JUST COMPENSATION TO OWNERS OF PRIVATE PROPERTY

Amendment 74

IT’S ONLY FAIR
The attached packet details the work that has been going on to support an important initiative petition that will make the ballot for the 2018 election cycle. Strengthening property right protections for all Coloradans against unjust government overreach is a cause that all Coloradans can get behind.

**This initiative will:**

- Prevent government overreach concerning private property.
- Hold the government accountable to Coloradans.
- Allow Coloradans to make a claim for fair market value lost due to government action.
- Maintain government’s ability to regulate, fairly.
- Protect the livelihoods of farmers and ranchers whom Coloradans rely on.
- Support Colorado’s economic future by not allowing government regulation to stifle growth.
- Policy wise, it is the correct thing to do; it’s Fair to ask for compensation.

Attached you will find the text of the initiative from the Colorado Secretary of State’s office as well as an op-ed written by the Colorado Farm Bureau outlining just how IP #108 will safeguard Coloradans. There is a reason that the Colorado Farm Bureau, who has worked for the rights of those who feed and provide for us for nearly 100 years, is backing this initiative. The organization has a long history of support for strong property rights and has long had policy specifically calling for better compensation for “regulatory takings.”

The largest opponents of IP #108 are municipalities and local governments, because they would be held more accountable for their actions and for the negative impacts to property owners they can create. You will see some quotes from that opposition attached.

And finally, there are helpful quotes from where this initiative was born. In 2001, the Colorado Supreme Court ruled in Animas Valley v. BOCC that almost all of a property owners land would have to be affected by a government ruling in order to be considered a takings. That is the current precedent in the state. Justice Rebecca Kourlis wrote a dissenting opinion in the case and those opinions are the basis of the language used in IP #108. Some of her quotes in the dissent are below.
Colorado
Secretary of State
Wayne W. Williams

Results for Proposed Initiative #108

Ballot Title Setting Board
2017-2018

The title as designated and fixed by the Board is as follows:

An amendment to the Colorado constitution requiring the government to award just compensation to owners of private property when a government law or regulation reduces the fair market value of the property.

The ballot title and submission clause as designated and fixed by the Board is as follows:

Shall there be an amendment to the Colorado constitution requiring the government to award just compensation to owners of private property when a government law or regulation reduces the fair market value of the property?

Hearing February 7, 2018

The Board made two technical corrections to the text of the initiative in order to address typographical errors. The Board determined that the proposed initiative does not only repeal in whole or in part a provision of the state constitution. The requirement for approval by fifty-five percent of the votes cast applies to this initiative.

Single subject approved; staff draft amended; titles set. Hearing adjourned 2:11 PM.
Coloradans can find common ground in defense of property rights

Author: Shawn Martini - June 8, 2018 - Updated: June 8, 2018

Colorado is a great state, a state that comes together to solve problems. There is a lot of mudslinging in politics right now, but there's a potential statewide ballot measure that provides a breath of fresh air. The proposed initiative finds common ground across all party affiliations and unites both rural and urban Colorado communities to safeguard private property from government overreach.

To ensure homeowners, businesses, farmers and ranchers are protected, the Colorado Farm Bureau and other agricultural interests are proactively sponsoring a measure that defends private property owners from state or local governments taking their property without compensation.

Colorado has a strong tradition of advocating for private property rights. And denying family farmers, homeowners and other property owners the right to decide how to use their own land and to take all or part of their property without compensation runs contrary to Colorado values. This initiative will ensure that strong private property rights remain a cornerstone of the Colorado way of life.

Our measure will level the playing field and provide property owners with a clear path to make their case to a judge when they believe the value of their property may have been taken, no matter the outcome. While citizens already have protections against the “taking” of their physical property by the government, the state Constitution is less clear when it comes to the government “taking” the value of private property.

Taking property’s value comes in many forms and impacts citizens from rural, suburban and urban communities. Property includes the crops farmers grow, water rights a family owns, the view from a back porch, or the tranquility of a quiet neighborhood. This measure will protect homeowners, farmers, ranchers, small businesses, landowners and all Coloradans. It promotes good government and an equal process for impacted individuals.
Our measure will level the playing field and provide property owners with a clear path to make their case to a judge when they believe the value of their property may have been taken, no matter the outcome.

Some municipalities are lining up to oppose this measure. They oppose it because they want to maintain the status quo. They want free rein to pass laws that may damage private property values without having to pay for that damage. This measure will hold them accountable and protect those people hurt by heavy-handed regulations. From disadvantaged communities in the inner city, to farmers and ranchers in rural Colorado, to suburban homeowners along the Front Range, everyone will have the same protections against government seizures of their property value.

Ultimately, this modest change to the Constitution will better clarify current private property rights, improve government, and provide individual citizens with stronger protections. The measure is simple but very clear. Unlike other proposals, it doesn’t introduce new concepts or complex rules into our constitution. It simply clarifies principles already established in our Constitution which ensure every Coloradan has the right to be free from government taking their property without compensation.

We think that's something all Coloradans can agree on.
LEGAL CITATIONS REGARDING INITIATIVE #108

Initiative #108 allows property owners to assert a takings under the Colorado Constitution if governmental regulation reduces the value of their property rights. Under current law, property owners may claim a takings only where governmental action has deprived them of all or nearly all of their property’s value. See Animas Valley Sand & Gravel, Inc. v. Bd. of Cnty. Comm’rs, 38 P.3d 59, 66 (Colo. 2001). Initiative #108 would broaden the range of property owners who may be entitled to compensation as a result of governmental action by authorizing takings claims even where less than nearly all value is lost. Under #108, an owner whose property value is diminished by 50%, 20% or even 10% wouldn’t be automatically precluded from seeking compensation for a taking.

However, Initiative #108 does not eliminate the other requirements imposed by case law to prove a takings and the entitlement to compensation. If Initiative #108 becomes law, Colorado courts would interpret these other requirements to limit the number of successful takings claims.

Can’t you already file a takings claim under current law?

It is quite difficult to prevail in a takings case. As an initial matter, these cases are expert-driven and heavily fact dependent. They take at least a year and often longer to litigate and are very expensive to bring. Substantively, these cases are very difficult for private property owners to win. There are several significant limitations on prevailing in cases that are discussed below. But most significantly, a property owner can only prevail if he/she can show a near complete diminution in property value as a result of the challenged regulation. The Colorado Supreme Court in Animas Valley surveyed a number of U.S. Supreme Court cases in which a taking was not found even though there was between a 75% and 92.5% diminution in property value. Animas Valley Sand & Gravel, Inc. v. Bd. of Cnty. Comm’rs of the Cnty. of La Plata, 38 P.3d 59, 65-66 (Colo. 2001). On this basis, the court found that takings only “provides a safety valve to the owner in the truly unusual case.”

Following is a brief discussion of several of the additional requirements that will limit the ability of property owners to successfully pursue takings claims.

1. **The Owner Must Prove Non-Speculative Damages.**

   In seeking compensation for an alleged taking of valuable property rights, an owner must still prove that it will incur damages that are definite and not speculative. See Coastal Petroleum v. Chiles, 701 So.2d 619, 625 (Fla. Dist. Ct. App. 1997) (royalty interest in area with no history of oil and gas activity “too speculative to be protected through means of inverse condemnation.”).

2. **The Owner Must Show Interference With Reasonable Investment-Backed Expectations.**

   Where government regulation results in the loss of partial value of an owner’s property, courts are required to consider whether the regulation has interfered with the owner’s reasonable investment-backed expectations for the property. See Animas Valley, 38 P.3d 59.
at 67. Factors that affect whether an owner has such expectations include whether the owner operated in a highly regulated industry, whether the owner was aware of the problem that spawned the regulation at the time the property was purchased, and whether the owner could have reasonably anticipated the regulation at the time of purchase. *Appolo Fuels, Inc. v. United States*, 381 F.3d 1338, 1349 (Fed. Cir. 2004). If an owner, based on these and other factors, had no reasonable expectation that its property would be free from a challenged regulation, the owner would not be able to meet this requirement and it is unlikely the owner could prevail on a takings claim.

3. **The Owner’s Property Must Be the Subject of the Governmental Action. Indirect Impacts Are Insufficient.**

There has been concern expressed that #108 would open the floodgates by allowing landowners to successfully pursue takings claims for impacts of regulation on adjacent or nearby properties. For example, if a municipality zoned neighboring property in a way that diminished the value of owner’s land, could he or she bring a takings claim under #108 to recover that diminished value? The answer is likely ‘no.’ Under existing legal principles of eminent domain and takings law, the regulation of land owned by a third party provides no basis for a nearby or adjoining landowner to assert a claim for compensation based on the indirect impacts of the regulation on his or her property values. On the contrary, courts have held that there is a “necessity of a nexus between the alleged interest and the property actually taken. Absent this indispensable link, the Government is under no obligation to make just compensation.” [*United States v. 677.50 Acres of Land in Marion Cty., Kan.*, 420 F.2d 1136, 1140 (10th Cir. 1970). See also *Campbell v. United States*, 266 U.S. 368, 371 (1924) (government’s taking and use of lands of others provided no right to compensation to adjoining landowner). As such, initiative #108 does not change this aspect of existing law and regulation or condemnation of nearby properties will not support a takings claim under #108.

4. **Governments Retain Authority to Abate Nuisances.**

The United States Supreme Court in the case *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1027-30 (1992) held that there can be no takings where there is even a total elimination of a property’s value from a governmental prohibition of uses that have historically been considered nuisances. This was applied in the case of *Rith Energy, Inc. v. United States*, 270 F.3d 1347 (Fed. Cir. 2001), where the federal court rejected Rith’s takings claim on the ground that under Tennessee nuisance law, Rith had no right to mine in a way that was likely to produce acid mine drainage, and that its property right in the coal leases therefore did not include the right to mine the Sewanee seam in the way that it wanted to.

5. **Governmental Exercise of Police Powers Usually Does Not Support Takings Claims.**

Initiative #108 does not change how courts are to evaluate the nature of governmental action in deciding takings claims, particularly with regard to the exercise of police powers to protect public health, safety and welfare. In the *Appolo Fuels* case, the Federal Circuit found that the prohibition of coal mining within lands determined to be unsuitable for mining did not constitute a compensation take of the plaintiffs’ coal leases. The court
noted that such a determination constituted the exercise of police powers to protect drinking water supplies and are “the type of governmental action that has typically been regarded as not requiring compensation for the burdens it imposes on private parties who are affected by the regulations.” 381 F.3d at 1351 (citing *Rith Energy*, 270 F.3d at 1352).

6. **Home Rule Authority Is Retained.**

   Initiative #108 will not affect a municipality’s home rule authority to enact local regulations to protect its citizens. It may in some cases warrant compensation that wouldn’t be available under current law, but as discussed above, many impediments still exist to successful takings claims.

7. **Class Action Takings Claims Would Still Be Typically Unavailable.**

   Class action cases are typically not available to pursue takings claims because each takings case requires an individualized assessment of the impact of the measure on an owner’s property rights and of whether the measure interfered with the owner’s reasonable investment-backed expectations. If there were many owners who were identically situated and whose property were impacted to the same extent by a governmental regulation, it theoretically would be possible to bring a class action for a takings, but that would be extremely rare and Initiative #108 wouldn’t change the law on that practice.

8. **Takings Claims Presume the Validity Of Regulations and Don’t Allow Challenges To Their Validity.**

   Under current law, as well as under Initiative #108, an owner who brings a takings claim is acknowledging that the governmental regulation is lawful, as only valid governmental regulation can result in a takings. *Lingle v. Chevron*, 544 U.S. 528 (2005). Therefore, Initiative #108 would not allow for a challenge to the lawfulness of governmental regulation or an injunction against its enforcement.
COLORADO SUPREME COURT CASE FROM WHICH INITIATIVE #108 STEMS

The following are quotes from Colorado Supreme Court Justice Kourlis in her dissenting opinion on the 2001 case involving a Takings claim, Animas Valley v. BOCC.

No. 00SC151, Animas Valley v. BOCC

JUSTICE KOURLIS specially concurring:

"I join the majority’s conclusion that this case must be remanded to the trial court for a new trial under the correct legal standard. However, I disagree with the majority’s construction of that standard. First, I would apply the Colorado Constitution and would not limit it as the majority does. Second, even under federal law, I suggest that the majority has imposed unwarranted restrictions on the applicable test for determining when a regulation works a taking. Accordingly, I respectfully concur in the result of the majority opinion, but write separately to identify my concerns."

"The trial court bifurcated the proceedings and first addressed the question of whether there had been a taking, leaving the issue of damages and just compensation for a possible later trial – which never occurred. In the first trial, the trial court required AVSG to prove that, after the adoption of the Plan, there was no reasonable use remaining on the AVSG property.

The trial court did not address reasonable investment-backed expectations in the property, as measured by the feasibility of additional sand and gravel mining; and the trial court did not permit AVSG to introduce evidence concerning the value of its property before adoption of the Plan and after adoption of the Plan. The trial court erred as a matter of law, and the court of appeals upheld that error. The majority correctly remands the case back to the trial court to correct those errors."
“Colorado has long recognized that a property owner who has suffered damage to his rights of ownership or use by operation of governmental action in a manner that differs in kind from that suffered by the public generally is entitled to compensation. The damage must differ in kind, not merely in degree... Lastly, the measure of damages is quite simply the difference in market value of the property before and after the government action."

“More broadly, even if this case is governed by federal law, I would offer broader and more complete directions to the trial court concerning the application of *Palazzolo v. Rhode Island*, 121 S. Ct. 2457-58 (2001), decided by the United States Supreme Court last Term.

A.

I do agree that *Palazzolo* specifically clarifies that courts are to evaluate regulatory action at two levels: first, if the action denies all economically productive or beneficial use of the land, it is a per se taking that requires compensation. *Id.* at 2457. Second, even if the action does not go that far, but does economically affect the landowner and interfere with the landowner’s reasonable investment-backed expectations, it may nonetheless be a compensable taking depending upon various factors. *Id.* As to this latter category, the Court concluded that such an “ad hoc” inquiry is mandated by the purpose of the Takings Clause, which is “to prevent the 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.’” *Id.* at 2457-58 (quoting *Armstrong v. United States*, 364 U.S. 40, 49 (1960))."
"An additional factor that a court must consider in assessing a takings claim in this context is the legitimacy of the governmental action itself... I resist the assumption that the Board has any right to impose upon or regulate use of private property by means of a master plan."

"In conclusion, I suggest that the majority appears to hold AVSG to a standard more akin to a per se takings analysis, warranted neither by the United States nor Colorado Constitutions. In my view, on remand, the trial court should consider the legitimacy of the governmental action in light of the non-binding status of a master plan. Further, the trial court should determine the value of the entire property owned by AVSG and contained within the River District both before and after the Plan’s adoption. If there is a diminution in value after adoption, the trial court should then determine: (i) whether the diminution is attributable to the Plan; and (ii) whether the diminution relates to AVSG’s reasonable investment-backed expectations. If the answer to both of those questions is yes, then AVSG should be awarded the difference in value as a compensable inverse condemnation of certain uses of its property."