INVERSE CONDEMNATION: SOVEREIGN IMMUNITY AND DEFENSES

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INVERSE CONDEMNATION: SOVEREIGN IMMUNITY AND DEFENSES

I. INTRODUCTION.

This article analyzes the substantive and procedural requirements for both physical and regulatory inverse condemnation claims. The article includes a discussion of inverse claims arising out of impairment of roadway access and claims arising out of flooding. The article also outlines the requirements for a regulatory inverse condemnation claim under the Private Real Property Rights Preservation Act. Views expressed are those of the author, do not constitute legal advice, and are not official opinions of the Office of the Texas Attorney General.

II. INVERSE CONDEMNATION DEFINED.

"Inverse condemnation is 'a cause of action against a governmental defendant to recover the value of property that 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) (quoting *United States v. Clark*, 445 U.S. 253, 257 (1980)).

A property owner whose property is taken, damaged or destroyed for, or applied to public use without adequate compensation may bring an inverse condemnation action pursuant to article 1, 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. 1, § 17.

An inverse condemnation suit, unlike a statutory condemnation proceeding, is initiated by the property owner rather than the government and based on a claim of governmental taking or damages to property without first following the formal condemnation procedures contained in Chapter 21 of the Texas Property Code. *City of Dall. v. Stewart*, 361 S.W.3d 562, 567 (Tex. 2012). However, statutory and inverse condemnations are substantially similar with respect to the rules of evidence and the measure of damages. *Id*.

III. A STATUTORY REMEDY MAY PRECLUDE AN INVERSE CONDEMNATION CLAIM.

If a statutory remedy is available to recover property or its value, a property owner may be precluded from bringing an inverse condemnation claim. *See York v. State*, 373 S.W.3d 32, 45–46 (Tex. 2012); *Patel v. City of Everman*, 361 S.W.3d 600, 601–02 (Tex. 2012); *City of Dallas v. VSC, LLC*, 347 S.W.3d 231, 234–37 (Tex. 2011).

Similarly, if an inverse condemnation claim concerns the identical property a condemnor seeks to condemn in eminent domain proceedings or an interest not recognized as separate from that property for condemnation purposes, a property owner does not have a valid inverse condemnation claim. *Dahl ex rel. Dahl v. State*, 92 S.W.3d 856, 861–62 (Tex. App.—Houston [14th Dist.] 2002, no pet.).

IV. INVERSE CONDEMNATION AND SOVEREIGN IMMUNITY.

A. Sovereign Immunity Protects Governmental Entities from Suit Unless Immunity is Waived.

Sovereign immunity protects the State, its agencies and officials, and political subdivisions from suit, unless immunity from suit is waived. *Hearts Bluff*, 381 S.W.3d at 476; *Gen. Servs. Comm'n v. Little-Tex Insulation Co*., 39 S.W.3d 591, 594 (Tex. 2001).[1] Immunity from suit may only be waived by legislative consent or constitutional amendment. *Wichita Falls State Hosp. v. Taylor*, 106 S.W.3d 692, 695 (Tex. 2003).

B. If Immunity is not Waived, the Courts Have No Subject Matter Jurisdiction.

Where immunity has not been waived, the trial court lacks subject matter jurisdiction. *Tex. Dep't of Parks & Wildlife v. Miranda*, 133 S.W.3d 217, 225–26 (Tex. 2004). Sovereign immunity is properly asserted in a plea to the jurisdiction. *Id*. Lack of jurisdiction may be raised at any time. *See Rusk State Hosp. v. Black*, 392 S.W.3d 88, 94 (Tex. 2012).

C. Sovereign Immunity is Waived for a Proper Inverse Condemnation Claim.

Article 1, Section 17 of the Texas Constitution waives sovereign immunity from suit for a proper inverse condemnation claim. *Little-Tex*, 39 S.W.3d at 598.

D. Sovereign Immunity is Retained for an Improper Inverse Condemnation Claim.

Sovereign immunity is retained where a plaintiff fails to properly plead or establish an inverse condemnation claim. *Hearts Bluff*, 381 S.W.3d at 491; *Little-Tex*, 39 S.W.3d at 598–99. Under such circumstances, the case should be dismissed for lack of jurisdiction. *See e.g.*, *Tex. Dep't of Transp. v. A.P.I. Pipe & Supply, LLC*, 397 S.W.3d 162 (Tex. 2013) (inverse condemnation arising out of State's removal of soil from land dismissed for want of jurisdiction where State

[1] References to "sovereign immunity" refer to the related doctrines of sovereign immunity and governmental immunity. While sovereign immunity protects the State, governmental immunity protects political subdivisions of the State such as cities and counties. *See Harris Cty. Flood Control Dist. v. Kerr*, 499 S.W.3d 793, 799 n.12 (Tex. 2016).

already owned the land); *Hearts Bluff*, 381 S.W.3d 468 (inverse condemnation claim arising out of denial of application for federal mitigation banking permit dismissed for want of jurisdiction); *State v. Holland*, 221 S.W.3d 639 (Tex. 2007) (alleged takings claim arising out of use of patented technology dismissed for lack of jurisdiction); *Little-Tex*, 39 S.W.3d 591 (alleged takings claim arising out of contract dispute dismissed for lack of jurisdiction).

E. A Party is Entitled to an Interlocutory Appeal of the Grant or Denial of a Plea to the Court's Subject Matter Jurisdiction.

Section 51.014(8) of the Texas Civil Practice and Remedies Code authorizes an interlocutory appeal from the grant or denial of a plea to the jurisdiction by a governmental entity. Thus, whether a plaintiff has properly plead or raised a fact issue as to an inverse condemnation claim may be subject to interlocutory appeal. *See*, *e.g*., Harris *Cty. Flood Control Dist. v. Kerr*, 499 S.W.3d 793 (Tex. 2016) (sustaining on interlocutory appeal a plea to the jurisdiction as to inverse claims). If specific deadlines are met, a party is entitled to a stay of all proceedings in the trial court pending resolution of the interlocutory appeal. *See* Tex. Civ. Prac. & Rem. Code § 51.014(b), (c).

V. REMEDIES FOR INVERSE CONDEMNATION.

A. Monetary Compensation is the Only Remedy for an Inverse Condemnation.

The only remedy available for an inverse condemnation is monetary compensation. *Tex. Parks & Wildlife Dep't v. Sawyer Tr.*, 354 S.W.3d 384, 390–92 (Tex. 2011). A prevailing property owner does not regain use of property lost to inverse condemnation or win possession of it. *Id*. at 391.

B. Attorney's Fees are not Available in an Inverse Condemnation Proceeding.

Attorney's fees are only recoverable against the government if provided for by statute or contract. *See Univ. of Tex. Sys. v. Courtney*, 946 S.W.2d 464, 469 (Tex. App. —Fort Worth 1997, writ denied). Though Article 1, Section 17 of the Texas Constitution waives immunity for an inverse condemnation, it does not authorize an award of attorney's fees. *City of San Antonio v. El Dorado Amusement Co., Inc.*, 195 S.W.3d 238, 249 (Tex. App.—San Antonio 2006, pet. denied).

VI. STATUTE OF LIMITATIONS FOR INVERSE CONDEMNATION.

A. Ten-year Statute of Limitations for a Physical Taking.

There is no statutory provision specifically providing a limitations period for inverse condemnation actions. However, courts have held that a claim for inverse condemnation based on an actual physical taking is subject to the ten-year statute of limitations for acquisition of land by adverse possession contained in Texas Civil Practice and Remedies Code § 16.026(a). *See City of Justin v. Rimrock Enters., Inc*., 466 S.W.3d 269, 279 (Tex. App.—Fort Worth 2015, pet. denied); *Allodial Ltd. P'ship v. N. Tex. Tollway Auth*., 176 S.W.3d 680, 684 (Tex. App.—Dallas 2005, pet. denied).

B. Two-year Statute of Limitations for a Damaging.

When an inverse condemnation claim involves property that has been damaged, instead of being physically taken, the claim is subject to the two-year statute of limitations for trespass or damage to land contained in Texas Civil Practice and Remedies Code § 16.003(a). *See Allodial Ltd. P'ship*, 176 S.W.3d at 684; *Hues v. Warren Petroleum Co*., 814 S.W.2d 526, 530 (Tex. App.—Houston [14th Dist.] 1991, writ denied).

C. Accrual of Inverse Condemnation Claims.

For a physical taking, an inverse condemnation claim accrues when the property is taken, i.e., when the property is physically entered. *City of Justin*, 466 S.W.3d at 279; *Trail Enters., Inc. v. City of Hous*., 957 S.W.2d 625, 631 (Tex. App.—Houston [14th Dist.] 1997, pet. denied).

For a damaging, the cause of action accrues when the property is actually damaged. Allen v. City of Tex. City, 775 S.W.2d 863, 866 (Tex. App.—Houston [1st Dist.] 1989, writ denied); *Hubler v. City of Corpus Christi*, 564 S.W.2d 816, 823–24 (Tex. Civ. App.—Corpus Christi 1978, writ ref'd n.r.e.). If the damage is permanent, the statute of limitations begins to run upon discovery of the first actionable injury and not when the full extent of the damage is realizable. *City of Odessa v. Bell*, 787 S.W.2d 525, 530 (Tex. App.—El Paso 1990, no writ), disapproved of on other grounds by *Schneider Nat. Carriers, Inc. v. Bates*, 147 S.W.3d 264 (Tex. 2004). If the damage is temporary, only those injuries occurring more than two years prior to the filing of suit are barred. *Id*.

VII. ESTABLISHING AN INVERSE CONDEMNATION CLAIM.

For an inverse condemnation claim, (1) a property owner must establish that (2) the government intentionally performed certain acts (3) that resulted in a taking, damaging or destroying of property (4) for public use (5) without the property owner's consent. *Sawyer*, 354 S.W.3d at 390–91.

A. Ownership.

To recover for inverse condemnation, a party must establish ownership of a protected property interest that has been taken or damaged by the government's actions. *Tex. Dep't of Transp. v. A.P.I. Pipe & Supply*,

LLC, 397 S.W.3d 162, 166 (Tex. 2013); *Tex. Dep't of Transp. v. City of Sunset Valley*, 146 S.W.3d 637, 644 (Tex. 2004).

B. Intent.

1. Negligence is Insufficient.

Mere negligence which eventually contributes to the destruction of property is not a taking. *City of Tyler v. Likes*, 962 S.W.2d 489, 505 (Tex. 1997); *Tex. Highway Dep't v. Weber*, 219 S.W.2d 70, 71–73 (1949); *State v. Hale*, 146 S.W.2d 731, 736–37 (1941).

2. Affirmative Conduct is Required.

"Only affirmative conduct by the government will support a takings claim." *Kerr*, 499 S.W.3d at 799. In *Kerr*, the Texas Supreme Court held that an inverse condemnation claim could not be based on the government's failure to take further steps to control flooding such as the failure to fully implement a flood control plan. *Id*. at 799–800, 805.

3. Intent is Not Present Where the Government Acts Pursuant to Colorable Contract Rights.

"When the government acts pursuant to colorable contract rights, it lacks the necessary intent to take under its eminent-domain powers . . . ." *State v. Holland*, 221 S.W.3d 639, 643 (Tex. 2007) (holding State's refusal to pay patent holder money allegedly due was not a taking of the holder's property when the State had a colorable contract right to use the patented process); *see also Little-Tex*, 39 S.W.3d at 598–99 (holding intent not present where State's refused to make additional payments under contract for labor and materials).

4. Intent is Present When the Government Knows of Harm or Knows Harm is Substantially Certain to Occur.

Intent is present when the government "(1) knows that a specific act is causing identifiable harm; or (2) knows that the specific property damage is substantially certain to result from an authorized government action—that is, that the damage is 'necessarily an incident to, or necessarily a consequential result of' the government's action." *City of Dallas v. Jennings*, 142 S.W.3d 310, 314 (Tex. 2004) (quoting *Weber*, 219 S.W.2d at 71). In *Jennings*, the Court held required intent was not present where the City intended to repair a sewer line, but it did not know or have reason to know that repairs would result in flooding a property owner's home with sewage.

On the same day *Jennings* was decided, the Court also decided *Tarrant Regional Water District v. Gragg*, 151 S.W.3d 546 (Tex. 2004). Relying on the same intent test set forth in *Jennings*, the Court found intent present where the evidence showed that the construction of a reservoir and the subsequent releases of water from the reservoir inevitably resulted in the increased frequency and severity of flooding on a property owner's land.

In *City of Keller v. Wilson*, the Court recognized that proof of the government's knowledge "requires evidence of 'objective indicia of intent' showing the City knew identifiable harm was occurring or substantially certain to result." 168 S.W.3d 802, 830 (Tex. 2005) (quoting *Gragg*, 151 S.W.3d at 555).

Further, the government's knowledge must be determined as of the time it acted, not with the benefit of hindsight. *City of San Antonio v. Pollock*, 284 S.W.3d 809, 821 (Tex. 2009). The government's awareness of the mere possibility of damage constitutes no evidence of intent. *Id*. (holding there was no showing the City knew migration of landfill gas to neighboring property, which City took steps to detect and prevent, would occur or was substantially certain to occur even though migration is a foreseeable consequence of operation of landfill).

In addition, a government's intentional act cannot constitute an inverse condemnation if the government did not have knowledge that damage to a specific property would result or was substantially certain to result from an act. *Kerr*, 499 S.W.3d at 805–10 (holding government did not have knowledge that any specific property would flood, even though approval of development in flood plain necessarily carried the risk of flooding). The courts "have not recognized liability where the government only knows that someday, somewhere, its performance of a general governmental function, such as granting permits or approving plats, will result in damage to some unspecified parcel of land within its jurisdiction." *Kerr*, 499 S.W.3d at 800.

C. Causation.

Proximate cause is an essential element of an inverse condemnation claim. *Hearts Bluff*, 381 S.W.3d at 483. The government must have taken direct governmental action, or have been the proximate cause, of the harm. *Id*. at 484 (holding causation not established where alleged harm was caused by the federal government not the State).

D. Public Use.

"Property is taken for public use only when 'there results to the public some definite right or use in the business or undertaking to which the property is devoted.'" *KMS Retail Rowlett, LP v. City of Rowlett*, No. 17-0850, 2019 WL 2147205, at *8 (Tex. May 17, 2019) (quoting *Coastal States Gas Producing Co. v. Pate*, 309 S.W.2d 828, 833 (1958)). "When damage is merely the accidental result of the government's act, there is no public benefit and the property cannot be said to be 'taken or damaged for *public use*.'" *Jennings*, 142 S.W.3d at 313 (quoting *Weber*, 219 S.W.2d at 71).

E. Without consent.

A property owner who consents to a governmental action cannot assert an inverse condemnation claim. *Kirby Lake Dev., Ltd. v. Clear Lake City Water Auth.*, 320 S.W.3d 829, 844 (Tex. 2010) (holding developers could not sue for inverse condemnation because they consented to taking by express terms of contract that permitted water authority to lease and use facilities free of charge until voters approved payment at bond election); *City of Round Rock v. Smith*, 687 S.W.2d 300, 303 (Tex. 1985) (holding property owners could not sue for inverse condemnation because their representative consented to the taking by filling in the natural watercourses and requesting the planning commission to approve the plat for lots over and adjacent to the former watercourses).

VIII. INVERSE CONDEMNATION CLAIMS ARISING OUT OF IMPAIRMENT OF ACCESS.

The government's interference with access to property may be the basis of an inverse condemnation claim if access is materially and substantially impaired. *State v. Delany*, 197 S.W.3d 297, 299 (Tex. 2006). Such claims may involve damages for permanent injury to property or lost profits due to the inconvenience of highway construction.

A. Inverse Condemnation Claim for Damages to Property Cause by Material and Substantial Impairment of Access.

Under the Texas Constitution, a compensable taking has occurred, and a property owner may be entitled to damages, if the government materially and substantially impairs access to property abutting a public road. *Id.; State v. Schmidt*, 867 S.W.2d 769, 774 (Tex. 1993). However, diversion of traffic or circuity of travel does not constitute a compensable taking. *See City of San Antonio v. Olivares*, 505 S.W.2d 526, 529 (Tex. 1974).

B. Inverse Condemnation Claim for Lost Profits For the Inconvenience of Highway Construction Due to Material and Substantial Impairment of Access.

A landowner is entitled to recover lost profits for the inconvenience of highway construction where access is materially and substantially impaired, and the facts fall within one of the three categories established in *City of Austin v. Avenue Corp.*, 704 S.W.2d 11 (Tex. 1986). According to *Avenue*, to recover lost profits for the inconvenience of highway construction, in addition to demonstrating a material and substantial interference with access to one's property, it is also necessary to show that there has been: (1) a total but temporary restriction of access; (2) a partial but permanent restriction of access; or (3) a temporary limited restriction of access brought about by an illegal activity or one that is negligently performed or unduly delayed. *Id*. at 13; *see also Bass v. City of Dallas*, 34 S.W.3d 1, 5–6 (Tex. App.—Amarillo 2000, no pet.) (holding the threshold inquiry is whether there has been a material and substantial impairment and that to be compensated for damages due to the inconvenience of highway construction, a property owner must show both a material and substantial impairment of access, and one of the *Avenue* elements); *City of San Antonio v. Guidry*, 801 S.W.2d 142, 148 (Tex. App.—San Antonio 1990, no writ) ("Such restrictions do not rise to the level of compensable takings unless they are material and substantial. . . . In the passage. . . quoted earlier . . . , the court did not say that undue delay by itself suffices to establish a material and substantial interference.").

C. Changes to the Impairment of Access Standard for Statutory Condemnation Cases do not Affect Inverse Condemnation Claims for Damages to Property Caused by Material and Substantial Impairment of Access.

In 2011, the Texas Property Code was amended to define what constituted compensable impairment of access in a statutory condemnation case. A compensable injury was defined to included "a material impairment of direct access on or off the remaining property that affects the market value of the remaining property." Tex. Prop. Code § 21.042(d). "Direct access" was defined to mean "ingress and egress on or off a public road, street, or highway at a location where the remaining property adjoins that road, street, or highway." *Id*. In *State v. Momin Properties, Inc*., 409 S.W.3d 1 (Tex. App.—Houston [1st Dist.] 2013, pet. denied), property owners asserting an inverse condemnation claim based on impairment of access argued that the amended version of Property Code section 21.042 applied and entitled them to a trial on the issue of whether access to their property had been materially impaired. The Court of Appeals rejected the property owner's argument, holding that Chapter 21 of the Property Code applies only to statutory condemnation proceedings initiated by the government, and not to inverse condemnation claims initiated by landowners. *Id*. at 9–10. The *Momin* holding was followed in *Edwards Aquifer Authority v. Bragg*, 421 S.W.3d 118, 148 (Tex. App.—San Antonio 2013, pet. denied) ("Chapter 21 does not govern inverse condemnation claims brought by landowners. . . . Here, the Authority did not file a condemnation suit to acquire property; rather, this suit is an inverse condemnation case arising from a regulatory taking. As such, we do not believe Property Code section 21.0421 applies." [citation omitted]).

IX. INVERSE CONDEMNATION CLAIMS ARISING OUT OF FLOODING.

Inverse condemnation claims based on the allegation that a governmental action has caused property to flood are not unusual. Over the past fifteen years, flooding claims have been the subject of several Texas Supreme Court opinions.

In *Jennings*, the Court held that the requisite intent for an inverse condemnation is present when a governmental entity knows that a specific act is causing identifiable harm or knows that the harm is substantially certain to result. 142 S.W.3d at 314. Applying this standard to the City's actions that caused sewage to flood the Jennings's home, the Court refused to hold the City liable for flooding damage where it did not know that flooding would result from the unclogging of a sewer line. *Id*. at 315. The Court rejected that argument that the City should bear the cost of flooding damage even if occasional flooding damage is inherent in the operation of any sewer system. *Id*. at 312–15.

Gragg involved inverse condemnation claims brought by owners of a cattle ranch alleging the construction and operation of a reservoir caused significant changes in flooding characteristics resulting in numerous flooding events that damaged the ranch. 151 S.W.3d at 548. The Court applied the test set out in *Jennings* and found the requisite intent present where the recurring flooding damage was the inevitable result of the construction and operation of the reservoir as intended. *Id*. at 555. The Court did note that "a single flood event does not generally rise to the level of a taking." *Id*.

In *City of Keller*, property owners brought inverse condemnation claims against the City after the City approved drainage plans which resulted in flooding of the property owner's farm land. 168 S.W.3d at 808. The Court held there was no evidence of "objective indicia of intent" showing the City knew identifiable harm was occurring or substantially certain to result where three sets of engineers certified to the City that the drainage plans would not increase downstream flooding and there was no evidence the City knew flooding was inevitable. *Id*. at 829–30.

Kerr involved inverse condemnation claims brought by 400 property owners whose homes had flooded based on the government's approval of private development without fully implementing a previously approved flood control plan. 499 S.W.3d at 795. The Court found the property owners had not alleged a valid inverse condemnation claim because (1) the failure to implement a flood control plan did not constitute affirmative conduct by the government; (2) the approval of private development did not establish the public use element of an inverse claim; and (3) there was no evidence the government knew the homeowners' particular properties would flood if the government approved new housing developments. Id. at 799–807.

X. INVERSE CONDEMNATION CLAIMS ARISING OUT OF THE REGULATION OR RESTRICTION OF THE USE OF PROPERTY.

A. Regulatory Takings Claims.

A regulatory taking is based on allegations that a governmental action regulating or restricting the use of property constitutes a compensable taking. *Sheffield Dev. Co., Inc. v. City of Glenn Heights*, 140 S.W.3d 660, 670 (Tex. 2004).

B. Regulatory Takings Claims Must be Based on the Substance of the Regulation.

A regulatory takings claim must challenge the substance of a regulation itself, and not just the procedures involved or the manner of enforcement. *See City of Houston v. Carlson*, 451 S.W.3d 828, 832–33 (Tex. 2014).

C. Whether a Regulation or Restriction Constitutes a Compensable Taking is a Question of Law.

The determination of whether a regulatory taking has occurred a question of law. *Harris Cty. Flood Control Dist. v. Kerr*, 499 S.W.3d 793, 806 (Tex. 2016).

D. Texas Courts Look to Federal Jurisprudence for Guidance.

In deciding regulatory takings issues, Texas courts look for guidance to federal jurisprudence regarding the Takings Clause of the Fifth Amendment to the United States Constitution. *Sheffield*, 140 S.W.3d at 669.

E. Regulatory Takings Claims Must be Ripe.

Whether a regularity takings claim is ripe implicates the court's subject matter jurisdiction. *Mayhew v. Town of Sunnyvale*, 964 S.W.2d 922, 928 (Tex. 1998). The ripeness doctrine has both constitutional and prudential aspects. *Id*. Under the separation powers provision in article II, section of the Texas Constitution, the courts have no jurisdiction to render advisory opinions because that is the function of the executive department not the judiciary. *Id.* In addition, the ripeness requirement ensures that judicial time and resources are only spent on real and current controversies and not abstract, hypothetical or remote controversies. *Id*.

Whether a regulatory claim is ripe depends partially on whether the claim is a facial challenge or an as applied challenge. A facial challenge is a challenge that a regulation on its face constitutes a taking. *See e.g*., *Edwards Aquifer Auth. v. Day*, 369 S.W.3d 814, 837 (Tex. 2012). An as applied challenge is a challenge that the regulation's effect on a specific property constitutes a taking. *See e.g*., *Hallco Tex., Inc. v. McMullen Cty.*, 221 S.W.3d 50, 57–58 (Tex. 2006)

An as applied challenge is not ripe until the government has reached a final decision regarding the application of the regulation to the property at issue. *See Mayhew*, 964 S.W.2d at 929. "A 'final decision' usually requires both a rejected development plan and the denial of a variance from the controlling regulations." *Id*. Nonetheless, a property owner is not required to make futile variance requests or re-applications. *Id*. Furthermore, the variance request is applied flexibly encompassing other types of available permits or actions that may provide relief. *Id*. at 930.

A facial challenge to a regulation is ripe when the restriction is imposed. *See Mayhew*, 964 S.W.2d at 930. Thus, a final decision is not required for a claim that is a facial challenge. *Id*.

F. Per Se Regulatory Takings.

The courts have identified two categories of per se takings: (1) where a regulation has a direct physical effect on property; and (2) where an owner is deprived of all economically viable use. *Day*, 369 S.W.3d at 838–39.[2]

1. Direct Physical Effect on Property.

A regulation's direct physical effect on property, even though short of governmental possession, can be a compensable taking. *Id*. For example, a law requiring landlords to allow cable companies to install cable facilities in their apartment buildings constituted a taking even though the facilities occupied at most only one and a half cubic feet of the property. *See Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1015 (1992) (discussing *Loretto v. Teleprompter Manhattan CATV Corp*., 458 U.S. 419, 435-40 & n.16 (1982).

2. Denial of All Economically Viable Use.

If a regulation denies a property owner of all economically beneficial or productive use of property there may be a compensable taking. *Sheffield*, 140 S.W.3d at 671. For example, a regulation that effectively prohibited a property owner from building on a beachfront lot in a residential subdivision constituted a taking. *See Lucas*, 505 U.S. 1015–16. This standard is not met if only one or more particular uses is precluded leaving other economically viable uses remaining as the standard is "limited to 'the extraordinary circumstance when *no* productive or economically beneficial use of land is permitted'" *Sheffield*, 140 S.W.3d at 671 (quoting *Tahoe–Sierra Pres. Council, Inc., v. Tahoe Reg'l Planning Agency*, 535 U.S. 302, 330 (2002) (quoting *Lucas*, 505 U.S. at 1017)).

G. Exactions.

An exaction case, where the government exacts dedication of a property interest, imposes a fee, or imposes conditions as a prerequisite of approving development, is a somewhat distinct type of regulatory taking. *Hearts Bluff*, 381 S.W.3d at 478 n.20. In *Town of Flower Mound v. Stafford Estates Ltd. Partnership*, 135 S.W.3d 620, 630–34 (Tex. 2004), the Texas Supreme Court restated and adopted federal jurisprudence regarding exactions as provided by the United States Supreme Court in *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987) and *Dolan v. City of Tigard*, 512 U.S. 374 (1994). The Court restated the rule of *Nollan/Dolan* as follows: "[C]onditioning government approval of a development of property on some exaction is a compensable taking unless the condition (1) bears an essential nexus to the substantial advancement of some legitimate government interest and (2) is roughly proportional to the projected impact of the proposed development." *Flower Mound*, 135 S.W.3d at 634.

H. Regulatory Takings Based on Unreasonable Interference With a Property Owner's Right to Use and Enjoy Property.

Even if a regulation does not fall into one of the per se takings categories it may still constitute a compensable taking if the regulation unreasonably interferes with a property owners' rights to use and enjoy their property. *See Mayhew*, 964 S.W.2d at 935. The factors that may be considered in determining whether such a claim exists are (1) the economic impact of the regulation on a property owner; (2) the extent to which the regulation interferes with the owner's reasonable investment-backed expectations; and (3) the character of the government's action. *City of Lorena v. BMTP Holdings, L.P*., 409 S.W.3d 634, 644 (Tex. 2013); *Sheffield*, 140 S.W.3d at 672; *see also Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 124 (1978). However, the Courts are not limited by these factors and should consider all of the relevant circumstances. *Sheffield*, 140 S.W.3d at 672–73. For example, the Courts have also found takings where the government acts against the economic interest of a property owner for its own enrichment. In *City of Austin v. Teague*, 570 S.W.2d 389 (Tex. 1978), the City denied the landowner a permit to re-channel a tributary, precluding all development of the land, because of the City's desire to establish a scenic easement on the property. The Court held the City liable for a compensable taking. *Id*. at 394. In *State v. Biggar*, 873 S.W.2d 11 (Tex. 1994), there was evidence the State

[2] A third previously recognized category, where a regulation does not substantially advance a legitimate government interest, was rejected by the United States Supreme Court in *Lingle v. Chevron U.S.A. Inc*., 544 U.S. 528 (2005). The Texas Supreme Court appears to have followed *Lingle* in rejecting the third category. *See e.g*., *Hearts Bluff*, 381 S.W.3d at 478 & n.21; *Day*, 369 S.W.3d at 838–39.

denied the property owner a routine easement exchange in order to reduce the cost of acquiring a portion of the property, thereby denying all opportunity to develop the property. The Court held the State liable for a compensable taking. *Id*. at 14. However, in *Taub v. City of Deer Park*, 882 S.W.2d 824 (Tex. 1994), the Court recognized that the City's dual role as both a rezoning authority and a condemning authority was not proof in and of itself the City was acting against the economic interest of a property owner for its own enrichment. *Id*. at 826–27.

1. The Economic Impact of the Regulation on a Property Owner.

The economic impact of a regulation compares the value that has been taken from the property with the value that remains in the property. *Mayhew*, 964 S.W.3d at 935–36. In *Sheffield*, the Court held that a regulation did not constitute a taking where rezoning had a substantial economic impact by reducing the potential value of development, but the property was still worth four times what the owner had paid. 140 S.W.3d at 677. In *Taub* the Court held that evidence that the property could not be profitably developed when zoned for single-family instead of multi-family use was not a sufficiently severe economic impact. 882 S.W.2d at 826. "The takings clause . . . does not charge the government with guaranteeing the profitability of every piece of land subject to its authority. Purchasing and developing real estate carries with it certain financial risks, and it is not the government's duty to underwrite this risk as an extension of obligations under the takings clause." *Id*.

2. Interference With the Owner's Reasonable Investment-backed Expectations.

In determining the reasonable investment-backed expectations of the property owner, historical uses of the property are critically important. *Mayhew*, 964 S.W.2d at 937. Further, the existing zoning of the property at the time the property was acquired by the property owner should be considered. *Id.* at 937–38. In *Mayhew*, the Court found the property owners did not have a reasonable investment-backed expectation to build 3,600 units on their 1,200 acres where the property was used for ranchland for four decades in a town of 2,000 people, and where development had already been restricted for twelve years at the time they purchased some portions of the property. *Id*. In *Sheffield*, the Court found rezoning did not constitute a compensable taking where rezoning interfered with the developer's expectations but the investment backing its expectations was minimal and speculative. 140 S.W.3d at 678.

3. Character of the Government's Action.

Consideration of the character of the government's action looks at whether the action was general in nature or directed at the individual property owner. *See id*; *City of Lorena*, 409 S.W.3d at 646. In *Sheffield*, the rezoning was precipitated by the owner's purchase of property, but the Court found the rezoning was still general in character and not exclusively directed at the property owner. *Id*.

XI. THE PRIVATE REAL PROPERTY RIGHTS PRESERVATION ACT.

In 1995, the legislature passed the Private Real Property Rights Preservation Act (PRPRPA), establishing a statutory regulatory takings cause of action. *See* Tex. Gov't Code §§ 2007.001-.026. The PRPRPA also requires governmental entities to prepare a written takings impact assessment of actions covered by PRPRPA and to provide public notice of such actions that may result in a taking. Tex. Gov't Code §§ 2007.042–.043. The attorney general was instructed to prepare guidelines to assist governmental entities in identifying covered actions that may result in a taking. *Id*. § 2007.041; *see* Private Real Property Rights Preservation Act Guidelines, https://www.texasattorneygeneral.gov/sites/default/files/files/divisions/general-oag/PropertyRightsPreservationActGuidelines.pdf (last visited June 13, 2019).

A. Causes of Action Under the PRPRPA.

The PRPRPA authorizes causes of action against political subdivisions and state agencies for takings as they are defined by the Act. Tex. Gov't Code §§ 2007.021–.022. Suits against political subdivisions are filed in district court in a county in which the affected real property is located. *Id*. § 2007.021. Claims against state agencies are filed as a contested case with the state agency and subject to the Administrative Procedure Act found in Chapter 2001 of the Texas Government Code. *Id*. § 2007.022.

The PRPRPA defines a taking to be either (1) a governmental action that constitutes a taking under current jurisprudence on takings under the United States and Texas Constitutions; or (2) a governmental action that restricts or limits an owner's right to private real property and that results in a devaluation of such property by 25% or more. Tex. Gov't Code § 2007.002(5).

Governmental actions covered by the PRPRPA are limited to four categories of actions listed in § 2007.003(a). That section also lists fourteen categories of actions to which the PRPRPA does not apply. *Id*. § 2007.003(b). Notably, the PRPRPA does not apply to the formal exercise of eminent domain power. *Id*. § 2007.003(b)(8).

Whether a governmental action results in a taking under the PRPRPA is a question of fact. *Id*. § 2007.023(a).

A party may appeal a judgment in a suit or seek judicial review of a final decision or order in a contested case. *Id*. § 2007.025.

B. Sovereign Immunity is Waived.

Sovereign immunity to suit and liability are waived and abolished to the extent of liability created by the PRPRPA. *Id*. § 2007.004(a). However, the waiver does not authorize execution of a judgment against the property of the state or a governmental entity. *Id*. § 2007.004(b).

C. Limitation of Actions.

A suit or a contested case must be filed within 180 days "after the date the private real property owner knew or should have known that the governmental action restricted or limited the owner's right in the private real property." *Id*. § 2007.021–.02. The 180-day requirement is jurisdictional. *Younger v. El Paso Cty. Emergency Servs. Dist. No. 2*, 564 S.W.3d 97, 103 (Tex. App.—El Paso 2018, no pet.).

D. Remedies.

The remedies provided by the PRPRPA are in addition to other procedures or remedies provided by law but a party may not recover under the PRPRPA and also recover under another law or in an action at common law for the same economic loss. Tex. Gov't Code § 2007.006. If the governmental action is found to be a taking, "the private real property owner is only entitled to, and the governmental entity is only liable for, invalidation of the governmental action or the part of the governmental action resulting in the taking." *Id*. § 2007.023(b). However, a governmental entity may elect to pay monetary damages instead of rescinding an invalid governmental action. *Id*. § 2007.024.

E. Attorney's Fees and Court Costs.

The prevailing party, whether property owner or governmental entity, shall be awarded reasonable and necessary attorney's fees and court costs. *Id*. § 2007.026.

F. Takings Impact Assessment.

The PRPRPA requires governmental entities to prepare a written takings impact assessment of actions covered by PRPRPA and to provide public notice of such actions that may result in a taking. *Id*. §§ 2007.042–.043; *see also id*. § 2007.045 (some assessments may require update). Assessments are public information. *Id*. § 2007.043(c).

If a required assessment is not prepared, the governmental action is void. *Id*. § 2007.044(a). A private real property owner affected by a governmental action taken without the required assessment may sue for a declaration of the invalidity of the governmental action. *Id*. Suit must be filed in district court in a county in which the affected real property is located. *Id*. § 2007.044(b). A prevailing property owner shall be awarded attorney's fees and court costs. *Id*. § 2007.044(c).