

STATE OF TENNESSEE

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May 22, 2007

Opinion No. 07-77

Regulatory Takings

QUESTION

Does a state law that prohibits or limits otherwise lawful activity on private property amount to a compensable taking under the state and/or federal constitutions?

OPINION

A state regulation that affects the value, use or transfer of private property may constitute a taking if the regulation: (1) denies the landowner all economically viable use of his property or substantially interferes with his reasonable investment-backed expectations; (2) is not reasonably related or roughly proportional to the projected impact of the landowner's proposed use of the property; or (3) closely resembles or has the effect of a physical invasion or occupation of private property.

ANALYSIS

Separate in theory from the government's power of eminent domain is the State's police power, which enables state legislatures to regulate land use to protect the health, safety, morals and welfare of the public. While there is no set formula for determining when a government's regulation of land use becomes a compensable taking, and no specific facts have been provided in the instant request, a "categorical" or per se taking may be found in the following instances: (1) a property owner is forced to suffer a permanent physical occupation of his property, regardless of the minimal economic impact on the property, *see Loretto v. Teleprompter Manhattan CATV Corp*, 458 U.S. 419, 102 S.Ct. 3164 (1982); and (2) a property owner is deprived of all economically viable use of his property, *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1019, 112 S.Ct. 2886 (1992).

In establishing regulatory takings doctrine, the United States Supreme Court has applied several factors or tests to determine the constitutionality of government action that effectively denies or limits certain property uses. On the one hand, a statute that substantially furthers important public policies such as health, safety and the general welfare may so frustrate distinct investment-backed expectations that it amounts to a taking. Beginning with *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 43 S.Ct. 158 (1922), the United States Supreme Court explicitly recognized that a police power

regulation of private property could be so onerous that it was tantamount to an unconstitutional taking. There, the plaintiff coal company had sold the surface rights to particular parcels of property, expressly reserving the right to mine the coal thereunder. The regulation in question, enacted after these transactions, was a statute prohibiting coal mining that would cause subsidence damage to surface structures. The Court, rejecting the nuisance paradigm established in earlier takings cases, held that the act amounted to an uncompensated taking, primarily due to the magnitude of the loss suffered by the owner of the mining rights. 260 U.S. at 415. The Court concluded that the statute made it commercially impracticable to mine coal and essentially left the mining company with no economic value in the mineral estate. In subsequent cases, however, the Court has allowed certain percentage losses to be tolerated in the name of state police power.

Most regulatory takings challenges today are governed by the three-part test outlined in *Penn Central Transportation Co. v. New York City*, 438 U.S. 104, 98 S.Ct. 2646 (1978). In *Penn Central*, the owners of Grand Central Terminal, a designated landmark, were denied approval to build a fifty-five story tower above the terminal, because the alteration would destroy the aesthetic qualities of the building. The Court considered, first, the character of the government's action, i.e., the type of intrusion, the economic impact of the regulation on the property owner, and, finally, the degree to which the regulation interfered with the owner's reasonable investment-backed expectations. 98 S.Ct. at 2659.

As to the nature of the regulation, the Court observed that the government may enact land use laws that adversely affect economic values without resulting in a taking, where, as with zoning laws, the intended purpose is to “enhance the quality of life by preserving the character and desirable aesthetic features” of an area. *Id.* at 2659-2661. The Court in *Penn Central* then concluded that, while the law prevented plaintiff from using certain features of the airspace above the building for expansion, it in no way interfered with plaintiff's present use of the terminal itself, nor did it prevent Penn Central from realizing a reasonable return on its investment. 98 S.Ct. at 2665. This case and later cases applying an economic viability test seem to stand for the proposition that diminished value should be measured in reference to the property “as a whole” and not simply to the portion affected by the regulation.

In *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 107 S.Ct. 1232 (1987), the Court was presented with facts almost identical to those sixty years earlier in *Pennsylvania Coal Co. v. Mahon*: an act prohibiting all coal mining in areas where subsidence damage could occur. But this time, the Court held that the act did not constitute a taking and distinguished *Pennsylvania Coal* on the grounds that the statute at issue there appeared to have been enacted solely for the benefit of private parties, while the law in *Keystone* was intended to regulate a public nuisance and was in the best interests of the general welfare. 107 S.Ct. at 1242. Invoking the *Penn Central* test, the majority also noted that the regulation did not completely prevent the plaintiff from mining coal on any parcel of land. In fact, the percentage loss in economic terms was minimal. As the Court stated, “where an owner possesses a full ‘bundle’ of property rights, the destruction of one ‘strand’ of the bundle is not a taking because the aggregate must be viewed in its entirety.” *Id.* at 1248, quoting *Andrus*

v. Allard, 444 U.S. 51, 100 S.Ct. 318, 326-327 (1979).

More recently, the Supreme Court addressed the issue of temporary takings, holding that regulations that work a temporary taking must be examined on the facts of each case. In *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 535 U.S. 302, 122 S.Ct. 1465 (2002), the Court amplified and explained some earlier decisions with respect to “categorical” takings and compensation for temporary takings. Specifically, the Court held that, in analyzing the economic impact of a regulation, the concept of “the parcel as a whole” is defined by both dimensions of a real property interest: the metes and bounds geographic dimension and the temporal aspect, which describes the terms of years of the owner’s interest in the land. 122 S.Ct. at 1484. In sum, a permanent deprivation of use is a taking of the parcel as a whole, but a temporary restriction (in this case on development) that causes a diminution in value is not, because the property will recover value once the restriction is lifted.

A takings analysis under the Tennessee Constitution generally follows the same principles as those set forth above. The Tennessee Supreme Court has, however, taken a more expansive view of takings vis-à-vis the physical invasion theory as it pertains to repeated overflights and aviation easements. In *Jackson v. Metropolitan Knoxville Airport Authority*, 922 S.W.2d 860, 863-864 (Tenn. 1996), the court rejected a line of federal case law that required direct overflights or a direct physical invasion to constitute a taking and, instead, ruled that a plaintiff must merely allege substantial interference with the use and enjoyment of property from flights that pass close to private land but not directly overhead.

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