POLICY brief

Washington Research Council

PB 02-15 December 17, 2002

BRIEFLY

Strong property rights are a key prerequisite for economic development in a market economy. Businesses only invest where the expected rate of return is sufficiently high to compensate for the risks that they face. Insecure property rights increase risks and decrease willingness to invest.

Other publications in this series include:

Washington's Growth Management Act: Goals and Promises — December 5, 2001

Economic Development: Growth Management's Missing Link —Wednesday January 9, 2002

Reviewing Growth Management – Planning for Housing — May 23, 2002

New Population Projections for GMA Planning — June 25, 2002

Build for Vitality — July 1, 2002

Front Lawns or Balconies? Trends in WA Housing — September 6, 2002

Washington Research Council
108 S Washington St., Suite 406
Seattle WA 98104-3408
206-467-7088
fax: 206-467-6957
www.researchcouncil.org

Property Rights and the Growth Management Act

Planning goals of the Growth Management Act aim both to protect the rights of individual property owners and to preserve large portions of the state's land area as undeveloped open space. These goals come into conflict when the land to be preserved is privately owned.

Following a high profile initiative campaign in the mid 1990s, the property rights movement has maintained a lower profile in recent years. That is not to say the issue has disappeared. Rather the struggle over property rights now focuses on individual regulations and court decisions.

The economic vitality of the state requires a clear system of property rights that are enforced with certainty.

Conflicting Goals

The Growth Management Act enumerates 13 goals. The sixth goal is a strong statement in support of property rights:

> (6) Property rights. Private property shall not be taken for public use without just compensation having been made. The property rights of landowners shall be protected from arbitrary and discriminatory actions.[1]

If these words sound familiar, it is because they echo language in the US Constitution's Fifth Amendment.

While all of the GMA goals are supposed to guide comprehensive plans, there are no overt references to individual's property rights in the mandatory elements for these plans.[2] As a goal of growth management protecting property rights has taken a backseat to containing sprawl and preserve natural resources. For this reason, property owners often find themselves in an adversarial role, reacting to legislation or zoning decisions.

The Growth Management Act goals nine and ten jointly aim to preserve the state's environmental resources.

> (9) Open space and recreation. Retain open space, enhance recreational opportunities, conserve fish and wildlife habitat, increase access to natural resource lands and water, and develop parks and recreation facilities.

(10) Environment. Protect the environment and enhance the state's high quality of life, including air and water quality, and the availability of water.[3]

When viewed collectively, these goals call for the management of our state's natural resources, open space and other land uses for the public's benefit. There is a clear tension between these goals and protection of the rights of individual property owners.

Property Rights

Strong property rights are a key prerequisite for economic development in a market economy. Businesses only invest where the expected rate of return is sufficiently high to compensate for the risks that they face. Insecure property rights increase risks and decrease willingness to invest.

In the 1992 land use case Lucas v. South Carolina Coastal Council, the US Supreme Court held that the Coastal Council had committed an unconstitutional taking and required compensation to landowners of their beachfront property, which was no longer developable.[4] This case refuted previous land use cases and upheld an interpretation of the 5th amendment requiring compensation for takings. The Lucas case, combined with others that followed, clarified the extent to which local governments can carry out regulatory takings without compensation.

In 1995, property rights advocates put forth a statewide referendum calling for "property regulatory fairness." Referendum 48, the Private Property Regulatory Fairness Act, would have required government agencies to conduct cost-benefit analyses of all new land use regulations and compensate landowners for any property taken.[5] Supporters believed that the initiative would allow owners to manage their property free from government interference. Opponents painted the measure as a radical departure from present practice that would gut all efforts to regulate land use. The measure was actually less extreme than either side admitted. Voters, however, turned it down decisively.

Also, in 1995 the state Attorney General's Office developed guidelines for local governments to review GMA plans and avoid unconstitutional takings of private property. These guidelines assist "agencies which exercise regulatory authority impacting private property rights" through the identification of "warning signals" that can "determine whether a proposed regulatory action may violate a constitutional requirement."[6] The guidelines were distributed to planning agencies and county attorneys across the state and are currently undergoing revisions due out in early 2003. Local governments have used these guidelines to assess their current administrative practices, although other land use cases have gone further than the AGO guidelines towards clarifying land use regulations with regards to regulatory takings.[7]

The following four examples illustrate the current state of the struggle over property rights in the state.

Home on the Gorge - Administrative Finality in Land-Use Regulation

In 1997, Skamania County issued a land-use permit to Brian and Jody Bea for the construction of a house on a parcel of land the Beas own overlooking the Columbia River. The Bea's property is within the boundary of the Columbia River Gorge National Scenic Area. In 1998, the Columbia River Gorge Commission ordered the Beas to stop construction on the house, which was then 70 percent complete. In January 1999 the Commission ordered the Beas to move the house. The commission argued that the house and the county's decision to permit it violated provisions of the federal Columbia River Gorge Act, because the structure would be too visible from viewpoints on the Oregon side of the river.[8]

The Beas and Skamania county officials appealed the Commission's decision to the Washington State Supreme Court.[9]

Before issuing the permit to the Beas, the County provided notice to the Commission of the pending action. The Commission offered no comment. The County again notified the Commission when the permit was actually issued. The Commission did not contest the action during the 20-day appeal period provided by law. It was only 13 months later that the Commission complained.

Skamania Count Prosecutor Bradley Anderson argued that the Commission's complaint came too late. It would put all landowners at risk if the Commission were able to force the retroactive revocation of a lawfully issued permit.

Anderson admitted that the County had failed to adequately monitor the project, that the Beas had violated a number of conditions in their permit, and that it would be appropriate for the Commission to press the County to enforce, but that the Commission lacked the power to force the Beas to move the house. Brian Bea described many of the violations as "rookie homebuilder mistakes" and expressed his willingness to work with the county to meet all permit conditions.

The Supreme Court ruled in favor of the Beas and the County, 9-0.

The Beas' attorney explained that in its decision the Supreme Court the recognized the importance of "administrative finality" in land-use regulation.

> The issue addressed by the Supreme Court was the critical need to establish certainty and finality in government's land-use-permitting process so that property owners can put their properties to productive use without fear that government may later change its mind. Government agencies have a responsibility to carry out their legal responsibilities in a timely manner. They cannot undermine established property rights by arbitrarily concocting "new" conditions for development on unsuspecting property owners months after a development has been officially approved and constructed.[10]

The Court's decision in the Beas' case represented a significant win for property rights and a significant win for the state's business cli-

mate. Increasing certainty and finality in land-use permitting increases the attractiveness of the state as a place to invest.

The Bea family, however, has not yet been able to complete and occupy their house. The county, the Beas and the Commission continue to negotiate the conditions for an occupancy permit. The Beas also have a damages suit pending against the Commission and the county.[11]

The 3rd Runway- Best Available Science and Regulatory Decision Making

According to GMA, local governments must develop regulations that protect critical areas, "which include wetlands, wildlife habitat, aquifer recharge areas, geologically hazardous areas, and frequently flooded areas."[12] In 1995, the legislature amended GMA's environmental protection goal to require that regulations use Best Available Science (BAS) to implement a "science-based standard" for the protection of critical areas. The state has adopted administrative rules and definitions for BAS.[13] These definitions and uniform requirements will standardize the process of critical areas protection across the state.

The requirement that regulators use best available science is important for two reasons: First, it increases the likelihood that the benefits of a regulation actually exceeds its costs. Second, it reduces the arbitrariness of regulatory decision-making, and makes the process more predictable.

BAS remains a contentious element of the development process. During the Research Council's study of the state's business climate, business leaders commonly expressed concern on the frequent lack of scientific bases for regulations. The resulting unpredictability of the regulatory process impedes business development without assuring greater environmental protection.

Local government can also be impeded by unscientific regulation, as shown by the Port of Seattle's effort to add a third runway at Seattle-Tacoma International Airport. Opposition groups opposing the third runway have used the permitting process to delay the project.

In August the state Pollution Control Hearings Board granted a key permit allowing the Port to fill 18 acres of wetland. However, the Hearings Board imposed 16 conditions on construction before the Port could proceed. In September, the Port appealed eight of these conditions to Superior Court. Among the Port's complaints was that the standard of cleanliness which the Hearings Board imposed for the fill lacked scientific justification.

The Board rejected the use of a widely accepted synthetic leaching procedure to test fill for contaminants. A spokesman for the Department of Ecology noted that because of this the Board would require fill to be "cleaner than soil found in nature."[14]

Evergreen Forest Trust — Voluntary Preservation

The Trust is an example of the use of the voluntary transfer of private property rights to conserve environmentally resources. In this case,

private landowners have set aside forest land to preserve for future generations. The private purchase of land for public use is a growing trend in the environmental community.

The Evergreen Forest Trust plans to issue tax-exempt bonds to purchase a 100,000-acre parcel of forestland in east King County from Weyerhaeuser for preservation as for open space. An application to the IRS to approve the bonds' tax-exempt status is pending. Logging will continue on a portion of the land to pay interest and principal on the bonds. When the financing is paid off, the landowners may choose to continue reduced logging efforts to fund future acquisitions, or they may discontinue the logging.

The Trust is the largest private conservation effort thus far in Washington, and is the first conservation program in the state to use tax-exempt bonds for purchasing private land. A conservation easement, to be held by the Cascade Land Conservancy, will prohibit development on the entire site. Logging would only be permitted on land out of view from the Snoqualmie Valley and would be permanently banned on 10,000 acres of sensitive areas. The Campbell Group, based in Portland, will manage the remaining acreage for timber harvest.[15]

King County TDR Program

King County government manages a Transfer of Development Rights (TDR) program that allows the private market purchase and sale of development rights. It encourages land development in urban areas and sets aside land for preservation in other, typically rural regions of the county. The TDR program is a complex development tool where the public and private sectors collaborate for mutual benefit.

TDR is a tool used to encourage the "voluntary transfer of growth from places where a community would like to see less development to places where a community would like to see more development."[16] King County's TDR Program "allows individuals to purchase and sell residential development rights from lands that provide a public benefit."[17] The program requires a permanent conservation easement on the land from which development rights are transferred. Participation in King County's program is voluntary.

In July 2002, the county purchased development rights for 88 residential units in the Ames Lake Forest near Carnation from the Port Blakely Tree Farms. Port Blakely will retain the land as a working forest. This sale preserves the forest land and enables the county to sell the rights to develop residential units in urban areas throughout King County.[18]

Discussion

Providing a strong system of property rights is critical to the state's business climate. There is a tension between private property rights and the public regulation of land use. Property rights will come under increasing scrutiny in coming years, since the environmental movement has a permanent home in the GMA goals.

The recent decision of the state Supreme Court in the Bea case was a positive development. Administrative finality in land-use regula-

tion makes investment in the state less risky. Similarly requiring regulators to use the best available science promotes efficiency and predictability in the regulatory process and encourages companies to invest in the state.

Private purchase of land such as the Evergreen Forest Trust and King County's TDR program are examples of a growing trend across Washington of setting aside land for preservation. Voluntary efforts such as these respect private property rights.

Endnotes

[1] RCW 36.70A.020.
[2] RCW 36.70A.070.
[3] RCW 36.70A.020.
[4] 505 U.S. 1003 (1992).
[5] Washington Research Council, *Property Rights Law Goes to Voters*, October 16, 1995.
[6] State of Washington, *State of Washington Attorney General's Recommended Process and Advisory Memorandum for Evaluation of Proposed Regulatory or Administrative Actions to Avoid Unconstitutional Takings of Private Property*, March 1995, p. 1. http://www.wa.gov/ago/pubs/takings0395.htm.
[7] See Dolan v. Tigard, 114 S. Ct. 2309, 1994.
[8] The Associated Press, "'Gorge house' furor goes on," *Seattle Times*, September 2, 1998.
[9] Hunter George, "Fight over Gorge dream home goes to court," *Seattle Times*, December 2, 2000.
[10] Russ Brooks, "Gorge couple fought good fight for all of us," *Seattle Times*, August 16, 2001.
[11] J. Lynch, "Gorge landmark empty despite ruling," *The Oregonian*, September 3, 2002.
[12] 1000 Friends of Washington, *Get Smart Washington: Managing Growth in the New Millennium,* June, 2000, p. 12.
[13] http://www.ocd.wa.gov/info/lgd/growth/bas/BAS_explanation.doc.
[14] Larry Lange, "Port decries stricter pollution test for runway," *Seattle Post-Intelligencer*, August 23, 2002; Eric Sorensen, "Appeals fly challenging state permit to start on 3rd runway," *Seattle Times*, September 19, 2002.
[15] E. Pryne, "Huge deal may save forest from sprawl," *Seattle Times*, January 17, 2002.
[16] R. Pruetz, "Transfer of Development Rights Update," *1999 APA Conference Proceedings*, http://www.asu.edu/caed/proceedings99/PRUETZ/PRUETZ.HTM.
[17] http://dnr.metrokc.gov/wlr/tdr/overview.htm.
[18] M. Taus, "King County buys development rights on tract, saving forest," *Seattle Post-Intelligencer*, July 25, 2002.

◆ ◆ ◆