

**FINAL REPORT OF THE JOINT
SUBCOMMITTEE STUDYING**

**GOVERNMENTAL ACTIONS
AFFECTING PRIVATE
PROPERTY RIGHTS**

**TO THE GOVERNOR AND
THE GENERAL ASSEMBLY OF VIRGINIA**



HOUSE DOCUMENT NO. 2

**COMMONWEALTH OF VIRGINIA
RICHMOND
1997**

MEMBERS OF THE JOINT SUBCOMMITTEE

Del. Glenn R. Croshaw, *Chairman*
Sen. Robert L. Calhoun, *Vice Chairman*
Del. Alan A. Diamonstein
Del. W. Tayloe Murphy, Jr.
Del. William J. Howell
Sen. Elmo G. Cross, Jr.
Sen. Kevin G. Miller

STAFF

DIVISION OF LEGISLATIVE SERVICES

Jeffrey F. Sharp, *Staff Attorney*
Michelle L. Browning, *Senior Operations Staff Assistant*

HOUSE COMMITTEE OPERATIONS

Lois Johnson, *Clerk*

TABLE OF CONTENTS

I. INTRODUCTION.....	1
II. BACKGROUND	1
A. JUDICIAL DECISIONS.....	1
B. FEDERAL LEGISLATION	3
C. TAKINGS LEGISLATION IN OTHER STATES.....	3
III. WORK OF THE JOINT SUBCOMMITTEE	4
IV. RECOMMENDATIONS.....	4
V. CONCLUSION.....	5
VI. APPENDICES	6
A. HOUSE JOINT RESOLUTION NO. 624 (1993)	7
B. HOUSE JOINT RESOLUTION NO. 74 (1994)	8
C. HOUSE JOINT RESOLUTION NO. 526 (1995)	10
D. SOURCES OF TAKINGS LAW.....	11
E. EXECUTIVE ORDER 12,360.....	13

Final Report of the Joint Subcommittee Studying Governmental Actions Affecting Private Property Rights

**To: The Honorable George F. Allen, Governor,
and
the General Assembly of Virginia**

I. INTRODUCTION

In response to the continuing tension between government regulation and private property rights, the 1993 General Assembly adopted House Joint Resolution No. 624 (Appendix A), calling for the creation of the Joint Subcommittee Studying Governmental Actions Affecting Private Property Rights. The seven-member joint subcommittee was established in 1993 to study Virginia governmental actions which may result in a regulatory taking of private property under current federal or Virginia constitutional law and the need, if any, for legislation to change current law or procedures in response to the findings of this study. Currently, statutory law is silent on the degree of regulation that constitutes regulatory taking. The study was subsequently continued by House Joint Resolution No. 74 (1994) (Appendix B) and House Joint Resolution No. 526 (1995) (Appendix C).

Delegate Glenn R. Croshaw of Virginia Beach served as chairman of the joint subcommittee, with Senator Robert L. Calhoun acting as vice chairman.

II. BACKGROUND

Judicial Decisions

Known as the "takings" clause, the legal basis of a taking claim is the fifth amendment of the U.S. Constitution, which states, "nor shall private property be taken for public use, without just compensation . . ." Also, Article I, § 11, of the Virginia Constitution prohibits the General Assembly from passing any law . . . whereby private property shall be taken or damaged for public uses, without just compensation"

The critical issue is determining when a taking will trigger a property owner's right to just compensation. When a government actually acquires a property, or physically occupies a property, then it is obvious that a taking has occurred. However, in 1922, the U.S. Supreme Court, for the first time, held that a taking can occur through government regulation which goes too far in restricting the use of one's property. This is referred to as a "regulatory taking." The

Supreme Court, over the years, has struggled to define when a regulatory taking occurs, and the Court's taking standards have changed frequently.

In 1978, in *Penn Central Transportation Co. v. City of New York*, the Supreme Court listed three factors to be considered in determining whether a regulatory taking has occurred: (i) the economic impact of the government action, (ii) the extent to which reasonable investment-backed expectations are disturbed, and (iii) the character of the government action.

In a 1980 case, *Agins v. City of Tiburon*, the Supreme Court used a two-part analysis to determine whether there had been a taking: (i) whether the challenged regulation substantially advances legitimate state interests and (ii) whether the regulation "denies an owner economically viable use of his land."

Other important takings cases include (i) *Nollen v. California Coastal Commission* (1987), which held that there must be a nexus between the proposed regulation of the property and the legitimate state interest sought to be advanced, and (ii) *First English Evangelical Lutheran Church v. County of Los Angeles* (1987), which held that governments must pay compensation not only for a permanent taking of property but also for a temporary taking.

In 1992, the Supreme Court heard the case of *Lucas v. South Carolina Coastal Council*, where the owner of two beachfront lots was denied the right to develop those lots for residential use by a newly enacted beachfront management act. The owner filed suit claiming a regulatory taking. It was not contested by the government that the regulation left the lots without economic value. The court held that the government must pay compensation where government action has "deprived a landowner of all economically beneficial uses" of the property. However, the court also declared that there would be exceptions to this rule where development could have been prevented under the common law nuisance doctrines of the state, or the denied use is not part of the owner's title to the property.

The Supreme Court did not determine whether these exceptions might apply in this case, but remanded the case back to the South Carolina courts for a final determination as to whether there had been a regulatory taking of Mr. Lucas' property. Last year, the parties reached an out-of-court settlement, with Mr. Lucas receiving a substantial payment from the state.

Most recently, the Supreme Court heard the case of *Dolan v. City of Tigard* (1994). In this case the city required a landowner to dedicate a portion of her property lying within the flood plain for improvement of the storm drainage system and property adjacent to the flood plain for a bicycle/pedestrian pathway as a condition for a building permit allowing expansion of the landowner's commercial property. Although the court concluded that the city's requirements had a nexus with legitimate public purposes, the court held that (i) the findings relied upon by the city to require the landowner to dedicate a portion of her property in the flood plain as a public greenway did not show the required reasonable relationship necessary to satisfy the requirements of the fifth amendment and (ii) the city failed to meet its burden of demonstrating that the additional number of vehicle and bicycle trips generated by the proposed commercial development

was reasonably related to the city's requirement of dedication of a pedestrian/bicycle pathway easement.

The bottom line with this series of takings cases is that there is no firm rule one can rely on to predict how the court will decide a case. The court looks at the regulatory takings issue on a case-by-case basis, and the outcomes of the cases seem to depend a great deal upon the nuances of the facts in each particular case (Appendix D).

Federal Legislation

Private property rights legislation has been a popular topic during the current congressional debate of environmental legislation. However, although many bills related to property rights have been introduced, they have not been successful. Furthermore, President Clinton has stated that he will veto any legislation that he believes would undermine the protection of clean air and water or weaken toxic waste standards.

Sen. Robert Dole (R-Kan.), the Senate majority leader, is a supporter of property rights legislation. In 1994 he introduced a bill (S. 177) that would have prohibited any federal regulation from becoming effective unless the U.S. Attorney General certified that it complied with procedures that assess a regulation's potential for taking private property and seek to minimize such takings where possible. The bill failed. In 1995, Sen. Dole introduced a bill (S. 605) which would require the federal government to compensate property owners if government action reduces the value of their property by at least one-third.

The House of Representatives passed several bills related to property rights in 1995. H.R. 9 would require the federal government to compensate a property owner whose use of any portion of that property has been limited by agency action under a specific regulation that diminishes the fair market value of that portion by 20 percent or more. The bill would also require federal agencies to prepare regulatory impact analyses for proposed rules that are likely to have an annual impact on the economy of at least \$50 million. Also, the bill would require federal agencies to prepare cost-benefit analyses for such rules. H.R. 925 would require the federal government to compensate private property owners for reductions of at least 20 percent in the value of their property resulting from federal agency action. H.R. 1022 would require federal agencies to perform risk assessments and cost-benefit analyses for proposed major regulations. These bills did not pass the Senate.

Takings Legislation in Other States

Over 30 states have introduced "takings," or private property rights, legislation over the past several years. Most of this legislation was based on President Reagan's Executive Order 12,360 and the implementing Attorney General Guidelines which require that all federal regulations be reviewed in order to assist federal departments and agencies in gauging the takings implications of their actions (Appendix E). Other state legislation would require that the state or localities compensate landowners whenever a regulation reduced the value of the property by more than a certain percent, typically 50 percent

To date, very few takings legislation efforts have been successful. Most of the legislation which has passed appears to be the takings assessment variety, rather than the compensation type. However, many private property rights advocates are watching to see what Congress does in this area, and it should not be surprising if there are renewed efforts at the state level to duplicate any federal successes.

III. WORK OF THE JOINT SUBCOMMITTEE

At its initial meeting, the joint subcommittee was briefed on the current status of takings law and the types of takings legislation introduced in other states, and received the comments of the various interested parties. The joint subcommittee asked for comments regarding both types of takings legislation introduced in other states: (i) a takings assessment prior to adoption of certain regulations and (ii) landowner compensation when a regulation diminishes property value by a certain percent.

The subcommittee heard from many interested parties during the initial stages of its study. A number of speakers supported the type of legislation being considered by the subcommittee. Among the reasons for such support were (i) the need to clarify legislatively what the courts have declared judicially with regard to takings law, (ii) the feeling that governments do not give appropriate weight to private property rights, (iii) the impact that government regulation has on property values, and (iv) the lack of resources available to most property owners to deal with proposed regulations. Other speakers however, opposed potential takings legislation. Among their objections were (i) the opinion that citizens already have adequate protections under the fifth amendment, (ii) the potential cost of takings legislation, (iii) the possible impact on historic resource ordinances, and (iv) the diminution of local governments' regulatory powers.

Although the first year of the study produced several recommendations, the joint subcommittee decided to continue its examination of private property rights and to monitor changes in takings law arising from federal initiatives and judicial decisions. However, due to continued uncertainty in the federal law, the joint subcommittee did not meet. It was determined that it would be futile to meet while the competing federal proposals are still being debated.

IV. RECOMMENDATIONS

After giving careful consideration to the type of takings legislation which had been introduced in other states and the arguments in favor of such legislation, the joint subcommittee concluded after its initial year of study that it was unnecessary at that time to pursue takings legislation in Virginia. Furthermore, it was felt that the status of takings law in the United States may change significantly due to legislation pending in the U.S. Congress or due to new judicial decisions.

Due to this uncertainty in the direction of takings law, the study was continued for two additional years. However, after a total of three years, it was determined that it would be too

speculative to attempt to predict the actions of Congress with regard to private property rights. Therefore, the joint subcommittee made no further recommendations.

V. CONCLUSION

The members of the joint subcommittee heard from, and were assisted by, various members of the public and private sector during the course of its study. The joint subcommittee expresses its gratitude to all those who gave testimony, provided materials or assisted in some other way during the study.

Respectfully submitted,

Glenn R. Croshaw, *Chairman*

Robert L. Calhoun, *Vice Chairman*

Alan A. Diamonstein

W. Tayloe Murphy, Jr.

William J. Howell

Elmo G. Cross, Jr.

Kevin G. Miller

VI. APPENDICES

Appendix A

HOUSE JOINT RESOLUTION NO. 624

Establishing a joint subcommittee to study governmental actions affecting private property rights.

Agreed to by the House of Delegates, February 25, 1993

Agreed to by the Senate, February 23, 1993

WHEREAS, the Fifth Amendment of the United States Constitution and Article I, Section 11 of the Virginia Constitution provide that private property shall not be taken for public use without just compensation; and

WHEREAS, recent Supreme Court decisions, in reaffirming the fundamental protection of private property rights and in assessing the nature of governmental actions that have an impact on constitutionally protected property rights, have also reaffirmed that governmental actions that do not formally invoke the condemnation power, including regulations, may result in a taking for which just compensation is required; and

WHEREAS, responsible fiscal management and fundamental principles of good government require that government decision-makers evaluate carefully the effect of their administrative, regulatory, and legislative actions on constitutionally protected property rights; and

WHEREAS, government regulations by their very nature protect one right, while restricting another; and

WHEREAS, any change in the "takings" law in Virginia may have far-reaching effects and make it more difficult for governmental agencies to implement necessary laws and regulations; and

WHEREAS, governmental actions which may have a significant impact on the use or value of private property should be scrutinized to avoid taking private property without just compensation; now, therefore, be it

RESOLVED by the House of Delegates, the Senate concurring, That a joint subcommittee be established to study Virginia governmental actions which may result in a taking of private property under current federal or Virginia constitutional law and the need, if any, for legislation to change current law or procedures in response to the findings of this study. For the purposes of this study, the exercise of eminent domain for acquisition of interests in land for parks, highways or other public facilities shall not be included.

The joint subcommittee shall be composed of seven members as follows: four members of the House of Delegates appointed by the Speaker of the House and three members of the Senate appointed by the Senate Committee on Privileges and Elections.

The joint subcommittee shall complete its work in time to submit its findings and recommendations to the Governor and the 1994 Session of the General Assembly as provided in the procedures of the Division of Legislative Automated Systems for the processing of legislative documents.

The indirect costs of this study are estimated to be \$14,095; the direct costs of this study shall not exceed \$6,300.

Implementation of this resolution is subject to subsequent approval and certification by the Joint Rules Committee. The Committee may withhold expenditures or delay the period for the conduct of the study.

Appendix B

HOUSE JOINT RESOLUTION NO. 74

Continuing the Joint Subcommittee Studying Governmental Actions Affecting Private Property Rights.

Agreed to by the House of Delegates, February 11, 1994
Agreed to by the Senate, February 28, 1994

WHEREAS, House Joint Resolution No. 624, adopted by the 1993 Session of the General Assembly, established a joint subcommittee to study governmental actions affecting private property rights; and

WHEREAS, the Fifth Amendment of the United States Constitution and Article I, Section 11 of the Virginia Constitution provide that private property shall not be taken for public use without just compensation; and

WHEREAS, recent Supreme Court decisions, in reaffirming the fundamental protection of private property rights and in assessing the nature of governmental actions that have an impact on constitutionally protected property rights, have also reaffirmed that governmental actions that do not formally invoke the condemnation power, including regulations, may result in a taking for which just compensation is required; and

WHEREAS, responsible fiscal management and fundamental principles of good government require that government decision makers evaluate carefully the effect of their administrative, regulatory and legislative actions on constitutionally protected property rights; and

WHEREAS, the joint subcommittee, during the course of its deliberations, studied the two basic types of takings legislation which have been introduced in many other states; and

WHEREAS, the joint subcommittee heard testimony from numerous individuals regarding the state of private property rights in Virginia and whether the Commonwealth should adopt takings legislation; and

WHEREAS, although those who argued in favor of takings legislation did so very ably and raised many important issues, the joint subcommittee concluded that at this time it is unnecessary to pursue the type of sweeping takings legislation which has been introduced elsewhere; and

WHEREAS, the joint subcommittee also considered an alternate proposal involving an economic impact analysis of proposed legislation which will result in the promulgation of regulations, but did not have sufficient time to fully explore this proposal; now, therefore, be it

RESOLVED by the House of Delegates, the Senate concurring, That the Joint Subcommittee Studying Governmental Actions Affecting Private Property Rights be continued. The joint subcommittee shall continue to study issues affecting private property rights and, in particular, the need for additional economic impact analysis of proposed legislation which will result in the promulgation of regulations.

The current seven members of the joint subcommittee shall continue to serve with any vacancy to be filled in accordance with the original resolution.

The direct costs of this study shall not exceed \$4,200.

The Division of Legislative Services shall provide staff support for the study. All agencies of the Commonwealth shall provide assistance to the joint subcommittee, upon request.

HJR 74 (cont.)

The joint subcommittee shall complete its work in time to submit its findings and recommendations to the Governor and the 1995 Session of the General Assembly as provided in the procedures of the Division of Legislative Automated Systems for the processing of legislative documents.

Implementation of this resolution is subject to subsequent approval and certification by the Joint Rules Committee. The Committee may withhold expenditures or delay the period for the conduct of the study.

Appendix C

HOUSE JOINT RESOLUTION NO. 526

Continuing the Joint Subcommittee Studying Governmental Actions Affecting Private Property Rights.

Agreed to by the House of Delegates, February 23, 1995

Agreed to by the Senate, February 21, 1995

WHEREAS, House Joint Resolution No. 624, adopted by the 1993 Session of the General Assembly, established a joint subcommittee to study governmental actions affecting private property rights; and

WHEREAS, House Joint Resolution No. 74, adopted by the 1994 Session of the General Assembly, continued the work of the joint subcommittee; and

WHEREAS, the Fifth Amendment of the Constitution of the United States and Article I, Section 11 of the Constitution of Virginia provide that private property shall not be taken for public use without just compensation; and

WHEREAS, recent Supreme Court decisions, in reaffirming the fundamental protection of private property rights and in assessing the nature of governmental actions that have an impact on constitutionally protected property rights, have also reaffirmed that governmental actions that do not formally invoke the condemnation power, including regulations, may result in a taking for which just compensation is required; and

WHEREAS, responsible fiscal management and the fundamental principles of good government require that government decision makers evaluate carefully the effect of their administrative, regulatory and legislative actions on constitutionally protected property rights; and

WHEREAS, due to continuing judicial interpretations and new federal initiatives, the state of takings law is likely to remain in flux; and

WHEREAS, it would be prudent for the joint subcommittee to continue its study of this evolving area of law in order to evaluate how any changes may effect private property rights in Virginia; now, therefore, be it

RESOLVED by the House of Delegates, the Senate concurring, That the Joint Subcommittee Studying Governmental Actions Affecting Private Property Rights be continued. The joint subcommittee shall continue to study issues affecting private property rights and make recommendations for any legislation which may be needed.

The current seven members of the joint subcommittee shall continue to serve with any vacancy to be filled in accordance with the original resolution.

The direct costs of this study shall not exceed \$4,200.

The Division of Legislative Services shall provide staff support for the study. All agencies of the Commonwealth shall provide assistance to the joint subcommittee, upon request.

The joint subcommittee shall be continued for one year only and shall complete its work in time to submit its final findings and recommendations to the Governor and the 1996 Session of the General Assembly as provided in the procedures of the Division of Legislative Automated Systems for the processing of legislative documents.

Implementation of this resolution is subject to subsequent approval and certification by the Joint Rules Committee. The Committee may withhold expenditures or delay the period for the conduct of the study.

Appendix D

SOURCES OF TAKINGS LAW

1. Fifth Amendment, U.S. Constitution

" . . . nor shall private property be taken for public use, without just compensation."

2. Article I, Section 11, Virginia Constitution

"The General Assembly shall not pass any law . . . whereby private property shall be taken or damaged for public uses, without just compensation"

3. *Pennsylvania Coal Co. v. Mahan*, 260 U.S. 393 (1922)

Established that a taking can occur through government regulation which goes too far (regulatory taking).

4. *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104 (1978)

Outlined a three-part takings analysis: (1) the economic impact of the government action; (2) the extent to which reasonable investment-backed expectations are disturbed; and (3) the character of the government action;.

5. *Agins v. City of Tiburon*, 447 U.S. 825 (1980)

Established a two-part test: (1) whether the regulation substantially advances legitimate state interests and (2) whether the regulation "denies an owner economically viable use of his land."

6. *Nollen v. California Coastal Commission*, 483 U.S. 825 (1987)

Required that there be a nexus between the proposed regulation of the property and the legitimate state interest sought to be advanced.

7. *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304 (1987)

Stated that the government must pay compensation not only for a permanent taking of property but also for a temporary taking.

8. *Lucas v. South Carolina Coastal Council*, 112 S.Ct. 2886 (1992)

Required government to pay compensation where government action has "deprived a landowner of all economically beneficial uses" of the property except where the development could have been prevented under the common law nuisance doctrines of the state, or the denied use is not part of the owner's title.

9. *Dolan v. City of Tigard*, 114 S.Ct. 2309 (1994)

Determined that the findings relied upon by the city to require a landowner to dedicate a portion of her property in the flood plain as a public greenway, as a condition for constructing a new commercial building, did not show the required reasonable relationship between the flood plain easement and the landowner's proposed new building necessary to satisfy the requirements of the fifth amendment takings clause.

Appendix E

Executive Order 12630 of March 15, 1988

Governmental Actions and Interference With Constitutionally Protected Property Rights

53 F.R. 8859

By the authority vested in me as President by the Constitution and laws of the United States of America, and in order to ensure that government actions are undertaken on a well-reasoned basis with due regard for fiscal accountability, for the financial impact of the obligations imposed on the Federal government by the Just Compensation Clause of the Fifth Amendment, and for the Constitution, it is hereby ordered as follows:

Section 1. Purpose. (a) The Fifth Amendment of the United States Constitution provides that private property shall not be taken for public use without just compensation. Government historically has used the formal exercise of the power of eminent domain, which provides orderly processes for paying just compensation, to acquire private property for public use. Recent Supreme Court decisions, however, in reaffirming the fundamental protection of private property rights provided by the Fifth Amendment and in assessing the nature of governmental actions that have an impact on constitutionally protected property rights, have also reaffirmed that governmental actions that do not formally invoke the condemnation power, including regulations, may result in a taking for which just compensation is required.

(b) Responsible fiscal management and fundamental principles of good government require that government decision-makers evaluate carefully the effect of their administrative, regulatory, and legislative actions on constitutionally protected property rights. Executive departments and agencies should review their actions carefully to prevent unnecessary takings and should account in decision-making for those taking that are necessitated by statutory mandate.

(c) The purpose of this Order is to assist Federal departments and agencies in undertaking such reviews and in proposing, planning, and implementing actions with due regard for the constitutional protections provided by the Fifth Amendment and to reduce the risk of undue or inadvertent burdens on the public fisc resulting from lawful governmental action. In furtherance of the purpose of this Order, the Attorney General shall, consistent with the principles stated herein and in consultation with the Executive departments and agencies, promulgate Guidelines for the Evaluation of Risk and Avoidance and Unanticipated Takings to which each Executive department or agency shall refer in making the evaluations required by this Order or in otherwise taking any action that is the subject of this Order. The Guidelines shall be promulgated no later than May 1, 1988, and shall be disseminated to all units of each Executive department and agency no later than July 1, 1988. The Attorney General shall, as necessary, update these guidelines to reflect fundamental changes in takings law occurring as a result of Supreme Court decisions.

Executive Order 12630 (cont.)

Sec. 2. Definitions. For the purpose of this Order: (a) "Policies that have takings implications" refers to Federal regulations, proposed Federal regulations, proposed Federal legislation, comments on proposed Federal legislation, or other Federal policy statements that, if implemented or enacted, could effect a taking, such as rules and regulations that propose or implement licensing, permitting, or other condition requirements or limitations on private property use, or that require dedications or exactions from owners of private property. "Policies that have takings implications" does not include:

- (1) Actions abolishing regulations, discontinuing governmental programs, or modifying regulations in a manner that lessens interference with the use of private property;
- (2) Actions taken with respect to properties held in trust by the United States or in preparation for or during treaty negotiations with foreign nations;
- (3) Law enforcement actions involving seizure, for violations of law, of property for forfeiture or as evidence in criminal proceedings;
- (4) Studies or similar efforts or planning activities;
- (5) Communications between Federal agencies or departments and State or local land-use planning agencies regarding planned or proposed State or local actions regulating private property regardless of whether such communications are initiated by a Federal agency or department or are undertaken in response to an invitation by the State or local authority;
- (6) The placement of military facilities or military activities involving the use of Federal property alone; or
- (7) Any military or foreign affairs functions (including procurement functions thereunder) but not including the U.S. Army Corps of Engineers civil works program.

(b) Private property refers to all property protected by the Just Compensation Clause of the Fifth Amendment.

(c) "Actions" refers to proposed Federal regulations, proposed Federal legislation, comments on proposed Federal legislation, applications of Federal regulations to specific property, of Federal governmental actions physically invading or occupying private property, or other policy statements or actions related to Federal regulation or direct physical invasion or occupancy, but does not include:

- (1) Actions in which the power of eminent domain is formally exercised;
- (2) Actions taken with respect to properties held in trust by the United States or in preparation for or during treaty negotiations with foreign nations;

Executive Order 12630 (cont.)

- (3) Law enforcement actions involving seizure, for violations of law, of property for forfeiture or as evidence in criminal proceedings;
- (4) Studies or similar efforts or planning activities;
- (5) Communications between Federal agencies or departments and State or local land-use planning agencies regarding planned or proposed State or local actions regulating private property regardless of whether such communications are initiated by a Federal agency or department or are undertaken in response to an invitation by the State or local authority;
- (6) The placement of military facilities or military activities involving the use of Federal property alone; or
- (7) Any military or foreign affairs functions (including procurement functions thereunder), but not including the U.S. Army Corps of Engineers civil works program.

Sec. 3. *General Principles.* In formulating or implementing policies that have takings implications, each Executive department and agency shall be guided by the following general principles:

- (a) Governmental officials should be sensitive to, anticipate, and account for, the obligations imposed by the Just Compensation Clause of the Fifth Amendment in planning and carrying out governmental actions so that they do not result in the imposition of unanticipated or undue additional burdens on the public fisc.
- (b) Actions undertaken by governmental officials that result in a physical invasion or occupancy of private property, and regulations imposed on private property that substantially affect its value or use, may constitute a taking of property. Further, governmental action may amount to a taking even though the action results in less than a complete deprivation of all use or value, or of all separate and distinct interests in the same private property and even if the action constituting a taking is temporary in nature.
- (c) Government officials whose actions are taken specifically for purposes of protecting public health and safety are ordinarily given broader latitude by courts before their actions are considered to be takings. However, the mere assertion of a public health and safety purpose is insufficient to avoid a taking. Actions to which this Order applies asserted to be for the protection of public health and safety, therefore, should be undertaken only in response to real and substantial threats to public health and safety, be designed to advance significantly the health and safety purpose, and be no greater than is necessary to achieve the health and safety purpose.
- (d) While normal governmental processes do not ordinarily effect takings, undue delays in decision-making during which private property use is interfered with carry a risk of being held to

Executive Order 12630 (cont.)

be takings. Additionally, a delay in processing may increase significantly the size of compensation due if a taking is later found to have occurred.

(e) The Just Compensation Clause is self-actuating, requiring that compensation be paid whenever governmental action results in a taking of private property regardless of whether the underlying authority for the action contemplated a taking or authorized the payment of compensation. Accordingly, governmental actions that may have a significant impact on the use or value of private property should be scrutinized to avoid undue or unplanned burdens on the public fisc.

Sec. 4. *Department and Agency Action.* In addition to the fundamental principles set forth in Section 3, Executive departments and agencies shall adhere, to the extent permitted by law, to the following criteria when implementing policies that have takings implications:

(a) When an Executive department or agency requires a private party to obtain a permit in order to undertake a specific use of, or action with respect to, private property, any conditions imposed on the granting of a permit shall:

- (1) Serve the same purpose that would have been served by a prohibition of the use or action; and
- (2) Substantially advance that purpose.

(b) When a proposed action would place a restriction on a use of private property, the restriction imposed on the use shall not be disproportionate to the extent to which the use contributes to the overall problem that the restriction is imposed to redress.

(c) When a proposed action involves a permitting process or any other decision-making process that will interfere with, or otherwise prohibit, the use of private property pending the completion of the process, the duration of the process shall be kept to the minimum necessary.

(d) Before undertaking any proposed action regulating private property use for the protection of public health or safety, the Executive department or agency involved shall, in internal deliberative documents and any submissions to the Director of the Office of Management and Budget that are required:

- (1) Identify clearly, with as much specificity as possible, the public health or safety risk created by the private property use that is the subject of the proposed action;
- (2) Establish that such proposed action substantially advances the purpose of protecting public health and safety against the specifically identified risk;
- (3) Establish to the extent possible that the restrictions imposed on the private property are not disproportionate to the extent to which the use contributes to the overall risk; and

Executive Order 12630 (cont.)

(4) Estimate, to the extent possible, the potential cost to the government in the event that a court later determines that the action constituted a taking.

In instances in which there is an immediate threat to health and safety that constitutes an emergency requiring immediate response, this analysis may be done upon completion of the emergency action.

Sec. 5. Executive Department and Agency Implementation. (a) The head of each Executive department and agency shall designate an official to be responsible for ensuring compliance with this Order with respect to the actions of that department or agency.

(b) Executive departments and agencies shall, to the extent permitted by law, identify the takings implications of proposed regulatory actions and address the merits of those actions in light of the identified takings implications, if any, in all required submissions made to the Office of Management and Budget. Significant takings implications should also be identified and discussed in notices of proposed rule-making and messages transmitting legislative proposals to the Congress, stating the departments' and agencies' conclusions on the takings issues.

(c) Executive departments and agencies shall identify each existing Federal rule and regulation against which a takings award has been made or against which a takings claim is pending including the amount of each claim or award. A "takings" award has been made or a "takings" claim pending if the award was made, or the pending claim brought, pursuant to the Just Compensation Clause of the Fifth Amendment. An itemized compilation of all such awards made in Fiscal Years 1985, 1986, and 1987 and all such pending claims shall be submitted to the Director, Office of Management and Budget, on or before May 16, 1988.

(d) Each Executive department and agency shall submit annually to the Director, Office of Management and Budget, and to the Attorney General an itemized compilation of all awards of just compensation entered against the United States for takings, including awards of interest as well as monies paid pursuant to the provisions of the Uniform Relocation Assistance and Property Acquisition Policies Act of 1970, 42 U.S.C. 4601.

(e)(1) The Director, Office of Management and Budget, and the Attorney General shall each, to the extent permitted by law, take action to ensure that the policies of the Executive departments and agencies are consistent with the principles, criteria, and requirements stated in Sections 1 through 5 of this Order, and the Office of Management and Budget shall take action to ensure that all takings awards levied against agencies are properly accounted for in agency budget submissions.

(2) In addition to the guidelines required by Section 1 of this Order, the Attorney General shall, in consultation with each Executive department and agency to which this Order applies, promulgate such supplemental guidelines as may be appropriate to the specific obligations of that department or agency.

Executive Order 12630 (cont.)

Sec. 6. *Judicial Review.* This Order is intended only to improve the internal management of the Executive branch and is not intended to create any right or benefit, substantive or procedural, enforceable at law by a party against the United States, its agencies, its officers, or any person.

RONALD REAGAN

THE WHITE HOUSE,
March 15, 1988.

