U.S. Department of Justice

Office of Legislative Affairs

Washington, D.C. 20530

September 14, 1999

Honorable Charles T. Canady
Chairman
Subcommittee on the Constitution
Committee on the Judiciary
U.S. House of Representatives
Washington, D.C. 20515

Dear Mr. Chairman:

This letter presents the views of the Department of Justice on H.R. 2372, the "Private Property Rights Implementation Act of 1999." On September 25, 1997, the Department testified in opposition to similar legislation, H.R. 1534 in the 105th Congress. Although H.R. 2372 is slightly different from the introduced version of H.R. 1534, the changes do not resolve our concerns and the Department continues to strongly oppose this legislation. As with H.R. 1534, the Attorney General would recommend that the President veto H.R. 2372 if passed in its present form.

H.R. 2372 would increase dramatically the role of Federal courts in supervising decisions that are core responsibilities of State and local officials -- where to locate a municipal waste incinerator, whether to grant a building permit to a liquor store, how close a factory can be to homes, or whether a community needs another gas station or fast food restaurant. Because issues such as these directly affect neighborhoods and communities, local land use agencies, historically and properly, have possessed the authority to decide them. H.R. 2372 is designed to take these issues away from local communities, planning commissions and State courts and send them to the Federal judiciary. This is inappropriate and unnecessary.

Under current law, Federal courts faced with challenges to the constitutionality of local land use decisions defer to State and local authorities in two important ways. First, where appropriate, Federal courts abstain from deciding important or complex issues of State law so that State courts can decide them, at least in the first instance. Second, Federal courts require developers and other property owners to make reasonable efforts to resolve land use disputes with State and local officials before proceeding to Federal court. This "ripeness" requirement helps to ensure that land use decisions are made at the State or

local level by those most familiar with the property at issue and who have been duly authorized to represent the local community. It also helps to provide a sufficiently developed factual record for the Federal courts, should they be required to decide whether the local land use decision constitutes an uncompensated taking.

H.R. 2372 would alter this commonsense approach. Instead of empowering State and local officials with more resources and authority -- as this Administration has sought to do by means of partnerships with State and local governments and as this Congress has sought to do in various legislation directed toward federalism concerns -- H.R. 2372 seeks to shift authority over quintessentially local matters from State and local officials to the Federal courts. It would so do, first, by sharply limiting the discretion of Federal judges to abstain from deciding State law issues that have not been resolved previously by State courts. Second, and more significantly, the bill would deem a property rights challenge to State or local government action "ripe" for Federal court review regardless of whether State and local officials have arrived at a final, definitive position on the land use question before them and before the claimant had sought compensation pursuant to legal procedures available in the State. This is contrary to the Supreme Court's interpretation of the Fifth Amendment and raises serious constitutional issues. These drastic changes to ripeness doctrine would circumvent and render irrelevant local land use dispute resolution mechanisms, dramatically expand land use litigation in Federal courts, and reduce incentives for property developers to work with State and local planning officials to achieve workable compromises.

We are aware of no significant material evidence that the existing delicate balance between State and Federal courts needs to be altered. We are aware of no evidence that State courts, on the whole, are failing to do an adequate job of protecting property owners in the hundreds, if not thousands, of cases that come before them each year. Guided by recent Supreme Court decisions, State courts are likely to be as sympathetic to local property owners as Federal courts and as competent as Federal courts to decide Federal constitutional claims under the Just Compensation Clause.

The Department's principal concerns with H.R. 2372 are explained in greater detail below.

1. By Placing Strict Limits on Abstention, H.R. 2372 Would Shift Authority over Local Issues from State and Local Tribunals to Federal Courts.

Longstanding abstention doctrines allow a Federal court to decline to exercise its jurisdiction in cases where abstention would allow a State or local tribunal to decide (at least in the

first instance) an issue of State or local law. Abstention promotes federalism by enhancing "comity," which the Supreme Court has described as "a proper respect for state functions, a recognition * * * that the National Government will fare best if the states and their institutions are left free to perform their separate functions in their separate ways." Younger v. Harris, 401 U.S. 37, 44 (1971). Additionally, abstention reflects a proper respect for State sovereignty and a recognition that State and local tribunals are best positioned to interpret often complex local laws. New Orleans Public Service, Inc. v. Council of City of New Orleans, 491 U.S. 350, 360-61 (1989). Abstention may be particularly appropriate where a State court has not had a previous opportunity to interpret the State law.

Federal courts long have abstained in a wide variety of challenges to local land use planning decisions, including cases involving the application of local annexation laws,[1] the adequacy of public services for residential areas,[2] and eminent domain issues. However, section 2(c) of H.R. 2372 would prohibit Federal courts from abstaining on State issues in cases brought under 28 U.S.C. § 1343 where the claimant asserted no State law claim and there was no parallel proceeding pending in State court. This prohibition against abstention would apply regardless of the importance of the State laws and policies that the case implicated or other factors that often have caused Federal courts to defer to State and local tribunals. And although the bill provides for certification to a State's highest appellate court of unsettled State law questions that are "patently unclear", *see* H.R. 2372, § 2(d), this standard is far more restrictive than existing abstention doctrine, which generally allows Federal courts to certify any State questions that are uncertain. Combined with this unduly narrow certification provision, the bill's prohibition against abstention would compel Federal courts to intrude more frequently into State law questions that are resolved best by State tribunals. The result would impair State sovereignty, undermine federalism, and increase the likelihood and frequency of

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[1] Front Royal and Warren County Indus. Park Corp. v. Town of Front Royal, 945 F.2d 760, 764-65 (4th Cir. 1991) (abstention is proper because the annexation court system is a matter of purely state and local law, and because there may be other state remedies available to plaintiffs), cert. denied, 503 U.S. 937 (1992).

[2] C-Y Development Co. v. City of Redlands, 703 F.2d 375, 378 (9th Cir. 1983) (abstention is appropriate because "[d]elicate issues of local land use planning such as these are precisely the type of issues which should be left to the state courts to decide under the doctrine of abstention.").

conflicting outcomes as Federal and State courts interpret and apply the same laws.

2. H.R. 2372 Would Allow Developers and Others to Sue in Federal Court Without Seeking to Resolve Their Disputes with State and Local Officials

In addition to placing severe restrictions on existing abstention doctrine, H.R. 2372 would revise the two-part test under which Federal courts currently evaluate the ripeness of takings challenges to State and local actions under the Just Compensation Clause of the Fifth Amendment. Under existing ripeness doctrine, articulated by the Supreme Court in Williamson County Regional Planning Commission v. Hamilton Bank, 473 U.S. 172 (1985), a takings claim is not ripe until: 1) State and local authorities have issued a final, definitive decision regarding permissible uses of the property at issue; and 2) the property owner has sought and been denied just compensation in the State court. See also City of Monterey v. Del Monte Dunes at Monterey, Ltd., 119 S.Ct. 1624, 1639 (1999); Suitum v. Tahoe Regional Planning Agency, 520 U.S. 725, 734 (1997). H.R. 2372 would shift power from State and local officials (including both land use planners and State judges) to Federal judges by altering the existing standard of administrative finality.

Under current law, before a land use claim is considered ripe for Federal court review, a claimant must utilize local decision making processes and the local government's decision must be final and definitive. By not permitting a claimant to litigate immediately in Federal court, these requirements encourage landowners to work with State and local officials to resolve land use conflicts outside of the courtroom. Currently, if a developer files a Federal lawsuit without engaging in good faith negotiations with State and local officials, the locality can immediately move to dismiss the suit on ripeness grounds.

H.R. 2372 would overturn this longstanding ripeness doctrine. It would deem ripe for federal court adjudication a property rights claim after the claimant has filed a single "meaningful" application that has not been approved. H.R. 2372, § 2(e)(2)(A)(ii)(I). Furthermore, there is no requirement to even complete the application process. Although the bill contains language requiring claimants to apply for an appeal or waiver, this requirement does not apply if no appeal process is available, if the appeal process cannot provide the relief requested, or if the application or reapplication would be futile. H.R. 2372, § (e)(2)(B). Practically speaking, this means that after filing a single development application that has not yet been approved -- and approval may just be a matter of

time -- a claimant can file suit in federal court.[3] Thus, developers and others could sue State and local officials in Federal court far earlier in the land use planning process without adequately seeking to resolve their disputes outside of the courtroom through local procedures.

Through these substantial changes to ripeness doctrine, H.R. 2372, would shift dramatically the balance of power between developers and State and local officials by handing developers a powerful new weapon in their negotiations with community officials: the threat of premature and potentially expensive Federal court litigation. This new weapon could well be used to disrupt state procedures designed to protect public health, safety, public resources and the environment. Confronted with the prospect of a potentially costly and time-consuming Federal court lawsuit, State and local officials would feel new pressure to approve land use proposals to avoid litigation, even if the proposed use might harm neighboring property owners and the community at large.

For example, a property owner might apply for a permit to operate a large commercial hog farm. The local planning commissioner denies the permit because noxious odors and pollution would harm nearby residents. However, the commissioner indicates that a permit might be approved for a smaller operation if the owner agreed to implement safeguards to protect local residents. The owner refuses to compromise and appeals the permit denial to the local land use review board. The review board rejects the appeal. Under H.R. 2372 the owner can sue in federal court as soon as the application is submitted, claiming that it has not been approved, and that appeal is futile, and thus "ripe" for judicial adjudication even though a compromise might be reached if local processes were allowed to play out prior to litigation.

H.R. 2372 also would allow claimants to sidestep local procedures for waivers and appeals altogether by arguing that the local procedure "cannot provide the relief requested." *See* H.R. 2372, § 2(e)(2)(B). Local authorities generally are not authorized to award compensation to owners whose land use proposals are denied and property owners typically must pursue

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[3] This provision could be read to allow a developer to file suit in federal court immediately after submitting an application by simply alleging that an appeal would be futile. H.R. 2372, § 2(e)(2)(B). There is no requirement that the application process must proceed to a conclusion. The only exception applies where local law provides for review by elected officials, in which case the claim becomes ripe when the "party seeking redress has applied for but is denied such review." H.R. 2372, § 2(e)(2)(A)(iii).

inverse condemnation actions in State court. Section 2(e)(2)(B)(1) would furnish an attractive means for plaintiffs to gain access to Federal courts far earlier than is allowed under existing law by enabling them to contend that the local procedure does not provide the relief desired.

Sections 3 and 4 of the bill would make virtually identical changes to standards of administrative ripeness in alleging infringements or takings of property rights by the United States and would therefore disrupt the administration of Federal programs designed to protect public health and safety, public resources, and the environment.

3. **H.R. 2372 Would Allow Developers and Others to Sue in Federal Court Without Seeking Compensation in State Court.**

H.R. 2372 also would deem ripe for Federal court adjudication a property rights claim before the claimant had sought compensation in State court. H.R. 2372, § 2(e)(3). This provision raises serious constitutional concerns. As the Supreme Court held in Williamson County and recently reaffirmed in Del Monte Dunes, a property owner cannot establish that a State or local government has violated the Just Compensation Clause unless and until that property owner first requests, and is denied, compensation in State court. Williamson County, 473 U.S. at 194-97; Del Monte Dunes, 119 S.Ct. at 1639. The obligation to pursue compensation derives not from prudential considerations, but from the nature of the Fifth Amendment itself. Williamson County, 473 U.S. at 195 n.13. The nature of the constitutional right at issue, which operates not as a protection against takings but as a protection against uncompensated takings, requires that a property owner utilize a State procedure for obtaining compensation before bringing an action under 42 U.S.C. § 1983.

H.R. 2372 would purport to allow Federal courts to adjudicate the merits of takings claims even if the plaintiff had failed to pursue available State compensation procedures. This could lead to an anomalous and self-defeating result. To the extent that State and local officials continued to disallow land uses that they regarded as harmful to their communities, notwithstanding the enhanced threat of Federal-court litigation under H.R. 2372, many of the resulting Federal-court takings claims would be subject to dismissal on substantive grounds where the claimant failed to seek compensation in State court. As the Supreme Court held in Williamson County and Del Monte Dunes, a property owner cannot establish that a State or local government has violated the Just Compensation Clause unless that property owner first demonstrates the inadequacy of State-court compensation remedies. The bill would thus offer many property owners the false hope of avoiding State court litigation and it

would result in confusion and wasteful litigation as claimants are shuttled back and forth between State and Federal courts.

4. The Bill Would Impose an Onerous Notice Requirement on the Federal Government.

Section 5 of H.R. 2372 would impose a sweeping notice requirement, applicable whenever Federal agency action "limits" the use of private property. Section 5 states that whenever a Federal agency takes an action limiting the use of private property (not just real property), that agency must give notice to the owners of that property explaining the owners' rights and the procedures for obtaining any compensation that may be due them. If construed literally, this mandate could apply to countless Federal programs and regulatory actions that prohibit illegal activity or control potentially harmful conduct. For example, a Federal prohibition on flying an unsafe airplane "limits" the use of the plane, emission controls for a hazardous waste incinerator "limit" the use of the incinerator, and so on. It is uncertain how courts would apply section 5, but those who challenge Federal protections undoubtedly would argue for the broadest reading. Additionally, it is unclear how property owners could be identified, let alone notified, in the case of many Federal actions of broad applicability. Because the provision's notice trigger is far broader than the constitutional standard for compensation, it would cause confusion among property owners by raising false expectations of success if they were to bring a property claim against the United States.

5. H.R. 2372 Would Cause a Substantial Increase in Litigation in the Already Crowded Federal Docket.

H.R. 2372 would burden the Federal docket further in several ways. First, because the bill would allow claimants to circumvent existing State and local procedures for resolving land use disputes, the bill inevitably would result in substantially more claims being filed in Federal courts against public officials and local governments. The bill not only would redirect claimants from State courts to Federal courts but also would generate new cases in situations that currently are resolved through local procedures without litigation. Therefore, the number of new Federal cases spawned by the bill might even exceed the number of Federal property rights claims currently filed in State courts on an annual basis. The bill's prohibition against abstention also would significantly limit the ability of Federal courts to shift cases to State courts where appropriate. Finally, sections 3 and 4 of the bill would allow premature claims to proceed against the United States. These would be the very kinds of cases Federal courts have deemed unfit for adjudication.

6. Federal Courts are not Necessarily a Better Forum for Resolving Local Land Use Disputes.

A key premise that appears to underlie H.R. 2372 is that Federal courts provide property owners with a better and perhaps more sympathetic forum for resolving their local property rights claims than do local land use agencies and State courts. This assumption may not be accurate. Local land use agencies are likely to be more sensitive to local land use concerns, they normally give parties affected by the land use dispute a chance to voice their opinions, and they generally settle land use disputes without expensive and time-consuming litigation. The Supreme Court has emphasized that local land use agencies "are singularly flexible institutions" that are well suited to resolving land use conflicts in a reasonable way. Suitum, 520 U.S. at 738 (quoting MacDonald, Sommer & Frates v. Yolo County, 477 U.S. 340, 350 (1986)).

Similarly, State courts review local land use disputes far more frequently than do Federal courts and therefore are far more familiar with local land use procedures. For this and other reasons, the Fourth Circuit reasoned that State courts are as capable as Federal courts in adjudicating local land use cases.

> Resolving the routine land-use disputes that inevitably and constantly arise among developers, local residents, and municipal officials is simply not the business of the federal courts. There is no sanction for casual federal intervention in what "has always been an intensely local area of the law." . . . "Federal judges lack the knowledge of and sensitivity to local conditions necessary to a proper balancing of the complex factors" that are inherent in municipal land-use decisions. . . . Further, allowing "every allegedly arbitrary denial by a town or city of a local license or permit" to be challenged under § 1983 would "swell[] our already overburdened federal court system beyond capacity." . . . Accordingly, federal courts should be extremely reluctant to upset the delicate political balance at play in local land-use disputes. Section 1983 does not empower us to sit as a super-planning commission or a zoning board of appeals, and it does not constitutionalize every "run of the mill dispute between a developer and a town planning agency." . . . In most instances, therefore, decisions regarding the application of subdivision regulations,

> zoning ordinances, and other local land-use controls properly rest with the community that is ultimately -- and intimately -- affected. Gardner v. Baltimore Mayor and City Council, 969 F. 2d 63, 67-68 (4th Cir. 1992).[4]

In short, one of the key premises that underlie H.R. 2372 is flawed. In most circumstances, local property rights disputes are best decided at the local level by those State and local officials and State judges with the knowledge of and sensitivity to local conditions necessary to a proper balancing of the complex factors inherent in municipal land-use decisions. Id.

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[4] The decisions of the United States Supreme Court on constitutional issues, of course, guide State courts as well as Federal courts. It is worth noting that over the last decade, the Supreme Court has invested considerable time and effort in helping to explicate the relationship between the Just Compensation Clause and the actions of State and local officials in administering local land use programs. Several of the Court's decisions have increased protections for developers and other property owners. For example, in First English v. County of Los Angeles, 482 U.S. 304 (1987), the Court recognized that local governments might rescind earlier regulatory action and held that, even in such circumstances of "temporary" regulation, State and local governments must pay financial compensation for the period during which the regulation was in effect. In Nollan v. California Coastal Commission, 438 U.S. 825 (1987) and Dolan v. City of Tigard, 512 U.S. 374 (1994), the Court decreed that a community can impose certain conditions on new development only if there is an "essential nexus" between those conditions and legitimate regulatory objectives and a "rough proportionality" between the extent of the conditions and the public burdens imposed by the development. These holdings circumscribe the ability of local governments to require developers to fund infrastructure investments to counterbalance the public costs of new development. In Lucas v. South Carolina Coastal Council, 505 U.S. 1003 (1992), the Court struck down a State coastal protection law enacted to govern new development along the State's deteriorating coastline. The decision established a rule that a taking will be found when a law eliminates all of a property's economic value. Decisions such as these suggest that, where necessary, the Supreme Court is ready to provide instructions to lower courts and local governments that protect property owners and their rights. This readiness suggests that there is no the need for legislation -- such as H.R. 2372 -- that seeks to expand the property rights of developers under Federal law.

Some might argue that H.R. 2372 is appropriate because developers and others are singled out for unfair treatment under our laws, but this is not true. By and large, the current local land use planning process in conjunction with State court review of local decisions works well and has benefitted the vast majority of property owners greatly. If land use procedures and standards in particular areas are in need of reform, those local laws should be revised. But we should not pass Federal legislation that would substantially shift the balance between local and Federal authority on inherently local issues, as H.R. 2372 would do. We should not force Federal courts to serve as local zoning boards of appeal. We should not pass Federal legislation that, by allowing claimants to file suit in Federal court before seeking compensation in State court, is contrary to the Supreme Court's interpretation of the Fifth and Fourteenth Amendments. And we should not inundate the Federal courts with land use claims that the Federal courts themselves traditionally have deemed unripe for decision.

Because H.R. 2372 would undermine the vital role State and local officials play in local land use planning, the Justice Department strongly opposes it. As noted above, the Attorney General would recommend that the President veto the bill if passed in its present form.

Thank you for the opportunity to present our views. The Office of Management and Budget has advised us that from the perspective of the Administration's program, there is no objection to submission of this letter.

Sincerely,

Jon P. Jennings
Acting Assistant Attorney General

cc: The Honorable Melvin Watt
Ranking Minority Member
Subcommittee on the Constitution
Committee on the Judiciary

The Honorable Henry J. Hyde
Chairman
Committee on the Judiciary

The Honorable John Conyers, Jr.
Ranking Minority Member
Committee on the Judiciary