



*Michigan Association of Planning
A Chapter of the American Planning Association*

Policy Statements on the Due Process and Regulatory Takings Doctrines Adopted 2005

The following statements present and briefly explain the policy positions of the Michigan Association of Planning with regard to the application of Michigan's constitutional substantive due process and regulatory takings doctrines to the regulation of private property by state and local units of government. The regulatory takings policy statement also addresses the issues of statutory compensation requirements. A full policy guide providing the background and reasoning behind these policy statements has been provided in a separate document and is available from MAP.

Policy Statement – Due Process

The Michigan Association of Planning:

- Strongly supports the ability of state and local units of government to exercise their police powers in order to regulate the use of private property for the purpose of protecting the public health, safety, morals, and general welfare, but strongly believes that government should do so only in ways that reasonably advance legitimate governmental interests.

The best way to ensure that local regulations like zoning and subdivision codes reasonably advance legitimate governmental interests is to clearly premise those regulations on a comprehensive local plan that has done the following things:

- **Identified local trends and conditions, including opportunities and constraints for land use and development based on land suitability and infrastructure conditions;**
- **Clearly articulated community goals for the public and private use of land and the future development of land that clearly take account of local development trends and conditions;**
- **Clearly articulated well-designed policies to implement those goals;**
- **Identified efforts to be taken to ensure consistency between the plan and implementing policies and regulations;**
- **Identified implementation timeframes and responsibilities; and**

- **Involved the public in meaningful dialogue in the development of the comprehensive plan, demonstrating that the plan was achieved through a public input process.**

The adoption of a well-crafted plan that pays close attention to these considerations, and the clear connection between this plan and the community's land use and development management regulations, will help to ensure that those regulations are not arbitrary and capricious but rather well supported and well designed so that they reasonably advance a legitimate governmental interest, which will in turn help to ensure their legal defensibility under the substantive due process doctrine.

Policy Statement – Regulatory Takings

The Michigan Association of Planning:

- Believes that the federal and state constitutional regulatory takings doctrines provide appropriate protections for private property owners against the unjust taking of their property rights through regulation.
- Strongly believes that the State of Michigan should not adopt, either through statute or constitutional amendments aside from the protections currently afforded under the federal and state regulatory takings doctrines, the requirement that governments compensate private property owners for reductions in the market values of their properties as may result from the regulation of those properties. Such “takings” or compensation requirements should not be adopted because:
 - *The regulatory takings doctrine currently provides adequate protection against regulatory takings and provides certainty to property owners in extreme cases, such as when a regulation deprives an owner of all reasonable use of the property, while providing sufficient flexibility to the courts to evaluate takings claims on a case-by-case basis in less clear cases.* As discussed more fully in the background to this policy statement, the animating principle behind the regulatory takings doctrine is the idea that it is sometimes unfair for the community to impose burdens on a few individual property owners through regulation that, in all fairness and justice, the community as a whole should bear. The doctrine itself has evolved over time to address this concern in balance with the recognition that the constitution guarantees *reasonable* use of one's property—not a “right” to extract as much economic profit from one's land as possible—and that “government could hardly go on” if it had to pay compensation for all of the economic costs imposed on private individuals as a result of its valid regulations. Mandatory compensation requirements—typically enacted to address the concerns of a relatively small number of property owners whose development expectations have been frustrated—invariably become “blunt sledgehammers” that redress the concerns of these particular property owners but in doing so forsake the sense of balance that the regulatory takings

doctrine embodies. Moreover, these kinds of mandatory compensation requirements can be found unconstitutionally unsound themselves when crudely drafted, such as when they draw unfair distinctions between property owners based on the date of property acquisition.¹

- *As a practical matter, mandated compensation requirements are administratively unworkable.* Especially when imposed on regulations that have broad applicability, administering compensation mandates necessitates determining not just the fair market value of a wide array of properties, but also determining how much the value of each of those properties might have been diminished because of the regulation itself, taking into account all of the other factors that affect property values. This is a very difficult if not practically impossible task. These kinds of compensation requirements thus often have the effect of either completely eliminating local government's ability to regulate land use in order to protect public health, safety, and welfare, or effectively imposing a substantial "unfunded mandate" onto local governments that undertake regulation by placing such extensive and costly administrative hurdles in the way.

- *Mandated compensation requirements have the effect of eroding private property rights as much as advancing them by placing "innocent" land owners at the mercy of irresponsible neighbors.* Because mandatory compensation can have the effect of greatly limiting local efforts to regulate land use and development (if not stopping them altogether, as described above), these requirements can also have the effect of allowing some private property owners to impose their land use wishes (and produce their own economic gains) at the expense of their neighbors. For example, building a sky-scraper within an historic downtown commercial district or a large chemical storage facility on farmland next to a neighboring farmer's home are all types of development that, while clearly incompatible, would not necessarily constitute nuisances and that would likely yield substantial economic profits for the property owners building them. If a mandated compensation requirement were in effect, it would likely apply to local regulations designed to prohibit these kinds of incompatible development, regardless of whether the regulations would allow compatible development as is typically the case, because of the "reduction" in values attributable to the regulations. As a result, the compensation mandate would effectively prevent local governments from regulating land use in order to protect the property owners wishing to development in incompatible ways. Moreover, it would essentially protect those individual property owners' development interests at the expense of the rights and property values of all of their neighbors, who have done nothing to diminish the reasonable use of the

¹ Most notably, an Oregon court recently struck down Oregon's "Measure 37" mandatory compensation requirement, in part for this very reason. *MacPherson v. Warner*, No. 05C10444 (OR Cir. Ct. for Marion County, Oct. 2005). Available at: <http://www.ojd.state.or.us/mar/documents/OpinionOrderMSJ.pdf> (November 2005).

properties in question but who must now themselves bear the “uncompensated” burdens of the incompatible development. The problematic nature of this kind of “deregulatory taking” has been recognized in other states such as Oregon (see the citation above) and Iowa, where the Iowa Supreme Court recently struck down a right-to-farm law as an invasion of the neighbor’s right to be free from the stink of a feedlot (*Bormann v. Kossuth County*, 584 N.W.2d 309 (Iowa 1998)).

- *Mandatory compensation requirements are unfair to the community because they allow individual property owners who do not want to follow the law to demand payment from the community as “compensation” for having to do so. As noted above, the motivating principle underlying the regulatory takings doctrine—and typically underlying calls for mandatory compensation requirements—is the idea that it is sometimes unfair for the community to impose burdens on a few individual property owners through regulation that, in all fairness and justice, the community as a whole should bear. Also as noted above, the regulatory takings doctrine has evolved to address this concern in careful balance with need for local government to be able to adopt valid regulations in order to protect public health, safety, and welfare. The effect of mandatory compensation requirements, however, is to remove this careful balance and require compensation even for validly enacted health, safety, and welfare regulations without regard to the need for those regulations or a reasonable property owner’s expectations in light of those needs. Rather, it allows the property owner to essentially demand “compensation” from the community for complying with a validly enacted law, and thereby sacrifice fairness to the community for the sake of a sense of fairness to the property owner.*

In sum, the public regulation of private property in order to advance public health, safety, and welfare often produces hardships for individual property owners, understandably raising concerns that those hardships are sometimes unjustly imposed on a few individuals when they should be born by the larger community. The regulatory takings doctrine has evolved over time to provide the delicate balance that needs to be struck in these instances as between the needs of the larger community and the interests of the individual property owners. Mandatory compensation requirements are generally intended to further address the hardships imposed on individual property owners, specifically to eliminate all (or most) of the private “costs” born by the individual as a result of the regulation, by making government “pay” for those costs. Thus promoted out of a sense of fairness, these requirements often have the unintended effect of tilting the balance (or removing the balance entirely) in favor of the individual property owner in an unjust way, either by making it practically impossible for government to regulate land use altogether, or by eroding the rights and values of neighboring property owners, or by allowing a complaining property owner to demand compensation from the community as the price for complying with a validly enacted law. For all of these reasons, the Michigan Association of Planning strongly opposes any kind of mandatory compensation requirement that would go beyond the protections already

afforded to private property owners through the federal and state constitutional regulatory takings doctrines.