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TAKINGS: A CASE STUDY IN CURRENT ISSUES

Robert F. Brown
Brown & Hofmeister, L.L.P.
740 East Campbell Road
Suite 800
Richardson, Texas 75081
(214) 747-6130
www.bhlaw.net
e-mail: rbrown@bhlaw.net

I.

INTRODUCTION

Numerous papers have been presented at this seminar over the years that provide a primer or overview of takings law.¹ This is not one of those papers. This paper presupposes that the reader has a basic understanding of takings law, but wants to learn more. This paper seeks to explore more topical and cutting-edge takings topics that move from the shallow end to the deep end of the takings pool. As a result, the topics discussed, at first glance, may appear to be rather random. I can assure you, however, that they are not as each of them relate to germane and current takings topics. The topics are, however, presented in no particular order of importance or primacy.

II.

DOES THE TEXAS CONSTITUTION PROVIDE GREATER TAKINGS PROTECTION THAN THE FEDERAL CONSTITUTION?

It is well established that interpretations of the Federal Constitution by the United States Supreme Court and the lower federal courts are not binding authority on Texas courts in interpreting the Texas Constitution, although they may be used as persuasive resources. A question that is not typically raised in interpreting the Texas Constitution's takings provisions is whether there is any substantive difference between the United States and Texas Constitutions. In fact, regarding the prohibitions against the government from taking property without compensation, there has been relatively little written about the differences between the Federal Constitution and the Texas Constitution.

In addition to other limits on the Federal government, the constitutional prohibition on the government taking property provides "nor shall private property be taken for public use without just

¹ This author has provided many such overview papers over the years, including the following: "*Rough Proportionality: Where to Draw the Line?*" oral presentation and paper (co-author), 21st Annual Land Use Planning Conference, April 6, 2017, Austin, Texas; "*Post-Koontz Exactions*," oral presentation and paper, 19th Annual Land Use Planning Conference, March 26, 2015, Austin, Texas; "*Trying the Land Use Case: Strategies and Trial Tactics for Governmental Entities*," oral presentation and paper, 18th Annual Land Use Planning Conference, March 27, 2014, Austin, Texas; "*Takings Jurisprudence and Municipal Planning and Zoning Practices: The Practical Impact of Sheffield and Stafford*," oral presentation and paper, 17th Annual Land Use Planning Conference, March 21, 2013, Austin, Texas; "*Regulatory Takings*," oral presentation and paper, 12th Annual Conference on Land Use Planning Law, March 6, 2008, Austin, Texas; "*Regulatory Takings*," oral presentation and paper, 11th Annual Conference on Land Use Planning Law, April 12, 2007, Austin, Texas; "*Exactions and Takings: Legal Rules and Practical Responses*," oral presentation and paper, 10th Annual Conference on Land Use Planning Law, April 7, 2006, Austin, Texas; "*Takings and Land Use Challenges: A Primer*," oral presentation and paper, 9th Annual Conference on Land Use Planning Law, March 11, 2005, Austin, Texas; "*Takings and Land Use Challenges: A Primer*," oral presentation and paper, 8th Annual Conference on Land Use Planning Law, March 4, 2004, Austin, Texas; "*How to Avoid Getting Taken*," oral presentation and paper, 7th Annual Conference on Land Use Planning Law, February 6, 2003, Austin, Texas; and "*Overview of Regulatory Takings: The Municipal Perspective*," oral presentation and paper (co-author), 6th Annual Conference on Land Use Planning Law, February 7, 2002, Austin, Texas;

compensation.”² This prohibition has been incorporated through the Fourteenth Amendment to apply to the individual states.³ The Texas Constitution contains a similar, but yet different, provision. The provision in the Texas Constitution is worded as follows:

No person’s property shall be taken, damaged or destroyed for or applied to public use without adequate compensation being made, unless by the consent of such person; and, when taken, except for the use of the State, such compensation shall be first made, or secured by a deposit of money; ...⁴

While the clauses in the Federal and Texas Constitutions are similar, they are not identical.

The language of the current Texas Constitution was changed from earlier versions of the constitution to add additional protections for Texans. In 1890, the Texas Supreme Court noted:

The constitution of 1869 provided that “no person’s property shall be taken or applied to public use without just compensation being made, unless by the consent of such person.” Const. 1869, art. 1, § 14; 2 Pasch. Dig. 1101. The owner’s rights in property are better guarded under the constitution of 1876. It declares that “no person’s property shall be taken, damaged, or destroyed for, or applied to, public use without adequate compensation being made, unless by consent of such person.” Const. 1876, art. 1, § 17.... In another, later case, decided at the Galveston term, 1889, Justice GAINES, commenting upon the language of the constitution, says: “Under the provisions of other constitutions, which merely provided compensation to the owner for property taken for public use, it had been a question whether or not one whose property was immediately and directly damaged by a public improvement, though no part of it was appropriated, could recover for such damages.... The insertion of the words “damaged or destroyed” in the section [of the constitution] quoted was doubtless intended to obviate this question, 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.”⁵

Of course, the Texas Constitution may provide greater protections than those provided by the United States Constitution.⁶ In *Dallas Hunting & Fishing Club v. Dallas County Bois D'Arc Island Levee Dist.*,⁷ another difference between the United States and Texas Constitutions was discussed and explained:

² U.S. CONSTITUTION amend. V.

³ *Chicago, B. & Q.R. Co. v. Chicago*, 166 U.S. 226, 241 (1897); *Mayhew v. Town of Sunnyvale*, 964 S.W.2d 922, 933 (Tex. 1996).

⁴ Tex. Const. art. I, § 17.

⁵ *Ft. Worth & R.G. Ry. Co. v. Jennings*, 76 Tex. 373, 13 S.W. 270, 270-271 (1890).

⁶ See *Heitman v. State*, 815 S.W.2d 681, 683 (Tex.Crim.App.1991).

⁷ 235 S.W. 607 (Tex.Civ.App.-Dallas 1921, no writ).

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