

**STATE OF TENNESSEE**  
OFFICE OF THE  
**ATTORNEY GENERAL**  
PO BOX 20207  
NASHVILLE, TENNESSEE 37202

May 12, 2009

Opinion No. 09-80

Termination of Nonconforming Motor Vehicle Business Establishment

---

**QUESTIONS**

1. May a local government require a nonconforming “motor vehicle business establishment,” as defined in Tenn. Code Ann. § 13-7-208, to cease operation without compensation to the business owner?
2. May a local government create a mechanism to amortize the value of a nonconforming motor vehicle business establishment and require the business to cease operation after the established time period?

**OPINIONS**

1. Evaluating whether a zoning ordinance constitutes a taking which requires just compensation to the business owner is fact-intensive and can only be determined on a case-by-case basis.
2. Yes; however, a zoning ordinance that includes an amortization period may still constitute a taking.

**ANALYSIS**

1. Pursuant to Tenn. Code Ann. §§ 13-7-201 *et seq.* (1999 and Supp. 2008), the General Assembly granted municipalities the power to enact and enforce zoning ordinances. Where the use of a building, structure, or land violates a zoning ordinance, the municipality “may, in addition to other remedies, institute injunction, mandamus or other appropriate action or proceeding to prevent such unlawful . . . use, or to correct or abate such violation, or to prevent the occupancy of the building, structure or land.” Tenn. Code Ann. § 13-7-208(a)(2) (Supp. 2008). A municipality’s ability to pursue such remedies is limited with regard to prior nonconforming uses. When a municipality amends a zoning ordinance, Tenn. Code Ann. § 13-7-208(b)(1) (Supp. 2008) permits businesses to continue in operation “under zoning regulations or exceptions thereto [existing] prior to the zoning change.” A business must satisfy several requirements for its nonconforming use to be “grandfathered in.” *See* Tenn. Code Ann. § 13-7-208(b)-(k) (Supp. 2008). Furthermore, certain nonconforming “motor vehicle business establishments” are not protected by the grandfather statute.

In any municipality having a metropolitan form of government and a population of over five hundred thousand (500,000), according to the 2000 federal census or any subsequent federal census, any

nonconforming motor vehicle business establishment may be terminated after notice and a hearing before the board of zoning appeals upon a finding that all of the following have been established in the record before the board of zoning appeals:

(A) Another motor vehicle business establishment is located within the one thousand feet (1,000') of the nonconforming motor vehicle business establishment, in the same block as the nonconforming motor vehicle business establishment, or in the block across a public street or road from the block in which the nonconforming motor vehicle business establishment is located;

(B) The parcel on which the nonconforming motor vehicle business establishment is located has less than two hundred fifty feet (250') of frontage on any public street or road, excluding any portion of the frontage not owned or leased by the licensed operator of the nonconforming motor vehicle business establishment; and

(C) At least ten percent (10%) of the inventory of the nonconforming motor vehicle business establishment at any point in time consists of motor vehicles titled pursuant to title 55, chapter 3, part 2, including, but not limited to, vehicles with salvage titles, flood titles, rebuilt titles, or nonrepairable vehicle certificates. The operator of the nonconforming motor vehicle business establishment shall make the titles for all of the vehicles located on the premises of the nonconforming motor vehicle business establishment immediately available upon request of a local zoning inspection official, or produce the original titles at the office of the local zoning inspection official within three (3) business days of the request by the local zoning inspection official. The failure of the nonconforming motor vehicle business establishment to make the titles for the vehicles located on the premises of the nonconforming motor vehicle business establishment available to the local zoning inspection official in accordance with this subsection (1) shall create a rebuttable presumption that at least ten percent (10%) of the inventory of the nonconforming motor vehicle business establishment consists of the motor vehicles titled pursuant to title 55, chapter 3, part 2.

Tenn. Code Ann. § 13-7-208(l)(2) (Supp. 2008).

A local government that terminates a nonconforming motor vehicle business establishment must pay just compensation to the owner if a “taking” has occurred. The Fifth Amendment of the United States Constitution provides that private property shall not “be taken for public use, without just compensation.” The Tennessee Court of Appeals discussed the general principles of the Takings Clause as it applies to regulatory takings, which includes zoning ordinances, as opposed to physical takings. *Consol. Waste Sys., LLC, v. Metro Gov’t of*

*Nashville and Davidson County*, No. M2002-02582-COA-R3-CV, 2005 WL 1541860 at \*8-15 (Tenn. Ct. App. June 30, 2005). “[R]egulatory takings jurisprudence . . . is characterized by essentially ad hoc, factual inquiries, designed to allow careful examination and weighing of all relevant circumstances.” *Consol. Waste Sys., LLC*, 2005 WL 1541860 at \*9, citing *Brown v. Legal Found. of Washington*, 538 U.S. 216, 233, 123 S.Ct. 1406, 1417-18 (2003) (internal quotations omitted). Assuming the regulation does not eliminate all beneficial economic use of the property, a court’s fact-intensive inquiry should include the consideration of “(1) the economic impact of the regulation, (2) the degree to which the regulation has interfered with the owner’s reasonable ‘distinct investment-backed’ expectations concerning the property, and (3) the character of the regulatory action.” *Consol. Waste Sys., LLC*, 2005 WL 1541860 at \*9, citing *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104, 124-25, 98 S.Ct. 2646, 2659-60 (1978); *Tahoe-Sierra Pres. Council, Inc., v. Tahoe Reg’l Planning Agency*, 535 U.S. 302, 327, 122 S.Ct. 1465, 1481 (2002); *Palazzolo v. Rhode Island*, 533 U.S. 606, 617, 121 S.Ct. 2448, 2457 (2001).

Because evaluating whether a zoning ordinance constitutes a taking is fact-intensive and can only be determined on a case-by-case basis, this office cannot answer the first question in the abstract.

2. An “amortization” period in a zoning ordinance permits a business owner to continue a nonconforming use for a specified period of time. 83 Am. Jur. 2d *Zoning and Planning* § 621 (2008). At the end of that period, the business owner must discontinue the nonconforming use. *Id.*

The General Assembly has not prohibited local governments from using amortization periods when terminating nonconforming motor vehicle businesses. As provided by Tenn. Code Ann. § 13-7-208(l)(2) (Supp. 2008), a “nonconforming motor vehicle business establishment may be terminated after notice and a hearing before the board of zoning appeals upon a finding” of all the facts specified in subparagraphs (A), (B), and (C). By using the word “may” instead of “shall”, the General Assembly has granted certain local governments the power to choose whether to terminate a nonconforming motor vehicle business establishment upon such a finding. Furthermore, Tenn. Code Ann. § 13-7-208(l) (Supp. 2008) does not require such termination to be immediate.

Some courts have upheld the constitutionality of amortization periods, while others have ruled that they “are ordinarily unconstitutional, regardless of their reasonableness.” 83 Am. Jur. 2d *Zoning and Planning* § 622 (2008). The Tennessee Court of Appeals held that an amortization period is proper where “the ordinance requiring the termination of a nonconforming use [is] reasonable in and of itself [and] as it applies to the particular property owner.” *Rives v. City of Clarksville*, 618 S.W.2d 502, 509 (Tenn. Ct. App. 1981). However, the *Rives* court only analyzed the constitutionality of an amortization period that was within a zoning ordinance, not whether the entire ordinance effected a taking. *Id.* at 506-07. If a Tennessee court were to review both of those questions, the court might incorporate the presence of the amortization period in its review of the takings question instead of considering it separately. *See Outdoor Graphics, Inc., v. City of Burlington*, 103 F.3d 690, 695 (8th Cir. 1996); *Georgia Outdoor Adver., Inc., v. City of Waynesville*, 900 F.2d 783, 786-87 (4th Cir. 1990) (courts that considered the presence of an amortization period when determining whether a zoning ordinance constituted a taking). A zoning ordinance that includes an amortization period may still

constitute a taking while “the absence of [such] a provision . . . does not invariably render such an ordinance an unconstitutional taking.” *Georgia Outdoor Adver., Inc.*, 900 F.2d at 786.

ROBERT E. COOPER, JR.  
Attorney General and Reporter

MICHAEL E. MOORE  
Solicitor General

NICHOLAS G. BARCA  
Assistant Attorney General

Requested by:

The Honorable Janis Sontany  
State Representative  
32 Legislative Plaza  
Nashville, Tennessee 37243-0153