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Balancing Land Use Management with Protection of Property Rights and the Environment

By Larry Morandi, *Senior Fellow*

The United States Constitution protects the right of individuals, corporations and others to own property free from government actions that result in a taking of the property, unless government is willing to pay the owner for the loss. The right is contingent on the individual using the property in a way that does not adversely affect the rights of other property owners or the health, safety and welfare of the general public. To ensure that the rights of all property owners and the general public are protected, government regulates, among other things, land use and the environment.

Just as the right to use property is conditioned, so too are government actions that regulate land use. Government, through regulation, may not remove all economically viable use of property without paying compensation, except where the proposed use is prohibited by nuisance law or other preexisting limitations on the use of the property. Regulation must substantially advance a legitimate public purpose, and the means of achieving its purpose must be directly related and roughly proportionate to the impacts that the regulation seeks to prevent or mitigate. This requires a delicate balance.

State legislatures may consider a multitude of approaches to manage land use and protect property rights and the environment.

As long as they comply with the principles of the federal and state constitutions as interpreted by the courts, state legislatures may weigh a multitude of approaches to manage land use and protect property rights and the environment. Some states may choose to consider separate legislation that confirms or expands protections for property owners or sets forth procedures for asserting property rights. Other states may incorporate more explicit recognition of property rights into new or existing land use or environmental laws. Still other states may adopt non-regulatory approaches that include tax incentives to encourage land conservation practices, purchase or transfer of development rights, mitigation banking and other tools. Finally, states may determine that a legislative response is not necessary.

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This state legislative report is designed to assist state legislatures to 1) better define the needs of balancing property rights, land use and the environment; 2) draw a clearer connection between the issue and any legislative response; and 3) explore alternative approaches to provide effective protections for property rights, the community and the environment. It provides general background information on constitutional provisions, case law, state takings legislation, alternative legislative approaches and approaches that may not entail legislation.

Constitutional Provisions

Constitutional provisions offer little guidance as to what types of government actions might effect a taking.

The Fifth Amendment to the United States Constitution guarantees that private property shall not "be taken for public use, without just compensation." This provision is the basis for private citizens to bring takings claims against the federal government, and through the Fourteenth Amendment, against state and local governments as well. Every state, either directly or by implication, has a similar provision in its constitution.

These constitutional provisions are brief. They offer little guidance as to what types of government actions might effect a taking. When government physically takes private property to construct a highway or to build a dam, it acquires the land through purchase or through a condemnation proceeding and pays just compensation. Compensation may also be required when government regulates in a way that substantially limits property use without physically taking the land under certain conditions. The determination of when regulation rises to the level of a taking has been left to the state and federal courts. But state legislatures recently have begun debating whether there is a need for a statutory definition of when regulation constitutes a taking.

A "taking" is a government action that removes all economically viable use of property.

Case Law

State and local governments have the authority and responsibility to protect the public health, safety and welfare of their citizens. They may place conditions on the use of private property through land use planning ordinances and environmental regulations, which are legitimate exercises of the police power. The courts have cautioned, however, that such actions may constitute a taking under certain conditions. In its first major decision on the takings issue, the United States Supreme Court in 1922 struck down a Pennsylvania law that prohibited coal mining in areas where land on the surface would subside as a result of mining activities underground. While acknowledging that "government hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law," Justice Oliver Wendall Holmes noted that "if regulation goes too far it will be recognized as a taking." (*Pennsylvania Coal Co. vs. Mahon*, 260 U.S. 393, 413, 415).

How far is "too far?" The United States Supreme Court waited more than 50 years to provide significant clarification. In *Penn Central Transportation Co. vs. New York City*, 438 U.S. 104 (1978), the court determined that a regulation will not constitute a taking if it substantially advances a legitimate public purpose, or does not deprive an owner of economically viable use of the property. The United States Supreme Court also stated that the takings analysis must be based on the effects of a regulation on the value of the property as a whole, not on a particular parcel (see also *Keystone Bituminous Coal Association vs. DeBenedictis*, 480 U.S. 470 (1987)).

The United States Supreme Court has handed down a series of decisions in the last 10 years that provide state and local governments with further guidance in measuring whether a regulatory action has gone too far. The basic lessons from each case, in chronological order, are presented briefly here; more detailed summaries appear in Appendix A.

U.S. Supreme Court decisions provide state and local governments with further guidance to measure whether a regulatory action has gone too far.

- In addition to being required to pay compensation for a taking, government may be required to pay compensation for a "temporary" taking, that is, for the time period during which the taking was in effect; the amount of compensation will be commensurate with the duration of the taking (see *First English Evangelical Lutheran Church vs. County of Los Angeles*, 482 U.S. 304 (1987)).

- Regulation requiring the granting of a development exaction (dedication of private property for a public purpose) must substantially advance a legitimate public interest, and there must be an "essential nexus" between the impact of the development and the permit condition (see *Nollan vs. California Coastal Commission*, 483 U.S. 825 (1987)).

- Regulation that prohibits all economically viable uses of private real property constitutes a taking, requiring just compensation without inquiry into the government's intent, unless the proposed property use is prohibited under nuisance law or other preexisting limitations on the use of the property (see *Lucas vs. South Carolina Coastal Council*, 505 U.S. 1003 (1992)).

- There must be "rough proportionality" between a required development exaction—such as payment of a fee or transfer of property to a particular use—and the projected impact of the development; the burden of proof in cases involving development exactions shifts from the landowner to the government (see *Dolan vs. City of Tigard*, 512 U.S. 374 (1994)).

Legislation

As long as state legislatures comply with the principles of the federal and state constitutions as interpreted by the courts, they may weigh a multitude of approaches to manage land use and protect property rights and the environment. Some states may choose to consider separate legislation that confirms or expands protections for property owners or

sets forth procedures for asserting property rights. Other states may incorporate more explicit recognition of property rights into new or existing land use or environmental laws. Still other states may provide greater certainty to property owners and regulators alike through changes in permitting procedures that make the process more efficient and equitable. Finally, the legislature may determine that a legislative response is not necessary, that existing statutory provisions and court procedures are adequate to manage land use and protect property rights and the environment. It remains the prerogative of each state legislature to make such a determination.

State Takings Legislation

One approach that proponents of greater protection for property rights support is state takings legislation. Some form of property rights protection legislation has been introduced in every state since 1991. NCSL has documented that 21 states have enacted legislation aimed at either ensuring that government actions do not result in a taking as defined in the U. S. Constitution or the state constitutions and interpreted by the courts, or defining a new level of reduction in property value that constitutes a regulatory taking requiring compensation or modification of the action for purposes of state law (see Appendix B for the statutory citations in each state). The statutes fall into four general categories:

Since 1991, some form of property rights protection legislation has been introduced in every state.

1. Requiring the state attorney general to review proposed state agency regulations for their takings implications.

2. Requiring state agencies and/or local governments to evaluate the takings implications of proposed regulations.

3. Requiring state or local governments to compensate landowners for reductions in property value, or to lessen the impacts by revising the regulation.

4. Establishing a dispute resolution process to settle disagreements between property owners and state and local governments in lieu of litigation.

Legislation in three states contains provisions that fall in the first category. The legislation does not change the case law interpretation of what is a taking; the intent of the legislation is to ensure that a taking as defined in the United States Constitution or the state constitutions and interpreted by the courts does not occur. Many state attorneys general review proposed state regulations to ensure that they comply with legislative intent. Legislation in category one expands the responsibility to flag those regulations that might result in a taking, depending on how they are implemented, and to advise the issuing agency accordingly. Delaware, Indiana and Maine have passed this type of law.

Legislation in category two typically requires the state attorney general to prepare guidelines to assist state agencies and local governments in assessing the potential takings

impacts of proposed regulation. The guidelines summarize relevant state and federal court decisions, and provide warning signals in the form of questions that government agencies should ask themselves to ensure that regulation does not go too far (see Appendix C for the Washington state attorney general's checklist, which has been used by other state attorneys general in preparing guidelines under state laws). The content of the state agency or local government assessments may be limited to evaluating the constitutional takings implications of proposed regulation, or the legislation may require additional analysis. The legislation in six states—Idaho, Michigan, Missouri, Tennessee, Washington and Wyoming—requires government agencies to consult the attorney general's guidelines in assessing the constitutional takings implications of proposed regulation. Two other states have related laws that are limited to assessing the takings implications of proposed regulation. Virginia's legislation requires the Department of Planning and Budget to include in its economic impact analysis of proposed state agency regulation the impact on the use and value of private property. Arizona's statute requires a local government to be able to demonstrate, during an administrative appeals process, that a land-use restriction is roughly proportional to the impact of the proposed land use, and that there is an essential nexus between the restriction and a legitimate government purpose.

The legislation in seven states—Kansas, Louisiana, Montana, North Dakota, Texas, Utah and West Virginia—requires government agencies to prepare a written evaluation of proposed regulations that includes a discussion of how the regulation substantially advances its stated purpose, the burden placed on property owners, the benefits to the public of the regulation, and alternatives that might accomplish the same purpose.

Some legislation defines the level of property value reduction that requires compensation or modification of the action.

The third category of legislation seeks to define the level of reduction in property value that constitutes a regulatory taking requiring compensation or modification of the action for purposes of state law. The level of property value reduction beyond which compensation is required varies: 40 percent in Mississippi, 25 percent in Texas, and 20 percent in Louisiana (the Mississippi and Louisiana statutes limit their application to reductions in the value of agricultural and forestry lands). A regulatory agency may revise its action to bring the reduction in property value under the threshold instead of paying compensation. Oregon passed a related law that authorizes a landowner whose timber value is reduced by 10 percent or more to apply to the State Forestry Department for approval of an alternate timber harvesting plan; if the landowner and the department fail to agree on the alternate plan, the landowner may request a hearing before the State Board of Forestry (the legislation expired July 1, 1997).

Rather than setting a percentage reduction in the value of property that constitutes a regulatory taking, Florida's law provides judicial relief for a government action that places an "inordinate burden," as determined by the courts, on the use of real property. The legislation defines inordinate burden to be a state or local government action that restricts the use of private real property such that the owner is unable to obtain reasonable, investment-backed expectations from its use, or that places a disproportionate share of the burden to protect the public good on the property owner. The legislation also shortens the

process required prior to a court determination that the administrative review is final and the action is ripe for appeal.

The fourth category of legislation establishes a dispute resolution procedure outside the court system that uses a mediator or a special master mutually agreed to by the property owner and the state agency or local government responsible for the regulatory action to provide mediation or other dispute resolution services. Legislation in Florida and Maine contains mediation and other dispute resolution provisions. Under each state's law, the result of a mediation or other dispute resolution proceeding does not prevent a landowner from seeking judicial review.

Alternative Legislative Approaches

State legislatures also have devised alternative approaches for dealing with the problems that takings legislation seeks to address. A state may consider incorporating variance provisions in specific environmental laws to provide regulators with discretionary authority to negotiate permit conditions with property owners in order to avoid a regulatory taking controversy. Maine's legislation includes a provision requiring the attorney general and the legislative committee reviewing a proposed rule to ensure that sufficient variance provisions exist in the law or rule to avoid a taking.

A legislature can amend state land use laws to provide greater clarity and safeguard property owners' rights during the permitting process.

The legislature may likewise amend its land use laws to provide greater clarity, greater advance notification and procedural safeguards for property owners in the permitting process. In 1996 amendments to its Growth Management Act, the Washington Legislature passed a package of bills that require counties to designate permit assistance staff to work with applicants; provide property owners with more immediate access to information about restrictions on the use of property; require local governments to notify county assessors of land use decisions that may affect the valuation of property for tax purposes; and authorize property owners to seek reevaluation of property to accurately reflect reductions in value associated with land use restrictions.

If a specific land use policy is viewed as overly burdensome to some property owners, the legislature may choose to amend that policy to provide for greater flexibility in land use. Minnesota's 1996 amendments to its Wetlands Conservation Act:

- Expand the definition of agricultural land exempt from wetlands regulations in rural areas.
- Allow the drainage of small wetlands primarily on farms under certain conditions.
- Ease the replacement requirements for drained or filled wetlands in counties with most of their original wetlands in place (for example, the replacement ratio drops from 2:1 to 1:1 for wetlands larger than 400 square feet in counties where 50 percent to 80 percent of original wetlands remain).

As a trade-off for these concessions in rural areas, the wetlands protection provisions were strengthened in urban areas. Replacement of wetlands lost primarily to road projects must now occur first within the same watershed or, if not possible, the same county or another county within the metropolitan Minneapolis-St. Paul area.

There are several other mitigation measures, many of them non-regulatory, that the legislature may consider as a way to protect the public interest and reduce undue restraints on land use, as an alternative to adopting takings legislation. In many cases, their use may not require any additional state legislation, relying instead on the traditional authority of local government and the courts to design and review permit conditions or land use plans:

Other mitigation measures rely on traditional local government authority and court design and review of permit conditions or land use plans.

- Administrative appeals to agencies empowered to grant relief.
- Cluster subdivisions, or similar techniques such as planned unit developments, to locate development on the least sensitive portion of the property.
- Increases in the intensity or use of areas appropriate for development in exchange for protection of sensitive areas.
- Performance zoning, including criteria to ensure that development will not adversely impact the surrounding area.
- Variances, waivers, adjustments of land development or permit standards, or other extraordinary relief, including, where appropriate, conditions on the amount of development, density of development, or use permitted.

If state legislatures can move the focus of debate from one particular approach, they may be able to involve more stakeholders in negotiating solutions that equitably balance competing public and private interests.

Appendix A
United States Supreme Court Decisions Cited in the Text

***Penn Central Transportation Co. vs. City of New York*, 438 U.S. 104 (1978)**
The United States Supreme Court upheld a New York City historic preservation ordinance declaring Grand Central Station a landmark. It found that the ordinance promoted a valid public purpose, and that it allowed the plaintiff to make a reasonable economic return on the current use of the property. On the question of whether the ordinance denied the plaintiff the value of preexisting air rights to build above the station, the court determined that it had to base its analysis on the property as a whole, not just on the parcel represented by the air rights.

***Keystone Bituminous Coal Association vs. DeBenedictis*, 480 U.S. 470 (1987)**
The United States Supreme Court rejected the plaintiff's claim that a Pennsylvania state law constituted a taking by requiring coal companies to leave 50 percent of the coal beneath certain buildings in place to prevent surface land subsidence. It determined that the regulation did not deny the coal companies all economically viable use of their property, and reaffirmed its finding in the *Penn Central* case that the takings analysis must be based on the effect of the regulation on the property as a whole, not on a particular segment of the property (in this case, the coal required to be left in the ground).

***First English Evangelical Lutheran Church vs. County of Los Angeles*, 482 U.S. 304 (1987)**
The United States Supreme Court determined that in addition to being required to pay compensation for a taking, compensation may be an appropriate remedy for a "temporary" taking. In this case, the plaintiff argued that the county's interim floodplain regulations preventing reconstruction of the church's buildings constituted a taking. Without deciding whether a taking had occurred, the court ruled that "where government's activities have already worked a taking of all use of property, no subsequent action by the government can relieve it of the duty to provide compensation for the period during which the taking was effective."

***Nollan vs. California Coastal Commission*, 483 U.S. 825 (1987)**
The United States Supreme Court found that requiring a beachfront owner to grant an easement across his property as a condition for a building permit did not substantially advance the legitimate government purpose of mitigating the limitation on visual access to the beach caused by construction on the lot. The court determined that there must be an "essential nexus" between the impact of the development (loss of visual beach access) and the permit condition (granting an easement). The court ruled that since there was no indication that the new building would prevent the public from walking up and down the beach, the requisite connection between the permit condition and the impact of the development was lacking.

Lucas vs. South Carolina Coastal Council, **505 U.S. 1003 (1992)**

The United States Supreme Court reversed a South Carolina Supreme Court decision that found that a South Carolina Coastal Council action preventing the plaintiff from developing two beachfront lots within a designated critical area of the state's sand dunes did not constitute a taking. The council's action was directly pursuant to state legislation passed after the plaintiff had purchased the property. The United States Supreme Court held that a regulation that denies all "economically beneficial or productive use of the land" constitutes a taking requiring just compensation without inquiry into the government's intent, unless the proposed use is prohibited by nuisance law or other preexisting limitations on the use of the property.

Dolan vs. City of Tigard, **512 U.S. 374 (1994)**

The United States Supreme Court determined that a dedication of private property must bear a "rough proportionality" to the development impact. It overturned a local permit that required the dedication of property for drainage purposes and for a bicycle path along the adjacent stream in order to mitigate the impact of the expansion of a hardware store. In recognizing that keeping the floodplain from development served the legitimate public purpose of reducing the risk of flooding, the Court suggested that the plaintiff could have simply been required to leave the floodplain portion of her land undeveloped without being forced to transfer title to the city. The Court also determined that the city had not produced sufficient evidence to demonstrate that the bicycle path would offset traffic caused by the hardware store expansion. Although it did not define "rough proportionality," the Court required government to make "some sort of individualized determination" that the dedication of property is related "both in nature and extent to the impact of the proposed development."

Appendix B
Statutory Citations to State Takings Laws

Arizona	Ariz. Rev. Stat. Ann., 9-500.12, 9-500.13, 11-810, 11-811
Delaware	Del. Code Ann., 29-605
Florida	Fla. Stat. Ann., 70.001, 70.51
Idaho	Idaho Code, 67-8001 et seq.
Indiana	Ind. Code, 4-22-2-32
Kansas	Kan. Stat. Ann., 77-701 et seq.
Louisiana	La. Rev. Stat. Ann., 3:3601 et seq., 3:3621 et seq.
Maine	Me. Rev. Stat. Ann., 2-8, 4-18(6-B), 5-3331(5), 5-3341, 5-8056(6), 5-8072 (4)(H)
Michigan	Mich. Comp. Laws, 24.421 et seq.
Mississippi	Miss. Code Ann., 49-33-1 et seq.
Missouri	Mo. Rev. Stat., 536.017
Montana	Mont. Code Ann., 2-10-101 et seq.
North Dakota	N. D. Cent. Code, 28-32-02.5
Oregon	1995 Or. Laws, Chap. 9, Secs. 17-19 (not codified)
Tennessee	Tenn. Code Ann., 12-1-201 et seq.
Texas	Tex. Gov't Code Ann., 2007.001 et seq.
Utah	Utah Code Ann., 63-90-1 et seq., 63-90a-1 et seq.
Virginia	Va. Code, 9-6.14:7.1(G)
Washington	Rev. Code Wash., 36.70A.370
West Virginia	W. Va. Code, 22-1A-1 et seq.
Wyoming	Wyo. Stat., 9-5-301 et seq.

Appendix C
State of Washington Attorney General's Guidelines

The Washington Attorney General, whose guidelines have been used as the basis for checklists prepared by attorneys' general offices in many other states, suggests five questions that state and local government agencies should ask themselves before finalizing a regulation:

1. Does the regulation or action result in a permanent physical occupation of private property?
2. Does the regulation or action require a property owner to dedicate a portion of property or to grant an easement?
3. Does the regulation or action deprive the owner of all economically viable use of the property?
4. Does the regulatory action have a severe impact on the landowner's economic interest?
5. Does the regulation or action deny a fundamental attribute of ownership?

The attorney general notes that a positive response to any question does not automatically mean that a taking has occurred; "It means only that there could be a constitutional issue and that agency staff should carefully review the proposed action with legal counsel."

State Legislative Reports

Report	Date
"Performance Contracting: State Savings Through Energy Efficiency" (Vol. 21, No. 10) (ISBN 1-55516-521-4)	October 1996
"State Responses to Asbestos: An Update" (Vol. 21, No. 11) (ISBN 1-55516-400-5)	December 1996
"Pay-As-You-Drive Insurance" (Vol. 21, No. 12) (ISBN 1-55516-089-1)	December 1996
"Significant State Juvenile Justice Enactments in 1996" (Vol. 21, No. 13) (ISBN 1-55516-903-1)	December 1996
"State Anti-Crime Legislation in 1996" (Vol. 21, No. 14) (ISBN 1-55516-905-8)	December 1996
"Feebates" (Vol. 22, No. 1) (ISBN 1-55516-904-X)	January 1997
"Affirmative Action: The Debate" (Vol. 22, No. 2) (ISBN 1-55516-814-0)	January 1997
"State School Finance Litigation: A Summary and an Analysis" (Vol. 22, No. 3) (ISBN 1-44416-223-1)	June 1997
"The Model Energy Code for Residential Buildings" (Vol. 22, No. 4) (ISBN 1-55516-906-6)	June 1997
"Market and Financial Incentives to Improve Home Energy Efficiency" (Vol. 22, No. 5) (ISBN 1-55516-907-4)	June 1997
"Legislative Staff Salaries and Personnel Policies: 1996-1997" (Vol. 22, No. 6) (ISBN 1-55516-908-2)	August 1997
"Fuel Excise Tax Structure and Alternative Fuels" (Vol. 22, No. 7) (ISBN 1-55516-909-0)	August 1997
"Balancing Land Use Management with Protection of Property Rights and the Environment" (Vol. 23, No. 1) (ISBN 1-55516-910-4)	January 1998

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Evaluating the Effects of State Takings Legislation

By Larry Morandi, *Senior Fellow*

Takings legislation represents one approach considered by states to address the controversy surrounding the impacts on property rights of land use and environmental regulations (for a detailed discussion of takings issues, see Larry Morandi, "Balancing Land Use Management With Protection of Property Rights and the Environment," NCSL *State Legislative Report* 23, no. 1, January 1998). This type of legislation is designed primarily to (1) ensure that local land use restrictions and state environmental regulations do not result in a taking of private property, as defined in the federal and state constitutions and interpreted by the courts, that requires financial compensation to the property owner; or (2) define a new level of reduction in property value that constitutes a regulatory taking and requires financial compensation or modification of the government action.

This state legislative report attempts to determine the effects of state takings legislation on state and local governments charged with implementing such laws. It is based on telephone interviews and written responses to a survey from state legislative staff, state offices of attorneys general, state regulatory agencies affected by takings legislation, local government officials and other sources in the 21 states that NCSL has documented as having enacted some form of takings law since 1991. It is not intended to be a thorough analysis due to the following limitations:

> *A "taking" is a government action that removes all economically viable use of property.*

1. Not all states surveyed provided sufficient information on which to make an assessment.
2. Information from local governments was not readily available.
3. Focusing on the attorney general's office and the state's primary environmental agency excludes other agencies whose actions might be covered under the laws.
4. Laws in the majority of states had been in effect for two years or less at the time research was completed in March 1997.

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Overview

NCSL staff reviewed takings legislation enacted in 21 states since 1991: Arizona, Delaware, Florida, Idaho, Indiana, Kansas, Louisiana, Maine, Michigan, Mississippi, Missouri, Montana, North Dakota, Oregon, Tennessee, Texas, Utah, Virginia, Washington, West Virginia and Wyoming. The legislation was placed in four general categories:

State takings legislation falls into four general categories.

1. Attorney general review of proposed regulations.
2. State agency and local government assessment of proposed regulations.
3. Compensation for regulatory takings.
4. Dispute resolution.

After reviewing legislation in each category, NCSL staff sought responses to the following questions:

- Has the attorney general prepared guidelines to assist state agencies in evaluating the takings implications of proposed regulations?
- Has the state environmental agency prepared any takings assessments of proposed regulations covered under the law?
- Has the state environmental agency revised any proposed regulations based on the results of the takings assessment?
- Has the state environmental agency incurred any additional costs in preparing takings assessments?
- Have any administrative appeals been filed against a local government challenging a dedication or exaction of private real property?
- Has any litigation been initiated against the state or local governments alleging that a government action constitutes a regulatory taking?
- Has any court awarded compensation to a property owner, or has a government action been modified, as a result of a regulatory taking?
- Are property owners and government agencies using dispute resolution procedures as an alternative to litigation?

Findings and Conclusions

NCSL received information from 15 of the 21 states that had enacted some form of takings legislation since 1991: Arizona, Delaware, Florida, Idaho, Indiana, Kansas, Louisiana, Maine, Mississippi, North Dakota, Tennessee, Texas, Utah, Washington and West Virginia.

Based on an analysis of that information, NCSL staff reached the following general conclusions.

(1) Attorney General Review of Proposed Regulations

The attorneys general offices have absorbed into their existing budgets whatever additional costs may have been incurred in reviewing proposed state agency regulations for their takings implications. Advice given to state agencies may be protected by attorney-client privilege, making it difficult to ascertain whether the attorney general found proposed regulations that might constitute a taking, or whether a state agency revised a proposed regulation based on the attorney general's review. Attorneys general have noted that it is difficult to determine whether a proposed regulation will constitute a taking until it is applied to a specific piece of property.

(2) State Agency and Local Government Assessment of Proposed Regulations

Where required by takings legislation, all state attorneys general have prepared guidelines to assist state agencies in conducting takings assessments. State agency assessments often are informal and undocumented, making it difficult to determine the number done and the conclusions reached. Some state agencies previously included a legal analysis of the takings implications of proposed regulations as part of the normal rulemaking process, thereby requiring no additional work under takings laws. Where state agencies have reported the results of their takings assessments, they have not found it necessary to modify proposed regulations. Some states have not conducted any assessments because of exemptions contained in the legislation for regulations issued pursuant to state or federal laws. The costs of preparing assessments have been minimal, with most state agencies absorbing them into their existing budgets, or not incurring any additional costs. In Texas, where additional costs were identified, the costs for developing procedures to determine whether a takings assessment is necessary and preparing the assessments ranged from $500 to $11,000 per agency.

Arizona takings legislation includes an administrative appeals process for property owners to challenge a local government action.

In Arizona, where takings legislation sets up an administrative appeals process for owners to challenge a local government dedication or exaction of real property, every municipality to which the law applies has prepared procedures to expedite the appeals process. At least two administrative appeals have been filed, both of which the municipality lost. Local governments are negotiating with property owners to accept voluntary dedications or exactions as an alternative to foregoing the improvement of property or purchasing a right of way or easement. Where local governments cannot require a dedication or exaction, they will incur costs to improve property.

(3) Compensation for Regulatory Takings

State offices of attorneys general and state regulatory agencies have reported that through March 1997, no litigation had been filed against a state agency or local government under the takings laws that provide a cause of action for a regulatory taking. There have been no court decisions and no compensation has been paid to any property owner for an alleged regulatory taking.

(4) Dispute Resolution

Dispute resolution has been used successfully by property owners in two states.

Property owners have used the dispute resolution provisions in the two states whose takings laws contain them. At least 30 cases have proceeded under the dispute resolution provisions of Florida's law. At least five have reached a mutually acceptable solution to the property owner and the government entity. One case has gone to mediation in Maine and was successfully resolved.

A more detailed evaluation of the effects of takings legislation in 15 of the 21 states for which information was submitted appears in the appendix to this report.

Appendix
Analysis of Takings Laws by Category of Legislation

1. Attorney General Review of Proposed Regulations

Delaware

One of the first states to pass takings legislation, Delaware's 1992 law (Del. Code Ann., 29-605) requires the attorney general to review all proposed state agency regulations before they go into effect and to inform the issuing agency of their potential to result in a taking of private property requiring compensation. Most state agencies are aware that they should ask a deputy attorney general assigned to their agency for an evaluation of a proposed regulation before it is issued. The attorney general's office will give a written response to any regulation submitted for review. The office has taken a position that if a proposed regulation will in any way restrict the use of private property, it will advise the agency that there is a potential for a taking and that a more meaningful analysis can only be done on a property-specific basis. In the 18-month period ending June 30, 1996, the office estimates that there may have been six to 12 proposed regulations that, depending on how they are implemented by a state agency, have the potential to constitute a taking. No litigation has been filed against a state agency by a landowner as a result of those regulations reviewed by the attorney general's office. The office has absorbed the staff time necessary to review the proposed regulations within its existing budget.

Indiana

Similar to Delaware's law, Indiana's 1993 legislation (Ind. Code Ann., 4-22-2-32) requires the attorney general to review all proposed state agency regulations before they go into effect for their potential takings implications. If the attorney general determines that a proposed regulation may constitute a taking, it must inform the governor and the issuing agency. The attorney general's advice is protected under attorney-client privilege. The office has indicated that most proposed regulations are of such a general nature that it is difficult to determine if they will constitute a taking until they are applied on a property-specific basis. The office has provided state agencies with a process for evaluating proposed regulations. Because of the attorney-client privilege afforded advice to state agencies, the effect of consultations between the attorney general's office and state agencies on the issuance of regulations cannot be determined. No litigation has been filed against a state agency as a result of regulations reviewed by the attorney general under the statute. The attorney general's office reports that it has always conducted a thorough review of proposed regulations for other purposes; as a result, it has been able to absorb any additional costs relating to the takings legislation within its existing budget.

2. State Agency and Local Government Assessment of Proposed Regulations

Arizona

Legislation passed in 1995 (Ariz. Rev. Stat. Ann., 9-500.12, 9.500.13, 11-810, 11-811) establishes an administrative appeals process whereby a property owner may appeal a municipal or county dedication or exaction of real property required as a condition of the property's use, improvement or development. The law does not apply to a dedication or exaction required by a municipal or county legislative act in which the administering agency has no discretion in determining the nature or extent of the action. The municipality or county must appoint a hearing officer to hear appeals. Once an appeal is made, the municipality or county must prove that there is an essential nexus between the dedication or exaction and a legitimate public purpose, and that the action is roughly proportional to the impact of the proposed property use. The law further requires every municipality with a population greater than 2,000 and every county to prepare administrative procedures to facilitate the administrative appeals process.

Every municipality and county to which the law applies has prepared administrative procedures. The League of Arizona Cities & Towns reports that there have been at least two appeals filed under the law, both in the city of Scottsdale (a third appeal was resolved before going to hearing). One concerned a scenic corridor easement, the other the dedication of a right-of-way for a water and sewer line. The city lost both appeals and withdrew the dedication or exaction. There have been no appeals in Phoenix, the largest city in the state. The Phoenix Development Services Department has indicated that it meets with property owners informally before a dedication or exaction is finalized in an attempt to resolve potential appeals.

There are two sets of costs that a municipality or county may incur under the law. The first is the *process* costs of performing individual analyses of proposed dedications or exactions to ensure that they comply with the essential nexus and rough proportionality requirements of United States Supreme Court decisions. The city of Phoenix plans to use existing plan review staff to perform these analyses. The city acknowledges that "this may cause some degradation of plan review turnaround time" and that "the overall fee schedule may have to be increased to recover the costs of individualized analyses since customers cannot be directly charged." The city of Scottsdale estimates that handling the appeals process incurs costs equivalent to approximately one-half day to one day of a staff person's time.

The second set of costs is the *capital* costs of having to purchase foregone right-of-way dedications and improvements of real property in order to maintain, in the words of one Phoenix official, "a safe, functional and aesthetically pleasing municipality." As of April 30, 1996, the city of Phoenix estimated that the value of foregone dedications and exactions in the first year of the law's operation amounted to $690,000.

Idaho

The stated purpose of Idaho's 1994 legislation (Idaho Code, 67-8001 et seq.) is to "establish an orderly, consistent review process that better enables state agencies to evaluate whether proposed regulatory or administrative actions may result in a taking of private property without due process of law." The statute goes on to stipulate that its purpose is not to "expand or reduce the scope of private property protections provided in the state and federal constitutions." It requires the attorney general to establish a process and a checklist to assist state agencies in evaluating proposed regulations or administrative actions for their takings implications (the most recent guidelines were prepared in October 1995). The state agency review process is protected by attorney-client privilege. The law was extended to cover local government regulations or administrative actions in 1995 (Chapter 182).

The Idaho Office of the Attorney General has indicated that the evaluation process is informal and undocumented, but that implicit in the Department of Environmental Quality's permitting and rulemaking processes is a practical and legal evaluation of any takings implications. State agency budgets have not increased as a result of conducting the evaluations; additional costs, if any, are from minimal legal training for staff on takings issues. The Department of Environmental Quality has not revised any proposed regulations or administrative actions based on the takings evaluations. Comparable information for local governments has not been available.

Kansas

The 1995 Private Property Protection Act (Kan. Stat. Ann., 77-701 et seq.) requires the attorney general to prepare guidelines to assist state agencies in evaluating whether a proposed government action constitutes a taking as articulated by the United States Supreme Court and the Kansas Supreme Court. State agencies must use the guidelines in preparing a written report on each proposed action that may constitute a taking. The report must:

- Identify the risk to the public health, safety or welfare of the use of private property that the action proposes to regulate.
- Describe how the proposed action will substantially advance the public interest.
- State the facts used to justify the proposed action.
- Assess the takings implications of the proposed action.
- Identify alternatives, if any, to the proposed action.

State agencies must submit a copy of each written report to the governor and the attorney general before implementing a government action for which a report has been prepared. Unlike other state takings assessment laws, the Kansas legislation requires state agencies to review and evaluate all existing rules and regulations in accordance with the attorney

general's guidelines, and submit to the governor and the attorney general a written report by Jan. 1, 1997.

The attorney general prepared guidelines to assist state agencies in evaluating the takings implications of proposed government actions on Dec. 21, 1995. The Department of Health and Environment, the primary state agency responsible for issuing rules and regulations that may affect property rights, adopted procedures to prepare the written report required under the law on July 16, 1996. Each bureau within the department prepares the written report on proposed government actions as required under the law. The department's Office of Legal Services answers the questions posed in the attorney general's guidelines.

The department has indicated that it routinely conducted some type of takings assessment on proposed rules and regulations prior to passage of the Private Property Protection Act in 1995, and that its assessments had been reviewed by the attorney general's office before implementing a proposed rule or regulation. No proposed rules or regulations have been found by the department or the attorney general's office to constitute a taking, and none have been revised based on that determination. The department has not incurred any additional costs to comply with the 1995 legislation's takings assessment requirements.

The Department of Health and Environment submitted its evaluation of existing rules and regulations to the governor and the attorney general on Oct. 21, 1996. After consulting the attorney general's guidelines, the department determined that none of its existing rules and regulations constitutes a taking.

North Dakota

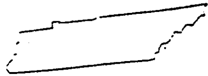
Legislation enacted in 1995 (N.D. Cent. Code, 28-32-02.5) requires a state agency to prepare a written assessment of the takings implications of any proposed rule that might limit the use of private real property. The agency assessment must:

- Assess the likelihood that a proposed rule may result in a taking.
- Clearly identify the purpose of the proposed rule.
- Explain why the proposed rule is necessary.
- Identify alternatives to the proposed rule.
- Estimate the cost to government if the proposed rule results in a taking.
- Certify that the benefits of the proposed rule exceed the estimated costs if compensation is required.

The Department of Health has reviewed its proposed rules to determine if a takings assessment is necessary. It determined that a takings assessment was not necessary for its ground water monitoring well rules (the only rules proposed since enactment of N.D. Cent. Code, 28-32-02.5) because their implementation would not result in a taking. The Office of Attorney General subsequently approved the rules. The department has incurred some additional costs to determine whether a takings assessment is necessary, but not

enough to justify seeking a budget increase. The department has not revised any proposed rules based on its takings assessment.

Tennessee



Legislation enacted in 1994 (Tenn. Code Ann., 12-1-201 et seq.) requires the attorney general to develop guidelines to assist state agencies in identifying and evaluating proposed government actions that might result in a taking of private property. The initial guidelines were published in July 1995. They were revised in August 1996. The attorney general's office considers consultation with state agencies to be covered by attorney client privilege. As a result, it cannot divulge how state agencies have used the guidelines or whether the office has suggested modifications to proposed regulations. Because state agencies are not required to prepare written assessments of their proposed actions, it is difficult to determine the effect of the guidelines on their final actions.

Texas

The 1995 Private Real Property Rights Preservation Act (Tex. Gov't Code Ann., 2007.001 et seq.) contains both takings assessment and mitigation/compensation provisions. The law requires the attorney general to prepare guidelines to assist government agencies in preparing takings impacts assessments (TIAs) of proposed actions covered under the law. The guidelines were published in the *Texas Register* on Jan. 12, 1996. In addition to determining whether the proposed action constitutes a taking, the assessment must demonstrate how the proposed action substantially advances its stated purpose, the burdens placed on private real property, the benefits to the public of the proposed action, and alternatives that might accomplish the same purpose as the proposed action. The law also required the state comptroller to present a report to the legislature before the convening of the 1997 session on how well government agencies are complying with the assessment provisions and what the compliance costs have been. The comptroller submitted its report on Jan. 15, 1997.

The comptroller sent a written survey to 131 state agencies to obtain compliance information; 119 agencies responded. The responses addressed two sets of costs; those for preparing procedures to determine whether a government action requires a TIA, and the actual costs of preparing the TIA. Ninety-five agencies indicated that they took no actions in FY 1996 that are covered under the act. Twenty-five agencies responded that they either took actions in FY 1996 that are covered under the act, or that they anticipate taking actions during FY 1997 that are covered under the act. Five agencies prepared specific procedures in FY 1996 to help them determine whether a proposed action requires a TIA; 11 agencies anticipate preparing specific procedures during 1997. Nine agencies will determine on an ad hoc basis whether a TIA is necessary. Agency costs for preparing specific procedures in FY 1996 ranged from zero to $11,000 per agency.

Four agencies prepared a total of 139 TIAs during FY 1996, with the Texas Natural Resources Conservation Commission (TNRCC) preparing 116 of the TIAs. Agency costs for preparing the TIAs ranged from $500 to $1,250 per agency. Agencies project that their FY 1997 costs for preparing TIAs will range from $500 to $5,000 per agency based on an increase in the number of TIAs being prepared (from 139 in FY 1996, to between 148-156 in FY 1997).

Based on comments received from government agencies, the comptroller made the following recommendations to the legislature:

- Clarify the types of agencies that are required to prepare TIAs.
- Clarify the types of government actions covered under the act.
- Clarify the rights of adjacent landowners to relief from actions undertaken by government agencies.
- Clarify the agency responsible for preparing the TIA, where more than one agency is involved in undertaking an action that affects a property owner.

Utah

Utah's 1993 takings assessment law (Utah Code Ann., 63-90-1 et seq.) provides very specific criteria for the composition of state agency assessments. It requires state agencies to adopt guidelines to assist them in identifying and evaluating government actions that have constitutional takings implications. Each assessment must include an analysis of:

- The likelihood that the proposed action will result in a taking.
- Alternatives to the proposed action.
- The estimated costs to the state for compensation should the action result in a taking, and the source of payment within the agency's budget.

The law further requires a state agency to:

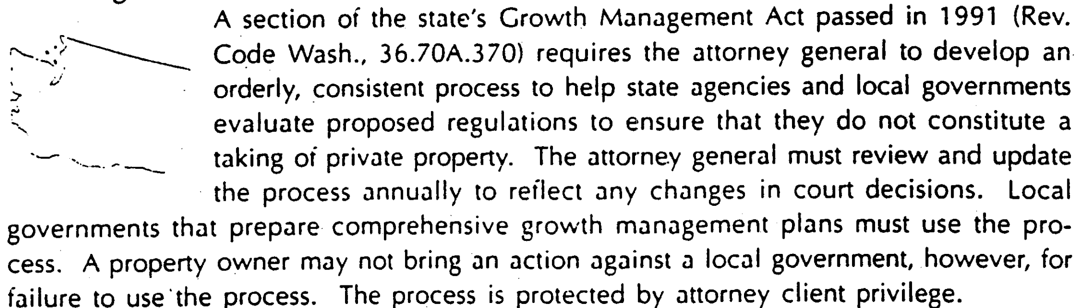
- Clearly identify the public health or safety risk created by the property use.
- Ensure that the proposed action substantially advances a legitimate public purpose.
- Establish that the conditions imposed by the action are proportionate to the impacts caused by the property use.

The law was expanded in 1994 (Utah Code Ann., 63-90a-1 et seq.) to require each political subdivision in the state to enact an ordinance establishing similar guidelines to those developed by state agencies. The law does not specify criteria to be included in a local government takings assessments; it merely requires each political subdivision to consider the guidelines when taking an action that might result in a taking. It further states that the guidelines are only advisory.

The Department of Environmental Quality has not prepared any takings assessments under the law. The reason relates to the definition of the term "government action" for which a takings assessment is required. Government action means "proposed rules and emergency rules by a state agency that if adopted and enforced may limit the use of private property *unless its provisions are in accordance with applicable state or federal statutes* [emphasis added]." The department has stated that all of its actions have been "in accordance with applicable state or federal statutes," and, therefore, do not require the preparation of a takings assessment. The department has also noted that if it were required to conduct the assessments, it would need additional financial resources.

Comments received from the Utah Association of Counties suggest that local governments may not be aware of the takings assessment requirement; there is little communication between local governments and the state attorney general's office. To the degree political subdivisions are aware of the takings assessment requirement, the association feels that they are already in compliance with the law. County governments in Utah are very sensitive to the effects of land use regulation on private property and on the county's property tax base.

Washington



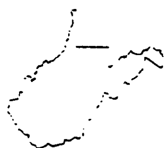
A section of the state's Growth Management Act passed in 1991 (Rev. Code Wash., 36.70A.370) requires the attorney general to develop an orderly, consistent process to help state agencies and local governments evaluate proposed regulations to ensure that they do not constitute a taking of private property. The attorney general must review and update the process annually to reflect any changes in court decisions. Local governments that prepare comprehensive growth management plans must use the process. A property owner may not bring an action against a local government, however, for failure to use the process. The process is protected by attorney client privilege.

The attorney general completed the initial guidance document in February 1992 (the first state to do so), and revised it in April 1993. The most recent update was prepared in 1995. The document consists of a "recommended process" and an "advisory memorandum" for evaluating proposed regulations. The recommended process suggests to local governments and state agencies that they review the advisory memorandum with their legal counsel and distribute it to all decision makers and key staff under their jurisdiction. The advisory memorandum contains warning signals that local governments and state agencies should use as a checklist to determine if a proposed regulation might go too far. The advisory memorandum concludes with a list and summary of relevant federal and state takings cases.

Two provisions of the statute make it difficult to determine the extent of local government and state agency use of the takings guidelines: (1) there is no requirement that a written takings assessment be completed; and (2) review of proposed regulations by legal counsel is protected by attorney client privilege. One attorney in the state attorney general's

office noted, however, that he was surprised by the limited reference to the guidelines by local governments preparing growth management plans.

West Virginia



The Private Real Property Protection Act of 1994 (W.Va. Code, 22-1A-1 et seq.) requires the Division of Environmental Protection to prepare an assessment of any action that is reasonably likely to result in a taking of private property. The assessment goes beyond a determination of the takings implications of a proposed regulation to include:

- Identifying the risk of the regulated activity and the benefits to be achieved by the regulation.
- The potential effects on other landowners and the environment without the regulation.
- How the regulation mitigates the risk.
- Why the division believes the regulation may result in a taking requiring compensation.
- Alternative actions to the regulation.
- Estimated costs to the state if compensation is required.

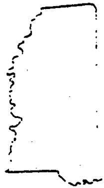
The statute contains an exclusion that significantly limits its application. An assessment is not required for agency actions undertaken pursuant to state or federal statutes, rules or regulations. The Division of Environmental Protection has determined that none of its regulatory actions are taken independent of state or federal statutes, rules or regulations. It has not, therefore, prepared any assessments or assumed any additional costs to comply with the law.

3. Compensation for Regulatory Takings

Louisiana

Louisiana's 1995 Right to Farm and Forest Act (La. Rev. Stat. Ann., 3:3601 et seq.) authorizes the owner of agricultural or forest land to bring an action against a state or local government agency to determine whether a government action has reduced the value of the property by 20 percent or more. If the court determines that a government action has reduced the value of the land by 20 percent or more, the property owner is entitled to compensation for the reduction and retention of title to the property, or, in the case of agricultural land only, recovery of the fair market value of the property and transfer of title to the government agency. As an option, the government agency may rescind the action resulting in the regulatory taking; the government agency remains liable for damages incurred while the action is in effect. The Louisiana Department of Agriculture and Forestry has reported that no actions have been filed against it or any local government agency seeking compensation for a regulatory action covered under the law.

Mississippi



Mississippi was the first state to enact legislation requiring compensation for a regulatory taking. Passed in 1994 and amended in 1995, the Mississippi Agricultural and Forestry Activity Act (Miss. Code Ann., 49-33-1 et seq.) grants a cause of action to seek compensation to an owner of forest or agricultural land whose property value is reduced by more than 40 percent as a result of a state or local government action. The government agency may repeal the action before a final court decision is reached. As in Louisiana, the government agency remains liable for damages incurred while the action is in effect. The attorney general's office has indicated that no legal actions have been taken against the state seeking compensation under the act.

Texas

Texas' 1995 Private Real Property Rights Preservation Act (Tex. Gov't Code Ann., 2007.001 et seq.) defines a "taking" to include a reduction in value of private real property of 25 percent or more caused by a state or local government action. It authorizes a property owner to bring suit to determine whether a government action constitutes a taking. If a court determines that a taking has occurred, the court may invalidate the action. The government agency responsible for the action may elect to pay compensation in lieu of rescinding the action. The law exempts actions that are reasonably taken to comply with state or federal mandates.

The Texas Natural Resource Conservation Commission (TNRCC) has reported that no litigation has been filed against the state alleging that a government action has reduced property value by 25 percent or more. The TNRCC has been sued, however, by landowners adjacent to a confined animal feed lot who argue that they have no recourse under the takings law to allege a reduction in their property value associated with the permit the TNRCC issued for the feed lot.

4. Dispute Resolution

Florida

The 1995 Bert J. Harris, Jr., Private Property Rights Protection Act (Fla. Stat. Ann., 70.001 et seq.) provides judicial relief for a property owner resulting from a state or local government action that inordinately burdens the use of real property, and a dispute resolution process to resolve a property owner's grievance outside of court. "Inordinate burden" is defined to mean a government action that restricts the use of private real property such that the owner is unable to obtain reasonable, investment-backed expectations from its use, or that places a disproportionate share of the burden to protect the public interest on the property owner. If a court determines that a government action amounts to an inordinate burden, it may require financial compensation for the actual loss in the property's fair market value.

Under the dispute resolution provisions of the act, a landowner who believes that a development order or an enforcement action of a government entity is unreasonable or unfairly burdens the use of the property may request relief from a special master mutually agreed upon by the landowner and the governmental entity responsible for the order or action. Before initiating a proceeding before a special master, the landowner must exhaust all nonjudicial administrative appeals. All hearings conducted by the special master must be informal, open to the public and not require an attorney. The role of the special master is to act as a mediator between the two parties in order to reach a mutually acceptable resolution of the dispute.

If an acceptable solution is not reached, the special master must make a written recommendation to both parties. If the special master determines that the development order or enforcement action is not unreasonable or does not unfairly burden the use of the owner's property, the special master must recommend that the order or action remain in place. If the special master determines that the order or action is unreasonable or unfairly burdens the use of the owner's property, the special master may recommend alternatives that protect the public interest but reduce the restrictions on the use of the property. The government entity may accept, modify or reject the recommendation. Regardless of the government's response, the property owner may seek judicial relief through the courts.

There has been no litigation alleging that a government action to which the law is applicable has placed an inordinate burden on the use of private real property. The courts have not determined what types of government actions or what level of reduction in property value constitute an inordinate burden. The courts have not awarded compensation to any property owner under the act. At least one county has not issued a development order drafted before passage of the act because of concern that it might be interpreted to place an inordinate burden on the use of private property if challenged in the courts.

According to the Florida Conflict Resolution Consortium, at least 30 cases have proceeded under the dispute resolution provisions of the act; 28 cases have been filed against county or municipal government actions, with one each having been filed against a regional water management district and the state Department of Environmental Protection.- At least five of the cases have resulted in a mutually acceptable solution between the property owner and the government entity. The difficulty in determining the exact number of cases is that there is no central location for initiating the dispute resolution process and selecting a special master. Some cities and state agencies are developing procedural guidelines to assist in the dispute resolution process. The Florida Conflict Resolution Consortium has developed "Model Procedural Guidelines for Special Master Proceedings," and has begun a training program for special masters.

Maine

Chapter 537 of the 1996 session laws (Me. Rev. Stat. Ann., 5-3341) established a land use mediation program in the Court Mediation service to provide private landowners with an alternative to litigation for resolving disputes over state and local government land use actions. The act establishes a fee not to exceed $175 for every four hours of mediation services to be paid by the landowner. Eligible landowners are those who have suffered significant harm as a result of a government action denying a land use permit. Use of the mediation services does not prevent a landowner from seeking judicial review of a permit decision.

One case has been filed under the land use mediation program. It involved a challenge to a local government denial of a variance. The mediator successfully resolved the issue to the satisfaction of the property owner and the local government in four hours at a cost of $175 to the landowner.