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**TEXAS INVERSE CONDEMNATION
JURISPRUDENCE:
A TWENTY-YEAR RETROSPECTIVE**

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TEXAS INVERSE CONDEMNATION JURISPRUDENCE: A TWENTY-YEAR RETROSPECTIVE

I. Background and Definitions

Inverse condemnation is a term which describes a claim brought against the government in which a property owner seeks compensation for a 'taking' of his property under the U.S. or Texas Constitutions. The term "inverse" is used, because usually condemnation suits are brought by the government. In the inverse condemnation context, it is the property owner who sues the government, alleging a taking (or damaging) of property without just compensation. *San Diego Gas & Electric Co. v. City of San Diego*, 450 U.S. 621, 638 n.2 (1981) (Justice Brennan dissenting).

Under federal law, the Takings Clause states that "private property" shall not "be taken for public use, without just compensation." U.S. Const. amend. V. This can be accomplished in three ways: (1) a per se taking under *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 435, 102 S. Ct. 3164, 73 L.Ed.2d 868 (1982); (2) a regulatory taking under *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104, 124, 98 S. Ct. 2646, 57 L.Ed.2d 631 (1978); and (3) an unconstitutional condition on development approval under *Nollan v. California Coastal Commission*, 483 U.S. 825, 107 S. Ct. 3141, 97 L.Ed.2d 677 (1987); *Dolan v. City of Tigard*, 512 U.S. 374, 114 S. Ct. 2309, 129 L.Ed.2d 304 (1994).

A prohibition against taking private property for public use without just compensation is also set forth in Article I, Section 17 of the Texas Constitution which provides that "[n]o 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." Tex. Const. art. I, § 17. *See Mayhew*, 964 S.W.2d at 933. The Just Compensation Clause of the Fifth Amendment to the United States Constitution, applied to the individual states through the Fourteenth Amendment, contains similar language. It provides that "private property [shall not] be taken for public use, without just compensation." U.S. Const. amends V, XIV. As a result, Texas courts often look to federal cases for guidance on the constitutionality of a taking. *See Sheffield Dev. Co. v. City of Glenn Heights*, 140 S.W.3d 660, 669 (Tex. 2004).

Takings are classified as either physical or regulatory. A physical taking occurs when the government literally takes property from its owner, such as when it "authorizes an unwarranted physical occupation of an individual's property." *Mayhew v. Town of Sunnyvale*, 964 S.W.2d 922, 933 (Tex. 1998). A regulatory taking occurs when the government restricts a property owner's rights to such an extent as to become the functional equivalent of a physical seizure. *Hearts Bluff Game Ranch, Inc. v. State*, 381 S.W.3d 468, 490 (Tex. 2012).

II. Twenty Years Ago

Twenty years ago the Texas Supreme Court issued three seminal takings opinions. The first involved a physical taking resulting from the intentional flooding of a tract of land. *Tarrant Reg'l Water Dist. v. Gragg*, 151 S.W.3d 546 (Tex. 2004). The second involved a downzoning case where the court ruled against the developer utilizing the *Penn Central* test. *Sheffield Dev. Corp. v.*

City of Glenn Heights, 140 S.W.3d 360 (Tex. 2004). In the third the court found that the relatively small amount of vehicular traffic generated by a new residential subdivision should not trigger a requirement to demolish an off-site newly constructed two-lane asphalt road and replace it with a two-lane concrete road. *Town of Flower Mound v. Stafford Estates LP*, 135 S.W.3d 620 (Tex. 2004).

In addition to advancements in case law the Legislature has enacted numerous statutes in the last twenty years that complement Texas courts' increasing protection of private property rights. This paper focuses on the changes (both in the case law and statutes) that impact Texas landowners and governmental entities.

III. Physical Takings

First year law students learn about property's bundle of sticks. How significantly these sticks are impacted by a governmental action determines whether there has been a taking or not. The more it appears the governmental action deprives a landowner of one or more sticks for a public purpose the more likely a taking will be found.

A property owner suing for compensation must show that the government (1) engaged in an affirmative act or course of conduct that resulted in the taking, damaging, destruction, or application of property; and (2) did so with the necessary intent—that is, with knowledge that either (a) the conduct is causing identifiable harm or (b) specific property damage is substantially certain to result. See *Harris Cnty. Flood Control Dist. v. Kerr*, 499 S.W.3d 793, 799-800 (Tex. 2016).

A. Background Federal Law

A *per se* taking occurs when the government orders the permanent possession of private property without consent. In *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982), the U.S. Supreme Court ruled that a regulation is generally considered a *per se* taking when it forces land owners to endure a permanent physical occupation on their land, such as the permanent physical presence of cable lines on a residential building. The Court held that any permanent physical presence destroyed the property owner's right to exclude, long recognized as one of the key rights in the "bundle of rights". The Court considered a New York statute which required landlords to install CATV cable facilities on the roof of their buildings; the facilities were part of a citywide cable network designed to bring cable services to the entire city. The City argued that the Court should apply a balancing test—that the invasion of property was minimal in comparison to the community wide benefit. But the Court's decision suggested that there was a *per se* rule requiring compensation in cases of this kind. In short, when the character of the governmental action is a permanent physical occupation of property the cases uniformly have found a taking to the extent of the occupation, without regard to whether the action achieves an important public benefit or has only minimal economic impact on the owner. *Id.* at 430.

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