

## **WINTER 2014 NEWSLETTER**

### **LAND USE, ZONING and REGULATORY TAKING**

**By John F. Roehm III**

#### **TEXAS COURT OF APPEALS**

***Edwards Aquifer Auth. v. Bragg*, 2013 Tex. App. Lexis 13854 (Tex. App. – San Antonio, November 13, 2013).**

Statute of limitations for a regulatory takings claim is ten years.

The Braggs, who are commercial pecan farmers, were denied a water permit for one of their pecan orchards and were granted a limited permit for another of their pecan orchards. The Braggs sued the Edwards Aquifer Authority for a taking of their property and obtained a judgment awarding them damages. The Authority appealed asserting in part that Braggs' claims are barred by the statute of limitations and the permitting decision did not cause a taking of property. Braggs' cross-appealed asserting that the trial court erred in concluding the denial of the permit applications did not amount to a per se taking.

The Court of Appeals found that although the Texas Supreme Court had yet to decide which limitations period applies to a regulatory takings claim, a regulatory taking is a type of inverse condemnation and so the court will look to case law discussing the statute of limitations for inverse condemnation claims. There is no statutory provision specifically providing a limitations period for inverse condemnation but courts have held that a cause of action for inverse condemnation is barred after the expiration of the ten-year period of limitations to acquire land by adverse possession. The Court concluded that the ten-year statute of limitations will apply to a regulatory taking which results from an unreasonable interference with the property owners' right to use and enjoy the property.

The Court further discussed how to establish a regulatory takings claim. There are two categories of regulatory actions that generally will be deemed per se takings without a case-specific inquiry. The first occurs when a regulation compels the property owner to suffer a physical invasion of his property. The second is where a regulation denies all economically beneficial or productive use of the land. Outside these two relatively narrow categories, regulatory takings challenges require an essentially *ad hoc* factual inquiry and are governed by the standards set forth by the U.S. Supreme Court in *Penn Central* – i.e., economic impact, investment-backed expectations and the nature of the regulation.

The Court affirmed that a taking occurred but that the trial court erred in calculating the compensation owed for the takings and thus, remanded the case for the trial court to properly calculate damages.

***City of Corpus Christi v. Aguirre Props.*, 2013 Tex. App. Lexis 15206 (Tex. App. – Corpus Christi, December 19, 2013).**

Damages which are the accidental result of the government's acts do not constitute a taking for public use.

Aguirre Properties sued the City for negligence, unconstitutional takings and nuisance. The City filed a plea to the jurisdiction arguing that the Plaintiff had offered no proof that the City took its property for a public use nor could they prove that the City committed any specific act that caused an identifiable harm or that specific property damage was substantially certain to result from any authorized government action. No evidentiary hearing was conducted and the court denied the City's plea to the jurisdiction. The City appealed the denial of its plea to the jurisdiction.

The Court of Appeals found that the Plaintiff alleged that its property was "taken, damaged, or destroyed" based on three occurrences of flooding and on one occurrence when the City threw a rebar on Plaintiff's property which blocked the entry way onto Plaintiff's loading dock. The Court, relying on Texas Supreme Court authority which held that when damage is merely the accidental result of the government's acts, there is no public benefit and the property cannot be said to be "taken or damaged for public use", found that Plaintiff failed to allege valid taking claims based on these three occurrences of flooding. However, the City did not address the Plaintiff's other basis for the takings claim in its plea to the jurisdiction.

The Court reversed the trial court order denying the City's plea to the jurisdiction with respect to Plaintiff's taking claims based on the three occurrences of flooding and rendered judgment dismissing those claims. The remainder of the trial court order was affirmed.