

Constitutional Highlights

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Wisconsin Constitution Article I, Section 13 JUST COMPENSATION CLAUSE

The property of no person shall be taken for public use without just compensation therefor.

History and purpose of the section

The just compensation clause (also known as the takings clause) of the Wisconsin Constitution requires the state and its subdivisions to pay just compensation for any private property taken for the use or benefit of the public. Also implicit in this provision is that government is empowered to take private property only for public use; the government may not take private property for private use. This section has never been amended. Wisconsin's just compensation provision is similar to the provision in the Fifth Amendment to the U.S. Constitution, but unlike the constitutions of several other states, in that Wisconsin's provision does not require compensation for property that is merely damaged, only for property that has been taken.

Chapter 32 of the statutes establishes the procedure by which a governmental agency or private entity that has been given express legislative authority may take private property. The procedure, known as eminent domain, involves certain required notices, deadlines, and opportunities for hearings. However, most litigation under the just compensation clause arises when a property owner claims that the government has, not through actual seizure and occupation, taken property without commencing eminent domain procedures and without paying just compensation. This type of legal proceeding is known as "inverse condemnation." In an inverse condemnation proceeding, a court is asked to interpret the Wisconsin Constitution's just compensation clause by deciding whether government has crossed the line separating a permissible regulation from a taking that requires payment of just compensation.

How courts interpret the section

"Takings jurisprudence has developed from two competing principles: on one hand, respect for the

property rights of individuals; on the other, recognition that the government retains the ability, in furtherance of the interests of all citizens, to regulate an owner's potential uses of land." *Zealy v. City of Waukesha*, 201 Wis. 2d 365 (1996).

In early cases, the Wisconsin Supreme court generally applied a narrow interpretation of the just compensation clause. The Court's interpretation generally limited the just compensation requirement to cases where government action closely resembled a formal exercise of the eminent domain power. In *Muscoda Bridge Company v. Worden-Allen Company*, the court concluded that a property owner was entitled to compensation "only where those authorized to exercise the power of eminent domain are actually in possession of or enjoying the use of [the owner's] property." 196 Wis. 76, 88 (1928). In other words, compensation was required only where private property was physically occupied by an entity that state law explicitly authorized to take private property. Even if a plaintiff could meet the *Muscoda Bridge* standard, courts sometimes denied recovery on the ground that a particular interference with property rights was merely indirect or "consequential." *Randall v. City of Milwaukee*, 212 Wis. 374 (1933).

Against a background of societal change, and in tandem with the U.S. Supreme Court's decisions interpreting the just compensation clause of the federal Constitution, the Wisconsin Supreme Court has eased away from *Muscoda Bridge*. While actual possession or use by the government (sometimes referred to as "physical invasion") is a taking *per se*, a taking also occurs when government action deprives an owner of "all, or substantially all, of the beneficial use of his property," *Howell Plaza, Inc. v. State Highway Commission*, 66 Wis. 2d 720 (1975), or divests the owner of title to property, *Zinn v. State*, 112 Wis. 2d 417 (1983). Drawing on the U.S. Supreme Court's opinions in *Dolan v. City of Tigard*, 512 U.S. 374 (1994), and *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992), the Wisconsin Supreme Court has defined "beneficial use" to mean a use that is "economically viable" and consistent with the property owner's "investment-backed expectations." *Zealy v. City of Waukesha*, 201 Wis. 2d 365 (1996).

In addition, a court may find a taking based on an ad hoc analysis of "the nature and character of government action, the severity of the economic impact of the regulation on the property owner, and the degree to which the regulation has interfered with the property owner's distinct investment-backed expectations in the property." *R.W. Docks & Slips v. State*, 2001 WI 73. The outcome of this ad hoc analysis often depends on whether a court views the government action in question as an effort to secure a public benefit or an effort to prevent a public harm. If government action appears to be intended to secure a public benefit, a court is likely to conclude that the government must pay for it, particularly if a citizen whose property right has been damaged does not appear to enjoy some reciprocal benefit. On the other hand, where a court is persuaded that the action in question amounts to an exercise of the police power to protect the health, safety, and welfare of the citizens, the court is unlikely to require compensation.

For instance, in *State ex. rel. Nagawicka Island Corporation v. City of Delafield*, 117 Wis. 2d 23 (1983), the Supreme Court struck down a zoning ordinance that had the effect of preventing any construction on an island owned by the corporation. In the court's view, Delafield's ordinance forced the corporation to

maintain a “private park.” *See also Piper v. Ekern*, 180 Wis. 586 (1923) (a statute limiting the height of buildings on the Capitol square was rejected; the statute was “solely based upon a selfish motive, and is confined to the protection from fire of the state’s property”). In *Just v. Marinette County*, 56 Wis. 2d 7 (1972), however, the court upheld shoreland zoning restrictions that prevented the owner from filling some wetlands he intended to subdivide and resell. The court reflected, “Is the ownership of a parcel of land so absolute that man can change its nature to suit any of his purposes?”

Courts focus on the practical effect of governmental action, rather than on the intended result, *Zinn v. State*, 112 Wis. 2d 417 (1983), and are now less inclined to deny compensation on the ground that an impairment of a property right was merely ‘consequential.’ *Luber v. Milwaukee County*, 47 Wis. 2d 271 (1970). In assessing the impact of regulation upon an owner’s property rights, courts examine the property as a whole, and do not “divide a single parcel into discrete segments and attempt to determine whether rights in a particular segment have been entirely abrogated.” *R.W. Docks & Slips v. State*, 2001 WI 73 (quoting *Penn Central Transp. Co. v. New York City*, 438 U.S. 104 (1978)). And a taking may occur even if the governmental entity responsible for the restriction lacks eminent domain authority: all that is required is that the entity have authority to take the action that interfered with the property owner’s rights. *Zinn v. State*, 112 Wis. 2d 417 (1983).

The state’s sovereign immunity — its power to determine when and on what terms it consents to be sued — does not bar a suit against the state seeking compensation for a taking. The Wisconsin Constitution’s takings clause is “self-executing”; the clause itself amounts to a waiver of the state’s immunity. *Zinn v. State*, 112 Wis. 2d 417 (1983). The measure of “just compensation” is the property’s “present value, presently paid,” meaning that interest must be paid from the time of the taking. *Grant v. Cronin*, 12 Wis. 2d 352.

Courts acknowledge that the Wisconsin Constitution’s takings clause prohibits the state or its subdivisions from taking private property for the private use of another, but the role of the courts in policing this prohibition is limited. *Chicago & N.W. R. Co. v. Morehouse*, 112 Wis. 1 (1901). Courts give a wide berth to the legislature and other bodies with respect to determining what amounts to a public use. When a taking represents an exercise of the power to protect the health, safety, and general welfare of the citizens, a court asks only whether the taking bears a reasonable relationship to the purpose or object of the determination. *Chicago & N.W. Transp. Co. v. Pedersen*, 80 Wis. 2d 566 (1977). Permissible public purposes include the preservation of “scenic beauty,” *Kamrowski v. State*, 31 Wis. 2d 256 (1966), and the elimination of “blighted” urban areas, *David Jeffrey Co. v. Milwaukee*, 267 Wis. 559 (1954).

Strategies for reconciling legislation with the section

If legislation restricts, eliminates, or otherwise negatively affects an established property right, it is best to consider the practical effects on the holder(s) of that right, paying particular attention to economic effects. Compare legislation’s practical effects with the property owner’s reasonable investment expectations. A

court will likely give greater leeway to legislation that can be characterized as an exercise of the police power to protect health, safety, and the general welfare.

Takings claims frequently involve action at the agency or local government level. Legislation affecting agency rule-making authority or municipal powers may be tailored to curb takings issues. Note that legislation can result in regulatory takings even if it does not relate to real property. Property subject to governmental takings includes state employee trust funds, inmate trust accounts, and almost any item in which a person may be said to have a vested interest.

Finally, it should be noted that legislation can, intentionally or unintentionally, create property rights as well as infringe upon them. In some instances, care may be warranted in drafting legislation that confers or creates a right, as a court may regard that right as property that cannot be taken away without payment of just compensation.



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