

BUFFER OPTIONS FOR THE BAY: EXPLORING THE TRENDS, SCIENCE, AND OPTIONS OF BUFFER
MANAGEMENT IN THE GREAT BAY WATERSHED

TAKINGS: EXECUTIVE SUMMARY/FAQ

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What is a taking?

A municipality's authority to regulate land use is a balance between private property rights and the purpose of government to promote the public health, welfare, and safety. To benefit from the ecosystem services and values buffers provide, towns may wish to enact regulations and ordinances to protect them. However, this may result in a **taking**, or the total or near total governmental deprivation of private property requiring payment of "just compensation" to the owner, and raise the potential for regulatory "takings" lawsuits. Both the U.S. Constitution and the New Hampshire Constitution secure property rights, and guard against "taking" private property:

Fifth Amendment of the United States Constitution: *"No person shall [...] be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."*

Article 12 of the New Hampshire Constitution: *"Every member of the community has a right to be protected by it, in the enjoyment of his life, liberty, and property; [...] but no part of a man's property shall be taken from him, or applied to public uses, without his own consent, or that of the representative body of the people[.]"* (N.H. statute RSA 498-A Eminent Domain Procedure Act supplies the "just compensation" requirement.)

In N.H., RSA 674:16 (Grant of Power) enables a municipality's authority to zone and the power to adopt a zoning ordinance. The circumstance in which an ordinance or regulation constitutes a taking depends on several factors, and there is no case history in N.H. that establishes a "bright line" beyond which a regulation becomes a taking. In N.H., a governmental regulation can be a taking, even if the land is not physically taken, if it is an arbitrary or unreasonable restriction that substantially deprives the owner of the economically viable use of his or her property to benefit the public.

How can I tell if an ordinance or regulation is a taking?

The first step is to determine whether the regulation affects a protected property right. The N.H. Supreme Court defines **property** as *"refer[ring] to a person's right to 'possess, use, enjoy and dispose of a thing and is not limited to the thing itself."*

If the regulation *does* affect a property right, a municipality can be subject to takings claims either when a regulation restricts "**all** economically beneficial or productive use of land" (a complete or **per se taking**) or when the regulation goes "too far" and infringes on private property rights (a **partial taking**). A per se taking would mean that the regulation takes away all economic or productive use of the land on the entire parcel.

How can I tell if an ordinance will be considered a partial taking?

Takings claims are evaluated case by case and are based on: (1) the economic impact on the property owner; (2) the degree of interference with the owner's reasonable investment-backed expectation; and (3) the character of the occupation.

(1) *Economic impact on the property owner*: N.H. courts use a “before and after” comparison to measure the degree to which a government regulation diminishes a property’s economically viable use. This test attempts to determine fair market value immediately before and immediately after the regulation. For most properties, N.H. courts use a comparable sales approach to assess fair market value.

(2) *Owner’s reasonable investment-backed expectations*: N.H. courts look at the reduction of value of regulated income and investment properties, based on the purpose for which the property had been purchased. If the landowner has an initial expectation to use the property for a purpose that is now prohibited by the regulation, courts will inquire into whether the expectation is objectively reasonable. Individuals who claim property rights in a “heavily regulated field” typically have a difficult time establishing they have an objectively reasonable expectation the state will not enact new regulations that will affect their property. For example, N.H. legislation has identified the Lamprey River as a “Protected River;” this could influence the court’s decisions on whether there was a reasonable investment-backed expectation regarding certain types of development in the Lamprey River watershed. N.H. courts will also look to the regulatory scheme currently in place in that community to determine whether government action could have been reasonably anticipated.

(3) *Character of the government action*: Lastly, N.H. courts evaluate the character of the government action by weighing the public interest served by the regulation against the private burden on an affected landowner. This definition of character is a determination of whether a government action constitutes a taking based on whether the burden on a private property interest should be carried by the landowner or the public at large. In the context of buffers, it is important to note that flood protection and water quality are important public benefits.

What steps can communities take to avoid a takings suit when trying to protect buffers?

The risk of municipal takings liability is low, so long as municipalities follow sound planning principles. The federal government *encourages* communities to enact certain types of regulations designed to reduce floodplain hazards (a key benefit of buffers), as does the legislatively approved Coastal Risks and Hazards Commission Report.

1. Make sure you have the enabling authority to create the ordinance or regulation; municipalities should clearly identify the enabling statute that allows the enactment of the ordinance or regulation.
2. Enact regulations in a way that preserves some economically viable use of the land.
3. Indicate that one of the purposes of the regulation is to promote hazard mitigation.
4. Tie the buffer regulation to goals in an approved master plan. Include goals in the management plan that address the need for buffers for flood protection, water quality protection, etc. Indicate that the purpose of these goals is to protect the health, safety and welfare of citizens in the community.
5. Acknowledge uncertainty in your master plan. By addressing uncertainty of flood hazards or changing environmental conditions, municipalities can acknowledge the unpredictability of future conditions, while at the same time emphasizing the importance of taking action despite uncertainty.

And remember...

In New Hampshire, scientific data is very rarely needed to justify the enactment of ordinances. All that is needed is a reasonable justification.

A municipality might consider using the principle of No Adverse Impact (NAI) as a standard when creating floodplain regulations to avoid takings claims. NAI is the principle that the action of one property owner may not adversely impact the flooding risk for other property owners.

A taking claim must be “ripe” for judicial review before the court will determine whether a regulation constitutes a compensable taking. The claimant must at least have applied for and been denied a variance or special use permit before a court will hear the case.

If you have a valid and justifiable ordinance in place, but the board misinterprets the ordinance in a way that affects a property right, that is not a taking. The taking stems from the validity of the ordinance itself.

For more information on the legal rights of communities...

This summary borrows heavily from the Vermont Law School Land Use Clinic study of June 2012, funded by the U.S. Department of Commerce, National Oceanic and Atmospheric Administration through the National Sea Grant Law Center Grants Program at the University of Mississippi to look at legal authority and consequences of basing municipal policy decisions in New Hampshire on best available scientific models. The full document can be found here: <https://goo.gl/q3Cp4X>.

For more information on this topic, see an extended analysis conducted by the BOB team at: www.nhbufferoptionsforthebay