th Cir. 1996). Under the standard of *Erie Railroad Co. v. Tompkins*, 304 U.S. 64, 78 (1938), federal courts exercising diversity jurisdiction must apply the substantive law of the state in which the are located. Thus, a plaintiff may bring a state law takings claim in federal court without seeking state compensation if

the traditional requirements for diversity jurisdiction are met. *Vulcan Materials*, 238 F.3d at 386. So, in theory, in a diversity setting, a state claim is still being adjudicated under state law but in federal court.

B. Ripeness

A fundamental element to asserting any takings claim is that the claim must be ripe for review. Under the Takings Clause, a taking does not occur—and thus, a takings claim is not ripe—"until (1) the relevant governmental unit has reached a final decision as to what will be done with the property and (2) the plaintiff has sought compensation through whatever adequate procedures the state provides." *Lange v. City of Batesville*, 160 F.3d 348, 354 (5th Cir. 2005); *Sandy Creek Investors, Ltd. v. City of Jonestown, Texas*, 325 F.3d 623, 626 (5th Cir. 2003); *see also Williamson County Reg'l Planning Comm'n v. Hamilton Bank*, 473 U.S. 172, 195-96 (1985). A plaintiff's failure to present its inverse condemnation action to the state court in a posture such that the state court could rule on the merits of plaintiff's claim constitutes a failure to utilize the available state procedures for obtaining compensation as is required for a takings claim to be ripe. *Liberty Mutual Insurance Co. v. Brown*, 380 F.3d 793, 797-98 (5th Cir. 2004). A plaintiff's

failure to establish the ripeness of a federal takings claim divests the federal court of subject-matter jurisdiction and causes the unripe federal takings claim to be dismissed for lack of subject-matter jurisdiction. *Liberty Mutual*, 380 F.3d at 799.

Similarly, under Texas law, for a regulatory takings claim to be ripe, there must be a final decision regarding the application of the regulation to the property at issue. *Mayhew*, 964 S.W.2d at 929, *citing Suitum v. Tahoe Regional Planning Agency*, 520 U.S. 725, 734 (1997) and *Williamson County*, 473 U.S. at 186. A final decision usually requires both a rejected development plan and the denial of a variance from the controlling regulation. *Mayhew*, 964 S.W.2d at 929, *citing Williamson County*, 473 U.S. at 187-88. However, futile variance requests or re-applications are not required. *Mayhew*, 964 S.W.2d at 929. The term "variance" is "not definitive or talismanic," it encompasses "other types of permits or actions [that] are available and could provide similar relief." *Id.* at 930, *quoting Southern Pacific Transportation Co. v. City of Los Angeles*, 922 F.2d 498, 503 (9th Cir. 1990), *cert. denied*, 502 U.S. 943 (1991). The variance requirement is therefore applied flexibly in order to serve its purpose of giving the governmental unit an opportunity to "grant different forms

of relief or make policy decisions which might abate the alleged taking." *Id.*, *quoting Southern Pacific*, 922 F.2d at 503.

Local decision-makers must be given an opportunity to review at least one reasonable development proposal before a challenge to a land use regulation will be considered ripe. *Williamson County*, 473 U.S. at 172. A court cannot determine whether a regulation has gone too far unless it knows how far the regulation goes. *MacDonald, Sommer & Frates v. County of Yolo*, 477 U.S. 340 (1986). This final and authoritative determination must expose the nature and extent of permitted development. *Id.* Since a court cannot determine whether a taking has occurred unless the extent of permissible development is clear, constitutional challenges to local land use regulations are unripe for adjudication until the full extent of the regulation has been finally fixed and the harm caused by it measurable. *Id.*

In *Williamson County*, the Supreme Court not only set forth the requirement that the plaintiff must first have submitted a development plan which was rejected, but also explained that the plaintiff must seek variances which would permit uses not allowed under the regulations. *Williamson County*, 473 U.S. at 181. Thus, the final decision which is ripe for

adjudication requires at least two decisions against the property owner: 1) a rejected development plan, and 2) a denial of a variance. *Williamson County*, 473 U.S. at 181. The final decision requirement responds to the high degree of discretion characteristically possessed by land-use authorities in softening the strictures of the general regulations they administer. *Suitum*, 520 U.S. at 725.

1. *Exceptions to Final Determination Requirement*

There are, of course, always exceptions to the rule. As stated above, futile variance requests or re-applications are not required. *Mayhew*, 964 S.W.2d at 929. An exception to the final determination requirement exists when a property owner can show that the filing of an application would be futile. *Id.* However, the futility exception is unavailable unless and until the property owner has submitted at least one "meaningful application" for development of the property and one "meaningful application" for a variance. *Shelter Creek Development Corp. v. City of Oxnard*, 838 F.2d 375, 379 (9th Cir. 1988). The futility exception to the ripeness requirement relieves a property owner from submitting "multiple applications when the manner in which the first application was rejected makes it clear that no project will be approved." *Southern Pacific*, 922 F.2d at 504.

2. *Mayhew v. Town of Sunnyvale,* 964 S.W.2d 922, 933 (Tex. 1998).

In *Mayhew*, the town initially permitted residential development at a density of 3.6 units per acre, but the ordinance was amended in response to septic tank failures to require a one-acre minimum lot size. *Mayhew*, 964 S.W.2d at 925. Even though sanitary sewer facilities were later made available, the town did not repeal the one-acre minimum lot requirement. *Id.* The Mayhews began meeting with town officials seeking permission to proceed with a planned development with a density which exceeded the one-unit-per acre zoning requirement, and they told the town officials that a planned development would not be feasible under the one-unit-per acre zoning. *Id.* at 925-26. The town amended its zoning ordinances to allow, upon council approval, planned developments with densities in excess of one unit per acre. *Id.* at 926. After spending more than $500,000 on studies and evaluative reports, the Mayhews submitted their planned development proposal to the town. *Id.* The proposal was based on a density of over three units per acre. *Id.* While the planning and zoning commission was reviewing the application, the town council passed a moratorium on planned

developments. *Id.* The commission recommended denial of the Mayhew's proposal, stating a preference for a less dense use of the property. *Id.* The town council appointed a negotiating committee which met with the Mayhews. *Id.* Both sides tentatively agreed to a compromise development of 3,600 units. *Id.* At a meeting with the town council, the Mayhews told the council that anything less than approval for 3,600 units would be considered an outright denial. *Id.* The town council again voted to deny the Mayhews' development proposal and the town cancelled a meeting to reconsider the planned development request. *Id.* The Mayhews subsequently filed suit alleging, among other things, that the town's refusal to approve the planned development was a taking of their property. *Id.* The trial court granted summary judgment on behalf of the town with respect to this claim, but the Dallas Court of Appeals reversed concluding that material fact questions existed as to whether the town violated the Mayhews' rights under the state and federal constitutions. *Id.* Upon remand, the case was tried to the court. *Id.* at 927. The district court concluded that the case was ripe for adjudication and that the town's decision to deny the application for the planned development was an unconstitutional taking under both the federal and state constitutions. *Id.* The court of appeals

reversed the district court's judgment and dismissed the Mayhews' claims, holding that none of the claims were ripe for review. *Id.* In the Supreme Court, the town argued that the Mayhews' claims were not ripe because they submitted only one planned development application and did not thereafter reapply for development or submit a variance. *Id.* at 931. Although the failure to reapply or seek a variance normally would be fatal to the ripeness of the Mayhews' claims, the Supreme Court found that, under the unique facts of the case, the Mayhews' planned development application and amended request for 3,600 units were sufficient, and any further applications would have been futile. *Id.* The court based its decision on the evidence showing that the Mayhews expended over $500,000 preparing and developing the application, they presented the initial proposal based on a density of over three units per acre, they engaged in negotiations with the town for over a year after the first proposal was rejected, and they presented a modified proposal which was subsequently rejected. *Id.*

3. *Hallco Texas, Inc. v. McMullen County*, 221 S.W.3d 50 (Tex. 2006).

In *Hallco*, Hallco purchased property near a reservoir with the intent of operating a non-hazardous industrial waste landfill, which required a

permit from the Texas Commission on Environmental Quality. *Hallco Texas, Inc. v. McMullen County*, 221 S.W.3d 50, 52 (Tex. 2006). Shortly after Hallco purchased the property, the McMullen County Commissioners Court adopted a resolution expressing opposition to the proposed use as a potential hazard to local water supplies. *Id.* at 53. Depite the opposition, Hallco filed its application with TCEQ. *Id.* McMullen County subsequently passed an ordinance banning the disposal of solid waste within three miles of the reservoir but allowed disposal in other areas provided that applicable state requirements were satisfied. *Id.* Hallco challenged the ordinance by filing suit in federal district court and it filed a parallel proceeding in state court. *Id.* at 53-54. The federal court dismissed without prejudice Hallco's claim alleging an unconstitutional taking in violation of the Fifth Amendment to the U. S. Constitution, holding that to ripen its federal takings claim, Hallco first had to seek compensation through procedures that state had established. *Id.* at 54. A week after the federal court's dismissal, the County moved for summary judgment in state court on various grounds. *Id.* The court of appeals affirmed the trial court's judgment holding that Hallco's takings claim failed because it did not have a cognizable property interest of which the government could deprive it.

Id. Hallco did not appeal that decision. *Id.* at 55. More than two years later, Hallco submitted a request for a variance to the McMullen County Commissioners Court but offered no changes to its proposed landfill. *Id.* The commissioners heard a presentation on the variance request, but did not take any action. *Id.* Two months later, Hallco filed suit alleging that the county's denial of the variance request constituted a taking under Article I, Section 17 of the Texas Constitution. *Id.* The county moved for summary judgment on all of Hallco's claims on various grounds, including that all of Hallco's claims were barred by *res judicata* because they were or could have been raised in the first state lawsuit (*Hallco I*). *Id.* The trial court again granted the county's motion without specifying the grounds, and the court of appeals affirmed. *Id.* at 55-56. To avoid the County's *res judicata* argument, Hallco argued that its takings claim was not ripe in *Hallco I*. *Id.* at 58-59. The Supreme Court addressed the ripeness argument in Section III-A of its opinion, but only four of the justices joined in this part of the opinion. *Id.* at 58. The court found that the ordinance at issue was not subject to discretionary application or variance and it prohibited precisely the use Hallco intended to make of the property. *Id.* at 60. Thus, Hallco's taking claim was ripe upon enactment of the

ordinance and *res judicata* applied. *Id.*

The effect of the final determination requirement is clear. A property owner cannot recover under the Texas Constitution or the Fifth Amendment to the U.S. Constitution unless he has been through the development process and has exhausted all available avenues of administrative relief. As a result, it makes substantial sense to adopt land use regulations which preserve some discretion in the planning bodies as to the intensity of development which will be allowed. It is also wise to consider providing some mechanisms of administrative relief such as a hardship provision in the event the regulations have a particularly severe impact on one property owner. The generous availability of administrative relief also provides an opportunity for the governmental agency to get an advance look a the property owner's claim and to ask the owner to produce evidence in support of that claim. Baseless threats of litigation may be less likely under such circumstances and well grounded threats can be realistically handled through the administrative process.

IV.
PRACTICAL APPROACHES TO AVOIDING TAKINGS CLAIMS

Most of the inverse condemnation takings, both regulatory and physical

takings, are avoidable. When we look at many of the leading takings cases from the perspective of a final court decision, we are often left shaking our heads. These after-the-fact types of questions point to an obvious key in avoiding takings—the local government often has the choice of not regulating and always has the option of condemning a property for a proper public use or purpose. But in most instances, the local government must regulate to carry out its functions and, perhaps more importantly, to avoid even greater liability.

More and more, we begin to ask, why do these cases seem to take a direct path from a regulatory decision to the trial court? Better regulations, as well as better procedures, such as variances or special permits, are needed to divert takings claims from long, expensive and always uncertain litigation.

Beginning at the general planning stage, there are a number of proactive strategies that can be used to minimize the risk of takings claims.

1. Create Realistic Expectations

An up-to-date and comprehensive general plan supported by a master environmental document lays a solid foundation for all land use regulation. These documents create realistic expectations among landowners by

describing the community's vision for development. Provided with this direction, landowners are more likely to propose new land uses that are consistent with the vision articulated in the general plan, which reduces the potential for litigation. Similarly, it is important to implement the following:

- *Send Clear Signals*. Avoid encouraging projects that have little chance to be approved.

- *Articulate New Priorities*. Where the general plan is not clear, or where new priorities are not yet reflected in planning documents, adopt interim policies that provide some idea of what level of development will be permitted.

- *Don't Make Predictions*. Elected officials and staff should avoid ad hoc statements—either positive or negative—that predict the final agency action. All applicants should be apprised that all discretionary authority—and thus the ultimate authority to approve or deny a project—rests solely with the final decision maker(s).

2. Include Safety Valves/Variance Provisions

Generally, a variance allows local governments to modify the application and enforcement of its ordinances to avoid unfair results. If a local government includes economic hardship variances in its land use and environmental ordinances, the local government may consider claims that a regulation deprives a landowner of his property value before the matter

goes to court. These variance provisions also protect against "facial" takings claims, when a landowner challenges a regulation irrespective of how it applies to a given situation.

3. Identify Low Impact, Economically Viable Uses

The Takings Clause requires that the landowners be afforded an economically viable—but not necessarily the most profitable—use of property. In highly sensitive areas subject to extensive regulation, identify permissible low impact, economically viable uses.

4. Emphasize Fairness

Although fairness is not part of the formal inquiry in takings cases, courts often view their fundamental role as dispensing justice. A local government will have a more difficult time defending its action if the challenger is able to persuasively characterize the local government's action as overreaching, arbitrary, and unresponsive to the property owners' interests.

5. Explain and Justify

Providing a thorough explanation of the reasons for a local government's decision makes it less likely the court will be inclined to second-guess the local government's judgment.

- *Well Written Findings*. Well written findings that "bridge the analytical gap" between the purposes of the local government action and its ultimate decisions are essential. Findings are especially important in individual "adjudicative" (situation-specific) actions, but can also be helpful when the local government adopts more broadly applicable policies.

- *Fees and Dedications*. For fees and dedications, document the relationship between the impact of the proposed development and the amount of the fee or dedication. When fees are used to rebuild existing infrastructure, clearly identify the degree to which new development will benefit from the improved infrastructure.

6. Don't Approve Substandard Lots

Subdivisions and lot line adjustments should create developable lots:

- *Sensitive Areas*. If a local government allows a landowner to sever sensitive environmental areas, such as hillsides or wetlands from an otherwise usable parcel, the local government may be exposed to a subsequent claim that the entire value of the new parcel is "taken" when the local government forbids use of the parcel.

- *Buffers*. Open space buffers for an approved development project should not be severed from the development, unless the project proponent has voluntarily placed a conservation easement or otherwise perpetually agreement (and recorded) that such land will remain as an open space buffer zone.

7. Consider Acquisition

In circumstances where a community places such a high value on the scenic or environmental nature of a parcel that no development or use of

that parcel is acceptable, local governments may wish to purchase the property (or at least purchase a conservation easement). In doing so, the local government may want to consider:

- *Building Alliances*. There are several organizations and land trusts throughout the state and nation that are dedicated to preserving key parcels of land that may be able to assist agencies with acquisitions.

- *Seeking Citizen Input*. Some communities have used ballot measures that give voters the choice of either funding the purchase of the property or allowing development.

8. Be Informed

Although it is easy to make claims that a regulation interferes with constitutionally protected property rights, successful regulatory takings are relatively rare. The courts recognize that local governments have the authority to achieve a fair balance between the private property owner's desire to put his or her property to the most compensatory uses and the community's overall interests. Putting the takings issue in terms of maximizing everyone's property values when explaining the local government's decision to the property owner and the public, places the issue into terms that most can understand and embrace.

9. Institute an Adequate Administrative Process

Institute an administrative process that gives decision-makers adequate information by requiring property owners to produce evidence of undue economic impact on the subject property prior to filing a legal action. Much of the guesswork and risk for both the public official and the private landowner can be eliminated for the "takings" arena, by establishing administrative procedures for handling "takings" claims and other landowner concerns before they go to court. These administrative procedures should require property owners to support claims by producing relevant information, including an explanation of the property owner's interest in the property, price paid or option price, terms of purchase or sale, all appraisals of the property, assessed value, tax on the property, offers to purchase, rent, income and expense statements for income-producing property, and the like.

V.
CONCLUSION

Land use law continues to evolve both at the federal and state court level and still remains to be very complex. Continued growth in communities and the increase in the communities' efforts in implementing strategic plans geared towards environmental protection, historic preservation, and

protecting the overall quality of life in the communities will add to the continued debate between property owners and the local governments as to when regulations encroach upon the property owner's rights. Taking a proactive approach to city planning and land use regulations will assist local governments in avoiding potential takings claims and minimize the risk of litigating these claims in the state and federal courts.