

"Regulatory Taking" and "Inverse Condemnation" Explained

by Stuart Lieberman

As part of my legal practice, I am fortunate enough to speak with many real estate professionals throughout the northeast. Often, they will ask me what can be done when the government denies a wetlands permit or some other permit that is needed to develop a piece of property. I explain to them that if the denial takes away all practical uses of the property, the denial may be a "regulatory taking," which is also called an "inverse condemnation."

I cannot tell you how many times the person I am speaking with thinks that I am talking in Greek when I use those terms. Actually, everyone in the real estate business really needs to be acquainted with them; so, I will now explain them to you so that you do not have to be shocked the next time you hear them. I promise I will not be boring!

Despite the promise I just made (yeah, I know the joke 'How do you know when a lawyer is lying!!!!), to begin with we need to read the Fifth Amendment of the United States Constitution. Here it is:

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation. "

This was an amazingly important Amendment. You have heard the expression, "I'll take the 5th." This is what these people mean—that they will not be a witness against themselves in a criminal action. There is a lot of other important material here, but for now we are looking at the last phrase of the Amendment: "nor shall private property be taken for public use, without just compensation."

Note that it promises that property will not be "taken" without just compensation. These kinds of cases are formally called regulatory takings or inverse condemnation cases. But they are nicknamed "takings" cases based on the word "taken" in the amendment.

Any time the government over-regulates a piece of property so that it no longer has any practical use, it may be possible that it has "taken" the property without paying just compensation. For people in the real estate industry, this may apply to denied wetlands permits, denied coastal development permits, denied zoning variances, other denied development applications, and any other government action which eliminates all practical use of the property. The sky is the limit in terms of the kinds of government actions that may result in a valid takings claim.

Condemnation is the power of the government to take title to any property that it needs for a public purpose. You are likely familiar with this concept in terms of highway expansions, new airports, new schools and parks. The federal government and the states have laws that govern the government's behavior when it condemns property. The government must always pay the property owner fair market value, and the property must always be used for a public purpose.

Inverse condemnation means that a property has been so over-regulated that the government may have well condemned it, so the term "inverse" condemnation. Often, an affected property owner will ask a court to force the government to commence condemnation proceedings.

The other term, regulatory taking, means that the government has effectively "taken" the property without paying for it by over-regulating it. In other words, it has taken the property through the enforcement of its own regulations.

In parts of the country that are heavily developed there are now pressures to curtail development. This is being done through a number of mechanisms that often include attempts to re-zone open spaces, limit the ability of developers to install infrastructure, such as sewers, and protective sensitive areas, such as wetlands.

As the urge to preserve open space builds, expect more assertions that the government has taken property without just compensation. History has shown that takings claims are a natural by-product of government efforts to slow development.

Does the government have a right to block all use of person's property through regulation? If the reason is for a public purpose, often the answer is yes. But, and this is a big but, the government must pay full fair market value and related costs. If it fails to do so, and it often appears to ignore this requirement, then the owner must go to court, or wherever the law says he or she must go, to seek just compensation and related costs. That often means ultimately filing a "takings" lawsuit.

Before one can go to court, often administrative remedies must be explored to their conclusion. This is called the "exhaustion of remedies" requirement. Though it seems simple, often there are disputes about how far a property owner must go to exhaust remedies.

The law and procedures in takings case differ from state to state and at the national level. But in general one must exhaust remedies and then can file a "takings" lawsuit. In addition to the Fifth Amendment Constitutional challenge, other federal and state claims may also be appropriate. Sometimes, federal civil rights claims, which can allow for punitive damages, are also asserted.

Should you attempt to do this without a lawyer? No, not if you are interested in winning. These are very difficult matters and should only be handled by those attorneys that have handled many of them in the past. In addition, there may be time limits that can affect a property owner's right to seek just compensation. Statute of limitations issues should be reviewed as promptly as possible to ensure that rights are not forever lost