April 1, 2009 Local Moratoria on Oil and Gas Drilling

The Honorable Steve Neville
New Mexico State Senator
P.O. Box 2458
Farmington, NM 87499

Re: Opinion Request - Local Moratoria on Oil and Gas Drilling

Dear Senator Neville:

You have requested our advice regarding recent moratoria on oil and gas drilling enacted in Santa Fe and Rio Arriba Counties. In particular, you ask:

1. May a public entity institute a moratorium or restrictive zoning on oil and gas drilling or other extractive activities?

2. What terms of a moratorium or restrictive zoning on oil and gas drilling are reasonable and at what point would the legislation justify an inverse condemnation claim by property owners for just compensation?

As discussed in more detail below, public entities have broad authority to institute a moratorium or restrictive zoning on oil and gas drilling and other extractive activities in the name of protecting public health, safety and welfare. There is no bright line rule for determining when a regulation limiting the use of private property, including drilling, mining and other extractive activities, amounts to a compensable taking. Instead, applicable judicial decisions provide that, in most cases, a regulation limiting the use of private property may be deemed a taking only after a close examination of the specific facts involved.

Your questions implicate the takings clauses of the United States and New Mexico constitutions. The federal takings clause states, in pertinent part: "nor shall private property be taken for public use without just compensation." U.S. Const. amend. V.[1] The state constitution similarly provides that "[p]rivate property shall not be taken or damaged for public use without just compensation." N.M. Const. art. II, § 20. Courts interpret the federal and state takings clauses in materially the same way, despite the additional words "or damaged," in the state constitution. See New Mexicans for Free Enter. v. City of Santa Fe, 2006-NMCA-007, ¶ 52, 126 P.3d 1149.

Judicial interpretations of the takings clause distinguish between physical takings, where the government physically appropriates private property for its own use, and regulatory takings. See Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency, 535 U.S. 302, 321 (2002). In a regulatory taking, the government does not take possession of private property, but "by law or regulation imposes restrictions so severe that they are tantamount to a condemnation or appropriation...." Id. at 322. Compensation for a regulatory taking:

> is required only if considerations such as the purpose of the regulation or the extent to which it deprives the owner of the economic use of the property suggest that the regulation has unfairly singled out the property owner to bear a burden that should be borne by the public as a whole.

Yee v. Escondido, 503 U.S. 519, 523 (1992).

In contrast to a physical taking, determining whether particular land-use regulations constitute a regulatory taking is relatively difficult. In one of the leading cases on regulatory takings, the U.S. Supreme Court acknowledged its inability "to develop any 'set formula' for determining when ... economic injuries caused by public action [should] be compensated by the government, rather than remain disproportionately concentrated on a few persons." Penn Central Transp. Co. v. City of New York, 438 U.S. 104, 124 (1978). Consequently, determining whether a particular restriction requires the government to compensate the landowner is an "essentially ad hoc, factual inquir[y]...." Penn Central, 438 U.S. at 124. See also Yee, 503 U.S. at 523 (deciding whether a regulation constitutes a taking "entails complex factual assessments of the purposes and economic effects of government actions").

Among the key factors the U.S. Supreme Court has identified for evaluating a regulation that restricts land use are the "economic impact on the claimant..., particularly, the extent to which the regulation has interfered with distinct investment-backed expectations" and the "character of the governmental action." Id. (citations omitted). According to the Court, "[a] 'taking' may more readily be found when the interference with property can be characterized as a physical invasion by the government, than when interference arises from some public program adjusting the benefits and burdens of economic life to promote the common good." Id. When analyzing the effect of government action on private property, the Court does not divide the property into segments, e.g., surface, subsurface and airspace, and determine whether the action has eliminated rights in a particular segment. Instead, the Court focuses on "the nature and extent of the interference with rights in the parcel as a whole...." Id. at 130-131. See also Andrus v. Allard, 444 U.S. 51, 65-66 (1979) ("where an owner possesses a full 'bundle' of property rights, the destruction of one 'strand' of the bundle is not a taking").

Typical of laws intended "to promote the common good" are land-use restrictions, such as zoning laws, historic-district legislation and restrictions on landmarks. Governments have broad authority, under zoning and similar laws, "to regulate land use as a way to protect public health, safety and welfare." Cerrillos Gravel Products, Inc. v. Board of County Comm'rs, 2005-NMSC-023, ¶ 8, 117 P.3d 932, 935 (2005). Reasonable regulations promoting "health, safety, morals or general welfare ... by prohibiting particular contemplated uses of land" have been upheld even though they "destroyed or adversely affected recognized real property interests." See Penn Central, 438 U.S. at 125. These include zoning and other regulations that barred or severely restricted the best use of private property, including prohibitions on industrial uses and construction, id. at 125 (citing cases), or that effectively destroyed existing uses of real property. See id. at 125-127 (citing cases upholding government action that required the removal of

cedars to preserve apple trees the government determined were more valuable; prohibited the continued operation of a brickyard the government deemed inconsistent with neighboring uses; and closed gold mines and other business operations to further a substantial public purpose). See also Centre Lime & Stone Co. v. Spring Twp. Bd. of Supervisors, 787 A.2d 1105, 1109 (Pa. Commw. Ct. 2001) (zoning ordinance's exclusion of surface mining and quarrying from forest district was "substantially related to the health, safety and general welfare of the community" and not an unconstitutional taking), appeal denied, 798 A.2d 1291 (Pa. 2002).

Use restrictions on real property amount to a compensable taking in rare cases where they are found to have "an unduly harsh impact upon the owner's use of the property." Penn Central, 438 U.S. at 127. These include regulations that completely destroy affected property interests, See Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1017, 1019-1020, n. 8 (1992) (statute barring construction deprived property owner of "all economically beneficial use of land").[2] See also New Mexicans for Free Enter., 2006-NMCA-007, ¶ 53, 126 P.3d at 1169 (general rule is that a regulation restricting the use of private property will not constitute a taking if the regulation "is reasonably related to a proper purpose and does not deprive the ... owner of substantially all of the beneficial use of his property"). The focus of the inquiry is on the uses a land use regulation permits; a regulation will not be deemed a taking merely because it causes a substantial diminution in property values. See Penn Central, 438 U.S. at 131 (zoning laws that caused a 75% and 87.5% diminution in value did not constitute a taking).

In a relatively recent decision, the U.S. Supreme Court held that the analysis it outlined in Penn Central applied to a moratorium on development. Tahoe-Sierra, 535 U.S. at 321. That case involved two moratoria imposed by the Tahoe Regional Planning Agency "to maintain the status quo while studying the impact of development on Lake Tahoe and designing a strategy for environmentally sound growth." Id. at 306. The moratoria effectively stopped development on most property within the Agency's jurisdiction for 32 months. Id.

Claimants in the case argued that the moratoria amounted to a taking because it temporarily made any beneficial use of the claimants' land impossible. According to the Court, the claimants' argument improperly attempted to "sever a 32-month segment from the remainder of each [affected] landowners' fee simple estate," contrary to the Court's regulatory takings decisions focusing on "the parcel as a whole." Tahoe-Sierra, 535 U.S. at 331. While "a permanent deprivation of the owner's use of the entire area is a taking of 'the parcel as a whole,' ... a temporary restriction that merely causes a diminution in value is not." Id. at 332. In part because of the importance it attached to the "interest in facilitating informed decisionmaking by regulatory agencies," the Court rejected any per se or categorical rule based on the length of temporary restrictions on land use. Id. at 339.[3] Instead, it concluded that the Penn Central approach -- under which the duration of a temporary restriction is but one of several important factors considered -- should be used to decide whether a particular moratorium was a compensable regulatory taking. Id. at 342. See also Santa Fe Village Venture v. City of

Albuquerque, 914 F. Supp. 478 (D.N.M. 1995) (2 ½ year building moratorium designed to preserve status quo pending Congressional action concerning potential national monument did not amount to a compensable taking).

The analysis used to determine whether a government regulation restricting or imposing a moratorium on oil and gas drilling and other extractive activities is a regulatory taking is the same as that employed by the U.S. Supreme Court in Penn Central and Tahoe-Sierra. As discussed above, under that approach no single factor is determinative. It requires a "complex factual assessment" of the purpose and character of the government action and its effect on the economic interests of affected real property owners.

Because the specific facts and context regarding the terms and application of a moratorium or zoning regulation are critical, it is difficult to designate the point at which an otherwise reasonable regulation would constitute a regulatory taking requiring compensation to affected property owners. Nevertheless, it is clear that government bodies have broad authority to restrict or temporarily halt oil and gas drilling in the name of environmental and other considerations affecting the public's health and welfare. See, e.g., Friel v. County of Los Angeles, 342 P.2d 374, 383 (Cal. Ct. App. 1959) (county had right to regulate the drilling and operation of oil wells within its limits, including prohibiting those activities in some districts, "if reasonably necessary for the protection of the public health, safety and general welfare"). See also Bass Enters. Production Co. v. U.S., 381 F.3d 1360 (Fed. Cir. 2004) (BLM's 45-month delay in approving permit to drill for oil and gas in leased lands within WIPP site was not a taking). Under the judicial decisions discussed above, it is unlikely that a court would conclude that a reasonable restriction on oil and gas drilling on private property was a regulatory taking unless the restriction permanently deprived the landowner of all economically beneficial use of the property or rendered the property valueless. Particularly if an owner could use real property for other purposes, a restriction or prohibition on drilling or other extractive activities on the property, by itself, probably would not constitute a taking. See generally Jan G. Laitos and Elizabeth H. Getches, Multi-Layered, and Sequential, State and Local Barriers to Extractive Resource Development, 23 Va. Envtl. L. J. 1, 31 (2004) (where restrictions do not affect portions of owner's property with no resource development activities and those portions remain economically viable, there is no taking).

If we may be of further assistance, please let us know. Your request to us was for a formal Attorney General's Opinion on the matters discussed above. Such an opinion would be a public document available to the general public. Although we are providing you our legal advice in the form of a letter instead of an Attorney General's Opinion, we believe this letter is also a public document, not subject to the attorney-client privilege. Therefore, we may provide copies of this letter to the public.

Sincerely,

ELIZABETH A. GLENN
Assistant Attorney General

cc: Albert J. Lama, Chief Deputy Attorney General

[1] The takings clause of the Fifth Amendment to the U.S. Constitution is applicable to the states through the Fourteenth Amendment. See, e.g., Palazzolo v. Rhode Island, 533 U.S. 606, 617 (2001).

[2] In addition to land-use restrictions that rendered property valueless, government action that amounted to an "acquisition[] of resources to permit or facilitate uniquely public functions" has been characterized as a regulatory taking. Penn Central, 438 U.S. at 127-128. he latter category consists of cases where government action not only affects property adversely, but also uses it. See id. at 128 (describing governmental action that amounted to a taking, including direct flights over a claimant's land that made the present use of the land as a chicken farm impossible and U.S. military installations' repeated firing of guns over a claimant's land).

[3] The Court noted that it would be more appropriate for state legislatures to formulate rules limiting the duration of moratoria on development. See Tahoe-Sierra, 535 U.S. at 342, n. 37.