S T A T E O F T E N N E S S E E
OFFICE OF THE
ATTORNEY GENERAL
PO BOX 20207
NASHVILLE, TENNESSEE 37202

May 6, 2008

Opinion No. 08-100

Quarantine of Clandestine Methamphetamine Lab Locations

QUESTIONS

1. If local law enforcement issues a quarantine on property where an illegal methamphetamine lab was seized pursuant to Tenn. Code Ann. § 68-212-503, will the local government be liable for clean-up costs or for damages for impairing access to or use of the property?

2. If local law enforcement seizes a methamphetamine lab in an out-building and issues a quarantine, will the quarantine automatically extend to other buildings on the parcel of property, or does law enforcement have authority to specify the part of the parcel that is subject to the quarantine?

3. If a seizure of a methamphetamine lab occurred prior to July 1, 2004, when the quarantine law went into effect, and there is evidence that the site is still contaminated, may quarantine now be imposed on the site?

OPINIONS

1. The local government is not likely to be held liable for clean-up costs at the quarantined site or for damages for impairing access to or use of the property.

2. The quarantine of an out-building does not automatically extend to other structures on the property. Law enforcement officers have the responsibility to determine, when imposing a quarantine, where the manufacture of methamphetamine is occurring or has occurred, for it is only these locations that may be subject to a quarantine.

3. A quarantine may be imposed upon a methamphetamine lab site discovered before July 1, 2004, that is still contaminated.

ANALYSIS

Tenn. Code Ann. §§ 68-212-501 — 509 represent a legislative effort to prevent the exposure of the public to the health hazards of methamphetamine and of the chemicals and byproducts associated with its manufacture. *See* Tenn. Code Ann. § 68-212-503(a). A principal part of this effort involves the quarantine of locations where the manufacture of methamphetamine is

occurring or has occurred. Tenn. Code Ann. § 68-212-503(b).

The statutory scheme provides a local law enforcement agency with the authority to quarantine any property, or any structure or room in any structure on any property, wherein the manufacture of methamphetamine is occurring or has occurred. Tenn. Code Ann. § 68-212-503(b). Upon institution of a quarantine, the local law enforcement agency takes steps to provide notice of the quarantine, both to the public at large and to parties having any right, title, or interest in the quarantined property. Tenn. Code Ann. §§ 68-212-503(b), 68-212-507. While the quarantine is in effect, no person may inhabit the property or offer the property to the public for temporary or indefinite habitation. Tenn. Code Ann. § 68-212-503(d). The statutory scheme does provide a mechanism for any person with an interest in the property to challenge the quarantine or to remove the quarantine after clean-up of the property. Tenn. Code Ann. §§ 68-212-503(c), 68-212-508.

1. The first question seeks an answer to whether a local government will be liable for clean-up costs or for damages for impairing access to or use of property subject to quarantine. For the reasons set forth below, it is the opinion of this Office that a local government is not likely to be liable for clean-up costs at the site or for damages for impairing access to or use of quarantined property.

Upon discovery of a clandestine methamphetamine lab, local law enforcement officers ordinarily first secure the site and, if applicable, take into custody any individuals believed to be engaged in criminal conduct and seize any illegal substances. Depending upon the circumstances at the site, law enforcement officers may remove or arrange to remove from the site bulk chemicals, manufacturing-related items, and other paraphernalia. Thereafter, law enforcement officers may implement a quarantine through the posting of appropriate signs at the site, the recording of a deed notice reflecting the quarantine, and the providing of notice of the quarantine to interested parties. Tenn. Code Ann. §§ 68-212-503(b), 68-212-507. The law enforcement officers must also transmit certain information pertaining to the quarantine to the Tennessee Department of Environment and Conservation ("TDEC"), which maintains the information for public access. Tenn. Code Ann. § 68-212-509.

In considering the question of whether a local government will be liable for clean-up costs at the site stemming from the performance of its statutory quarantine responsibilities, we note that circumstances can vary greatly from one methamphetamine lab to another, including for instance the chemical method used to produce the drug, the duration of production, the amount of drug produced or capable of being produced, and the physical attributes of the site of production. Depending upon the circumstances, any one of a number of statutory schemes may bear on the issue of liability for clean-up costs, including for example the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA"), 42 U.S.C. § 9601 *et seq*., the Tennessee Hazardous Waste Management Act, Tenn. Code Ann. § 68-212-101 *et seq*., and the Hazardous Waste Management Act of 1983, Tenn. Code Ann. § 68-212-201 *et seq*.

It is not possible to identify with specificity the myriad of scenarios in which a local government may be called upon to fulfill its responsibilities under the quarantine provision.

However, we have found no support in the statutes or case law for imposing liability on a local government for clean-up costs at the site merely by virtue of the performance of its statutory functions related to addressing clandestine methamphetamine labs. We do not believe that it would be consistent with the legislative goals of the potentially-applicable statutes establishing liability for clean-up costs associated with the release of hazardous substances to hold a local government liable when the governmental actions at issue are taken pursuant to a remedial regulatory framework aimed at responding to public health emergencies. *Cf. FMC Corp. v. United States Dept. of Commerce*, 29 F.3d 833 (3d Cir. 1994) (stating that CERCLA's essential purpose is not served by making the government liable for attempting to clean up wastes created by others); *California Dept. of Toxic Substances Control v. Interstate Non-Ferrous Corp.*, 298 F.Supp.2d 930, 955 (E.D. Cal. 2003) (stating that governmental regulatory action taken to clean up a contaminated site does not subject the government to liability under CERCLA); *United States v. American Color & Chem. Corp.*, 885 F.Supp. 111, 114 (M.D. Pa. 1995) (stating that acts undertaken by a governmental entity to ameliorate a dangerous situation that, but for the prior action of the generators and transporters of the hazardous waste would not exist, do not subject the governmental entity to CERCLA liability for clean-up costs). Accordingly, in our view, a local government would not be liable for clean-up costs at the site merely by virtue of performing its statutory functions in quarantining clandestine methamphetamine lab locations.

In considering the question of whether a local government will be liable for damages for impairing access to or use of property subject to quarantine, we note that the issue presented involves "takings" analysis.[1] The precise nature of the governmental action in effecting a quarantine under Tenn. Code Ann. § 68-212-503(b) is simply to regulate the use of property. The local government does not physically occupy the property, nor does it affect the property in any way other than preventing inhabitation of the quarantined property or offering it to the public for temporary or indefinite habitation until such time as the property has been certified as safe for human use. Tenn. Code Ann. §§ 68-212-503(d), 68-212-505.

The United States Supreme Court long ago recognized that, separate from a direct appropriation of private property, the power of the government to redefine the range of interests included in the ownership of property is constrained by constitutional limits. *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 414-15, 43 S.Ct. 158, 160, 67 L.Ed. 322 (1922). To place this principle more in the context of the quarantine provision at issue here, *Mahon* stands for the proposition that although the government has the authority to regulate land use, it must do so within the confines of certain constitutional guarantees, among them the "just compensation" clause of the United States Constitution.[2] *Mahon* marked the birth of "regulatory takings" jurisprudence. In the years since,

---

[1]Generally speaking, a "taking" stems from the government depriving a property owner of the use and enjoyment of property.

[2]The United States Constitution provides that private property shall not be taken for public use without just compensation. U.S. Const. amend. V. Similarly, the Tennessee Constitution provides that "[n]o man's particular services shall be demanded, or property taken, or applied to public use, . . . without just compensation being made therefore." Tenn. Const. art. I, § 21.

it has become clear that, for the most part, regulatory takings analysis entails a very case-specific, ad hoc, factual inquiry. *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1015, 112 S.Ct. 2886, 2893, 120 L.Ed.2d 798 (1992).

In cases involving regulations analogous to the quarantine provision at issue here, where the governmental regulation represents neither a physical invasion of property nor a complete regulatory taking,[3] takings analysis focuses generally on the balance of public and private interests involved. Several factors are commonly considered, including (1) the economic impact of the regulation, (2) the degree to which the regulation has interfered with the property owner's reasonable, distinct investment-backed expectations concerning the property, and (3) the character of the regulatory action.[4] *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104, 124-25, 98 S.Ct. 2646, 2659, 57 L.Ed.2d 631 (1978).

Obviously, it is difficult to offer a general answer to a question that necessarily entails a case-specific inquiry. *Cf. Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 535 U.S. 302, 320, 122 S.Ct. 1465, 1477-78, 152 L.Ed.2d 517 (2002) (commenting that a facial takings challenge faces an "uphill battle" because the lack of proof as to a specific deprivation hampers an ad hoc, fact-intensive inquiry). For example, the quarantine of a non-residential out-building on a parcel of property would seem to present a different case than the quarantine of a private residence, both of which present different cases than the quarantine of commercial residential property (*e.g.*, a motel room).

Common to all scenarios, however, is the character of the regulatory action. The quarantine provision does not seek to prevent all uses of the property subject to quarantine, and it provides property owners a ready method to remove the quarantine. *See* Tenn. Code Ann. §§ 68-212-503(c), 68-212-503(d). Moreover, the quarantine provision is aimed at protecting public health. *See* Tenn. Code Ann. § 68-212-503(a). It is well-established that prohibiting the use of property for purposes declared to be injurious to public health and safety militates against a finding that such governmental regulation constitutes a taking. *See, e.g., Penn Cent. Transp. Co.*, 438 U.S. at 125, 98 S.Ct. at 2659-60; *Mugler v. Kansas*, 123 U.S. 623, 668-69, 8 S.Ct. 273, 300-01, 31 L.Ed. 205 (1887). More specifically, the quarantine provision restricts a use of property that is akin to a public nuisance.[5] This circumstance weighs heavily against a finding that the regulation constitutes a taking. *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 487-88, 107 S.Ct. 1232,

---

[3]A complete regulatory taking occurs when a regulation permanently deprives an owner of all economically beneficial use of property. *See generally Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 112 S.Ct. 2886, 120 L.Ed.2d 798 (1992).

[4]Apart from the multiple specific factors relevant to the analysis of regulatory takings issues, it is clear that, as a general matter, the analysis must focus on the parcel as a whole and not on discrete segments of the parcel. *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 535 U.S. 302, 326-27, 122 S.Ct. 1465, 1481, 152 L.Ed.2d 517 (2002).

[5]The concept of nuisance even includes conditions that render the ordinary use or physical occupation of property uncomfortable. *Hayes v. City of Maryville*, 747 S.W.2d 346, 350 (Tenn. Ct. App. 1987).

1243, 94 L.Ed.2d 472 (1987). Thus, given all of the circumstances detailed above, the character of the quarantine provision weighs against a finding of a taking.

Additionally, a property owner has no reasonable expectation to inhabit or offer for inhabitation property that poses a risk to human health. Nor could a property owner reasonably expect to be able to put property to a use that constitutes a nuisance. *See Keystone Bituminous Coal Ass'n*, 480 U.S. at 491, 107 S.Ct. at 1245, n.20 (commenting that the government has not "taken" anything when it asserts the power to restrict nuisance-like activity, because no individual has the right to use property so as to create a nuisance or otherwise harm others). Accordingly, given both the lack of any reasonable expectation to put property to the particular use restricted by the quarantine provision and the remedial character of the regulation, it is the opinion of this Office that a quarantine pursuant to Tenn. Code Ann. § 68-212-503(b) is unlikely to amount to a taking.

We note that it has been quite some time since the Tennessee Supreme Court considered a regulatory takings issue analogous to the one presented in this opinion request.[6] The Tennessee Court of Appeals, however, has more recently considered a takings challenge to land use regulation, and we believe the analysis is consistent with the framework outlined earlier in this opinion. *See Varner v. City of Knoxville*, No. E2003-02650-COA-R3-CV, Knox County (Tenn. Ct. App., October 14, 2004, at Knoxville) (analyzing takings challenge to local governmental regulation restricting type of development on property pursuant to the framework of *Lucas* and *Penn Central*). *See also STS/BAC Joint Venture v. City of Mt. Juliet*, No. M2003-00171-COA-R3-CV, Wilson County (Tenn. Ct. App., December 1, 2004, at Nashville) (suggesting analysis of takings challenge to regulation restricting development of property under framework of *Penn Central*).

2. The second question seeks an answer to whether a quarantine of an out-building automatically extends to other buildings on a parcel of property or whether, instead, the local law enforcement agency has the authority to specify the part of the parcel that is subject to the quarantine. It is our understanding that an "out-building" refers to a structure on a parcel of property separate from the principal structure on that parcel.

The statutory scheme provides that a quarantine may extend to "[a]ny property, or any structure or room in any structure on any property wherein the manufacture of [methamphetamine] is occurring or has occurred." Tenn. Code Ann. § 68-212-503(b). This multi-option language generally suggests a certain degree of flexibility and discretion in the decision as to what area of a parcel of property is subject to quarantine. The use of the alternative phrase of "or any structure or room in any structure on any property" clearly indicates that a quarantine may be

---

[6]The Tennessee Supreme Court, much like the United States Supreme Court, has historically declined to find a taking in the case of a land use regulation aimed at abating a public nuisance. *Compare Jackson v. Bell*, 143 Tenn. 452, 226 S.W. 207, 209-10 (1920) (holding that a governmental order requiring destruction of a building as a fire hazard did not constitute a taking because the regulation was aimed at abating a nuisance) *and Thelian v. Porter*, 82 Tenn. 622, 626 (1885) (holding that governmental action in removing building found to be unhealthy did not constitute a taking because the regulation was aimed at abating a nuisance) *with Keystone Bituminous Coal Ass'n*, 480 U.S. at 492, 107 S.Ct. at 1245, n.22 (commenting that the government need not provide compensation when diminishing the value of property by stopping illegal activity or abating a public nuisance).

imposed upon something less than an entire parcel of property and, in fact, even upon something less than an entire structure on a parcel of property. It is worth noting that the statutory scheme, in describing the form deed notice to be filed upon implementation of a quarantine, provides space for a specific "description of property sufficient to identify" in addition to setting forth the property address and owner. Tenn. Code Ann. § 68-212-507(b).

In light of the statutory structure, it is the opinion of this Office that a quarantine of an out-building on a parcel of property does not automatically extend to other buildings on the parcel of property. Law enforcement officers, in imposing a quarantine, have the responsibility to determine where the manufacture of methamphetamine is occurring or has occurred, for it is only those locations that may be subjected to a quarantine.[7]

3. The third question seeks an answer to whether a quarantine may be imposed at a site where the seizure of a clandestine methamphetamine lab took place before July 1, 2004, the effective date of the quarantine law, but the site remains contaminated. We assume the phrase "seizure of a methamphetamine lab" refers to a situation in which law enforcement officers discovered that the manufacture of methamphetamine was occurring at a site and therefore took action to prevent further manufacture, for instance the arrest of individuals on appropriate criminal charges. The question does not necessarily contemplate that the site or any structures on the site had actually been "seized" by a law enforcement agency.

As mentioned above, the statutory scheme provides, in pertinent part, that a quarantine may extend to "[a]ny property, or any structure or room in any structure on any property wherein the manufacture of [methamphetamine] is occurring or *has occurred*." Tenn. Code Ann. § 68-212-503(b) (emphasis added). The statutory language does not distinguish between instances where law enforcement officers took action before July 1, 2004, and instances where the clandestine methamphetamine lab remained undetected until after July 1, 2004. The plain language of the statute authorizes, as of July 1, 2004, a quarantine for locations wherein the manufacture of methamphetamine "has occurred," past tense. In our view, the use of the past tense, "has occurred," evidences a legislative intent to apply the statutory scheme retrospectively, in other words to authorize quarantine of a site at which the manufacture of methamphetamine occurred before July 1, 2004. This proposition is consistent with the remedial purpose of the statute, the prevention of the exposure of the public to the health hazards of methamphetamine as well as the chemicals and byproducts associated with its manufacture, for it would seem that the danger to public health

[7]It is our understanding that certain law enforcement officers undergo training focused on dealing with situations involving hazardous substances, including training aimed at recognizing and addressing clandestine methamphetamine labs. It is our further understanding that there are screening tools to aid in the determination of whether the manufacture of methamphetamine has occurred in a particular location. These screening tools range from low-tech methods such as the use of litmus testing on applicable surfaces to high-tech methods such as the use of an ion scanner. Different law enforcement agencies may have access to different screening tools. Additionally, it goes without saying that law enforcement officers may take into account other circumstances from the scene (e.g., visual cues such as staining in a bathtub or the presence of broken pseudoephedrine pill capsules, coffee filters, Coleman fuel, or other methamphetamine precursors or reagents) in determining whether the manufacture of methamphetamine has occurred in a particular location.

associated with methamphetamine production is no less present where the manufacture occurred on June 30, 2004, than it is where the manufacture occurred on July 1, 2004.

This conclusion does not, however, end the inquiry. The question remains as to whether the legislature may legitimately choose to apply this statutory provision retrospectively. The Tennessee Constitution provides that "no retrospective law, or law impairing the obligations of contracts, shall be made." Tenn. Const. art. 1, § 20. The Tennessee Supreme Court, in *Dark Tobacco Growers' Coop. Ass'n v. Dunn*, 150 Tenn. 614, 266 S.W. 308, 312 (1924), held that Article I, Section 20, does not inhibit retrospective laws made in furtherance of the police power of the state. *See, e.g.*, Op. Tenn. Att'y Gen. No. 06-125 (August 3, 2006); Op. Tenn. Att'y Gen. No. 05-065 (April 27, 2005); Op. Tenn. Att'y Gen. No. 89-40 (March 29, 1989). In our view, the quarantine statute falls squarely within the police power of the state. *See H & L Messengers, Inc. v. City of Brentwood*, 577 S.W.2d 444, 452 (Tenn. 1979) (stating that the police power is the power to take action to protect the public safety, health, morals or welfare).

Furthermore, the Tennessee Supreme Court has construed Article I, Section 20, as prohibiting laws which take away or impair vested rights acquired under existing laws or create new obligations, impose new duties, or attach new disabilities in respect of transactions or considerations already passed. *Morris v. Gross*, 572 S.W.2d 902, 907 (Tenn. 1978). A vested right, although difficult to define with precision, is one which is proper for the state to recognize and protect, and of which an individual could not be deprived arbitrarily without injustice. *Doe v. Sundquist*, 2 S.W.3d 919, 923 (Tenn. 1999). There is no precise formula for determining what constitutes a vested right, but there are several factors that are commonly considered: (1) whether the public interest is advanced or retarded by retrospective application; (2) whether retrospective application gives effect to or defeats the bona fide intentions or reasonable expectations of affected persons; (3) whether retrospective application surprises persons who have long relied on a contrary state of the law; and (4) the extent to which the statute appears to be procedural or remedial in nature. *Doe*, 2 S.W.3d at 924.

As mentioned, the quarantine provision is aimed at protecting public health and safety, and we believe that the interest in public health and safety would be advanced by retrospective application. Moreover, a property owner cannot reasonably expect to be able to put property to a use that constitutes a nuisance. *See Keystone Bituminous Coal Ass'n*, 480 U.S. at 491, 107 S.Ct. at 1245, n.20 (indicating that no individual has the right to use property so as to create a nuisance or otherwise harm others); *Shelby County v. Dodson*, 13 Tenn. App. 392 (1930) (relating the well-settled common law principle that no individual has a right to commit a nuisance to the injury of the public) (citation omitted). Accordingly, considering all of these circumstances, it is the opinion of this Office that the quarantine provision does not impair a vested right and, thus, Article I, Section 20, does not prohibit retrospective application of the quarantine provision.

ROBERT E. COOPER, JR.
Attorney General and Reporter

MICHAEL E. MOORE
Solicitor General

R. STEPHEN JOBE
Senior Counsel

Requested by:

James H. Fyke, Commissioner
Department of Environment and Conservation
L&C Tower Annex, 1st Floor
401 Church Street
Nashville, Tennessee 37243-0435