IN THE SUPREME COURT OF GUAM

FRANCES H. CEPEDA,
Plaintiff-Appellee,

vs.

GOVERNMENT OF GUAM,
Defendant-Appellant.

Supreme Court Case No.: CVA03-008
Superior Court Case No.: CV1714-96

OPINION

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Appeal from the Superior Court of Guam
Argued and submitted on February 16, 2004
Hagåtña, Guam

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BEFORE: F. PHILIP CARBULLIDO, Chief Justice; FRANCES M. TYDINGCO-GATEWOOD, Associate Justice; ROBERT J. TORRES, JR., Associate Justice.

PER CURIAM:

[1] Defendant-Appellant Government of Guam appeals from three separate Superior Court Decisions and Orders, primarily challenging the trial court's finding that there had been an inverse condemnation of the property of Plaintiff-Appellee Frances Cepeda by the government and its order of a land exchange of government property in Barrigada Heights, Guam for Cepeda's property. During trial court proceedings, Cepeda argued that the government had built a culvert that directed the flow of run-off water onto her property and had prohibited the property's development denying her all economically viable use of her property. These actions, Cepeda asserted, constituted a taking by inverse condemnation for which an action could be filed pursuant to Title 7 Guam Code Annotated § 11311.1. The trial court determined Cepeda was eligible for a land exchange pursuant to section 5 of Guam Public Law 22-73 because she was an affected landowner whose property was taken by the government by inverse condemnation; therefore, it ordered that the government execute the land exchange. We agree with the trial court that Guam law permits a person who did not own property at the time of the taking to file an inverse condemnation claim. We hold, however, that the trial court erred in finding that a taking of Cepeda's property had occurred and in failing to address the issue of the ripeness of Cepeda's taking claim. Accordingly, the trial court judgment is **REVERSED**.

I.

[2] The subject property is located in Barrigada; specifically, Lot No. 2264-1-R3 ("the Property" or "Cepeda's property"). It was surveyed in 1963, and consists of 11,322.54 square meters, as evidenced on the survey map, a warranty deed, a quitclaim deed, and in the Certificate of Title. The Property includes a 40-foot right of way access road, which runs along the northern and eastern borders. Raffaele Sgambelluri sold the Property in 1985 by warranty deed to U.S. Foreign Investor, Inc. ("the Corporation"), a Guam corporation made up of Cepeda and her husband Vicente C. Cepeda, and Michael Hechanova and his wife.

[3] The Property had been purchased by the Corporation for development. About a week after the Property's purchase, grading equipment was brought to the Property. Before extensive grading occurred, Barrigada Mayor Raymond Laguana "begged" the Corporation's representatives to stop because it would flood the village. Transcript of Proceedings ("Tr.") vol. II of VI, pp. 21, 53-55 (Cont'd. Bench Trial, Sept. 3, 2002). The Corporation then began negotiating with the government for a land exchange for a government lot in Barrigada Heights, Lot No. 15, Block E. Tract 9, containing 9,949.74 square meters. The Corporation was not successful in exchanging the lots.

[4] Because the Property allegedly could not be developed, the Corporation refused to pay property taxes. As a result, the Property was deeded to the government for nonpayment of taxes; first in 1988, and again in 1990. The deeds indicate that the Corporation failed to pay property taxes of $148.60. Notwithstanding the uncertainty of the ownership, the Corporation continued to seek a land exchange.[1] They were advised by the late Senator Francisco R. Santos that a land exchange would be easier if sought by an individual. The Corporation then executed a quitclaim deed, granting the Property to Cepeda in 1992, and Cepeda was issued a Certificate of Title. Even after receiving the quitclaim deed, Cepeda was unsuccessful in obtaining a land exchange.

[5] Cepeda thereafter filed a complaint for inverse condemnation against the government, seeking compensation of $396,270. The action was filed pursuant to 7 GCA § 11311.1 as enacted by Public Law 22-73, which allowed any person whose land was expropriated by the Government of Guam between August 1, 1950 and July 1, 1994 and who has not been compensated for such taking to institute an action for condemnation on or before December 31, 1996. Cepeda's inverse condemnation claim arises from the government's purported use of the Property as a ponding basin for surface run-off, and from the installation of a water pipe to force run-off water onto Cepeda's land. Cepeda maintained that the government's use of the Property and prohibition of its development permanently and substantially interfered with her use and enjoyment of the Property,

[1] On appeal, the government argues that because the Property was deeded to the Government of Guam for non-payment of taxes, then legal ownership of the land is at issue. The government did not raise this challenge during trial court proceedings. We decline to address this issue now, because, as as a general rule, this court has declined to address arguments raised for the first time on appeal. *See, e.g., Univ. of Guam v. Guam Civil Serv. Comm'n*, 2002 Guam 4, ¶ 20); *Dumaliang v. Silan*, 2000 Guam 24, ¶ 12; *B.M. Co. v. Avery*, 2001 Guam 27, ¶ 33; *Guam Bar Ethics Committee v. Maquera*, 2001 Guam 20, ¶ 39.

and constituted a complete taking of her interest in the Property. She later filed a First Amended Complaint, which added the count of a land exchange for the government lot in Barrigada Heights. In seeking the land exchange, Cepeda relied on Public Law 22-73 § 5, which authorized the Governor to offer affected landowners direct compensation, a land exchange, or credit towards income taxes, or any combination thereof.

[6] The government subsequently filed a motion for summary judgment asserting Cepeda had no standing to bring the inverse condemnation action because she was not the owner of the Property at the time of the alleged taking and the court could not order the government to exchange the Property for property in Barrigada Heights, as it belonged to the Chamorro Land Trust Commission. The trial court denied the motions for summary judgment in a Decision and Order issued May 16, 2001. The court concluded that the general rule that only the owner of the land at the time of the taking has standing to bring an action for inverse condemnation does not apply to actions under 7 GCA § 11311.1, and that current owners of property are authorized by this statute to file actions for inverse condemnation, even though the taking occurred before their ownership. The court further found that summary judgment was not appropriate because factual inquiries remained regarding whether the property in Barrigada Heights or other property, which may be under the Chamorro Land Trust jurisdiction, was nonetheless available for a land exchange. The government then filed three motions: for reconsideration of the May 16, 2001 Decision and Order; for partial summary judgment; and a motion in limine. The trial court denied the motions for reconsideration and partial summary judgment, and granted the motion in limine.

[7] After a bench trial, the trial court issued its Decision and Order holding that the government's placement of the culvert and the prohibition against development denied Cepeda economically viable use of her Property, and ordered that the land exchange be granted. The court also held that Guam law does not allow Cepeda to recover the rental value of the Property, and awarded attorney's fees and costs to Cepeda. Judgment was entered and the government's Notice of Appeal was timely filed. The government appealed from the Decision and Order denying summary judgment, the Decision and Order denying reconsideration and partial summary judgment, and the post-trial Decision and Order that found a taking and ordered a land exchange.

II.

[8] This is an appeal from a final judgment.[2] The Supreme Court has jurisdiction over appeals from final judgments of the Superior Court. 48 U.S.C. § 1424-1(a)(2) (West, WESTLAW through Pub. L. 109-40 (2005)); Title 7 GCA §§ 3107 and 3108(a) (West, WESTLAW through Guam Pub. L. 28-037 (Apr. 22, 2005)).

III.

[9] The trial court's denial of a motion for summary judgment is reviewed *de novo*. *Nat'l Union Fire Ins. Co. v. Guam Hous. & Urban Renewal Auth.*, 2003 Guam 19, ¶ 12. "Summary judgment is proper 'if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.'" *Hemlani v. Flaherty*, 2003 Guam 17, ¶ 7 (quoting Guam R. Civ. P. 56(c)); *Bank of Guam v. Flores*, 2004 Guam 25, ¶ 8.

[10] The government challenged many of the trial court's factual findings and legal conclusions. Findings of fact after a bench trial are reviewed for clear error. *Yang v. Hong*, 1998 Guam 9, ¶ 7. Conclusions of law are reviewed *de novo*. *Town House Dep't Stores, Inc. v. Hi Sup Ahn*, 2000 Guam 32, ¶ 13. Issues of statutory interpretation are reviewed *de novo*. *Carlson v. Guam Tel. Auth.*, 2002 Guam 15, ¶ 16.

IV.

[11] On appeal, the government argues that the trial court erred because under Guam law only the owner of land at the time of the taking is entitled to compensation for inverse condemnation, and Cepeda is not entitled to compensation because she was not the owner who suffered the loss. The government further contends that even if Cepeda was entitled to file a claim for inverse condemnation, she should not be awarded compensation because there was no taking of the Property. Finally, the government submits the court erred in finding that the Property and the Barrigada

[2] On August 28, 2003, this court ordered the final judgment stayed pursuant to Rule 12 of the Guam Rules of Appellate Procedure, which permits such a stay of the lower court's judgment pending appeal. The stay order also prohibited the government from encumbering or otherwise affecting its title to the Barrigada Heights government lot.

Heights land exchange property were equivalent in value, and in ordering the land exchange without legislative approval.

[12] Cepeda argues that the court properly interpreted Title 7 GCA § 11311.1, which specifically allows a person to file an inverse condemnation action if his or her property was taken for a public purpose, to include persons who were not the owners at the time of the taking. Cepeda maintains the court conducted a fact-intensive analysis of the arguments presented and correctly concluded that there was a taking. Cepeda also asserts that the court was authorized to order the government execute the land exchange pursuant to Public Law 22-73 § 5, as amended by Public Law 22-80 § 6.[3] Finally, Cepeda argues that the court did not err in finding the Property was equivalent to the Barrigada Heights lot, and in ordering attorney's fees and costs pursuant to Title 21 GCA § 15112.

A. Inverse Condemnation Actions Pursuant to Public Law 22-73

[13] We analyze first whether Cepeda was entitled to file an inverse condemnation claim pursuant to Title 7 GCA § 11311.1.[4]

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[3] The case at bar primarily implicates two provisions in Public Law 22-73. Section 9 of Public Law 22-73 added 7 GCA § 11311.1 to create an action for inverse condemnation for land that "was expropriated for public purposes by the government of Guam between August 1, 1950, and July 1, 1994 . . . **provided**, that such action is instituted on or before December 31, 1996." Guam Pub. L. 22-73 § 9 (Feb. 16, 1994). For ease of reference, we refer to the codified provision. Section 9 was later amended to remove the December 31, 1996 deadline. Guam Pub. L. 23-128, ch. IV § 32 (Dec. 12, 1996).

Alternatively, section 5 of Public Law 22-73 provided for the remedies that may be offered to a landowner who succeeded in an inverse condemnation claim, specifically, the Governor is authorized to offer to affected landowners, direct compensation, value-for-value exchange, or credit toward income taxes. Guam Pub. L. 22-73 § 5 (Feb. 16, 1994). Soon after enactment, the Legislature amended section 5 of Public Law 22-73, modifying the value-for-value exchange to an area-for-area exchange. Guam Pub. L. 22-80 §6 (Mar. 3, 1994). Because this provision has never been codified, we refer only to the public law.

[4] Section 11311.1 of Title 7, Guam Code Annotated currently reads as follows:

> **§ 11311.1. Inverse condemnation.** Any person whose land was expropriated for public purposes by the government of Guam between August 1, 1950, and July 1, 1994, and who has not been compensated by the government of Guam for such taking may institute an action for inverse condemnation. In any taking by the government of Guam after July 1, 1994, in which the government fails to follow the eminent domain provisions of Title 21, Guam Code Annotated, the person whose land is taken shall have four (4) years from the time of such taking to institute an action for inverse condemnation. An action shall lie 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 any action for inverse condemnation in which an award is made to a person for a taking, the court shall also award reasonable attorney's fees and costs.

Title 7 GCA § 11311.1 (West, WESTLAW through Guam Pub. L. 28-037 (Apr. 22, 2005)).

[14] Section 11311.1 was added by section 9 of Public Law 22-73, "*An Act to Require the Government of Guam to Properly Compensate Landowners Whose Property has been Taken for Public Use and to Make an Appropriation to the Governor's Office in Connection therewith.*" Section 1 of Public Law 22-73 explains the intent of the law, stating that it has been the practice of the government of Guam to exchange land with a private landowner, where the government needs the private land for a public purpose. Guam Pub. L. 22-73 §1 (Feb. 16, 1994). The Legislature explained that "since 1945, it has also been the practice of the government to take private property without any compensation or compensatory exchange when that land has been needed" for public purposes, and further, that "[t]his practice must cease immediately because it is contrary to the principles of eminent domain, justice, and constitutional guarantees of property rights." *Id.* The Legislature also recognized the concern expressed by the Office of the Inspector General of the U.S. Department of the Interior that the Inspector General's recommendations, made pursuant to a 1992 audit report, had not been addressed.[5] *Id.* Certain persons whose land was expropriated by the Government of Guam were therefore permitted to institute an action for an inverse condemnation pursuant to 7 GCA § 11311.1.

[15] The government asserts the court erred because Cepeda did not prove she was the owner who suffered the loss at the time of the taking, or conversely, that the loss was passed on to her when she acquired the Property. The government's argument is based on general principles that limit compensation in inverse condemnation cases to owners at the time of the taking. *See United States v. Dow*, 357 U.S. 17, 20-21, 78, S. Ct. 1039, 1044 (1958) ("For it is undisputed that '[since] compensation is due at the time of taking, the owner at that time, not the owner at an earlier or later date, receives the payment.'") (quoting *Danforth v. United States*, 308 U.S. 271, 284, 60 S. Ct. 231, 236 (1939)).

[16] An issue of statutory interpretation is reviewed *de novo*. *Carlson*, 2002 Guam 15 at ¶ 16. The trial court apparently relied on the plain language of 7 GCA § 11311.1 in allowing the inverse condemnation claim. "In cases involving statutory construction, the plain language of a statute must

[5] The audit report recommended, *inter alia*, that Guam "[d]evelop a policy concerning land taken previously for public roads, or assert government ownership based on the principle of prescriptive rights or adverse possession." Guam Pub. L. 22-73 §1 (Feb. 16, 1994).

be the starting point." *Bank of Guam v. Guam Banking Bd.*, 2003 Guam 9, ¶ 19 (quoting *Pangelinan v. Gutierrez*, 2000 Guam 11, ¶ 23). The stated legislative intent of Public Law 22-73 and plain language of 7 GCA § 11311.1 does not appear to limit an inverse condemnation claim or compensation for a taking to only those who owned land at the time of the taking. The Legislature's purpose was to provide compensation for takings since 1945, and research on such property was "[to] include but not be limited to eminent domain, to condemnation, to outright taking, to all government easements (for any reason), and to all similar means of taking." Guam Pub. L. 22-73 § 2 (Feb. 16, 1994).

[17] Although the issue in the instant case involves only inverse condemnation, the goal behind Public Law 22-73 was quite expansive and included a requirement that the Governor compile a list of "all private property which has been taken by the various agencies and departments of the government of Guam since 1945 and for which no compensation or grossly inadequate compensation has been given, either in terms of money or by land exchanges." *Id.* The list was to include "the legal name of the property owner, the location of the land, any compensation offered (and whether or not accepted), the amount of land taken, the date taken, the current value of the land taken, and all pertinent information needed to ensure that justice is done for all." *Id.* In addition, the removal of the statute of limitations period in the subsequent passage of Public Law 23-128 strongly suggests the Legislature's intent to expand the rights of those whose property had been taken by the government. Guam Pub. L. 23-128 (Dec. 12, 1996). These statutory provisions, in our view, do not limit compensation to only those who were original landowners at the time of the taking, or who were subsequently assigned the takings claim.

[18] We conclude that the trial court correctly held that pursuant to 7 GCA § 11311.1, persons who were not the landowners at the time of the taking, or were not assigned the claims to compensation when they acquired the property, may file inverse condemnation claims.

B. Takings.

[19] Having determined that Cepeda may bring an action for inverse condemnation, we turn to the trial court's decision that Cepeda could recover compensation from the government for a taking of the Property. The guiding principles for our analysis are the Fifth Amendment takings cases enunciated by the United States Supreme Court.

[20] The Fifth Amendment guarantees just compensation when there is a governmental taking of private property for a public purpose. U.S. CONST. amend. V ("[N]or shall private property be taken for public use, without just compensation."). *See also* 48 U.S.C. § 1421b(f) (West, WESTLAW through P.L. 109-21, 2005) ("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.'" *E. Ent., v. Apfel,* 524 U.S. 498, 522, 118 S. Ct. 2131, 2146 (1998) (quoting *Armstrong v. United States*, 364 U.S. 40, 49, 80 S. Ct. 1563, 1569 (1960)); *see generally* David L. Callies, *Takings: An Introduction and Overview*, 24 U. HAW. L. REV. 441 (2002).

[21] A government can use its eminent domain power to condemn private property and provide compensation to the landowner; in contrast, an "inverse" or "reverse" condemnation proceeding arises from the landowner's attempt to receive compensation for a taking of property for public purposes when the government has not brought formal condemnation proceedings. *See United States v. Clarke*, 445 U.S. 253, 100 S. Ct. 1127 (1980). Here, Cepeda's inverse condemnation claim, and implicitly her "takings" argument, arises from the government's building a water pipe into the Property which forces run-off water onto the Property, its use of the Property as a ponding basin and from its alleged prevention of further development of the Property. United States Supreme Court jurisprudence has recognized two types of takings, physical and regulatory. "An inverse condemnation can . . . arise when government action provides for the physical occupation of private property without just compensation. Such actions have consistently been held to constitute compensable takings." Gregory M. Stein, *Regulatory Takings and Ripeness in the Federal Courts*, 48 VAND. L. REV. 1, 8 n.15 (1995). Likewise, "if a land use regulation (zoning, subdivision and so forth) goes 'too far' in reducing the use of a parcel of land, then it is a taking requiring compensation, as if the government physically took or condemned an interest in (or all of) the land." Callies, *supra*, at 443. Further examination of both these types of takings is necessary in order to properly analyze the trial court's February 23, 2003 Decision and Order.

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1. Physical Takings

[22] It is well established that a taking has occurred when there is a physical appropriation or invasion of private property by, or authorized by, the government for a public use. *See, e.g., United States v. Pewee Coal Co.*, 341 U.S. 114, 71 S. Ct. 670 (1951) (taking where the federal government, to avert a nation-wide strike of mining workers, seized and directed operation of a coal mine during World War II); *United States v. Causby*, 328 U.S. 256, 66 S. Ct. 1062 (1946) (taking where military aircraft frequently and regularly flew at low altitudes over private chicken farm); *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 102 S. Ct. 3164 (1982) (taking where a New York ordinance required landlords to permit cable television installation, resulting in cables and cable boxes being affixed to the roof and exterior walls of plaintiff-landlord's building).

[23] The situation herein can be compared to cases where the construction of dams resulted in permanent flooding of privately-owned property. The Court has long held that in many cases, the flooding resulted in a taking. *See, e.g., Pumpelly v. Green Bay Co.*, 80 U.S. 166 (13 Wall. 166) (1871) (taking where construction of a dam, pursuant to state authority, resulted in the permanent flooding of property); *United States v. Cress*, 243 U.S. 316, 37 S. Ct. 380 (1917) (taking where a dam had raised the water levels resulting in permanent frequent overflows of lands not normally invaded); *United States v. Kansas City Ins. Co.*, 339 U.S. 799, 70 S. Ct. 885 (1950) (taking where raising of water level resulted in destruction of agricultural use of land).

[24] However, not every governmental action that results in flooding of private property is deemed a taking. *Sanguinetti v. United States*, 264 U.S. 146, 44 S. Ct. 264 (1924) involved the city of Stockton, California and its outlying areas, which lies between the Calaveras River and Mormon slough. The federal government had authorized construction of a connecting canal which resulted in waters of the slough diverting onto the river. *Id.* at 146-47, 44 S. Ct. at 264. After a flood of "unprecedented severity" in 1911 and recurrent, albeit less severe floods in later years, the canal could not carry away the flood waters, resulting in flooding of Sanguinetti's property. *Id.* at 147, 44 S. Ct. at 264-65. The Court articulated a bright line rule, stating that "in order to create an enforceable liability against the government, *it is at least necessary that the overflow be the direct result of the structure, and constitute an actual, permanent invasion of the land*, amounting to an appropriation of and not merely an injury to the property." *Id.* at 149, 44 S. Ct. at 265 (emphasis

added). The Court rejected the takings argument and determined Sanguinetti's property had been subject to the same periodic overflow even before the canal had been constructed, and the extent of any increased overflow from the canal was "purely conjectural." *Id.*, 44 S. Ct. at 265. Further, the Court held that "[i]t was not shown that the overflow was the direct or necessary result of the structure, nor that it was within the contemplation of or reasonably to be anticipated by the government." *Id.* at 149-50, 44 S. Ct. at 265. The Court ultimately held that there was no taking, as the injury to the property was indirect and consequential. *Id.* at 150, 44 S. Ct. at 265.

[25] Certain physical takings cases, when the governmental action "is a permanent physical occupation of real property," fall into the category of *per se* takings, because the Court has stated that a taking has occurred "without regard to whether the action achieves an important public benefit or has only minimal economic impact on the owner." *Loretto*, 458 U.S. at 434-35, 102 S. Ct. at 3175. In so holding, the Court expressed concern that a permanent physical occupation of another's property was perhaps the most serious form of invasion of an owner's property interests. *Id.* at 435, 102 S. Ct. at 3175.

2. Regulatory takings

[26] Takings are not limited to actual physical appropriation, but may also be the result of indirect governmental action in the context of regulations. In *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 43 S. Ct. 158 (1922), the Court introduced the concept of regulatory takings and announced the often-quoted principle: "[W]hile property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking." *Id.* at 415, 42 S. Ct. at 160.

[27] The difficulty arises from determining exactly when a regulation has gone too far, because the Court "quite simply, has been unable to develop any set formula for determining when justice and fairness require that economic injuries caused by public action be compensated by the government." *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104, 124, 98 S. Ct. 2646, 2659 (1978). As a result, the Court has resorted to analyzing regulatory takings by conducting "essentially ad hoc, factual inquiries" and considering certain factors of "particular significance": first, "the economic impact of the regulation on the claimant and, particularly, the extent to which the regulation has interfered with distinct investment-backed expectations"; and second, "the character of the governmental action." *Id.*, 98 S. Ct. at 2659; *see also* Callies, *supra*, at 449. With regard to

the governmental action, the Court specified that "[a] 'taking' may be more readily found when the interference with property can be characterized as a physical invasion by government . . . ." *Penn Cent.*, 438 U.S. at 124, 98 S. Ct. at 2659.

[28] While the *Penn Central* test continues to guide regulatory takings analysis, the Court has limited its application to cases of "partial" takings, where a regulation has resulted in a diminution of value or deprivation of use of private property. In a takings analysis, "[t]he starting point . . . [is] to ask whether there [i]s a total taking of the entire parcel; if not, then *Penn Central* [i]s the proper framework." *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 535 U.S. 302, 331, 122 S. Ct. 1465, 1483-84 (2002); *see also Palazzolo v. Rhode Island*, 533 U.S. 606, 121 S. Ct. 2448 (2001) (remanding case for consideration of the takings claim under *Penn Central* factors, after Court had determined that landowner was not deprived of all economic use of his property); Callies, *supra*, at 448.

[29] In *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 112 S. Ct. 2886 (1992), the Court departed from the balancing of "ad hoc, factual inquiries" and instead applied a categorical *per se* rule in cases where a regulation "denies all economically beneficial or productive use of land." *Id.* at 1015, 112 S. Ct. at 2893. Two years after landowner David Lucas had purchased property intending to build single family homes, the state legislature enacted the Beachfront Management Act which prohibited him from constructing permanent habitable structures on his property. *Id.* at 1008, 112 S. Ct. at 2889. Lucas sued, arguing the Act's prohibition prevented him from making any economically viable use of his property. *Id.* at 1009, 112 S. Ct. at 2890. The Court agreed, but recognized that such takings were an "extraordinary circumstance" and were "relatively rare situations where the government has deprived a landowner of all economically beneficial uses." *Id.* at 1017-18, 112 S. Ct. at 2894. Nonetheless, the Court stated unequivocally that "when the owner of real property has been called upon to sacrifice *all* economically beneficial uses in the name of the common good, that is, to leave his property economically idle, he has suffered a taking." *Id.* at 1019, 112 S. Ct. at 2894. When such a taking has occurred, the Court need not further analyze the "particular circumstances" of the case. *Penn Central*, 438 U.S. at 124, 98 S. Ct. at 2659.

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[30] In addition to the *Lucas* rule, the Court has recognized that "a land use regulation can effect a taking if it 'does not substantially advance legitimate state interests . . . ." *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 485, 107 S. Ct. 1232, 1241 (1987) (quoting *Agins v. City of Tiburon*, 447 U.S. 255, 260, 100 S. Ct. 2138, 2141 (1980)).

C. The February 24, 2003 Decision and Order.

[31] The trial court recognized these general principles of physical and regulatory takings in its February 24, 2003 Decision and Order. The trial court made three findings in support of its conclusion that a taking occurred with respect to Cepeda's property: first, Cepeda suffered a "physical invasion of her property" due to the run off from the government-built culvert; second, Cepeda was "denied economically viable use of her property by the Government's interference with her development"; and third, the government has an interest in diverting the run off to prevent flooding of Barrrigada. Appellee's ER, tab 83 (Feb. 24, 2003 Decision and Order, pp. 5-7). Although the trial court cited Supreme Court takings jurisprudence, its analysis does not accurately reflect takings principles articulated by that Court. For this reason, we must examine the February 24, 2003 Decision and Order in detail to clarify both the trial court's reasoning and its ultimate conclusion that a taking had occurred.

1. Physical invasion

[32] At first, it would appear that the trial court conducted a physical takings analysis. In fact, the court used language suggestive of a *per se* or categorical physical taking; first, in finding that the government "did install a culvert" that did not change the flow of water, but "worsen[ed] the run off water emptying out onto [Cepeda's] property," and second, in finding that the run off from the culvert caused Cepeda "to suffer a physical invasion of her property by the government." Appellee's ER, tab 83 (Feb. 24, 2003 Decision and Order, p. 5.)

[33] Curiously, the court did not refer to the *per se* rule of *Loretto*, despite its finding that the run off resulted in a physical intrusion onto Cepeda's property. Moreover, while the facts in this case can be analogized to flooding cases discussed above, the trial court did not apply general principles from flooding cases, and did not apply the bright line rule announced in *Sanguinetti.* The trial court simply concluded that the culvert worsened the flow of water onto the Property which caused Cepeda to suffer a "physical invasion." This statement is subject to *de novo* review, either as a conclusion

of law, *Guam Econ. Dev. Auth. v. Island Equip., Inc.*, 1999 Guam 7, ¶ 4, or as a mixed question of law and fact. *Town House Dep't Stores v. Hi Sup Ahn*, 2000 Guam 29, ¶ 6.

[34] Review of the evidence reveals that the court erred in concluding that the culvert worsened the flow of water and caused Cepeda to suffer a physical invasion. Mark Gagarin, former chief engineer at the Department of Public Works ("DPW"), testified that the additional water flow from the culvert amounted from 1.85 to 2 percent. Tr. vol. IV of VI, p. 17, 34-35 (Cont'd. Bench Trial, Sept. 11, 2002). In addition, there was ample evidence presented that the Property was part of the lowest area of the village, and that any water would have naturally drained there even without the existence of the culvert. Carl J.C. Aguon, Director of the Department of Land Management, testified that during rainfall, water drains "eventually towards the Cepeda property and eventually to a sump hole on the adjoining property." Tr. vol. III of VI, p. 83 (Cont'd. Bench Trial, Sept. 10, 2002). Ronald Teehan, Administrative Director of the Chamorro Land Trust Commission, testified the Property was "a naturally occurring low lying area. It has always been of low elevation compared to the surrounding areas." Tr. vol. II of VI, p. 149 (Cont'd. Bench Trial, Sept. 10, 2002). Furthermore, DPW Engineer Isidro Duarosan testified as to his survey of the Cepeda property, and the map he had prepared indicating that the drainage would end up on Cepeda's property, as well as an adjoining lot. *See also* Appellant's ER, tab D (hand drawn map).

[35] Evidence was also presented that only rainfall or water from a certain part of the village would have been collected by the pipe. Gagarin explained that "[i]f nothing falls on this hatch area, then nothing would be collected by the pipe." Tr. vol. IV of VI, p. 35 (Cont'd. Bench Trial, Sept. 11, 2002). Furthermore, when the trial court specifically asked Gagarin what would happen "[i]f you put a concrete wall right where the pipe enters the lot," Gagarin responded that the water "will eventually end up at the low point." Tr. vol. IV of VI, p. 36 (Cont'd. Bench Trial, Sept. 11, 2002). The trial court then acknowledged that the water would simply return to Cepeda's lot. In fact, the trial court conceded in the February 24, 2003 Decision and Order that "the culvert was not the sole source of the run off onto [Cepeda's] property and the area is naturally prone to flooding." Appellee's ER, tab 83 (Feb. 24, 2003 Decision and Order, p. 7).

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[36] We hold that the facts do not support the trial court's conclusion that the culvert worsened the water flow which resulted in a physical invasion of Cepeda's property. Even in light of its finding that the government constructed the culvert, the trial court could not reasonably conclude under these facts that a *per se* physical taking had occurred. Instead, the trial court resorted to regulatory taking principles.

[37] As discussed below, the trial court's reasoning does not, however, clearly reflect the principles it relied upon, or reflect the Supreme Court's regulatory takings jurisprudence. More importantly, it does not address the ripeness of Cepeda's takings claim.

2. Regulatory Takings

a. Denial of economically viable use

[38] Although the trial court purported to use a "regulatory taking standard," it did not specificaly articulate the specific regulatory takings theories it adopted. We glean from the language of the February 24, 2003 Decision and Order that it attempted to apply the *per se* categorical rule from *Lucas*, based on its adoption language from *Lucas* that a taking occurs when a landowner is denied of all economically viable use of his or her property. Unlike *Lucas*, the instant case does not involve a land use regulation comparable to the Beachfront Management Act. In fact, the court did not find, and the parties do not now assert, that any such regulation is involved here. Rather, the trial court analyzed the actions of the Barrigada mayor as the equivalent of a prohibition on development imposed by a land use regulation or a regulatory taking.

b. Ripeness

[39] A threshold inquiry for a court in any regulatory taking case is the ripeness of the claim. "[A] claim that the application of governmental regulations effects a taking of a property interest is not ripe until the government entity charged with implementing the regulations has reached a final decision regarding the application of the regulations to the property at issue." *Williamson County Reg'l Planning Comm'n v. Hamilton Bank*, 473 U.S. 172, 186, 105 S. Ct. 3108, 3116 (1985). The Court later stated that "[a] final decision by the responsible state agency informs the constitutional determination whether a regulation has deprived a landowner of 'all economically beneficial use' of the property, or defeated the reasonable investment-backed expectations of the landowner to the extent that a taking has occurred." *Palazzolo v. R.I.*, 533 U.S. 606, 618, 121 S. Ct. 2448, 2458 (2001).

[40] Neither party raised, and the trial court did not discuss, the ripeness issue apparently because the regulatory takings claim was advanced only toward the end of the trial proceedings.[6] Nonetheless, as ripeness is a threshold issue in a regulatory takings discussion, we *sua sponte* consider it now.

[41] There is no dispute that about a week after the Property was purchased, the Corporation obtained a grading permit from Public Works and started to grade the Property, when the Barrigada mayor "came and beg[ged] us not to [grade]." Tr. vol. II of VI, p. 21, 52-54 (Cont'd. Bench Trial, Sept. 3, 2002). Cepeda further testified that Mayor Laguana said that grading "would flood the people of Barrigada." Tr. vol. II of VI, p. 56 (Cont'd. Bench Trial, Sept. 3, 2002). Cepeda's son also testified that the mayor "cancelled or revoked" the grading permit. Tr. vol. IV of VI, p. 69 (Cont'd. Bench Trial, Sept. 11, 2002). Other than testimony of Cepeda and her son, no other evidence was presented regarding the mayor's alleged cancellation or revocation of the grading permit.

[42] The trial court, however, stated that it was "undisputed that Mayor Raymond Laguana of Barrigada stopped [Cepeda] from developing her property as planned by cancelling her grading permit." Appellee's ER, tab 83 (Feb. 24, 2003 Decision and Order, p. 6). In making this finding, the trial court implicitly interpreted a mayor's authority as including the ability to cancel such a permit. Yet none of the powers and duties of a mayor, listed in Title 5 GCA § 40112, include any reference to the mayor's authority to cancel or revoke a permit issued by DPW.[7] A liberal reading

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[6] In fact, the government attorney protested during closing argument that rather than proceeding under the physical takings argument, "I hear, at the eleventh hour, that – after all the testimony is presented – that they're switching their whole theory to a regulatory taking . . . Now . . . all of a sudden we're going with regulatory [taking], which is not alleged in the Complaint." Tr. vol. VI of VI, p. 26 (Cont'd. Bench Trial, Sept. 20, 2002).

[7] **§ 40112. Powers, Duties and Responsibilities.** A Mayor shall perform the following duties and responsibilities in his district:

> (a) Serve as the direct administrative representative of the people of the district from which he is elected.
>
> (b) Plan and implement a street name and house numbering system.
>
> (c) Oversee, coordinate or undertake beautification programs including a clean-up and removal of public nuisance and debris, and, to this end, is hereby authorized to officially utilize, establish regular and consistent working relations and effectively coordinate with the Department of Public Works, the Department of Parks and Recreation and any other entity within the government of Guam and may also work with non-profit organizations.

of this section would still not invest the mayor with such authority. It is undisputed that the permit was issued by the DPW, and may be revoked by a "building official" who is defined as "the Director of Public Works or his deputy." Title 21 GCA § 45102(d) (West, WESTLAW through Guam Pub. L. 28-037 (Apr. 22, 2005)); *see also* Title 21 GCA §66407 (West, WESTLAW through Guam Pub. L. 28-037 (Apr. 22, 2005)) (listing three circumstances for revocation of a building permit by a

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(d) In cooperation with the appropriate department or agency conduct or cause to be conducted a periodic sanitary, health and environmental inspection in accordance with guidelines set forth by the appropriate public agency. He may issue a warning for a first violation or report the same to the appropriate government agency for action.

(e) Be responsible for the maintenance and security of the Mayor's Office in his district.

(f) Be responsible for maintenance of village streets, parks and recreation facilities, in conjunction with the Department of Public Works and Department of Parks and Recreation pursuant to §40113 of this Chapter.

(g) Assist appropriate government agencies in implementing social services and public assistance programs within his jurisdiction.

(h) Serve as peace officer and assist in the maintenance of law and order in his district.

(i) Act as an official representative of his district at legislative and executive public hearings involving matters affecting his district.

(j) Assist in coordinating the civilian emergency preparedness system in time of emergency or disaster.

(k) Submit an annual written report to the Governor and the Guam Legislature on the activities of his office, expenditure of funds allotted and make general comments and recommendations relative to the state of his district.

(l) Make a report to the residents of his district on a quarterly basis at a properly noticed public meeting to be held within the district.

(m) Conduct an annual census and maintain a current listing of names of all residents in his jurisdiction.

(n) Cooperate with any agency and department of the government of Guam in matters pertaining to his district and work jointly with officials of the government of Guam toward the attainment of peace, order, justice and the general economic and social welfare of the people of Guam.

(o) To issue citations to owners of property for failure to remove property deemed unsafe by building officials pursuant to §§66501 through 66507 of Title 21, Guam Code Annotated. In the event that the owner does not remove the unsafe structure, the Mayor or Vice-Mayor may have the structure cleared and submit the bill to the owner for payment. In the event that the Mayor of Vice-Mayor takes action to clear the unsafe structure, a ten percent (10%) surcharge shall be added to the bill, and the surcharge shall be deposited into the Municipal Fund. Should the owner refuse to pay, the Mayor or Vice-Mayor shall forward the claim to the Attorney General requesting that steps be taken to record a lien against the property in the amount of the unpaid bill.

(p) Coordinate with the Department of Public Works (*DPW*) and the Guam Police Department (*GPD*) in determining where speed bumps should be located in their village streets. DPW shall construct and maintain such speed bumps after their location is so determined and after obtaining the concurrence of GPD. DPW shall post warning signs on such streets with speed bumps cautioning drivers to beware of pedestrians and to slow down.

(q) To administer the Oath of Office to Municipal Planning Council members, and to officers-elect and board members-elect of organizations and associations. This authority may be delegated to a village Vice Mayor upon the discretion of that same village's Mayor.

Title 5 GCA § 40112 (West, WESTLAW through Guam Pub. L. 28-037 (Apr. 22, 2005)).

building inspector). In fact, during appellate argument, Cepeda's attorney admitted that DPW should have been the one to cancel the permit.

[43] Although the trial court relied on the mayor's "cancellation" of the permit and his request to stop grading to conclude that Cepeda had been denied economic use of her Property, the mayor had no authority to cancel the grading permit or impose any land use restrictions on Cepeda's property. Moreover, it seems to be an overstatement to characterize the mayor's "begging" them not to grade as the functional equivalent of an outright "prohibition against development" that can be compared to a land use regulation or zoning ordinance. Appellee's ER, tab 83 (Feb. 24, 2003 Decision and Order, p. 6).

[44] The trial court placed great emphasis on the mayor's actions; however, the mayor was not "the government entity charged with implementing the regulation[]." *Williamson*, 473 U.S. at 186, 105 S. Ct. at 3116. The permit was issued by the DPW, and although it may be revoked by the DPW Director of his deputy, the Department of Land Management or the Territorial Land Use Commission are the agencies responsible for implementing land use restrictions.[8]

[45] Even if Laguana disagreed with the granting of the permit and took action that caused Cepeda to cease grading, Laguana was not the appropriate government authority to issue a "final decision" as envisioned in *Williamson*. *See also Palazzolo*, 533 U.S. at 619, 121 S. Ct. at 2458 (stating that the "central question in resolving the ripeness issue . . . is whether petitioner obtained a final decision . . . determining the permitted use for the land."). The "final decision" is often at the hands of a land use board or a zoning authority. *See Suitum v. Tahoe Reg'l Planning Agency*, 520 U.S. 725, 117 S. Ct. 1659 (1997) (claim against land regulation agency); *Williamson*, 473 U.S. 172, 105 S. Ct. 3108

[8] The Department of Land Management's responsibility would be limited to government property. *See* Title 21 GCA § 60103 (West, WESTLAW through Guam Pub. L. 28-037 (Apr. 22, 2005)) ("The Department of Land Management shall have cognizance of all government real property."); Title 21 GCA § 68101(a) (West, WESTLAW through Guam Pub. L. 28-037 (Apr. 22, 2005)) ("The Director with the approval of the Governor is authorized to grant permits for the use of any suitable government real property, not otherwise occupied or in use, for any lawful purposes."). The jurisdiction of the Territorial Land Use Commission, however, is more far-reaching. *See* Title 21 GCA § 62106 (West, WESTLAW through Guam Pub. L. 28-037 (Apr. 22, 2005)) (granting authority over subdividing of property); Title 21 GCA §61615 (West, WESTLAW through Guam Pub. L. 28-037 (Apr. 22, 2005)) (establishing the Commission's power to hear appeals from issuance of documents including building permits and certificates of occupancy, and appeals "from any order, requirement, decision or determination made by the Building Official in the enforcement of the provisions of this Chapter."); Title 21 GCA § 61616 (West, WESTLAW through Guam Pub. L. 28-037 (Apr. 22, 2005)) (granting authority over the granting of variances); Title 5 GCA § 65204 (West, WESTLAW through Guam Pub. L. 28-037 (Apr. 22, 2005)) (requiring Commission approval before establishment of agricultural preserves).

(claim against local planning commission); *MacDonald, Sommer & Frates v. Yolo County*, 477 U.S. 340, 106 S. Ct. 2561 (1986) (claim against decision by local planning commission). The record in the instant case does not include any such facts.

[46] Cepeda did not present any plans to a land use or zoning board; she simply stopped working on the Property pursuant to the mayor's request. The trial court did not address this fact, stating only that a person who is denied the ability to grade property need not obtain a business license to build homes: "The Plaintiff's lack of a business license is not dispositive of whether the Government denied the Plaintiff economically viable use of her property." Appellee's ER, tab 83 (Feb. 24, 2003 Decision and Order, p. 6.) While obtaining a business license is not singularly dispositive, it is a factor to be considered in Cepeda's claim for developing the Property, and ultimately, the issue of ripeness. Cepeda had testified at trial that the Property was purchased to build homes, but later admitted that no plans had ever been prepared for development of the Property.

[47] In *Agins*, the Court had rejected a takings claim as unripe where the petitioner had failed to submit development plans. "Because the appellants have not submitted a plan for development of their property as the ordinances permit, there is as yet no concrete controversy regarding the application of the specific zoning provisions." 447 U.S. at 260, 100 S. Ct. at 3141. Cepeda testified that she had not she had not applied for a business license to build homes, and had not even prepared plans for the building of homes for the proposed development of the Property. Although there are no ordinances requiring Cepeda to submit plans for development, submission of these plans is one factor in considering the issue of ripeness. Cepeda asserted on appeal that she had been informed that permits to develop her property would not be granted. No evidence supporting this allegation was presented to the trial court, and it will not be considered here.

[48] If Cepeda, however, were to obtain indication from "the government entity charged with implementing the regulation[]" that it "has reached a final decision" and denied her application for permits and thus the ability to develop her property, then her inverse condemnation claim would be ripe. *See Williamson*, 473 U.S. at 186, 105 S. Ct. at 3116. Until that time, there has been no "final decision by the responsible state agency" and we cannot determine whether there has been any regulation that denied Cepeda "'all economically beneficial use' of the property, or defeated [her]

reasonable investment-backed expectations . . . to the extent that a taking has occurred." *Palazzolo*, 533 U.S. at 618, 121 S. Ct. at 2458.

[49] The trial court also did not refer to *Lucas*, yet it is apparent that the trial judge considered the *Lucas* rule in holding that Cepeda was denied "economically viable use of her property" because of the cancellation of the permit and the prohibition against development. Appellee's ER, tab 83 (Feb. 24, 2003 Decision and Order, p. 6). The facts of the case do not support application of the *Lucas* categorical rule. As discussed above, the Mayor of Barrigada had no authority to cancel the grading permit. Further, the mayor's request that Cepeda cease backfilling her property simply does not amount to a governmental prohibition against development. We do not discount the deference that is given to the mayor, or the mayor's authority within the village. But clearly, there was no governmental prohibition against development – in short, no regulation – that denied Cepeda all economically viable use of her property.

[50] Ripeness is a threshold issue in a regulatory takings claim, and the trial court failed to address this issue during proceedings below. This court has "the definite and firm conviction that the court below committed a mistake" in failing to address the ripeness of Cepeda's claim and in determining she was denied economically viable use of her property." *Craftworld Interiors, Inc. v. King Ent., Inc.*, 2000 Guam 17, ¶ 2 (quoting *Yang*, 1998 Guam at ¶ 7).

[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 will also not examine the dispute regarding the valuation of the Property and the Barrigada Heights property, the right of Cepeda to recover the rental value of the property or the award of attorney's fees pursuant to Public Law 22-73 § 8, codified at 21 GCA § 15112 (West, WESTLAW through Guam Pub. L. 28-037 (Apr. 22, 2005)), except to state that reversal of the February 24, 2003 Decision and Order implicitly reverses the award of attorney's fees.

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V.

[52] We hold first that Public Law 22-73 § 9, codified at 7 GCA § 11311.1, allows a subsequent landowner, who did not own the property at the time of the taking, to file an inverse condemnation claim.

[53] We next hold that the trial court erred in finding that Cepeda was entitled to compensation for the taking of the Property. The trial court did not address the ripeness of Cepeda's takings claim; had it done so, it would have reached the conclusion that the case was not ripe. Moreover, even assuming *arguendo*, the issue was ripe for review, the trial did not clearly articulate the specific regulatory taking theories it adopted and erred in interpreting the facts of the case under a "regulatory taking standard," in accordance with United States Supreme Court takings jurisprudence.

[54] Accordingly, the judgment of the trial court is **REVERSED**. Correspondingly, the stay of final judgment is rendered moot.