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Regulatory Takings

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Introduction

In the spring of 2020, the State of Texas witnessed an extraordinary exercise of governmental power in response to the COVID 19 virus. Executive orders issued on short notice by governments around the state directed, among many other things, that certain businesses stop operations and close upon 24 hours' notice until designated dates that were revised throughout the spring and summer. In some cases, the closure resulted or will result in complete loss of the business. In cases where the business can reopen under the conditions imposed, financial damage may be severe. These selective shut-downs were not attributed to any unlawful conduct or nuisance activity of the businesses, but rather to a stated need for social distancing to inhibit the spread of the virus and protect the public health, safety and welfare.

These events may bring new attention to constitutional language that qualifies our government's inherent right to take private property for public benefit by requiring that the government pay for the property taken. What are the constitutional provisions at issue and how have they been interpreted by the courts? This paper will provide an overview of takings jurisprudence, with particular focus on regulatory takings. The paper will also discuss an important recent change in the law that expands the choice of forum in which a takings claim may be pursued. Finally, in response to events of recent months, the paper will briefly examine the relatively unexplored law governing takings in the context of emergency exercise of police power.

Eminent Domain

Takings jurisprudence has its roots in the ancient tradition of eminent domain. The right of eminent domain is the right of the people or government to take private property for public use. Black's Law Dictionary Online 2d Ed. By another definition, eminent domain is the right of the government to take private property for public use by virtue of the superior dominion of the sovereign power over all lands within its jurisdiction. Merriam-Webster On-Line Dictionary.

Protection of Private Property

The right of eminent domain in this country is balanced against the constitutional protection of private property, found in both the United States and Texas Constitutions. The Fifth Amendment of the U.S. Constitution concludes with the following statement:

“...nor shall private property be taken for public use, without just compensation.” U.S. Const. amend. V.

Article I, Section 17, of the Texas Constitution provides in part 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 . . .”

[Tex. Const. art. I, § 17.](#)

As discussed below, there is a difference in language between the state and federal constitutional protections.

Throughout much of our judicial history, the great majority of governmental takings occurred in the straightforward context of land occupation or acquisition. Thus, much of the law of eminent domain has developed for the purpose of providing the procedural structure for governmental takings and the determination of just compensation. *See Hendler v. United States*, [952 F.2d 1364](#), 1371–73 (Fed. Cir. 1991), for a good discussion of this history, citing J. Sackman, Nichols’ the Law of Eminent Domain § 8 (1991).

Condemnation

Condemnation is the legal *process* by which the government exercises the *right* of eminent domain to take the property of a private owner for public use, without consent, but upon the payment of just compensation. *Hubler v. City of Corpus Christi*, [564 S.W.2d 816](#), 820 (Tex. Civ. App.—Corpus Christi 1978, writ ref’d n.r.e.). The object of a condemnation proceeding is to ascertain what would be just compensation to the owner of the land sought to be taken under the circumstances of the particular case. Essentially, the process involves negotiations between the party seeking to acquire the property (“condemnor”) and the property owner (“condemnee”), filing by the condemnor of a condemnation petition in the appropriate court if negotiations are unsuccessful, a commissioner’s hearing to assess damages, and potentially a trial de novo on damages and jurisdictional issues.

Condemnation proceedings in Texas are governed by Texas Property Code chapter 21. A governmental entity that has eminent domain power may exercise such authority exclusively through Texas Property Code sections 21.012 through 21.016. *See Tex. Prop. Code § 21.011*. However, additional procedures required to initiate eminent domain proceedings are now found in chapter 2206, subchapter B, of the Texas Government Code. In condemnation proceedings, the requirements of the statutes must be strictly followed. *See City of Bryan v. Moehlman*, [282 S.W.2d 687](#) (Tex. 1955).

Notably, chapter 21 establishes only the *procedure* by which the power of eminent domain is exercised when that power has been delegated. Nothing in chapter 21 constitutes a delegation of the power itself. In Texas, the power of eminent domain must be conferred by the legislature either expressly or by necessary implication and will not be gathered from doubtful inferences. *Texas Rice Land Partners, Ltd. V. Denbury Green Pipeline-Texas*, [363 S.W.3d 192](#) (Tex. 2012). Because the exercise of the power of eminent domain is in derogation of the rights of citizens, statutes that confer such power are strictly construed in favor of the landowner and against those corporations and subdivisions of the state vested with such power. *Burch v. City of San Antonio*, [518 S.W.2d 540](#) (Tex. 1975). Where the power of eminent domain is granted, a determination by the condemnor of the necessity for acquiring certain property is conclusive unless the condemnor’s decision was fraudulent, in bad faith, or arbitrary and capricious. *City of Austin v. Whittington*, [384 S.W.3d 766, 777](#) (Tex. 2012); *FKM P’ship, Ltd. v. Bd. of Regents of the Univ. of Houston Sys.*, [255 S.W.3d 619, 629 n. 9](#) (Tex. 2008).

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