

## **CHAPTER 3**

### **PROTECTION OF PROPERTY RIGHTS**

**B**oth the federal Constitution and the constitution of the State of Idaho provide that private property may not be taken for public use without just compensation as prescribed by law.

Idaho Code sections 67-6508 (a), 67-8001, 67-8002, and 67-8003 establish a review process which the City uses to evaluate whether proposed regulatory or administrative actions result in a taking of private property without due process of law.

However, Section 67-8001 states that it is not the purpose of the chapter to expand or reduce the scope of the private property protections provided in the State and federal Constitutions. Section 67-8001 states that nothing in the section grants a person the right to seek judicial relief requiring compliance with the provisions of the chapter.

Any laws or regulations governing private property should heavily depend upon the government's authority and responsibility to protect public health, safety, and welfare.

Based upon this premise, courts have supported the limitation of the use of private property through land use planning regulations such as Comprehensive Plans, Zoning Ordinances, Subdivision Ordinances, and Environmental Quality Acts.

#### **GOAL**

Ensure that the City of Victor land use policies, restrictions, conditions and fees do not violate private property rights and to establish a predetermined orderly, consistent review process for the City of Victor to evaluate whether proposed regulatory or administrative actions may result in a taking of private property without due process of law.

#### **OBJECTIVES**

1. Ensure that City land use actions, decisions, and regulations will not cause an unconstitutional physical occupation of private property.
2. Ensure that land use actions, decisions, and regulations do not cause an unconstitutional physical invasion of private property.
3. Ensure that City land use actions, decisions, and regulations do not effectively eliminate all economic value of the property.

4. Ensure that City land use actions, decisions, and regulations depend upon the City's responsibility to protect public health, safety, and welfare.

5. Ensure that City land use actions, decisions, and regulations do not prevent a private property owner from taking advantage of a fundamental property right or impose a substantial and significant limitation on the use of the property.

### **IMPLEMENTATION POLICY**

**It shall be the policy of the City of Victor that staff shall consider the following questions in reviewing the potential impact of a regulatory or administrative action on specific property.**

While these questions provide a framework for evaluating the impact proposed regulations may have generally, takings questions normally arise in the context of specific affected property. The public review process used for evaluating proposed regulations is another tool that the City 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 that there has been a "taking." Rather, it means there could be a constitutional issue and that City 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."

**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 granting 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.

**3. Does the regulation deprive the owner of all economically viable uses of the 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 pre-existing limitations on the use of the property.

**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 will often 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.

**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.

**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. Likewise, regulatory actions that closely resemble, or have the effects of a physical invasion or occupation of property, are more likely to be found to be takings. The greater the deprivation of use, the greater the likelihood that a "taking" will be found.

Private property rights and local land use control have been linchpins of American society for many years but it seems these ideals, sometimes viewed as complementary, have become unlikely adversaries.

Property rights activists must understand that rights can be strong, but only up to the point where exercising them does not have a substantial external effect on the community. And when the community wants certain land used a certain way, then the community must purchase that land, its development rights, or an easement for public use.

In many places “local control” has become a euphemism for no or slow growth, and “property rights” a euphemism for no planning. Getting back to reasonable definitions of those terms, and shifting the local approval processes from the tactical to the strategic, will help us retain local control as well as strong private property rights.

