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OTTEN JOHNSON ALERT

Amendment 74: A Serious Danger to the Colorado Economy

October 2018 • [Brian Connolly](#)

This November, Colorado voters will face several (some will say, too many) ballot measures. One of these measures, Amendment 74, proposes amending the Colorado Constitution to require that owners receive “just compensation” when their property is “reduced in fair market value by government law or regulation.” While Otten Johnson strongly supports our clients’ property rights—and we routinely assist clients in cases involving takings, eminent domain, and related land use matters—we firmly believe that Amendment 74 is poorly conceived and drafted. It will hamstring local governments, thwart meritorious legislation, and prompt excessive litigation. Amendment 74 presents a serious danger to Colorado’s economic future, and we encourage our clients and friends to oppose it.

Both the federal and state constitutions allow owners to recover “just compensation” whenever the government confiscates property. Courts have recognized that a taking of property may occur when a regulation, such as zoning, goes “too far” in burdening private property. Compensable “regulatory takings” have been found to occur where government action eliminates all or substantially all productive uses of private property. A regulation that simply reduces a property’s value or eliminates some of its use, does not generally merit compensation.

The approach proposed by Amendment 74—where any law that reduces the value of any property in any amount triggers a payment requirement—has been repeatedly

rejected by courts. The Supreme Court observed in 1922 that requiring government to pay for the private impact of every regulation would virtually destroy government itself. For example, taxes are necessary for the government to function, but may reduce a property's value; requiring the government to pay for the impact of taxes would commence a vicious cycle in which government would be nearly stymied in its ability to collect revenue to protect the public good.

Under Amendment 74, *any* regulation creating a public good greater than its private benefit would require compensation. While general regulations almost always impose some reduction in value, courts have consistently held that those reductions are the costs of a functioning government and are not compensable.

Otten Johnson strongly supports and fights for landowners' property rights. But we believe that Amendment 74 carries too many unintended consequences and will kill development in Colorado. Here are some reasons why we oppose Amendment 74:

- Oregon previously attempted a similar requirement, which was widely viewed as a catastrophic failure. In 2004, Oregon voters approved Measure 37, imposing a just compensation requirement for land use laws that adversely affected property values. Within three years, 7,000 lawsuits alleging \$19.8 billion in losses had been filed. Because of the serious liability accruing to local governments as a result of rezonings, development was virtually stopped. The law was subsequently amended, after producing little to no actual compensation for landowners.
- Amendment 74 does not exempt fire or building codes, or other public safety regulations. Because fire and building codes (as well as storm drainage regulations and utility requirements) necessarily reduce properties' fair market value, local governments will face incalculable liability for these necessary public safety regulations. To the extent the government reduced or eliminated such safety regulations, all properties would be harmed. An unsafe building constructed on a block makes the rest of the block unsafe.
- Amendment 74 applies to any governmental action that reduces property values. If a local government rezoned property, issued a special use permit, or even approved a site plan in order to attract a major employer or allow a new development project, neighbors could file a claim that their properties were devalued. Local governments would have serious disincentive to rezone property for economic development or any other purpose to avoid that liability. In addition, local governments might require developers to indemnify them for takings claims associated with these actions, leading to potentially significant liability for developers.
- Amendment 74 does not include a minimum threshold for bringing a claim, does not specify who may bring a claim, and provides no guidance as to whether the law will apply retroactively. Colorado courts would be overwhelmed with litigation, which would take decades to sort out. In the meantime, the uncertainty

surrounding the amendment would likely halt development activity.

- Once enacted, Amendment 74 cannot be further modified, except with the approval of more than 55% of the state's electors, or repealed, except with a majority of electors.
- Amendment 74 is opposed by many major business interests in Colorado. In response to Proposition 112, which would impose sizable setbacks on oil and gas development, some agricultural and energy interests support the measure. While we believe Proposition 112 is bad public policy, we believe that Amendment 74's potential for unintended consequences is far too risky to our state's economy. We would gladly support a more limited measure that would allow landowners to recover compensation for partial takings, but we cannot support a measure that potentially bankrupts government and risks shutting down real estate development.

No state has ever enacted a reform as broad as Amendment 74. The late U.S. Supreme Court Justice Oliver Wendell Holmes wrote in the case of *Pennsylvania Coal Co. v. Mahon*, "[g]overnment hardly could go on if to some extent values incident to property could not be diminished without paying for every change in the general law." That statement remains true today. Please join us in opposing Amendment 74.

Otten Johnson attorneys in our [Land Use](#) practice group have substantial experience with development and governmental agreements. For more information on this Otten Johnson Alert or for help evaluating your current situation, contact any of the attorneys in the Land Use practice group. For a listing, [click here](#).

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