

# PROPERTY PRACTICE QUESTIONS

## ANSWER 21

Gerry W. Beyer

*Governor Preston E. Smith Regents Professor of Law*



**Caveat:** The outline of the answer below provides guidance regarding the main issues which you should address in your answer. The answer is *not* designed to be a model answer.

### **Bob v. Government (River flow reduction)**

- **Eminent domain** is based on the Fifth Amendment and is one of the six major categories of the legislative or administrative restrictions
  - The U.S. Constitution states: “private property shall not be taken for public *use* without just compensation”
  - The U.S. Supreme court has interpreted the Fifth Amendment to allow taking by eminent domain if the land is taken for public *purpose* (*Kelo v. City of New London Connecticut*)
- If the taking was effectuated by the Federal Government, then Bob would most likely lose, because the Federal Government would follow *Kelo* and would most likely decide that a private hospital satisfies the *public purpose* requirement
- However, Texas has enacted anti-*Kelo* legislation
  - Cannot use the taking as a pretext to convey an interest to private property
  - Cannot take for public purpose unless it is to clean up slums
- Because Bob’s house was not a slum and it was taken to convey a benefit on private property, i.e., the private hospital, Bob will likely prevail even though the hospital would further a legitimate public purpose

**Eleanor v. Government (Zoning regulation amounted to taking)**

- As a general rule, regulations do not constitute a taking but if the regulations have gone too far they can be a taking
- To determine whether or not a governmental action is a taking, we need to conduct the following analysis:
  - ***Is the governmental action taken for public use or benefit?***
    - If not, the government cannot act at all
      - In this problem, one could argue that the government took action for a public use
        - Purely aesthetic purpose could constitute public use
  - ***Does the government's action constitute a categorical, automatic taking?***
    - *Physical invasion of any kind is a categorical taking*
      - On the facts in this problem, there is no physical invasion
    - *If the regulation denies the property owner **all** economically beneficial or productive use of his land it is a categorical taking*
      - If the government's action amounts to a categorical taking, then it is clearly a taking, and there is no need to determine whether the action was taken pursuant to the police power
        - Eleanor can continue living in her house and can even continue advertising, she just needs to make her billboard smaller
        - The government's action did not deny Eleanor all economically beneficial or productive use of her land and thus did not constitute a categorical taking
        - Because it did not constitute a categorical taking, we need to find out whether the government acted pursuant to its police power
  - ***Is the regulation a taking or just an exercise of the government's police power?***
    - *What is the extent of the regulation?*

- Not a very large extent. Eleanor only has to make the billboard a little smaller. Regulation does not require Eleanor to make the billboard tiny or get rid of it altogether.
  - *What is the value of the property that the government is taking?*
    - Not very big value. Only the cost of the billboard that Eleanor cannot use by her house. She may still be able to use it in a different place where there are different zoning regulations.
  - *Did the government's actions render the use of the property commercially impracticable for its owner?*
    - No. Eleanor primarily used her land as her residence. Even if Eleanor had primarily used her property for advertising purposes, the government's actions still did not render her use commercially impracticable. All Eleanor has to do is get a smaller billboard.
  - *Does the landowner's activity constitute a nuisance?*
    - If so, then it is not a governmental taking, because it is the society that deprives the owner of the use of his land
      - The government could argue that Eleanor's activity constitutes a nuisance in addition to violating zoning regulations because the neighbors may get frustrated having to look at a very large billboard advertisement blocking the view from their windows.
- In analyzing all the relevant factors to determine whether or not the city's action constituted a taking of Eleanor's property, it is very unlikely that the courts could find that it was a taking.
- Eleanor is likely to lose on her claim and have to get a smaller billboard to advertise in her neighborhood.