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MEMORANDUM

To: Frank Piorko., Division Director
Division of Watershed Stewardship
Department of Natural Resources and Environmental Control

From: Ralph K. Durstein III, Deputy Attorney General

Copies: David Small, DNREC Secretary
Aaron Goldstein, State Solicitor

Re: Regulatory Takings Review
Regulations Governing Beach Protection and the Use of Beaches

Date: November 19, 2015

Question

Do the comprehensive amendments to *7 Del. Admin. Code 5102*, the Regulations Governing Beach Protection and the Use of Beaches, constitute a “taking” of private property in violation of the Fifth Amendment of the United States Constitution or of Article I, Section 7 of the Delaware Constitution?

Answer

No, for the reasons stated below, the proposed Regulations lack the potential to trigger a taking of private property, such that compensation to a property owner would be required.

Regulations

The Division of Watershed Stewardship has proposed amendments to Title 7 of the Delaware Administrative Code, Section 5102, published in the Delaware Register of Regulations in October of 2015. These draft Regulations were a product of a series of meetings and workshops conducted by a Regulatory Advisory Committee over a period of over a year, since the Start Action Notice issued on May 20, 2014. A public hearing was held in Lewes on November 7, 2015, and the comment period concludes on December 7, 2015.

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Discussion

You have asked for a review of the Beach Preservation Regulations, in light of 29 *Del.C.* §605(a), which provides that “[n]o rule or regulation promulgated by any state agency shall become effective until the Attorney General has reviewed the rule or regulation and has informed the issuing agency in writing as to the potential of the rule or regulation to result in a taking of private property.” According to the statute, a “taking of private property” means “an activity wherein private property is taken such that compensation to the owner of that property is required by the Fifth and Fourteenth Amendments to the Constitution of the United States or any other similar or applicable law of this State.” 29 *Del.C.* §605(c). The Takings Clause of the Fifth Amendment to the United States prohibits the federal government from taking private property for public use without providing just compensation. The Takings Clause applies to state action through the Fourteenth Amendment. *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 160 (1980). Article I, Section 7 of the State of Delaware Constitution of 1897 contains a similar prohibition: “nor shall he or she be deprived of life, liberty or property, unless by the judgment of his or her peers or by the law of the land.” *See Cannon v. State*, 807 A.2d 556,568-570 (Holland, J. dissenting). The required review thus involves an inquiry into whether the proposed regulatory changes have the potential to mandate compensation for the taking of private property pursuant to the United States Constitution or other laws.

When a state directly appropriates private property, it is considered a *per se* taking, and the state has a duty to compensate the owner. *Tahoe–Sierra Pres. Council v. Tahoe Reg'l Planning Agency*, 535 U.S. 302, 322 (2002) (moratorium on development imposed during the process of devising a comprehensive land-use plan does not constitute a *per se* taking of property requiring compensation under the Takings Clause). The present inquiry does not present such a

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classic taking, but instead poses the issue of a so-called “regulatory taking”, where a possible interference with property rights “arises from some public program adjusting the benefits and burdens of economic life to promote the common good.” *Penn Central Transp. Co. v. New York City*, 438 U.S. 104, 124 (1978) (upholding use of historic landmark preservation law). A land use regulation does not effect a taking, so long as it substantially advances legitimate state interests and does not deny an owner economically viable use of his land. *Nollan v. California Coastal Comm’n.*, 483 U.S. 825, 834 (1987).

The State’s authority to protect natural resources through regulations is broad; but not unlimited. “While property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking.” *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415, (1922) (statutory bar to exercise of mining rights reserved by deed is a taking under eminent domain). Where, as here, the question involves a possible regulatory taking, there is no set formula for analyzing the impact of proposed regulations on property rights. *Tahoe-Sierra, supra*, at 326. Courts engage in a searching factual inquiry to determine whether a taking has been effected. *New Jersey v. United States*, 91 F.3d 463, 468 (3d Cir.1996). The jurisprudence of regulatory takings is characterized by “essentially *ad hoc*, factual inquiries,” *Penn Central*, 438 U.S. at 124, designed to allow “careful examination and weighing of all the relevant circumstances.” *Palazzolo v. Rhode Island*, 533 U.S. 606, 636 (2001) (O’Connor, J., concurring) (statutory bar to development of wetland not a taking where property retained value).

The constitutionally-protected right of a property owner to do as he or she sees fit with his or her own property is not absolute; but is subject to such reasonable restraints and regulations established by law as the legislature, under power vested in it by the Constitution, may think necessary and expedient, including zoning, eminent domain, and the police power.

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16B Am.Jur.2d Constitutional Law §631. In reviewing the constitutionality of a zoning ordinance, courts employ a substantive due process inquiry, involving a balancing of landowners' rights against the public interest sought to be protected by an exercise of the police power. *Township of Exeter v. Zoning Hearing Bd. of Exeter Tp.*, 962 A.2d 653, 659 (2009) (striking down an ordinance prohibiting billboards larger than 25 square feet). There is, for instance, no general constitutional right to be free from all changes in land use laws, *New Port Largo, Inc. v. Monroe County*, 95 F.3d 1084, 1090 (11th Cir.1996) (rezoning of breakwater property for airport use upheld), and there is no constitutionally protected right to the most profitable or the most desirable use of real property. *Edgewater Inv. Assoc. v. Borough of Edgewater*, 510 A.2d 1178, 1185-86 (1986) (upholding act protecting seniors and disabled from eviction through conversion of housing to condominiums).

To succeed on a regulatory takings claim, a citizen would have to show that the State's action affected a "legally cognizable property interest." *Prometheus Radio Project v. FCC*, 373 F.3d 372, 428 (3d Cir.2004) (upholding FCC regulation of airwaves). In the absence of such showing, there can be no taking. The doctrine of regulatory takings "aims to identify regulatory actions that are functionally equivalent to the classic taking [of real property]." *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 539, (2005). For example, when the government uses its own property in such a way that it destroys private property, it has "taken" that private property. See *United States v. Causby*, 328 U.S. 256, 261–262 (1946) (heavy military aircraft flying 83 feet above plaintiffs' chicken farm, where barn was 2,220 feet from runway); *Pumpelly v. Green Bay Co.*, 13 Wall. 166, 177–178, (1872) (dam flooding plaintiff's land constituted a taking). It is a taking when a state regulation forces a property owner to submit to a permanent physical occupation, *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 425–426, (1982)

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(CATV cables in rental housing by city franchise), or deprives him of all economically beneficial use of his property, *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1019, (1992) (absolute prohibition on building on oceanfront lots). States may effect a taking if they recharacterize as public property what was previously private property. See *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 163–165, (1980) (county claiming interest on funds held in escrow as “public funds” despite collecting fee for filing).

The character of the state action is relevant to the determination of whether the regulation has “gone too far”. Like a taking of private property under the government’s eminent domain power, a regulatory taking must serve a genuine “public purpose”. *Kelo v. City of New London*, 545 US. 469, 480 (2005) (condemnation pursuant to urban development plan was a valid public use of eminent domain power and not an unconstitutional taking). Courts have then undertaken a balancing test to determine whether the regulations are equivalent to a classic taking through the transfer of property to the State by eminent domain. *Stop the Beach Renourishment, Inc. v. Florida Department of Environmental Protection*, 560 U.S. 702 (2010) (upholding state’s beach replenishment project that allegedly deprived beachfront owners of littoral rights). Courts have examined whether restrictions on the development of beachfront property, *Lucas, supra*, wetlands, *Palazzolo, supra*, as well as a moratorium on development, *Tahoe-Sierra, supra*, have gone too far, giving rise to claims for compensation, or can be justified as legitimate exercises of the police power in the public interest with limited private impact.

Unlike a physical appropriation of land, a public program adjusting the benefits and burdens of economic life to promote the common good ordinarily will not generate a right to compensation. *American Exp. Travel Related Services, Inc. v. Sidamon-Eristoff*, 669 F.3d 359, 371 (3rd Cir.2012) (amendment to unclaimed property statute reducing presumptive

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abandonment period). Thus, that a regulation “adversely affect[s] recognized economic values” is not enough to constitute a taking. *Id.* Even a regulation that prohibits the most beneficial use of property, or prevents an individual from operating an otherwise lawful business, does not necessarily violate the Takings Clause. *Penn Cent. Transp. Co. v. New York City*, *supra* at 122 . If a state regulation appears genuinely designed to prevent harm to the public and is likely to achieve that goal, and the harm suffered by the property owner does not appear to be one that should be borne by the entire community, courts will not find a taking. *Zeman v. City of Minneapolis*, 552 N.W.2d 548, 554 (Minn.1996) (city's revocation of property owner's rental dwelling license did not constitute a taking of owner's property; since ordinance served public harm prevention purpose); *Keystone Bituminous Coal Ass'n. v. DeBenedictis*, 480 U.S. 470, 488-93 (1987) (Act limiting removal of coal underneath structures not a taking); *Mugler v. Kansas*, 123 U.S. 623, 661-62 (1887) (State alcohol prohibition law a valid exercise of police power and does not constitute a “taking” of property).

As the United States Supreme Court observed in *Pennsylvania Coal Co.*, *supra*, 260 U.S. at 413, “[g]overnment hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law”. Government regulations may deprive an owner of a beneficial property use—even the most beneficial such use—without rendering the regulation an unconstitutional taking. *Bardsley v. Conservation Comm’n. of Harwich*, 997 N.E.2d 1221 (Mass.App.2013) (upholding denial of permit to construct bridge over salt marsh, due to failure to address erosion), *citing Daddario v. Cape Cod Commn.*, 681 N.E.2d 833 (1997) (denial of sand and gravel mining permit not a taking). When a regulatory taking involves neither a physical invasion nor a complete deprivation of use, several interrelated factors are considered in determining whether a compensable taking has occurred:

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(1) the economic impact of the regulation on the claimant; (2) the extent to which the regulation has interfered with distinct investment-backed expectations; and (3) the character of the governmental action. *Id.* at 836-837. Even if denial of a variance would result in a taking of property, the commission still had authority to deny the variance. *Chiancola v. Board of Appeals of Rockport*, 843 N.E.2d 108 (Mass.App.2006). Property owners have no legal right to a variance, and variances are to be granted sparingly. *Bardsley, supra.*

The United States Supreme Court has held that the right to fair compensation applies as fully to the taking of a landowner's riparian rights as it does to the taking of an estate in land, if there has been an actual "taking" of those rights. *Lucas, supra.* An amendment to a state's beachfront management act that prohibited a landowner from building on oceanfront lots deprived him of all economically beneficial use of his property, and thus was an unconstitutional taking. *Id.* at 1019. In *Stop the Beach Renourishment, Inc., supra*, the United States Supreme Court denied a legal challenge by beachfront landowners to a beach replenishment project undertaken by the City of Destin and Walton County, Florida to restore beach eroded by a series of hurricanes. The Court held that the creation of public beach on State land did not constitute an unconstitutional "taking" of the property rights of beachfront landowners. The plaintiff in *Harvey Cedars v. Karan*, 70 A.3d 524, 526 (N.J.Supr.2013) owned beachfront property that was affected by dune replenishment following Hurricane Sandy, which afforded protection but partially blocked the ocean view. After Karan could not agree with the town on "just compensation", a hearing was held, and Karan was awarded \$375,000. The trial court declined to consider evidence of enhancement in value due to dune protection as a set-off to the loss of view. The New Jersey Supreme Court reversed, holding that the enhanced market value

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resulting from the public dune replenishment project should have been calculated and considered by the court, in determining whether a partial taking had occurred.

Conclusion

The Delaware General Assembly, in acting comprehensive legislation to promote beach preservation, stated the goals of such conservation emphatically:

“Beaches of the Atlantic Ocean and Delaware Bay shoreline of Delaware are hereby declared to be valuable natural features which furnish recreational opportunity and provide storm protection for persons and property, as well as being an important economic resource for the people of the State. Beach erosion and shoreline migration occur due to the influence of waves, currents, tides, storms and rising sea level. These natural forces have created, and will continue to alter, the beaches of the State. Development and habitation of beaches must be done with due consideration given to the natural forces impacting upon them and the dynamic nature of those natural features. The purposes of this chapter are to enhance, preserve and protect the public and private beaches of the State, to mitigate beach erosion, to create civil and criminal remedies for acts destructive of beaches, to prescribe the penalties for such acts and to vest in the Department of Natural Resources and Environmental Control ("the Department") the authority to adopt such rules and regulations it deems necessary to effectuate the purposes of this chapter.” 7 *Del.C.* §6801.

In pursuit of these goals, DNREC was vested with sole authority to enhance, preserve, and protect public and private beaches within the State, §6803(a), and charged with the responsibility to prevent and repair beach erosion. §6803(b). To that end, DNREC was granted broad authority to promulgate rules and regulations to effectuate the purposes of Chapter 68 of Title 7 of the Delaware Code. §6801. The Secretary was directed to establish a building line along the coast, to define the beach, and for the purpose of regulating construction. 7 *Del.C.* §6802(4).

DNREC was tasked by the legislature to issue permits pursuant to duly promulgated regulations for persons seeking to construct, modify, or rebuild any structure or facility on any beach seaward of the building line, and also for projects involving the

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substantial alteration of any land seaward of the building line which may affect the enhancement, preservation or protection of beaches. §6805(a). Under the criteria set forth in the statute, §6805(d), no property owner may be prevented from repairing, modifying, modernizing, updating, or improving an existing structure, within the existing “footprint”. However, any construction seaward of the building line must be reduced in size or altered so as to eliminate or diminish the amount of encroachment. *Id.* Further, if an existing structure is destroyed by an act of God or other accident, property owners are permitted to rebuild within the “footprint”, so long as the beach has been maintained to “coastal engineering standards of beach protection”. §6802(4).

Under the Beach Preservation Regulations, which implement the statutory mandate, there can be no “taking” of private property rights, because the market value of property is preserved, if not enhanced. The government action is benign, and would not interfere with legitimate investment-backed expectations for private property. Existing owners may rebuild or repair or improve structures, even on lots that straddle the building line established by law, so long as they work within the existing “footprint” and minimize any encroachment. The “four-step process” now included in the Regulations, ¶3.1.1.2.1 – 3.1.1.2.4, ensures that adjacent structures do not protrude seaward excessively, in comparison to their immediate neighbors. Thus, the beachfront property owners are assured that their views will not be impaired, and the value of their lots will be preserved and enhanced by the Regulations.

Because reasonable zoning and land use limitations are a proper exercise of police power, such restrictions will constitute a taking only if they do not substantially advance legitimate state interests or if they prevent economically viable use of the property. *Rodgers, supra.* Such a

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taking occurs only where the property retains little more than a *de minimis* value. *Id.* at 10.

Where, as here, the Regulations preserve the dune system and afford storm protection, the government effectively preserves property values. No taking can occur, where the regulatory scheme merely limits land disturbance in the interest of beach preservation.

The Regulations do not impose a moratorium on development, as was the case in *Tahoe-Sierra, supra*, nor is there a prohibition on building, as was the case in *Lucas, supra*. In instances of rebuilding or improvement of lots straddling the building line, the Regulations would mandate design to minimize encroachment, which could conceivably add to construction costs, but without any adverse impact on market value. Regulations intended to promote the common good by facilitating beach preservation and protecting the shoreline environment will not violate the federal or state constitution due to some incidental impact on private property rights. Beachfront landowners cannot claim compensation for the taking of private property rights where there has not been a significant loss of market value as a result of regulatory actions.

The Delaware regulations governing beach preservation satisfy the criteria of *Penn Central, supra*. The beach regulatory plan is broad, comprehensive, and universal, so that property owners and developers are equally burdened by compliance, while enjoying the benefits of preservation and replenishment. These regulations present a level playing field, and no one party is unfairly prejudiced. Second, the Regulations have been developed and promulgated through a transparent process, such that property owners and developers can readily factor in the effect of any costs associated with compliance on their investment. Builders and engineers have many years of experience with the prior beach preservation regulations, and are fully capable of budgeting for the cost of compliance. There is no issue as to surprise, as investment decisions

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have been made for many years according to the same standards, indeed relying on the beach preservation measures anticipated and facilitated by the Regulations. Third, the Regulations do not prevent a landowner from making valuable use of land or from enjoying a handsome return on investment.

It is clear beyond question that these regulations bear a rational relationship to a legitimate government goal, as set forth in the findings and policy articulated by the General Assembly. The recent amendments incorporate statutory changes and formalize existing policies and practices utilized by DNREC in assessing applications and awarding permits, and set forth the options available to the regulated community in achieving compliance with the Regulations. These amendments unquestionably serve legitimate state interests in preservation of coastal resources and stabilization of beaches.

Finally, the challenged regulations are *not* arbitrary or capricious, and were promulgated in full compliance with the Administrative Procedures Act and Title 7, through a transparent and thorough process that included community workshops and meetings of the Regulatory Advisory Council. The regulations are part of a public program adjusting the benefits and burdens of economic life to promote the common good. The amended Regulations do not constitute a “regulatory taking”, and their adoption would not trigger a valid claim for compensation on the part of anyone.