"Takings" loses in Senate Committee

House Bill 1192 was defeated in the local government committee of the Senate Committee last week. This defeat was a victory for the Sierra Club, the Audubon Society and other conservation groups who opposed the legislation.

Representative John Witwer of Evergreen who voted for the legislation believes it was defeated because of the restrictions it would put on local governments. He also believes that another Takings bill will be forthcoming next year with fewer regulations and would be more likely to pass through both the House and the Senate.

Senator Bryan Sullivant followed in the footsteps of the late Senator Tony Grampsas whom he replaced, by voting against the legislation in the Senate Committee. In fact he said he led the charge against the legislation. He was adamant in his opposition saying that land use issues must remain at the local level. The bill as written, he said would preclude local governments from applying discretionary limits on development. Practically speaking, land in the mountains would have the same regulations as land in the city; the bill would treat them all the same.

What is the history around this concept of "Takings" that causes such a rift between conservationists and people who want to develop their property without restrictions?

The framers of the constitution, in the Fifth Amendment, gave people a fundamental right by saying, "nor shall private property be *taken* for public use without just compensation." Today this is known as the right of eminent domain or condemnation and it gives government the right to take land to build roads, dams, parks and other public projects but only if the individual receives just compensation.

Witwer in a recent interview defined takings as the "tension between constitutional safeguards of individual property rights and the constitutional safeguards of the "common good". If a regulation goes too far, he said, it is a taking. He voted for the bill in the House because he believed it was important to codify the constitutionally based standards established and applied by the courts. According to House Bill 1192, these standards would provide a clear path for local governments to follow in Takings cases.

In numerous cases the Supreme Court has ruled that a Taking is the physical invasion of private property in which the owner suffers full loss of the economic benefit of property without legitimate state interests being advanced. Three Supreme Court cases are often cited in the writing of Takings legislation.

The first was Nolan versus the California Coastal Commission in 1987. In this case the court addressed the power of local governments who required developers to contribute land or other assets to offset the costs of pubic facilities that were created by their projects.

The state was demanding that the developer allow public access across their private beach in return for a building permit for a 3 bedroom vacation home. The court opposed this saying it was not reasonably related to the burden imposed by the development.

A second decision by the Court involved the regulation of development in a coastal hazard zone. In the case of Lucas v. South Carolina Coastal Council in 1992, the state had adopted strict shoreline development regulations to alleviate the impact of hurricanes. Lucas had purchased the land to build on and could not because of the new regulations even though his neighbors had previously built homes and when he acquired the land residential zoning was in effect. There was no dispute that the regulations served a valid public purpose, and that the economic impact on Lucas was severe and as a result the Court ruled that "in the relatively rare instance where a regulation goes so far as to deny all economic use of the property, it will be considered a taking unless the prohibited use is barred by existing rules or understandings from the states law of property and nuisance." In this case then because of the "nuisance exception" it was not a taking.

The last case which strikes closer to home, Dolan v. Tigard in 1994, involved the increasingly common practice of requiring pubic dedication of land in return for development approval. The person wanted a permit to expand her hardware business and the city required her to dedicate a floodplain area to handle the increased storm water runoff.

This was not a problem but what the Court objected to was the city's requirement to open the floodplain corridor to public access for a bicycle and pedestrian trail. This decision placed a greater burden on local governments to justify land dedication requirements especially those which mandate public access.

This reminds me of the rules put on the Tanoa Development in which the land was extensively altered next to the Means land to create a 100 year flood plain and in addition the county required the developers to put in a concrete bike path area through the floodplain.