

CONCLUSION

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This Regulatory Takings Symposium comes at a critical time in the history of land-use planning and compensation systems. As these Articles suggest, there is an assumption in many countries, explicit or implicit, that exempts most planning and land-use regulation from compensation if taken under regulatory powers. This assumption is not holding. In the United States, for example, the assumption is under attack from a conservative property rights movement. It has mobilized the media and public sentiment to endorse legislation that requires compensation for land-use restrictions, almost without exception.

This radical response to the compensation problem makes the Articles in this Symposium, which report on the international experience, most topical. The national systems reported here are patchwork responses to compensation that reflects particular concern with direct acquisition as well as government actions that can have a depressive effect, such as blighting a property prior to condemnation. For the most part, the systems discussed in this Symposium add up to a sensible list of compensation requirements, though there are exceptions where compensation may have gone too far. Gone are the comprehensive solutions, such as those contained in the British, post-World War II Town and Country Planning Act.¹ That Act tried to solve the compensation problem through a one-time national comprehensive payment that transferred development rights in property to government so that planning decisions could be taken free of compensation demands. Thereafter, compensation was to be paid based on existing use value.

The British experiment was an attempt to deal comprehensively with what has been called the windfalls-for-wipeouts problem. Historically, landowners have been compensated for the wipeout of government actions when these were considered serious enough to require compensation, but they also continued to enjoy the windfall of greater development value when land values increased even though the increase was caused by government actions, such as the provision of new infrastructure. Under the British scheme, landowners were compensated once and for all for any wipeout the planning system caused, based on a nationwide assessment of property values. Thereafter, windfalls were eliminated since compensation

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1. See Town and Country Planning Act, 1947, 10 & 11 Geo. 6, c. 51.

was based on existing use, and development rights had been compensated in full and transferred to the government. This experiment failed early on, partly the victim of political change. The British Article in the Symposium explains the present system.²

The question now is whether piecemeal solutions to the compensation problem are enough, or whether comprehensive schemes like the British model should again be attempted. This is not an easy question to answer. Whether a comprehensive solution that lasts can ever be possible and whether it is superior to piecemeal solutions are open questions. The British experiment would suggest that such a drastic interference with market dynamics will not survive.

The British solution at least was total. There was total compensation and total elimination of windfall value. The difficulty today, at least in the United States, is that pressure exists for a total solution on the property rights side of the equation with no attention to the windfall problem. Until recently, only a few states had adopted such laws, and they have been moderated by requiring compensation only for a specified decrease in property value, or by requiring a showing of undue burden, as in Florida. One state, Oregon, has now adopted a compensation law by popular vote that requires compensation for any loss in value from land use regulation with few exceptions. This is a draconic solution on the compensation side because it comprehensively demands compensation for all land-use restrictions with any effect on property values. The adoption of this law in Oregon is all the more surprising because Oregon has been the leading example of an effective, statewide land-use program. The triumph there has encouraged supporters of such systems to try for the enactment of similar legislation elsewhere. If more states follow, legislation of this type could undermine planning and land-use programs because the compensation it demands is financially intolerable.

This American experience may be isolated and may be explained by a variety of factors, including hostility to government intervention of any kind and the economic importance of land and home ownership, which are the primary and substantial investments for most Americans. Still, the adoption by popular vote of a radical compensation measure in the state that had produced the most advanced land-use program in the country should give us pause. It is true, of course, that British and European social and political systems are more resilient, that the need for some form of

2. See Michael Purdue, *The Law on Compensation Rights for Reduction in Property Value Due to Planning Decisions in Great Britain*, 5 WASH. U. GLOBAL STUD. L. REV. 493 (2006).

land-use planning and regulation has greater acceptance there, and that their social and political institutions can resist radical change. Nevertheless, the growing importance of property rights in national cultures is a social movement that cannot be ignored.