

“The Takings Clauses: Limits on What the Government May Do on the Coast”

presented by

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INTRODUCTION

The Takings Clauses of the Texas and United States Constitutions do not mince words. Article I, section 17 of the Texas Constitution states: “no person’s property shall be taken, damaged or destroyed for or applied to public use without adequate compensation being made.” The Fifth Amendment to the United States Constitution guarantees “private property [shall not] be taken for public use, without just compensation.” The Takings Clauses were “designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.”²

Yet as Justice Holmes wrote over eighty years ago, “[g]overnment hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law.”³ The challenge for lawmakers, regulators and government attorneys, on the one hand, and private property owners and their attorneys on the other, is to determine when the Takings Clauses will require government to compensate private property owners for actions government proposes to take, or takes. Governments often dislike the Takings Clauses, viewing them as impediments to achieving necessary progress and improvements. This sentiment is especially strong when public budgets are tight, as they almost always are. But as Justice Holmes also wrote, “a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change.”⁴

The inevitable and continuing conflict between government laws and regulations and private property owners’ rights is particularly divisive along the nation’s coastline. Several of the United States Supreme Court’s recent opinions construing the federal Takings Clause arose out of coastal regulations. For examples, *City of Monterey v. Del Monte Dunes*⁵ involved Monterey, California’s denial of applications to develop residential units on a 37-acre oceanfront tract; *Lucas v. South Carolina Coastal Council*,⁶ which probably is the most significant takings case in recent history, dealt with South Carolina’s enforcement of its Beachfront Management Act to prevent Lucas from building houses on his beachfront lots; and *Palazzolo v. Rhode Island*⁷ was based on Rhode Island’s reliance on its Coastal Resources Management Program to prevent Palazzolo from building a private beach club on his coastal marshland. These recent Supreme Court cases are part of many federal and state cases that discuss coastal regulations and takings.

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² *Armstrong v. United States*, 364 U.S. 40, 49 (1960).

³ *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 413 (1922).

⁴ *Id.* at 416.

⁵ 526 U.S. 687 (1999).

⁶ 505 U.S. 1003 (1992).

⁷ 533 U.S. 606 (2001).

The numbers of Takings Clause conflicts on the coast no doubt will increase in future years as government becomes increasingly active in regulating, preserving, and restoring the coastal environment, more people move to live along the coastlines, and private property along the coast increases in value.

This paper is divided into two parts:

First, we review the past year's major developments in the law of eminent domain. Eminent domain is the government's power to take private property for public use, subject to compensation for the taking. "[E]minent domain is one of the most intrusive powers of government. It requires that individual owners relinquish their property without their consent."⁸

This past year brought the United States Supreme Court's controversial 5-4 decision in *Kelo v. City of New London*,⁹ which presented the issue whether government may take private property for what might be a private, rather than public use. May a city use eminent domain to take the land where Joe's Beachside Motel and Bait Shop now sits in order to deliver that land to developers of an expensive, new golf club and resort that will attract well-heeled tourists to town, increase the city's tax revenue, and provide many new jobs? This past year also brought the Texas Legislature's new statute that limits the use of eminent domain. Although enacted in reaction to the *Kelo* decision, the new statute still leaves most of the difficult questions unanswered.¹⁰

Second, we survey the current law on inverse condemnation, which includes the law of regulatory takings. Inverse condemnation is a taking for which government does not pay in advance, but for which the Takings Clauses nevertheless may require compensation.¹¹

There are likely two bright lines in this area of the law that help practitioners identify an unconstitutional taking of private property; but for the most part the lines are unusually blurred and erratic. The Texas Supreme Court borrows John Milton's phrase to characterize the law of regulatory takings as a "Serbonian Bog," into which Milton wrote that "armies whole have sunk."¹²

The law of inverse condemnation—which separates governmental actions that do require compensation from those that do not—continues to expand rapidly. The recent United States Supreme Court cases cited above—*Del Monte Dunes*, *Lucas*, and *Palazzolo*—fall within this area of the law. Likewise, the Texas Supreme Court frequently ventures into the Serbonian Bog.¹³ The Texas Legislature added a statutory layer to the law by enacting the Private Real Property Rights Preservation Act in 1995.¹⁴

The most we can hope to do in the second part of this paper is to present a readable outline of regulatory takings law, provide guideposts to which government officers and attorneys, and property owners and their attorneys, may refer as they must abide by and enforce the Takings Clauses, and call attention to a few current topics and lawsuits (some on the Texas coast) that present interesting takings questions.

⁸James W. Ely, Jr., *Can the "Despotic Power" Be Tamed?*, 17 PROB. & PROP. 31, 31 (Dec. 2003).

⁹125 S.Ct. 2655 (2005).

¹⁰TEX. GOV'T CODE § 2206.001.

¹¹"Inverse condemnation may occur when government, without paying compensation in advance, "physically appropriates or invades [private] property, or when it unreasonably interferes with the landowner's right to use and enjoy the property, such as by restricting access or denying a permit for development." *Westgate, Ltd. v. State*, 843 S.W.2d 448, 452 (Tex. 1992).

¹²See *Sheffield Dev. Co. v. City of Glenn Heights*, 140 S.W.3d 660, 671 (Tex. 2004).

¹³Recently, see, e.g., *Tarrant Regional Water District v. Gragg*, 151 S.W.3d 546 (Tex. 2004) (construction and operation of reservoir caused change in flooding characteristics that resulted in a taking); *City of Dallas v. Jennings*, 142 S.W.3d 310 (Tex. 2004) (flooding of plaintiffs' home with raw sewage was not a taking); *Sheffield Dev. Co.*, *supra* n. 12, 140 S.W.3d 660 (rezoning tract to reduce number of houses that could be built did not constitute a taking).

¹⁴TEX. GOV'T CODE § 2007.001 *et seq.*

**PART ONE: RENEWED INTEREST IN THE LIMITATION THAT
A TAKING MUST BE FOR A "PUBLIC USE"**

It has long been accepted that government may employ its power of eminent domain to take private property only for *public* use. Government may not take property from Citizen A for the sole purpose of transferring it to Citizen B, even if the government compensates A.¹⁵ The difficulties lie in determining: (1) which branch of government gets to decide whether a particular taking is for a "public use," and (2) what does "public use" mean? The Supreme Court's answers to those questions last year in the *Kelo* decision provoked an unusually intense and critical public debate.

A. *Kelo v. City of New London*.¹⁶ Contrary to much of the outrage aimed at the Supreme Court in the aftermath of *Kelo*, the decision is not an example of "judicial activism." Rather, it is an example of judicial deference, or as more informed critics may say, even judicial abdication. Ultimately, the Supreme Court decided that in most cases, the federal courts will not second-guess the decisions of city councils and state courts that a particular exercise of eminent domain seizes private property for a public, rather than private, use. The Supreme Court concluded that the Court's previous cases defined the concept of "public use" broadly and that the Court would adhere to its "longstanding policy of deference to legislative judgments in this field."¹⁷

Justice Kennedy, whose vote with the majority was necessary for the outcome of *Kelo*, added a concurring opinion that sounds a note of caution. Kennedy said there may be cases "in which the transfers [of private property] are so suspicious, or the procedures employed so prone to abuse, or the purported benefits so trivial or implausible, that courts should presume an impermissible private purpose" when reviewing takings to which a legislative body nevertheless had attached a "public use" label. Kennedy did not find *Kelo* to be such a case.¹⁸

Both Justices O'Connor and Thomas filed dissenting opinions. Justice O'Connor warned that as a result of the majority's decision, "all private property is now vulnerable to being taken and transferred to another private owner, so long as it might be upgraded—*i.e.*, given to an owner to use it in a way that the legislature deems more beneficial to the public—in the process."¹⁹ Justice Thomas said the Takings Clause requires that takings be for "public use," not merely for a "public purpose" as the majority opinion said.²⁰

In *Kelo*, the city council of New London, Connecticut, adopted a comprehensive plan to renew a blighted section of that city. The plan required New London to acquire, by purchase or condemnation, 115 acres of land within an old section of the city. Private homes occupied much of that land. After the city acquired the land, it planned to transfer the land to an economic development corporation that would then lease the property to private

¹⁵*Kelo*, *supra* n. 9, 125 S.Ct. at 2661; *Olcott v. The Supervisors*, 83 U.S. 678, 694 (1872) ("The right of eminent domain nowhere justifies taking private property for a private use."); *Maher v. Lasater*, 354 S.W.2d 923, 924 (Tex. 1962) (Art. I, § 17 of the Texas Constitution "prohibits the taking of property for *private* use").

¹⁶*Kelo*, *supra* n. 9, 125 S.Ct. 2655.

¹⁷*Id.* at 2663.

¹⁸*Id.* at 2670-71 (Kennedy, J., concurring). The concerns expressed by Justice Kennedy came to fruition in one of the few cases interpreting "public use" decided thus far since *Kelo*. In February of this year, the Supreme Court of Rhode Island voided, for lack of a proper public purpose, the condemnation by the Rhode Island Economic Dev. Corp. ("EDC") of an easement in a private company's airport parking garage. The Rhode Island court obviously was offended by the EDC's use of condemnation to obtain garage space for which it had been unable to negotiate. The court said EDC's condemnation was motivated by the public corporation's desire for more airport parking revenue, and that while it did not result in creation of any new parking spaces for public use, it did produce a "multimillion-dollar windfall" for the condemning authority. *Rhode Island Economic Dev. Corp. v. The Parking Co.*, 892 A.2d 87 (R.I. 2006).

¹⁹*Id.* at 2671 (O'Connor, J., dissenting).

²⁰*Id.* at 2677 (Thomas, J., dissenting).

developers for long terms and nominal rents.²¹ Pfizer, the pharmaceutical company, agreed to lease part of the land to build a large research facility. Other developers planned to build a hotel, conference center, high-end residences, a museum, office space, health club, and parking garage on the land. New London contemplated that its renewal plan would create a large number of new jobs and result in substantially increased tax revenue for the city and positive momentum that would inspire revitalization of adjacent areas of the city.

Some homeowners and residents sued to stop the redevelopment plan, claiming that the city proposed to take their land and demolish their homes for the purpose of conveying the land to private, for-profit developers. The city did not contend the plaintiffs' homes were blighted. Some of the plaintiffs had made extensive improvements to their homes; others had unique homes because of water views. A trial judge enjoined parts of New London's plan, but the Connecticut Supreme Court reversed, holding that all of New London's takings were valid. And in *Kelo*, the sharply divided United States Supreme Court affirmed the Connecticut Supreme Court, holding that carefully-planned and considered economic redevelopment projects such as New London's, carried out in accordance with the state's municipal development statute, serve a "public purpose." The United States Supreme Court held that New London could employ the power of eminent domain to carry out its redevelopment project without violating the Fifth Amendment's requirement that takings be for "public use."

Two Texas-based commentators have described the *Kelo* decision as establishing the following propositions: (1) the taking for "public use" limitation in the Fifth Amendment is satisfied if the taking is merely for a "public purpose," (2) courts should defer to a legislature's determination that a particular taking is for a public purpose, unless the legislature's determination is irrational, and (3) courts should defer to legislative determinations of which private property, and how much of that property, should be taken to achieve the public purpose.²²

B. The Texas Response to *Kelo*. In *Kelo*, the United States Supreme Court interpreted only the Fifth Amendment to the federal constitution. The Court stated "nothing in our opinion precludes any State from placing further restrictions on its exercise of the takings power."²³

It is not clear whether the Texas Supreme Court would interpret Article I, section 17 of the Texas Constitution in the same way as *Kelo*.²⁴ Late last year, the Austin Court of Appeals surveyed the Texas Supreme Court's cases construing what constitutes a "public use" under the State constitution and concluded that the State supreme court's holdings are inconsistent. The Austin Court wrote:

There is no concrete rule for determining whether a use is a public use; each case is usually decided upon the basis of its own facts and the surrounding circumstances. At times, the [Texas Supreme Court] has stated that "this court has adopted a liberal view concerning what is or is not a public use." On the other hand, throughout the twentieth century, the [Texas Supreme Court] has also steadfastly rejected "that liberal definition of the phrase 'public use' . . . which makes it mean no more than the public welfare or good, and under which almost any kind of extensive business or undertaking to which the property is devoted." Instead, Texas courts have espoused a narrower "use by the public" concept: property can only be taken when "the public be

²¹*Id.* at 2660 n.4 (negotiations with one developer contemplated a 99-year ground lease for rent of \$1 per year).

²²D. Sanders & P. Pattison, *The Aftermath of Kelo*, 34 REAL ESTATE L. J., 157, 160 (2005).

²³*Kelo*, *supra* n.9, 125 S.Ct. at 2668.

²⁴It is sometimes suggested that Art. I, § 17 of the Texas Constitution may provide more protection for private property owners than its federal counterpart, but the Texas Supreme Court has not directly addressed that question. In general, the Texas and federal courts consider the two Takings Clauses to be coextensive. *See, e.g., Vulcan Materials Co. v. City of Tehuacana*, 369 F.3d 882, 888 n.4 (5th Cir. 2004) (stating that the court would evaluate the plaintiff's claims under more established federal standards, "keeping in mind that greater protection of property rights generally may be afforded under the Texas constitution."); *Sheffield Dev. Co.*, *supra* n.12, 140 S.W.3d at 669 ("[I]t could be argued that the differences in the wording of the two [Takings Clauses] are significant, but neither Sheffield nor the City makes this argument.").

entitled to share indiscriminately in the proposed use as a matter of right.”²⁵ Under these principles, the [Texas Supreme Court] has invalidated takings for private benefit even in the face of legislative declarations of public use, and despite claims that the use would confer indirect public benefits.²⁶

Enter the Texas Legislature. In August 2005, less than three months after the Supreme Court decided *Kelo*, Governor Perry opened the Second Called Session of the 79th Legislature, convened originally to deal with public school finance, to consider a bill to limit the use of eminent domain. The Legislature enacted, and the Governor signed, the legislation now codified as section 2206.001 of the TEXAS GOVERNMENT CODE.

The Legislature stated that section 2206.001 is intended to limit the use of eminent domain by Texas governmental entities, as well as private corporations having the power of eminent domain (such as public utilities and common carrier pipelines). The most important part of the statute, which became effective November 18, 2005, states:

A governmental or private entity may not take private property through the use of eminent domain if the taking:

- (1) confers a private benefit on a particular private party through the use of the property;
- (2) is for a public use that is merely a pretext to confer a private benefit on a particular private party; or
- (3) is for economic development purposes, *unless the economic development is a secondary purpose resulting from municipal community development or municipal urban renewal activities to eliminate an existing harm on society from slum or blighted areas under [the Texas Community Development Act or the Texas Urban Renewal Law]*.²⁷

So does the italicized exception in subsection (3) of this new statute approve the result the United States Supreme Court reached in *Kelo*? Realistically, section 2206.001 fails to provide much additional specificity in this area of the law beyond that already available from judicial opinions. The new statute does not define “private benefit” or “pretext to confer a private benefit.”

There are several broad exceptions to the statute, including those for transportation projects (roads, highways, airports, railroads); ports and navigation districts; water, wastewater, flood, and drainage projects; public buildings, hospitals, and parks; utilities; a “sports and community venue project approved by the voters at an election on or before December 1, 2005,”²⁸ operations of a common carrier or energy transporter; public utility

²⁵In *Kelo*, the U. S. Supreme Court stated it had rejected a test very similar to this one first in 1906, and then consistently thereafter. 125 S.Ct. at 2662-63.

²⁶*Whittington v. City of Austin*, 174 S.W.3d 889, 897 n.3 (Tex. App.—Austin 2005, pet. denied) (internal citations and quotations from law review article omitted). There are other recent, but pre-*Kelo*, Texas appellate court opinions on the question whether a particular taking is for “public use.” See *Malcomson Rd. Util. Dist. v. Newsom*, 171 S.W.3d 257 (Tex. App.—Houston [1st Dist.] 2005, pet. pending as No. 05-0626) (condemnation for retention pond was for a public use even though it benefited adjacent developer’s project, but there was an issue of fact whether it was necessary to take the owner’s property); *Hardwicke v. City of Lubbock*, 150 S.W.3d 708, 714-15 (Tex. App.—Amarillo 2004, no pet.) (trial court did not abuse discretion by denying a temporary injunction to halt a condemnation within an urban renewal project even though a private developer requested the city to condemn the plaintiff’s property after negotiations for purchase failed and agreed to reimburse the city for the cost of the condemnation).

²⁷TEX. GOV’T CODE § 2206.001(b) (emphasis added).

²⁸This exception covers the City of Arlington’s use of eminent domain to acquire land for a new stadium for the Dallas Cowboys. The exception raises doubt about the fate of condemnation projects to provide similar venues for other professional sports teams in the future. If the drafters of the new statute thought it necessary to provide an exception for the new Cowboys Stadium, the implication is the statute would forbid projects not within the exception.

services; underground storage operations; waste disposal projects; and libraries, museums, and related facilities.²⁹ Although the statute does not define “public use,” one may infer that the Legislature considers the types of projects within this list of exceptions to be “public uses.”

It will be interesting to watch Texas law develop under section 2206.001.³⁰ Obviously, the statute continues to leave most questions to the courts. Does a particular taking confer a private benefit on a particular private party? Is an ostensible public use merely a pretext? If the courts find that a particular Texas entity’s use of eminent domain *violates* section 2206.001, that should be sufficient to halt the condemnation. But ultimately, the responsibility for interpreting and enforcing Article I, section 17 of the Texas Constitution belongs to the judiciary. So if the courts hold that section 2206.001 allows a particular condemnation project to go forward, the courts nevertheless might conclude that Article I, section 17 independently operates to void that condemnation.³¹

C. Pending Controversies. Controversies that are pending or forecast in the State show that government officials and private landowners will continue to wrestle with the issues discussed in *Kelo* or offshoots of those issues. Attendees at the Coastal Law Seminar may know of others, but briefly, here are two current matters and a prospective issue:

(1) ***Mr. Harry Whittington’s Fight with the City of Austin.*** The Whittington family owns a city block near the Austin Convention Center. In 2001, the Austin City Council passed a resolution that the Whittington block “should be acquired for a public use,” but the resolution did not specify what “public use.” Austin commenced proceedings to condemn the block. The Whittingtons filed a motion for summary judgment to dismiss the proceedings, alleging the city had failed to establish that the City Council condemned their land for a valid public purpose or determined that it was necessary to take their lot. By the trial date, the city’s staff had announced plans to use the Whittington block for parking and a chilling plant associated with the Convention Center. The trial judge denied the Whittingtons’ motion, and a jury awarded the Whittingtons \$7.75 million in compensation for their block.

The Whittingtons appealed, and late last year the Austin Court of Appeals reversed the trial court’s judgment, holding the city failed to establish that City Council, as the condemning authority, condemned the Whittington block for a valid public purpose or that the Council had determined that taking the block was necessary.³² As noted above, the Council had resolved only that the block should be acquired for a “public use,” but had not stated what the use was. The Austin Court’s holding makes good sense. Courts cannot review the decisions of the legislative branch to take private property unless the legislative body itself identifies the “public use” for which it employs the power of eminent domain and provides a statement of why taking a particular property is necessary for that use.³³ The Austin Court correctly refused to accept the *post hoc* statements from

²⁹TEX. GOV’T CODE § 2206.001(c).

³⁰The Texas Legislature may return to the subject of eminent domain in its 2007 session. There is an interim joint committee studying the power of eminent domain, with a report due to the Lieutenant Governor and Speaker by December 1, 2006. Rep. Beverly Woolley (Houston) is co-chair of the interim committee.

³¹The Texas Supreme Court has held Art. I, § 17 to be self-effectuating. *See, e.g., Steele v. City of Houston*, 603 S.W.2d 786, 791 (Tex. 1980) (“The Constitution itself is the authorization for compensation for the destruction of property and is a waiver of governmental immunity for the taking, damaging or destruction of property for public use.”).

³²*Whittington v. City of Austin*, *supra* n.26, 174 S.W.3d 889.

³³*But see* the opinion in *City of Arlington, Texas v. Golddust Twins Realty Corp.*, 41 F.3d 960 (5th Cir. 1994), in which the federal court, interpreting the public use requirement of Art. I, § 17 of the Texas Constitution, reversed a district court’s judgment voiding Arlington’s condemnation of a leasehold interest in property that Arlington wanted to make available to the Texas Rangers baseball club as part of the new Ballpark at Arlington stadium complex. The Arlington City Council’s resolution stated the purpose of the condemnation was to provide parking space for the existing Arlington Stadium, but a jury found the city’s true intent to be different. The Fifth Circuit concluded that since the city’s undisclosed intent was to take the private owner’s leasehold interest as part of the development of a comprehensive ballpark complex, the taking

Austin's city employees of what the City decided to do with the Whittington block. The law should not permit legislative bodies to delegate the responsibility for deciding whether a particular taking is necessary for a public use to lesser officers.

(2) *The Nature Conservancy's Fight with Willacy County.* The Nature Conservancy stated on December 27, 2005, that it was "surprised and alarmed" to learn that the Willacy County Commissioners' Court had announced plans to condemn all or part of the Conservancy's 1,500 acre nature preserve on South Padre Island. In 2000, the Conservancy purchased a 24,000 acre tract of undeveloped land on South Padre. It later conveyed all but 1,500 acres to the U. S. Fish and Wildlife Service's Laguna Atascosa National Wildlife Refuge. Willacy County intends to condemn all or some of the remaining 1,500 acres in order to start a beach ferry to take tourists from Port Mansfield to South Padre Island using an amphibious vehicle the Willacy County Navigation District purchased in 2004.³⁴ The Conservancy complained in December that Willacy County would not fully reveal its plans, but county officials said the project would include at least a ferry landing and public restrooms on the island. Some Port Mansfield residents fear the true purpose of the county's condemnation is to clear the path for private development on South Padre Island across from Port Mansfield.³⁵ The Nature Conservancy vowed to fight Willacy County's condemnation in court.³⁶

(3) *The Proposed Trans-Texas Corridor.*³⁷ The Texas Legislature has authorized the Texas Transportation Commission to acquire options to purchase property "that the commission is considering for possible use as part of the Trans-Texas Corridor even if it has not been finally decided that the Trans-Texas Corridor will be located on that property."³⁸ The same statute goes on to make clear that "[a]n option to purchase may be purchased along alternative potential routes for the Trans-Texas Corridor even if only one of those potential routes will be selected as the final route."

Although there are restrictions, the Transportation Commission also has statutory authority to acquire property for "ancillary facilities" along the proposed Trans-Texas Corridor, including gas stations, convenience stores, or similar facilities that "[provide] services to and directly [benefit] users of the Trans-Texas Corridor."³⁹ Last year, after *Kelo*, the Legislature limited the Transportation Commission's power to take private property for "ancillary facilities" to condemnations "for one of the multiple ancillary facilities included in a comprehensive development plan approved by the county commissioners court of each county in which the property is located."⁴⁰ Cynics might say that limitation was an effort to try to insulate the Transportation Commission's takings of

was, in the end, for a public purpose (even if a different public purpose from the one the City Council announced) and therefore legal.

³⁴See Stephen Scheibal, *South Texas County May Sue to Take Wildlife Preserve*, AUSTIN AMERICAN-STATESMAN, Dec. 24, 2005; Anton Caputo, *South Padre Ferry Plan is Sailing on Troubled Waters*, SAN ANTONIO EXPRESS-NEWS, Dec. 14, 2005.

³⁵See Fernando del Valle, *Port Mansfield Residents Wary of County's Plans* (appearing in ISLAND BREEZE, South Padre Island, Feb. 2, 2006), available at http://spislandbreeze.com/news_more.php?id=429_0_2_0_C.

³⁶See Carter Smith, *South Padre Island Preserve Deserves Our Protection*, The Nature Conservancy (op-ed) (Dec. 27, 2005), available at <http://www.nature.org/wherewework/northamerica/states/texas/>.

³⁷For general information about the Trans-Texas Corridor, see <http://www.keeptexasmoving.org/about/>. One of the proposed corridors, TTC-35, generally follows I-35 from Laredo to north of Dallas. It does not come near the coast. The second proposed corridor, known as proposed I-69 TTC, runs from the Lower Rio Grande Valley or Laredo (or both), through the Houston area to Texarkana. Parts of I-69 TTC may lie in the coastal counties, but current maps (on the website cited above) do not show it lying along the coast, itself.

³⁸TEX. TRANSP. CODE § 227.041(a).

³⁹*Id.*, § 227.041(b) & (b-1). The Commission may the same power to condemn for the Trans-Texas Corridor that it has for toll roads, which includes, with certain limitations, the power to condemn property to provide locations for a "gas station, garage, store, hotel, restaurant, or other commercial facility" anticipated to generate revenue for a toll project. See TEX. TRANSP. CODE §§ 227.041(a), 203.052(b)(9).

⁴⁰See TEX. TRANSP. CODE §§ 227.041(b)(5), 203.052(c).

private property for service stations, hotels, restaurants, and similar private enterprises from constitutional attack by enveloping such takings within some sort of “comprehensive plan.” It will be interesting to see which will be formulated first: (1) the Transportation Commission’s desire to condemn private property for a hotel, truck stop or fast food restaurant, or (2) the affected county’s comprehensive plan that includes such a project.

The state’s assertion of a power to condemn options to purchase private property for *possible* use for potential routes for the Trans-Texas Corridor has drawn criticism. The King Ranch, which owns approximately 1,300 square miles of South Texas land, filed an *amicus curiae* brief in the *Kelo* case, arguing that the “government should not be allowed to acquire property or options to purchase property (which would limit the owner’s ability to use its property for its own purposes) unless and until the government can show its *present* need for that property, and that its use of the property will be for a public purpose, not a private one.”⁴¹ The Supreme Court did not address King Ranch’s issue in the *Kelo* opinion.

No doubt the Trans-Texas Corridor project, if it proceeds, will produce significant questions about eminent domain, as well as likely litigation.

PART TWO: INVERSE CONDEMNATION (TAKING WITHOUT FIRST PAYING)

This part of the paper focuses on the more difficult part of Takings Clause jurisprudence—when the government acts in a manner that takes or damages private property but does *not* institute condemnation proceedings. In these situations, one may expect the government to argue that it did not take or damage private property; or that if the government did, it is not required to pay because it did so in a proper manner and only to a limited degree. Landowners who file inverse condemnation lawsuits usually find themselves in protracted, difficult litigation against well-funded and well-represented governmental foes.

A. *Bright Line Rules.* There are no bright line rules about the facts of a taking, *i.e.*, about *what* actually happened, or what property is actually taken. The facts of each case must be examined separately. For two situations in this area of the law, however, once the courts have decided *what* happened, the law will likely impose a reasonably predictable result. The Supreme Court of Texas has described these two bright line situations as “small islands in the [Serbonian] bog.”⁴² The situations are:

Bright Line Rule No. 1: When government physically appropriates or intentionally invades private property. Both the United States and Texas Supreme Courts hold that when the government intentionally “compel[s] the property owner to suffer a physical ‘invasion’ of his property,” a taking has occurred for which the government must compensate.⁴³ This is true whether the government itself invades the private property or merely compels a landowner to permit others to invade the property.⁴⁴ This rule also applies “no matter how minute the intrusion, and no matter how weighty the public purpose behind it.”⁴⁵

We will review two United States Supreme Court cases that illustrate this rule, and then we will describe a pending Texas appeal in which the private landowner contends this bright line rule applies. The two Supreme

⁴¹*Amicus Curiae* Brief of King Ranch, Inc. in Support of Petitioners in *Kelo v. City of New London*, No. 04-108 (U.S.). [For disclosure, my partners at Locke Liddell & Sapp LLP wrote the King Ranch *amicus* brief.]

⁴²*Sheffield Dev. Co.*, *supra* n.12, 140 S.W.3d at 671.

⁴³*See, e.g., Lingle v. Chevron U.S.A., Inc.*, 125 S.Ct. 2074, 2081 (2005). The Texas Supreme Court has said “[p]hysical possession [of private property] is, categorically, a taking for which compensation is constitutionally mandated.” *Sheffield Dev. Co.*, *supra* n.12, 140 S.W.3d 660, 669-70. Merely negligent invasions are not takings. *See, e.g., City of Dallas v. Jennings*, *supra* n. 13, 142 S.W.3d at 313-315.

⁴⁴*See Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 435-36 (1982); *GTE Southwest v. Public Util. Comm’n*, 10 S.W.3d 7, 13 (Tex. App.—Austin 1999, no pet.).

⁴⁵*Lucas*, *supra* n.6, 505 U.S. at 1015.

Court cases demonstrate that once the Court has characterized a particular government action as a physical invasion of private property, it inevitably requires compensation.

(A) **Examples from the U. S. Supreme Court:** *Loretto v. Teleprompter Manhattan CATV Corporation*⁴⁶ is sometimes cited as a near-perfect example of the rule that any physical occupation constitutes a taking. A New York statute required owners of apartment buildings to permit the cable television company to install its equipment on their buildings for whatever fee a state agency deemed reasonable. The state agency deemed a one time fee of \$1 to be reasonable, and apartment owners sued. The United States Supreme Court concluded the New York statute compelled private property owners to allow the cable company to place its boxes, bolts, wires, and plates on their property. Having characterized the statute as compelling a physical invasion, the Court quickly condemned it as an unconstitutional taking without compensation, even though the imposition on the apartment owners was minimal and New York had enacted the statute for the valid public purpose of making cable television more available to tenants throughout the state.⁴⁷

Another example, directly pertinent to the coast, is found in the United States Supreme Court's opinion in *Kaiser Aetna v. United States*.⁴⁸ A private property owner in Hawaii owned an ancient pond that was separated from the Pacific Ocean by a barrier beach. Under Hawaiian law, the pond was private property. The private owner conveyed land bordering the pond for the construction of a marina, and ultimately the owner of the marina, with approval by the Corps of Engineers, dredged an 8-foot deep channel through the barrier beach to connect the pond and marina to the ocean. The marina owner also spent a substantial sum improving the pond. The marina owner controlled the access to the pond from the ocean and did not allow commercial use of the pond. Other owners of private property bordering the pond paid fees to support patrolling and maintaining the pond. The federal government objected to the marina owner's denying public access to the pond, contending that after the pond was connected to the ocean, the public acquired a federally-protected right of access to the pond as a water of the United States.

The Supreme Court characterized the navigational servitude the government sought to impose on the private pond as "an actual physical invasion of the privately-owned marina."⁴⁹ The Court reasoned that if the government physically invades even by imposing only an easement on private property, it still must pay compensation. The Court held that "if the Government wishes to make what was formerly Kuapa Pond into a public aquatic park after petitioners have proceeded as far as they have here, it may not, without invoking its eminent domain power and paying just compensation, require them to allow free access to the dredged pond . . .

..⁵⁰

⁴⁶*Loretto, supra* n.44, 458 U.S. 419.

⁴⁷But in *Yee v. City of Escondido*, 503 U.S. 519 (1992), the Supreme Court held that a rent control ordinance applicable to mobile home pads did not constitute a physical taking of the pad owners' property. The landowners contended the ordinance gave renters a right to occupy the owners' mobile home pads indefinitely for submarket rents. The Supreme Court disagreed, holding that government physically occupies private land only when it *compels* the land's owner to submit to someone else's occupying of his or her land. Here, the landowners voluntarily rented their land to mobile home tenants. The Court thought the ordinance merely regulated the relationship between landlord and tenant.

⁴⁸444 U.S. 164 (1979).

⁴⁹*Id.* at 180.

⁵⁰*Id. Texas Parks & Wildlife Dept. v. Callaway*, 971 S.W.2d 145 (Tex. App.—Austin 1998, no pet.), presented an analogous situation to *Kaiser Aetna v. United States*. In 1976, the Parks & Wildlife Dept. acquired an easement in order to construct the Lake Water Exchange Pass, a canal-like waterway that connects the Sabine-Neches Ship Channel and Keith Lake ("the Pass"). The purpose of the Pass was to foster fish and wildlife populations in Keith Lake. The easement obligated the Department to keep the Pass closed to all private water traffic. Ten years after it constructed the Pass, the Department decided it lacked authority to close the Pass to public use and removed the traffic barriers it had placed across the Pass. An owner of land on and under the Pass sued, claiming that the Department's opening the Pass to the public, which it lacked the right to do under its easement, took his private property for public use under Art. I, § 17 of the Texas Constitution. In the cited opinion, the Austin Court held the owner pleaded a viable takings claim that was not barred by sovereign immunity.

(B) **The Pending Texas Appeal in *TH Investments v. Kirby*.** Before I describe the pending Texas appeal, which is *TH Investments, Inc. v. Kirby Inland Marine L.P. and the Port of Houston Authority*,⁵¹ I must disclose that I am one of the lawyers representing the landowner, TH Investments (“THI”), in the appeal and that THI lost in the trial court.

THI’s case involves a 27-acre tract of land near the confluence of the San Jacinto and Old Rivers in Harris County, north of the Houston Ship Channel and approximately 37 miles inland from the Gulf of Mexico. The San Jacinto and Old Rivers are navigable, tidally-influenced rivers in this vicinity. The land was patented out of the Republic of Texas in 1838 as part of a larger tract. When the land was conveyed out of the public domain into private ownership, the land was dry, emergent land. The parties in the case, which are THI, the Port of Houston Authority, and Kirby Inland Marine, stipulated at trial that THI holds unbroken record title to the land. (Because the Port Authority and Kirby are aligned in the case, I will refer to them together as the “Port.”)

During the past century, THI’s land, along with surrounding parts of Harris County, subsided primarily because of the withdrawal of underground water. Publications of the Harris-Galveston Coastal Subsidence District show the land sank approximately 8 feet between 1906 and 2000.⁵² As a result of that subsidence, the land now lies shallowly submerged, most of the time, under waters from Old River. From time to time, however, the land is for a few days exposed land.

The trial court held that as the land became submerged beneath the waters of Old River, title to the land reverted out of its private owner back into the State.⁵³ The trial court signed a conclusion of law stating: “As the 27 Acre Tract became submerged beneath the line of mean high tide, ownership of the property beneath the line of mean high tide passed to the Port Authority pursuant to Texas law.” Throughout the trial, the Port’s attorneys and the trial court spoke of THI’s land as having “escheated” to the State.

The Port relied principally on the Texas Supreme Court’s 1943 opinion in *Lorino v. Crawford Packing Company*,⁵⁴ which states there is a presumption that submerged land along the Gulf belongs to the State.⁵⁵ The Port also relied on the rule of *Rudder v. Ponder*,⁵⁶ which holds for grants from the sovereign governed by common law, the coastal boundary between the State’s land and that of the littoral owner lies along the line of mean high tide. Most of THI’s 27 acres now lies below the line of mean high tide. The Port contends in its appellate brief that public policy—specifically “use and regulation of the State’s maritime assets as a part of the Port of Houston”—supports its claim to current ownership of the 27 acres.

The trial court applied its understanding of Texas law to divest THI of title to its land and vest that title in the Port, as assignee of the State. The Port did not take THI’s land by eminent domain; it paid THI no

⁵¹No. 14-05-00204-CV (Tex. App.—Houston [14th Dist.]).

⁵²The Texas Supreme Court twice has acknowledged that substantial subsidence has occurred in Harris and Galveston Counties due to withdrawal of underground water, oil, and gas. See *Friendswood Dev. Co. v. Smith-Southwest Ind.*, 576 S.W.2d 21, 23-24 (Tex. 1978); *Coastal Indus. Water Auth. v. York*, 532 S.W.2d 949, 951 (Tex. 1976).

⁵³By a 1927 statute, the Texas Legislature transferred ownership of the State’s submerged lands along the Houston Ship Channel and its tributaries to a predecessor of the Port of Houston Authority. Act of April 5, 1927, 40th Leg., R.S., ch. 292, 1927 TEX. GEN. LAWS 437. The trial court held that the Port now owns THI’s land pursuant to that statute.

⁵⁴175 S.W.2d 410 (1943).

⁵⁵*Lorino* states: “it has been the policy of the State to retain title to lands covered by navigable waters, and the presumption is that there has not been any act of the State divesting itself of title.” *Id.* at 414. THI contends that it overcame the *Lorino* presumption by proving that the land was patented out of the sovereign at a time when the land was dry land. The question in THI’s case, like the question in *Coastal Indus. Water Auth. v. York*, is “not whether a riparian owner may acquire ownership of additional land but whether the submergence of land to which he has title necessarily divests him of that title.” *York, supra*, 532 S.W.2d at 953.

⁵⁶293 S.W.2d 736 (Tex. 1956).

compensation. Yet, pursuant to the trial court's judgment, which THI has appealed, the Port now has title to THI's land.

THI disputes that Texas law supports that result, pointing to, among other authorities, the following holdings from the Texas Supreme Court's opinion in *Coastal Industrial Water Authority v. York*:

It is clear from the cases . . . that *submergence does not necessarily destroy the title of the owner*. It is sometimes said that there must be a "transportation of the land beyond the owner's boundary to effect that result." *There has been no erosion or transportation of the York land—only a subsidence. This is not an ordinary hazard of riparian ownership; it is not the result of the force of the waters which takes from some owners and gives to others.*⁵⁷

THI's argument that is pertinent to this paper is that the trial court's interpretation of Texas law violates the Texas and federal Takings Clauses. THI contends that the Port physically appropriated THI's private property for public use in violation of the Takings Clauses. THI points to the United States Supreme Court's decision in *Lucas v. South Carolina Coastal Council*, which says a state may not employ a rule of law to take private property without compensation unless that rule of law already "inhere[s] in the title itself, in the restrictions that background principles of the state's law of property and nuisance already place upon land ownership."⁵⁸

For centuries the law has been that *erosion* from the action of water can take a private landowner's riparian or littoral land, just as *accretion* may add to private land. The Texas Supreme Court has said the risks of erosion and accretion *are* inherent limitations in titles to riparian and littoral property.⁵⁹ But the quotation above from the Texas Supreme Court's opinion in *Coastal Industrial Water Authority v. York* makes clear that *subsidence* is different. In *York*, the supreme court said the risk of loss of land to the State from subsidence is "not an ordinary hazard of riparian ownership."⁶⁰ Consequently, under *Lucas* there is no "background principle of the State's law of property" or limitation that "inheres in [THI's] title itself"⁶¹ that can trump the Takings Clauses or justify the Port Authority's taking of THI's land without compensation. As the Supreme Court wrote in *Lucas*, "a State, by *ipse dixit*, may not transform private property into public property without compensation."⁶²

THI states in its appellate brief that if the trial court's judgment is allowed to stand, it will set the stage for the Port's uncompensated taking of valuable subsided private land throughout the Harris and Galveston County areas. Alternatively, the Port warns in its brief that THI's arguments "throw open to dispute the ownership of thousands of acres of tidal submerged lands from the Sabine River to the Rio Grande River." By next year's Coastal Law Conference, we should have an appellate opinion in THI's case either to praise or roundly criticize.

Bright Line Rule No. 2: When the government enforces a law or regulation that has the effect of depriving private property of all economically beneficial or productive use. If a private owner can convince a court that a government-imposed regulation has *destroyed* the value of his or her land, it is likely that a court will find that the regulation violates the Takings Clauses.⁶³ This bright line rule presents private landowners with a difficult evidentiary burden because the government will argue the owner's property can still be put to *some*

⁵⁷*York*, *supra* n. 52, 532 S.W.2d at 954 (emphasis added and internal citations omitted).

⁵⁸*Lucas*, *supra* n. 6, 505 U.S. at 1029. The Fifth Circuit recently observed that "Texas courts attribute significant relevance to *Lucas*" when interpreting Art. I, § 17 of the Texas Constitution. *Vulcan Materials Co.*, *supra* n.24, 369 F.3d at 893 n.11.

⁵⁹*Manry v. Robison*, 56 S.W.2d 438, 445 (Tex. 1932).

⁶⁰*York*, *supra* n.52, 532 S.W.2d at 954.

⁶¹*Lucas*, *supra* n.6, 505 U.S. at 1029.

⁶²*Id.* at 1031 (internal quotation marks omitted).

⁶³*See Lingle*, *supra* n.43, 125 S.Ct. at 2081; *Lucas*, *supra* n.6, 505 U.S. at 1019; *Sheffield Dev. Co.*, *supra* n.12, 140 S.W.3d at 671; *City of Austin v. Teague*, 570 S.W.2d 389, 394 (Tex. 1978).

economic benefit, no matter how small. Nevertheless, landowners have been successful pursuing these kinds of claims.

The United States Supreme Court's decisions in *City of Monterey v. Del Monte Dunes*⁶⁴ and *Lucas v. South Carolina Coastal Council*⁶⁵ provide examples of this second bright line rule. The Texas Supreme Court applied this type of rule in *City of Austin v. Teague*.⁶⁶

The Supreme Court's decision in *Del Monte Dunes* principally deals with whether it was proper for a federal district court to submit to a jury the question whether Monterey's preventing Del Monte Dunes from developing its oceanfront property constituted a taking. Monterey repeatedly denied the owner's development applications, stating, among other reasons, that the property was habitat for an endangered species of butterfly.

The federal district court's instructions to the jury stated:

For the purpose of a taking claim, you will find that the plaintiff has been denied all economically viable use of its property, if, as the result of the city's regulatory decision there remains no permissible or beneficial use for that property. In proving whether the plaintiff has been denied all economically viable use of its property, it is not enough that the plaintiff show that after the challenged action by the city the property diminished in value or that it would suffer a serious economic loss as the result of the city's actions.⁶⁷

The Supreme Court stated these instructions were "consistent with our previous general discussions of regulatory takings liability,"⁶⁸ and the Court affirmed a "takings" judgment in favor of the property owner.

Lucas may present the best example of the United States Supreme Court's dealing with a "total taking." Lucas purchased two beachfront lots on which he planned to build single-family houses. After Lucas purchased the lots, South Carolina enacted its Beachfront Management Act, which prohibited Lucas from erecting any permanent habitable structures on his lots. A state trial court found that the Beachfront Management Act rendered Lucas's lots "valueless."⁶⁹ The Supreme Court advanced two justifications for the rule that such a "total taking" requires compensation: (1) a total taking is the equivalent of a physical appropriation,⁷⁰ and (2) where, as in Lucas's case, government requires private property to be left in its natural state, there is a "heightened risk that private property is being pressed into some form of public service under the guise of mitigating serious public harm."⁷¹

That second rationale is no doubt what influenced the Texas Supreme Court's decision in *City of Austin v. Teague*.⁷² On several occasions, Austin denied Teague a permit for development of a tract of land bordering I-35 near the south entrance to the city. The city's final denial was premised on a newly-passed ordinance requiring any development in that area to preserve "the natural and traditional character of the land and waterway to the

⁶⁴*Del Monte Dunes*, *supra* n. 5, 526 U.S. 687 (1999).

⁶⁵*Lucas*, *supra* n. 6, 505 U.S. 1003 (1992).

⁶⁶*Teague*, *supra* n. 63, 570 S.W.2d 389.

⁶⁷*Del Monte Dunes*, *supra* n. 5, 526 U.S. at 700.

⁶⁸*Id.* at 704.

⁶⁹*Lucas*, *supra* n. 6, 505 U.S. at 1006-07.

⁷⁰*Id.* at 1017.

⁷¹*Id.* at 1018. Because the Supreme Court held in *Lucas* that a total taking did not require compensation if the same result would be achieved through applying state's common law of nuisance or because of a limitation inherent in the private owner's title to the property, *id.* at 1027-30, the Court remanded *Lucas* to the South Carolina Supreme Court. On remand, that state court held the common law of nuisance did not justify the South Carolina Coastal Council's prohibiting Lucas from constructing homes on his two lots. 424 S.E.2d 484 (S.C. 1992).

⁷²*Teague*, *supra* n. 63, 570 S.W.2d 389.

greatest extent feasible.”⁷³ The Texas Supreme Court was persuaded that Teague and his co-owners lost all permissible uses of their land because the City “wanted to use plaintiffs’ land as a scenic easement on the southern approach to the City of Austin.” The court thought Austin had “singled out plaintiffs to bear all of the cost for the community benefit without distributing any cost among members of the community.” The court also wryly observed that government may not “take or hold another’s property without paying for it, just because the land is pretty.”⁷⁴

Another question that often appears in “total takings” cases is how courts should define the extent of the property actually taken. In *Lucas*, the Supreme Court provided an example of the difficulty: “When, for example, a regulation requires a developer to leave 90% of a rural tract in its natural state, it is unclear whether we would analyze the situation as one in which the owner has been deprived of all economically beneficial use of the burdened portion of the tract, or as one in which the owner has suffered a mere diminution in value of the tract as a whole.”⁷⁵

The United States Court of Appeals for the Fifth Circuit recently considered that issue under Article I, section 17 of the Texas Constitution.⁷⁶ Vulcan owned a lease with the right to quarry limestone. A portion of the lease lay within the city limits of Tehuacana, a town of 350 people. As Vulcan undertook to commence quarrying, Tehuacana passed an ordinance forbidding quarrying and mining within its city limits. The federal district court held that Tehuacana’s ordinance did not effect a “total taking” because it reached only the 48 acres of Vulcan’s lease lying within city limits, and not the adjacent 250 acres lying outside the city. The Fifth Circuit disagreed, concluding the city’s ordinance categorically took that portion of Vulcan’s lease within city limits by rendering that portion of the lease valueless. The Fifth Circuit looked at the power of the regulator (here Tehuacana) and concluded that the regulator took all within its reach. The court wrote: “when a regulator exercises its regulatory jurisdiction to the fullest extent possible—stripping all value from the property within its reach—it has acted categorically—*i.e.*, absolute or unqualified.”⁷⁷

B. For the Remainder of the Cases, There Are No Bright Line Rules. For the remainder and majority of regulatory takings cases, there are no bright line rules. (There are a few semi-bright line rules in cases within the Texas Private Real Property Rights Preservation Act, which we will discuss below). Under federal law, and for Texas cases not governed by the Preservation Act, the outcomes of “partial takings” cases are difficult to predict. Both the United States and Texas Supreme Courts have stated that judicial inquiries in such cases are essentially *ad hoc*, requiring courts to conduct a case-by-case “careful analysis of how the regulation affects the balance between the public’s interest and that of private landowners.”⁷⁸ The United States Supreme Court is mindful that “[l]and use regulations are ubiquitous and most of them impact property values in some tangential way—often in completely unanticipated ways. Treating them all as *per se* takings would transform government regulation into a luxury few governments could afford.”⁷⁹

First, the U. S. Supreme Court abandoned the “Substantially Advances” test for a taking under the United States Constitution shortly after the Texas Supreme Court embraced that same test under the Texas Constitution. In its 1980 opinion in *Agins v. City of Tiburon*, the United States Supreme Court wrote that application of a governmental regulation “to a particular property effects a taking if the ordinance does not

⁷³*Id.* at 391.

⁷⁴*Id.* at 394.

⁷⁵*Lucas*, *supra* n. 6, 505 U.S. at 1016 n.7.

⁷⁶*Vulcan Materials Co.*, *supra* n.24, 369 F.3d 882. The Fifth Circuit remanded the case to the district court for trial of the issue whether Vulcan’s quarrying within city limits would constitute a common law nuisance.

⁷⁷*Id.* at 891.

⁷⁸*Sheffield Dev. Co.*, *supra* n.12, 140 S.W.3d at 671-72; see *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 124 (1978).

⁷⁹*Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 535 U.S. 302, 324 (2002).

substantially advance legitimate state interests.”⁸⁰ Last year, in *Lingle v. Chevron U.S.A., Inc.*, the Supreme Court lamented that “[o]n occasion, a would-be doctrinal rule or test finds its way into our case law through simple repetition of a phrase—however fortuitously coined,” and then held that the *Agins* “substantially advances” test has “no proper place in our takings jurisprudence.”⁸¹ The Supreme Court concluded that the “substantially advances” test is not a proper takings test because it focuses only on whether a particular regulation of private property is effective in achieving some legitimate public purpose, rather than on the magnitude or character of the burden the regulation imposes on private property or how the regulation distributes that burden among property owners. Thus, the Court said the test is not helpful in identifying government regulations that are “functionally comparable to government appropriation or invasion of private property.”⁸²

As the United States Supreme Court jettisoned its *Agins* “substantially advances” language in *Lingle*, it mentioned that some courts had read that language “to announce a “stand-alone regulatory takings test.”⁸³ One such court was the Texas Supreme Court. One year before *Lingle*, in *Sheffield Development Company v. City of Glenn Heights*, the Texas court wrote: “[W]e continue to believe for purposes of state constitutional law, . . . that the statement in *Agins* is correct: that whether regulation substantially advances legitimate state interests is an appropriate test for a constitutionally compensable taking, at least in some situations.”⁸⁴

So as of this writing, a court may find a taking to have occurred under the Texas Constitution if a regulation burdens private property but does not “substantially advance a legitimate state interest.” After *Lingle*, that is no longer true under the Fifth Amendment to the United States Constitution. It remains to be seen whether the Texas Supreme Court will conform the State’s takings jurisprudence to the United States Supreme Court’s *Lingle* opinion, or whether the “substantially advances” test will be one way in which the Texas Constitution provides arguably greater protection against governmental takings than the federal constitution.

Second, Texas and federal courts apply the “Penn Central Factors” to assess on a case-by-case basis whether the Takings Clauses mandate compensation when a governmental regulation effects only a “partial taking” of private property. The courts’ case-by-case inquiries in “partial takings” cases are guided, in part, by three factors the United States Supreme Court announced in *Penn Central Transportation Company v. City of New York*.⁸⁵ The *Penn Central* factors are: (1) the character of the government action, (2) the economic impact of the action, and (3) the reasonableness of the property owner’s investment-backed expectations.⁸⁶

The United States Supreme Court described its *Penn Central* factors as merely “factors of particular significance”⁸⁷ and has confirmed that the factors do not comprise a formulaic test but exist only as important guideposts.⁸⁸ The Texas Supreme Court has said the same and emphasized that it considers *all* surrounding circumstances in deciding whether the constitution requires compensation for a particular partial taking.⁸⁹ The State’s highest court has labeled the ultimate question whether an unconstitutional partial taking has occurred as one of law, subject to *de novo* review by the appellate courts.⁹⁰

The Texas Supreme Court’s opinion in *Sheffield Development Company v. City of Glenn Heights*⁹¹

⁸⁰447 U.S. 255, 260 (1980).

⁸¹*Lingle*, *supra* n.43, 125 S.Ct. at 2077, 2082-83.

⁸²*Id.* at 2083-84.

⁸³*Id.* at 2082.

⁸⁴*Sheffield Dev. Co.*, *supra* n.12, 140 S.W.3d at 674; *see id.* at 673-75.

⁸⁵438 U.S. 104 (1978).

⁸⁶*Id.* at 123-125.

⁸⁷*Id.* at 124.

⁸⁸*Tahoe*, *supra* n.79, 535 U.S. at 326-27 & n.23.

⁸⁹*Sheffield Dev. Co.*, *supra*, 140 S.W.3d at 671-73, 677 (“[O]ur analysis cannot be merely mathematical”).

⁹⁰*City of Austin v. Travis County Landfill, L.L.C.*, 73 S.W.3d 234, 240-41 (Tex.), *cert. denied*, 537 U.S. 950 (2002).

⁹¹*Sheffield Dev. Co.*, *supra* n.12, 140 S.W.3d 660.

provides a good illustration of the subjective, *ad hoc*, manner in which courts analyze partial takings. Glenn Heights, a rapidly-growing municipality south of Dallas, rezoned land that Sheffield had purchased for a planned residential development. Prior to its purchase, Sheffield inquired of city officials about possible zoning changes and was told there were none planned. But Glenn Heights later amended its zoning ordinance, thereby reducing the number of houses Sheffield could build on its land. There were facts showing that the city enacted the zoning change quickly, without notifying Sheffield, for fear Sheffield would hurriedly file a development plat and thereby acquire vested rights under the previously-existing zoning ordinance. A jury found the zoning change to have reduced the fair market value of Sheffield's land by 50 percent. The trial court held the zoning change an unconstitutional taking and awarded damages of \$485,000; the Waco Court of Appeals affirmed that award. But the Texas Supreme Court reversed and rendered judgment giving Sheffield nothing.

The supreme court concluded that Glenn Heights' rezoning was permissible because the city had revised its zoning ordinances in general, not just the ordinance applicable to Sheffield's property. The court concluded the city acted permissibly to advance its interests in avoiding the ill effects of urbanization and preserving a desired rate of community growth, even though the court noted evidence that city officials had "blindsided" Sheffield. Although the supreme court agreed that the city's rezoning had a substantial economic impact on Sheffield and interfered with Sheffield's reasonable investment-backed expectations, it nevertheless held no taking occurred.

Illustrating the subjective nature of a *Penn Central* partial takings analysis, the Texas Supreme Court explained as follows:

[W]e do not agree that the rezoning in this case went too far, approaching a taking. Rather, we think that the City's zoning decisions, apart from the faulty way they were reached, were not materially different from zoning decisions made by cities every day. On balance, we conclude that the rezoning was not a taking.⁹²

That explanation brings to mind Justice Potter Stewart's famous quip about pornography: "I know it when I see it, and the motion picture involved in this case is not that."⁹³ One might say a court will know an unconstitutional regulatory taking when it sees one. But that is not much help to those seeking legal advice about whether the impact of a particular governmental action on private property will require compensation.

The Texas Supreme Court will decide another case about the *Penn Central* factors when it hands down a decision in *Hallco Texas, Inc., v. McMullen County*.⁹⁴ Hallco invested approximately \$800,000 preparing a site where it planned to dispose nonhazardous industrial waste. Hallco's site lies approximately two miles from Choke Canyon Lake in rural McMullen County. The trial court and San Antonio Court of Appeals held that the company had no "reasonable investment-backed expectations" when McMullen County passed an ordinance forbidding waste disposal within three miles of Choke Canyon Lake and then denied Hallco a variance from that ordinance. The courts held Hallco had no reasonable investment-backed expectations because Hallco had not yet obtained a permit from the State authorizing disposal of industrial waste.

Before the Texas Supreme Court, Hallco's counsel has argued that the San Antonio Court improperly turned the final *Penn Central* factor ("reasonable investment-backed expectations") into a *per se* rule denying compensation that places landowners at the mercy of governments "right up to the point in the development process when they have all of their required permits in hand." Hallco's lawyers warn that if the court of appeals' decision stands, "landowners will be discouraged from investing in substantial development projects by the

⁹²*Id.* at 679.

⁹³*Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964) (Stewart, J., concurring).

⁹⁴No. 02-1176 in the Texas Supreme Court. The decision in the lower court is at 94 S.W.3d 735 (Tex. App.—San Antonio 2002, pet. granted). The supreme court heard oral arguments in *Hallco* January 5, 2005.

ominous threat that a disgruntled local government will decide to ban their planned land use at the last minute with financial impunity.”⁹⁵

Finally, the Texas Private Real Property Rights Preservation Act provides more predictable rules for Texas regulatory takings of real property, but is riddled with exceptions. Although the Private Real Property Rights Preservation Act (the “Act”)⁹⁶ was enacted in 1995, it does not often figure in decided cases. That is somewhat surprising because the Act does answer, at least for the limited purposes of the statutory rights of action created by the Act, a few questions that are answered only vaguely, if at all, in decisional law governing regulatory takings. Nevertheless, the Act obviously was the product of a great deal of political compromise. As a result, it is riddled with exceptions and contains unusual procedural and remedial limitations.

The Act creates a statutory cause of action against political subdivisions of the State, except for municipalities, and provides for contested case proceedings against State agencies to determine whether a particular “governmental action” results in a “taking.”⁹⁷ The Act applies to “the adoption or issuance of an ordinance, rule, regulatory requirement, resolution, policy, guideline, or similar measure,” and to enforcement of any of those measures. It also applies to “an action that imposes a physical invasion or requires a dedication or exaction of private real property.” The Act applies to government action that “in whole or in part or temporarily or permanently” affects privately-owned real property and “is the producing cause of a reduction of at least 25 percent in the market value of the affected private real property.”⁹⁸

Under the Act, “whether a governmental action results in a taking is a question of fact.”⁹⁹ There is a *short* statute of limitations under the Act that requires filing suit “not later than the 180th day after the date the private real property owner knew or should have know that the governmental action restricted or limited” his or her rights in the private real property.¹⁰⁰ The only remedy a court or State agency may give a landowner under the statute is “invalidation of the governmental action or the part of the governmental action resulting in the taking.” Nevertheless, judgments under the Act must include a finding of monetary damages, and the governmental defendant may elect to pay the damages in lieu of having its action invalidated by the court or agency.¹⁰¹ The provisions of the Act are not exclusive and are in addition to other procedures or remedies allowed by law.¹⁰²

As stated above, the Act generally does not apply to municipalities. It also contains broad exceptions. For example, the Act does not apply to an action “that is reasonably taken to fulfill an obligation mandated by federal law or an action of a political subdivision [of the State] that is reasonably taken to fulfill an obligation mandated by state law.”¹⁰³ That statutory exception would constitute a highly doubtful defense to an inverse condemnation suit brought directly under the Takings Clauses. In a recent case, the City of Galveston defended a takings, due process, and equal protection suit by arguing it had been instructed by the Texas General Land Office to take action against certain homeowners on a Galveston Beach. In an opinion that remains subject to a motion for rehearing, the United States Court of Appeals for the Fifth Circuit wrote that the City “places too much weight on this blame-shifting defense,” and “cannot cite any cases suggesting that a rational basis for governmental

⁹⁵Amended Brief of Petitioner Hallco Texas, Inc., No. 02-1176 p. 8. The briefs in Hallco are available on the Texas Supreme Court’s website under “electronic briefing.”

⁹⁶TEX. GOV’T CODE §§ 2007.001 *et seq.* See generally Comment, *Texas Private Real Property Rights Preservation Act: A Political Solution to the Regulatory Takings Problem*, 27 ST. MARY’S L.J. 557 (1996).

⁹⁷TEX. GOV’T CODE §§ 2007.021 (political subdivisions), 2007.022 (state agencies). The Act applies to municipalities *only* to the extent that a governmental action by a municipality, not including annexation, has an effect on part, but not all, of the municipality’s extraterritorial jurisdiction. *Id.* at § 2007.003(a)(3) & (b)(1).

⁹⁸*Id.* at § 2007.002(5)(A)-(B).

⁹⁹*Id.* at §2007.023(a).

¹⁰⁰*Id.* at § 2007.021.

¹⁰¹*Id.* at §§ 2007.023(b) & 2007.024.

¹⁰²*Id.* at § 2007.006.

¹⁰³ *Id.* at § 2007.003(b)(4).

action exists simply because one governmental unit ‘was told to act’ by another.’ The Fifth Circuit said the City “must still conform to its constitutional obligations.”¹⁰⁴

Other notable exceptions to the Act include actions taken by political subdivisions to regulate construction in floodplains, promote water safety, regulate hunting or fishing, prevent subsidence, prevent waste or protect the rights of owners of interests in groundwater, or to “prohibit or restrict a condition or use of private real property if the governmental entity proves that the condition or use constitutes a public or private nuisance.”¹⁰⁵

A second part of the Act obligates State agencies and political subdivisions to give public notice of their intent to take action that may result in a “taking,” as defined in the Act,¹⁰⁶ and to prepare and make available to the public “Takings Impact Assessments” before they take such actions.¹⁰⁷ If a governmental action requires a “Takings Impact Assessment,” but one is not prepared, any affected private real property owner may sue to have the governmental action declared invalid.¹⁰⁸ The Attorney General of Texas is required by the Act to publish guidelines to assist governmental units in determining whether their actions may result in a taking under the Act. The Attorney General has published such guidelines, and they are available to the public on the Attorney General’s website.¹⁰⁹

CONCLUSION

The Takings Clauses of the United States and Texas Constitutions establish limits on the permissible actions of the federal, State, and local governments along the coast. Most of the other subjects discussed at this Coastal Law Conference must occur within the confines of the Takings Clauses. As I hope this paper has demonstrated, the limitations imposed by the Takings Clauses are, with a few exceptions, often difficult to predict. Nevertheless, limits do exist. The power of government to condemn, regulate, use, or prohibit the use of private property ebbs and flows with the successful advocacy of public and private lawyers and the judiciary’s, and (as we in Texas recently have seen) the legislature’s, interpretations of the Takings Clauses. Anyone who is interested in coastal law, whether on the side of government or the side of private owners, should regularly consult the jurisprudence of the Takings Clauses.

¹⁰⁴*Mikeska v. City of Galveston*, No. 04-41147, ___ F.3d___ (5th Cir., Aug. 2, 2005) (Slip op. at 5-6).

¹⁰⁵Tex. Gov’t Code § 2007.003(6), (10), (11).

¹⁰⁶*Id.* at § 2007.042.

¹⁰⁷*Id.* at § 2007.043.

¹⁰⁸*Id.* at § 2007.044.

¹⁰⁹http://www.oag.state.tx.us/AG_Publications/txts/propertyguide2005.shtml.