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STATE OF TENNESSEE

Office of the Attorney General

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PUBLICATIONS

July 12, 2016

Cody York
Director, Publications Division
Secretary of State's Office
8th Floor, Snodgrass Tower
Nashville, Tennessee 37243

RE: Publication of Attorney General's Regulatory Takings Guidelines - Annual Update

Dear Mr. York:

In accordance with Tenn. Code Ann. § 12-1-203, I am enclosing an original and one copy of the annual (2016) update of the Attorney General's Regulatory Takings Guidelines for publication in the Tennessee Register. *There have been no changes in federal or state law affecting takings over the preceding twelve months.* I will also be forwarding to you an electronic version of the guidelines in Word format.

I would appreciate it if you would stamp the enclosed copy "filed" or "received" and return it to me by messenger mail to the address below. If you have any questions regarding this update, please feel free to contact me at the number below.

Sincerely,

Elizabeth P. McCarter
Senior Counsel
(615) 532-2582
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Encls.

Reply To: Office of the Attorney General, Environmental Division
John Sevier State Office Building, 500 Charlotte Avenue, Nashville, Tennessee 37243

[July 2016]

ATTORNEY GENERAL'S GUIDELINES FOR EVALUATION OF PROPOSED REGULATORY OR ADMINISTRATIVE ACTIONS TO AVOID UNCONSTITUTIONAL TAKINGS OF PRIVATE PROPERTY

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I. PURPOSE

These guidelines are submitted by the Office of the Attorney General pursuant to Chapter 924 of the Public Acts of 1994 (codified at Tenn. Code Ann. §12-1-201, *et seq.*). Section 4 of the Act requires the Attorney General to develop guidelines to assist state agencies in the identification and evaluation of government actions that may result in an unconstitutional taking of private property, in order to avoid an unnecessary burden on the public treasury and unwarranted interference with private property rights. The guidelines establish a basic framework for agencies to use in their internal evaluations of the takings implications of administrative and regulatory policies and actions. The guidelines do not prevent an agency from making an independent decision about proceeding with a specific policy or action that the decision maker determines is authorized by law.

These guidelines are intended solely as internal and predecisional management aids for agency decision makers and should not be construed as an opinion by the Attorney General on whether a specific action constitutes a taking. A private party shall not be deemed to have a cause of action against an agency for failure to follow any suggested procedures contained in the guidelines.

II. SCOPE

An agency should evaluate, for their takings implications, its administrative and regulatory policies and actions that affect, or may affect, the use or value of private real property in accordance with the framework established in these guidelines, including, but not limited to, regulations that propose or implement licensing, permitting or certification requirements, conditions or restrictions otherwise imposed by an agency on private property use, and any actions

relating to or causing the physical occupancy or invasion of private property. These guidelines are limited to examination of takings of private real property and are not intended to govern or affect issues such as validity of searches or investigative or discovery demands which are controlled by other statutory and constitutional law.

The following policies and actions are excluded from evaluation under these guidelines:

1. The exercise of the power of eminent domain;

2. The forfeiture or seizure of private property by law enforcement agencies as evidence of a crime or for violations of law;

3. Orders issued by a state agency or court of law that result from a violation of law and that are authorized by statute; and

4. The discontinuation of government programs.

Examples of agency actions that would be excluded under these guidelines include, but are not limited to, tax enforcement and collection activities pursuant to Tenn. Code Ann. § 67-1-1401, *et seq.*, or other authority.

III. GENERAL PRINCIPLES

A. <u>Constitutional and Statutory Framework</u>

The Fifth Amendment to the United States Constitution provides that private property shall not be taken for public use without just compensation. Article 1, Section 21 of 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. . . ." The government may not, therefore, take property except for public purposes within its constitutional authority and only upon payment of just compensation.

The State has historically used its power of eminent domain under Tenn. Code Ann. § 29-16-101, *et seq*. to acquire private property for a public purpose, such as a highway or recreation area, and in so doing has compensated property owners through a formal condemnation proceeding. The government, however, may also become liable for payment of just compensation to private property owners without the initiation of formal proceedings, when private property has either been physically occupied or invaded by the government on a permanent or temporary basis, or so affected by governmental regulation as to have been effectively taken despite the fact the government has neither physically invaded, confiscated nor occupied the property. In contrast to the formal exercise of eminent domain, the private property owner can obtain compensation by filing an "inverse condemnation" suit.

B. Nature of a Taking

A taking of private property rights may occur when permanent or temporary government actions result in the physical occupancy of property, the physical invasion of property, either directly or indirectly (*see* discussion in B. 2. below), or the regulation of property.

1. Physical Occupancy

As a general rule, a physical occupation of property by the government which is permanent is a taking, regardless of how slight the occupancy, the minimal economic impact on the property owner or whether the government action achieves an important public benefit. Aside from formal condemnation exercises, examples of physical occupancy takings include permanent utility easements and access easements. In some circumstances, however, even a temporary access easement may be deemed to be a physical taking. *See* discussion in B. 2. below.

2. Physical Invasion

The concept of permanent physical occupation does not necessarily require that in

every instance the occupation be exclusive or continuous and uninterrupted. Physical invasions of property may also give rise to a taking where the invasions are of a recurring and substantial nature, or of finite duration, and thereby amount to temporary takings. Examples of physical invasion takings may include, among others, flooding and water related intrusions resulting from government projects, access easements, and aviation easement intrusions. The last example is not necessarily limited to direct overflights, but may result where there is continuous interference, through noise, pollution or vibration, with the beneficial use and enjoyment of property. Moreover, the government action that causes a physical invasion must result from some purposeful or intentional action for a taking to exist.

3. Regulatory Takings

Land use regulations that affect the value, use, or transfer of private property may constitute a taking if the regulations are adjudged to go too far. The greater the deprivation of use, the greater the likelihood that a taking will be found. While there is no set formula for determining when government action constitutes a taking, an agency should consider the following criteria:

a. Whether the regulation denies the landowner all economically viable use of his property or substantially interferes with his reasonable investment-backed expectations. In this regard, the timing of the regulatory enactment with respect to the landowner's acquisition of title may be relevant, but not necessarily dispositive.

b. Whether the regulation is not reasonably related or roughly proportional to the projected impact of the landowner's proposed use of the property. Regulation of an individual's property that conditions approval of a permit/development on the dedication of some property or easement for public use, or the payment of funds, must not be disproportionate to the degree to which the individual's property use is contributing to the overall problem. The less

direct, immediate and demonstrable the contribution of the property-related activity to the harm to be addressed, the greater the risk that a taking will be found.

c. The degree to which a regulatory action closely resembles, or has the effect of, physical invasion or occupation of property. For example, an intended policy or action that totally abrogates an essential property interest, such as the right to exclude others by imposing an access easement, may, in certain circumstances, constitute a taking. *See* discussion in B. 2. above and C. 1. below.

C. Special Situations and Suggested Procedures

When implementing a regulatory policy or action and evaluating the takings implications of that policy or action, agencies should consider the following special factors and suggested procedures:

1. Permitting and Certification Programs

The programs of many agencies require private parties to obtain permits or certification before making specific uses of, or acting with respect to, private property. An agency may place conditions on the granting of such permits or certification, or deny the same if an applicant refuses such conditions, without necessarily effecting a taking for which compensation is due, however, the agency should first consider the following factors in determining whether a taking may result:

a. Whether the government action will deprive the owner of essentially all economically viable or productive use of his property (*see* discussion below in C. 2. regarding economic impact of regulation); and

b. The degree to which the state imposed restriction interferes with the owner's reasonable investment-backed expectations; and

c. Whether the condition imposed by the government will result in a permanent physical occupation or invasion of the property, such as an access easement; and

d. Whether a condition that requires a dedication of property to public use or the payment of funds is reasonably related or roughly proportional to the projected impact of the landowner's proposed use of the property. Where public health and safety is the asserted regulatory purpose, then the health and safety risk posed by the property use must be identified with as much specificity as possible and should be real and substantial, and not merely speculative.

2. Assessing Economic Impact of the Regulation as Applied

In assessing whether a proposed policy or action may affect a taking of private property, an agency may want to consider the economic impact of a regulation by examining the following factors:

a. The character and present use of the property, as well as the character and anticipated duration of the proposed or intended government action; and

b. The likely degree of economic impact on all identified property and economic interests. A mere diminution in the value of the property to be regulated by the government's denial of the highest and best use of the property will not generally, by itself, amount to a taking (but *see* discussion below in C. 3. regarding the "parcel as a whole"); and

c. Whether the proposed policy or action carries benefits to the private property owner that offset or otherwise mitigate the adverse economic impact of the proposed policy or action; and

d. Whether alternative actions are available that would achieve the underlying lawful governmental objective and would have a lesser economic impact.

3. The "Parcel as a Whole" Analysis

In determining the economic impact of a proposed or intended government action, an agency should consider the impact on the "parcel as a whole," and not merely the part of the parcel that is subject to regulation. The parcel as a whole is not limited by its geographic dimensions, but also has a temporal aspect defined by the term of years of the owner's interest in the land. Generally, if an owner has been denied economic use of a segment of a parcel, but retains viable economic use of other segments of the same parcel, a taking may not result.

7/8/2016
Date

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Attorney General and Reporter

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