

TOWN OF TIBURON

STAFF REPORT

ITEM NO. _____
MEETING DATE: JUNE 8, 2005

To: PLANNING COMMISSION
From: ANN R. DANFORTH, TOWN ATTORNEY
SCOTT ANDERSON, DIRECTOR OF COMMUNITY DEVELOPMENT
Subject: ZONING ORDINANCE TEXT AMENDMENT TO ADD PROVISIONS
REGARDING ECONOMIC EXCEPTIONS; FILE #Z2005-01
Date: June 3, 2005

BACKGROUND

One of the most contentious and unpredictable areas of land use law involves takings claims. Applicants who find their projects denied or subjected to stringent conditions of approval often claim that the permitting agency has violated the constitutional prohibitions against taking property without compensation. Courts tend to review such claims on a case by case basis, utilizing a number of factors to determine the constitutionality of the challenged actions. As a result, litigation of these cases can be protracted, costly and of uncertain outcome.

At the February 7, 2005 Town Council/Staff retreat, the Council stated that it would like to consider adoption of an ordinance that would allow applicants to apply for an Economic Exception¹ from strict application of the Town's land use regulations. The Institute of Local Self Government (ILSG) has developed a model ordinance that creates an economic variance procedure. This procedure is designed to both reduce the number of takings claims against the adopting public agency and ensure that before taking action on a project, the agency has before it all the facts relevant to a potential takings claim. Staff has used this ILSG model ordinance as a starting point, expanding its scope to include conditions of approval, mitigation measures and similar factors that may arise during the approval process.

This item is being reviewed by the Planning Commission because, by local ordinance, any amendment to the Town's Zoning Ordinance requires a public hearing before the Planning Commission prior to hearing and action by the Town Council.

ANALYSIS

¹ The proposed ordinance uses the term "exception" instead of "variance." The existing Zoning Ordinance already has a variance procedure that uses the statutory meaning of the term (a permit granted for a structure that is not otherwise permitted by the zoning regulations pursuant to Gov. Code § 6509). The Council determination authorized by the proposed ordinance more closely resembles an exception than a variance in this context.

Takings litigation generally falls into two broad categories. The first category, known as “facial” claims, are claims that a regulation, by its mere existence, effectively takes an owner’s property without compensation. For example, if a city passed an ordinance that banned all potential use of a parcel of property, the owner could file a facial takings challenge to that regulation. However, such claims are valid only if there is no administrative procedure to obtain a variance or exception allowing the land to be used in an economically remunerative way. The proposed ordinance would create such a procedure, effectively insulating the Town’s General Plan, Zoning Ordinance and other land use regulations from facial attack.

The second broad category of takings claim is the “as-applied” challenge. In these cases, a property owner claims that a governmental agency’s application of land use regulations to his or her property effectively takes that property without compensation. The alleged taking generally assumes one of three forms: (1) physical invasion (the property owner is required to surrender an interest in the property and the requirement is not adequately related to a project impact); (2) destruction of value (the property owner is deprived of all economically viable use of his or her property); or (3) undue interference with reasonable, investment-back expectation.²

Physical invasion claims are relatively straightforward, hence relatively rare in recent years. However, the second and third types of claims, commonly called “regulatory takings,” are more complex and rely on numerous facts relating to the property in question. In the absence of a physical invasion of property, the courts have been unable to develop any set formula for determining whether an illegal taking has occurred. However, the U.S. Supreme Court has enumerated several factors that are critical to the inquiry and directed courts to make a case by case inquiry. Most recently, the Court said the following:

The Court in *Penn Central* acknowledged that it had hitherto been "unable to develop any 'set formula'" for evaluating regulatory takings claims, but identified "several factors that have particular significance." . . . Primary among those factors are "the economic impact of the regulation on the claimant and, particularly, the extent to which the regulation has interfered with distinct investment-backed expectations." . . . In addition, the "character of the governmental action" -- for instance whether it amounts to a physical invasion or instead merely affects property interests through "some public program adjusting the benefits and burdens of economic life to promote the common good" -- may be relevant in discerning whether a taking has occurred. The *Penn Central* factors -- though each has given rise to vexing subsidiary questions -- have served as the principal guidelines for resolving regulatory takings claims that do not fall within the physical takings or *Lucas* rules.³

² Until very recently, the Supreme Court recognized an additional takings test: whether the regulation substantially advanced a legitimate state interest. This test was derived from *Agins v. City of Tiburon (1980)*. On May 23, 2005, the Supreme Court eliminated this test from takings jurisprudence in *Lingle v. Chevron U.S.A.*.

³ *Lingle v. Chevron U.S.A.* 2005 U.S. Lexis 4342 (U.S. May 23, 2005) (citations omitted).

The courts have identified a number of factual circumstances relevant to determining whether a regulation causes a regulatory taking. These types of facts may be absent from the record in the normal land use application process. If the facts are not in the record, a takings challenge is likely to turn on external evidence, which means a protracted and costly discovery process, followed by an evidentiary hearing.

The proposed Ordinance would require property owners to request an Economic Exception before making a takings claim and, through the Economic Exception process, the Town would have the opportunity to review all the facts and reasoning relevant to the potential claim. This would enable the Town to fairly balance the rights of the property owner with the Town's interest in enforcing its land use regulations. The Town would be able to tailor its regulatory programs to avoid an unjust result. Moreover, if the Town finds that normal application of its regulations will not constitute a taking, the Ordinance would assure that the administrative record will contain enough facts to enable the agency to prevail at an earlier stage of litigation. This is potentially a very significant savings in litigation costs.

The Commission should note that these types of ordinances are relatively untested. However, based on existing takings jurisprudence, we believe that the Ordinance is likely to reduce the incidence of takings claims in Tiburon, and enhance the likelihood of a successful outcome in those cases that are not resolved through the Economic Exception process. The Cities of Malibu, Lafayette and Napa have somewhat similar procedures, which have not been tested in court as far as staff has been able to ascertain. The City of Livermore has a related process that allows the City Attorney to decide whether a regulatory application constitutes a taking. This process resulted in the City's successful defense of a refusal to grant an exception to its scenic route protection policies.

The operation of the Economic Exception process is fairly simple. Project applicants must request an Economic Exception as early as possible in the approval process. Staff has expanded the procedure to include challenges to conditions of approval, mitigation measures, and similar impositions on project applications, because we believe them to be the most likely source of takings claims in Tiburon. The applicant must provide all factual information relevant to their claim and explain why, under the stated facts, the strict application of Town regulations would constitute an unlawful taking. The Town Council would hold a hearing on the request and could issue an Economic Exception if it made the following findings:

- (1) Based on the economic information provided by the applicant, as well as any other relevant evidence, strict application of the Town's Land Use Regulations would not provide an economically viable use of the applicant's property or would otherwise constitute an unconstitutional taking of the applicant's property.
- (2) The Economic Exception granted will result in a project which, to the maximum extent possible while avoiding an unconstitutional taking, (a) complies with the Town's General Plan and Zoning Ordinance; and, (b) minimizes environmental damage.

RECOMMENDATION

The Planning Commission should conduct a public hearing on the proposed zoning ordinance text amendment and then consider whether it wishes to recommend adoption to the Town Council. If it finds in the affirmative, the Commission should adopt the attached Resolution (**Exhibit 1**).

EXHIBITS

1. Resolution recommending adoption to Town Council.
2. Excerpt from Institute for Local Self Government (ILSG) website