

Texas City Attorneys Association
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“Avoiding Takings Claims”



Overview of Takings Claims

Constitutional Foundations of Takings Law

*"[N]or shall private property be taken for public use,
without just compensation."*

U.S. Const. amend. V.

*"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...."*

Tex. Const. Art. I, § 17.

Overview of Takings Claims

General Categories of Takings Claims

- Physical Occupation
- Exactions
- Regulatory Takings

Overview of Takings Claims

Physical Occupation

A physical invasion or a regulatory activity that produces a physical invasion, will support a takings claim without regard to the public interest advanced by the regulation or the economic impact upon the landowner.

See Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency, 505 U.S. 1003, 1015 (1992).

Overview of Takings Claims

Exactions

A condition of approval will not result in a judicial determination of an unconstitutional taking if:

1. the condition furthers a substantial/legitimate governmental interest;
2. the condition is related to the interest that is served; and
3. the impacts of the development are roughly proportional to the condition imposed.

Dolan v. City of Tigard, 512 U.S. 374, 391 (1994); Nollan v. California Coastal Comm'n, 483 U.S. 825, 836 (1987).

Overview of Takings Claims

Regulatory Takings

- Encompasses the majority of takings cases and involves the most complex analysis
- A compensable regulatory taking occurs when a governmental agency imposes restrictions that either deny a property owner all economically viable use of his property or unreasonably interferes with the owner's right to use and enjoy the property. *City of Dallas v. Blanton*, 200 S.W.3d 266, 271 (Tex.App.—Dallas 2006, no pet.) (citing *Mayhew v. Town of Sunnyvale*, 964 S.W.2d 922, 935 (Tex. 1998)).

Overview of Takings Claims

"As Applied" Partial Taking

- An "as applied" partial taking claim includes circumstances where the application of a regulation to particular property is a taking of some interest in property that is less than the whole, although the regulation may not effect a taking on its face.
- "Where a regulation places limitations on land that fall short of eliminating all economically beneficial use, a taking nonetheless may have occurred, depending on a complex of factors including the regulation's economic effect on the landowner, the extent to which the regulation interferes with reasonable investment-backed expectations, and the character of the government action." *Palazzolo v. Rhode Island*, 533 U.S. 606, 617 (2001).

Overview of Takings Claims

Inverse Condemnation in Texas

To state a claim for inverse condemnation under the Texas Constitution, a plaintiff must allege:

1. an intentional governmental act;
2. that resulted in his property being taken, damaged, or destroyed;
3. for public use.

General Services Commission v. Little-Tex Insulation Company, Inc.,
39 S.W.3d 591, 598 (Tex. 2001).

Procedural Hurdles & Defenses in Litigating Takings Claims

Ripeness in Federal Takings Claims

1. State Compensation Requirement
2. Final Decision Requirement

Procedural Hurdles & Defenses in Litigating Takings Claims

State Compensation Requirement

“Because the Fifth Amendment proscribes takings without just compensation, no constitutional violation occurs until just compensation has been denied. The nature of the constitutional right therefore requires that a property owner utilize procedures for obtaining compensation before bringing a Section 1983 action.”

Williamson County Regional Planning Comm'n v. Hamilton Bank, 473 U.S. 172, 194 n.13 (1985).

Procedural Hurdles & Defenses in Litigating Takings Claims

Exceptions to State Compensation Requirement

1. Inadequate State Remedies
 - Texas provides an “adequate procedure for seeking just compensation” for a taking through an inverse condemnation action under Art. I, § 17 of the Texas Constitution. *John Corp. v. City of Houston*, 214 F.3d 573, 580-81 (5th Cir. 2000).
2. Claims based on failure to substantially advance legitimate state interests
3. Claims based on diversity jurisdiction

Procedural Hurdles & Defenses in Litigating Takings Claims

Final Decision Requirement

Under the Takings Clause, a taking does not occur—and thus, a takings claim is not ripe—“until the relevant governmental unit has reached a final decision as to what will be done with the property....”

Lange v. City of Batesville, 160 F.3d 348, 354 (5th Cir. 2005).

Procedural Hurdles & Defenses in Litigating Takings Claims

Ripeness Requirement for Regulatory Takings Claims under Texas law

- Texas law requires a final decision regarding the application of the regulation to the property at issue.
Mayhew, 964 S.W.2d at 929.
- Final decision usually requires both a rejected development plan and the denial of a variance from the controlling regulation.

Procedural Hurdles & Defenses in Litigating Takings Claims

Exceptions to Ripeness (Final Decision) Requirement

- Futile variance requests or re-applications are not required.

Procedural Hurdles & Defenses in Litigating Takings Claims

Requiring property owners to submit development plans for review and request for variances gives the governmental unit an opportunity to “grant different forms of relief or make policy decisions which might abate the alleged taking.” *Mayhew*, 964 S.W.2d at 929.

Practical Approaches to Avoiding Takings Claims

1. Create Realistic Expectations

A thoughtful comprehensive plan or program that sets forth overall community goals and objectives and which establishes a rational basis for land use regulations helps lay the foundation for a strong defense against any takings claim. Likewise, background studies of development and environmental impacts can build a strong foundation for environmental protection measures.

Practical Approaches to Avoiding Takings Claims

■ Include Safety Valves/Variance Provisions

Establish an economic hardship variance and similar administrative relief provisions that allow the possibility of some legitimate economically beneficial use of the property in situations where regulations may have an extreme result.

Practical Approaches to Avoiding Takings Claims

- Identify Low Impact, Economically Viable Uses
- In highly sensitive areas subject to extensive regulation, identify permissible low impact, economically viable uses.
- Examples include agriculture, horticulture, forestry, and very low density residential.

Practical Approaches to Avoiding Takings Claims

- Emphasize Fairness

Make development pay its fair share, but establish a rational, equitable basis for calculating the type of exaction, or the amount of any impact fee.

Practical Approaches to Avoiding Takings Claims

- Explain & Justify
 - Provide well-written findings
 - Document the relationship between the impact of the proposed development and the amount of the fee or dedication

Practical Approaches to Avoiding Takings Claims

- Don't Approve Substandard Lots

Take steps to prevent the subdivision of land in a way that may create economically unusable substandard or unbuildable parcels.

Practical Approaches to Avoiding Takings Claims

- Consider Acquisition

In circumstances where a community places such a high value on the scenic or environmental nature of a parcel that no development or use of that parcel is acceptable, local governments may wish to purchase the property (or at least purchase a conservation easement).

Practical Approaches to Avoiding Takings Claims

- Be Informed

Putting the takings issue in terms of maximizing everyone's property values when explaining the local government's decision to the property owner and the public, places the issue into terms that most can understand and embrace.

Practical Approaches to Avoiding Takings Claims

9. Institute an Adequate Administrative Process

Institute an administrative process that gives decision-makers adequate information by requiring property owners to produce evidence of undue economic impact on the subject property prior to filing a legal action.

*Enjoy the rest of the
conference!!*

Happy  Halloween