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Opinion No. 09-26

Validity of Pending Legislation Affecting Development in Rural Communities

QUESTION

Does House Bill 2361/Senate Bill 2217, which would limit development in certain predominantly rural communities, amount to a compensable taking of property under Article I, Section 21 of the Tennessee Constitution?

OPINION

It is the opinion of this Office that the provisions of House Bill 2361/Senate Bill 2217 limiting development in predominantly rural communities, as long as those communities meet certain specified standards, do not, on their face, constitute a taking. Whether enforcement of the provisions would be deemed a taking, as applied to a particular case, will be fact-dependent and is beyond the scope of this opinion.

ANALYSIS

House Bill 2361/Senate Bill 2217 authorizes the designation of predominantly rural communities under a new chapter titled the "Rural, Agricultural and Natural Resources Act." It further authorizes the Tennessee Department of Environment and Conservation to promulgate rules establishing the requirements a community must meet in order to apply and qualify for such designation, and it sets out strict parameters for development once such areas are designated. The stated purpose of the bill is to safeguard "the rural character and unique beauty of each of the three (3) grand divisions of this state against the rapid expansion of urban development and the loss of thousands of acres of agricultural land each year."

You have inquired whether this bill amounts to an unconstitutional taking under Article I, section 21 of the Tennessee Constitution, which prohibits the taking of private property without "just compensation." 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, 73 L.Ed.2d 868 (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, 120 L.Ed. 2d 798 (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, 67 L.Ed.2d 322 (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 129, 98 S.Ct. at 2661. The Court then concluded that, while the law prevented the plaintiff from using certain features of the airspace above the building for expansion, it in no way interfered with the plaintiff's present use of the terminal itself; nor did it prevent Penn Central from realizing a reasonable return on its investment. *Id.* at 136-37, 98 S.Ct. at 2665-66. 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, 94 L.Ed.2d 472 (1987), the Court was presented with facts almost identical to those it addressed 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. 480 U.S. at 485, 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 497, 107 S.Ct. at 1248 (quoting *Andrus v. Allard*, 444 U.S. 51, 100 S.Ct. 318, 326-327, 62 L.Ed.2d 210 (1979)).

Not long after the *Keystone* decision, the Supreme Court established its threshold categorical formulation in *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 112 S.Ct. 2886, 120 L.Ed.2d 798 (1992), in which it determined that two categories of regulatory action would be compensable without reference to the three-part *Penn Central* type inquiry. But the Court acknowledged that, with respect to the second category, *i.e.*, the deprivation of all economically viable use, it had not clarified the "'property interest' against which the loss of value is to be measured." 505 U.S. at 1016, n.7, 112 S.Ct. at 2894, n.7. The Court went on to suggest that the answer might require an examination of how the property owner's reasonable expectations had been shaped by the state's laws affecting land use. *Id.* at 1016, 112 S.Ct. at 2894.

Applying all of this jurisprudence to the pending legislation that is the subject of this request, it is the opinion of this Office that the provisions of House Bill 2361/Senate Bill 2217 limiting development in predominantly rural communities, as long as those communities meet certain specified standards, are, on their face, constitutionally permissible. Any takings analysis of the enforcement of those provisions will be fact-dependent and must rely upon application of the case law and criteria listed above to the specific facts involved.

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