STATE OF ARIZONA

OFFICE OF THE ATTORNEY GENERAL

ATTORNEY GENERAL OPINION by TERRY GODDARD ATTORNEY GENERAL December 12, 2008	No. I08-011 (R08-017) Re: Statutes Requiring Paving or Stabilization of Parking Lots and Driveways as Air Pollution Control Measures

TO: The Honorable Carolyn S. Allen
Arizona State Senate

Questions Presented

You have asked for an Attorney General opinion addressing whether the implementation of Arizona Revised Statutes ("A.R.S.") §§ 9-500.04(A)(7) and 49-474.01(A)(6) would constitute a taking requiring compensation to the affected property owners under the Arizona or United States Constitutions. These statutes require the adoption and enforcement of laws mandating the paving or stabilization of parking lots and driveways in certain areas of the State. You have also asked whether A.R.S. § 12-1134, adopted as part of Proposition 207 in the 2006 general election, would affect the implementation of these statutes.

Summary Answer

The enforcement of ordinances or other laws that A.R.S. §§ 9-500.04(A)(7) and 49-474.01(A)(6) requires would not result in a taking of property under either the Arizona or United States constitutions or under A.R.S. § 12-1134, as long as such ordinances or other laws did not deprive a landowner of virtually all beneficial or economic use of the land.

Background

In 2007, the Legislature passed Senate Bill 1552, an air pollution control measure, codified in part at A.R.S. §§ 9-500.04(A)(7) and 49-474.01(A)(6). 2007 Ariz. Sess. Laws, ch. 292, § 1. Section 9-500.04(A)(7) applies to cities and/or towns in area A, which is defined in A.R.S. § 49-541(1), as the Phoenix metropolitan area. It requires any city or town in area A to adopt or amend its codes or ordinances to ensure that "parking, maneuvering, ingress and egress areas that are three thousand square feet or more in size at residential buildings with four or fewer units are maintained with a paving or stabilization method authorized by the city or town by code, ordinance or permit." A.R.S. § 39-500.04(A)(7). Section 49-474.01(A)(6) requires a county with a population of over two million people or in an area designated by the United States Environmental Protection Agency as a serious PM_{10}[1] nonattainment area to adopt or amend its codes or ordinances to contain the same requirements. The Phoenix metropolitan area is one such designated nonattainment area. *See* http://www.azdeq.gov/environ/air/plan/notmeet.html (listing designated nonattainment areas in Arizona). The purpose of these new laws is to reduce airborne particulate (dust) pollution. *Arizona State House of Representatives, Fact Sheet for S.B. 1552*, 48th Leg., 1st Reg. Sess.

[1] "PM_{10}" is an airborne pollutant of 10 micrometers or less in size. A.A.C. § R18-2-101(86). Health impacts related to PM_{10} pollution may be found in the U.S. Environmental Protection Agency Fact Sheet issued in connection with its adoption of national standards, at http://www.epa.gov/particles/pdfs/20060921_factsheet.pdf.

Analysis

We analyze questions of government takings under both the United States and Arizona constitutions, as well as under A.R.S. § 12-1134.

A. United States Constitution

The "takings clause" of the Fifth Amendment to the United States Constitution prohibits the taking of "private property . . . for public use, without just compensation." The takings clause applies to a direct appropriation of property or to the "functional equivalent of a practical ouster of [the owner's] possession." *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 537 (2005) (citations and quotation marks omitted). In addition, since the decision in *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922), the United States Supreme Court has recognized that "government regulation of private property may, in some instances, be so onerous that its effect is tantamount to a direct appropriation or ouster—and that such 'regulatory takings' may be compensable under the Fifth Amendment." *Lingle*, 544 U.S. at 537.

In *Lingle*, the Court described two categories of regulatory action that it would generally deem *per se* takings for Fifth Amendment purposes. "First, where government requires an owner to suffer a permanent physical invasion of her property—however minor—it must provide just compensation." *Id.* at 538 (citing *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982) (state law requiring landlords to permit cable companies to install cable facilities in apartment buildings effected a taking)). The Court has similarly found a taking where a regulatory authority has required landowners to grant public access easements as a condition of obtaining permits from the authority. *Id.* at 539, 546-48 (citing *Dolan v. City of Tigard*, 512 U.S. 374 (1994); *Nollan v. Calif. Coastal Comm'n*, 483 U.S. 825 (1987)). Second, a taking occurs when regulations completely deprive an owner of "'*all* economically beneficial us[e]' of her

property." *Id.* at 538 (quoting *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1019 (1992) (holding that South Carolina law prohibiting construction within certain distance of shoreline constituted taking and required compensation because it deprived landowner of any reasonable economic use of the land)).

Aside from the above two relatively narrow categories of regulatory takings, the Supreme Court has stated that regulatory takings challenges are governed by the standards set forth in *Penn Central Transportation Company v. New York City*, 438 U.S. 104 (1978). The *Penn Central* decision did not develop any set formula for determining when a regulatory taking has occurred, but did identify several factors the Court would consider in that analysis, including the economic impact of the regulation on the property owner and the extent to which the regulation "interfered with distinct investment-backed expectations." *Penn Central*, 438 U.S. at 124. The *Penn Central* Court also looked to the "character of the governmental action," and whether it amounts to a physical invasion or merely affects property interests through "some public program adjusting the benefits and burdens of economic life to promote the common good." *Id.*

The Court in *Penn Central* also stated that the land "parcel as a whole" is what should be measured in determining the degree to which a property's value has been affected by regulatory action. *Id.* at 130-31. In so doing, the *Penn Central* Court ultimately upheld a landmark preservation law that prevented the construction of a multi-story office tower over the Grand Central Terminal, arguably costing the landowner millions of dollars. *Id.* at 138. *Penn Central* cited previous Supreme Court decisions where regulations were upheld even though they drastically reduced the value of the affected landowner's property, as much as 75 to 87 percent. *Id.* at 131. As the *Lingle* Court commented, the Supreme Court's takings cases "share a common touchstone. Each aims to identify regulatory actions that are functionally equivalent to the

classic taking in which government directly appropriates private property or ousts the owner from his domain." *Lingle*, 544 U.S. at 539.

Short of a law requiring a property owner to suffer a physical invasion of his property rights or a virtual elimination of the economic benefit of such property, the U.S. Supreme Court has upheld regulatory action as not being a taking. The U.S. Supreme Court has not addressed compensation in any circumstance close to the situation at hand, where a law would merely require the paving or stabilization of driveways and parking areas. The requirement to pave or stabilize the driveways and parking areas of a parcel of land to improve the public's air quality presumably would not substantially preclude a property's intended use. Likewise, the requirement will not result in a physical invasion of, or ouster from, any affected landowner's property. Accordingly, the requirement is not a taking under the U.S. Constitution.

B. Arizona Constitution

The Arizona Constitution's "takings clause" is found at Ariz. Const. art. II, § 17. Arizona courts have, in interpreting this provision, followed the U.S. Supreme Court in holding that diminution in the value of land alone is not sufficient to constitute a taking of private property and that deprivation of the most beneficial use of the land is also not sufficient to constitute a taking. *Ranch 57 v. Yuma*, 152 Ariz. 218, 226, 731 P.2d 113, 121 (App. 1986). A taking would occur if an aggrieved property owner could show that an ordinance, if enforced, would put such a restriction on the owner's property as to "preclude its use for any purpose to which it is reasonably adapted," and thus destroy its economic value. *Id.* (internal citations omitted).

Therefore, because the legal standard is the same, the analysis of the statute under the Arizona Constitution is necessarily similar to the analysis under the U.S. Constitution. The imposition of a requirement to pave or stabilize the driveways and parking areas of a parcel of

land presumably would not preclude its intended use, or result in a physical invasion of, or ouster from, any affected landowner's property, and thus would not qualify as a taking under the Arizona constitution.

C. Proposition 207

Finally, we examine the effect of A.R.S. § 12-1134, which passed with Proposition 207 in November 2006. This statute provides, in subsection A:

> If the existing rights to use, divide, sell or possess private real property are reduced by the enactment or applicability of any land use law enacted after the date the property is transferred to the owner and such action reduces the fair market value of the property the owner is entitled to just compensation from this state or the political subdivision of this state that enacted the land use law.

The statute contains in subsection (B)(1) an exception declaring that it does not apply to laws that "[l]imit or prohibit a use . . . of real property for the protection of the public's health and safety, including rules and regulations relating to fire and building codes, health and sanitation, transportation or traffic control, solid or hazardous waste, and pollution control."

Both A.R.S. §§ 9-500.04(A)(7) and 49-474.01(A)(6) are pollution control measures designed to reduce airborne contaminants, including dust, from unpaved and unstabilized parking areas and roadways. As such, these statutes fall within the exception stated in A.R.S. § 12-1134(B)(1), and thus the takings provisions of this statute do not apply to them.

Conclusion

For the foregoing reasons, an ordinance or code provision adopted or enforced pursuant to the requirements of A.R.S. §§ 9-500.04(A)(7) and 49-474.01(A)(6) that did not deprive a landowner of virtually all beneficial or economic use of his or her property would not effect a

taking of property requiring that compensation be paid to any landowner under either the United States or Arizona constitutions, or under A.R.S. § 12-1134.

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