IN THE SUPREME COURT OF GUAM

CARL T.C. GUTIERREZ,
Plaintiff-Appellant,

v.

GUAM POWER AUTHORITY, GOVERNMENT OF GUAM,
Defendant-Appellee.

Supreme Court Case No. CVA11-010
Superior Court Case No. CV0544-05

OPINION

Cite as: 2013 Guam 1

Appeal from the Superior Court of Guam
Argued and submitted on December 2, 2011
Hagåtña, Guam

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BEFORE: ROBERT J. TORRES, Presiding Justice[1]; KATHERINE A. MARAMAN, Associate Justice; JOHN A. MANGLONA, Justice *Pro Tempore*.

TORRES, J.:

[1] Plaintiff-Appellant Carl T.C. Gutierrez appeals from a final judgment of the trial court which held that the placement of power poles and transmission lines by Defendant-Appellee Guam Power Authority on Gutierrez's property, Lot 1-2-2, did not amount to a government taking of his private property. In so holding, the trial court found there was a valid license to construct and maintain power poles on the property before it was transferred to Gutierrez, that the transfer to Gutierrez was subject to the license, and that such license was irrevocable through the operation of estoppel. The court also held that the occupation was not substantial enough to interfere with Gutierrez's rights so as to constitute a taking, and even if there had been a taking, the court could not render an award of compensation because the governor, who was not a party in the case, was an indispensable party. Furthermore, the trial court held that even if there had been a taking, Gutierrez was not entitled to compensation because he failed to provide any evidence of fair rental value of the property for the period of the taking.

[2] We agree with the trial court that a license was created between the Navy and Guam Power Authority to construct and maintain power poles on Lot 1-2-2. We hold, however, that such license was not irrevocable and was not reserved in the subsequent conveyances of the property, and Gutierrez, who took the property without notice of the license, was not bound by the license. Guam Power Authority's occupation of the property constituted a compensable physical taking under the Fifth Amendment's Takings Clause, and Gutierrez provided sufficient evidence upon which the trial court could determine the amount of compensation due for the

[1] Associate Justice Robert J. Torres, as the senior member of the panel, was designated Presiding Justice.

inverse condemnation. Finally, we hold that the governor is not an indispensable party in this litigation. Accordingly, we reverse the trial court's judgment and remand on the issue of damages.

I. FACTUAL AND PROCEDURAL BACKGROUND

[3] Lot 5014 #1-2-2 ("Lot 1-2-2"), containing an area of approximately 9,000 square meters, was originally registered under Certificate of Title No. 5682 by the United States, "acting by and through the Department of the Navy." Record on Appeal ("RA"), tab 49 at 1 (Def.'s Ex. 3, Department of Land Management ("DLM") Instr. No. 638645, Quitclaim Deed: Guam Economic Development Authority ("GEDA") to Guam Ancestral Lands Commission ("GALC"), Sept. 4, 2007); RA, tab 55 at 2 (Finds. Fact & Concl. L., Mar. 28, 2011). During the time the Navy owned Lot 1-2-2,[2] the Navy gave Guam Power Authority ("GPA") "approval" to install concrete power poles and transmission lines on its properties as part of a joint project funded by both the Navy and GPA. RA, tab 55 at 4 (Finds. Fact & Concl. L.); Transcript ("Tr.") at 78 (Bench Trial, Oct. 10, 2007).

[4] About twelve years after GPA installed the poles and transmission lines, the United States transferred Lot 1-2-2 to GEDA by quitclaim deed. GEDA thereafter transferred Lot 1-2-2 to GALC, which in turn conveyed the property to Gutierrez by quitclaim deed on April 20, 2004. Soon after acquiring the property, Gutierrez hired a licensed surveyor, Frank L.G. Castro, to survey the property. Castro identified several concrete poles that were located on Lot 1-2-2, and not within the existing utility easement designated as Lot 1-2-1. Gutierrez claims he subsequently notified John Benavente, then-GPA general manager, that these power poles were

[2] According to the quitclaim deed from the United States to GEDA, the United States "act[s] by and through the Department of Navy" in its conveyance of certain real properties in Guam, including the property at issue. RA, tab 49 at 1 (Def.'s Ex. 3, DLM Instr. No. 638645, Quitclaim Deed: GEDA to GALC).

on Gutierrez's property rather than on the existing easement, and informed Benavente that a demand for rents was forthcoming. Gutierrez further alleges that he made the demand for rents in the amount of $2,500.00 per month for the portion of the property being used by GPA for the poles and transmission lines, but no payments were ever made. The power poles and transmission lines located on Lot 1-2-2 were eventually removed by GPA about three years after Gutierrez received the property.[3]

[5] Gutierrez filed an inverse condemnation claim against GPA, alleging that the placement of the power poles and transmission lines amounted to a governmental taking of his property. After a bench trial, the trial court issued its Findings of Fact and Conclusions of Law, holding that GPA's installation of power poles and transmission lines on Lot 1-2-2 did not constitute inverse condemnation. The court found that GPA had a valid license to construct and maintain power poles on the property. *See* RA, tab 55 at 15 (Finds. Fact & Concl. L.) ("In this case, the testimony of Andriano E. Balajadia unambiguously establishes that permission/license was granted to the Defendant by the previous owner of Lot 1-2-2, the U.S. Naval government, to build power poles and transmission lines on a portion of Lot 1-2-2."). Moreover, the court held that Gutierrez was equitably estopped from ousting GPA and requesting damages for the use of the property because the license between the Navy and GPA had become irrevocable through estoppel. The court further held that the occupation was not substantial enough to interfere with Gutierrez's rights so as to constitute a taking.

[3] The trial court observed that there was no evidence presented during trial of the length of time that the power poles remained on Gutierrez's land. During the bench trial, however, Gutierrez's attorney stated that the poles were removed in April 2007. Tr. at 5 (Bench Trial). On direct examination, GPA's former Manager of Engineering, Andriano Balajadia, acknowledged that the poles had been removed earlier that year, the time of trial being October 2007. *See id.* at 76.

[6] Moreover, the court found that even if there had been a taking of Gutierrez's property, the court could not render an award of compensation because the governor, who was not a party in the case, was an indispensable party under Rule 19(b) of the Guam Rules of Civil Procedure. Lastly, the court concluded that Gutierrez could not recover damages due to his failure to provide evidence of a reasonable fair rental value of the property. Judgment was entered, and Gutierrez timely appealed.

II. JURISDICTION

[7] This court has jurisdiction over appeals from final judgments of the trial court. 48 U.S.C.A. § 1424-1(a)(2) (Westlaw through Pub. L. 112-207 (2012)); 7 GCA §§ 3107, 3108(a) (2005).

III. STANDARD OF REVIEW

[8] A trial court's findings of fact after a bench trial are reviewed for clear error, while conclusions of law are reviewed *de novo*. *Babauta v. Babauta*, 2011 Guam 15 ¶ 19 (citing *Mendiola v. Bell*, 2009 Guam 15 ¶ 11). The question of whether there has been an inverse condemnation is a mixed question of law and fact. *CUNA Mut. Life Ins. Co. v. L.A. Cnty. Metro. Transp. Auth.*, 133 Cal. Rptr. 2d 470, 476 (Ct. App. 2003) (citing *Ali v. City of L.A.*, 91 Cal. Rptr. 2d 458, 461 (Ct. App. 1999)). Mixed questions of law and fact are subject to *de novo* review. *Gov't of Guam v. 162.40 Square Meters of Land*, 2011 Guam 17 ¶ 6. Issues of statutory interpretation are reviewed *de novo*. *See Santos v. Gov't of Guam*, 2012 Guam 9 ¶ 5 (citing *Mesngon v. Gov't of Guam*, 2003 Guam 3 ¶ 8. The indispensability of a party is a question of law reviewed *de novo*. *Jourdan v. Nationsbanc Mortg. Corp.*, 42 P.3d 1072, 1079 n.22 (Alaska 2002) (citing *Silvers v. Silvers*, 999 P.2d 786, 792 (Alaska 2000)); *see also Guam Top Builders, Inc. v. Tanota Partners*, 2012 Guam 12 ¶ 10 (reviewing questions of law *de novo*).

IV. ANALYSIS

[9] Gutierrez contends the trial court erred in holding that the GPA power poles and transmission lines located on his property did not constitute a compensable taking by inverse condemnation. Gutierrez challenges the trial court's finding of a valid license granted to GPA by the Navy to construct and maintain the power poles on Lot 1-2-2. Appellant's Br. at 7-11 (Sept. 1, 2011). Gutierrez also maintains that even if there had been a valid license, such license did not survive the subsequent conveyances of the property from the United States, acting by and through the Department of the Navy, to GEDA; from GEDA to GALC; and ultimately from GALC to Gutierrez. *Id.* at 12-14. Moreover, Gutierrez challenges the trial court's finding that the license was irrevocable through estoppel. *Id.* at 14-19. Gutierrez further contends that his inverse condemnation claim should not have been dismissed under Rule 19(b) of the Guam Rules of Civil Procedure for failure to join the governor as an indispensable party. *Id.* at 20-21. Lastly, Gutierrez asserts he presented sufficient evidence of fair rental value of the property upon which the trial court could determine the amount of compensation. *Id.* at 22-26.

A. Whether GPA Had a Valid License to Use Lot 1-2-2

[10] In rejecting Gutierrez's inverse condemnation claim, the trial court concluded that the Navy, the original owner of Lot 1-2-2, granted a license to GPA to install and maintain the power poles and transmission lines on Lot 1-2-2. RA, tab 55 at 15 (Finds. Fact & Concl. L.). The court further found that the conveyance to Gutierrez was subject to this license and that the doctrine of equitable estoppel rendered the license irrevocable. *Id.* at 15-23. The court also held that GPA's occupation of the property was not substantial enough to constitute a taking. *Id.* at 31.

[11] Before we determine whether Gutierrez was entitled to an inverse condemnation claim, we must initially analyze whether there was a valid license to install and maintain power poles and transmission lines on Lot 1-2-2. If so, we must determine whether such license was binding on Gutierrez as a subsequent transferee, or, if not, whether the license nevertheless became irrevocable through estoppel.

1. License to Use Lot 1-2-2

[12] "A license in respect of real property . . . is permission to do an act or a series of acts upon the land of another without possessing any estate or interest in such land." *Mueller v. Keller*, 164 N.E.2d 28, 32 (Ill. 1960). It does not vest any title, interest, or estate in the licensee, and may be created by parol, a writing, or can be implied from the acts of the parties, from their relations, and from usage and custom. *Kendrick v. Healy*, 192 P. 601, 610 (Wyo. 1920); *see also Kitchen v. Kitchen*, 641 N.W.2d 245, 249 (Mich. 2002). The primary distinction between an easement and a license lies in the fact that an easement creates an interest in land, while a license does not. *Markstein v. Countryside I, L.L.C.*, 77 P.3d 389, 398 (Wyo. 2003); *see also Kitchen*, 641 N.W.2d at 249. For eminent domain purposes, a license does not constitute an estate in real property. *See Hubbard v. Brown*, 785 P.2d 1183, 1186 (Cal. 1990) ("California eminent domain law, like federal law, declares licenses to be noncompensable in eminent domain proceedings.").

[13] Gutierrez believes the placement of the poles on his property and just outside the easement "is more logically explained by a disregard on the part of GPA as to the boundaries of the easement and not a permissive placement of the poles just off of the easement." Appellant's Br. at 12. The trial court disagreed, finding that a license was created between the Navy and GPA to place power poles on Lot 1-2-2. RA, tab 55 at 15 (Finds. Fact & Concl. L.). During trial, Andriano Balajadia, GPA's former manager of engineering, testified that there were two

separate recorded easements that contained utility poles. Tr. at 74-76 (Bench Trial). He further testified that sometime in 1989, the Navy and GPA agreed to install additional power poles and transmission lines to service the Macheche Substation. *Id.* at 74-75. While the Navy specifically refused to grant an easement for the additional poles, it gave its "approval" to install and maintain power poles on its property. *Id.* at 78. Most, but not all, of the new poles were placed on one of the two existing easements. *See id.*

[14] Even if the Navy and GPA had initially intended for the poles to be placed on the existing utility easements, Balajadia's testimony confirms the Navy impliedly permitted the actual location of the poles on Lot 1-2-2. *See Kendrick*, 192 P. at 610 (finding that a license may "be implied from the acts of the parties, from their relations, and from usage and custom."). The poles were on Lot 1-2-2 for at least twelve years while the Navy owned the property, and the Navy had every opportunity to object to the positioning of the poles during that time. Instead, it acquiesced to GPA's placement and continued use of the poles and transmission lines as located on Lot 1-2-2, thereby implicitly authorizing a license to use the property for that particular purpose. "When the owner of land, with full knowledge of the facts, tacitly permits another repeatedly to do acts upon the land, a license may be implied from his failure to object." *Turnway Corp. v. Soffer*, 336 A.2d 871, 878 (Pa. 1975) (quoting *Leininger v. Goodman*, 120 A. 772, 773 (Pa. 1923)). Based on the evidence, we agree with the trial court's conclusion that GPA had an implied license to install and maintain the power poles and transmission lines on Lot 1-2-2. We now address whether this license was binding on Gutierrez.

2. License was not Reserved in the Quitclaim Deed or by the Public Laws Referenced Therein

[15] Gutierrez argues that even if a valid license had been created between the Navy and GPA, such license did not survive the series of transfers of the property from the United States to

GEDA, from GEDA to GALC, and ultimately from GALC to Gutierrez. Appellant's Br. at 12-14. Generally speaking, a license is personal, revocable, unassignable, and impermanent. *See Hay v. Baumgartner*, 870 N.E.2d 568, 571-72 (Ind. Ct. App. 2007); *LSP Ass'n v. Town of Gilford*, 702 A.2d 795, 800 (N.H. 1997). Because a license does not give the license holder an interest in the land, it does not pass with the title to the property and is binding only between the parties to the license, expiring upon the death of either party or through the conveyance of the burdened property. *Rowan v. Riley*, 72 P.3d 889, 896-97 (Idaho 2003); *see also Coach House Rest., Inc. v. Coach & Six Rests., Inc.*, 934 F.2d 1551, 1563 (11th Cir. 1991) ("Usually[,] an implied license is terminable at will.").

[16] In rejecting Gutierrez's contention that the license had been extinguished upon transfer of the property, the trial court explained that Gutierrez's quitclaim deed and the public laws referenced therein reserved GPA's right to maintain the power poles and transmission lines on Lot 1-2-2. RA, tab 55 at 23-26 (Finds. Fact & Concl. L.). The trial court observed that "[t]he quitclaim deed by which GEDA granted Lot 1-2-2 to the Plaintiff specifically states that the grant was made in accordance with Guam Public Laws 22-145, 23-23, 23-141, 25-45, 25-178, 26-36, and 26-100." *Id.* at 24. The quitclaim deed from GALC to Gutierrez contains the following relevant language:

> TO HAVE AND TO HOLD, GRANTOR conveys subject property to GRANTEE(S) so long as GRANTEE(S)' [sic] use the property for public benefit use, as prescribed by the Guam Excess Lands Act, U.S. Public Law 103-339, 108 Stat. 3116 (1994), Guam Public Laws 22-145, 23-23, 23-141, 25-45 (Chapter 80 of Title 21 G.C.A.), 25-178, 26-36 and 26-100.

RA, tab 50 at 5 (Def.'s Ex. 4, DLM Instr. No. 691395, Quitclaim Deed: GALC to Carl T.C. Gutierrez, Sept. 4, 2007). However, upon closer examination, we find GPA's license to use Lot

1-2-2 was not reserved in the deed or in the laws referenced therein; therefore, the license was not binding after the transfer of the property to Gutierrez.

[17] In its analysis, the trial court relied on section 8 of Public Law 22-145, entitled "Lands exempted from this Act," which states:

> *Any land that is presently utilized for public easements such as* roadways, water, power, sewer or underground telephone or communication lines *or other such government utility use or infrastructure uses* essential to the public's safety, welfare, health and protection is exempt from the provisions of this Act and shall not be released by the government of Guam to their former owners or heirs.

Guam Pub. L. 22-145:8 (Dec. 29, 1994) (emphases added).[4] Public Law 23-141 reiterates this same provision. *See* Guam Pub. L. 23-141:7 (Jan. 2, 1997). The trial court placed emphasis on the phrase "or other such government utility use or infrastructure uses," RA, tab 55 at 24 (Finds. Fact & Concl. L.), presumably to suggest that such phrase covers GPA's use of Lot 1-2-2. We disagree. The word "any" modifies the phrase "land that is presently utilized for public easements," and the words "such as" is synonymous to "for example" or "of the kind specified," and is a "phrase of general similitude." *See Hinkleman v. Shell Oil Co.*, 962 F.2d 372, 382 (4th Cir. 1992) (Wilkins, J., concurring and dissenting) ("The word 'any' modifies each of the words

[4] Gutierrez properly notes that other than Public Laws 23-141 and 23-023, the other public laws referenced in the deed are irrelevant to the license at issue in this case. Public Law 22-145, which pertains specifically to land returns pursuant to U.S. Public Law 103-339, is not the law by which Gutierrez acquired Lot 1-2-2. *See* Guam Pub. L. 22-145 (Dec. 29, 1994), Instead, Gutierrez obtained the property under the 1994 Guam Land Use Plan, which is governed by a separate law, Public Law 23-141. *See* Guam Pub. L. 23-141:1 (Jan. 2, 1997). Public Law 25-045 is equally inapplicable to this case because that law pertains to the establishment of GALC and the procedure by which an original landowner would file an ancestral land claim, but has no provision exempting particular lands from the act. Public Law 25-178 established the rules and regulations of the ancestral lands program. While it does contain a provision granting government agencies forty-five days in which to petition GALC "for a reservation of those ancestral lands deemed necessary for providing a direct essential service to the community" before any land claim determinations are made, Guam Pub. L. 25-178:2 (adding section 80102.15 to Title 21 of the Guam Code Annotated), there is no evidence here that such a petition was filed by GPA, and therefore whether GPA's use of the property was necessary to provide a direct essential service under the law was not considered or decided below. Gutierrez also correctly points out that Public Law 26-036 is irrelevant to this case because that law deals with the funding of mandated tax rebates and the use of lapses in GALC funds. Lastly, Public Law 26-100 pertains to properties located in the village of Tiyan, and is therefore inapplicable to Lot 1-2-2, which is located in the village of Dededo.

following it, ..."); *Macon Cnty. Samaritan Mem'l Hosp. v. Shalala*, 7 F.3d 762, 767 (8th Cir. 1993) ("*Such as* is 'a phrase of general similitude' meaning *for example* or *of the kind specified.* Unlike *including,* or its more specific, arguably redundant cousin, *including, but not limited to, such as* does not imply that there are necessarily more relevant factors than those Congress enumerated." (citation omitted)). Thus, the prefatory words "[a]ny land that is presently utilized for public easements" refers to existing public easements, and all of the words following "such as"—including "or other such government utility use or infrastructure uses"—are examples of land uses that further clarify "public easements." *See* Guam Pub. L. 23-141:7. The language of Public Law 23-141:7 explicitly applies only to land presently utilized for public easements, and therefore does not encompass GPA's implied license.

[18] The language of Public Law 23-023:2 is not, however, as limiting as that of Public Law 23-141:7:

> **§ 2004. Policy with respect to original landowners.** It is the *policy* of the government of Guam that land returned by the federal government to Guam be returned to the estates that held such property prior to the condemnations of said lands by the Federal Government. *Exceptions* to this policy shall be:
>
> > (a) *Lands clearly under existing public use. In such circumstances, the government of Guam shall make good faith efforts to derive a means of compensation for continued public use of such lands.*

Guam Pub. L. 23-023:2 (May 30, 1995) (emphases added); *see also* 1 GCA § 2004(a) (2005). While GPA's use of power poles and transmission lines on Lot 1-2-2 might constitute a "use of purpose inuring to the benefit of the public generally" under 21 GCA § 15103's definition of "public use," 21 GCA § 15103 (2005), a bare expression of the government's policy to return federal land to its original owners, without more, is not dispositive with respect to the government's intent to reserve a license for this particular use. Rather, such intent must be clear and unequivocal. *Cf. Cooper v. Boise Church of Christ of Boise, Idaho, Inc.*, 524 P.2d 173, 175

(Idaho 1974) ("Whether an instrument purporting to convey the right to use the property of another conveys an easement or a license depends upon the intent of the parties as interpreted from the language use and to the extent the rules of evidence permit from the surrounding circumstances, ...") (citation and internal quotation marks omitted); *Richmond Ramblers Motorcycle Club v. W. Title Guar. Co.*, 121 Cal. Rptr. 308, 312 (Ct. App. 1975) ("Public dedication of land [will not] be implied where the public use is under a license or permission of the owner.").

[19] Even assuming arguendo that the policy expressed in Public Law 23-023 effectively reserved and exempted GPA's license as it constitutes an "existing public use," that same law provides that "the government of Guam shall make good faith efforts to derive a means of compensation for continued public use of such lands," language which the trial court seems to have ignored. Guam Pub. L. 23-023:2. Therefore, if Public Law 23-023 were applicable to this case, Gutierrez would be entitled to compensation from the time he received Lot 1-2-2 to the time the poles and transmission lines were removed.

[20] Finally, we cannot ignore the fact that the original quitclaim deed from GEDA to GALC exempts and reserves only recognized "easements," and the implied license was not made binding on Gutierrez by the conveyance from GALC. The deed from the GALC provides, in pertinent part:

> EXCEPTING AND RESERVING, HOWEVER, unto the UNITED STATES and GRANTOR, in perpetuity, *the easements*, as further described in this instrument as well as that certain Quitclaim Deed between the UNITED STATES and the GUAM ECONOMIC DEVELOPMENT AUTHORITY dated April 18th, 2001 (attached as Attachment 1), . . . and incorporated by reference and made a part hereof for the operation, maintenance, repair and replacement of the UNITED STATES' utility facilities, equipment and related facilities, and FURTHER EXCEPTING AND RESERVING unto the UNITED STATES and/or

> GRANTOR (where applicable), ownership of such existing utility lines, equipment and related facilities as are located *within the easement* parcels.

RA, tab 49 at 7 (Def.'s Ex. 3, DLM Instr. No. 638645, Quitclaim Deed: GEDA to GALC) (emphases added). The language of the quitclaim deed explicitly reserves to the original grantor "easements," and does not reserve oral or implied licenses. *Id.* "A quitclaim deed only transfers whatever interest the grantor had in the described property at the time the conveyance was made." *Taitano v. Lujan*, 2005 Guam 26 ¶ 19 (quoting *In re Marriage of Gioia*, 14 Cal. Rptr. 3d 362, 368 (Ct. App. 2004)); *see also Michigan Dep't of Natural Res. v. Carmody-Lahti Real Estate, Inc.*, 699 N.W.2d 272, 283 (Mich. 2005) ("A quitclaim deed is, by definition, '[a] deed that conveys a grantor's complete interest or claim in certain real property but that neither warrants nor professes that the title is valid.'" (alteration in original) (emphasis omitted)). Since a grantee's rights are the same as those of his grantor, Gutierrez took Lot 1-2-2 subject to whatever rights GEDA, and subsequently GALC, obtained. Because GPA's use of Lot 1-2-2 pursuant to the implied license was not specifically reserved in the quitclaim deed from the United States to GEDA or in the quitclaim deed from GEDA to GALC, we find that Gutierrez was not bound by the conveyance documents to recognize the license to maintain power poles and transmission lines on Lot 1-2-2.

3. Irrevocable License by Estoppel

[21] Having determined that the quitclaim deed and the referenced laws did not reserve GPA's implied license, we must now examine whether the implied license between the Navy and GPA had become irrevocable through estoppel. The courts are split as to whether a license may become irrevocable. Some states have recognized that a license may become irrevocable "when the landowner's promise to allow a use of the land for an unlimited time induces the other party to make significant expenditures for permanent improvements, consistent with the use for which

the consent was given." *Dority v. Hiller*, 986 P.2d 636, 639 (Or. Ct. App. 1999) (citing *Brown v. Eoff*, 530 P.2d 49, 51 (Or. 1975)); *see also Cambridge Vill. Condo. Ass'n. v. Cambridge Condo. Ass'n.*, 743 N.E.2d 954, 958 (Ohio Ct. App. 2000) ("If the parties [to a license] intend the agreement to be permanent in nature, the license is said to be coupled with an interest. A license coupled with an interest becomes irrevocable, meaning that it is no longer terminable at the will of the licensor, and constitutes a right to do the act rather than a mere privilege to do it." (citations omitted)); *Lara, Inc. v. Dorney Park Coaster Co.*, 542 A.2d 220, 224 (Pa. Commw. Ct. 1988) ("Pennsylvania has recognized an equitable theory of an irrevocable license when there has been substantial expenditure in reliance on the license."); *Harber v. Jensen*, 97 P.3d 57, 63 (Wyo. 2004) ("[O]ne claiming an irrevocable license must prove the licensor had knowledge of the licensee's improvements and acted in some way to induce the licensee's reliance on the permissive use to make such improvements. Additionally, the improvements themselves must have required the use of the licensor's property.").

[22] Other courts have rejected the concept of an irrevocable license. For instance, in *Fourth Davis Island Land Co. v. Parker*, the Mississippi Supreme Court affirmed the state's longstanding rule that a license may not be made irrevocable, a rule based on the state's policy that "gives security and certainty of titles, which are most important to be preserved against defects and qualifications not founded upon solemn instruments." 469 So. 2d 516, 524 (Miss. 1985). In *Hector v. Metro Centers, Inc.*, the Supreme Court of North Dakota rejected "the proposition that a license executed by the expenditure of funds is irrevocable," explaining that "[w]here nothing more than a mere license appears, it is revocable at the will of the licensor, whatever expenditures the licensee may have made, provided the licensee has reasonable notice

and opportunity to remove his fixtures and improvements." 498 N.W.2d 113, 117. (N.D. 1993) (citation and internal quotation marks omitted).

[23] Even those jurisdictions that acknowledge an irrevocable license by estoppel recognize the irrevocable license should "only [arise] under certain very narrow circumstances and should be applied only to the extent required to prevent inequity." *Tatum v. Dance*, 605 So. 2d 110, 113 (Fla. Dist. Ct. App. 1992), *aff'd*, 629 So. 2d 127 (Fla. 1993); *Dority*, 986 P.2d at 639 ("An irrevocable license arises when the landowner's promise to allow a use of the land for an unlimited time induces the other party to make significant expenditures for permanent improvements, consistent with the use for which the consent was given. If the licensee proves by clear and convincing evidence that the consent was given and that the licensee reasonably and detrimentally relied on the consent, then the landowner is estopped from revoking the license." (citation omitted)).

[24] Some jurisdictions that have adopted the irrevocable license doctrine have also limited its duration "to the time necessary to protect the reliance investment of the licensee." *Tatum*, 605 So. 2d at 113; *see also Cooke v. Ramponi*, 239 P.2d 638, 641 (Cal. 1952) ("[W]here a licensee has entered under a parol license and has expended money, or its equivalent in labor, in the execution of the license, the license becomes irrevocable, the licensee will have . . . his rights under his license, and the license will continue for so long a time as the nature of it calls for." (citation and internal quotation marks omitted)); *Bomberger v. McKelvey*, 220 P.2d 729, 736 (Cal. 1950) (en banc) ("Various factors . . . may render a license irrevocable, and it is generally recognized that a license coupled with an interest is not revocable but continues to exist for the period contemplated by the license.").

[25] In concluding that the license had become irrevocable, the trial court cited to several cases which purportedly support the notion that an irrevocable license through estoppel may arise when a landowner voluntarily imposes an apparent servitude on his property, and a governmental entity, acting reasonably and in good faith, believes the servitude is permanent and in reliance upon such belief enters the property and makes improvements which it would not have made otherwise. RA, tab 55 at 16 (Finds. Fact & Concl. L.) (citing *Town of Essex v. New England Tel. Co. of Mass.*, 239 U.S. 313, 321-22 (1915); *Palacios Seafood, Inc. v. Piling, Inc.*, 888 F.2d 1509, 1511, 1514 (5th Cir. 1989); *Klugh v. United States*, 818 F.2d 294, 297, 299 (4th Cir. 1987); *Riverside Realty Co. v. City of New Orleans*, 323 F.2d 74, 74 (5th Cir. 1963); *Lacy v. United States ex rel. Tenn. Valley Auth.*, 216 F.2d 223, 225 (5th Cir. 1954); *City of Eufaula, Okl. v. Meyer*, 169 F.2d 463, 465 (10th Cir. 1948); *Scogin v. United States*, 33 Fed. Cl. 568, 577-78 (1995)). However, each of these cases is either distinguishable from the present case or does not support the trial court's proposition. In *Palacios*, the plaintiff was renting government-owned land upon which he owned a building. 888 F.2d at 1511. The plaintiff gave the government verbal consent to an improvement project on the land which resulted in extensive damage to the plaintiff's building. *Id.* at 1511-12. The case did not involve a license or easement of any sort. *Klugh* involved land that was formally condemned by the government; the issue was whether the plaintiffs were barred by the statute of limitations, not whether the plaintiffs were estopped from revoking a license or easement. 818 F.2d at 296, 299-301. The remaining cases cited by the trial court are distinguishable from the present case because they each dealt with a dispute concerning the *original* licensor and licensee, rather than a dispute between a licensee and a *successor* to a licensor.

[26] We also agree with Gutierrez that the trial court's reliance on *Northern Pacific Railroad Co. v. Smith*, 171 U.S. 260 (1898), which it characterized as "nearly indistinguishable" from the present case, RA, tab 55 at 21 (Finds. Fact & Concl. L.), was misguided. *Smith* involved the running of a railroad line across a portion of an 80-acre tract of land used as a town site. *Smith*, 171 U.S. at 263. In 1864, prior to the existence of the township, Congress approved "An act granting lands to aid in the construction of a railroad and telegraph line from Lake Superior to Puget Sound on the Pacific Coast, by northern route." *Id.* at 261. The act created the Northern Pacific Railroad Company and granted to the company "the right of way through the public lands, to the extent of 200 feet in width on each side of said railroad where it may pass through the public domain. *Id.* at 265-66. In 1872, the company filed with the Department of Interior the map of its general route and began grading on this line. *Id.* at 264. Later that year, an 80-acre tract of land near this line was selected as the location of a town site. *Id.* at 263. In 1873, the company filed with the Secretary of Interior its map fixing the definite location of its railroad line. *Id.* at 264. The line thus fixed passed about two miles south of the 80-acre tract. *Id.* However, when the railroad was actually constructed later that year, the grading on its line of definite location was abandoned. *Id.* In November 1873, commissioners appointed under federal railroad act reported that they had examined the Dakota division of the railroad, including that portion which covered the land in controversy, and that they had found its construction to be in accordance with the instructions furnished for their guidance by the interior department, and accordingly recommended the acceptance of the road by the government. *Id.* at 267. The President approved this report a week later. *Id.* The lots in controversy were within 200 feet of the main track of the railroad, as actually constructed. *Id.* In 1874, the plat of the town site was recorded in the county's office of the register of deeds. *Id.* at 263. In 1879, this town site was

adopted as the site of the city of Bismarck and patented to the mayor of the city under a federal town-site act. *Id.* The lots in controversy were conveyed to plaintiff Smith sometime thereafter. *Id.* at 267.

[27] The Supreme Court determined that the railroad company had established a prima facie title and right of possession of the disputed tract. *Id.* at 268. In addition to the fact that the 1864 act specifically granted to the company a right of way through the public lands, and despite the company's deviation from its map of definite location, the Court found significant the government's subsequent approval of the railroad as actually constructed:

> It is evident that when, in 1873, the [company] took possession of the land in dispute as and for its right of way, and constructed its road over and upon the same, if the tract so taken was then part of the public lands only the United States could complain of the act of the company in changing the location of its tracks from that previously selected. But, so far as this record discloses, the United States did not object to such change of location, but rather, by having, through the commissioners and the president, approved and accepted this part of the road when constructed, must be deemed to have acquiesced in the change of location as properly made.

Id. at 267-68. Because the railroad was constructed and its actual location approved prior to the recording of the 80-acre tract in 1874 and the subsequent grant of the patent to the mayor in 1879, and because of the open and notorious nature of a railroad, Smith was deemed to have taken the land subject to the railroad. *Id.* at 269-70.

[28] While there are certainly similarities between *Smith* and the present case, important factual distinctions render *Smith* inapplicable to this case, the most glaring of which is that *Smith* concerns a railroad line which was constructed and maintained as part of a large, comprehensive federal act which not only granted a right of way to the railroad company but in fact created this company. Moreover, while here the evidence demonstrates only implied acquiescence on the part of the Navy through its silence after the actual placement of the power poles onto Lot 1-2-2

rather than within the existing utility easements, in *Smith*, the federal government—including the President—documented its approval of the railroad as actually constructed. Finally, the location and operation of the railroad were imposing and obvious to Smith and his predecessors-in-title. By contrast, it was not readily apparent to Gutierrez or his predecessors-in-title that the poles installed by GPA had encroached onto the subject property rather than remained within the existing utility easements. Such factual distinctions are important when considering an equitable remedy such as granting an irrevocable license.

[29] Even if there had been an irrevocable license through estoppel, Gutierrez, as subsequent owner of Lot 1-2-2, did not take the property subject to the irrevocable license. It is generally held that a successor-in-title will take subject to an irrevocable license "if they had notice of the license before the purchase." *Blackburn v. Lefebvre*, 976 So. 2d 482, 494 (Ala. Civ. App. 2007) (emphasis omitted) (quoting *Kovach v. Gen. Tel. Co. of Penn.*, 489 A.2d 883, 885 (Pa. Super. Ct. 1985)) (internal quotation marks omitted); *see also Hopkins v. Va. Highland Assocs., L.P.*, 541 S.E.2d 386, 389 (Ga. Ct. App. 2000) ("For the verbal agreement between the [licensor and licensee] to have been effective against subsequent purchasers, the record must show that any such purchaser 'took with notice of the agreement.'").

[30] There was no evidence to suggest Gutierrez had actual or constructive notice of a license authorizing the placement of poles on Lot 1-2-2. Instead, the evidence suggests that the poles' placement on Lot 1-2-2 first came to light after Gutierrez had the property surveyed. *See* Tr. at 9 (Bench Trial). There appears to be no written record of the Navy's grant of permission to GPA upon which Gutierrez could be said to have record notice concerning such use of the property. The quitclaim deeds and the public laws referenced therein did not explicitly mention or reserve GPA's continued location of the poles on Lot 1-2-2. Accordingly, Gutierrez received Lot 1-2-2

without any notice of GPA's implied license. We therefore conclude that even if the implied license created between the Navy and GPA was irrevocable as to the Navy as the original licensor, the license was not effective against Gutierrez.

[31] We now turn to the question of whether GPA's use of Lot 1-2-2 constituted a taking of Gutierrez's property, thereby entitling him to just compensation for inverse condemnation.

B. Inverse Condemnation

[32] The final clause of the Fifth Amendment provides: "[N]or shall private property be taken for public use, without just compensation." U.S. Const. amend. V. This right has been extended to Guam by way of the Organic Act of Guam. *See* 48 U.S.C.A. § 1421b(f) (Westlaw current through Pub. L. 112-207 (2012)) ("Private property shall not be taken for public use without just compensation."). "The Takings Clause is a limitation on governmental power, and is intended to prevent the 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." *Cepeda v. Gov't of Guam*, 2005 Guam 11 ¶ 20 (quoting *E. Enters. v. Apfel,* 524 U.S. 498, 522 (1998)) (internal quotation marks omitted). As its language indicates, the Takings Clause does not prohibit the taking of private property, but instead prohibits taking without just compensation. *First English Evangelical Lutheran Church of Glendale v. Cnty. of L.A., Cal.*, 482 U.S. 304, 314 (1987).

[33] Where the government plans an acquisition and sues an owner to take his property, it is known as the exercise of the government's power of eminent domain. *Cepeda*, 2005 Guam 11 ¶ 21. By contrast, an inverse condemnation proceeding is brought by a landowner whose property was taken for public purposes without the institution of formal condemnation proceedings. *Id.*; *see also* 7 GCA § 11311.1 (2005) (allowing a landowner to institute an action for inverse condemnation "for the taking of a person's fee or for lesser compensable interest in the property

which has been expropriated by the government of Guam without according the person due process."). In an inverse condemnation action, the landowner has the burden of proving the taking and the amount of compensation due. *See Troiano v. Colo. Dep't of Highways*, 463 P.2d 448, 451 (Colo. 1969) ("The property owner has the burden of proof with regard to establishing the existence of damages and the amount of compensation therefor."); *Regency Outdoor Adver., Inc. v. City of Los Angeles*, 139 P.3d 119, 133 (Cal. 2006) ("[T]he property owner must first clear the hurdle of establishing that the public entity has, in fact, taken [or damaged] his or her property before he or she can reach the issue of 'just compensation.'"). Thus, we first determine whether Gutierrez has proven a compensable taking.

1. GPA's Use of Lot 1-2-2 Constituted a Compensable Taking

[34] The trial court concluded that "even if the Court were to determine that [GPA] was not entitled to occupy [Gutierrez's] land at any time, [Gutierrez] could not succeed in [his] inverse condemnation claim based upon the fact of [GPA's] presence on the land, because [Gutierrez] has failed to prove an occupation which was substantial enough to constitute a taking." RA, tab 55 at 26 (Finds. Fact & Concl. L.). In its analysis on whether GPA's use of the land constituted a taking, the trial court first considered whether GPA's use of the land was physical or regulatory. *Id.* at 27. Then, having determined that the evidence did not support a finding of a regulatory taking, the court turned to the question of whether the power poles' placement on the land amounted to a compensable taking. *Id.* After finding that GPA's occupation of the land was only temporary, the court then applied a two-part test to determine whether the physical invasion warranted compensation as a taking. *Id.* at 29-30. The trial court stated, "First, the property owner must prove that the government invasion of property interests was either 'the direct or necessary result' of governmental action or was 'within contemplation of or reasonably to be

anticipated by the government.'" *Id.* at 30. "[T]he property owner must next show that 'the government's interference with any property rights of [the plaintiff] was substantial and frequent enough to rise to the level of a taking.'" *Id.* (alteration in original) (quoting *Ridge Line, Inc. v. United States*, 346 F.3d 1346, 1356-57 (Fed. Cir. 2003)). The trial court ultimately concluded that while Gutierrez met the first prong of the *Ridge Line* test, he did not present evidence to show substantial interference with his property in satisfaction of the second prong. *Id.* at 31 ("[Gutierrez] has presented no evidence that [GPA's] occupation disturbed [his] possession or disposition of Lot 1-2-2, and accordingly, the Court cannot find that [GPA's] occupation was a substantial enough interference with [Gutierrez's] rights in the property to constitute a taking.").

[35] "The [U.S.] Supreme Court has recognized that the government may 'take' private property by either physical occupation or regulation, and that these two categories of takings are subject to different analyses." *Tuthill Ranch, Inc. v. United States*, 381 F.3d 1132, 1135 (Fed. Cir. 2004) (citing *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1014-15 (1992)). A regulatory taking occurs when the government regulates a property to such a degree that the regulation effectively amounts to an exercise of the government's power of eminent domain, as if the government physically took an interest in the property. *Cepeda*, 2005 Guam 11 ¶ 21 (quoting David L. Callies, *Takings: An Introduction and Overview*, 24 U. Haw. L. Rev. 441, 443 (2002)). The trial court found, and we agree, that GPA's use of Lot 1-2-2, whatever it may be, was not the result of any government regulation. We must therefore consider whether or not GPA's actions amounted to a physical taking of Gutierrez's property.

[36] The trial court's conclusion that GPA's actions did not constitute a physical taking rested on the court's interpretation of federal cases, including the U.S. Supreme Court case *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982). RA, tab 55 at 27-31 (Finds. Fact &

Concl. L.). While the trial court properly points to *Loretto* to guide our analysis, its conclusion misreads *Loretto* and other physical takings cases.

[37] In *Loretto*, the Court held that a permanent physical occupation of a property, no matter how small, is a constitutionally compensable taking. 458 U.S. at 426; *see also Cepeda*, 2005 Guam 11 ¶ 25 (articulating holding of *Loretto*). *Loretto* concerned a New York state law that authorized a cable company to install cables and a cable box on plaintiff's apartment building. 458 U.S. at 421-22. Thus, the case involved a government regulation that expressly authorized physical occupation of private property. The issue before the Court was whether an otherwise valid regulation could so frustrate property rights that compensation must be paid to the property owner. *Id.* at 425-26 (citing *Penn Cent. Transp. Co. v. New York*, 438 U.S. 104, 127-28 (1978); *Del., L. & W. R. Co. v. Town of Morristown*, 276 U.S. 182, 193 (1928)). In its analysis, the Court carefully distinguished permanent physical occupations, in which it had always found a taking, from both temporary physical invasions short of an occupation and regulations restricting the use of private property. *Id.* at 428-34. The Court concluded that of the three, only a permanent physical occupation of property is a *per se* taking, "without regard to whether the action achieves an important public benefit or has only minimal economic impact on the owner." *Id.* at 434-35. Finding that the cable "installation involved a direct physical attachment of plates, boxes, wires, bolts, and screws to the building, completely occupying space immediately above and upon the roof and along the building's exterior wall," the Court concluded that the installation constituted a taking under the traditional physical occupation test. *Id.* at 438.

[38] Like the cables and cable boxes in *Loretto*, here, the power poles were physically attached to Gutierrez's property, actually occupying space on the lot. Though the trial court acknowledged that the placement of the poles on Lot 1-2-2 amounted to a physical occupation

or, at the very least, "invasion" of the property, it nevertheless concluded that GPA's subsequent removal of the poles rendered the occupation "temporary," rather than permanent, under *Loretto*. RA, tab 55 at 29-31 (Finds. Fact & Concl. L.). Specifically, the trial court stated, "[I]t is undisputed that the power poles and transmission lines have been removed from the subject property, and thus, any occupation of Lot 1-2-2 by the poles was only temporary." *Id.* at 29. The trial court then concluded that because GPA's occupation was merely temporary, Gutierrez must meet a two-part balancing test before the occupation could be deemed a compensable taking. *Id.* at 30 (citing *Ridge Line*, 346 U.S. at 1356-57).

[39] While *Loretto* did recognize a distinction between a permanent physical occupation and a temporary physical invasion short of an occupation, holding that the former constitutes a *per se* taking and acknowledging that the latter is subject to a balancing process, we do not agree with the trial court that the key to this distinction lies in the terms "permanent" and "temporary." Rather, we believe the Court's focus was on whether the government action amounted to a physical occupation rather than a momentary intrusion onto the property. Indeed, "[t]he Court described its recent cases as having emphasized the central role that an *actual physical occupation* plays in determining whether or not a physical taking had occurred." *Tuthill Ranch*, 381 F.3d at 1137 (emphasis added) (citing *Loretto*, 458 U.S. at 432); *see also Tuthill Ranch*, 381 F.3d at 1136 ("[T]he sole question governing physical takings is whether or not the government has physically occupied the plaintiff's property." (citing *Loretto*, 458 U.S. at 438)); *Otay Mesa Prop., L.P. v. United States*, 670 F.3d 1358, 1363 (Fed. Cir. 2012) ("Although there has been some confusion over the use of the terms 'temporary' and 'permanent' in the takings context, it is clear that courts recognize both types of physical takings." (citations omitted)). After all, "'permanent' does not mean forever, or anything like it." *Otay Mesa*, 670 F.3d at 1367 (quoting

Hendler v. United States, 952 F.2d 1364, 1376 (Fed. Cir. 1991)). "[A]ll takings are 'temporary,' in the sense that the government can always change its mind at a later time . . . ." *Id.* (quoting *Hendler*, 952 F.2d at 1376). Moreover, just last month, the Supreme Court recognized that "[o]rdinarily, . . . if government action would qualify as a taking when permanently continued, temporary actions of the same character may also qualify as a taking." *Ark. Game & Fish Comm'n v. United States*, 133 S. Ct. 511, 515 (2012). Noting its longstanding rejection of the argument that government action must be permanent to qualify as a taking, the Court stated, "Once the government's actions have worked a taking of property, 'no subsequent action by the government can relieve it of the duty to provide compensation for the period during which the taking was effective.'" *Id.* at 519 (quoting *First English*, 482 U.S. at 321); *see also Otay Mesa*, 670 F.3d at 1366 ("The Court [in *First English*] stated that abandonment of a permanent taking creates a temporary taking, thereby affecting the compensation due. However, the Court did not hold or suggest that, in that case, prior to the abandonment, the taking would be classified as temporary." (citing *First English*, 482 U.S. at 318)).

[40] "The duration of a physical taking pertains, not to the issue of whether a taking has occurred, but to the determination of just compensation." *Otay Mesa*, 670 F.3d at 1363; *accord Hendler*, 952 F.2d at 1376 (discussing *United States v. Gen. Motors Corp.*, 323 U.S. 373 (1945), and noting that in that case, "[t]he government's appropriation of the unexpired term of a warehouse lease was a taking; the fact that it was finite went to the determination of compensation rather than to the question of whether a taking had occurred."); *Skip Kirchdorfer, Inc. v. United States*, 6 F.3d 1573, 1583 (Fed. Cir. 1993) ("The limited duration of this taking is relevant to the issue of what compensation is just, and not the issue of whether a taking has occurred."). What is relevant in our analysis is the fact that GPA actually occupied physical

space on Gutierrez's property. Such occupation was not a mere passing intrusion or momentary excursion on the property; the poles remained attached to the property for several years before they were finally removed. It is clear that had the poles continued to remain on the property, there would be a "permanent" physical occupation and thus a compensable taking. The fact that GPA eventually removed the poles does not relieve GPA of its duty to justly compensate Gutierrez for the period in which the poles were continuously affixed to the property.

[41] In *Hendler*, the Federal Circuit Court of Appeals held that the distinction between "permanent" and "temporary" within the rule of *Loretto* goes to the nature of the occupancy, rather than the duration of the taking. *Hendler*, 952 F.2d at 1375-76. *Hendler* concerned a challenge to the federal government's installation, maintenance, and monitoring of concrete wells on private property. *Id.* at 1367. The court held that the wells and the government workers who entered to install, maintain, and monitor them, constituted a permanent physical occupation amounting to a *per se* taking under *Loretto*. *Id.* at 1376-78. The court's decision rested upon the permanent nature of the wells and the regular government intrusions to monitor and maintain them.[5] *Id.*

[42] We find the factual situation in *Hendler* analogous to the present case. While the poles and transmission lines in this case did not occupy as much physical space as the wells in *Hendler*, throughout the time in which the poles remained on Lot 1-2-2, they were permanently

[5] In describing the wells, the court stated:

> There is nothing 'temporary' about the wells the Government installed on plaintiffs' property . . . . Years have passed since the Government installed the first wells. The wells are some 100 feet deep, lined with plastic and stainless steel, and surrounded by gravel and cement. Each well was capped with a cement casing lined with reinforcing steel bars, and enclosed by a railing of steel pipe set in cement. These surveillance wells are at least as 'permanent' in this sense as the CATV equipment in *Loretto*, which comprised only a few cables attached by screws and nails and a box attached by bolts.

Hendler, 952 F.2d at 1376 (citation and footnote call number omitted).

affixed on the property. The poles were heavy cement structures embedded into the ground and remained on the property for several years; nothing suggests that the poles were a momentary excursion shortly to be withdrawn. Moreover, during the time the poles remained on the property, one would expect government workers to enter to maintain and monitor the power poles and transmission lines. Although ultimately GPA's use of the property was only temporary in the sense that it ended on a finite date, its actions constituted an occupation rather than a mere invasion or intrusion. The fact that the poles were eventually removed affects only the determination of compensation, not the issue of whether a taking has occurred.

[43] The trial court also found that because "[Gutierrez] has presented no evidence that [GPA's] occupation disturbed [his] possession or disposition of Lot 1-2-2," it could not "find that [GPA's] occupation was a substantial enough interference with [Gutierrez's] rights in the property to constitute a taking." RA, tab 55 at 30 (Finds. Fact & Concl. L.). According to the trial court's interpretation of *Loretto*, Gutierrez's retention of the other parts of Lot 1-2-2 precludes a finding of a *per se* taking. However, the occupation involved in *Loretto* is similar to this case insofar as the property claimed to have been taken by the government was only a small portion of the owner's whole property and did not disturb the owner's use of the rest of her property. *See First English*, 482 U.S. at 329 ("[E]ven minimal physical occupations constitute takings which give rise to a duty to compensate." (citing *Loretto*, 458 U.S. 419)). Indeed, the Court in *Loretto* noted that a compensable physical taking would occur in circumstances where telephone lines, rails, and underground pipes or wires are affixed on an owner's property. 458 U.S. at 430. As the Court explained:

> Later cases, relying on the character of a physical occupation, clearly establish that permanent occupations of land by such installations as telegraph and telephone lines, rails, and underground pipes or wires are takings *even if they*

> *occupy only relatively insubstantial amounts of space and do not seriously interfere with the landowner's use of the rest of his land.*

Id. (emphasis added). Thus, even if Gutierrez had to prove that GPA's interference with Lot 1-2-2 was substantial and frequent enough to rise to the level of a taking, *Ridge Line*, 346 F.3d at 1357, we find that Gutierrez met this requirement.

[44] The trial court further relied on *Transportation Co. v. Chicago*, 99 U.S. 635 (1878), to support its conclusion that the interference here was not "substantial enough" to constitute a taking. RA, tab 55 at 31 (Finds. Fact & Concl. L.). Such reliance, however, was misplaced. In *Transportation Co.*, the city government constructed a tunnel along a street which ran adjacent to privately owned property and at the same time erected a dam in front of the owner's dock, thereby impairing the owner's access to its property during the period of construction. 99 U.S. at 635-36. The Court held that absent direct encroachment upon private property, there can be no taking within the meaning of the Takings Clause:

> [A]cts done in the proper exercise of governmental powers, and not directly encroaching upon private property, though their consequences may impair its use, are universally held not to be a taking within the meaning of the constitutional provision. . . . The extremest qualification of the doctrine is to be found, perhaps, in *Pumpelly v. Green Bay Company*, 13 Wall. 166, and in *Eaton v. Boston, Concord, & Montreal Railroad Co.*, 51 N. H. 504. In those cases it was held that permanent flooding of private property may be regarded as a "taking." In those cases there was a physical invasion of the real estate of the private owner, and a practical ouster of his possession. But in the present case there was no such invasion. No entry was made upon the plaintiffs' lot. All that was done was to render for a time its use more inconvenient.

Id. at 642. *But see Lucas*, 505 U.S. at 1014 (recognizing abrogation of *Transportation Co.* by *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922), on grounds that a "practical ouster of [owner's] possession" not always necessary to constitute a taking; "while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking." (citations and internal quotation marks omitted)).

[45] In contrast to *Transportation Co.*, the government action complained of in this case involved the direct affixation of permanent structures on private property. The poles did not merely block access to Gutierrez's property, but instead were actually directly attached to the property and remained so for several years.[6] Considering the relevant precedent and the specific facts of this case, we find that GPA's actions constituted a compensable physical taking. Accordingly, we hold that the trial court erred in finding otherwise. We now address the issue of just compensation.

2. Just Compensation for Temporary Taking

[46] The trial court determined that even if there had been a temporary physical taking of Lot 1-2-2, Gutierrez was not entitled to compensation because he failed to provide sufficient evidence upon which the court could determine the fair market rental value of the portion of Lot 1-2-2 that was occupied by GPA. RA, tab 55 at 44 (Finds. Fact & Concl. L.).

[47] "The Fifth Amendment guarantees *just compensation* when there is a governmental taking of private property for a public purpose." *Cepeda*, 2005 Guam 11 ¶ 20 (emphasis added). The U.S. Supreme Court has defined "just compensation" as "the full and perfect equivalent in money of the property taken. The owner is to be put in as good [a] position pecuniarily as he would have occupied if his property had not been taken." *United States v. Miller*, 317 U.S. 369,

[6] In concluding that GPA's actions did not amount to a taking, the trial court also considered whether Gutierrez was deprived of his rights to possess, use, and dispose of the property. RA, tab 55 at 30 (Finds. Fact & Concl. L.). The trial court found that Gutierrez was not denied the use of his property because there was no evidence that Lot 1-2-2 was made inaccessible to Gutierrez, in contrast to the owner in *Transportation Co.* who was denied access to his land. The trial court further found that Gutierrez's rights to possession or disposition of the property were likewise undisturbed. We disagree. While it may be true that the power poles took up only a small portion of the property in comparison to the property's size as a whole, so that technically speaking Gutierrez was free to possess, use, and dispose of the remaining portion of his property, Gutierrez was denied his rights to possess, use, and dispose of the portion of the land upon which the poles were attached. While the poles and transmission lines remained on the property, Gutierrez had no right to possess or control the use of the occupied space himself. Even though he may have retained the bare legal right to dispose of the occupied space, the occupation of that space emptied that right of any value, since any potential lessee would also have been unable to make any use of that space.

373 (1943); *see also Comm'r of Transp. v. Rocky Mountain, LLC*, 894 A.2d 259, 281 (Conn. 2006) ("The paramount law intends that the condemnee shall be put in as good condition pecuniarily by just compensation as he would have been in had the property not been taken."). As stated earlier, in an inverse condemnation action, the landowner has the burden of proving the amount of compensation due. *See Troiano*, 463 P.2d at 451.

[48] "Courts use different methods to determine just compensation owed, depending on the temporal classification of a taking." *Otay Mesa*, 670 F.3d at 1363. "Once a taking has been classified as either temporary or permanent, the court applies the appropriate method of determining just compensation." *Id.* at 1364. In the case of a permanent taking, the owner ordinarily is entitled to the fair market value of his property at the time of the taking. *Id.* While courts have not arrived at a single measure of damages in a temporary taking case, the usual measure "is the fair rental value of the property for the period of the taking." *Id.*

[49] To determine fair market value in a temporary taking case, the trier of fact must assume "that free bargaining between [the property owner] and a hypothetical lessee of that temporary interest would have taken place in the usual framework of such negotiations." *Kimball Laundry Co. v. United States*, 338 U.S. 1, 7 (1949). The landowner is entitled to value the property at the highest and best use it could have made by lease of the property during the temporary taking period. *See Fowler Irrevocable Trust 1992-1 v. City of Boulder*, 17 P.3d 797, 804 (Colo. 2001) ("In the temporary taking context, the just compensation inquiry asks this question: considering the property's highest and best use during the period of the temporary taking, what rental would the property have produced."). Regardless of the method employed, the focus of compensation is to look at the actual loss of the landowner, as calculated with reasonable certainty. *SDDS, Inc. v. State*, 2002 SD 90, ¶ 34, 650 N.W.2d 1, 14.

[50] The trial court found that Gutierrez did not meet his burden of proof as to damages because he failed to provide evidence of the fair market rental value of the portion of the property that was essentially taken as a temporary utility easement. RA, tab 55 at 44-45, 49-52 (Finds. Fact & Concl. L.). Gutierrez argues that he offered various computation methods upon which the trial court could have arrived at a compensation for the temporary taking of Lot 1-2-2. Gutierrez hired an appraiser, Nicolas Captain, to conduct a "consulting study" of Lot 1-2-2. *Id.* at 7. Captain provided three estimates based on three different methodologies: (1) a "before and after" analysis; (2) a "DCF[7] of Annual Damages Estimate"; and (3) a "DCF with Reversion Only." *Id.* The trial court rejected Captain's conclusions regarding the second and third methods, finding that they each lacked analysis or factual basis to support its conclusion. *Id.* at 8. Accordingly, the trial court analyzed only the "before and after" approach since that method was accompanied by documentation, explanation, and analysis. *Id.* at 52. Nevertheless, after review, the court also rejected this approach. *Id.* at 53-54. In order to determine whether Gutierrez provided sufficient evidence by which the trial court could have considered a fair market rental value for the temporary taking of Lot 1-2-2, we must analyze each of Captain's valuation approaches.

a. "Before and After" Method

[51] The "before and after" method of valuation measures the difference between the value of the property before and after the government's taking, *Otay Mesa*, 670 F.3d at 1364; in other words, the reasonable price of the land immediately "before" the taking is subtracted by the reasonable price of the land immediately "after" the taking, Tr. at 37-38 (Bench Trial) (testimony

[7] "DCF" stands for "discounted cash flow." *See In re Hawaiian Telcom Commc'ns. Inc.*, 430 B.R. 564, 577 (Bankr. D. Haw. 2009).

of Nicolas Captain). To determine the value of the property "before" the taking, Captain referred to sales transactions of similar types of properties in the area that occurred during the period assigned as the time "before" the taking, or April 2004. *Id.* at 38. Using this "comparable sales approach," Captain concluded that the reasonable price of Gutierrez's property before the taking was approximately $1,220,000.00, or $83.00 per square meter. *Id.* at 39. Next, Captain testified that he calculated the value of the property "after" the taking, which he concludes was $1,020,000.00, or about $69.00 per square meter, by accounting for the "negative impact associated" with the encroachment of the poles onto the property, including the "lower desirability of the land after the partial taking . . . ." *Id.* at 39.

[52] The trial court rejected Captain's use of sales transaction of similar properties to determine the value of the property "before" the taking, stating that the correct method of valuation is an analysis of similar rentals in the area. RA, tab 55 at 50-51 (Finds. Fact & Concl. L.). While we do not necessarily agree with the court's reasoning insofar as it precludes appraisers from using the "comparable sales approach" to assess a fair market rental value, *see, e.g.*, *City of Mission Hills v. Seton*, 160 P.3d 812, 823-24 (Kan. 2007), we find that the trial court did not err in rejecting the "before and after" approach under the circumstances of this case.

[53] Several courts have rejected the use of the "before and after" method in temporary takings cases. *See, e.g.*, *Kimball*, 338 U.S. at 7 ("[T]he proper measure of compensation [in a temporary taking case] is the rental that probably could have been obtained, ... Indeed, if the difference between the market value of the fee on the date of taking and that on the date of return were taken to be the measure, there might frequently be situations in which the owner would receive no compensation whatever because the market value of the property had not decreased during the period of the taker's occupancy." (citations omitted)); *Bass Enters. Prod. Co. v.*

United States, 48 Fed. Cl. 621, 623-24 (2001) (same); *United States v. Banisadr Bldg. Joint Venture*, 65 F.3d 374, 378 (4th Cir. 1995) (finding that district court did not err in rejecting "before and after" approach and stating that "it is well established that when the Government takes property only for a period of years, such as in the case before us, it essentially takes a leasehold in the property. Thus, the value of the taking is what rental the marketplace would have yielded for the property taken."). *Contra Portland Natural Gas Transmission Sys. v. 19.2 Acres of Land*, 318 F.3d 279, 285 (1st Cir. 2003) ("Compensation for a temporary taking is generally determined by . . . ascertaining the difference in the value of the property before and after the taking; . . . ." (internal quotation marks omitted)); *SDDS, Inc.*, 2002 SD 90, ¶ 34, 650 N.W.2d 1, 14 ("Various methods for calculating compensation for temporary takings have been created: fair rental value, option value, interest on lost profit, *before-and-after valuation* (two methods), market rate of return, the equity interest approach, the Herrington standard, and the public benefits approach." (emphasis added)).

[54] The "before and after" method is generally used where the government permanently takes an easement rather than a fee simple interest in the property. *See Otay Mesa*, 670 F.3d at 1364. In that situation, it makes sense that the measure of just compensation is the difference between the value of the property before and after the easement was imposed. However, we decline to set a bright-line rule prohibiting the use of the "before and after" method of valuation in a temporary taking case as we believe there may be instances in which such method could be appropriately considered. That being said, we find that the use of the method in this case is unwarranted given Captain's testimony that such method is more appropriate in a permanent taking case and that in his opinion the resulting figure was too high under the circumstances of the case, *see* Tr. at 37, 39-40 (Bench Trial) ([T]he before-and-after methodology . . . gives an indicated just

compensation of $200,000, and again in my mind, a realistic number would be lower than that."), and in light of the availability of evidence regarding two more appropriate methods of valuation, the "DCF of annual damage" method and the "DCF with reversion only" method.

b. "DCF of Annual Damage" Method

[55] The second type of valuation method that Captain applied involves estimating compensation to the landowner on an annual basis based on the rate of income the property can hypothetically generate. Under this "cost approach," Captain took the original land price in the undamaged condition, which he concluded was $1,220,000.00 based on the comparable sales approach, and multiplied that figure by an eight percent land rate of return (i.e., rental income rate), a rate he testified is "frequently use[d]." Tr. at 40 (Bench Trial) ("In other words, from a real estate analyst's perspective, the *fair rental income* that a property should generate approximates eight percent of its fair market price . . . ." (emphasis added)). The resulting figure of $97,600.00 is the damage in full for the property per year. *Id.* To account for the time value of money, the annual damage of $97,600.00 was then discounted at a rate of ten percent to arrive at a "reasonable present value figure" of 2.49. *Id.* at 41; RA, Pl.'s Ex. 1.1 (Summ. Revised Concl., Oct. 10, 2007). From this, Captain concluded that the just compensation under the cost approach is $240,000.00. Tr. at 41 (Bench Trial).

[56] Captain admitted that the $240,000.00 figure "would be more in line with more of a permanent taking." *Id.* at 40. Captain testified:

> [W]hen I look at [the "before and after" and "DCF of annual damage"] methodologies, I think . . . these [figures] are at the high end of the range. These are more than what the landowner deserves, because these are more indicative of more of a permanent taking, not just a temporary taking.

Id. at 41.

[57] The trial court declined to consider Captain's testimony regarding this methodology because it found that Captain had provided no analysis or evidence to support his figures. We disagree. While it may be true that Captain's report primarily supported his calculations under the "before and after" method, Captain relied upon his "before" valuation of the property to support his calculations under the other two methodologies. Though Captain did not provide documentation to support his testimony that real estate analysts typically rely on an eight percent land rate of return to calculate fair rental value and a ten percent discount rate to account for the time value of money, the parties stipulated to Captain's expertise in real estate analysis, and these rates were not disputed by GPA's expert, Michael Jury.[8] *See id.* at 3 (statement from Gutierrez's attorney that he and defense counsel have "agreed that both Nick Captain and Michael Jury can testify as experts in this case, on the . . . valuation of property within the territory of Guam . . . ."). Thus, the trial court erred in refusing to consider this method.

[58] We also find that Captain's testimony regarding this "cost approach" provided sufficient proof of the fair market rental value of the occupied space during the time of GPA's taking. While we agree with the trial court that the appropriate amount of compensation in this case is the fair market rental value of the occupied space rather than the parcel as a whole, we do not agree that Gutierrez's proof was lacking in this regard. Although Captain's figures represented the rental value for the entire property rather than the portion that was taken, we believe the trial court could fairly easily determine the rental value for the occupied space by calculating

[8] Jury did not specifically rebut Captain's use of the "DCF of annual damage" method other than by arguing that the "before and after" method is the method normally used in federal condemnation actions. *See* Tr. at 84 (Bench Trial) ("The federal guidelines highly recommend that the sales comparison approach method be used."); Tr. at 101 (Bench Trial) ("The federal standards advise the use of the sales comparison approach."). GPA did not dispute the land rate of return or the time value discount rate used by Captain in his "DCF of annual damage" estimate. Given our rejection of the application of the "before and after" method under the circumstances of this case, we find that Captain's testimony as to these rates was undisputed.

damages taking into consideration the pro rata amount of square meters that were taken. Accordingly, on remand, should the trial court choose to calculate just compensation using the "cost approach," the court should use the rates provided by Captain.[9]

c. "DCF with Reversion Only" Method

[59] The "DCF with reversion only" method, also known as the "income capitalization" approach, involves ascertaining the land price as of the date of the initial taking and inflating that value to account for the appreciation of the land for the entire period of the taking. Tr. at 42-44 (Bench Trial). Using the $1,220,000.00 land value as calculated under the comparable sales approach, Captain multiplied that figure by five percent, which he testified was the reasonable rate of land appreciation in April 2004.[10] *Id.* at 43. That figure was then discounted using a ten percent rate to account for the time value of money, resulting in a present value factor of 0.75 over the three years in which the poles remained on the property. *Id.* at 44. Captain thus

[9] In making such calculation, the trial court should consider Captain's testimony that the occupied space is more valuable than the remainder of the property because it abuts Marine Corps Drive, thus likely affecting the per-square-meter rate. Tr. at 61-62 (Bench Trial) ("I mean, if you are asking me if the $83.00 a square meter value, or price conclusion, that I came to is applicable to the -- every square meter of the entire lot, I would say, no. That doesn't make sense. The value of -- of the frontage along Marine Drive is higher than the value or price of the land at the back of the lot. And clearly, if there was a temporary taking at the rear of the lot, the impact on this particular -- for this particular situation would be much less.").

The trial court is not limited to using Captain's estimate of $1,220,000.00 or $83.00 per square meter as representing the property's value immediately prior to the taking, but can determine which figure—Captain's estimate, Jury's estimate of $760,000.00 or $52.00 per square meter, or some other figure—most accurately depicts the value of the property at the time of the taking, with due consideration of the highest and best use of the property. The trial court shall express the reasons for its choice in writing. Because GPA did not dispute the different rates used by Captain in calculating land return, land appreciation, or time value of money, the trial court is limited to Captain's figures in this regard.

[10] Captain testified as to how he arrived at the five percent land appreciation rate:

> [T]hat estimate was made with the mind-set of all knowledge through April of 2004. Clearly, the market has moved up significantly more than five percent a year. But . . . you have to take yourself back into that time period and ask yourself what estimate would you have made at that time with all of the information that you had up until that date. So, it was made in that particular circumstance, not based on the reality of the market, and the -- incredible growth that we've actually seen take place.

Tr. at 62 (Bench Trial).

concluded that the present value of the reversion, i.e., "getting the land back in the unencumbered format three years" later, would have been $1,120,000.00. *Id.* This figure was then subtracted from the land's value at the time of the taking, resulting in a just compensation amount of $100,000.00. *Id.*

[60] The trial court did not consider the propriety of the income capitalization approach, on the grounds that Captain did not provide support or validation for any of the figures used in his calculations. RA, tab 55 at 8 (Finds. Fact & Concl. L.). However, we find this to be an invalid reason to disregard Captain's testimony, for as in the cost approach, Jury did not rebut the reasonableness of the rates used by Captain in the income capitalization approach. Instead, Jury argued that such an approach is discouraged under the federal standards and that instead the "before and after" approach should be used. Tr. at 101 (Bench Trial). We leave to the trial court to decide in the first instance whether the income approach is an appropriate method of compensation in a temporary taking case. Should the trial court determine that it is proper and choose this method of valuation to calculate just compensation to Gutierrez, the court should use the rates relied upon by Captain in his calculations as they were undisputed

[61] Finally, we briefly address the trial court's concerns regarding the lack of zoning on the property and the questionable size of the occupied space. The trial court determined that Gutierrez failed to prove actual loss because the property remained unzoned during the entire time of the taking, and thus could not have been developed or used for any purpose. RA, tab 55 at 57-60 (Finds. Fact & Concl. L.). However, testimony from both experts suggests that a lack of zoning does not necessarily render a property valueless or unmarketable. For instance, on cross-examination, Captain testified:

> [O]ne of [the] comparables that I used in my analysis was unzoned when it was under contract [of sale] in April 2004 . . . . [M]y job is to follow what the market is doing. So, if the market is placing value on land that's unzoned, then certainly that's going to be a good indicator of what my land is worth in an unzoned basis.

Tr. at 51-52 (Bench Trial). Similarly, Jury provided testimony regarding the sale of two other ancestral properties further down Marine Corps Drive, both of which lacked zoning at the time of purchase, but both buyers had expectations that the properties would be zoned for commercial use. *Id.* at 88-89.

[62] Moreover, Gutierrez testified that two different companies had expressed interest in leasing the property notwithstanding the lack of zoning. Gutierrez testified that he had been in "serious negotiations" with Payless Supermarkets to lease the entire property for $10,000.00 per month, and with South Pacific Petroleum (doing business as 76) to construct a service station on the property for $15,000.00 per month. *Id.* at 12-14. Gutierrez claims that both negotiations failed solely due to GPA's encroachment upon the front of the property. *Id.* at 13-14. Gutierrez further testified that both potential lessees had been unconcerned about the lack of zoning of the property, as zoning could have easily been done for the property. *Id.* at 14-15. Indeed, GPA's expert, Michael Jury, testified that the property could be zoned for commercial use given its location, and as evidenced by the other properties in the area. *Id.* at 93-95. Given the evidence, we conclude the trial court erred in determining that Gutierrez failed to prove actual loss.

[63] We also find erroneous the trial court's finding that Gutierrez failed to prove the size of the space that had been occupied by GPA's poles and transmission lines. *See* RA, tab 55 at 7 (Finds. Fact & Concl. L.). While there was some inconsistency in the testimony, both experts relied upon an area of 1,277 square meters as being the measure of the encroachment, and neither side disputed this amount. *Id.* In fact, the measurement was initially used by Jury, GPA's

expert, and then subsequently by Captain in reliance upon Jury's report. *Id.* at 7; Tr. at 59 (Bench Trial) ("I assumed that the number in [Jury's] reports was correct which was about -- estimated at 1,277 square meters. I just rounded it off to 1,280 square meters."). Because it appears both sides agree that the size of the encroachment approximated 1,277 square meters, we find that Gutierrez met his burden of proof on the issue.

C. Indispensable Party

[64] Gutierrez further challenges the trial court's *sua sponte* finding that his case must be dismissed under Guam Rules of Civil Procedure ("GRCP") Rule 19 because the governor was not a party to the case.[11] In *Cepeda*, we declined to address the issue of whether the remedy upon inverse condemnation is an executive function for the governor to determine. 2005 Guam 11 ¶ 51 ("Because we hold that the trial court erred regarding the takings claim, it is not necessary to discuss the remaining arguments raised on appeal. We will therefore not address whether the remedy upon inverse condemnation is an executive function for the Governor—not the court—to determine."). We are now asked to address the issue in this case.

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[11] GRCP 19(a) provides in pertinent part:

> (a) Persons to be Joined if Feasible. A person who is subject to service of process and whose joinder will not deprive the court of jurisdiction over the subject matter of the action shall be joined as a party in the action if
>
> > (1) in the person's absence complete relief cannot be accorded among those already parties, or
> >
> > (2) the person claims an interest relating to the subject of the action and is so situated that the disposition of the action in the person's absence may
> >
> > > (i) as a practical matter impair or impede the person's ability to protect that interest or
> >
> > . . . .
>
> If the person has not been so joined, the court shall order that the person be made a party. If the person should join as a plaintiff but refuses to do so, the person may be made a defendant, or, in a proper case, an involuntary plaintiff.

GRCP 19(a).

[65] Of its own accord, the trial court raised the issue of whether the governor was indispensable to this case. RA, tab 55 at 35-36 (Finds. Fact & Concl. L.). Gutierrez argues that the governor is not an indispensable party to this litigation because GPA is a public corporation which may be sued in its own name. Appellant's Br. at 21. In its opposition brief, GPA simply restated the trial court's conclusions that "it could not proceed to make an award of compensation without first obtaining the approval of the governor . . . and . . . that the Governor is a necessary party." Appellee's Br. at 10 (Oct. 4, 2011). GPA did not directly or adequately respond to the indispensable party argument raised by Gutierrez in his opening brief. During oral argument, GPA appeared to concede the issue. When asked "about the trial court's finding on the joinder of indispensable party," GPA's counsel responded that "GPA is a public corporation and . . . thus [has] the right to sue and be sued under its own name." Digital Recording at 11:18:34 (Oral Argument, Dec. 2, 2011).[12] When asked whether it was "conceding on that issue," GPA's counsel responded that "[GPA does not] believe that the governor would have to come into this case," thereby abandoning this issue. *Id.* at 11:18:56.

[66] Some courts have held that a party's defense based upon the absence of an indispensable party may be waived and abandoned. *See, e.g.*, *Mathis v. Hammond*, 486 S.E.2d 356, 357 (Ga. 1997) (finding that appellants waived its indispensable party defense by failing to raise defense

[12] The actual exchange between this court and GPA's counsel was as follows:

Q: What about the trial court's finding on the joinder of indispensable party? You didn't address that in your brief.

A: We did not address that. That was an argument -- the trial court found -- GPA is a public corporation and has been and thus has the right to be sued and to sue.

Q: So are you conceding on that issue?

A: The trial court made its findings.

Q: So that is a yes.

A: We don't believe that the governor needs to be in this case.

Digital Recording at 11:18:34 (Oral Argument, Dec. 2, 2011).

by motion or defensive pleading as required by statute); *Home Sav. & Loan v. Aetna Cas. & Sur. Co.*, 817 P.2d 341, 347 (Utah Ct. App. 1991) (noting that party waived its indispensable party defense by abandoning defense during oral argument). Indeed, Guam's rules as to how and when the defense may be raised is essentially identical to the rules relied upon in *Mathis*. *Compare* GRCP 12(b)(7) (defense of failure to join a party under Rule 19 may be raised by motion or defensive pleading), *and* GRCP 12(h)(2) ("[A] defense of failure to join a party indispensable under Rule 19, . . . may be made in any pleading permitted or ordered under Rule 7(a), or by motion for judgment on the pleadings, or at the trial on the merits."), *with* Ga. Code Ann. § 9-11-12(b)(7) (2012), *and* Ga. Code Ann. § 9-11-12(h)(2) (2012).

[67] However, we believe that the better view, supported by both federal and state courts, is that the issue of whether or not a party is indispensable is generally not waivable and can be raised at any time, even by an appellate court. *See, e.g.*, *Enter. Mgmt. Consultants, Inc. v. United States ex rel. Hodel*, 883 F.2d 890, 892-93 & n.2 (10th Cir. 1989) ("[C]ourts and commentators generally agree that [the indispensable party] issue is not waivable, and that a reviewing court has 'an independent duty to raise it *sua sponte*.' The text of Rule 12(h)(2) does not support [the] conclusion [that the defense is waived if not raised in the trial court]. Moreover, the advisory committee notes to the 1966 amendment to Rule 12(h) expressly state to the contrary. 'It is to be noted that . . . the more substantial defense[] of . . . failure to join a party indispensable under Rule 19 . . . [is] expressly preserved against waiver by amended subdivision (h)(2) . . . .'" (citations and footnote call number omitted)); *McShan v. Sherrill*, 283 F.2d 462, 464 (9th Cir. 1960) ("The absence of indispensable parties can be raised at any time, . . . even by the appellate court on its own motion. [Federal Rules of Civil Procedure Rule 12(h)] provides that the defense of failure to join an indispensable party is never waived." (citations omitted)); *James J. Parks*

Co. v. Lakin, 292 N.W.2d 21, 25 (Neb. 1980) ("The absence of indispensable parties cannot be waived by the parties to the litigation."); *cf. Provident Tradesmens Bank & Trust Co. v. Patterson*, 390 U.S. 102, 111 (1968) ("When necessary, . . . a court of appeals should, on its own initiative, take steps to protect the absent party, who of course had no opportunity to plead and prove his interest below."). "The defect is not 'jurisdictional', in one sense of the word, but . . . is predicated 'on the ground that no court can adjudicate directly upon a person's right, without the party being either actually or constructively before the court.'" *McShan*, 283 F.2d at 464 (citations omitted). Accordingly, the issue of whether the governor is an indispensable party is properly before us.

[68] Under GRCP 19(a)(1), a party's presence is required when "complete relief cannot be accorded among those already parties." GRCP 19(a)(1). In *Benavente v. Taitano*, we stated that the focus of this rule "is on the relief between the parties to the present action, and not on the possibility of further litigation between a party and the absentee." 2006 Guam 15 ¶ 59. Relying on Public Law 22-080, which amended Public Law 22-073, the trial court determined that "*only* the Governor is authorized to offer compensation to a landowner who is successful in an inverse condemnation case." RA, tab 55 at 36 (Finds. Fact & Concl. L.). According to the trial court, because the governor has the exclusive power to authorize compensation for a governmental taking, his absence precludes relief to Gutierrez for any taking of Lot 1-2-2. *Id.* at 38.

[69] However, the actual language of Public Law 22-080 provides that "[t]he Governor is *authorized* to offer to an affected landowner" any of the enumerated compensation. Guam Pub. L. 22-080 (Mar. 3, 1994) (emphasis added). While the language of Public Law 22-080 provides that the governor has the authority to offer compensation to landowners affected by inverse condemnation, the statute does not explicitly provide that "only" the governor has such power.

The other two Guam statutes on compensation in eminent domain proceedings, 21 GCA §§ 15105 and 15109, suggest that the governor has sole authority to award compensation in eminent domain cases. Nevertheless, these statutes are inapplicable in an inverse condemnation case. For instance, section 15109, which governs payment for lands taken by eminent domain, provides:

> No action irrevocably committing the government of Guam to the payment of the ultimate award *shall be taken unless the Governor of Guam shall* be of the opinion that the ultimate award probably will be within any limits prescribed by the Guam Legislature or the Congress of the United States on the price to be paid.

21 GCA § 15109 (2005) (emphasis added). Section 15105, which provides funding for the exercise of eminent domain, states that "[t]he power of Eminent Domain may be exercised by the government of Guam upon authorization and appropriation by the Guam Legislature of funds necessary for payment of just compensation. Such power *shall be exercised by the Governor of Guam*." 21 GCA § 15105 (2005) (emphasis added). The plain language of sections 15109 and 15105 suggests that the governor has the exclusive authority to award compensation in eminent domain proceedings. Because eminent domain actions are instituted by the government itself, it would be reasonable to infer that the legislature intended that the authority to commence eminent domain proceedings be solely an executive function.

[70] However, "[e]minent domain and inverse condemnation actions are distinguished primarily by who initiates the action. Eminent domain actions are initiated by an authorized public entity and are governed by the Eminent Domain Law." *Mt. San Jacinto Cmty. Coll. Dist. v. Superior Court*, 11 Cal. Rptr. 3d 465, 470 (Ct. App. 2004). By contrast, where property is taken other than by formal condemnation, the landowner may initiate an action for inverse condemnation. *Id.*; *Regency Outdoor Adver.*, 139 P.3d at 133 ("A property owner initiates an inverse condemnation action, while an eminent domain proceeding is commenced by a public

entity."); *Beaty v. Imperial Irrigation Dist.*, 231 Cal. Rptr. 128, 129-30 (Ct. App. 1986) ("Both eminent domain proceedings and inverse condemnation actions rest on the constitutional requirement that the government must provide just compensation to a property owner when it takes his or her private property for a public use. The principal procedural distinction between direct and inverse condemnation actions is that in a direct action the public entity takes the initiative while in an inverse action the property owner takes the initiative." (citations omitted)). Moreover, "[t]he law of inverse condemnation is not governed by the Eminent Domain Law, but has been left for determination by judicial development." *Mt. San Jacinto*, 11 Cal. Rptr. 3d at 470. In an eminent domain action, the focus is on the amount of compensation owed to the property owner, "since by initiating the proceeding the government effectively acknowledges that it seeks to 'take or damage' the property in question." *Regency Outdoor Adver.*, 139 P.3d at 133. In an inverse condemnation action, "the property owner must first clear the hurdle of establishing that the public entity has, in fact, taken [or damaged] his or her property before he or she can reach the issue of 'just compensation.'" *Id.* (alteration in original) (internal quotation marks omitted). Public Law 22-080 pertains expressly to the award of compensation in inverse condemnation actions. While the governor is authorized to award compensation in such proceedings, the statute does not provide exclusive authority to him or her.

[71] Under GRCP 19(a)(2)(i), a party's presence is required for just adjudication when the party "claims an interest relating to the subject of the action and is so situated that the disposition of the action in the person's absence may as a practical matter impair or impede the person's ability to protect that interest." GRCP 19(a)(2)(i). "The purpose of Rule 19(a)(2)(i) 'is to protect the legitimate interests of absent parties . . . .'" *Benavente*, 2006 Guam 15 ¶ 62. Because we hold that the governor does not have the exclusive authority to grant relief in an inverse

condemnation claim, no interest will be impaired or impeded by his absence in this litigation. Therefore, the trial court erred in finding that the governor is an indispensable party and that the failure to join him prevented the court from awarding compensation to Gutierrez.

V. CONCLUSION

[72] The trial court did not err in finding that a license was created between the Navy and GPA to construct and maintain power poles on Lot 1-2-2. Nevertheless, we hold that such license did not survive the series of conveyances of the property, and even if the license was irrevocable, Gutierrez, as the successor-in-title to Lot 1-2-2, was not bound by the license because he took the property without notice of the license. GPA's use of the property for three years without consent or due process constituted a physical taking of Gutierrez's property, albeit a temporary one, compensable under the Fifth Amendment's Takings Clause and relevant Guam statutes. Additionally, Gutierrez provided sufficient evidence upon which the trial court could determine the amount of compensation for the government's taking. Accordingly, we **REVERSE** the trial court's judgment and **REMAND** to the trial court to determine the appropriate amount of damages to be awarded and for any further proceedings consistent with this opinion.

Original Signed By: **Katherine A. Maraman**
KATHERINE A. MARAMAN
Associate Justice

Original Signed By: **John A. Manglona**
JOHN A. MANGLONA
Justice *Pro Tempore*

Original Signed By: **Robert J. Torres**
ROBERT J. TORRES
Presiding Justice