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Takings bills are still bad economics, bad policy

Maine's Legislature once again is considering bills that would establish a right for property owners to claim monetary compensation if a land-use regulation results in the diminution of the market value of the property. The Legislature has considered bills of this sort at least six times since 1995, most recently in 2012, and rejected them each time. It is unfortunate that the Legislature must spend its valuable time rehashing these issues.

In my judgement, both bills — LDs 162 and 309 — represent bad economics and bad public policy. One of the key concepts in economics is that of negative externalities. A negative externality occurs when the action of one party causes harm to one or more other parties and the responsible party has no obligation to compensate those who are harmed.

There is a long literature on the appropriate ways to deal with negative externalities. Regulation barring or restricting the activity causing the harm or requiring the party causing the harm to compensate those who are harmed is among the options discussed in this literature. These bills would turn this whole concept on its head by requiring that those who potentially would cause the harm be compensated for the regulation that would prevent them from causing harm.

Another way to look at this issue involves recognizing that it is implicitly based on a premise I think most people would reject if it were made explicit. The implicit premise is that landowners have a fundamental right to use their land in ways that cause harm to others and that they should be compensated whenever government regulations interfere with that right. An assertion that landowners have such unlimited rights offends my sense of fairness and has no basis in the U.S. or Maine constitutions.

A logical corollary of the implicit premise behind these bills is that abutting landowners do not have a right to recover damages when one landowner's actions cause them harm. Again, most people would reject this premise. It runs counter to a long tradition in American common law.

In an increasingly interdependent world, there are many ways in which a landowner's activities can inflict harms on others, either directly or indirectly. In my view, these activities are legitimate targets for government regulations, and landowners should not have a right to expect compensation for not inflicting this harm. Examples of regulations that would prevent harms to others include the following:

— Limitations on building height that prevent landowners from obstructing the views of abutters or that limit their access to sunlight and solar power.

— Regulations governing septic system installations that serve to protect groundwater and surface water quality for others.

— Minimum lot size requirements that prevent high-density development that can threaten the quantity and quality of groundwater supplies.

— Regulations preventing the destruction or alteration of wetlands so as to protect groundwater and prevent the loss of essential habitat for waterfowl and other species of importance to people.

I have no doubt that there are instances in which regulations have gone too far in the sense that the harms to others that are prevented are small compared to the costs imposed on landowners or where there is no clear demonstration of harm to others. But the requirement that landowners be compensated for a broad class of regulations is not the proper remedy in such cases. Rather, the answer to such cases of "over-regulation" is to examine each regulation and to reject those that do not deal with a clearly identifiable harm to others or that impose costs on the landowners that are out of proportion to the harms prevented. And landowners who believe that a particular regulation affecting them is not justified in terms of the harms it prevents have a variety of ways to seek changes in the regulation or to request a variance.

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