

Why do we need a Victor Landowners Association? To Defend our Property Rights, Preserve our Land Values and Guarantee “Just Compensation”!

Land Values

One of the most important factors that will determine the value of undeveloped property is the land’s “potential” for development. When this “potential” for development is limited due to the existing characteristics of the property, the market value of the property usually reflects the diminished potential. These characteristics may include: location, deed restrictions, terrain, zoning, excessive wetland areas and limited access to utilities, roadways or other types of infrastructure. These limitations are clearly documented by the visible physical characteristics of the property, existing development restrictions and the legal covenants attached to the property. If additional development restrictions are placed on the land, after purchase, the potential for development will be reduced and the value of the land will also decline.

Compensation for Development Rights

This “potential value” of land is the key component in determining the value of a landowner’s “property and development rights”. What is the profit that a developer or landowner can generate from developing the land for its best use? This potential profit sets the market price of the property and determines the value of a landowner’s development rights. The value of “development rights” is an unknown variable until the property is sold for development or “development rights” are purchased by another entity. The value of development rights is definitely impacted by existing and future development restrictions. Historically, “development rights” are calculated based on the difference between the value of the land for agricultural use and the land’s best use value.

Obviously, the most desirable land for development will be in greater demand and will have a higher market price. This fact also applies to the development rights of the same parcels. The same physical characteristics that make land desirable for development will probably make the land valuable for conservation purposes. Land parcels that include woodlots, streams, hilltop or hillside vistas and large bodies of open water have always attracted residential development. Restricting development based on the presence of these same characteristics will obviously diminish potential value because the property can’t be developed. The cost of purchasing the development rights of these parcels could be significantly higher because the best use value will be higher. This is critical to the situation in Victor because of Victor’s central location and its’ unique

topography. These characteristics are very desirable factors for residential and commercial development, so demand and land values should be very high. On the contrary, demand for land in Victor has declined, in spite of its desirable location and topographic characteristics, due to current excessive zoning restrictions. The implementation of new and more restrictive land use regulations to control development will reduce development potential and demand further. When supply is high (there are thousands of acres of undeveloped land in Victor) and demand is low (nobody is buying because they can't develop it) the price goes down.

When Land Use Regulations=Taking of Property Rights

When the government imposes new land use regulations that limit the development potential of undeveloped property and other open space, the market value of that property is going to decline. When the market value of the property is diminished by the regulations, so is the value of development rights. When this government induced decline occurs, the landowner should be entitled to compensation for the lost market value of their property and development rights. Landowners have a “right to compensation” for the “taking” of private property by the government. This right is guaranteed under the Fifth Amendment to the Constitution. The process of “Eminent Domain” is an unpopular, forced seizure of property, by government that requires compensation for the taking of private property. The “Catch 22” for landowners is that “eminent domain” involves taking title to private property and “acquisition by regulation” does not.

The multiple layers of regulation imposed on land development often have a greater negative impact on landowners than actually “taking” title to the property by “eminent domain”. When “eminent domain” is invoked, the landowner is entitled to compensation that equals the “fair market value” of the property. With “acquisition by regulation”, the government takes the property rights that are related to the future development of the property, without compensating the landowner. There is little practical difference for the landowner between “acquisition by regulation” and “eminent domain”, except that the landowner is no longer entitled to the “just compensation” mandated by the Fifth Amendment.

With the process of “acquisition by regulation”, the government restricts the use of property so severely, that it doesn't require taking title to the property to control its future use or development. This subtle process circumvents the protection of private property from government seizure guaranteed by the Fifth Amendment to the Constitution. The power to control development of property through zoning regulations is virtually unrestricted in New York State. This is due to the broad zoning and regulatory powers given to local governments by the State. Zoning laws are seldom overturned by the courts and are usually adjudicated on an individual basis. Abuse of this legislative power is a major threat to the right of private ownership of real property in the United States, including homes and businesses. There is a growing realization by the courts and citizens that excessive zoning regulations constitute the “taking” of property rights. This taking of property should require compensation to landowners based on the Fifth Amendment, but Supreme Court rulings continue to favor the government's right to

control land use without compensation. A “taking” of land resulting from zoning or development restrictions must render the entire property “worthless”. **In order to overcome this regulatory taking of property, landowners need to organize and oppose these laws at the local level.**

Is “Just Compensation” A Forgotten Concept?

The failure to include “just compensation” for landowners when implementing land use regulations is what is inherently wrong with the process. With this regulatory process of land acquisition, there is no set of checks and balances established to protect the property owner. **If there is no cost to this regulatory “taking” of property, then the potential for abuse is unlimited.** The economic cost of invoking “eminent domain” is a primary control mechanism for limiting excessive use of this power by local government. The government is less likely to “take” property rights that it can’t afford to purchase and pursue alternate methods of acquisition with compensation. The “acquisition by regulation” process is a popular technique used by local, state and federal legislative bodies because it hasn’t required compensation. This regulatory process is often rationalized with an argument based on “an end justifying the means” mentality. While it may not be right to “take” an individual’s property without compensation, it may be acceptable when it is for a good cause. **Taking something without paying for it! This is a basic concept that we teach our children is wrong!** We need to remember that owning land refers to the right to control the use of the land. Included in these rights are: the right to use the land, to restrict use by others, to develop it or sell these rights to others. Land may lack the liquidity of other assets like cash or stocks, but these rights are still assets. Real Estate is governed by a different set of laws than other types of assets. It has enjoyed certain protections and incurs additional costs, such as property taxes, that other investment vehicles avoid. Imagine the government took 50% of your cash assets because you wanted to utilize the other 50% for investment or retirement purposes. Imagine the government told you that taking the 50% would make the remaining 50% more valuable. Does this sound absurd? Of course it does! This is the same logic used to justify a mandatory 50% conservation easement. Conservation easements were originally established as voluntary acts by the landowner, not a mandatory taking of the development rights. At some point in time the idea to mandate conservation easements as a condition for approval of development became the norm.

The Origins of “Acquisition by Regulation”

When State and Federal legislatures imposed restrictions on development that could have a negative impact on wetlands, endangered species habitat and other environmentally sensitive areas, the agencies avoided “eminent domain”. Instead of taking title to property for the “public good” through “eminent domain”, they passed laws severely restricting or forbidding any development activity. The root of these laws was not to control development, but to protect the environment. They set a precedent for local regulatory restrictions being used to control the use of property and development, without

compensating the landowner for lost development rights. These regulations don't provide for compensation to landowners who lose the ability to control the future use and/or development of their property. The only people who challenged this approach were those who owned property that was impacted by these rules. In many instances, the financial impact of these policies was devastating to landowners. This unequal imposition of conservation costs on the landowner is a fundamental flaw in the use of this process. The process does not distribute the cost of protecting the environment to all those who will benefit, it only assesses the cost to the landowner. This is a violation of the "equal protection" that is guaranteed by the Fourteenth Amendment to the Constitution. The cost of conservation should be distributed to all of those people who will benefit from it.

Tax deductions: Are they really Compensation?

One stated means of "compensation" to landowners is through a reduction in the assessed value of the land and a corresponding reduction in property taxes on the affected property. Another alternative is to claim a possible income tax deduction for the lost market value of the property. The landowners are "compensated" for the taking of their property with reduced property assessments (recognition of lower property values) and the corresponding lower property taxes that reflect the diminished "real" or "market value" of the property. This is like telling an employee that you are going to cut his salary, so he won't have to pay as much in income taxes! Another alternative is through income tax deductions based on the value of land donated to environmental conservation groups, conservation easements or "land trusts". This remedy does not compensate the landowner for the full loss in "potential value" or the value of lost "development rights". It would take most landowners many years to recover the lost market value of their property using income tax deductions and/or lower property taxes. It also assumes the landowner has taxable income to take a deduction against or that the landowners aren't dependant on the income from selling their property to sustain themselves. In many cases this just isn't true. At its best, it is only a partial reimbursement of lost land value based on the landowner's tax bracket. If it were a tax credit for the full value of the lost development rights, it would make more sense. This restrictive regulatory process has worked so effectively at the Federal and State levels that it encouraged Local government agencies (Zoning and Planning Boards) to adopt programs with similar structures.

No individual can overcome the collective power of the U.S. Army Corps of Engineers, New York State Department of Environmental Conservation, Environmental Protection Agency or the New York State Department of Parks, Recreation and Historical Preservation, but we can influence local policies and zoning laws.

EPODS Emerge

The emergence of Environmental Protection Overlay Districts (EPODS) is the result of combining an expansion in the scope of zoning regulations with the process of "acquisition by regulation". Originally, zoning laws were instituted to provide buffers

and separate different types of land use and development, protect the integrity of residential neighborhoods and to insure that new construction met required safety codes. Zoning laws were passed to protect the safety, welfare and property values of local residents. In recent times, the role of zoning codes has evolved to include the conservation of open space and a broad band of “quality of life” issues. This is accomplished through the use of mandatory conservation easements, density overlays and other regulatory tools, such as EPODS. EPODS restrict development on or near wetlands, steep slopes, streams, historical preservation sites, woodlots, scenic vistas, wildlife habitat or unique geological formations. The EPODS restrict any new development, or land use, that impacts the specific target of the EPOD. EPODS may overlap and restrict entire parcels from being developed, even if the parcel is already zoned for a specific type of development. With EPODS the affected parcel is virtually frozen in its present state and restricted to certain future uses allowed by the EPOD regulations. In addition, EPODS can affect existing development: whether it is industrial, commercial or residential, by restricting the expansion or renovation of existing structures. Most residents don’t realize that these regulations don’t just impact landowners, but business owners and homeowners within the EPOD, as well. EPODS are not another layer of review they are another layer of restrictions that create more hardship for the landowner.

How much is enough?

In Victor, the initial step in the process of “acquisition by regulation” was the passage of zoning regulations that created a mandatory 50% Conservation Easement on new residential development and a mandatory 35% Conservation Easement on commercial development. This is one of the most aggressive conservation easement regulations in our area and effectively usurps the development rights of 50% of all remaining open space and undeveloped property in Victor. I believe the mandatory status of this easement is what constitutes the “taking” of the property owner’s development rights. Another excess of this mandatory conservation easement is the threshold for triggering the easement: the application for approval of a major subdivision. This threshold is the subdivision of five or more building lots on a parcel. No matter how large the parcel, once the fifth lot is subdivided, 50% of the parent parcel must go into a mandatory conservation easement with few exceptions. Theoretically, the subdivision of five two-acre lots on a parcel of 200 acres would require a conservation easement of 100 acres from the landowner. Even if you accept the validity of a 50% mandatory conservation easement, this is a disproportionate penalty assessed for the right to develop a small percentage of your property.

Cluster development was proposed as the “quid pro quo” for this loss of developable land. Cluster development allows development on smaller building lots in a concentrated area (higher density). Landowners were led to believe that the original number of lots and homes permitted on the parcel could still be developed on the remaining, unrestricted 50% of the property. This would preserve the value of the property by preserving the existing potential for development. The rationale provided to landowners was that developers could save money by reducing their infrastructure and development costs, still build the same number of units on the property and preserve

green space. The value of landowners' development rights wouldn't be lost because the property would still maintain its development potential and continue to be attractive to developers.

The next step in this process was the establishment of density zoning overlays that reduced the existing densities from 1995 levels. This reduced the total number of building lots allowed on each parcel of land and reduced the potential value for development on virtually every parcel in Victor. These new density limits restricted the development of affordable housing because the number of units allowed per acre limits the developer's ability to recover the cost of development. Greater densities than those currently allowed are required in order to recover the costs of planning, engineering, legal representation, insurance, excavation, grading, sanitary sewers, drainage controls, water, electricity, gas and other development expenses. The further land is from existing utilities like sanitary sewer and municipal water service the greater these costs will be. Unfortunately the density zoning restrictions in Victor often increase the further one gets from these utilities. This further diminishes the development potential of these land parcels. To offset these costs, residential developers are restricted to building high-end homes to generate enough profit to cover the cost of development. The major problem for landowners is that only 5% of the housing market falls within this price range and there is insufficient demand from developers to sustain land values in Victor. It is difficult to gauge the financial impact of this decreased demand because so few parcels have been sold in the past few years. Many of the parcels sold have been for the construction of golf courses and horse farms.

Other Landowners Fight Back

Realizing the dangers and inequities of the "acquisition by regulation" approach being used to control development, the voters in the State of Oregon, passed a referendum referred to as: "Measure 37"*. This measure called for compensation to landowners, whenever government regulations or restrictions reduced the value of property. The voters in Oregon recognized that government regulation could have a negative impact on land values. If compensation for lost property rights were not made within a reasonable time period, then the restrictions or regulations pertaining to the subject property would not be enforced. The Oregon voters recognized the inequities and injustice of "acquisition by regulation" and attempted to correct the problem by changing the law. Unfortunately, the courts have held that this measure does not grant "due process" to landowners who bought property after these laws were passed. In addition, opposition groups have claimed that local communities cannot afford to purchase these rights and it isn't fair to ask all of the taxpayers to share the financial burden of conservation. It is difficult to understand why it is preferable to have the landowners incur the expense of conservation and not tax all taxpayers. Being paid for something you own isn't a windfall it is a return on your investment. While this measure is being challenged in the courts by environmental groups, the importance of this measure is that the **majority of voters**, in the State of Oregon, agreed that: **landowners should be compensated by the government for the value of development rights taken by government regulations or the regulations should not be enforced.** It is ironic that

one of the legal arguments being made for the repeal of this measure is the financial burden placed on the taxpayer. What about the financial burden being placed on landowners by these restrictions? There are other ways to finance the purchase of development rights without using public funds.

Establish Equal Protection and Due Process for Landowners

When the Town repairs roads in the community, improves water treatment facilities, provides municipal water service, improves or expands sanitary sewer service, builds community buildings, constructs hiking trails, sports fields or parks and embarks on most other projects, designed to improve the “quality of life” for all residents in the Town, the cost is incurred by all residents. Towns seem to find the money for these projects. When the Town mandates that green space will be preserved to enhance the quality of life for all Town residents the cost is incurred by the current landowners and future residents. The landowners pay in lost property rights and land value, while future homeowners pay in higher housing costs because development costs are distributed among fewer homebuyers.

Environmental Conservation and Landowner Compensation: Success through voluntary and private participation

I believe that the process of “acquisition by regulation” violates the rights of landowners guaranteed under the “due process”, “equal protection” and “right to compensation” clauses of the Fifth and Fourteenth Amendments to the Constitution. Landowners are denied “due process” because they are not compensated for the “taking” of their property rights. Furthermore, they are denied “equal protection” because all Town residents are not asked to share equally for the cost of conservation efforts that are benefiting the entire community.

Here are several suggestions to mitigate this problem without litigation:

First, we need to **set realistic conservation goals that the community can afford.**

Second, we need to **find creative ways to finance compensation efforts, so that we can conserve the greatest amount of green space possible.**

Third, we need to **set reasonable limits on the amount of land being restricted for development.**

Fourth, we need to **identify and prioritize the most ecologically sensitive and desirable environmental assets and concentrate conservation efforts on those areas.**

And finally, we need to **guarantee that no property or property rights will be “taken” from landowners without compensation at fair market value.**

