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Regulatory Takings

The fundamentals and recent application in Texas

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I. TAKINGS JURISPRUDENCE - THE BASICS.

Article I, section 17 of the Texas Constitution provides “[n]o person’s property shall be taken, damaged, or destroyed for or applied to public use without adequate compensation being made.”

The Fifth Amendment of the United States Constitution states: “nor shall private property be taken for public use without just compensation.”

General concepts:

The Takings Clause does not prohibit the taking of private property, instead it provides that the property owner will be compensated. *Lingle v. Chevron U.S.A., Inc.*, 544 U.S. 528, 536 (2005).

In construing article I, section 17 of the Texas Constitution, Texas courts “are generally guided by the United States Supreme Court’s construction and application of the similar guarantee provided by the Fifth Amendment to the United States Constitution and made applicable to the states by the Fourteenth Amendment.” *Edwards Aquifer Authority v. Day*, 369 S.W.3d 814, 838 (Tex. 2012) (citing *Sheffield Dev. Co., Inc. v. City of Glenn Heights*, 140 S.W.3d 660 (Tex. 2004)). *See also Hearts Bluff Game Ranch, Inc. v. State*, 381 S.W.3d 468, 477 (Tex. 2012) (“Our caselaw on takings under the Texas Constitution is consistent with federal jurisprudence.”)

Under the Texas Constitution, “taking,” “damaging,” and “destruction” of one’s property are three distinct claims, but the term “taking” has become shorthand to refer to all three types of claims. *City of Dallas v. Jennings*, 142 S.W.3d 310, 313 n.2 (Tex. 2004). As the Texas Supreme Court has noted, the insertion of the words “damaged or destroyed” in article I, section 17 was “doubtless intended to obviate this question [of whether a compensable taking required a physical appropriation], and to afford protection to the owner of property, by allowing him compensation, when by the construction of a public work his property was directly damaged or destroyed, although no part of it was actually appropriated.” *Sheffield*, 140 S.W.3d 660, 669, n. 37 (quoting *Trinity & S. Ry. Co. v. Meadows*, 73 Tex. 32, 11 S.W. 145, 146 (1889)).

“Real property, tangible property and intangible property may all be the subject of takings claims.” *Cebe Farms, Inc. v. United States*, 116 Fed. Cl. 179, 191 (U.S. Ct. Fed. Claims May 28, 2014). However, under the Fifth Amendment at least, the Takings Clause affords less protection to personal than to real property. *Horne v. U.S. Dept. of Agriculture*, 750 F.3d 1128, 1139 (9th Cir. 2014).

A citizen suing to recover compensation from the government for a taking does so under a claim of “inverse condemnation.” Inverse condemnation is “a cause of action against a governmental defendant to recover the value of property which has been taken in fact by the governmental defendant, even though no formal exercise of the power of eminent domain has been attempted by the taking agency.” *Hearts Bluff Game Ranch, Inc. v. State*, 381 S.W.3d 468, 476 (Tex. 2012).

Elements of the cause of action:

The elements of an inverse condemnation claim are:

1. The governmental entity intentionally performed an act in the exercise of its lawful authority,
2. that resulted in the taking, damaging, or destruction of the claimant’s property,
3. for public use.

Comunidad Balboa, LLC v. City of Nassau Bay, 402 S.W.3d 479, 483 (Tex. App. – Houston [14th Dist.] 2013, pet. denied).

Only an intentional act can give rise to a takings claim. *City of Dallas v. Jennings*, 142 S.W.3d 310, 313 (Tex. 2004).

An inverse condemnation claim may be based on a physical or regulatory taking. *Mayhew v. Town of Sunnyvale*, 964 S.W.2d 922, 933 (Tex. 1998).

A. Types of governmental takings.

1. Direct appropriation.

The clear case of a taking requiring compensation is a direct government appropriation or physical invasion of private property. *Lingle v. Chevron U.S.A., Inc.*, 544 U.S. 528, 537 (2005).

“The Takings Clause is ‘designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.’” *Arkansas Game & Fish Commission v. United States*, 133 S.Ct. 511, 518 (2012) (quoting *Armstrong v. United States*, 364 U.S. 40, 49 (1960)). “And ‘[w]hen the government physically takes possession of an interest in property for some

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