Mary Sue Terry

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COMMONWEALTH of VIRGINIA

Office of the Attorney General

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The Honorable George F. Allen
Member, House qf Delegates
109 East Jefferson Street

Charlottesville, Virginia 22901

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My dear Delegate Allen:

You ask whether the buffer area requirements of the Chesapeake Bay Preservation Area Designation and Management Regulations and similar requirements in the zoning ordinances of localities outside the area to which those regulation's apply on a mandatory basis create an unconstitutional "taking' of agricultural lands.

1. Applicable Constitutionad, Statutory and Regulat-ory Provisions

A. Constitutional Requirements and ZoninFr Enabling **Statutes**

The Fifth Amendment to the Constitution of the United States prohibits the taking of private property for public use, 'without just compensayon.' Article 1, *S 11* of the Constitution of Virginia (1971) contains a similar prohibition.

Section 15.1-486 of the Code of Virginia authorizes, localities to adopt zoning ordi- nances, dividing their territory Into districts, and In each district regarding, among other matters:

(a) The use of land, buildings, structures and other premises for agricultural, business, industrial, residential flood plain and other specif le uses;

(e) The areas and dimensions of land, water, and air space to be occupied by buildings, structures and uses, and of courts, yards, and other open spaces to be left unoccupied by uses and structures, Including variations In the sizes of lots based on&-wthether a public or community water supply or sewer system is available and ,

1 Iarticle I, S 11 actually requires Just compensation for private property "taken or damaze I for public use. (Emphasis added.) While this appears to be a stricter standard than the federal constitutional requirement, the Virginia provision has, In fact, been applied similarly to the federal one, preserving a distinction between compensable "tak- lng3l and valid noncompensable restrictions on the use of property Imposed through the state's or locality's exercise of Its police power. See *I* A. Howard, *Comrnentaries on the Con3titution of Virginia* 218-23 (1974).

Section 15.1-489 details the permissible purposes of local zoning ordinances, includ- ing "to provide for the preservation of agricultural and forestal lands and other lands of significance for the protection of the natural environment," and "reasonable provisions, not inconsistent with applicable state water quality standards, to protect surface water and groundwater.'

B. Chesapeake Bay Preservation Act and Regulations

The Chesapeake Bay Preservation Act, SS 10.1-2100 through 10.1-2115 (the "Bay Act'), establishes the Chesapeake Bay Local Assistance Board (the "Board"), and empow- ers it to adopt regulations and criteria for the Bay Act'.s implementation.

The Emergency Chesapeake Bay Preservation Area I)esignation and Management Regulations, VR 173-02-01.1, 7:7 Va. Reg3. 'Reg. 1138 (1990) (the 'Reg-Wationsl), adopted by the Board pursuant to the Bay Act, set forth criteria for use by local governments 'to determine the ecological and geographic extent of Chesapeake Bay Preservation Areas' and to "establish criteria for use by local governments in granting, denying, or modifying requests to rezone, subdivide, or to use and develop land In these area3." Section 10.1-2107; *sea also* 7:7 Va. Reg3. Reg., 3upra S 1.3, at 1140.

Local governments in Tidewater Virginia are required to designate the Chesapeake Bay Preservation Areas within their respective jurisdictions and must apply the Regula- tions to protect the quality of state waters within these designated preservation areas, through their comprehensive plans, zoning ordinances and subdivision ordinances. Section 10.1-2109. Local governments outside Tidewater Virginia also may employ the criteria in the Regulations and 'may incorporate protection of the quality of state waters Into their comprehensive plans, zoning ordinances and subdivision ordinances.' Section 10.1-2110.

'Resource Protection Areas' under the Bay Act and Regulations consist of "sensi- tive lands at or near the shoreline that have an intrinsic water gumdity value due to the ecological and biological processes they perform or are sensitive to Impacts which may cause significant degradation to the quality of state waters.' 7:7 Va. Regs. Reg., 3upra S 3.2(A), at 1142. A Resource Protection Area includes a 'buffer area" of naturgLI or established vegetation managed to protect other components of the Resource Protection Area. This buffer area must have a width of not less than 100 feet alongside tidal wet- lands and -otfmr components of the Resource Protection Area, and along both sides of any tributary stream@ EL S 3.2(B)(5).

In agricultural lands, thU buffer area may be reduced to 50 feet when the adjacent land Is enrolled In an agricultural best management practices program and that program is being implemented. IcL 5 4.3(B)(4)(a), at 1145. The buffer area may be reduced to 25 feet when an approved soil and water conservation plan has been implemented on the adjacent land. IcL 5 4.3(B)(4)(b), at 1146. "De buffer area is not required for agticul- tural drainage ditches If the adjacent agricultural land has In place best management practices In accordance with a conservation plan approved by the Io-cal Soil and Water Conser,vation District." Id. 5 4.3(8)(4)(c), at 1146.

II. Regulation Effects "Taking" if It Deprives Owner of All Economically Viable Use of Property

The Supreme Court of the United States long ago held that not every governmental regulation resulting in a diminution of property values constitutes a "taking" coinpensable under the Fifth Amendment. *See Mugler v. Kansai,* 123 U.S. 623 (1887) (state not re- quired to compensate brewery owner for damage to property value resulting from prohi- bition law). Local zoning regulations and similar restrictions on land use, even when they diminish land valoes, likewise have long been upheld. *See Euclid v. Ambler Co-,* 272 U.S. 365 (1926). However, the Supreme Court also has long acknowledged that some regula- tions go too far in restricting property uses, and thereby constitute a taking. Penna. *Coal Co. v. Mahon, 260* U.S. 393 (1922) (state law barring subsurface coal mining to pre- vent subsidence under public buildings invalid exercise of police power to accomplish what state could only achieve by exercise of eminent domain, compensating owner of mineral rights).

These early cases establish the extremes. Analysis of specific taking claims, how- ever, has proven difficult.

The Virginia law of takings, like the federal law, is imprecise in its t>orders and definitions ....

The most important distinction in Virginia law, as in federal law, is that between eminent domain, in which private property is taken or damaged, and the exercise of the police power of the State, in which the use of the prop- erty is simply regulated for the public interest. The former Is compensable; the latter is not.

I A. Howard, supra note 1, at 218, 219.

In recent cases, the Supreme Court of the United States has focused its takings analysis on the economic viability of the uses remaining to the property owner being reg- ulated. The application of land use controls Is a taking only if the ordinance or regula- tion "does not substantially advance legitimate state interests, or denies an owner eco- nonileally viable use of his land.'_ *Agins v. Tiburon,* 447 U.S. 255, 260 (1980) (citations omitted); ios *also Keystone Bituminous Coal As=. v.* DeBonedictLi, 480 U.S. 470, 495 (1987); *Ciampittt v. U.S.,* 22 Ct. Cl. 310 (1991); *Florida Rock* Indui., Inc. *v. Limited States,* 21 Ct. Cl. 161 (1990).

The Supreme Court of Virginia has reached similar conclusions:

All citizens hold property subject to the proper exercise of the police power for the common good.. Even where such an exercis e results In substantial diminution of property v&lues@, an owner has no right to compensation there- for. In *Penn Contmi Transportation Co. v. City of Now York,* 438 U.S. 104 (1978), the Supreme Court held that no taking occurs In these circumstances unles s the regulation Interferes with all reasonable beneficial uses of the prop,erty, taken as a whole.

Comrnonwealth v. County Utilities, 223 Va. 534, 542, 290 S.E.2d 867, 872 (1982) (citations omitted).

Most recently, the Supreme Court of Virginia has held that a zoning ordinance does not constitute a taking unless the owner is "deprived of all economically viable uses of Its property.' *Virginia Beach v. Virginia Land* Invest. A&iri,- 239 Va. 412, 416-17, 389 S.E.2d
312, 314 (1990) (emphasis added).

Ill. On Their Face. Regulations on Agricultural Use Under Bay Act Do Not Exact Taking

The Regulations Ikere adopted pursuant to the Say Act, which makes an express legislative finding that the Regulations are necessary for "[tjhe protection of the public interest in the Chesapeake Day, its tributaries, and other state waters and the promotion of the general welfare of the people of the Commonwealth.' Section 10.1-2100. The protection of Virginia's waters "is a valid exercise of the State's police power.' *Com*- monwoalth v. *County Utilitie3,* 223 Va. at 542, 290 S.F-2d at 872.

The Regulations contain certain buffer zone requirements. 7:7 Va. Reg3. Reg., *supra S* 3.2(B)(5), at 1142. Based on the above, It Is my opinion that these buffer zone requirements are reasonably related to the protection of water qualit' y-

The Regulations also include restrictions that land disturbance be minimized and that indigenous vegetation be preserved to the maximum extent possible consistent with the use and development allowed. Id. S 4.2(l)-(2), at 1143. F- xemptions are made In the Resource Protection Area, Including the buffer area, for water wells, passive recrea- tional facilities, and historic preservation and arl-haeological activities. Id. S 4.5(C), at 1146. In agricultural areas, the buffer zone may be narrowed, and may be eliminated alongside agricultural drainage ditchft, when the adjacent land 1.3 appropriately man- aged. Id. S 4.3(B)(4), at 1145-46. The Regulations speciflcany permit exceptions to the criteria where necessary to afford relief from any unconstitutional effect. Id. S 4.6, at 1146-

On their face, therefore, the Regulations provide for restrictions on the use, not for the physical appropriation, of agricultural lands In the buffer zone. I'hese restrictions dD not purport to eliminate aJU economically viable agricultural uses of the land. The Regu- lations allow for exceptions to avoid unconstitutional application; they are thus explicitly designed to avoid unconstitutional effects.

Based on the above, It Ls my opinion that the agricultural buffer zone requirements in the Regulations do not, on their face, exact an unconstitutional taking.

IV. Whether Regulations Exact Taking of Particular Parcel to Be Determined from Facts of Case

In Penn *Central TrarLip. Co. v. Now York City,* 438 U.& 104 (1978), the Supreme Court of the United States held that 'whether a particular restriction will be rendered Invalid by the government's failure to pay for any losses proximately caused by It depends largely 'upon the particular circumstances [in that) case.' ' Id. at 124 (citation omitted).

> In engaging in these essentially ad hoe, factual inquiries, the Court's deci- sions have identified several factors that have particular significance. The economic impact of the regulation or, the claimant and, particularly, the extent to which the regulation has interfered with distinct investment- backed expectations are, of course, relevant considerations. So too is the character of the governmental action. A 'taking' may more readily be found when the interference with property can be characterized as a pi3ysical inva- sion by government than when interference arises from some public program adjusting the benefits and burdens of economic life to promote the common good.

Id. (citations omitted).

Unless the landowner obtains an exception under 5 4.6 of the Regulations, a local ordinance adopted pursuant to the Regulations will restrict the cultivation of a strip of his land potentially as great as 100 feet in width around tidal wetlands and other compo- nents of the locality's Resource Protection Area, and along both sides of any tributary stream. This use of buffer zones is analogous to the use of well-established setback requirements as part of local land use control, and the requirement that open spaces on privately owned land be landscaped and maintained In good condition', which have been approved by the courts. 2*See, e.g., French* v. Town *of Clintwood,* 203 Va. 562, 568, 125 S.E.2d 798, 802 (1962).

With respect to a particular tract of agricultural land, therefore, whether a local action in conformance with the Regulations interferes with'all beneficial uses of that tract, or deprives the owner of all economically viable uses of his property, necessarily must be determined from the particular ordi@ance in question and the specific circum- stances of its application. If such an unconstitutional impact were Identified, S 4.6 of the Regulations would require the granting of an exception to eliminate the unconstitu- tional effect.

V. Locadities Outside Tidewater Empowered to Adopt Restrictions Similar to Those Mandated by Bay Act and Regulations for Tidewater Jurisdictions

Section 10.1-2110 specifically authorizes localities not subject to the mandatory provisions of the Bay Act and Regulations nevertheless to incorporate those criteria into their comprehensive plans and subdivision and zoning ordinances for "protection of the

2*See alio Bd. Sup. James City County v. Rows,* 216 Va. 128, 1313-41, 216 S.E.2d 199, 208-10 (1975), where the Supreme Court of Virginia upheld an ordinance restricting the buildable a-rea of certain commercial lots, but invalidated a requirement In the same ordinance for mandatory dedication In fee simple of a 55 foot right--of-way for a service road along the existing highway frontage of the same lots. The Court found that, where the need for the road was not generated by the plaintiff's proposed development, this mandatory dedication was a 'taking' without compensation, In violation of *Article 1,* S I I.

quality of state waters." Section 10.1-2103 recognizes such provisions to be a valid exercise of local police powers. Similar authority is found, in the general zoning enabling statutes. See 5 15.1-489.

Although the legislative branch of a local government in the exercise of its police power has wide discretion in the enactment of zoning ordinances, its actions being presumed valid as long as they are not unreasonable and arbitrary, the authority of local governments in this area is not totally unrestricted. *See Board of County SupervL%or3 of Fairfax* County v. Davi3, 200 Va. 316, 322, 106 S.E.2d 152 (1958). 7,oning regulations necessarily "should be related to the character of the district which they affect. . . ." *Bd. of Supervisor3 of Fairfax Co.* v. Allman, 215 Va. 434, 444, 211 &E.2d 48, 54 (1975) (quoting West Bros. Brick Co. v. City of Alexandria, 169 Va. 271, 281, 192 S.E. 881, 885 (1937)). Within these necessarily limited constraints, It is further my opinion that the statutes quoted above make the voluntary adoption of the Regulations' requirements in ordinances of localities outside Tidewater Virginia equally as v&Hd as those mandatorily adopted by Tidewater jurisdictions.

With kindest regards, I am

Sincerely,

Mary Sue Terry
Attorney General

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