Reforming the Law of Takings in Michigan

The Case for Strengthening the Property Rights of Michigan Citizens

by Donald J. Kochan

ISBN 0-9647703-5-0

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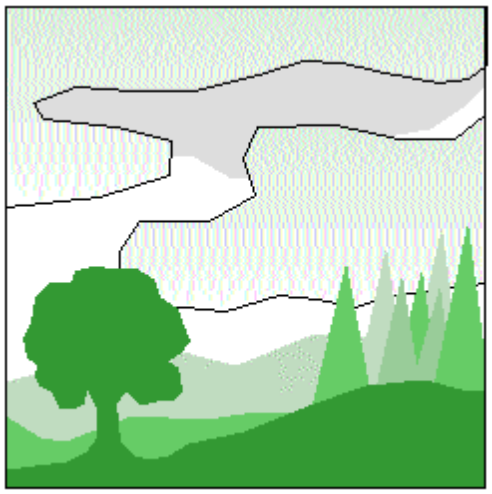

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Executive Summary

Russell and Lois Volkema are among the latest victims of Michigan's failure to protect the rights of property owners. A wetlands regulation, passed years after they purchased land in Kent County, robbed their land of $212,000 in value and partly destroyed their plans for retirement.

The Michigan Court of Appeals, in a decision last October, conceded that the regulation interfered with the Volkemas' investment plans. However, the court ruled that the couple was not due one penny of compensation for the "taking" of the property's value by government regulation. The reason? The law deprived the Volkemas of only *some* of their property's value, not all of it.

Relief may be on the way. Under consideration in the U. S. Congress is a measure that would require the federal government to pay owners of private property whenever a federal action reduces their property values by more than 33 percent. Legislators in 23 states introduced compensation reform bills in 1995, and at least five states have been successful at passing laws similar to, and some even more protective than, the federal bill.

In Michigan, weak but helpful reforms are getting attention in the legislature. One bill requires that two departments, the Department of Natural Resources and the Department of Environmental Quality, conduct impact assessments to recognize potential takings and evaluate the effect of their actions on property rights. Unfortunately, this type of "look before you leap" reform makes officials *look* but does little to prevent them from *leaping* at the expense of property owners. Another bill would require property-rights sensitivity training for the employees of the DNR and the DEQ—again, a helpful but very modest reform.

These proposals do not address the flaws in the current system of compensation or provide a substantive increase in the amount of protection afforded property owners. Their greatest flaw is in their mandating of assessments and training based on current judicial takings standards. It is those very standards that cry out for fundamental change.

Though both the U. S. Constitution and the Michigan Constitution say that property shall not be taken for public use "without just compensation," court interpretations of various laws and regulations have undermined that principle. Owners are usually awarded compensation in the courts only if all economically viable uses of their property are destroyed by a

governmental action. Even if a regulation decreases the value of a person's property by half, for instance, so long as one use or some value of the total property remains, the owner is left without a remedy. The Michigan Supreme Court, if it chooses to review the Volkema case, will have an opportunity to reevaluate this incorrect, but prevailing, interpretation.

The congressional measure cited above would establish a "trigger point," requiring compensation by the federal government only when its regulations deprive a citizen of more than 33 percent of his property's value. But fundamental fairness and justice dictate that one citizen should not be forced to bear the full costs of a taking that is supposed to benefit the public as a whole. This goal can truly be achieved, however, only if the public is forced to compensate property owners for any reduction, not just those above a certain point. That means that both federal and state standards should be beefed up.

Florida and North Carolina have passed compensation legislation with no trigger point. The governments in these states must compensate for *any* non negligible reduction in a property's value resulting from their actions. This study from the Mackinac Center for Public Policy argues strongly that the adoption of a similar standard in Michigan should be a high priority for the legislature.

Opponents will argue that reform of this sort would be too costly to the public treasury. They want governments to have freer reign to do what they want without having to worry about the bills. They see little harm or injustice in foisting tremendous burdens on a few innocent, property-owning individuals if others in society derive some benefit. No free society, however, should put the whims of regulators ahead of the rights of individuals. When those rights are respected through full compensation for "takings," a better-informed public, like any consumer, will be able to evaluate the real costs of government actions that are now hidden in the losses imposed on families like the Volkemas.

Key legislators such as Representative Ken Sikkema of Grandville have said that "more needs to be done" on the takings question and have promised "additional measures in the weeks to come." This opportunity for reform in Michigan is encouraging, but the end goal of genuine reform must be clear. Property rights form the foundation of individual liberty and deserve no less.

The Framers understood the importance of protecting property rights when they drafted the Constitution of the United States. In the Lockean tradition, the Founders understood that protection of property constitutes the purpose of any government which recognizes individual liberty.[1] John Locke articulated that, "The great and chief end therefore, of men's uniting into commonwealths, and putting themselves under government, *is the preservation of property*. To which in the state of nature there are many things wanting."[2] James Madison observed this essential correlation between property and the state when he wrote, "Government is instituted to protect property of every sort.... This being the end of government, that alone is a *just* government, which *impartially* secures to every man, whatever is his *own*."[3] To be sure, property rights are essential to the protection of

[1] See Richard A. Epstein, *Takings: Private Property and the Power of Eminent Domain* 29 (1985): "It is very clear that the founders shared Locke's and Blackstone's affection for private property, which is why they inserted the eminent domain provision in the Bill of Rights."

[2] John Locke, *Second Treatise of Government* 75 (Cox ed., 1982).

[3] From an essay entitled "Property" published March 27, 1792, National Gazette; reprinted in James Madison, 14 *The Papers of James Madison* 266 (Rutland, et al. eds, 1983).

individuals and are meant to be preserved in our Constitutional framework as found in the takings clause of the Fifth Amendment of the U.S. Constitution, as well as in the Michigan Constitution.

The most important protection lies in Michigan's takings clause which is found in Article X, Section 2. It states, "Private property shall not be taken for public use without just compensation therefor first being made or secured in a manner prescribed by law." Mirroring the federal takings clause in the U. S. Constitution, Michigan's takings clause recognizes that, at times, the proper functioning of government may collide with individual property rights. It authorizes intrusions on property for public uses, but also mandates that the responsibility of compensation lie with the government when collisions occur. The "just compensation" requirement ensures that public uses will be funded by the public with the burden falling on the community at large—not disproportionately on individual property owners.

In an era of burgeoning governmental regulations, society is moving toward Locke's criticism of the state of nature, for once again there are "many things wanting" in the preservation of property. The sanctity of property rights understood at our country's founding is constantly in jeopardy as the weight of the government falls on individual property owners. Judicial interpretations, over time, have diluted the status of property while governmental intrusion on it has grown. More and more, aggrieved property owners are forced to turn to the political branches for the protections they fail to receive from the judiciary.

This study will identify the status of takings jurisprudence as it relates to the state of Michigan, reflect on the detrimental effects of this failed jurisprudence, and outline appropriate remedies available to the political branches to combat the assault on private property unleashed by the unchecked growth of federal, state, and local government. Property is a broad term encompassing qualities of ownership in everything from land to ideas to liberties.[4] Though this study will primarily focus on takings of real property such as land, the government has an obligation to assure that property rights of every kind are safe from governmental intrusion. The enactment of comprehensive property rights protections is essential to the preservation of the liberty of Michigan's citizenry.

I Takings Jurisprudence

The Michigan Supreme Court forms the final judgment on the extent of takings protections in the state. Michigan citizens can also challenge state and federal actions under the takings clause of the Fifth Amendment to the United States Constitution, which has been incorporated by the U.S. Supreme Court to apply to the states.[5] Given that the scope of this study is to recommend reforms to Michigan's takings structure to curb the abuses directly under control of the government within the state, the jurisprudential analysis to follow will focus on the interpretation of the takings clause by the Michigan judiciary. The level of protection afforded by the courts in Michigan, for the most part, parallels that afforded by the U.S. Supreme Court under Fifth Amendment scrutiny.

The Michigan judiciary has taken a very limited view of the law of takings protections.

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[4] Id.

[5] *Chicago, Burlington & Quincy R.R. v. Chicago*, 166 U.S. 226 (1896). The Bill of Rights was originally intended to apply only to federal actions, but the merits of the incorporation doctrine need not be addressed here.

Property owners are greatly affected by the courts' interpretation of the takings clause in relation to each of its key provisions—takings, public use, and just compensation. An analysis of the prevailing precedents illustrates the degree to which the courts have strayed from the original intent of the takings clause and the necessity for reform if property rights are to remain valued by the state.

A. The Scope of "Takings" Determinations

The definition of what constitutes a taking is critical to any discussion of the protection afforded private property rights. If a property owner cannot establish that a taking has occurred, the governmental action is immune from scrutiny under the other components of the clause. Several Michigan court decisions have contributed to setting an extremely high standard for establishing a taking, making it difficult for property owners to gain compensation for the harm caused them by government actions.

It has remained well established that a taking occurs when the state physically occupies, invades, or condemns property.[6] If a governmental action results in a "permanent physical occupation" of property, a taking is found regardless of the level of economic impact on the owner or whether it achieves an important public benefit.[7] As limitations on property uses grow with increases in the regulatory state, however, it is clear that the standard of "physical occupation" should not be the determinant factor for determining whether a taking occurs.

Prior to Justice Oliver Wendell Holmes' 1922 opinion in *Pennsylvania Coal Co. v. Mahon*, takings were generally thought to occur by the courts only when there were direct appropriations of property or their functional equivalent.[8] Holmes recognized that protecting the principles of private property meant that the government's ability to redefine the range of interests in the ownership of property must also be constitutionally limited. Holmes stated that, "while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking." Just what is meant by "too far" has never been clearly defined. Nevertheless, *Mahon* illustrated that regulatory takings were within the ambit of Fifth Amendment protection.

For seven decades, the U. S. Supreme Court consistently refused to set any standards for making a determination on the meaning of "too far," preferring instead to "engage in . . . essentially ad hoc, factual inquiries."[9] In the 1992 case of *Lucas v. South Carolina Coastal Council,*[10] however, the Court established the rule that government action which left private property totally valueless or which physically encroached upon private property always constituted a taking. When non-physical invasion or less than a complete reduction in value occurs, the analysis reverts back into an ad hoc inquiry. From takings decisions by the Michigan and federal courts, the level of protections currently granted under this system can be analyzed.

Recent U.S. Supreme Court decisions have addressed some regulatory taking concerns.

[6] See, e.g. *Berman v. Parker*, 348 U.S. 26 (1954).

[7] *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 432, 434-435 (1982). See also *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922).

[8] *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922). This is primarily due to the fact that, prior to *Mahon*, the impacts of governmental actions on private property were minimal. The government was only beginning to "find" constitutional authority for regulatory powers.

[9] *Penn Central Transportation Co. v. New York City*, 438 U.S. 104 (1978).

[10] 112 S.Ct. 2886 (1992).

The Michigan Supreme Court, in such cases as *Electro-Tech, Inc. v. City of Westland,*[11] has followed the holdings of these decisions. Attempts to coerce individuals into ceding property rights through permit conditions or requirements is one key area that has fallen under scrutiny. *Nollan v. California Coastal Commission* held that conditions which advance the same purpose as is served by the permitting process itself are not considered takings.[12] When an essential nexus does not exist between the permit condition and the state interest, however, the required exaction of property is considered a compensable taking. The U.S. Supreme Court extended this interpretation in *Dolan v. City of Tigard*.[13] It is assumed that the exaction of property through an easement or designation not roughly proportional to the permit's purpose should be treated like a taking exercised under the formal power of eminent domain and condemnation.

Moreover, the government must confine its exercise of eminent domain to that of necessity. In *City of Troy v. Barnard*, for instance, the Michigan Court of Appeals held that the municipality abused its discretion in taking property in excess of what it needed for laying a sidewalk.[14]

Land use regulations which deny an owner all use of his property, even if only temporarily, are considered analogous to physical appropriations and therefore require compensation.[15] "Normal delays in obtaining building permits, changes in zoning ordinances, variances, and the like" are, however, exempted from this rule.[16] In contrast, a land use regulation is not categorically considered a taking if it "substantially [advances] legitimate state interests" and does not "[deny] an owner economically viable use of his land."[17] Elimination of all use is a taking, but elimination of only some uses is not.[18]

Herein lie the more difficult cases, arising out of inverse condemnation, where the state does not actually take physical possession of property but does affect the rights of possession attached to it—a decline in value or deprivation of use directly resulting from a governmental action. Falling into this category are challenges to such things as regulatory programs and permit schemes which limit or condition the legal uses of property.

When a regulation restricts certain uses of property, it not only prevents individuals from using their property in a way they desire, but it often has the effect of essentially stealing the worth of one's property. After imposition of a regulation, it is often economically impossible for an owner to sell his land and move elsewhere to use another property in the way that satisfies his needs. When fair market value is affected by a governmental action, selling means imposing a financial loss on the property owner.

The courts in Michigan have not fully recognized these deleterious effects on property as "takings." The primary test is whether an owner is deprived of *all* economically viable use

[11] 433 Mich. 57, 68-73, 445 N.W.2d 61, 65-68 (1989).
[12] 483 U.S. 825 (1987).
[13] 114 S.Ct. 2309 (1994).
[14] 183 Mich.App. 565, 455 N.W.2d 378 (1990).
[15] *Lucas v. South Carolina Coastal Council*, 112 S.Ct. 2886 (1992); *First English Evangelical Lutheran Church of Glendale v. Los Angeles Co.*, 482 U.S. 304 (1987).
[16] 482 U.S. at 321.
[17] *Nollan v. California Coastal Comm.*, 483 U.S. 825, 834 (1987), citing *Agins v. Tiburon*, 447 U.S. 255, 260 (1980).
[18] The owner may be able to pursue a substantive due process claim which does not require that all use be denied, but substantive due process is beyond the scope of this study.

of his property.[19] Land use regulations only amount to takings in extreme circumstances. Although recognizing that the economic impact of a regulation should be considered in determining whether an action results in a taking, deprivation of the most profitable or preferable uses of property are not considered takings under the interpretation of the term in Michigan court decisions.[20] Several cases illustrate this all-or-nothing approach to a takings determination.

In *Bevan v. Township of Brandon*, the Michigan Supreme Court addressed these limitations.[21] The Bevans were restricted from building two or more houses on their six-acre property unless access was made available over a road with a right of way. Due to the restriction in use created by this zoning ordinance, the Bevans contended an unconstitutional taking had occurred. The court restated the limited scope of compensable takings when it held:

> Because the access regulation in question serves a legitimate governmental interest and does not deny the owners economically viable use of their land, we conclude that enforcement does not effect an unconstitutional taking of plaintiffs' property.[22]

The court cited the U. S. Supreme Court justifying the all-or-nothing definitional scope of the takings clause on the premise that such an interpretation is necessary for effective functioning of government. Under the unusual notion that government efficiency justifies the infringement of constitutionally protected rights, the Court stated, "Government could hardly go on if to some extent values incident to property could not be diminished without paying for every such change in the general law."[23]

The *Bevan* decision articulated a two factor test for determining whether zoning affects a taking: "The owner must show that the property is either unsuitable for use as zoned or unmarketable as zoned."[24] Again, an owner must show complete destruction of its property's use or value. No gradations of loss are allowable to prove a taking, for "a showing of confiscation will not be justified by showing a disparity in value between uses."[25]

Fortunately, the court does argue that zoning laws cannot "oust the property owner of his vested right" to continue a non-conforming use that was previously lawful. It does, however, require that the non-conforming use be already occurring at the time the new zoning ordinance is passed, or that "work of a substantial character" has been accomplished toward the non-conforming use. Intentions or contemplations will not allow a property owner to escape application of new zoning laws to his property.[26]

In *Blue Water Isles Company v. Department of Natural Resources*, the Michigan Court of Appeals upheld a denial of a permit application to dredge and fill 442 acres of marsh lands.[27] In the 1988 case, the court found that the denial of Blue Water Isles permit application did not constitute a taking, for it was "reasonably necessary to the effectuation of

[19] *Bond v. Dep't of Natural Resources*, 183 Mich.App. 225, 454 N.W. 2d 395 (1989).
[20] *Carabell v. Dep't of Natural Resources*, 191 Mich.App. 610, 612, 478 N.W.2d 675, 676 (1991); *Andrus v. Allard*, 444 U.S. 51, 66 (1979).
[21] 438 Mich. 385, 475 N.W.2d 37 (1991).
[22] 438 Mich. at 387, 475 N.W.2d at 39.
[23] 438 Mich. at 390, 475 N.W.2d at 40, citing *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415.
[24] 438 Mich. at 403, 475 N.W.2d at 46, citing *Kirk v. Tyrone Twp.*, 398 Mich 429, 444, 247 N.W.2d 848 (1976).
[25] Id.
[26] 438 Mich. at 400, 475 N.W.2d at 45.
[27] 171 Mich.App. 526, 431 N.W.2d 53 (1988).

a substantial public purpose" in preserving the state's natural resources and the protection of the public trust in inland lakes and streams.[28] The court acknowledged that takings can occur when "the value of the property is destroyed . . . or where the owner is excluded from use or enjoyment of his property or from any of the appurtenances thereto"[29] but then argued that there was not a substantial reduction in the plaintiff's property value and alternative uses for the property remained, thereby no taking was found.

In the 1989 case of *Bond v. Department of Natural Resources*, the Michigan Court of Appeals overturned a compensation award to a property owner denied a permit to develop land according to the original development scheme he envisioned when purchasing the property.[30] A drainage permit for creating a system of canals was denied because the Department of Natural Resources (DNR) considered the majority of his 170 acre parcel either wetlands or shorelands. The court held that they would not assume that the denial of one development application was conclusive evidence that all alternative development plans would be denied by the DNR in the future. DNR representatives testified that they could not tell if any alternative permit applications would be accepted for this land, but the court still found that the plaintiff had not met the burden of showing that all beneficial use was destroyed by the regulations.

The court stated, "[E]ven if plaintiff suffered a diminution in the value of his property as a result of the designations [as wetlands] and even though his application for a permit to dredge a drainage ditch was denied, a taking did not occur."[31] It is clear from this holding that the courts do not recognize decreases in value or restrictions on use of property as compensable takings. The 1991 case of *Carabell v. DNR* involved similar facts and affirmed the trial court's holding that a property owner must "exhaust all ends in determining whether there was any use whatsoever for [the] land."[32] Plaintiff property owners are faced with an incredibly high burden of proving that no valuable uses of their property remain. So long as some economically viable use of an affected property exists or could exist, no part of the property is considered to have been taken, and no compensation is due.

This is all in sharp contrast to the meaning attributed to a "taking" intended at Michigan's founding. Thomas M. Cooley, former Justice of the Michigan Supreme Court, provided valuable guidance as to the true scope of takings protections. Writing during the infancy of the state of Michigan, Justice Cooley argues that takings occur when governmental actions infringe, completely or partially, on uses of property. In discussing the jurisprudence of eminent domain in his *Treatise on Constitutional Limitations*, Cooley states:

> "[A]ny injury to the property of an individual which deprives the owner of the ordinary use of it is equivalent to a taking, and entitles him to compensation....So a partial destruction or diminution of value of property by an act of the government which directly and not merely incidentally affects it, is to that extent an appropriation."[33]

Takings protections clearly should extend to more than actions which eliminate all uses of property. Cooley's analysis indicates that those actions which infringe on ordinary uses or

[28] 171 Mich.App. at 535, 431 N.W.2d at 58, citing *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104, 127 (1978).
[29] Id., citing *Bott v. Natural Resources Comm.*, 415 Mich 45, 81, n43, 327 N.W.2d 838 (1982) and *Pearsall v. Eaton Co. Supervisors*, 74 Mich 558, 561, 42 N.W. 77 (1889).
[30] 183 Mich.App. 225, 231, 454 N.W.2d 395, 398 (1989).
[31] 183 Mich.App. at 231, 454 N.W.2d at 398 (1989).
[32] 191 Mich.App. 610, 612, 478 N.W.2d 675, 676 (1991).
[33] Thomas M. Cooley, *A Treatise on the Constitutional Limitations Which Rest Upon the Legislative Power of the States of the American Union* 601-602 (2nd ed., 1871).

deflate the value of property should, and did at one time, fall into the category of compensable takings.

Furthermore, Justice Cooley argues that the level of interest interfered with by a governmental action, such as requiring an easement for a private road, is immaterial to the calculus of whether a taking has occurred. "Nor would it be material to inquire what *quantum* of interest would pass from him: it would be sufficient that some interest, the appropriation of which detracted from his right and authority, and interfered with his exclusive possession as owner, had been taken against his will."[34] The level of diminution should therefore be irrelevant to the determination of a taking, though it clearly should play into the calculation of compensation.

B. Determining the Relevant Parcel

Because the courts have placed such a high degree of importance on how much of a piece of property has been affected in its takings determinations, defining the property to be analyzed in that determination is critical. If the relevant property is only the portion affected by the regulation, the impact of the regulation will seem much greater than if the court looks at that portion as only part of a larger relevant whole. The key question in current takings jurisprudence is whether the affected portion constitutes a separate segment of property. Thus, defining the relevant parcel of property for determining whether or not a taking occurred is central to a judge's analysis in a takings claim.

The courts have consistently held that, as between the entire property and the portion of property subject to regulation, the appropriate parcel for takings analysis is the entire property. In *Penn Central Transportation Co. v. New York*, the U.S. Supreme Court stated that,
" 'Taking' jurisprudence does not divide a single parcel into discrete segments and attempt to determine whether rights in a particular segment have been entirely abrogated."[35] In *Andrus v. Allard*, the Court found that, "At least where an owner possesses a full 'bundle' of property rights, the destruction of one 'strand' of the bundle is not a taking, because the aggregate must be viewed in its entirety."[36] Similar to the argument that a taking does not occur if only one "use" of property is restricted and other "strands" of "use" remain, one physical portion of a property cannot be considered in isolation from an owner's entire holding.

Take the example of a logger restricted from cutting down a portion of his tree lot because of an Endangered Species Act regulation protecting the spotted owl. Though 100 percent of the logging "use" of the land has been prevented, the court will find that other uses such as hiking, camping, etc. may remain. Therefore, only ten percent of all economically viable uses are restricted and the owner is not entitled to compensation. Similarly, if the logger is only prevented from cutting down 30 percent of his entire tree lot, the court will generally consider only 30 percent of his entire parcel of land to be affected by the regulation though 100 percent of the southwest corner which constitutes that 30 percent cannot be cut down. This parcel determination is critical, for if the court were to determine that the southwest corner constituted the relevant parcel, the impact of the regulation would necessarily appear much greater.

[34] Cooley at 584-5.
[35] 438 U.S. 104, 130-131 (1978).
[36] *Andrus v. Allard*, 444 U.S. 51, 66-67 (1979).

In *Keystone Bituminous Coal Ass'n v. DeBenedictus*, the plaintiff coal mining company was required to leave dormant a support estate of coal, resulting in the inability to mine 27 million tons of coal.[37] The U.S. Supreme Court found that those 27 million tons were not a separate segment for takings law purposes. Subsequently, the court found no taking because, though large, 27 million tons was only a small portion of the entire mining operation.

The *Keystone* decision followed *Andrus* and *Penn Central* in refusing to consider anything but the whole property when deciding if a taking had occurred.[38] It even argued that separate deeds or tax identification numbers were "artificial" and therefore not controlling in takings analysis. The *Keystone* decision also underscored the importance of the relevant parcel determination to today's takings jurisprudence:

> Because our test for regulatory taking requires us to compare the value that has been taken from the property with the value that remains in the property, one of the critical questions in determining how to define the unit of property "whose value is to furnish the denominator of the fraction."[39]

Though the Court has argued that an exact standard does not exist, as the controlling precedent, *Keystone* indicates a hostility towards considering individual portions of property separately from their surroundings.

Michigan has followed a similar analysis. For example, in *Bevan v. Township of Brandon*, the Michigan Supreme Court found that two contiguous residential lots, purchased and taxed separately, which had been subdivided by the plaintiff's predecessor, consisted of one parcel for the purpose of the takings analysis.[40] The local zoning ordinance, and resulting easement problems, limited the Bevans to building only one single family residence on the two lots.

The *Bevan* decision held that, "As a general rule, a person's property should be considered as a whole when deciding whether a regulatory taking has occurred."[41] The key considerations of the court in finding the two lots to be one parcel were contiguity, unity of ownership and unity of purpose (both were zoned for residential use). The court explained that, "contiguous lots under the same ownership are to be considered as a whole for determining the reasonableness of zoning ordinances, despite the owner's division of the property into separate identifiable lots."[42] The court was following the analysis of *Keystone* in finding that the Bevans did not have separate property interests in each of the two segments.

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[37] 480 U.S. 470 (1987). See e.g. also *Jentgen v. U.S.*, 657 F 2d 1210 (Ct Cl, 1981), cert den 455 U.S. 1017 (1982) (where plaintiff owned 100 acres, 60 of which could not be developed due to wetlands regulations and the court of claims considered the 100 acres as the parcel in finding no taking); *Ciampitti v. U.S.*, 22 Ct Cl 310 (1991) (determining the relevant parcel to be entire 45-acre parcel of wetlands and uplands, not just the 14 acres of wetland.)

[38] 480 U.S. 470, 500, "It is clear...that our takings jurisprudence forecloses reliance on such legalistic distinctions within a bundle of property rights."

[39] 480 U.S. 470, 497, citing Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law*, 80 Harv. L. Rev. 1165, 1192 (1967); Sax, *Takings and the Police Power*, 74 Yale L. J. 36, 60 (1964); Rose, *Mahon Reconstructed: Why the Takings Issue is Still a Muddle*, 57 S. Cal. L. Rev. 561, 566-567 (1984).

[40] *Bevan v. Township of Brandon*, 438 Mich 385, 475 N.W.2d 37 (1991), *cert den* 112 S.Ct. 941 (1992). See also *State Highway Commissioner v. Englebrecht*, 2 Mich.App. 572, 140 N.W.2d 781 (1966); *In re Dillman*, 256 Mich 654, 239 N.W. 883 (1932); *State Highway Commissioner v. Snell*, 8 Mich.App. 299, 154 N.W.2d 631 (1967).

[41] 438 Mich 385, 393 citing 1 Rathkopf, Zoning and Planning, §6.07(5), p. 6-45.

[42] Id. at 395, citing *Korby v. Redford Twp.*, 348 Mich 193, 82 N.W.2d 441 (1957).

The most recent statement of law by the Michigan Court of Appeals on this subject indicates a continued adherence to the *Bevan* standard. In October of 1995, that court decided the case of *Volkema v. Department of Natural Resources*.[43] A Michigan wetland regulation passed years after the purchase of their land prevented Russell and Lois Volkema from developing six acres, destroying $212,000 of their land's worth. Because these six acres, now valueless, are only a part of a 24.6 acre parcel, the Michigan Court of Appeals refused to find a compensable taking. Even after finding that the regulation interfered with the Volkemas' investment-backed expectations, part of the Volkemas' retirement investment was destroyed on the basis that some value remained in the parcel as a whole. The Volkemas have applied to the Michigan Supreme Court for appellate review.

Out of a number of cases conducting ad hoc inquiries on the relevant parcel, a list of factors can be compiled which are weighed by judges in making their determinations: degree of contiguity, dates of acquisition, unity of ownership, unity of use, extent to which the protected lands contribute to the value of the remaining lands, value of affected parcel, and countless others. There is no doubt that the lack of an established formula for deciding the importance of these various factors creates a great deal of confusion and makes the determination of the relevant parcel a difficult task for any judge.

Although the result of weighing these factors has almost always resulted in an owner's entire property being deemed the relevant parcel, one notable exception emerged in *Loveladies Harbor, Inc. v. United States.*[44] The U.S. Court of Claims was faced with 12.5 acres of wetlands affected by regulation. These 12.5 acres were originally part of a 250-acre parcel formerly owned by the plaintiff. The court of claims here found that the 12.5 acres was the only parcel at issue.

Similarly, in the 1994 case of *Miller Brothers v. Department of Natural Resources, The State of Michigan*, the Michigan Court of Appeals made a distinction from its *Bevan* standard.[45] The director of the Department of Natural Resources had designated a 4,500-acre area in Mason County as the Nordhouse Dunes Area. That designation resulted in the prohibition of oil and gas development in the area. The court rejected the argument that the adjoining property must necessarily be included in its taking analysis and found a compensable taking of the segment.

The *Miller Brothers* decision did not, however, clearly announce the reasoning for this distinction. It stated, "This case is not similar to the cases defendants cite wherein development of a portion of a parcel of land was limited or restricted. In this case, development of thousands of acres of property was totally prohibited."[46] The distinction seems to lie in the fact that the court found the plaintiff's mineral interests to have one, and only one, economically viable use. This lone use was prohibited by the DNR's designation. This more liberal approach to defining the relevant parcel is encouraging; but its impact is limited, for the decision comes out of Michigan's appellate division, and the weight of Michigan and U.S. Supreme Court precedents falls against it.

Given the importance of the relevant parcel determination to the outcome of a takings case, confusion resulting from the lack of a clear standard has a tremendous impact on property owners. Judge Sawyer's dissent in the *Volkema* case provides valuable guidance as to the standard that should be applied:

[43] 1995 Mich. App. LEXIS 461 (No. 159820, October 20, 1995).
[44] 21 Cl Ct 153 (1990).
[45] 203 Mich.App. 674 (1994).
[46] Id. at 680.

> [I]n light of the strong historical protection of private property in this country and the constitutional mandate that the government may put private property to public use only after compensating the owner of that property, I believe that the question posed in *Lucas* is best answered by concluding that a taking occurs where a regulation precludes the use of an identifiable, discreet piece of property, even if that property forms only a portion of a larger parcel. I do not find it relevant how large a portion of property the owner possesses. What is relevant is that the government has determined that a public purpose would be served by denying the rightful owner of the property, the use of that property and requiring it to be used, or in this case not used, in accordance with that public purpose. While the government is permitted to do this, it must compensate the property owner for putting the property to public use. Our historical protection of private property in the constitution allows no less.[47]

The Michigan courts should embrace a standard similar to the one posed by Judge Sawyer in order to prevent a large number of affected owners from being disabled by the current government-favoring standard. A legislative response which alleviates the problems in this area will also go a long way toward simplifying the takings law system and, if properly crafted, toward protecting private property rights.

C. The Scope of Just Compensation

What constitutes just compensation cannot be considered by the court unless a taking has first been determined to occur. Instead of reading the clause as a whole, compensation is paid only when takings occur through physical occupations or regulations which eliminate all uses of property. Compensation is not always paid, therefore, in direct relation to the amount of property loss or depletion in value.

The fundamental tenet of just compensation is to put the property owner in as good a position as he would have been in had the injury not occurred.[48] This serves the principal purpose of the just compensation requirement, "to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole."[49] Similarly stated, "Just compensation should neither enrich the individual at the expense of the public nor the public at the expense of the individual."[50]

Because the court accepts these notions, it is quite inconsistent for it to argue that a governmental action which causes a less than complete diminution in the value of property is not compensable. As a result of the government action, the property owner's position is lowered, but because a taking is not considered to have occurred, the state is not required to put the property owner in as good a position as he was in prior to the action. Nor do they ensure that individual property owners are not forced to bear a disproportionate economic cost to advance a community interest which should be paid for by the community at large.

Compensation can be calculated when a taking is determined to occur. If only a portion of a parcel of property is taken, just compensation includes the value of that parcel and the reduction in value to the remaining portions. In *Jack Loeks Theatres v. City of Kentwood*, the Michigan Court of Appeals observed that:

> [I]t has long been recognized in this state that where, as here, only part of a parcel is

[47] *Volkema v. Department of Natural Resources*, 1995 Mich.App. LEXIS 461 (dissent).

[48] *In re Widening of Bagley Ave.*, 248 Mich. 1, 5, 226 N.W. 688 (1929).

[49] *Armstrong v. United States*, 364 U.S. 40, 49 (1960).

[50] *Michigan State Highway Commission v. Cronenwett*, 52 Mich.App. 109, 144, 216 N.W.2d 597, 600 (1974), citing *In re State Highway Commissioner*, 249 Mich. 530, 535, 229 N.W. 500, 501 (1930).

> taken, "just compensation is to be determined by the amount which the value of the parcel from which it is taken is diminished. The part actually taken is allowed as direct compensation, but the decreased value of the residue of the parcel on account of the use made of the land is also allowable as compensation."[51]

The *Jack Loeks Theatres* decision also stated that property owners can present evidence of the "highest and best use" of the land taken, so long as the land is adaptable to that use and that use is not merely speculative but has "attained some degree of concrete physical realization."[52] In the end, however, the amount of compensation is ultimately a question for the jury based on the facts of each case.[53]

D. Public v. Private Uses

The intent of the takings clause is to state that not only are takings which fail to compensate property owners illegal, but also that takings for purely private uses are illegal regardless of whether compensation is actually paid. This "public use" language in the takings clause is intended to prohibit the power of the government to take property for private uses. The purpose of the state is only to act as a public functionary, therefore, it is false to assume that the government has the power to advance private uses through its eminent domain power.

Unfortunately, the Michigan Supreme Court's decision in *Poletown Neighborhood Council v. City of Detroit* substantially blurs the line between public and private uses. Dissenting from the majority in the case, Justice Ryan warned of the implications of this decision:

> The reverberating clang of its economic, sociological, political, and jurisprudential impact is likely to be heard and felt for generations. By its decision, the Court has altered the law of eminent domain in this state in a most significant way and, in my view, seriously jeopardized the security of all private property ownership. This case will stand...for judicial approval of municipal condemnation of private property for private use....it seems important to describe...how government, in all its branches, caught up in the frenzy of perceived economic crisis, can disregard the rights of the few in allegiance to the always disastrous philosophy that the end justifies the means.[54]

The *Poletown* 5-2 decision remains the law, and it is therefore necessary to understand its concept of "public use" review.

The Detroit Economic Development Corporation set out a plan to acquire, by condemnation if necessary, a large tract of land to convey to General Motors for an assembly plant site. The majority posed the issue at bar as:

> Can a municipality use the power of eminent domain granted to it by the Economic Development Corporations Act, MCL 125.1601 et seq., MSA 5.3520(1) et seq., to condemn property for transfer to a private corporation to build a plant to promote industry and commerce, and thereby adding jobs and taxes to the economic base of the municipality and state?[55]

[51] 189 Mich.App. 603, 608, 474 N.W.2d 140, 143, citing *In re Grand Haven Hwy.*, 357 Mich. 20, 26, 97 N.W.2d 748 (1959), quoting *In re Widening of Michigan Avenue, Roosevelt to Livernois*, 280 Mich. 539, 548, 273 N.W. 798 (1937).

[52] 189 Mich.App. 603, 618, 474 N.W.2d 140, 147 (1991), citing 4 Nichols on Eminent Domain, §12B.08[2], p. 12B-54, §12B.12, pp. 12B-90--12B-105.

[53] *Poirier v. Grand Blanc Tp.*, 192 Mich.App. 539, 481 N.W.2d 762 (1992).

[54] 410 Mich. 616, 645-6, 304 N.W.2d 455, 464-5 (1981).

[55] 410 Mich. 616, 630, 304 N.W.2d 455, 458 (1981).

The court was deciding this question at a time when the legislature considered Michigan to be in an economic crisis. Additionally, there was tremendous public support for clearing the way for the plant. Swept up in the process were the property owners.

Interestingly, General Motors had chosen the site and approached the city about obtaining the land. GM made demands for road improvements, tax breaks, and exemptions from certain penalties for its plant design. This, in and of itself, indicates that a private interest attempted to use the imprimatur of the state to acquire land.

The court recognized that condemnation for private use or purpose is forbidden.[56] It found, however, that the legislature had determined governmental actions like those contemplated by Detroit met a public need and served an essential public purpose of fostering employment and revitalizing the economy when passing the Economic Development Corporations Act. The court argued that the determination of public use is primarily a legislative function, and the court established that it would give great deference to legislative declarations of a public purpose.[57]

The loose judicial standard for determining a public use established by the *Poletown* Court is whether "substantial proof" can be provided "that the public is primarily to be benefitted."[58] Land can be taken and then conveyed to private interests. The "public benefit cannot be speculative or marginal but must be clear and significant if it is to be within the legitimate purpose as stated by the Legislature."[59] By shifting the analysis to "benefits," the court established a standard which looks to the effects of a taking, thereby converting the determination into a matter of policy instead of a matter of law. The court proceeded to determine that the Detroit plan was significant to the public and therefore allowable.

Even if the land could be more beneficially used by General Motors than by its then-residing owners, this should not justify invoking the power of eminent domain. Justice Cooley articulated that the power was intended to be far more limiting than the *Poletown* standard:

> [T]here are many cases in which the property of some individual owners would be likely to be better employed or occupied to the advancement of the public interest in other hands than in their own; but it does not follow from this circumstance alone that they may be rightfully dispossessed.[60]

Cooley further elaborated that conveyances to private parties who could indirectly serve the public interest were not sufficient considerations for meeting the public use requirement:

> [I]f taken for a purely private purpose, it would be unlawful. Nor could it be

[56] 410 Mich. at 632, 304 N.W.2d at 458. One common law exception, the instrumentality of commerce exception, does allow roads or ways by land or water to be conveyed to private parties. Commerce instrumentality conveyances are justified on grounds of extreme public necessity otherwise impracticable, continuing accountability to the public, and public choice of land; see Ryan, dissent, 410 Mich. at 674-5, 304 N.W.2d at 477-8, citing *Swan v. Williams*, 2 Mich. 427, 439 (1852).

[57] 410 Mich. at 632-4, 304 N.W.2d at 458-9.

[58] 410 Mich. at 634, 304 N.W.2d at 459.

[59] Id.

[60] Cooley at 586-7. Cooley adds, "It may be for the public benefit that all the wild lands of the State be improved and cultivated, all the low lands drained, all the unsightly places beautified, all dilapidated building replaced by new;...but the common law has never sanctioned an appropriation of property based on these considerations alone." Today's interests in environmental protection to take land to preserve "wild lands" or to prevent the drainage of lowlands at the expense of development, though completely the opposite of the anticipated public interest assertions that concerned Cooley, would be no more legitimate under his analysis.

> important that the public would receive incidental benefits, such as usually spring from the improvement of lands or the establishment of prosperous private enterprises: the *public use* implies a possession, occupation, and enjoyment of the land by the public at large, or by public agencies; and a due protection to the rights of private property will preclude the government from seizing it in the hands of the owner, and turning it over to another on vague grounds of public benefit to spring from the more profitable use to which the latter may devote it.[61]

The court, in providing deference to the legislature, has prevented itself from evaluating the nature of public use, thus has ignored the original principles inherent in public uses discussed by Cooley and the early case law in Michigan.

State-by-State Legislative Update

23 States have passed property rights legislation
48 states have provided over 140 property rights bills in 1995
updated 12/8/95

Arizona[1]
codifies Nollan and Dolan, planning, creates ombudsman

Deleware[1]
plannning, wetlands compensation

Florida[4]
compensation -

Idaho[3]
planning

Indianna[3]
planning

Kansas[4]
plannning

Louisiana[4]
planning, compensation – 20% trigger point

Maine[4]
study

Mississippi[3]
compensation - 40% trigger point

Missouri [2]
planning

Montana[4]
Planning

New Mexico[4]
special - endangered species

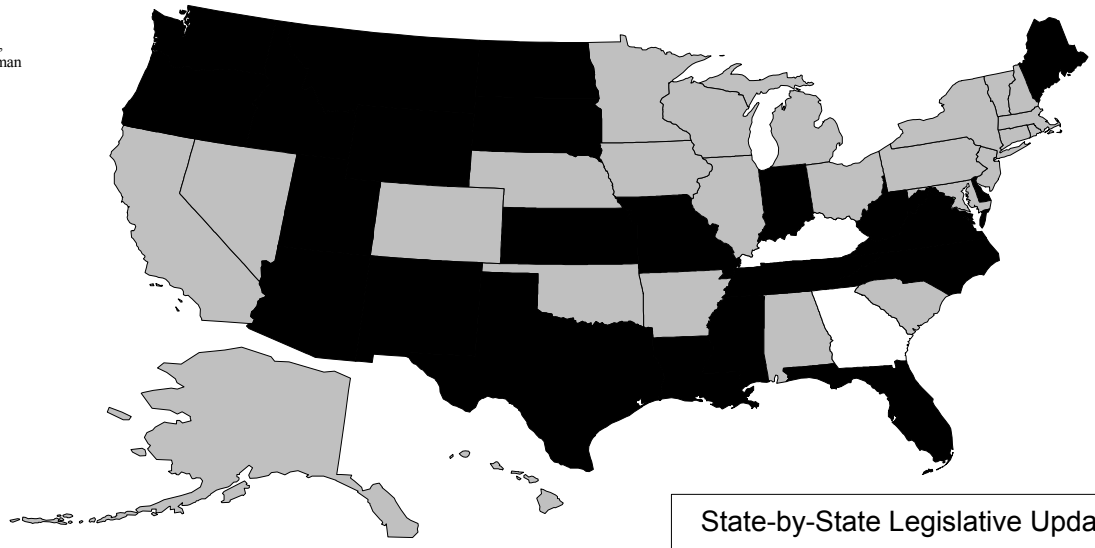
North Carolina[2]
compensation - trigger point

North Dakota[4]
wetlands planning

Oregon[4]
historic preservation

South Dakota[4]
resolution

Tennessee[3]
planning



Texas[4]
compensation - 25% trigger point

Utah[2]
codifies Nollan and Dolan, creates constitutional defense council

Virginia[2]
study, planning

Washington[1]
planning, compensation

West Virginia[3]
wetlands planning

Wyoming[4]
planning

Notes: 1. Adopted first property rights legislation in 1992. 2. Adopted first property rights legislation in 1993.
3. Adopted first property rights legislation in 1994. 4. Adopted first property rights legislation in 1995.

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[61] Cooley at 585-6. Cooley does argue that property may be transferred to a private entity, but limits such transfers to recognized areas of eminent domain such as the construction of public ways.

Justice Ryan's dissent indicates this represents a major shift in the Michigan courts' takings jurisprudence. Citing extensive authority, he writes, "It has always been the case that this court has accorded little or no weight to legislative determinations of 'public use.' 'Whether the use for which land is sought to be acquired by condemnation is a public one is a judicial question.'"[62] All cases cited by the majority supporting deference dealt with the legislature's power to tax, not its power to take.

Deference to legislative pronouncements of public use insulates laws from review to the extent that anything can be deemed legitimate so long as it is labelled so. Justice Ryan describes the standard as "protean," "nebulous," and limitless.[63] A vital component of a takings claim has been successfully removed from citizen challenge.

A 1993 Michigan Supreme Court decision, *City of Lansing v. Edward Rose Realty, Inc.*, also deals with the issue of defining "public use."[64] A Lansing ordinance provided for mandatory access to private property by the grantee of a city cable television service franchise. Should the owner of a dwelling, such as Edward Rose Realty, directly or indirectly prohibit any resident from receiving cable services by the grantee of the franchise, the ordinance allowed the cable provider to request that the city commence condemnation proceedings. The court differentiated this municipal action from that of Detroit in *Poletown* because here there was no state-enabling statute identifying a public use or purpose for the taking to which to defer.

The court held that a greater degree of review should be employed when no state statute exists to which they can defer. The ordinance "must be reasonable and not oppressive," must be "essential or indispensable to the accomplishment of the objects and purposes of the municipality," and must provide a clear and specific public benefit which predominates over the benefit to the private party.[65] Actions by municipalities which are not acting under a mandate from the state, therefore, receive higher scrutiny in relation to "public use." The court found that the access requirements in this case could not withstand this level of review and deemed the taking exceeded the city of Lansing's authority.

II Legislative Responses

To redress the lack of judicial protection against the expansion of governmental power, a surge of property rights bills have emerged in state legislatures throughout the country in recent years. Fueled by grass-roots property rights organizations,[66] 21 states have enacted some form of enhanced property rights protective legislation, and hundreds of such bills have been introduced [See Table 1]. Michigan, lately a leader in state reform, is oddly one of the last states to begin addressing the need for greater property rights protections, and its initiatives to date have been incomplete.

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[62] 410 Mich. at 666, 304 N.W.2d at 474, citing *General Development Corp. v. Detroit*, 322 Mich. 495, 498, 33 N.W.2d 919 (1948); *Lakehead Pipe Line Co. v. Dehn*, 340 Mich. 25, 39-40, 64 N.W.2d 903 (1954); *Cleveland v. Detroit*, 322 Mich 172, 179, 33 N.W.2d 747 (1948); *Board of Health of Portage Twp. v. Van Hoesen*, 87 Mich. 533, 539, 49 N.W. 894 (1891).

[63] 410 Mich at 681, 304 N.W.2d at 480.

[64] 442 Mich. 626, 502 N.W.2d 638 (1993).

[65] 442 Mich. at 639, 502 N.W.2d at 645.

[66] Michigan's first statewide property rights organization, The Rights Alliance for Michigan, formed in 1995.

It must be noted that non judicial remedies should not be necessary. Illegitimate takings should be barred through a correct interpretation of state constitutions and the United States Constitution in the judicial review power of the courts. The text of the Michigan Constitution's takings clause and its intent, correctly interpreted, incorporates all of the protections that could be repeated through non judicial remedies. Inappropriate interpretations, however, have forced legislatures to begin to clarify and underscore the limitations inherent in the takings clause.

Legislation, though, runs the risk of indicating that the protections afforded by the original clause are not as broad as they truly were intended to be. Constitutional protections are difficult to alter and stand as supreme statements of law. Ensuring that protections are understood to lie in the constitution, as opposed to statutes, prevents such protections from existing only at the mercy of the legislative mood. Judicial interpretations, however, cannot be mandated and the only means for correcting judicial errors lies in our ability to choose judges in the future who respect the constitutional intent.

Though statutory clarifications can be altered more easily, they do provide an important remedy for property owners who now find their rights unprotected in the courts. The lack of respect for the original constitutional takings protections necessitates a turn to non-judicial solutions.

The types of initiatives being pursued in the states range in their nature and level of protection. Several categories can be isolated to organize these efforts; but only an approach which incorporates each of these categories of protection will provide a comprehensive defense against governmental infringements on the property rights of citizens.

Some efforts deal with special problems such as rights to forest or farm, mineral or water rights, landfills, submerged land, coastal property, rent control, or attempt to limit the application of specific statutes. Often these specialized efforts are more politically feasible than a comprehensive property rights bill. Most of the concerns addressed in such legislation, however, can be swept up in a more general and comprehensive policy dealing with the taking of property. To reach a more complete understanding of takings implications from actions by the government, some states have chosen to provide mechanisms studying the takings issue and measures for addressing governmental encroachments on private property.

Some states have also attempted to codify recent United States Supreme Court decisions such as *Dolan v. City of Tigard* [67] and *Nollan v. California Coastal Commission*[68] in their legislation. Each of these recent cases has limited the state's power to condition the issuance of use permits on the exaction or designation of private property rights. Legislation targeted specifically at permit issuance procedures has passed in Arizona and Utah,[69] while many of the compensation bills also encompass the issue of takings in permitting.

One common effort at more broad-based reform has been to institute a planning procedure in relation to private property. Often referred to as "look before you leap" legislation, these efforts generally require government officials to assess and analyze the impact that a law or regulation is likely to have on private property within their jurisdiction, or to mandate specific procedures to be followed when condemning property under the

[67] 114 S. Ct. 2309 (1994).
[68] 483 U.S. 825; 107 S. Ct. 3141 (1987).
[69] 1995 AZ Chapter 166, 1995 AZ H.2229; 1993 Laws of Utah Chapter 269, 1995 UT H.B. 171. Oklahoma and Texas also introduced permit condition bills in 1995; 1995 OK S.B. 152, 1995 TX 74R H.B. 2481.

power of eminent domain. It is believed that forcing officials to recognize the intrusiveness of their actions, by weighing a value formerly ignored in their determinations on the appropriateness of a law or regulation, may cause them to think twice about the need for the policy.

Planning controls also require officials to narrowly tailor their actions in relation to private property such that the least intrusive means for achieving the government's goal are employed. When effective alternatives are present that have less of an impact on property rights, planning laws command those alternative actions to be implemented in place of the originally proposed action.

Planning requirements create a more stringent system of accountability. Most require notice be given to property owners likely to be affected by a governmental action. Moreover, the public can access the findings of a takings impact assessment and judge the legitimacy of their governmental representative's policies. Ignoring the effects on property can no longer be a shield against public criticism when strong planning laws are in place.

Planning bills have formed the core of most property rights reform efforts.[70] In fact, the Michigan legislature's only concentrated effort to date for reforming takings law, House Bill 4433, falls into this category. Many states have implemented targeted planning efforts which affect only certain regulations, such as those affecting wetlands. Similarly, Michigan's bill requires only that assessments be done within the Department of Natural Resources and the Department of Environmental Quality. The most intrusive measures on private property are doubtlessly those resulting from environmental regulations. Regulations from other agencies, legislative enactments, and actions of municipalities, however, also have a tendency to result in takings. These governmental entities should be required to assess their actions in relation to property rights.

Furthermore, most state legislatures that have addressed the takings assessment issue have included standards for analysis within their bills. The Michigan legislature, on the other hand, requires the attorney general to formulate such standards himself. Specific requirements are more preferable, for they do not depend on the dispositions of the attorney general and cannot change as easily when a new attorney general is elected.

Another shortcoming of many planning efforts, Michigan's included, is their reliance on the definitions afforded "takings" by the Michigan Supreme Court and the United States Supreme Court. Remedies which afford no greater protection than the courts are not much remedy at all. Though they do ease the process of filing suit to gain compensation for governmental actions that are currently considered "takings," planning measures often are merely restatements of the existing law.

To address this concern, another category of property rights legislation involves reforming the definitional scope of a compensable taking.[71] These efforts address the judicial void in relation to permit conditions, partial takings, temporary takings, and/or other actions which result in a restriction on the use of property. By expanding the definition of a "taking," these laws provide property owners with a cause of action against governmental actions which render portions of property useless or reduce the value of their property.

[70] Twenty-six state legislatures introduced planning bills in 1995, and 16 states have enacted planning legislation since 1992. Arizona, Delaware, Idaho, Indiana, Kansas, Louisiana, Michigan, Missouri, Montana, North Dakota, Tennessee, Texas, Virginia, Washington, West Virginia, and Wyoming have all enacted some form of planning legislation.

[71] 23 states introduced compensation reform legislation in 1995.

This cause of action kicks in at a certain "trigger point," a threshold percentage of reduced property value. Obviously, those acts with the lowest "trigger points" are the most protective.

Two states, Florida and North Carolina, have passed compensation bills with no trigger point.[72] Any "non negligible" reduction in value of property caused by a governmental action shall be compensated at the fair market value of the loss. Inherent in this is a redefinition of taking to mean any non negligible reduction in a property's value, and thereby, it allows for compensation for regulatory takings, or inverse condemnation.

Texas has passed a planning and compensation law which entitles owners to compensation when a governmental action "is the producing cause of a reduction of at least 25 percent in the market value of the affected private real property."[73] Mississippi's law compensates owners when the market value of their property is reduced by 40 percent or more[74], and Louisiana compensates for agricultural land decreased in value by 20 percent or more and also requires planning to occur in relation to impacts on agricultural lands.[75]

Many states have been successful at combining several different categories of reform to increase the amount of protection afforded private property owners within their state. The Michigan legislature can learn from these examples of legislation with varying degrees of protection when defining its goals for reform. It is increasingly clear that states have a responsibility to respond to the failures of their judiciaries and to stabilize the rights of private property owners within their jurisdiction. Given the impetus for takings reform, additional layers of protection are sure to be added in the years to come.

III A Strategy for Reform in Michigan

It is a fundamental tenet of our system of government that the legislative and executive branches can provide greater protections to individual liberties than are understood by the courts to be protected in existing law. Protections by the courts form only a floor. It is increasingly becoming recognized that the judiciary, in Michigan and the United States at large, has abdicated its responsibility by setting that floor far below its intended level in relation to property rights. The legislature and executive now have the responsibility of remedying this situation and ensuring that private property rights once again receive the respect they deserve in a free society.

All three branches of government, as well as the people, have a role to play in the protection of private property from illegitimate takings. Each single effort is important to advancing a defense for property owners against the power of the government. A full combination of efforts within and among each branch, however, is the best approach for

[72] Bert J. Harris, Jr., Private Property Rights Protection Act, FL Chapter 95-181, 1995 FL H.B. 863;. The Washington state legislature also passed a compensation law with no trigger point, however, it failed when enough signatures were gathered to force a referendum on the issue and was subsequently defeated by the voters in November of 1995; The Private Property Regulatory Fairness Act, 1995 WA C.A. 164. North Carolina's state legislature also introduced a compensation bill with no trigger point in 1995; 1995 NC H.B. 597.

[73] Governmental Action Affecting Private Property Rights, TX Government Code, Title 10, Subtitle A, Chapter 2007; 1995 TX 74R S.B. 14.

[74] Mississippi Agricultural and Forestry Activity Act, 1995 MS H. 1541.

[75] Right to Farm and Forest, LA Title 3, Chapter 22; 1995 LA H.B. 2199.

returning to, and maintaining, what Madison called the only "*just* government"—one which exists to protect property.

Table 2

Constitution of the State of Michigan of 1963

Article X, Section 2

Private property shall not be taken for public use without just compensation therefor being first made or secured in a manner prescribed by law. Compensation shall be determined in proceeding of a court of record.

Suggested Constitutional Amendment

Article X, Section 2, shall be deleted. The following section shall be added to *Article I, The Declaration of Rights:*

(a) Private property shall not be taken or damaged for public use without just compensation of a court of record.therefore being first made or secured in a manner prescribed by law. Compensation shall be determined in proceeding

(b) No owner shall be deprived of a use of property, or any part thereof, by governmental regulation or action that results in a non negligible reduction in fair market value without full compensation determined by a jury. No prior resort to administrative remedies shall be required. The court shall award reasonable attorney fees and costs to any prevailing owner.

Section I of this study identifies the failures of the judiciary. Ensuring legitimate protections at this level is the most direct method for achieving reform. As previously mentioned, however, judicial interpretation is the one area over which the people have the least direct control. In future elections and appointments, the people should scrutinize their choices and secure onto the bench judges who accept a role as arbiters of the original intent of the constitutional framework and its takings clause. Judicial philosophy is often unpredictable, therefore this method is the least powerful one for instituting change.

Judicial interpretation can be controlled, however, by providing clearer laws for interpretation which will limit the judiciary's power to ignore private property rights. Constitutional and statutory revisions to the current takings law must be adhered to in future court decisions, thus providing greater controls on the judiciary's opportunities to stray from the Founding principles.

A constitutional amendment of Article X, Section 2, which provides a clearer enunciation of private property rights protections will embed such protections in the supreme law of Michigan. Establishing a constitutional remedy provides a greater degree of permanency than any other reform effort, though it is probably the most difficult to implement.

To combat the courts' unwillingness to compensate partial or regulatory takings, language should be added to Michigan's current takings clause [See Table 2]. One revision would alter the clause to read the property shall not be "taken or damaged" without just compensation.[76] Including "damaged" will make restrictions on uses of property compensable. Although property is not actually transferred to the state in regulatory takings, the bundle of rights inherent in property is damaged by restrictions on its use.

Another alternative is to revise the clause to read property shall not be "taken, in whole or in part," thus ensuring that partial takings are compensable under the constitution. Similarly, a separate section could be added to explicitly deal with regulatory takings and deprivations of uses of property. Language to prevent deprivations of property uses without compensation will ensure that individual property owners are not forced to bear the full cost of a regulation or action intended to benefit all of society.

The Florida legislature introduced a joint resolution in January of 1995 which proposed an amendment to their constitution with similar language to address the issue of regulatory takings.[77] The resolution was withdrawn two months later. The legislature proceeded,

[76] Many state constitutions include the word "damaged" or some equivalent thereof in their takings clauses. See William B. Stoebuck, "Nontrespassory Takings" in *Eminent Domain* 5 (1977).

[77] 1995 FL S.J.R. 968; 1995 FL H.J.R. 1847.

however, to pass one of the most comprehensive property rights protection acts to date.[78]

Given the rigors of amending the constitution, the Michigan legislature might pursue legislation leading to comprehensive statutory protections of private property rights.[79] The scope of this legislation could go far beyond that of Michigan H.B. 4433 which merely mandates that the attorney general establish takings impact assessment guidelines in relation to two departments. Comprehensive legislation could address the need to broaden the definition of takings, ease the process by which aggrieved property owners may be compensated, and require governmental officials to analyze the impact of their law making and regulatory actions [See Appendix B].

Any comprehensive measure must limit all governmental entities—legislative and executive; state and local.[80] Municipalities have the power to "take" only by delegation from the legislature.[81] The legislature, therefore, may condition that power. The entire gamut of governmental authorities have abused their authority in relation to private property. Only an act which limits the authority of the entire structure will afford the guarantees property owners deserve under a just government.

The first priority should be to expand the scope of a compensable taking beyond that understood by the current judicial structure. Any governmental action that results in either a physical occupation of property, in whole or in part, provides the basis for the definition of a "taking," and is primarily consistent with the current judicial interpretation of the takings clause. In addition to this, the legislature should deem as a taking any action which results in a

non negligible reduction in the value of an owner's property.[82]

This eliminates the confusion involved in determining what parcel is to be examined for takings purposes. Currently, if 10 acres of a 100-acre area are rendered undevelopable by a regulation, the judge must determine whether the 10 acres or the 100 acres is the relevant parcel. If he chooses the 10 acres, there is a 100 percent limitation on use and the owner will be compensated. If he chooses the 100 acres, there is only a 10 percent taking and the owner is not guaranteed compensation because only a portion of his land has been limited. When the standard is that any non negligible effect on property constitutes a taking, no matter which parcel is deemed relevant, the owner is guaranteed compensation for the entire value of the affected property—the value of the 10 acres and any incidental loss to the remaining 90 acres.

This definition of taking will also combat the current judicial opinion that a taking has not occurred unless all economically viable uses are destroyed by a governmental restriction on the use of property. Clearly, property owners should not face a loss in value to their property without compensation. Property cannot be separated from its worth and the

[78] The Bert J. Harris, Jr., Private Property Rights Protection Act, FL Chapter Law 95-181; 1995 FL H.B. 863.

[79] The following enacted or proposed bills provide particularly valuable guidance, in whole or in part, to those drafting legislation for Michigan: Texas (Government Code, Title 10, Subtitle A, Chapter2007; 1995 TX 74R S.B. 14); Florida (Bert J. Harris, Jr., Private Property Rights Protection Act, 1995 FL H.B. 863); Washington (Private Property Regulatory Fairness Act, Initiative 164; Referendum 48); Louisiana (Title 3, Chapter 22; 1995 LA H.B. 2199); North Dakota (1995 ND S.B. 2388); New York (1995 NY A.B. 5820).

[80] See Appendix B, Section 3 (a) and (b).

[81] See *Alan v. Wayne Co.*, 388 Mich. 210, 200 N.W.2d 628 (1972).

[82] See Appendix B, Sections 4 and 6.

expectations placed on such property by its owner. For this reason, value should be attached both to the property and to its uses. Any deprivation in a previously legitimate use of property, in whole or in part, should be deemed a taking. The value of the use will then figure into the determination of the amount of compensation. Legislation passed without an expansion of the scope of compensable takings will fail to remedy the current failures in judicial interpretation that currently leave many owners helpless when facing governmental actions which affect their property.

The legislation should also ensure that *just* compensation is paid to an aggrieved property owner. Compensation should take into account the amount of reduction in fair market value of the property affected by a governmental action when more than a de minimis reduction occurs. In determining this reduction, however, values attached to specific intended or proposed uses of the property must also go into the calculus of just compensation.[83] To rest the calculus only on the fair market value of the property in its current condition is inherently unjust.[84]

Furthermore, the legislature might limit the scope of allowable takings to only those for true "public uses."[85] A public "use" cannot exist if the public is not actually using the property taken, i.e. where the government does not retain exclusive control over the property or use that has been restricted. This section will remedy the holding in *Poletown Neighborhood Council v. City of Detroit* which allowed takings of land for essentially private uses. Setting a more stringent standard for evaluating legitimate public uses and returning the power to make such a determination to the judiciary is a vital component for limiting the illegitimate expansion of governmental power.

Additionally, a comprehensive bill could ease the process by which property owners can defend their rights. In today's system, the costs of bringing suit often makes it extremely difficult for the individual property owner to challenge governmental actions and hold officials accountable. Awarding attorney fees and costs to property owners who prevail in a takings challenge[86] makes it economically reasonable for property owners to defend their rights and removes a formidable barrier to suit that currently insulates governmental entities from legal accountability. The original draft of Michigan's H.B. 4433 included a provision like this. It was unwisely removed, however, when the bill was revised in committee.

A further barrier to suit is the sovereign immunity power of the state. The legislature should take the position that challenges to governmental actions which affect constitutional rights should never be subject to the state's permission.[87] Because the judiciary has the power to throw out frivolous lawsuits and ensure that plaintiffs have standing, removal of the permission to sue requirement in relation to takings actions will not eliminate any vital state administrative power.

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[83] See Appendix B, Section 3 (d).

[84] See Michael DeBow, Unjust Compensation: The Continuing Need for Reform, 46 S.C. L. Rev. 579 (1995).

[85] See Appendix B, Section 5.

[86] See Appendix B, Section 8. See also *Jack Loeks Theatres, Inc. v. City of Kentwood*, 189 Mich.App. 603, 617: "Just as a property owner in a properly initiated and prosecuted condemnation action is entitled to, pursuant to statute, a reasonable attorney fee...a property owner forced to pursue an inverse condemnation action should be entitled to the same attorney fees as part of its 'just compensation' pursuant to our state constitution."

[87] See Appendix B, Section 7.

Another vital element to a comprehensive legislative reform is to require takings impact analyses for all actions at every level of government.[88] The Michigan legislature has moved in this direction with its requirement that the attorney general formulate guidelines for assessment to be followed by the Department of Natural Resources and Department of Environmental Quality in H.B. 4433. It could move beyond this, however, to require such assessments of all governmental entities, including local governments and the legislature itself. Coupling the assessments to an expansion in the definition of takings will ensure that governmental officials have a full understanding of the impact of their decisions. Moreover, the basic requirements of a takings impact assessment can be defined by the legislature. Governmental entities should state the interest which would be furthered by the governmental action, certify that the action is necessary to advance the purpose, assess the impact the action is likely to have on property rights, establish that no alternative means are available for meeting the state interest that may have a lower impact on property, and certify that the benefits of the action actually outweigh the costs.

Included in the assessment process could be notification to property owners likely to be affected by a governmental action and opportunities for those owners to challenge the necessity of the action. Again, the goal should be to allow affected property owners opportunities to avoid long and costly court processes to validate their rights to compensation for, or injunction of, the action.

The legislative branch has the ability to restructure the takings law and thereby restore the status of property rights in Michigan. Reform at this level can affect the passage of laws, promulgation of rules, and enforcement of state policies. Comprehensive legislative reform should receive the highest priority in Michigan's struggle to protect its citizens.

Finally, if the executive branch prevents itself from actually instituting illegitimate takings, property owners will be spared the harms of governmental actions or can more easily avoid a lengthy court process now necessary to determine their rights when takings occur. The governor should execute an order [See Appendix A] which provides guidelines for executive department actions to ensure that government officials assess the property rights implications of their actions and institute the least intrusive means for meeting any governmental objective, understand that takings is a category much broader than the judicial definition, and respect property owners who may have a legitimate takings claim against an action.

In 1988, President Ronald Reagan issued Executive Order 12,630, "Governmental Actions and Interference With Constitutionally Protected Property Rights," to control federal executive department actions in this way.[89] The order requires most governmental regulations to undergo takings impact analysis in an effort to avoid enforcing regulations or laws in a manner that would result in unnecessary takings. By establishing budgetary responsibility within each department for compensation awards, each section of the executive is forced to bear fiscal responsibility for their actions.[90] This order has gone mainly unused, especially during the Clinton Administration.[91] Nonetheless, it has formed the basic model for most takings impact assessment legislation in the states and in Congress.

[88] See Appendix B, Sections 11-14.

[89] Executive Order No. 12,630, 53 Fed. Reg. 8859; 24 Weekly Comp. Pres. Doc. 347 (1988).

[90] See generally Roger J. Marzulla, *The New "Takings" Executive Order and Environmental Regulation--Collision or Cooperation?*, 18 Envtl. L. Rep. 10,254 (July 1988); Nancie G. Marzulla, *State Property Rights Initiatives*, 46 S.C. L. Rev. 613, 628 (Summer 1995).

[91] *EPA Measure Faces Hit on "Takings,"* Nat'l J.'s Congress Daily/A.M., Apr. 26, 1993, at 1.

It also serves as a good base model for Michigan's governor to follow in the creation of his own executive order.

President Reagan's executive order, however, did not attempt to expand the definition of takings to be used by the government in evaluating its actions. A complete executive order in Michigan should recognize that compensable takings occur more often than they would be found to occur in today's judicial environment[92] This added level of protection will allow the executive order to be almost as protective for property rights as a comprehensively structured property rights statute passed by the legislature.

Michigan's elected officials have a responsibility to pursue an agenda which seeks to guarantee a higher level of protection for property rights. As each branch moves towards the goals delineated above, a layer of protections will emerge that will ensure that the cost of pursing community interests will be born by the entire community. As Richard Epstein, professor of law at the University of Chicago, stated in *Takings*, "When the stakes are high, any shift in course has important consequences."[93] Reform must shift the cost of governmental actions so they do not fall disproportionately on individual property owners.

Conclusion

The government has a responsibility to control the growth of its power over individual liberty. James Madison observed the necessity of governmental accountability when he wrote:

> If men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controls on government would be necessary. In framing a government which is to be administered by men over men, the great difficulty lies in this: You must first enable the government to control the governed; and in the next place, oblige it to control itself.[94]

Nowhere is this balance of responsibility better stated than in the takings clause. The government is given the power to take property for public uses on rare occasions when doing so is necessary to provide for the public good, but it is obliged to control itself by compensating property owners harmed by its actions. The goal must now be for the government to renew its commitment to control itself through comprehensive takings reform.

It does not make sense for the judiciary to divorce property such as land from its uses. It is the expectation for usage of property that gives it its value, for the right of usage is one of the most important "sticks" in each owner's bundle of property rights. To prevent compensation for the element of usage is to prevent compensation for the greatest element of value in property. The goal of the just compensation clause is to put the owner in as good a position as he was in before the governmental taking of property occurred. An owner is not returned to his original position when his property is devalued and an economically less beneficial use is foisted unto him.

The need for reform stretches to all levels of government. With increasing control over actions of Michigan's citizenry by federal laws and regulations, reform at the federal level is necessary, and should be encouraged, to achieve a complete system of protection of property

[92] See Appendix A, Sections 1 and 2.
[93] Epstein at 329.
[94] James Madison, *The Federalist* No. 51, at 349 (Cooke ed., 1961).

rights. However, one cannot discredit the impact that state and local actions have on property owners. That power is likely to grow as Congress returns more control and discretion to the states. For this reason, stronger property rights protections at the state level are essential to attaining a more just system of government.

Opponents will argue that reform is too costly to the public coffers. But if laws and regulations which impede on property rights are truly desired by society, why should the community not share equally in paying the bill for them? It is certainly not fair or just for the majority of citizens to impose tremendous burdens on individual property owners in order to reap a benefit for themselves. The costs to individuals displaced from their property or precluded from using their land as they see fit cannot be ignored. Furthermore, a lack of a cohesive policy on takings can also be costly to the public treasury, as the recent Nordhouse Dunes case illustrates.[95] Individual rights should never be conditioned on the willingness of the majority to pay for their protection.

Michigan has an opportunity to set itself up as a leader in property rights reform, as it has done in areas such as welfare and tax reform. Let us resanctify the ideals of the Founders and return property to its proper place in the concept of individual liberty.

Afterword

Though work can be done to create a statutory, constitutional, and jurisprudential structure that provides a more just system of compensation for property owners aggrieved by governmental actions, no system of compensation can perfectly replace the value owners attach to their property. Property often has a higher value to its current owner than it may have on the market or in the hands of the public. Because subjective value is impossible to validate when determining compensation, reforms are forced to use the more objective "market value" standard. When the government takes land and is required to pay only the market value, however, the current owner may not be fully compensated. He may be able to put the land to a higher use than the present market value dictates, or he may be able to sell his property rights to others who value the property more than the average person in the market. This potential buyer may be able to put the property to a higher alternative use than would be served by the governmental regulation.

An even more threatening situation is when property is taken for private uses. The one using the state to take the land expropriates this surplus value, thereby creating a dead-weight economic loss. The price the owner would be willing to accept to part with his property will often be higher than the average market indicator. The usefulness of contract is that it creates individualized determinations of value such that both parties to a contract benefit from the transaction. Only when the state, or a private party wishing to employ the power of the state, is forced to bargain with a property owner for acquiring his property or a use of it, can a more balanced scheme of compensation occur. In a compensation scheme based on market value, the harm done to property owners by governmental actions may be diminished, but it will never be eliminated.

For this reason, among others, responsible policy makers must not work to correct just our definitions of takings and liberalize the system of compensation, but must work also to minimize the amount of takings that actually occur. Property owners can truly be protected only when governmental actions do not affect their property rights in the first place.

[95] *Property Rights Done Wrong*, The Detroit News, October 27, 1995.

Following the intent of the Framers, a policy maker's first concern should be to prevent the state from intruding on private property. Property rights should not be a secondary concern receiving importance only after fulfilling some other perceived objective of the state.

A system of restrained regulation will not eliminate remedies for citizens affected by noxious uses of property. The private law of torts affords the opportunity for individuals to bring suits under nuisance or trespass to abate harmful uses of property. Broad based governmental regulations have co-opted this route. Private regulation, however, is superior in that it allows for specific and individualized controls that address actual harms. Returning to a system of greater property rights protections will not, therefore, allow owners to run roughshod over the community by using their property in ways that will harm others.

A sound protection of property rights is a fundamental condition for all other liberties.[96] One's property defines his sovereign domain as an individual. The ability to labor and exchange and retain the fruits of those efforts is a primary condition for autonomy. James Madison warned, "[A]s a man is said to have a right to his property, he may be equally said to have a property in his rights. Where an excess of power prevails, property of no sort is duly respected. No man is safe in his opinions, his person, his faculties, or his possessions."[97] The excessive growth of the state's power to control real property has vital implications for the citizenry's liberty in general. This growth must be brought in check if our property in liberty is to be preserved.

Delineation of property rights in our laws, such as those in the Michigan and federal takings clauses, were understood to be vital to limiting the expansiveness of the state and to identifying that zone of liberty which the government cannot intrude. The government should work toward a system, however, where concerns of compensation diminish as it chooses to conservatively employ its power to take. The power of eminent domain is, and was always, meant to be only a power of last resort.

Appendix A: Model Executive Order

Executive Order No._____

Respect for Property Rights in Governmental Actions

WHEREAS, Article V, Section 1, of the Constitution of the State of Michigan of 1963 vests the executive power in the governor; and

WHEREAS, Article V, Section 2, of the Constitution of the State of Michigan of 1963 empowers the governor to make changes in the organization of the executive branch or in the assignment of functions among its units which he considers necessary for efficient administration; and

WHEREAS, Article V, Section 8, of the Constitution of the State of Michigan of 1963 provides that each principal department shall be under the supervision of the governor, unless otherwise provided in the constitution; and

[96] The Supreme Court has stated: "Property does not have rights. People have rights. The right to enjoy property without lawful deprivation...is in truth a "personal" right...In fact, a fundamental interdependence exists between the personal right to liberty and the personal right in property. Neither could have meaning without the other. That rights in property are basic civil rights has long been recognized." *Lynch v. Household Fin. Corp.*, 405 U.S. 538, 552 (1972).

[97] From an essay entitled "Property" published March 27, 1792, National Gazette; reprinted in James Madison, 14 *The Papers of James Madison* 266 (Rutland, et al. eds, 1983).

WHEREAS, Article X, Section 2, of the Constitution of the State of Michigan of 1963 provides that private property shall not be taken for public use without just compensation; and

WHEREAS, Protection of private property is a fundamental end and obligation of government; and

WHEREAS, Governmental actions may have an adverse impact on private property interests; and 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, Executive departments and agencies have a responsibility to review their actions carefully to prevent unnecessary takings and account in decision-making for those takings that are necessitated by statutory mandate.

NOW, THEREFORE, I, _____, governor of the state of Michigan, pursuant to the powers vested in me by the Constitution of the State of Michigan of 1963 and the laws of the state of Michigan, do hereby order the following:

SECTION 1. ***General Principles.***

In formulating or implementing policies that have takings implications, each state 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 Article X, Section 2, of the Constitution of the State of Michigan of 1963, 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 property that non-negligibly affect its value or use, may constitute 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) Actions to which this order applies are asserted to be for the protection of public health and safety should be undertaken only in response to real and substantial threats to public health and safety, and be no greater than is necessary to achieve the health and safety purpose.

(d) Undue delays in decision making during which private property use is interfered with carry a risk of being held to 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 non negligible impact on the use or value of private property should be scrutinized to avoid undue or unplanned burdens on the public treasury.

SECTION 2. ***Determination of taking and compensation due.***

(a) Before implementing any policy, the executive department or agency shall assess the likelihood that engaging in such action will constitute a taking as understood by the

principles of Article X, Section 2, of the Constitution of the State of Michigan of 1963, the just compensation clause of the Fifth Amendment of the Constitution of the United States, and by the principles established in Section 1 of this order.

(b) When a taking is clearly determined to result, compensation will be required whenever an owner is deprived of a use of property, or any part thereof, by governmental action that results in a non negligible reduction in fair market value and damages should be paid prior to commencing the action and without requirement of a judicial order mandating such payment.

SECTION 3. ***Department and Agency Action.***

In addition to the fundamental principles set forth in Sections 1 and 2, executive departments and agencies shall adhere, to the extent permitted by law, to the following criteria when implementing policies that have takings implications:

(a) Before undertaking any proposed action regulating private property use, the executive department or agency involved shall, in internal deliberative documents and in the Michigan register:

(1) Identify clearly, with as much specificity as possible, the state interest and the necessity of the restriction on the private property use that is the subject of the proposed action; and

(2) Describe the burdens imposed on private property and the benefits to society resulting from the proposed restriction on the use of private property; and

(3) Establish that the restriction on the private property use is necessary and the least intrusive means for furthering the identified public purpose by analyzing and identifying alternative actions; and

(4) Establish that such proposed action substantially advances the identified purpose; and

(5) 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 to be abated or to the purpose to be furthered.

(b) When an executive department or agency requires a private party to obtain a permit, license, or requires a designation, 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; and

(3) Be the least intrusive means for advancing that purpose in relation to property; and

(c) 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.

(d) When a proposed action involves a permitting, licensing, or requirement process or any other decision-making process that will interfere with, or otherwise prohibit, the use of private property pending completion of the process, the duration of the process shall be kept to the minimum necessary and any unreasonable delay shall be considered a temporary taking for which compensation is due.

SECTION 4. ***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, in public notices of proposed rule making and messages transmitting legislative proposals to the Congress, stating the departments' and agencies' conclusions on the takings issues.

(c) The attorney general shall, 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 3 of this order, and shall take action to ensure that all takings awards levied against an agency are subtracted from that agency's budget.

(d) In addition to the guidelines required above, 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.

SECTION 5. ***Limitations.***

This order does not apply to the forfeiture or seizure of property by law enforcement agencies as evidence of a crime or for violations of law; actions taken exclusively with respect to property held by the state of Michigan; or the discontinuance of a government program or regulation.

In fulfillment of the requirement of Article V, Section 2, of the Constitution of the State of Michigan of 1963, the provisions of this executive order shall become effective _____, 19__, at 12:01 a.m.

Given under the hand and the Great Seal of the State of Michigan this ___ day of ____, in the year of our Lord, One Thousand Nine Hundred and Ninety-__.

GOVERNOR
BY THE GOVERNOR:

SECRETARY OF STATE

Appendix B:
Model Property Rights Protection Bill

_____BILL No._____

The People of the State of Michigan Enact:

SECTION 1. ***This Act shall be known and may be cited as the "property rights restoration act."***

SECTION 2. ***Purpose.***

(a) It is the policy of this state that private property shall not be taken for public use by governmental action without payment of just compensation;

(b) This act is intended to provide remedies to property owners in addition to any constitutional rights under the Michigan and/or federal constitutions and it is not intended to restrict or replace any constitutional rights;

(c) The provisions of this act are not exclusive. The remedies provided by this act are in addition to other procedures or remedies provided by law. A person may not recover under this act and also recover under another law or in an action at common law for the same economic loss.

SECTION 3. ***Definitions.***

As used in this act:

(a) "Governmental entity" means this state and any officer, agency, board, commission, department, council, or other agency or similar body funded fully or partially by the state or any county, city, municipality, or other political subdivision of the state.

(b) "Governmental action" means any of the following actions by a governmental entity:

(1) the enforcement of a statute or rule, including the issuance of an order;

(2) rules, regulations, or laws that if promulgated or enforced may limit the use of private property; or

(3) regulations, proposed regulations, proposed legislation, comments on proposed legislation, or other governmental policy statements that, if implemented or enacted, could limit the use of private property, 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.

(c) "Governmental action" does not include forfeiture or seizure of property by law enforcement agencies as evidence of a crime or for violations of criminal laws; actions taken exclusively with respect to property held in title by the state of Michigan; or to the discontinuance of a government program or regulation.

(d) "Fair market value" means the most probable price at which real property would be sold, in a competitive and open market under all conditions requisite to a fair sale, between a willing buyer and a willing seller, neither of whom is under any compulsion to buy or sell and both having reasonable knowledge of relevant facts, and immediately prior to the state's initiation of its action against such property. Investment-backed expectations for proposed or intended uses that could be fulfilled absent the governmental action may create an existing fair market value in the property greater than the fair market value of the actual, present use or activity on the real property.

SECTION 4. ***Determination of compensable takings.***

A taking shall be deemed to occur when:

(a) A governmental action affects private real property, in whole or in part, temporarily or permanently, in a manner that requires the governmental entity to compensate the private property owner as provided by Article X, Section 2, of the Constitution of the State of Michigan of 1963 or the Fifth and Fourteenth Amendments to the United

States Constitution in accordance with the meaning ascribed to these sections by the Supreme Court of the State of Michigan and the United States Supreme Court; or

(b) A governmental action results in a physical invasion or occupancy or condemnation of property that non negligibly affects its value or use; or

(c) A governmental action deprives a property owner of a use of property, in whole or in part, temporarily or permanently, affecting any separate or distinct interests, in a manner that non negligibly restricts or limits the owner's right to the property that would otherwise exist in the absence of the governmental action; or

(d) A governmental action is the producing cause of a non negligible reduction in the market value of the affected private property, determined by comparing the market value of the property as if the governmental action is not in effect and the market value of the property determined as if the governmental action is in effect.

SECTION 5. ***Public use.***

(a) In actions challenging a governmental action that results in a taking, determination of public use shall be made by the judiciary as a matter of law. Legislative declarations of public use will not constitute conclusive evidence of a public use.

(b) No property may be taken for non-public uses.

(1) A use shall be determined public when the property taken or regulated remains under the exclusive control of the government.

(2) Any exercise of the eminent domain power which ultimately results in a conveyance to a private use shall be justified only if there exists public necessity of the extreme sort, continuing accountability to the public for that use, and selection of the land to be conveyed is determined by the government and chosen for independent public significance. A use is private so long as the land is to remain under private ownership and control, and no right to its use, or to direct its management, is conferred upon the public.

SECTION 6. ***Determination of compensation.***

When a governmental action constitutes a taking under the provisions of Section 4 of this act, the owner will be entitled, at his option, to either:

(a) compensation equalling the diminution in fair market value resulting from the state action, and remain title thereto; or

(b) compensation equalling the entire fair market value of the real property prior to the diminution when more than a fifty percent diminution of value occurs, and transfer title to the state upon payment of such fair market value.

(c) Compensation to the property owner is also fair and appropriate in cases involving regulatory programs which abate a public nuisance when the property owner neither contributed to the public nuisance nor acquired the property knowing of the public nuisance nor acquired the property in circumstances where the property owner should have known about the nuisance based upon prevailing community standards.

SECTION 7. ***Waiver of governmental immunity; permission to sue.***

Sovereign immunity to suit and liability is waived and abolished to the extent of liability created by this act.

SECTION 8. ***Attorney fees and costs.***
The court shall award reasonable attorney fees and costs of litigation to any prevailing property owner.

SECTION 9. ***Source of compensation.***
Any award made to an owner of private property from a government agency for a taking, including any award of attorney fees and costs, must come from the agency's existing budget unless the agency has previously disclosed an estimate of the costs to the appropriate fiscal management authority and other funds were budgeted for that purpose.

SECTION 10. ***Valuation of property.***
If a state agency undertakes a governmental action that is a taking pursuant to Section 4 of this act, any real property that is affected by the governmental action shall be assessed in an amount that reflects the limitation in use of that real property.

SECTION 11. ***Takings impact assessment.***
All governmental entities shall prepare a written takings impact assessment before undertaking any action that may result in a regulation of private property use.

(a) The takings assessment must:

(1) Clearly and specifically identify the state interest and purpose of the governmental action; and

(2) Establish that such proposed action is necessary substantially to advance the identified purpose; and

(3) Assess the likelihood that the governmental action will result in a taking; and

(4) Estimate the potential cost to the government if the action is deemed a compensable taking pursuant to the meaning ascribed to those terms in this act; and

(5) Establish that the restriction on the private property use is necessary and the least intrusive means for substantially furthering the identified public purpose and why no alternative action is available that would achieve the entity's goals while reducing the impact on the property owner; and

(6) 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 to be abated or to the purpose to be furthered; and

(7) Certify that the benefits of the governmental action exceed the estimated compensation costs.

(b) All bills introduced in either house of the Michigan legislature must be accompanied by a takings impact assessment pursuant to the meaning attributed to the taking of private property in Section 4 of this act.

(c) Before undertaking any action or proposing any action which may regulate private property use, the executive department or agency or the municipality or other governmental entity involved shall conduct a takings impact assessment to be included in internal deliberative documents and published in the Michigan register.

(d) A regulation or restraint of a private property use by a governmental entity is prohibited unless a takings impact assessment is prepared.

(e) If there is an immediate threat to public health or safety that constitutes an emergency and requires an immediate response, the review of the takings assessment guidelines required under this act may be made when the response is completed.

SECTION 12. ***Public Notice.***

Public notice shall be given at least sixty days prior to taking any governmental action or promulgation of any proposed rule that may result in a taking. Notice shall include a copy of the takings impact assessment. All identifiable property owners whose property is likely to be affected by the governmental action shall be notified individually.

SECTION 13. ***Minimum Necessary Regulation***

Should the governmental entity choose to adopt a proposed regulation or restraint on the use of private property, the governmental entity shall adopt the regulation or restraint that has the least possible impact on private property and still accomplishes the necessary public purpose.

SECTION 14. ***Regulatory rollback.***

(a) Any private property owner who is or may be affected by a governmental action or proposed action that limits the use of the owner's real property may request in writing that the governmental actor reconsider the application or need for the action. Within sixty days of receiving the request, the agency shall consider the request and shall in writing inform the landowner whether the agency intends to keep the rule, regulation, or law in place, modify application of it, or repeal it.

(b) If the governmental entity from which compensation is successfully required under this act is unwilling or unable to pay the costs awarded, it may instead roll back the land-use planning, zoning, or other regulatory program as it affects the plaintiff's land to the previous level of regulation. In that event the governmental unit shall be liable to the plaintiff property owner for the reasonable and necessary costs, plus any actual and demonstrable economic losses caused the plaintiff by the regulation during the period in which it was in effect.

ACKNOWLEDGEMENTS

The author wishes to express appreciation to Judge Clifford W. Taylor, Dr. Stephen P. Dresch, and Mr. David Littmann for their comments and review of this work and to Defenders of Property Rights for aiding in a portion of the research of this study.

ABOUT THE AUTHOR

Donald J. Kochan is a student at Cornell Law School and an adjunct scholar with the Mackinac Center for Public Policy. In 1995, Mr. Kochan was the Charles G. Koch Fellow at Defenders of Property Rights in Washington, D.C., and in 1994 was a research assistant to The Federalist Society for Law and Public Policy Studies in Washington, D.C. A native of Sterling Heights, Michigan, he is a graduate of Western Michigan University with majors in political science and philosophy.