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S. 2271: THE PROPERTY RIGHTS IMPLEMENTATION ACT OF 1998

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Abstract. On July 7, 1998, Senator Hatch introduced S. 2271, the "Property Rights Implementation Act of 1998." The bill appears to be the likely replacement on the Senate floor for H.R. 1534. It retains the basic process approach of its predecessor, but makes numerous changes. Among these are a restriction of H.R. 1534's takings-ripeness provisions to real property rather than all types of property, a new definition of "futility," different restrictions on district court abstention, and new provisions as to attorneys fees and prior notice applicable to parties suing local governments for takings under 42 U.S.C. section 1983.

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Summary

On July 7, 1998, Senator Hatch introduced S. 2271, the "Property Rights Implementation Act of 1998." The bill appears to be the likely replacement on the Senate floor for H.R. 1534 as reported by the Senate Committee on the Judiciary. S. 2271 retains the basic "process" approach of its predecessor, but makes numerous changes. Among these are a restriction of H.R. 1534's takings-ripeness provisions to real property rather than all types of property, a new definition of "futility," different restrictions on district court abstention, and new provisions as to attorneys fees and prior notice applicable to parties suing local governments for takings under 42 U.S.C. sec. 1983.

On July 7, 1998, Senator Hatch introduced S. 2271, the "Property Rights Implementation Act of 1998." The bill takes a "process" approach to the property rights issue, lowering or eliminating some of the threshold hurdles now encountered by property owners when they sue local governments, or the federal government, for alleged infringements of property rights. These threshold hurdles allow the federal court to avoid reaching the merits of the property owner's claim, when the claim is deemed by the court to be improperly or inappropriately before it. The bill disavows any intention to change the substantive standard by which courts determine whether government actions effect "takings" under the Takings Clause of the Fifth Amendment.

S. 2271 is designed as a replacement for H.R. 1534, which the Senate Committee on the Judiciary reported in February, 1998. It is scheduled for a Senate floor vote (should it survive a likely filibuster) in the near future.

This report supplements CRS Report 97-877, which examines in detail the Senate-reported version of H.R. 1534 and the two House-passed bills (H.R. 992 and H.R. 1534) of which it consists. CRS Report 97-877 also provides extensive background for understanding the complex legal concepts of Tucker Act jurisdiction, abstention, and ripeness which these bills seek to modify. Here, we do not repeat that background, and urge the reader to read the present, brief update in conjunction with the earlier report. The

present report confines itself to the changes made by S. 2271 in the committee-reported version of H.R. 1534.

Those changes are:

1. *Title:* S. 2271 is the "Property Rights Implementation Act of 1998." H.R. 1534 is the "Citizens Access to Justice Act of 1998."

2. *Duty of notice to local governments.* An S. 2271 provision with no counterpart in H.R. 1534 bars the filing of an action under 42 U.S.C sec. 1983 alleging the taking of real property until 60 days has elapsed from the date when written notice has been provided to the defendant. ("Section 1983 actions" are widely used to challenge actions of local governments in federal court.)

3. *Ripeness: scope of provisions.* The ripeness provisions of S. 2271 apply solely to claims founded on a constitutional right to use *real* property (land and things attached to land). H.R. 1534's ripeness provisions would have applied to all types of property — real and personal, tangible and intangible.

4. *Ripeness: time allowed for government processing of development applications.* S. 2271 says that the ripeness of the property owner's taking comes about only after the specified government approvals, following application therefor, have not been obtained "within a reasonable time." H.R. 1534, in a possibly inadvertent omission, demanded only that, following the property owner's submission of its application for development approval, such approval had not been obtained. There was no mention of "within a reasonable time."

5. *Ripeness: definition of "futility."* S. 2271, like its predecessor, provides that a property owner can ripen its taking claim without having obtained a required government approval if applying therefor would be "futile." H.R. 1534 offered no definition of "futile," however — suggesting that the term's meaning was to be drawn from takings case law. S. 2271 defines "futile" to mean "the inability of an owner of real property to seek or obtain approvals to use such real property, and the hardship endured by such inability, as defined under applicable land use and invironmental law."

6. *Ripeness: definition of "meaningful application."* Both bills insist, as a condition for a ripe taking claim, that the property owner make one "meaningful application" to develop its property to the local land use regulating entity, which is not approved. H.R. 1534 says that the content of "meaningful application" is "as defined by the locality." S. 2271 retains the "as defined by the locality" language of H.R. 1534 for some uses of "meaningful application" (the discretionary abstention provision, and where the meaningful application is not approved and is accompanied by an explanation of the development that would be accepted), but not for one other use (where the meaningful application is not approved and is not accompanied by an explanation of the development that would be approved). The reasons for having two definitions of "meaningful application" are not clear.

7. *Ripeness: the written explanation provided by the locality.* Both bills stipulate that where a local government offers, in conjunction with a development proposal disapproval, a written explanation of the use, density, or intensity of development it would accept, the landowner must, to ripen its constitutional claim, submit a second application "taking into account" that explanation and have that application, just as the first one, not be approved. S. 2271 clarifies that such written explanation need only specify the "range" of use, density, or intensity of development that would be approved.

8. *Abstention: nature of prohibition on district court use.* S. 2271 states that whenever a federal district court exercises jurisdiction under 28 U.S.C. sec. 1343 (which covers section 1983 actions, among others), the court shall not abstain "because the party seeking redress" (1) "brings a prior or concurrent proceeding before a State, territorial, or local tribunal ... ; (2) asserts claims under State or local law pendent to or arising from the same core of operative facts as a claim for the taking of real property; or (3) asserts a claim for the taking of real property that requires interpretation of State, territory, or local laws." This language appears to contemplate that district-court abstention is never categorically barred, but rather cannot be based by the court on the specified factors. H.R. 1534, by contrast, takes the form of an absolute ban, but states the triggering factors more narrowly than those of S. 2271. Under H.R. 1534, an abstention prohibition applies only when no state law at all is filed and where no parallel proceeding arising from the same facts as the taking claim is pending in state court.

S. 2271 also contains a discretionary abstention provision not present in H.R. 1534. Under S. 2271, a federal district that exercises jurisdiction under 42 U.S.C. sec. 1343 in an action concerning real property use *may* abstain where the plaintiff (1) has not submitted a "meaningful application" (see item 5) to use the real property, and (2) challenges whether an action of the locality exceeds the authority conferred upon it under state law.

9. *Abstention: when district courts should "certify" questions of state law.* Both bills deal with the issue of when a district court, facing a claim involving the use of real property that cannot be decided without resolving an unsettled question of state law, may certify that question to the highest appellate court of the state. S. 2271 states that the district court, in deciding whether to certify, "may consider" whether the question of state law will significantly affect the merits of the claim and is patently unclear. H.R. 1534 states that the district court "shall not" certify the question unless these factors are present.

10. *Attorneys fees.* In claims against any act of Congress or federal regulation affecting property rights, S. 2271 specifies that the court "may" award attorneys' fees and other costs to the prevailing plaintiff. H.R. 1534 used the mandatory "shall" instead.

An S. 2271 provision with no analog in H.R. 1534 is titled "Attorneys Fees for Localities." This provision states that in a section 1983 action (under 42 U.S.C. sec. 1983) alleging a taking of real property, a district court may hold the property owner liable for a reasonable attorney's fee and costs where the taking claim is not "substantially justified" — unless special circumstances make such an award unjust. The phrase "substantially justified" is apparently taken from the Equal Access to Justice Act, where it performs a similar function in specifying that the United States must pay attorney's fees to prevailing parties in judicial actions, unless its position in the litigation was "substantially justified." 28 U.S.C. sec. 2412(d)(1)(A).