

PREFACE

Why this Handbook is Important

More and more, developers and other landowners are attempting to use takings litigation — or the mere threat of takings litigation — to persuade government officials to relax or abandon land use controls and other community protections. Developer voices are amplified by the so-called “property rights” movement, which argues for an aggressive application of the Takings Clause to curtail government regulation. Recent rulings in favor of takings claimants by the Supreme Court add to the perception that local governments risk takings liability when they act to protect our neighborhoods and natural environment. As a result, the fear of large compensation awards sometimes has a chilling effect on those charged with protecting our communities from harmful land use.

The perceived risk of takings liability is more myth than reality. Scholars identified this durable myth as far back as 1973,^{*} and it is still with us today. With a proper understanding of takings doctrine, community officials may strike a reasonable balance between private property rights and community interests without risking a debilitating compensation award under the Takings Clause. Given the predominance of “property rights” objections in the land use debate, government attorneys, land use planners, and other public officials need to arm themselves with a working knowledge of takings law.

Hence, this Handbook. Community Rights Counsel and the California Community Land Use Project have prepared this book to help demystify the Takings Clause. The Handbook results from a series of workshops we are conducting for government attorneys, public officials, and planners to explain how to avoid takings lawsuits.

^{*}See FRED BOSSELMAN, ET AL., THE TAKING ISSUE: AN ANALYSIS OF THE CONSTITUTIONAL LIMITS OF LAND USE CONTROL 324 (1973) (“Since the ‘myth’ of the taking clause assumes that less can be regulated than the court decisions actually permit, many local governments fail to exercise their powers — or if they do, they back down easily when challenged.”).

Where litigation is unavoidable, the Handbook suggests strategies for successfully defending takings claims. We also offer suggestions for the development of a proper record to support land use decisions.

We want to provide some measure of comfort to government attorneys and their clients. Take heart: The news is not nearly as bad as certain press accounts and the self-proclaimed “property rights” movement would have you believe. Although the Supreme Court has ruled in favor of property owners in certain high-profile takings cases in recent years, these rulings have been narrow and carefully limited. The Court repeatedly has reaffirmed the essential role of local land use planning to protect our communities. When litigation is unavoidable, government counsel usually should prevail.

Just as important, government attorneys often serve as the gatekeepers to creative land use planning. Prudent local officials typically will not proceed with new community protections unless they get the green light from their legal advisors. The information in this Handbook should assist government attorneys in performing this critical counseling function. State and local governments should not view the Takings Clause as an insurmountable barrier to innovative regulatory protections.

Disclaimers

We make no pretense in this Handbook of balance or objectivity. Our mission is to defend local governments against takings challenges, and this Handbook reflects that perspective. Government defendants should win (and in fact do win) most cases filed under the Takings Clause, and this Handbook is designed to help them do just that.

We hope that this Handbook will be a useful guide through the thickets of takings jurisprudence, but it is not a substitute for legal advice tailored to specific circumstances. Counseling clients on regulatory takings and the proper handling of a takings case require full knowledge of the facts and thoughtful application of the law to those facts. As the courts have said time and again, regulatory takings issues often are intensely fact-sensitive. A Handbook like this one,

designed for use by government attorneys across the country, cannot discuss the myriad legal issues unique to particular communities, jurisdictions, and factual scenarios.

Several related topics are beyond the scope of this Handbook. Although takings claimants have challenged a wide variety of government actions, we focus on takings challenges to land use controls. We do not cover non-takings challenges to land use controls, such as claims alleging violations of the First Amendment, the Equal Protection Clause, or local administrative procedures. Although we discuss the interplay between takings claims and substantive due process (see Chapter 8), we do not provide a comprehensive analysis of due process claims. Nor do we cover liability that might result from damage to private property caused by public improvements, such as flood damage caused by a broken water main.

While we hope that federal litigators will find this Handbook useful, our target audience is state and local government attorneys. Accordingly, the Handbook does not address procedural or jurisdictional issues unique to the U.S. Court of Federal Claims or the U.S. Court of Appeals for the Federal Circuit, the tribunals that hear most takings challenges brought against the United States.

No single volume could answer every question concerning takings jurisprudence or potential takings liability in the land use arena. At the end of each chapter, we include a bibliography of additional resource material. Regulatory takings jurisprudence has generated countless treatises and law review articles that provide a more comprehensive treatment of the issues we address.

Acknowledgements

The authors are indebted to Robert Brauneis, Richard Lazarus, Thomas Roberts, James Ryan, Joseph Sax, and Glenn Sugameli for their willingness to review a draft of this Handbook and their unfailingly helpful comments and suggestions. By incorporating their suggestions and reacting to their comments, we have made this a far better Handbook. We also owe a large debt of gratitude to Maggie Garratt,

a recent graduate of George Washington University Law School, who perceptively and tirelessly researched, edited, fact-checked, and cite-checked this entire Handbook. A special thank you goes to Ellen Forman, who devoted countless hours to editing drafts. Her keen insight was infinitely valuable. Finally, we thank Jared Eigerman, F.G. Courtney, Susan Cleveland, Bill Higgins, Barry Weinstein, John Clifford, and Chris Carneghi for their helpful comments on portions of the Handbook, Keith Garner, Maria Protti, and Margie O'Toole for research assistance, and San Francisco City Attorney Louise Renne for her support of this project.