Land Use Policy 77 (2018) 603–612

Contents lists available at ScienceDirect

Land Use Policy

journal homepage: www.elsevier.com/locate/landusepol

Land use decision-making in the wake of state property rights legislation: Examining the institutional response to Florida's Harris Act

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ARTICLE INFO

Keywords:
Property rights
Land use law
Dispute resolution
Florida
Institutional analysis and development

ABSTRACT

Land use scholars hypothesize that state property rights legislation—adopted by more than half of U.S. states as a way to buttress the protections of landowners against uncompensated regulatory takings—negatively impacts the ability of local governments to regulate land use. This theorized impact can happen in two ways. First, compensation provisions may "chill" land use regulation due to increased risk of liability from adverse adjudication. Second, settlement and dispute resolution processes may limit public participation and abrogate decisions made in the public interest. However, there is little empirical or theoretical treatment of these concerns. To address this gap, we examine local land use decision-making in Florida in the more than two decades since the 1995 enactment of the Bert J. Harris, Jr. Private Property Rights Act [Act], one of the strongest state property rights laws in the United States. We use the Institutional Analysis and Development (IAD) framework to understand the system of rules and norms that operate within and between institutional actors in Florida's land use arena and animate decisions related to the Act. Drawing on key informant interviews and public documents, we show how contextual conditions and institutions mediate the impact of state private property laws. In Florida, institutions and transactions costs limit litigation under the Act—and consequently mitigate the Act's chilling effect—although unevenly depending on local context. The Act's compensation provision does little to reconfigure institutional arrangements and outcomes in property rights disputes; however, settlement and dispute resolution processes triggered by the Act effectively resolve local process and political challenges. Our findings suggest that dispute resolution is a more impactful and socially optimal approach to state property rights laws compared to compensation, and can enhance land use decision-making and outcomes for planning, the public interest, and landowners.

1. Introduction

State-level property rights legislation, which attempts to augment substantively and procedurally the constitutional protections of landowners against uncompensated regulatory takings, has become a common feature in the United States (U.S.) legal landscape. However, little is known about the effects of such legislation on the land use regulatory decisions of planners and other administrative and elected local government actors. Apart from a few notable exceptions (Jacobs, 1998, 1999, 2003, 2010; Jacobs and Bassett, 2011; Jacobs and Ohm, 1995; Jacobs and Paulsen, 2009; White, 2000), the planning literature has been largely disengaged from theoretical and empirical explorations of the implications of such legislation on land use decision-making and planning practice. Foremost among the concerns for local land use policy where states adopt strong property rights legislation is the "chilling effect," whereby local government officials and staff—fearing the consequences of a successful lawsuit—do not amend, adopt, or enforce regulations that may be necessary to manage growth and land use (Chapin and Higgins, 2011; Daniels, 2014; DeGrove, 2005; Deyle et al., 2007; Echeverria, 2008; Stroud and Wright, 1996; White, 2000). Efforts at downzoning and increasing environmental protections are seen as especially likely to be undermined where states adopt a strong property rights rule (Chapin and Higgins, 2011; Daniels, 2014; Deyle et al., 2007). A second concern is that dispute resolution provisions, often included as a key component of property rights legislation, may work against the public interest by allowing land use regulatory decisions—presumably made with public input and with the general welfare of that public in mind—to be modified without public input and in ways that no longer advance that interest (Juergensmeyer, 1996). Although these effects are discussed in the literature on property rights legislation, there is little empirical or theoretical treatment of them.

Our research responds to these gaps through an institutional

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https://doi.org/10.1016/j.landusepol.2018.05.002
Received 8 November 2017; Received in revised form 6 March 2018; Accepted 3 May 2018

analysis of local actor responses to state private property rights legislation. We study the critical case of Florida and the 1995 Bert J. Harris, Jr. Private Property Rights Act (Florida Statute § 70.001) (hereinafter referred to as the Harris Act, or Act), which has been described as "the most far-reaching property rights legislation in the country" (Echeverria, 2008, p. 4), and among the most "detailed" and "sophisticated" of state property rights laws (Spohr, 1997, p. 313). The Harris Act attempts to augment significantly the constitutional regulatory takings protections available to property owners by allowing claims for compensation to be brought by those "inordinately burdened" by a government regulatory action (the Act's compensation provision) (Florida Statute § 70.001), and by requiring an attempt at settlement between a local government and aggrieved landowner, which can invoke a dispute resolution process (settlement and dispute resolution provision). Land use experts anticipated both a chilling effect and an undermining of the public interest in planning and regulatory decisions as a result of the Harris Act (Chapin and Higgins, 2011; Daniels, 2014; DeGrove, 2005; Deyle et al., 2007; Jacobs, 1999; Juergensmeyer, 1996; Stroud and Wright, 1996; White, 2000). However, most of these concerns were identified in the initial years after adoption of the Act, and very little research or commentary has been produced in subsequent years. Florida also presents an intriguing context due to its strong state-level planning framework, which requires local governments to manage growth through comprehensive planning.

We examine the impact of the Harris Act on land use decision-making in Florida, focusing on the potential chilling effect from the Act's compensation provision and the potential for abrogation of the public interest resulting from the settlement and dispute resolution processes. We rely primarily on semi-structured key informant interviews with Florida land use attorneys who have represented the interests of both local governments and landowners, and secondarily on analysis of select Harris Act cases, settlements, and local meeting minutes. Our study is grounded theoretically in the institutional analysis and development (IAD) framework, which is used to understand the governance of resource use in formal and informal institutional contexts (Aligica and Boettke, 2009; Imperial, 1999; Ostrom, 2005; Ostrom et al., 1994; Rahman et al., 2014). The IAD framework provides a tool for evaluating the interactions among actors in decision-making situations, also known as *action arenas* (Clement, 2010; Ostrom, 2010; Rahman et al., 2014). It provides a way to parse more clearly what happens in the gap between state property rights policy adoption and local land use decisions. We also see our work as contributing to planning scholarship that explores the space within which disputes about land, property rights, and planning take place (Trapenberg Frick, 2014; Trapenberg Frick et al., 2014; Whittemore, 2013). In addition, our institutional analysis of local land use policy in the wake of property rights legislation responds directly to the recent calls by Schatz (2015) and Mualam (2014) for further investigation of the "trickle down" impact of court decisions in planning practice, and the emphasis Jacobs (2010, 2003, 1998) brought to the significance of property rights legislation over the last two decades.

We find that, more than two decades since it was adopted, the Harris Act is a looming, daily presence in planning decision-making in Florida. However, transaction costs and institutions mediate its impacts, limiting the chilling effect from the Act's compensation provision—although, critically, this varies by local context. We find that settlement and dispute resolution processes pursuant to the Act reduce transaction costs and present political and process solutions where land use decisions are dominated by special interests. Although the existing literature casts state property rights legislation as mostly harmful to planning, these findings point to a more nuanced understanding of the impacts of such laws. In the remainder of this article, we first discuss regulatory takings jurisprudence and the property rights movement in the U.S.. Next, we describe the Harris Act. We then present our findings and conclude with implications for practice and suggested pathways for future research.

2. Regulatory takings and state property rights legislation in the U.S

While a full review of takings jurisprudence is outside the scope of our paper, a brief tour will help the reader better understand the intentions behind state private property rights legislation. Most governments enjoy some power of expropriation, referred to as eminent domain in the U.S., by which private property can be taken for public use. The key limitation is found in the Fifth Amendment of the U.S. Constitution, which requires that just compensation be provided when such actions occur. In the typical eminent domain case, a government pursues a condemnation proceeding through which just compensation is determined. However, courts have long recognized that government regulations can cause inverse condemnations by interfering with property rights or value, and have allowed a landowner to seek compensation by bringing a claim against the government (*Pennsylvania Coal Co. v. Mahon,* 1922). These regulatory takings cases broadly delineate between physical takings (permanent physical invasions, however small (*Loretto v. Teleprompter Manhattan CATV Corp*., 1982) and regulatory takings, which can be total (a deprivation of all economically beneficial use, also known as a categorical taking (*Lucas v. South Carolina Coastal Council*, 1992) or partial (a deprivation of use or value that is not total, also known as a non-categorical taking) (*Penn Central Transportation Co. v. New York City,* 1978). The imposition of unconstitutional conditions can also give rise to a compensable taking (*Nollan v. California Coastal Commission,* 1987*; Dolan v. City of Tigard,* 1994; *Koontz v. St. Johns River Water Management District*, 2013).

Three characteristics of U.S. land use jurisprudence have sown discontent among property rights advocates. The first is the uncertainty surrounding partial regulatory takings. The test established in *Penn Central* (1978) evaluates claims by considering (1) the economic impact of the proposed regulation on the landowner, (2) the owner's reasonable investment-backed expectations, and (3) the character of the government action. The test has been critiqued as a "complex and *ad hoc*" approach that gives officials "unchecked discretion" based on subjective notions of fairness (Eagle, 2014, 604). Echeverria characterizes the test as "vague and uncertain" (2011, p. 6):

> Because it is so open-ended and value-laden, the *Penn Central* three-factor test invites the courts to second-guess legislative judgments. The value to be assigned to a particular policy objective, and whether achieving the objective is worth the social costs entailed in any regulatory program, represent quintessentially legislative issues. If the courts were to evaluate taking claims using essentially the same type of balancing test employed by the legislatures, they would run a serious risk of intruding on the responsibilities of the political branches (Echeverria, 2011, p. 8).

Property owners faced considerable uncertainty about their rights to regulation-triggered compensation under this system.

The second characteristic viewed negatively by property rights advocates is the broad federal understanding of "public use" in takings jurisprudence. Any taking, whether through direct or inverse condemnation, must advance a public use. However, the definition of this term is broad and highly deferential to local governments. The 2005 Supreme Court decision in *Kelo v. City of New London* reinforced the rationale for Court deference to state-led definitions of public use, which in prior cases was already being read expansively (Norwood, Poletown, etc.). As both the Kelo dissent (and other legal commentators) noted, this stance risks allowing local governments to have carte blanche with regard to being able to claim their actions advanced a public use.

Kelo was arguably the high water mark for the well-established deference shown local legislative decisions under substantive due process, which derives in part from the separation of powers. This is the third characteristic of land use law that can be seen as problematic from a property rights perspective. As noted in *Berman v. Parker* (1954):