

Bonner County Planning Department

"Protecting property rights and enhancing property value"

1500 Highway 2, Suite 208, Sandpoint, Idaho 83864

Phone (208) 265-1458

Email: planning@bonnercountyid.gov - Web site: www.bonnercountyid.gov



BONNER COUNTY COMPREHENSIVE PLAN

COMPONENT: PROPERTY RIGHTS

ADOPTED UPDATE: DECEMBER 07, 2022

Table of Contents

Introduction	1
Chapter 1 - Legislative and Judicial History	2
Chapter 2 - Attorney General’s Checklist Criteria	3
THE CHECKLIST	3
Section 2.1 – Physical Occupation	3
Section 2.2 – Property Dedication.....	3
Section 2.3 – Viable Use	4
Section 2.4 – Economic Interest.....	4
Section 2.5 – Fundamental Ownership Attributes.....	5
Section 2.6 – Nexus	5
Chapter 3 – Regulatory Takings and Idaho Code	6
Section 3.1 – Idaho Code §67-8001. Declaration of Purpose	6
Section 3.2 – Idaho Code §67-8002. Definitions	6
Section 3.3 – Idaho Code §67-8003. Protection of Private Property	6
Section 3.4 – Idaho Code §67-8004. Short Title.....	7
2016 AMENDMENT TO IDAHO CODE SECTION 67-8003	7
2015 AMENDMENT TO IDAHO CODE SECTION 7-701A	7
2021 AMENDMENT TO IDAHO CODE SECTION 7-701A	7
Chapter 4 – Bonner County Revised Code, Title 12, Land Use Regulations.....	8
Section 4.1 – Authority, Purpose and Intent.....	8
Section 4.2 – Land Use Decisions	8
Issues	8
Bibliography.....	9

Introduction

Idaho Code §67-6508 (a) requires the following for the Property Rights component: An analysis of provisions which may be necessary to ensure that land use policies, restrictions, conditions and fees do not violate private property rights, adversely impact property values or create unnecessary technical limitations on the use of property and analysis as prescribed under the declarations of purpose in Chapter 80, title 67, Idaho Code.

The Property Rights component includes an analysis of provisions which may be necessary to ensure that land use policies, restrictions, conditions and fees do not violate private property rights, adversely impact property values or create unnecessary technical limitations on the use of property and analysis as prescribed under the declarations of purpose in Chapter 80, Title 67, Idaho Code.

The Property Rights component incorporates changes made to Idaho Code Section 67-8002 and Section 67- 8003 by Idaho's legislature in 2003. These changes provide that the checklist applied to takings analyses also applies to regulatory takings, whether the takings are total, partial, temporary, or permanent. The changes also provide for a system by which real property owners can require an agency to analyze whether an action it intends to take will constitute a taking.

The goal of producing this Property Rights component is to protect property rights by complying with state law relevant to any county action.

Chapter 1 - Legislative and Judicial History

In the 1995 Legislative Session, two amendments were made to existing statutes that affect Idaho cities and counties regarding land use planning. These statutes, created to avoid the unconstitutional "taking" of private property by a governmental agency, require a review of existing and proposed comprehensive plans and local ordinances that establish standard which might affect private property. These statutes became effective July 1, 1995 (Idaho Association of Counties). (Larry Wasden 2012)

Both the United States and Idaho Constitutions provide that private property may not be taken for use by the government without just compensation for the value of that use. Courts have recognized situations in which just compensation is required:

- (a) When a government action causes physical occupation of property;
- (b) When a government action causes physical invasion of property; or
- (c) When government regulation effectively eliminates all economic value of property.

Any comprehensive plan policy, zoning provision or subdivision standard governing private property use should heavily depend upon the government's authority and responsibility to protect public health, safety and welfare. Based upon this premise, the courts have supported the limitation of property use through land use planning, zoning ordinances, setback standards and environmental mitigations. However, if such regulations and/or laws destroy a fundamental property right or impose a substantial and significant limitation on the property, it could be considered a taking. (Idaho Association of Counties Undated)

In the 1994 Legislative Session, Chapter 80, Regulatory Takings, was added to Idaho Code, Title 67, State Government and State Affairs. Specifically, Sections 67-8001 through 67-8004 were adopted, imposing a duty upon state agencies to follow a "checklist" developed by the Attorney General's office to ensure that land use standards did not result in a "taking" of private property. The Attorney General issued an opinion and checklist (see Chapter 2). This concept also applies to local governments as a result of 1995 legislative action (see Chapter 3).

In the 2003 Legislative Session, Section 67-8002 was amended to provide that the checklist requirements apply in all cases of taking, including regulatory taking, and whether the taking is total or partial, temporary or permanent. At the same time, Section 67-8003 was amended to provide a system by which real property owners can require an agency to analyze whether an action it intends to take constitutes a taking.

Chapter 2 - Attorney General's Checklist Criteria

State and local 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 standards may have generally, takings questions normally arise in the context of specific affected property. The public review process used for evaluating proposed standards is another tool that agencies should use aggressively to safeguard property rights. If property is subject to regulatory jurisdiction of multiple government agencies, each agency should be sensitive to the cumulative impacts of the various regulations.

While county agencies most commonly deal with issues related to regulatory takings (discussed below), they must also evaluate whether the action itself is allowed as a "public purpose." In 2005, the United States Supreme Court determined in *Kelo v. City of New London*, 545 U.S. 469 (2005) that a governmental agency could condemn private property, but any direct taking should be analyzed under current state and federal law, including *Kelo*. In response to the *Kelo* case, the Idaho Legislature in 2006 enacted House Bill 555 to specifically prohibit the use of eminent domain to take private property in order to convey it to a private interest to promote economic development. (Larry Wasden 2012) (Idaho Code, Section 7-701A 2006)

For actions not involving a direct taking, although a question on the checklist may be answered affirmatively, it does not mean that there has been a "taking." Rather, it means there could be a constitutional issue and agency staff should carefully review the proposed action with legal counsel.

THE CHECKLIST

Section 2.1 – Physical Occupation

Does the regulation or action result in a permanent or temporary physical occupation of private property?

Government decisions or actions 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." *Loretto v. Teleprompter Manhattan CATV Corp.* 458 U.S. 419 (1982).

Section 2.2 – Property Dedication

Does the regulation or action require a property owner to dedicate a portion of property or to grant an easement?

All land use decisions or standards requiring the public dedication of property or grant of a public easement must be carefully reviewed. 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" ("nexus") to the adverse impacts created by the development. A court also will consider whether the action in question substantially advances a legitimate public interest.

For example, the United States Supreme Court determined in *Nollan v. California Coastal Commission*, 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, constituted a "taking." Likewise, the United States Supreme Court held that compelling a property owner to leave a *public* green way, as opposed to a private one, did not substantially advance protection of a floodplain, and constituted a "taking." *Dolan v. City of Tigard*, 114 U.S. 2309 (June 24, 1994).

Section 2.3 – Viable Use

Does the regulation deprive the owner of all economically viable uses of the property?

If a land use standard 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. *Lucas v. South Carolina Coastal Council*, 112 S. Ct. 2886 (1992).

In addition to the property dedication and viable use criteria, it is also important to analyze the action's impact on the property as a whole, and not just the impact on a portion of the property. It is also important to assess whether there is *any* profitable use of the remaining property available. *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 land use action or decision interferes with a property owner's "reasonable investment-backed development expectations."

Land use codes requiring that all of a particular parcel of land be left substantially in its natural state must be carefully reviewed. A prohibition of all economically viable uses of the property is vulnerable to a takings challenge. In some situations, however, there may be pre-existing limitations on the use of property that could insulate the government from takings liability.

Section 2.4 – Economic Interest

Does the regulation have a significant impact on the landowner's economic interest?

Land use codes that have a significant impact on the owner's economic interest must also be carefully reviewed. 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. Another economic factor courts will consider is the degree to which the challenged regulation impacts any development rights of the owner. As with the viable use criterion, these economic factors are normally applied to the property as whole.

Section 2.5 – Fundamental Ownership Attributes

Does the regulation deny a fundamental attribute of ownership?

Land use codes 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 and may require the landowner be “justly compensated.”

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 different 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).

The United States Supreme Court has also held that barring the inheritance (an essential attribute of ownership) of certain interests in land held by individual members of an Indian tribe constituted a “taking.” *Hodel v. Irving*, 481 U.S. 704 (1987).

Section 2.6 – Nexus

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 land use standard may “go too far” and may result in a takings claim where it does not substantially advance a legitimate governmental purpose. *Nollan v. California Coastal Commission*, 107 S. Ct. 3141 (1987); *Dolan v. City of Tigard*, 114 U.S. 2309 (June 24, 1994); *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922).

In *Nollan*, the United States Supreme Court held that it was an unconstitutional “taking” to condition the issuance of a permit to land owners on the grant of an easement to the public to use their beach. The Court found that since there was no indication that the Nollans’ house plans interfered in any way with the public’s ability to walk up and down the beach, there was no “nexus” between any public interest that might be harmed by the construction of the house, and the permit condition. Lacking this connection, the required easement was just as unconstitutional as it would be if imposed outside the permit context.

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.

Chapter 3 – Regulatory Takings and Idaho Code

The following sections of Title 67, Chapter 80, Idaho Code, became effective July 1, 1995, and provide the legal framework for local government's evaluation of regulatory action:

Section 3.1 – Idaho Code §67-8001. Declaration of Purpose

The purpose of this chapter is to establish an orderly, consistent review process that better enables state agencies and local governments to evaluate whether proposed regulatory or administrative actions may result in a taking of private property without due process of law. It is not the purpose of this chapter to expand or reduce the scope of private property protections provided in the state and federal constitutions.

Section 3.2 – Idaho Code §67-8002. Definitions

As used in this chapter:

"Local government" means any city, county, taxing district or other political subdivision of state government with a governing body.

"Private property" means all property protected by the constitution of the United States or the constitution of the state of Idaho.

"State agency" means the state of Idaho and any officer, agency, board, commission, department or similar body of the executive branch of the state government.

"Regulatory taking" means a regulatory or administrative action resulting in deprivation of private property that is the subject of such action, whether such deprivation is total or partial, permanent or temporary, in violation of the state or federal constitution.

Section 3.3 – Idaho Code §67-8003. Protection of Private Property

The attorney general shall establish, by October 1, 1994, an orderly, consistent process, including a checklist that better enables a state agency or local government to evaluate proposed regulatory or administrative actions to assure that such actions do not result in an unconstitutional taking of private property. The attorney general shall review and update the process at least on an annual basis to maintain consistency with changes in law. All state agencies and local governments shall follow the guidelines of the attorney general.

Upon the written request of an owner of real property that is the subject of such action, such request being filed with the clerk or the agency or entity undertaking the regulatory or administrative action not more than twenty-eight (28) days after the final decision concerning the matter at issue, a state agency or local governmental entity shall prepare a written taking analysis concerning the action. Any regulatory taking analysis prepared hereto shall comply with the process set forth in this chapter, including use of the checklist developed by the attorney general pursuant to subsection (1) of this section and shall be provided to the real property owner no longer than forty-two (42) days after the

date of filing the request with the clerk or secretary of the agency whose action is questioned. A regulatory taking analysis prepared pursuant to this section shall be considered public information.

A governmental action is voidable if a written taking analysis is not prepared after a request has been made pursuant to this chapter. A private real property owner, whose property is the subject of governmental action, affected by a governmental action without the preparation of a requested analysis as required by this section may seek judicial determination of the validity of the governmental action by initiating a declaratory judgment action or other appropriate legal procedure. A suit seeking to invalidate a governmental action for noncompliance with subsection (2) of this section must be filed in a district court in the county in which the private property owner's affected real property is located. If the affected property is located in more than one (1) county, the private property owner may file suit in any county in which the affected real property is located.

During the preparation of the taking analysis, any time limitation relevant to the regulatory or administrative actions shall be tolled. Such tolling shall cease when the taking analysis has been provided to the property owner. Both the request for a taking analysis and the taking analysis shall be part of the official record regarding the regulatory or administrative action.

Section 3.4 – Idaho Code §67-8004. Short Title

The provisions of this chapter shall be known and cited as the "Idaho Regulatory Takings Act."

The following legislative changes have been made to the Idaho Regulatory takings Act since the 2013 update to the Comprehensive Plan:

2016 AMENDMENT TO IDAHO CODE SECTION 67-8003

In the 2016 Legislative Session, Section 67-8003 was amended to clarify that a private property owner is not required to submit a request for a takings analysis, and the decision not to submit said request does not prohibit a property owner from seeking further legal or equitable relief, including just compensation for a taking.

2015 AMENDMENT TO IDAHO CODE SECTION 7-701A

In the 2015 Legislative Session, Section 7-701A was amended to prohibit the use of eminent domain for the public acquisition of trails, paths, greenways or other ways for walking, running, hiking, bicycling or equestrian use, unless adjacent to a highway, road or street.

2021 AMENDMENT TO IDAHO CODE SECTION 7-701A

In the 2021 Legislative Session, Section 7-701A was amended to empower an urban renewal agency to exercise the right of eminent domain if its board of commissioners is comprised entirely of elected officials. However, if a board contains at least one appointed commissioner, it may only act in an advisory capacity on such matters, and any final decision on the use of eminent domain must be made by the local governing body that created the urban renewal."

Chapter 4 – Bonner County Revised Code, Title 12, Land Use Regulations

Section 4.1 – Authority, Purpose and Intent

Bonner County’s land use standards, codified at Bonner County Revised Code (BCRC), Title 12, Chapters 1 through 8, were adopted pursuant to authority granted by Title 67, Chapter 65 of the Idaho Code, and Article 12, Section 2 of the Idaho Constitution, as amended or subsequently codified.

The zoning, subdivision and other land use standards and procedures were established in accordance with a comprehensive plan and Idaho Code for the purpose of promoting the health, safety, morals and the general welfare of Bonner County. They have been designed to lessen the congestion in the streets; to secure from fire, panic, and other dangers; to provide adequate light and air; to prevent the overcrowding of land; to avoid undue concentration of population; and to facilitate provision of transportation, water, sewage, schools, parks, and other public requirements. They have been made with reasonable consideration, among other things, for the character of the zoning district and its peculiar suitability for particular uses, and with a view of conserving the value of land and structures and encouraging the most appropriate use of the land throughout the unincorporated areas of Bonner County. (Bonner County Revised Code, Title 12 n.d.)(Chapter 1)

Section 4.2 – Land Use Decisions

Pursuant to and in accordance with the Attorney General’s Checklist and Idaho Code, Title 67, Chapter 80, the Bonner County Planning and Zoning Commissions and Bonner County Commissioners in reviewing the potential impact of a regulatory or administrative action generally, or on private property specifically, conclude upon making each decision whether an action “results in a taking of private property.” The decision-making process includes a “findings” framework for evaluating the impact proposed standards may have generally, and in the context of specific affected property.

In addition to the legal parameters of property rights set forth herein and in the Idaho Regulatory Takings Act as well as the public comments received which indicate a strong preference to include other general considerations for land use decisions which may affect value, objectives and policies were considered to address these issues. Idaho code 67-6508 addresses impacts to property values as well as avoiding unnecessary technical limitations on the use of property. The policies and objectives were adopted.

Issues

The State of Idaho and the Attorney General’s Office have established a process for the consistent, orderly review of proposed regulatory and administrative actions to ensure a jurisdiction’s actions do not result in a regulatory taking of private property. Idaho Code §67-6508(a) requires the Property Rights component analyze provisions necessary to ensure land use policies and actions do not violate private property rights, adversely impact property values or create unnecessary technical limitations.

Bibliography

Bonner County Revised Code, Title 12. Sandpoint, Idaho: Bonner County.

Larry Wasden, Idaho Attorney General. Idaho Regulatory Takings Act Guidelines. Guidelines, Boise: Idaho Attorney General's Office, 2012.