

[Oct. 2023]

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

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I. PURPOSE

The Office of the Attorney General submits these guidelines 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 identifying and evaluating government actions that may result in an unconstitutional taking of private real property. Avoiding unnecessary takings protects the fundamental right to property enshrined in the United States and Tennessee Constitutions and protects the public treasury from undue burdens.

Agencies should consult these guidelines when evaluating the potential takings implications of their administrative and regulatory policies and actions that may affect the use or value of private real property, such as: (1) regulations that propose or implement licensing, permitting, or certification requirements; (2) conditions or restrictions otherwise imposed by an agency on private property use; and (3) actions relating to or causing the physical occupancy or invasion of private property. These guidelines are intended as an aid; each agency should make an independent determination about whether to proceed with a specific policy or action that the agency decisionmaker determines is authorized by law. Even when the law authorizes a taking, an agency should consider whether its objectives can be achieved through less disruptive means.

II. SCOPE AND LIMITATIONS

These guidelines are intended solely for internal use by agency decisionmakers and should not be construed as an opinion by the Attorney General on whether a specific policy or action constitutes a taking. No private party shall be deemed to have a cause of action against an agency for failure to follow the procedures contained in these guidelines.

These guidelines are limited to incidental and regulatory takings of private real property and are not intended to govern or affect issues controlled by other statutory and constitutional law, such as tax enforcement and collection activities pursuant to Tenn. Code Ann. § 67-1-1401, *et seq.* Similarly, these guidelines do not extend to the use of or entry onto private property for investigative or discovery demands or for searches and seizures. The following policies and actions are outside of the scope of these guidelines:

1. The exercise of the power of eminent domain;
2. The search or seizure of private property by law enforcement agencies as evidence of a crime or the forfeiture of private property as a penalty for criminal activity;
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.

III. GENERAL PRINCIPLES

Pursuant to their duties under the United States and Tennessee Constitutions, each agency should evaluate the takings implications of its policies and actions that affect the use or value of private real property.

A. Constitutional and Statutory Framework

Both the United States Constitution and the Tennessee Constitution prohibit the compelled taking of private property unless such taking is for a public use and the property owner is given just compensation. The Fifth Amendment to the United States Constitution provides that no person “shall be deprived of . . . property, without due process of law; nor shall private property be taken for public use, without just compensation.” Similarly, 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. . . .”

Historically, the State has 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. When exercising its eminent domain powers, the State generally initiates a formal condemnation proceeding to take title to the property and establish the amount of just compensation owed to the property owners. However, the constitutional requirements of public use and just compensation may apply to other government actions that affect the use or value of private real property. For example, a state policy or action that causes private property to be permanently or temporarily occupied may constitute a taking. Additionally, a government action that negatively impacts the owner’s use of real property may constitute a taking, even if the government has not physically occupied, invaded, or confiscated the property. In such instances, the private property owner may seek just compensation by filing an “inverse condemnation” action pursuant to Tenn. Code Ann. § 29-16-123.

B. Types of Takings

Courts have recognized three types of takings resulting from state action other than the exercise of eminent domain: (1) physical occupation takings, (2) nuisance-type takings, and (3) regulatory takings. Physical occupation takings and nuisance-type takings generally require that the government cause some physical intrusion into real property, whereas regulatory takings involve governmental limits or conditions on the use or enjoyment of the property.

1. Physical Occupation Takings

A physical occupation taking generally occurs when the government causes a permanent or sustained physical occupation of private property, regardless of how slight the occupancy, how minimal the economic impact on the property owner, and 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.

A physical occupation taking may also occur if a government action causes a destruction of a property owner's rights, even if the property itself is not physically invaded. For example, the closing of a street abutting property may constitute a physical occupation taking if it destroys the property owner's easement of access to and from the property.

2. Nuisance-Type Takings

The concept of physical occupation does not require that the occupation be exclusive or continuous and uninterrupted in every instance. Intentional or purposeful physical invasions of property may also give rise to a nuisance-type taking where the invasions are of a recurring and substantial nature, or of finite duration, and thereby amount to a temporary taking. Examples of nuisance-type takings include: 1) temporary flooding and water-related intrusions resulting from government projects; 2) public access easements, even if they are intermittent as opposed to continuous, and even if such easements do not burden a particular parcel of property, as long as they appropriate the right to exclude others; and 3) aviation easement intrusions. Aviation easements are not limited to direct overflights but may occur when noise, pollution, or vibration continuously interferes with the beneficial use and enjoyment of property.

3. Regulatory Takings

Agency regulations that affect the value, use, or transfer of private real property may constitute takings. For example, many agencies require private parties to obtain permits or certifications before making specific uses of, or acting with respect to, private property. An agency may place conditions on the granting of such permits or certifications without necessarily causing a legal taking for which compensation is owed. However, such regulations become government

takings if they “go too far.” The greater the deprivation of use or diminution of value, the greater the likelihood that the regulation constitutes a taking. When evaluating whether a regulation or action constitutes a government taking, courts generally use the factors identified in Part C below.

C. Evaluating Regulations and Actions for Takings Implications

An agency should consider the issues identified below when evaluating whether an action or regulation may constitute a taking.

1. General Takings Considerations

a. The regulation’s economic impact and interference with investment-backed expectations. The greater the effect on the use or value of the property, the more likely it will be considered a taking. A regulation that deprives a property owner of all economically viable use of the property is generally considered a taking *per se*. Conversely, a mere diminution in value of the property caused by the government’s denial of its highest and best use will not generally be considered a taking. In evaluating the economic effect on the property, courts will often consider the expectations of the owner at the time of acquisition, such as whether the government action or regulation occurred prior to ownership, but such considerations are not necessarily dispositive.

b. The public good achieved by the regulation. A regulation affecting property that promotes the health, safety, morals, or general welfare of the public is less likely to be considered a taking, even if it significantly impacts the value of the property. The less direct, immediate, and demonstrable the contribution of the property-related activity to the harm to be addressed, the greater the likelihood that the government’s action will be found to constitute a taking. Where public health and safety is the asserted regulatory purpose, the risk of harm to the public posed by the property use must be identified with as much specificity as possible and should be real and substantial, not merely speculative.

c. The proportionality of the regulation. When evaluating the public benefits of a regulation, an agency should also consider its proportionality—whether the regulation unreasonably concentrates a burden on a few persons or imposes an unreasonable burden in light of the public good to be achieved. Similarly, an agency should consider whether the proposed policy or action carries benefits to the property owner that offset or otherwise mitigate the adverse economic impact of the proposed policy or action.

d. The character of the regulation. The more closely that a regulatory action resembles, or has the effect of, a physical invasion or occupation of property, the more likely it will be considered a taking. For example, a regulation that creates a public access easement across someone's private real property may constitute a taking if such easement functionally deprives the owner of the right to exclude others.

2. Special Considerations

In addition to examining the factors above when determining whether an agency action or regulation constitutes a taking generally, agencies should also consider the following:

a. 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. If multiple lots have a common owner, for example, an agency should consider whether the owner could reasonably anticipate that their holdings would be treated as one parcel or, instead, as separate tracts. The parcel as a whole analysis is not limited by its geographic dimensions but includes 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.

b. Less Disruptive Alternatives

Whether or not an agency determines that its action or regulation constitutes a taking or that a particular taking is allowed, the agency should consider whether alternatives are available that would achieve the underlying objective with a lesser impact on a property's use or value.

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