

Appendix A: ATTORNEY GENERAL'S CHECKLIST

In an effort to provide guidance regarding “takings,” the Office of the Attorney General of the State of Idaho has prepared the following checklist for use when reviewing the potential impact of a regulatory or administrative action upon specific property. Agency staff must use the following questions in reviewing the potential impact of a regulatory or administrative action on specific property. While these questions also provide a framework for evaluating the impact proposed regulations may have generally, takings questions normally arise in the context of a specifically affected property. The public review process used for evaluating proposed regulations is another tool the agency should use aggressively to safeguard rights of private property owners. If property is subject to regulatory jurisdiction of multiple government agencies, each agency should be sensitive to the cumulative impacts of the various regulatory restrictions.

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

1. ***Does the regulation or action result in a permanent or temporary physical occupation of private property?*** Regulation or action resulting in a permanent or temporary physical occupation of all or a portion of private property will generally constitute a “taking.” For example, a regulation that required landlords to allow the installation of cable television boxes in their apartments was found to constitute a “taking.” (See *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 [1982].)
2. ***Does the regulation or action require a property owner to dedicate a portion of property or to grant an easement?*** Carefully review all regulations requiring the dedication of property or grant of an easement. The dedication of property must be reasonably and specifically designed to prevent or compensate for adverse impacts of the proposed development. Likewise, the magnitude of the burden placed on the proposed development should be reasonably related to the adverse impacts created by the development. A court also will consider whether the action in question substantially advances a legitimate state interest.

For example, the United States Supreme Court determined in *Nolan v. California Coastal Comm'n*, 483 U.S. 825 (1987), that compelling an owner of waterfront property to grant a public easement across his property that does not substantially advance the public's interest in beach access, constitutes a “taking.” Likewise, the United State Supreme Court held that compelling a property owner to leave a public greenway, as opposed to a private one, did not substantially advance protection of a floodplain, and was a “taking.” (*Dolan v. City of Tigard*, 114 U.S. 2309 [June 24, 1994].)

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

Unlike 1 and 2 above, it is important to analyze the regulation's impact on the property as a whole, and not just the impact on a portion of the property. It also is important to assess whether there is any profitable use of the remaining property available. (See *Florida Rock Industries, Inc. v. United States*, 18 F.3d 1560 [Fed. Cir. 1994].) The remaining use does not necessarily have to be the owner's planned

use, a prior use, or the highest and best use of the property. One factor in this assessment is the degree to which the regulatory action interferes with a property owner's reasonable investment-backed development expectations.

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

4. ***Does the regulation have a significant impact on the landowner's economic interest?*** Carefully review regulations that have a significant impact on the owner's economic interest. Courts often will compare the value of property before and after the impact of the challenged regulation. Although a reduction in property value alone may not be a "taking," a severe reduction in property value often indicates a reduction or elimination of reasonably profitable uses. Another economic factor courts will consider is the degree to which the challenged regulation impacts any development rights of the owner. As with 3 above, these economic factors are normally applied to the property as a whole.
5. ***Does the regulation deny a fundamental attribute of ownership?*** Regulations that deny the landowner a fundamental attribute of ownership — including the right to possess, exclude others, and dispose of all or a portion of the property — are potential takings.

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

The city never demonstrated why a public green way, as opposed to a private one, was required in the interest of flood control. The difference to the petitioner, of course, is the loss of her ability to exclude others . . . [T]his right to exclude others is "one of the most essential sticks in the bundle of rights that are commonly characterized as property." (*Dolan v. City of Tigard*, 114 U.S. 2309 [June 24, 1994].)

6. ***Does the regulation serve the same purpose that would be served by directly prohibiting the use or action; and does the condition imposed substantially advance that purpose?*** A regulation may go too far and may result in a takings claim where it does not substantially advance a legitimate governmental purpose. (*Newline v. California Coastal Commission*, 107 S. Ct. 3141 [1987]; *Dolan v. City of Tigard*, 114 U.S. 23009 [June 24, 1994].)