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Nichols on Eminent Domain®

Publication 460 Release 75

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HIGHLIGHTS

Revised Chapter 6—Taking of Private Property for Public Use

- Examines the fundamental eminent domain issue of what constitutes a taking requiring compensation.

Case Law Developments in White Page Text

Revised Chapter 6—Taking of Private Property for Public Use. *Revised* Chapter 6 begins with a brief discussion of the historical distinction between “taking” and “damages” claims. The contemporary view of what governmental action gives rise to a constitutional just compensation claim is then presented. The focus of that discussion is placed upon the *Lucas* decision and other “regulatory taking” decisions of the United States Supreme Court. A discussion of certain procedural aspects of taking claims (*e.g.*, ripeness, exhaustion of administrative remedies) follows. The chapter then focuses upon the various types of takings recognized under state and federal law, and includes an extended discussion of the relationship between the Takings Clause and governmental land use regulations and activities. The final

section of the chapter introduces the concept of “inverse condemnation,” a pivotal procedure in contemporary land use law and a shorthand description of the remedy available to a property owner to recover just compensation for impairment of his property rights when formal condemnation proceedings have not been instituted by the government.

The bulk of the chapter is devoted to an examination of a number of government actions and a determination of whether they constitute “takings.” Examples of some of these government actions are:

- legitimate police power activities (§ 6.01[2]);
- laws seeking to prevent nuisances (§ 6.01[7]);
- moratoria on land development (§ 6.01[13][i]);
- physical _____ invasions (§ 6.01[14][a]-[c]);
- temporary takings (§ 6.01[16]);
- construction-related traffic diversions (§ 6.02[8][d]); and
- required dedications and preservation of open spaces (§ 6.02[17][d]).

Case Law Developments. Recent developments in the law of eminent domain include cases and analysis on topics such as:

- that there is no constitutionally protected “property interest” in punitive damages awarded to a plaintiff in a wrongful termination and defamation suit. Under a state statute, half of all punitive damages awarded in the suit were to be allocated to the state. The court found that the allocation did not constitute a taking in violation of the state constitution because the plaintiff’s claim accrued after the effective date of the statute and the plaintiff therefore had no reasonable expectation to the full amount of the damages award. *Anderson v. State ex rel. Central Bering Sea Fishermen’s Ass’n* (Alaska 2003) (§ 5.03[1]).
- a restrictive view of “public use” leading to a holding that a proposed marine terminal was not a public use because the terminal would be financed, managed and operated by a private firm with no general right of public access. *Georgia Dept. of Transp. v. Jasper County* (S.C. 2003) (§ 7.02[2]).
- a less restrictive view of “public use” leading to a holding that a redevelopment plan to create a pedestrian mall, entertainment center and parking garage served a public purpose regardless of whether the property would eventually be owned by a public or private entity. *City of Las Vegas Downtown Redev. Agency v. Pappas* (Nevada 2003) (§ 7.06[26]).
- that zoning changes or variances that are reasonably probable may be considered when determining the highest and best use of property. *City of Las Vegas v. Bustos* (Nevada 2003) (§ 12B.14).
- that cost to cure may be relevant evidence in a partial taking case, but must be assessed in reference to the reduction in fair market value. *Florida Dept. of Transp. v. Armadillo Partners, Inc.* (Florida 2003) (§ 14A.04[2]).
- that the taking of property by one municipality from another municipality may raise special statutory or constitutional issues; a court held that a municipality could not condemn parkland owned by another municipality for the purpose of expanding a cemetery because the state constitution did not allow the taking of property where the taking would destroy an existing public use. *Worthington v. Columbus* (Ohio 2003) (§ 14A.04[2]).

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