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REGULATORY TAKINGS

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Mr. Brown is a frequent author and speaker on civil rights and land use matters, with over 80 articles and presentations to his credit, including “*Litigation Under the Fair Housing Act: Practical Tips for Attorneys and Planners*,” published by Matthew Bender & Co. in its 2007 Institute on Planning, Zoning and Eminent Domain proceedings; “*Individual Immunity Defenses Under Section 1983*,” published by the American Bar Association in its 2006 publication Sword and Shield: A Practical Approach to Section 1983 Litigation (3rd Edition); “*Update on Exactions: The Texas Experience*,” published by Matthew Bender & Co. in its 2004 Institute on Planning, Zoning and Eminent Domain proceedings; “*Trying the Case*,” published by the American Bar Association in its 2000 publication How to Litigate a Land Use Case; “*Immunity for Public Officials in Land Use Cases*,” published by Matthew Bender & Co. in its 1997 Institute on Planning, Zoning and Eminent Domain proceedings; and “*Seeking Terra Firma in Complex Zoning Litigation: The Defense Practitioner's Perspective*,” published by Matthew Bender & Co. in its 1994 Institute on Planning, Zoning and Eminent Domain proceedings.

Mr. Brown was named as one of the “Best Lawyers in Dallas 2007” by *D Magazine*.

I.

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INTRODUCTION

In recent years, perhaps no area of municipal planning and practice has become the subject of more confusion and debate than zoning and land use practice. While federal and state courts attempt to unravel the often perplexing decisions of the United States Supreme Court in regulatory takings and land use cases, mayors, city council members, city managers, planners, city attorneys and building officials are left scrambling for footing on an ever shifting playing field that appears to become softer and more unsure with each Supreme Court opinion.

One need only read a local newspaper and, more than likely, you will probably see an article about a zoning or land use dispute. Disputes about zoning classifications, variances and permits are common place. More frequently, in addition to these traditional situations, we now see new controversies that stem from increased municipal efforts to protect the environment, preserve our historic landmarks and cultural heritage, and enrich the quality of life in our neighborhoods. Overlying all of these issues is a greater emphasis on identifying and controlling urban sprawl and its ill-effects.

While each of these issues are worthy of significant and in depth discussion, this paper makes no effort to do so, primarily because the task would be somewhat daunting and the results extremely voluminous. Rather, this paper seeks to provide an overview of the takings eminent domain law, with particular emphasis on two seminal Texas Supreme Court cases - *Sheffield Development Company, Inc. v. City of Glenn Heights, Texas*, 140 S.W.3d 660 (Tex. 2004), and *Town of Flower Mound, Texas v. Stafford Estates Limited Partnership*, 135 S.W.3d 620 (Tex. 2004) - both of which concerned issues of first impression in Texas and involved current cutting-edge zoning and land use issues that illustrate the scope and breath of the dangerous waters that municipalities and their elected and appointed officials must swim through on a daily basis when traversing the troubled waters that fill our zoning and land use seas.

CAVEAT: The author's practice is dedicated exclusively to the defense of local governments and their appointed and elected officials. Consequently, while this paper attempts to present the various positions involved in this perplexing area of the law, the author makes no pretense of balance or objectivity given that it is the author's mission to defend local governments against takings challenges. Indeed, it is hoped that this paper will provide government attorneys with the arguments that they can use to defend against regulatory takings claims, and the practical guidance to allow them to avoid such claims altogether.

THE SPECTRUM OF TAKINGS CASES

Article I, Section 17 of the Texas Constitution provides that “[n]o person’s property shall be taken, damaged or destroyed for or applied to public use without adequate compensation being made, unless by the consent of such person....” Tex. Const. art. I, § 17. The federal Takings Clause is substantially similar. *See* U.S. Const. amend. V (“[N]or shall private property be taken for public use, without just compensation”). As a result, the Texas Supreme Court relies upon interpretations of the federal Takings Clause in construing the Texas takings provision and analyzes Texas takings claims under the more familiar federal standards. *See, e.g., City of Austin v. Travis County Landfill Co., L.L.C.*, 73 S.W.3d 234, 239 (Tex. 2002) (considering aircraft overflights takings claim, asserted under Texas Constitution, by reference to federal standard established in *United States v. Causby*, 328 U.S. 256 (1946)); *City of Corpus Christi v. Pub. Util. Comm’n of Texas*, 51 S.W.3d 231, 242 (Tex. 2001) (examining federal precedent to decide the framework for determining whether utility charges constitute a taking); *Mayhew v. Town of Sunnyvale*, 964 S.W.2d 922, 932 (Tex. 1996); (“[W]e assume, without deciding, that the state and federal guarantees in respect to land-use constitutional claims are coextensive, and we will analyze the Mayhews’ claims under the more familiar federal standards.”).

Both the Texas and Federal Constitutions recognize a claim for a taking of property. *Mayhew*, 964 S.W.2d at 933; *Agins v. City of Tiburon*, 447 U.S. 255, 260 (1980). There are three general categories of takings claims: (1) physical occupation, (2) exactions and (3) regulatory takings. *Stafford*, 135 S.W.3d at 630; *Sheffield*, 140 S.W.3d at 671-72; *Mayhew*, 964 S.W.2d at 933. The United States Supreme Court has determined that the first category, a physical invasion or a regulatory activity that produces a physical invasion, will support a takings claim without regard to the public interest advanced by the regulation or the economic impact upon the landowner. *See Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 535 U.S. 302, 330 (2002); *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1015 (1992); *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 435-440 (1982). *See also Mayhew*, 964 S.W.2d at 933 (recognizing physical takings as takings category).

The second category of takings claims is found where an exaction, such as the required dedication of land, is made a condition of development approval. *See City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687, 704 (1999); *Dolan v. City of Tigard*, 512 U.S. 374, 391 (1994); *Nollan v. California Coastal Comm’n*, 483 U.S. 825, 836 (1987).

The third category of takings claims -- regulatory takings -- encompass the majority of takings cases and involve the most complex analysis. *See Mayhew*, 964 S.W.2d at 933 (recognizing regulatory takings as category of takings claim). Within the context of regulatory takings, the United States Supreme Court has recognized a categorical rule where a regulation itself “denies all economically beneficial or productive use of land,” finding that such regulation requires compensation without “case-specific inquiry into the public interest advanced in support of the restraint.” *Lucas*, 505 U.S. at 1015-16. The Texas Supreme Court also recognized this rule in

Mayhew, wherein it held that a compensable taking occurs when a governmental restriction “denies the landowner all economically viable use of the property or totally destroys the value of the property....” *Id.* at 935.

When a regulatory takings claim does not render property valueless, however, a taking may still result after evaluation of the three factors promulgated in *Penn Central Transp. Co. v. City of New York*, 438 U.S. 104 (1978). Those factors are (1) the character of the governmental action, (2) the economic impact of the regulation upon the claimant and (3) the extent to which the regulation has interfered with distinct investment-backed expectations. *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1016-20 (1992); *Penn Central Transp. Co. v. City of New York*, 438 U.S. 104, 122 (1978). The United States Supreme Court has consistently reaffirmed the viability of the *Penn Central* standards. *See Tahoe-Sierra*, 535 U.S. at 321 (“[W]e conclude that the circumstances in this case [determining whether a 32 month moratorium is a taking] are best analyzed with the *Penn Central* framework.”); *Palazzolo v. Rhode Island*, 533 U.S. 606, 617 (2001) (“Where a regulation places limitations on land that fall short of eliminating all economically beneficial use, a taking nonetheless may have occurred, depending on a complex of factors including the regulation’s economic effect on the landowner, the extent to which the regulation interferes with reasonable investment-backed expectations, and the character of the government action.”).

The Texas Supreme Court in *Mayhew* recognized two of these three factors (“the economic impact of the regulation and the extent to which the regulation interferes with distinct investment-backed expectations”), but did not address the third factor – the character of the government action. *Id.* at 935-36. This third factor would not be addressed until the Texas Supreme Court’s 2004 decision in *Sheffield*.

III.

PHYSICAL OCCUPATION CASES

The first category of claims involves government-authorized physical occupations and invasions of private property. The government can invade or occupy property in a variety of contexts such as flying planes low and frequently over private property, damming a river and causing flooding upstream, or authorizing a cable company to install cable boxes and wires on apartment buildings. The Texas Supreme Court has recognized physical occupations as a categorical taking. *See Sheffield*, 140 S.W.3d at 671 (“The [United States] Supreme Court has identified, in its words, ‘at least two discrete categories of regulatory action as compensable without case-specific inquiry.’ One is where regulation ‘compel[s] the property owner to suffer a physical ‘invasion’ of his property.’” The direct, physical effect on property, though short of government possession, makes the regulation categorically a taking.”)(citing *Lucas*, 505 U.S. at 1115). In determining these types of cases, Texas courts appear to follow the federal standards.

For example, in *Travis County Landfill*, *supra*, the Texas Supreme Court, in considering an aircraft overflights takings claim asserted under Texas Constitution, decided the issue by reference to

the federal standard established in *Causby*, *supra*. In this case, the owner of a landfill located one-half mile from a city airport brought an action against the city, alleging that the operation of civilian flights through airspace over the landfill property without permission was an unconstitutional taking without compensation. *Travis County Landfill*, 73 S.W.3d at 236-38. The Court, noting that “[w]e have never decided when aircraft overflights constitute a taking of property under our constitution, though our courts of appeals, including the court of appeals in this case, have invoked the federal standard,” determined it would analyze the taking claim under the federal *Causby* standard. *Travis County Landfill*, 73 S.W.3d at 238-39.

Thus, the federal standard and the standard that various state courts have recognized requires that, to rise to the level of a constitutional taking, the overflight-related effects must directly, immediately, and substantially impact the property’s surface so that it is no longer usable for its intended purpose. Under [*Causby* and related cases], to establish a taking by aircraft overflights, a landowner must show that the flights directly, immediately, and substantially interfere with the land’s use and enjoyment. To meet this standard, the landowner must show that the overflight effects directly and immediately impact the land so that the property is no longer usable for its intended purpose. It is against this constitutional standard that we review the evidence that [the landfill owner] presented here.

Id. at 240 (citations omitted).

Another category of physical occupation takings cases involve flooding. A “taking or damaging” by flooding is a specific type of inverse condemnation. *See, e.g., Brandywood Hous., Ltd., v. Texas Dept. of Transp.*, 74 S.W.3d 421 (Tex.App.-Houston [1st Dist.] 2001, writ denied); *Tarrant Reg’l Water Dist. v. Gragg*, 43 S.W.3d 609 (Tex.App.-Waco 2001), *aff’d*, 151 S.W.3d 546 (Tex. 2004). Once again, while Texas courts are not required to follow federal precedent in interpreting the Texas takings clause, Texas courts have specifically relied on federal precedents in the context of flooding to determine if the extent of the flooding rises to the level of a compensable taking or damaging. *See, e.g., Gragg*, 151 S.W.3d at 555; *Bennett*, 894 S.W.2d at 449.

One of the required elements to establish a taking by virtue of flooding is that the government acted with the requisite intent to inversely condemn the property. This element of intent, and the public policies behind it, were explored in 2004 by the Texas Supreme Court in two flooding cases – *City of Dallas v. Jennings*, 142 S.W.3d 310 (Tex. 2004), and *Gragg, supra*. In *Jennings*, the Court considered whether a City of Dallas sewer main back up that flooded a residential home was a taking, damaging or destruction of the home under the Texas Constitution. *Id.*, 142 S.W.3d at 312-13. The key issue before the Court was the “intent” needed to establish a taking. The Court rejected the home owners’ contention that they need only show that Dallas intended to perform an act – in this case the unclogging of a backup – that caused the flooding to be liable for a taking.

We do not agree with the plaintiffs’ contention that any intentional act can give rise to liability for an intentional taking. Such a standard would hold the government

entity “to a higher liability than a private person engaging in the same acts.” Such a requirement would also ignore the predicate of Article I, Section 17: that the damage be “for or applied to public use.” When damage is merely the accidental result of the government’s act, there is no public benefit and the property cannot be said to be “taken or damaged *for public use*.”

Id. at 313 (citations omitted, emphasis in original).

Instead, the *Jennings* Court adopted the standard used by most other states and, not surprisingly the federal courts, that the required intent means that the actor desired to cause the consequences of his act, or that he believed that the consequences were substantially certain to result from his act. The Court stated this standard as follows:

We therefore hold that when a governmental entity physically damages private property in order to confer a public benefit, that entity may be liable under Article I, Section 17 if it (1) knows that a specific act is causing identifiable harm; or (2) knows that the specific property damage is substantially certain to result from an authorized government action — that is, that the damage is “necessarily an incident to, or necessarily a consequential result of” the government’s action.

Id. at 314 (citations omitted). The Court indicated that this standard was consistent with other states with similar constitutional provisions, citing with approval language from the Supreme Court of New Mexico that “[f]or an act to give rise to a [takings claim], we think that the act must at least be one in which the risk of damage . . . is so obvious that its incurrence amounts to the deliberate infliction of harm for the purpose of carrying out the governmental projects.” *Id.* (citations omitted).

In *Jennings*, the Court rejected the takings claim because there was no evidence that Dallas possessed the knowledge required to establish a taking. *Id.* at 315 (“In this case, there is no evidence that the City knew, when it unclogged the sewer line, that any flooding damage would occur. Nor is there evidence that the act of unclogging was substantially certain to lead to such damage; the record reflects that unclogging backups does not ordinarily cause residential flooding, and the plaintiffs themselves allege only that unclogging ‘sometimes’ results in such damage.”).

This *Jennings* standard was also applied in the ranch flooding case presented in *Gragg*, wherein the Court held that a water district’s repeated release of water from its reservoir caused recurrent destructive changes in flooding characteristics that directly impacted the Gragg Ranch, such that it was no longer usable for its intended purpose and, thus, taken. *Gragg*, 151 S.W.3d at 549. The Court once again reiterated that negligent conduct could not support a taking because “we strive to avoid what would be an anomalous result if the State, an entity otherwise generally entitled to immunity for negligence, were subject to liability for something less than intentional behavior.” *Id.* at 554. Applying the *Jennings* standard to the flooding context before it, the Court held as follows:

[W]e hold that the requisite intent is present when a governmental entity knows that a

specific act is causing identifiable harm or knows that the harm is substantially certain to result. In the case of flood-water impacts, recurrence is a probative factor in determining the extent of the taking and whether it is necessarily incident to authorized government activity, and therefore substantially certain to occur. While nonrecurrent flooding may cause damage, a single flood event does not generally rise to the level of a taking. The recurrence requirement assures that the government is not held liable for taking property when a project's adverse impacts, and by implication its benefit to the public, are too temporal or speculative to warrant compensation. This is similar to the standard the federal courts have applied in determining whether the government's actions have taken property affected by flooding, and it is the standard we apply in the present case.

Id. at 555 (citations omitted).

In *Gragg*, the evidence established that the Gragg Ranch experienced a large number of severe floods over an eight-year period after the reservoir was built and after waters were released hundreds of times from the reservoir's dam. *Id.* at 549-51. In fact, the water district's own expert testified that his hydrology modeling showed that the Gragg Ranch would flood more often because of the water district's activities. *Id.* at 552. Based against this factual backdrop, the Court upheld the trial court's finding that the water district's activities caused the repeated and recurring flooding of the Gragg Ranch. *Id.* at 553-54. The Court further found that "the extensive damage the Gragg Ranch experienced was the inevitable result of the reservoir's construction and of its operation as intended." *Id.* at 555.

Jennings and *Gragg* confirm that the element of "intent" in a constitutional takings case requires more than mere proof that the government performed an intentional act that caused damage; a plaintiff must also show that the damage caused thereby was necessarily incident to or necessarily a consequential result of the government's intentional act. *Jennings*, 142 S.W.3d at 315; *Gragg*, 151 S.W.3d at 555.

IV.

EXACTION CASES

Two United States Supreme Court cases articulate the current federal tests for determining whether conditions that require the dedication of land, and possibly all exactions, constitute a taking under the Fifth Amendment. The first, *Nollan*, requires a court to evaluate the nexus between (1) what the municipality seeks to exact from the developer by way of imposing a condition that takes land and (2) the projected impact of the proposed development. In *Nollan*, the Court required that in cases involving permanent dedication of title, an "essential nexus" must exist between the title condition imposed and the stated police power objective of requiring development to meet the needs created by the development. *Id.*, 483 U.S. at 837. Under this test, the dedication must serve the same governmental purpose as the regulation. The Court employed a heightened level of scrutiny,

differentiating the ad hoc, factual inquiry balancing test of an economic take as enunciated in *Penn Central*.

Following *Nollan*, there was uncertainty regarding the degree of nexus that a municipality was required to establish in order for a land dedication condition to pass constitutional muster. In *Dolan*, the Supreme Court clarified *Nollan* by adopting the “rough proportionality” test as the means for determining the degree of nexus required between a real property exaction imposed by a municipality and the projected impact of a proposed development. In *Dolan*, the Court addressed the question of a second nexus required between the city’s conditions of title transfer and the projected impact caused by the proposed development. *Id.*, 512 U.S. 512 U.S. at 388.

To evaluate this question, the *Dolan* Court articulated a two-pronged test. First, as determined in *Nollan*, there must exist an essential nexus between legitimate state interests and the permit conditions. *Id.* at 386. Second, the exaction required by the permit condition must be roughly proportional to the projected impact of the proposed development. *Id.* at 391. Under this prong, the government bears the burden of proof and must show that the dedication or exaction is roughly proportional to the impact of the project. *Id.* The Court intended this two-prong test to function as a higher standard of review. The Court noted, however, that traditional land use planning tools such as dedications for streets, sidewalks and other public ways will generally be considered reasonable exactions. *Id.* at 395.

A. *Nollan* Facts

As a condition to granting the Nollans a permit for their house, the California Coastal Commission required the Nollans to give the public an easement across their beachfront property. The Commission recited the usual “health, safety and welfare” justifications which have traditionally supported land use regulation, and declared that the easement was necessary because the new building “would increase blockage of the view of the ocean” from the street; might reduce the public’s perception that a public beach existed in the other side of the house; and would “burden the public’s ability to traverse to and along the shorefront.” The Commission refused the permit to build unless the couple granted an easement across the shorefront part of their land for public use.

The United States Supreme Court recognized the general police power of the Commission, but found that there was no “essential nexus” between the exaction (a public easement across the beach front of the Nollan’s land) and the state impact created or exacerbated by the construction of a new house (ability to see the beach, assisting the public in overcoming the “psychological barrier” to using the beach created by a developed shorefront, and preventing congestion on the public beaches). *Nollan*, 483 U.S. at 835. The Court held that the absence of any “nexus” between the exaction and the state interest asserted by the Commission resulted in taking without just compensation in violation of the U.S. Constitution. *Id.*

B. *Dolan* Facts

This “essential nexus” requirement of *Nollan* was refined by the Court in *Dolan*. Mrs. Dolan

operated a store which had a gravel parking lot. A creek traversed part of her property. Mrs. Dolan applied for a permit to increase the size of her store and pave the parking lot. The city conditioned the permit upon a dedication by Mrs. Dolan of a portion of her land for use as a flood control area and upon the dedication of an additional 15-foot strip of land adjacent to the creek as a bicycle path. *Dolan*, 512 U.S. at 385-86. The city claimed that the creek land was necessary to control flooding and the bicycle path might alleviate congestion on the streets and was necessary for the health, welfare and safety of the public. Mrs. Dolan complained on appeal that the city had not identified any “special quantifiable burdens” created by her new parking lot or building that would justify the particular exactions from her.

After concluding that there was a “nexus” between the exactions and the claimed state interest, the United States Supreme Court framed the following additional question: “What is the required degree of connection between the exactions imposed by the city and the projected impacts of the proposed development.” *Dolan*, 512 U.S. at 375. The Court answered as follows:

We think a term such as ‘rough proportionality’ best encapsulates what we hold to be the requirement of the Fifth Amendment. No precise mathematical calculation is required, *but the city must make some sort of individualized determination that the required dedication is related both in nature and extent to the impact of the proposed development.*

Dolan, 512 U.S. at 391 (emphasis added).

The exactions were stricken because less invasive measures than taking Mrs. Dolan’s land would have accomplished the same stated goals. Read together, *Nollan* and *Dolan* appear to inquire first whether the government imposition of the exaction would constitute a taking if done without the corresponding application for a permit by the landowner. If the question is answered affirmatively, the Court then applies the two part “rough proportionality” test which asks whether the exaction demanded is roughly proportional both in nature (nexus) and extent (proportionality) to the impact of the proposed development. *Dolan* appears to place the burden of proof squarely upon the governmental entity to show compliance with the rough proportionality test. *Dolan*, 512 U.S. at 391.

C. *Turtle Rock*

Before adopting the “rough proportionality” test, the *Dolan* Court considered the tests that existed among the states for determining the degree of nexus required for a condition to be constitutionally valid. The state tests considered by the Court have been organized into three categories: (1) the judicial deference test; (2) the “specifically and uniquely attributable” test, and “the reasonable relationship” test. *Id.* at 390-92. The principal difference among the three tests is the requisite degree of nexus between the exaction and the projected impact caused by the development. Under the judicial deference test, a court would find that the required degree of nexus between the exaction and the need created by the development exists by the mere existence of a statute calling for the exaction. A court utilizing the judicial deference test simply defers to the legislature, which in enacting the statute authorizing the exaction, has already decided that the

projected impact is addressed by the exaction. The specifically and uniquely attributable test requires the municipality to show that the exaction is directly proportional to the specific need created by the proposed development. *Dolan*, 512 U.S. at 389-90.

The Court rejected the judicial deference tests used in states such as Montana and New York as “too lax.” On the other hand, the Court found that the specifically and uniquely attributable test used in states such as Illinois to be more exacting than what was required by the Federal Constitution. The Court ultimately concluded that the reasonable relationship test, used in states such as Texas, was closest to the federal constitutional norm. *Id.* at 391. The test adopted by the *Dolan* Court was labeled the “rough proportionality” test because the majority wanted to differentiate the newly articulated federal constitutional standard from the less demanding rational basis test which the Court implied was analogous to the judicial deference test.

The rough proportionality standard adopted by the Court in *Dolan* requires a court to conduct a more exacting scrutiny of real property exactions than does the judicial deference test, and a less exacting scrutiny than does the specifically and uniquely attributable test. Stated differently, the specifically and uniquely attributable test guarantees an individual more protection than federally mandated, the judicial deference test does not provide enough protection, and the reasonable relationship test provides a constitutionally sufficient amount of protection.

In determining that the reasonable relationship test provides a constitutionally sufficient amount of protection under the Fifth Amendment, the Court cited the Texas Supreme Court’s decision in *City of College Station v. Turtle Rock*, 680 S.W.2d 802 (Tex. 1984), as a jurisdiction that used this test. *Dolan*, 512 U.S. at 390-91. Consequently, the United States Supreme Court has reviewed and addressed the Texas Supreme Court’s analysis in *Turtle Rock* and has arguably held that the *Turtle Rock* test passes constitutional muster under the *Dolan* standard.

In *Turtle Rock*, the Texas Supreme Court set forth a test to determine the validity of ordinances requiring dedications, or fees in lieu of dedicating property, for park purposes. Drawing upon previous Texas Supreme Court cases, the Court held that a city may enact reasonable regulations to promote the health, safety and general welfare of its citizens provided that the ordinance meets two requirements: (1) the regulation must accomplish a legitimate goal; and (2) the regulation must be reasonable and not arbitrary. *Id.*, 680 S.W.2d at 805.

The first requirement depends upon whether or not reasonable minds could differ that the ordinance has a substantial relationship to the public health, safety, morals, or general welfare. The Court in *Turtle Rock* recognized that cities may impose reasonable regulations as a condition for the use of property or as a condition precedent to the subdivision of land and held that the College Station ordinance in question was a regulatory response to park needs created by the developer’s use of land. As a result, the ordinance satisfied the first level of judicial scrutiny. *Id.* at 805-806.

The second test articulated in *Turtle Rock* identified the reasonableness requirement for a valid ordinance. The Court stated that the second requirement for park land dedication is whether a reasonable connection exists between the increased population arising from the subdivision

development and the increased park and recreation needs in the neighborhood. Citing The American Law Institute, the Supreme Court stated that “[t]he Code adopts the position that developers may be required to provide streets and utilities but only of the quality and quantity reasonably necessary for the proposed development.” *Id.* at 807. Among the important elements to be considered include the extent of the dedication and the size of and number of subdivision lots. The Court opined that the requested exaction would be deemed reasonable if imposed to offset the need created by the proposed development. *Id.*

The Court expressly noted, however, that the burden rests on the plaintiff challenging a city’s regulation “to demonstrate that there is no such reasonable connection.” *Id.* at 806-807. To that extent, *Turtle Rock* is at odds with the burden of proof allocation discussions in *Dolan*.

V.

TOWN OF FLOWER MOUND V. STAFFORD: TEXAS GETS ITS FIRST DOLAN CASE

In 2004, the Texas Supreme Court released its opinion in *Stafford*, which concerned the constitutionality of a subdivision exaction and, for the first time, addressed the application of the United States Supreme Court’s decisions in *Nollan* and *Dolan* to a fairly standard road improvement subdivision requirement used by many Texas cities. *Stafford*, and its take on the law of exactions, is important to understand given that it has application to many work-a-day development requirements commonly imposed by municipalities as a condition of development approval.

While the United States Supreme Court issued its decision in *Dolan* in 1994, there had not been a reported decision in Texas addressing how *Dolan* would be applied in Texas until the decision in *Stafford*. *Stafford* is a regulatory takings case challenging the constitutionality of a plat approval condition under the two-prong test articulated in *Dolan*. In a bifurcated trial, the trial court held, based upon a stipulated record, that the Town’s plat approval condition (that Stafford reconstruct and improve an abutting substandard street from which the subdivision development would take access) was a taking under the Texas and United States Constitutions. After a trial on damages, the court awarded Stafford \$425,426 in damages, as well as attorney’s fees, expert fees and costs.

On appeal, the Fort Worth Court of Appeals affirmed that the plat approval condition was a taking under the Texas Constitution and upheld the damage award; but reversed and rendered the award of attorney’s fees, expert fees and costs. *Stafford*, 71 S.W.3d 18 (Tex.App.-Fort Worth, 2002), *aff’d*, 135 S.W.3d 620 (Tex. 2004). The Texas Supreme Court upheld the appellate court in its application of the nexus test of *Nollan*, and the rough proportionality test of *Dolan*, to all types of development “exactions,” which the appellate court defined broadly to include “any requirement that a developer provide or do something as a condition to receiving municipal approval . . .” *Stafford*, 71 S.W.3d at 30 n. 7.

A. Factual Background

Between 1994 and 1997, Stafford developed a 247 single-family lot subdivision (“Subdivision”), in three phases, on 90 acres located at the intersection of McKamy Creek Road and Simmons Road (“Simmons”) in the Town. Phases II and III of the planned Subdivision proposed two street intersections with Simmons, which at that time was a two-lane asphalt road abutting the Subdivision. Pursuant to the Town’s subdivision regulations, which required that all proposed developments take access to and from concrete streets, the Town required Stafford, as a condition of plat approval, to improve Simmons, at Stafford’s cost, to the Town’s minimum standards as a concrete road. The required improvements to Simmons were located entirely within existing Town right-of-way, no part of which was required to be dedicated by Stafford.

Section 4.04 of the Town’s Land Development Code (“LDC”) addresses subdivision standards for streets located within the Town. Section 4.04(o) of the LDC provides as follows:

(o) Construction and dedication of boundary streets. Where a subdivision or industrial area abuts a street that does not meet the minimum design standards of this section, the following shall apply.

(1) Local and collector streets. Abutting substandard local and collector streets shall be constructed or reconstructed as necessary by the developer to bring them up to minimum standards, and all right-of-way from the centerline of such roadway necessary to meet minimum right-of-way requirements dedicated to the Town, with no cost participation from the Town. The Federal Government, the State of Texas, and political subdivisions of the State of Texas may be exempt from the provisions of this requirement.

(2) Major and minor arterials. In the event that the subdivision or industrial area proposes access to a planned major or minor arterial shown on the Thoroughfare Plan, no development plan or record plat shall be approved and no development permits shall be issued until such arterial is constructed or until agreement is reached between the Town and the developer on the financing and construction of such arterial.

Section 4.04(b) of the LDC requires that “all builder/developers shall be required to construct concrete streets according to the Engineering Standards Manual”. Section 4.04(a) of the LDC allows property owners to apply for and the Town Council to grant an exception to the street design standards “provided that the Council finds and determines that such standards work a hardship on the basis of utility relocation costs, right-of-way acquisition costs, and other related factors.”

While Stafford objected to bearing the total road improvement costs in various letters to the Town, and unsuccessfully sought to obtain from the Town an exception to be relieved of 50% of the costs, Stafford did not file suit seeking to have the road improvement condition found unlawful until after Stafford had received the benefits of plat approval and Simmons had been rebuilt, thereby irreparably changing the status quo so that the Town's only recourse, in the event of a *Dolan* violation, would be the payment of damages.

In October, 1994, the Town adopted roadway impact fees pursuant to Chapter 395 of the Texas Local Government Code. The Town's impact fee ordinance establishes a maximum road impact fee per service unit based on the total cost of capital improvements necessitated by and attributable to new development. For the service area in which the Subdivision is located (Service Area No. 2), the maximum impact fee is \$1,249 per service unit. The number of service units for a single-family dwelling is 2.85, making the maximum allowable impact fee approximately \$3,559 per single-family dwelling for Service Area No. 2.

At that time, roadway impact fees were assessed at the maximum impact fee per service unit for each service area at the time of plat approval for most developments. The Town's impact fee ordinance heavily discounts impact fees for single-family dwellings. The ordinance thus establishes a fee to be collected of \$1,140 per single-family dwelling unit, roughly 32% of the maximum allowable fee. As a result, although Stafford was assessed impact fees in the amount of \$3,559 per single-family dwelling unit at the time of final approval for each phase of the Subdivision, Stafford was only required to pay impact fees in the amount of \$1,140 per single-family dwelling unit.

After the lawsuit was filed, the Town retained an expert to perform a rough proportionality analysis. That expert concluded that the Town's requirement that Stafford improve Simmons was roughly proportional and, at trial, he testified that the Town's regulatory objective of providing an adequate roadway network concurrent with new development was implemented through road impact fees, paid for by builders, in conjunction with mandatory right-of-way dedication and road construction requirements for perimeter roads that provide access to new development. Road impact fees are used to finance major arterial roads within the Town and are established by the impact fee ordinance. In Service Area No. 2, which includes Stafford Estates, the fee is roughly 32% of the impact of the development's traffic. Pursuant to the Town's regulatory strategies for providing roads, developers must dedicate right-of-way and construct perimeter roads, including access points, as established by the Town's subdivision ordinance. Developers are required to construct two of four lanes for major collectors or arterials, and two lanes for rural collectors. No developer, however, is ever required to build more than two lanes.

The Town's expert further testified that only the costs for major roads can be financed with impact fees. An impact fee shortfall (maximum fee allowed less actually fee charged) must be taken into account in evaluating the impact on roads created by new development. As applied to the Subdivision, the maximum impact fees are \$3,560 per dwelling unit. Stafford paid \$1,140 per unit, which created a shortfall of about \$600,000. This shortfall was roughly proportional to the total cost of the improving Simmons. Based upon this analysis, the Town contended that the Simmons

improvements were roughly proportional and did not violate *Dolan*.

The Town also presented testimony that the Simmons improvements were roughly proportional given the safety considerations involved in the Simmons improvements. The Town's subdivision regulations prescribe minimum safety design features where perimeter roads must be upgraded. Those features include sight distance, safe access, interface of old and new road segments, increased road shoulders, and long-term durability by utilizing concrete over asphalt. Additionally, the size of the subdivision and the length of frontage along Simmons necessitated that a second point of access be taken from Simmons for the Subdivision. The Simmons improvements supplied safety features benefiting residents of the Town traveling on the adjacent segment of Simmons, in addition to the Subdivision's residents, by upgrading the road to community standards.

The Town presented evidence that the improved Simmons was a safer road that would benefit the Subdivision's residents because of better sight distances, which would allow both traffic turning into and exiting the Subdivision on Simmons to have more time to see approaching vehicles. Testimony established that the wider shoulders added to Simmons provided an additional degree of safety that would be of benefit to the Subdivision's residents, and that the Simmons improvements, being made of concrete rather than asphalt, would extend the life expectancy of Simmons and reduce the necessity for repairs on Simmons, which repairs would be an obvious detriment to traffic flowing in and out of the Subdivision from Simmons.

B. *Nollan/Dolan* on the Spectrum of Takings Claims

Traditionally, takings jurisprudence has distinguished between two kinds of encroachments on property interests, with significantly different analyses applicable to each. The first is an actual physical invasion or occupation of property, whether in the form of a physical trespass or a forced dedication. The Takings Clause is particularly protective of property against that form of encroachment, and physical invasions or diminutions of rights of exclusive possession have been deemed to be *per se* takings that entitle a property owner to compensation. *See Tahoe-Sierra*, 535 U.S. at 321-22; *Lucas*, 505 U.S. at 1015; *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 435-440 (1982). *See also Mayhew*, 964 S.W.2d at 933 (recognizing physical takings as takings category). This categorical rule recognizes that such an invasion is unconstitutional "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. *See Sheffield*, 140 S.W.3d at 669-70 ("Physical possession is, categorically, a taking for which compensation is constitutionally mandated, but a restriction in the permissible uses of property or a diminution in its value, resulting from regulatory action within the government's police power, may or may not be a compensable taking.").

A similar categorical rule applies where a regulation itself "denies all economically beneficial or productive use of land," with such regulation requiring compensation without "case-specific inquiry into the public interest advanced in support of the restraint." *Lucas*, 505 U.S. at 1015-16. *See also Mayhew*, 964 S.W.2d at 935 (recognizing that a compensable taking occurs when a

governmental restriction “denies the landowner all economically viable use of the property or totally destroys the value of the property...”).

These categorical approaches do not apply, however, to most traditionally recognized types of government encroachments on property interests, namely, regulatory restrictions on property uses, *e.g.*, zoning. In testing use restrictions, no “set formula” determines whether an unconstitutional taking has occurred. *Lucas*, 505 U.S. at 1015. Instead, a court must engage in an essentially ad hoc, factual inquiry that considers evaluation of the three factors promulgated in *Penn Central*, *supra*. Those factors are (1) the character of the governmental action, (2) the economic impact of the regulation upon the claimant and (3) the extent to which the regulation has interfered with distinct investment-backed expectations. *Lucas*, 505 U.S. at 1016-20; *Penn Central*, 438 U.S. at 122. Thus, when the government regulates property without physically occupying it or totally destroying its value, the Takings Clause is much less protective of the interests of the property owner and much more deferential to the public interests served.

Dolan, and the case that foreshadowed it, *Nollan*, were decided against that landscape. Both cases involved development conditions that, in effect, required the landowner to forfeit part of his property in exchange for approval to develop. The Court therefore was confronted with a blend of the governmental encroachments described above. On the one hand, the challenged government action involved a regulatory use restriction in the form of a restriction on further development. Traditionally, such a restriction would have triggered a lenient takings standard. On the other hand, as a condition of relaxing the use restriction, the government required the property owner to suffer a physical occupation or invasion. Traditionally, such an invasion would have been considered a *per se* taking. The issue for the Court was how to test that amalgamation.

The facts of the cases provide context that is helpful to understanding the Court’s resolution of that issue. In *Nollan*, the plaintiffs sought approval from a California agency to rebuild a beachfront house. The agency granted the approval, subject to the condition that the plaintiffs dedicate a public easement behind their house, along the shore, so that the public could pass freely between the two public beaches bordering the plaintiffs’ property. In invalidating the dedication, the Court accepted as legitimate the agency’s concern that the house that the plaintiffs proposed to build would block visual access to the beach and create a “psychological barrier” to its use by the public. But the Court considered the requirement of a public easement behind the house to be unrelated to that interest, because it did nothing to enhance visual access of the beach from the street or to overcome any psychological barrier. Instead, the easement merely facilitated use of the public beaches by people already aware of and using them. The Court concluded that the dedication therefore lacked an “essential nexus” between the condition imposed and the government interest in imposing it, which rendered the dedication a taking. *Id.* at 841-42. In short, although the Court declined to deem the condition a *per se* taking as it had for other physical invasions or dedications of property interests, the Court required that there be a logical connection between the governmental interest to be served and the particular condition imposed on the landowner.

Because the Court determined that no connection existed between the dedication and the government's interest in imposing it, the Court did not, however, have to decide how close a nexus

was required between the two to avoid an unconstitutional taking. *Id.* at 838. The Court granted *certiorari* in *Dolan* for the express purpose of settling that unresolved issue. *Id.*, 512 U.S. at 377.

In *Dolan*, the property owner sought to double the size of her retail store and to pave her parking lot. As a condition of allowing the development, the city required the owner to dedicate a 15-foot strip of land for use as a pedestrian path and bikeway and also to dedicate a portion of her property within the 100-year flood plain for a publicly accessible “greenway.” The city defended the bikeway requirement with a calculation that the increased size of the retail store would add 937 car trips per week and that the bikeway “could” help to offset the increased traffic. The city defended the flood plain dedication on the basis that paving the gravel parking lot would increase the amount of impermeable ground, thus adding to flooding from the adjacent and already overburdened creek. *Id.* at 379-82.

The Court, in examining the dedications, established a two-step inquiry for analyzing regulatory takings claims in the context of conditional use or development permits. First, as it had in *Nollan*, the Court examined whether there was an “essential nexus” between the conditions and legitimate governmental interests, such that the purpose to be served by the condition was the same as the government’s interest in the use restriction. The Court found that nexus requirement readily satisfied. More specifically, the Court determined that there was a logical relationship between relieving traffic congestion and requiring a bike path and between the increased risk of flooding due to the parking lot and requiring property within the local flood plain to remain undeveloped. *Id.* at 387-88.

Second, having determined that the “essential nexus” inquiry was satisfied, the Court turned to the degree of connection between the dedications and the projected impact of the proposed development. *Id.* at 388. The Court began by endorsing the predominant test developed by state courts--*i.e.*, the requirement of a “reasonable relationship” between the condition imposed and the impacts of the development. That test, the Court reasoned, best “encapsulat[ed]” what the federal Takings Clause requires. *Id.* at 391. The Court, however, adopted the phraseology “rough proportionality” to avoid confusion with “rational basis” scrutiny, which the Court viewed as appropriate for equal protection rather than takings analysis. *Id.* Thus, the Court held that there must be “rough proportionality” between a development’s projected impacts and the condition required of the property owner to permit development. *Id.* The Court emphasized that it was requiring proportionality of only an approximate kind: “No precise mathematical calculation is required, but the city must make some effort to quantify its finding in support of the dedication ... beyond the conclusory statement that it could offset some of the [impacts of the development].” *Id.* at 395-96. The government “must make some sort of individualized determination that the required dedication is related both in nature and extent to the impact of the proposed development.” *Id.* at 391. Moreover, the Court made clear that it was departing from the general rule applicable to zoning and other use restrictions that the “burden properly rests on the party challenging the regulation to prove that it constitutes an arbitrary regulation of property rights.” *Id.* at 391 n. 8. Instead, the burden was on the government “to justify the required dedication.” *Id.*

Applying the “rough proportionality” prong of the test to the case before it, the Court concluded that the record in *Dolan* was insufficient to satisfy the government’s burden. With respect to the dedication of the greenway, the Court observed that the city’s interest in not overburdening the adjacent creek was served by keeping the flood plain free of development. But rather than just regulate petitioner’s private use of that portion of the property, the city required her to dedicate it to public use as a greenway. The Court concluded that nothing in the record demonstrated any “individualized determination” of the development impacts that would support divesting the owner of her property, rather than regulating her use of it. *Id.* at 393-94. As for the bike and pedestrian pathway, the Court deemed the city’s finding that the pathway *could* offset some of the traffic demand insufficiently precise to justify a dedication of some the landowner’s property for public use. *Id.* at 395-96.

In departing from the less exacting requirements applicable to zoning and other traditional use regulations, the Court in *Dolan* explained:

Th[ose sort of land use regulations], however, differ in two relevant particulars from the present case. First, they involved essentially legislative determinations classifying entire areas of the city, whereas here the city made an adjudicative decision to condition petitioner’s application for a building permit on an individual parcel. Second, the conditions imposed were not simply a limitation on the use petitioner might make of her own parcel, but a requirement that she deed portions of the property to the city.

Id. at 385.

Both *Nolan* and *Dolan* arose in the context of discretionary adjudicative determinations specific to one development proposal on a particular parcel of land. Both, moreover, involved conditions that took the form of a dedication of property for public use. As the decision in each case reveals, those facts played an explicit part in the Court’s rationale for adopting a heightened level of scrutiny for the development conditions at issue. The issue that lower courts throughout the nation have struggled with is whether those facts are therefore an indispensable predicate for applying this heightened scrutiny. As a result, the two questions that consistently arise, and which were before the trial court, court of appeals and Texas Supreme Court in *Stafford*, are (1) does *Dolan* apply to nonpossessory exactions, such as the street improvement requirement imposed in this case, and (2) does *Dolan* apply to development conditions imposed through generally applicable legislation, rather than individual adjudicative decisions.

In Texas, as demonstrated by the *Stafford* decision, the “land only” defense is no defense at all, and the *Dolan* standard will be found to apply to all exactions, regardless of their characterization as legislative or adjudicative.

C. The Supreme Court Speaks in *Stafford*

The Court in *Stafford* applied *Dolan* broadly, rejecting the distinctions that some courts had made in limiting *Dolan*'s reach. Additionally, the Court rejected the Town's efforts to force developers to bring suit to challenge alleged *Dolan* violations before accepting the benefits of permit approval.

1. A Threshold Defense

As a threshold matter, the Court declined to accept the Town's argument that the developer had waived, or was estopped from asserting, a takings claim because the developer took the benefits of plat approval without first seeking to challenge any conditions attached to the approval that the developer contended were unlawful. Cases from other jurisdictions that have addressed this issue have required permits holders to file suit seeking to invalidate conditions before accepting the benefits of permit approval. *See, e.g., Weatherly v. Town Plan and Zoning Commission of Town of Fairfield*, 579 A.2d 94, 97 (Conn.App.1990) ("One who seeks to avail himself of the benefits of a zoning regulation is precluded from raising the question of that regulation's constitutionality; or of that regulation's validity; in the same proceeding.") (citations omitted); *Crystal Green v. City of Crystal*, 421 N.W.2d 393, 394-95 (Minn. Ct. App. 1988) ("Developers must challenge dedications prior to final plat approval and registration in order to assure finality of dedication, give municipalities an opportunity to change their requirements if their requirements are unreasonable, and prevent municipalities from being sued by developers when the only remedy available to a losing municipality is payment."); *Salton Bay Marina, Inc. v. Imperial Irrigation Dist.*, 172 Cal. App. 3d 914, 941 (Cal. App. 1985) ("[M]eaningful governmental fiscal planning would be impossible and legislative control over appropriations emasculated if persons were permitted to simply stand by in the face of administrative action claimed to be unlawful and injurious and years later assert substantial monetary damages."); *County of Imperial v. McDougal*, 564 P.2d 14, 17 (Cal. 1977) (landowner who accepts and complies with the conditions of a building permit cannot later sue the issuing public entity for inverse condemnation for the costs of compliance); *Pfeiffer v. City of La Mesa*, 69 Cal. App. 3d 74, 78 (Cal. Ct. App. 1977) ("It is fundamental that a landowner who accepts a building permit and complies with its conditions waives the right to assert the invalidity of the conditions and sue the issuing public entity for the costs of complying with them.")

The *Stafford* Court, however, was not persuaded. In fact, while recognizing the Town's argument that "[i]t is in the public interest . . . for the government to have the opportunity to withdraw a condition of approval that is found to constitute a taking and thereby avoid the expense to taxpayers of money damages" (*Stafford* at 628), the Court found that the countervailing public policy of protecting developer interests more convincing. *Id.* ("The Town does not address the obvious concern that such a standard would pressure landowners to accept the government's conditions rather than suffer the delay in a development plan that litigation would necessitate.").

2. The Dedications Only Limitation is Rejected

The Town had urged the Court to find that the Fort Worth Court of Appeals had erred by extending the land dedication tests from *Nollan* and *Dolan* to the Town's concrete road requirement. *Nollan* and *Dolan* involved, and as a result were particularly concerned with, forced dedications of land. See *Nollan*, 483 U.S. at 841 (“We are inclined to be particularly careful. . . where the actual conveyance of property is made a condition to the lifting of a land-use restriction.”); *Dolan*, 512 U.S. at 385 (distinguishing permit conditions from “a requirement that [Mrs. Dolan] deed portions of the property to the city.”).

Thus, the Town urged the Court to recognize the limitation found by other courts in limiting *Dolan* to land dedication cases. See, e.g., *Texas Manufactured Hous. Ass'n v. Nederland*, 101 F.3d 1095, 1105 (5th Cir. 1996) (holding that *Nollan* and *Dolan* do not apply because “the Nederland Ordinance does not ‘extract benefits’ from [the plaintiff] in the *Nollan* sense of requiring some dedication of property . . .”); *Harris v. City of Wichita*, 862 F. Supp. 287, 294 (D. Kan. 1994), *aff'd*, 74 F.3d 1249 (10th Cir. 1996) (“The Supreme Court’s decision in *Dolan* was based on the facts of that case, namely that the City had required a dedication of property as a condition for granting a redevelopment permit.”); *Clajon Prods. Corp. v. Petera*, 70 F.3d 1566, 1578-79 & n.21 (10th Cir.1995) (“[W]e believe that the ‘essential nexus’ and ‘rough proportionality’ tests are properly limited to the contexts of development exactions where there is a physical taking or its equivalent.”); *Southeast Cass Water Resource Dist. v. City of Burlington*, 527 N.W.2d 884, 896 (N.D. 1995) (holding that *Dolan* is not applicable to a duty to pay for culvert improvements); *GST Tucson Lightwave, Inc., v. City of Tucson*, 949 P.2d 971, 978-79 (Ariz. Ct. App. 1997) (holding that *Nollan* and *Dolan* do not apply because “this case does not involve the City forcing Lightwave ‘to dedicate a portion of its public property to public use’”); *Sprenger, Grubb & Assocs. v. City of Hailey*, 903 P.2d 741, 747 (Idaho 1995) (*Dolan* is limited to real property exactions); *Waters Landing Ltd. Partnership v. Montgomery County*, 650 A.2d 712, 724 (Md. Ct. App. 1994) (impact tax “does not require landowners to deed portions of their property to the County”).

The Court rejected this distinction, however, noting that “[f]or purposes of determining whether an exaction as a condition of government approval of development is a compensable taking, we see no important distinction between a dedication of property to the public and a requirement that property already owned by the public be improved. The *Dolan* standard should apply to both.” *Stafford* at 639-40.

3. The Legislative/Adjudicative Distinction is Rejected

In *Dolan*, the Supreme Court expressly distinguished its holding from traditional zoning, exaction and development regulations that did not require the dedication of land from a property owner in an adjudicative manner.

The sort of land use regulations discussed in the cases just cited, however, differ in two relevant particulars from the present case. First, they involved essentially legislative determinations classifying entire areas of the city, whereas here the city made an adjudicative decision to condition petitioner's application for a building permit on an individual parcel. Second, the conditions imposed were not simply a limitation on the use petitioner might make of her own parcel, but a requirement that she deed portions of the property to the city.

Dolan, 512 U.S. at 385.

As a result, many courts have limited the reach of *Dolan* to adjudicative decisions and found *Dolan* inapplicable to the application of legislatively created standards. See *Home Builders Ass'n v. City of Scottsdale*, 930 P.2d 993, 1000, *cert. denied*, 521 U.S. 1120 (1997); *Ehrlich v. City of Culver City*, 911 P.2d 429, 439 (1996), *cert. denied* 519 U.S. 929 (1996); *San Remo Hotel v. City and County of San Francisco*, 41 P.3d 87, 105 (2002); *Krupp v. Breckenridge Sanitation Dist.*, 19 P.3d 687, 695 (Colo.2001) ("Application of the *Nollan/Dolan* test has been limited to the narrow set of cases where a permitting authority, through a specific, discretionary adjudicative determination, conditions continued development on the exaction of private property for public use."); *Parking Ass'n of Ga., Inc. v. City of Atlanta*, 450 S.E.2d 200, 203 n. 3 (1994) (*Dolan* test did not apply to city's legislative determination), *cert. denied*, 515 U.S. 1116 (1995) (Thomas, J., joined by O'Connor, J., dissenting from the denial of certiorari, noting conflict in lower courts on whether test from *Dolan* or *Agins* applied when a taking is alleged based on a legislative act); *Southeast Cass Water Res. Dist. v. Burlington Northern R. Co.*, 527 N.W.2d 884, 896 (N.D.1995) (stating that *Nollan* and *Dolan* do not "change the constitutional analysis for legislated police-power regulation").

The Texas Supreme Court, however, was not persuaded.

While we recognize that an ad hoc decision is more likely to constitute a taking than general legislation, we think it entirely possible that the government could "gang up" on particular groups to force extractions that a majority of constituents would not only tolerate but applaud, so long as burdens they would otherwise bear were shifted to others. Nor are we convinced that a workable distinction can always be drawn between actions denominated adjudicative and legislative . . . We think that the Town's argument, and the few courts that have accepted it, make too much of the Supreme Court's distinction in *Dolan*.

Stafford at 641.

4. *The Taking is Upheld, but the Attorneys' Fees are Not*

Having determined that *Dolan* applied fully to the street improvement requirement at issue, the Court held that Stafford's development, which would only account for 18% of the increased traffic on the road in question, could not be charged for 100% of the costs to improve the road.

Stafford at 645 (“[C]onditioning development on rebuilding Simmons Road with concrete and making other changes was simply a way for the Town to extract from Stafford a benefit to which the Town was not entitled.”).

The Court did provide some good news for Texas cities in its decision. Importantly, the Court held, in contrast to the holdings of most other courts on this issue, that the government did not have to make an advance determination of rough proportionality, but could perform its studies “after the fact” to be used to justify the condition at trial. *Stafford* at 644 (“Stafford argues that the Town was required to make [the rough proportionality] determination before imposing the condition on development, but we agree with the court of appeals that while the determination usually *should* be made before a condition is imposed, *Dolan* does not preclude the government from making the determination after the fact.”) (emphasis in original). Additionally, the Court upheld the court of appeals determination that Stafford could not recover attorneys’ fees and expert witness fees because its federal takings claim, which was the only claim for which such fees could be awarded, as a matter of law could not become ripe once Stafford had obtained compensation under the Texas Constitution. *Stafford* at 645-46.

D. A Legislative Response: H.B. 1835

The Texas Legislature expanded the reach of *Stafford* in its enactment of H.B. 1835, which became effective September 1, 2005, and which created Section 212.904 of the Local Government Code. Section 212.904 provides as follows:

Sec. 212.904. APPORTIONMENT OF MUNICIPAL INFRASTRUCTURE COSTS.

- (a) If a municipality requires as a condition of approval for a property development project that the developer bear a portion of the costs of municipal infrastructure improvements by the making of dedications, the payment of fees, or the payment of construction costs, the developer’s portion of the costs may not exceed the amount required for infrastructure improvements that are roughly proportionate to the proposed development as approved by a professional engineer who holds a license issued under Chapter 1001, Occupations Code, and is retained by the municipality.
- (b) A developer who disputes the determination made under Subsection (a) may appeal to the governing body of the municipality. At the appeal, the developer may present evidence and testimony under procedures adopted by the governing body. After hearing any testimony and reviewing the evidence, the governing body shall make the applicable determination within 30 days following the final submission of any testimony or evidence by the developer.
- (c) A developer may appeal the determination of the governing body to a county or district court of the county in which the development project is located within 30 days of the final determination by the governing body.

(d) A municipality may not require a developer to waive the right of appeal authorized by this section as a condition of approval for a development project.

(e) A developer who prevails in an appeal under this section is entitled to applicable costs and to reasonable attorney's fees, including expert witness fees.

(f) This section does not diminish the authority or modify the procedures specified by Chapter 395.

Tex. Loc. Gov't Code Ann. § 212.904.

This new law provides developers with the attorneys' fees and expert fees denied the developer in *Stafford* should they prevail in an appeal under the statute. Among the many unanswered questions presented by H.B. 1835 are the following:

1. Does the "roughly proportionate" study requirement apply if the city requires the developer to bear the entire cost of the exaction versus only a portion of the cost?

2. What are the standards for a "roughly proportionate" exaction?

3. Is the legislatively-imposed "roughly proportionate" standard the same as the constitutionally-imposed "rough proportionality" standard discussed in *Dolan* and *Stafford*?

4. What criteria does the professional engineer that the city is required to retain to do the "roughly proportionate" utilize?

5. While Section 212.904 requires that the city retain the engineer for the study, can the city shift the costs of the study in whole or in part to the developer?

6. While a city cannot require a developer to waive its rights to appeal under Section 212.904, can a city and a developer enter into a development agreement wherein both parties agree that the exaction is "roughly proportionate" without the preparation of the required study?

VI.

REGULATORY TAKINGS

In 1980, the United States Supreme Court in *Agins, supra*, set out a test to determine if a land use regulation amounts to a taking.

The application of a general zoning law to particular property effects a taking if the ordinance does not substantially advance legitimate state interests [citation omitted], or denies an owner economically viable use of his land [citation omitted].

Agins, 447 U.S. at 260.

The first prong of this test – the substantially advances test – was overturned in 2005 by the United States Supreme Court in *Lingle v. Chevron U.S.A., Inc.*, 544 U.S. 528 (2005). The Court held that the “substantially advances” formula is not a valid method of identifying compensable regulatory takings as it prescribes an inquiry in the nature of a due process test, which has no proper place in the takings jurisprudence. *Id.* at 540-43. It explained that the *Agins* formula unquestionably was derived from due process precedents, and that the language the Court selected in *Agins* was imprecise. *Id.* The Court acknowledged that the *Agins* test suggests a means-ends inquiry, asking, in essence, whether a regulation of private property is effective in achieving some legitimate public purpose, and that such an inquiry is not a valid method of discerning whether private property has been “taken” for Fifth Amendment purposes.

The Court noted that the “substantially advances” test inquiry reveals nothing about the magnitude or character of the burden a particular regulation imposes upon private property rights, or how any regulatory burden is distributed among property owners, which are fundamental attributes of determining whether a regulation goes so far as to be a taking. Thus, this test does not help to identify those regulations whose effects are functionally comparable to government appropriation or invasion of private property. *Id.*

The Court also noted the practical difficulties of applying the *Agins* formula’s application as a takings test. Reading it to demand heightened means-ends review of virtually all regulation of private property would require courts to scrutinize the efficacy of a vast array of state and federal regulations--a task for which they are not well suited. It would also empower--and might often require-- courts to substitute their predictive judgments for those of elected legislatures and expert agencies. *Id.*

In light of *Lingle*, it has been reaffirmed that within the context of regulatory takings, the United States Supreme Court has recognized a categorical rule where a regulation itself “denies all economically beneficial or productive use of land,” finding that such regulation requires compensation without “case-specific inquiry into the public interest advanced in support of the restraint.” *Lingle*, 544 U.S. at 538; *Lucas*, 505 U.S. at 1015-16. When a regulatory takings claim does not render property valueless, however, a taking may still result after evaluation of the three factors promulgated in *Penn Central*, *supra*. Those factors are (1) the character of the governmental action, (2) the economic impact of the regulation upon the claimant and (3) the extent to which the regulation has interfered with distinct investment-backed expectations. *Lingle*, 544 U.S. 538-39; *Lucas*, 505 U.S. at 1016-20; *Penn Central*, 438 U.S. at 122.

Under the Texas Constitution, a “taking” can be either a physical appropriation of a property or an unreasonable interference with the landowner’s right to use and enjoy his property. *See Felts v. Harris County*, 915 S.W.2d 482, 484 (Tex. 1996); *State v. Biggar*, 873 S.W.2d 11, 13 (Tex. 1994); *DuPuy v. City of Waco*, 396 S.W.2d 103, 108 (Tex. 1965); *Allen v. City of Texas City*, 775 S.W.2d 863, 865 (Tex. App.-Houston [1st Dist.] 1989, writ denied). Governmental restrictions on the use of

property can be so burdensome that they result in a compensable taking. *San Antonio River Auth. v. Garrett Brothers*, 528 S.W.2d 266, 273 (Tex.Civ.App.-San Antonio 1975, writ ref'd n.r.e.).

Among the factors Texas courts have historically considered to determine whether a taking has occurred are: (1) whether the land use decision rendered the property wholly useless, (2) whether the governmental burden disproportionately diminished or destroyed the property's economic value, and (3) whether the government's action was against the owner's economic interest and was for the government's own advantage. See *City of Austin v. Teague*, 570 S.W.2d 389, 393 (Tex. 1978).

In its 1998 decision in *Mayhew*, the Texas Supreme Court, in the context of a denial of a request for increased zoning rights (an "upzoning"), set forth for the first time a regulatory takings standard that was patterned after United States Supreme Court precedents interpreting the federal Takings Clause. See *Mayhew*, 964 S.W.2d at 933 (recognizing regulatory takings as category of takings claim). The Texas Supreme Court in *Mayhew* recognized two of the *Penn Central* factors ("the economic impact of the regulation and the extent to which the regulation interferes with distinct investment-backed expectations"), but did not address the third factor – the character of the government action. *Id.* at 935-36.

The *Mayhew* framework, following the United States Supreme Court's decision in *Agins*, began as follows:

As a general rule, the application of a general zoning law to a particular property constitutes a regulatory taking if the ordinance "does not substantially advance legitimate state interests" or it denies an owner "all economically viable use of his land."

Id., 964 S.W.2d at 933.

Mayhew indicated that in any taking analysis, the initial inquiry is whether the challenged governmental action substantially advances a legitimate public interest. The second step in the taking analysis examines whether the challenged governmental action denied the property owner all economically viable use of its land. *Id.*

The legitimacy prong of a regulatory takings analysis requires a court to identify whether the challenged regulation substantially advances a legitimate governmental interest. The *Mayhew* Court indicated that "a broad range of governmental purposes and regulations" will pass this constitutional muster given the variety of legitimate state interests available to governmental entities, including protecting residents from the "ill-effects of urbanization," "enhancing the quality of life," "precluding the conversion of open-space land to urban uses," "preserving desirable aesthetic features," and "controlling both the rate and character of community growth." *Id.* at 934.

The *Mayhew* Court, in reviewing the just compensation prong of the regulatory taking analysis, held that even if a governmental action substantially advances a legitimate state interest, that "[a] compensable regulatory taking can also occur when governmental agencies impose

restrictions that either (1) deny landowners of all economically viable use of their property, or (2) unreasonably interfere with landowners' rights to use and enjoy their property." *Id.* at 935. In determining whether a restriction denies a landowner all economically viable use of the property, a court must determine whether the restriction renders the property valueless or, in other words, whether any value remains in the property after the governmental action. *Id.*

To determine whether the government has unreasonably interfered with the landowner's rights to use and enjoy property, the Court noted the importance of two factors: "the economic impact of the regulation and the extent to which the regulation interferes with distinct investment-backed expectations." *Id.* In analyzing the first factor, the economic impact of the regulation, the Court indicated that it was appropriate to compare "the value that has been taken from the property with the value that remains in the property." *Id.* The Court admonished, however, that "[t]he loss of anticipated gains or potential future profits is not usually considered in analyzing this factor." *Id.* at 936.

In *Mayhew*, the Supreme Court, first applying the legitimacy prong, had little difficulty in deciding that the denial of the property owners' request to increase the zoning density from one dwelling unit per acre to over three dwelling units per acre on the approximately 1196 acres in question (which was over 26% of the developable land in the Town) substantially advanced the legitimate governmental interests of the Town of Sunnyvale to protect the Town's "overall character of the community and the unique character and lifestyle of the Town," and to protect the Town against "urbanization effects." *Id.* at 935.

Similarly, the Court, applying the economic impact prong of the takings test, found that no taking had occurred. The value of the land after the denial of the upzoning was \$2.4 million, thus not denying the Mayhews of all economically viable use of their land. *Id.* at 937. Additionally, the property had a fair market value of at least \$9,700,000 before the upzoning denial, and \$2,400,000 after the denial, for a reduction in value of 75%. *Id.* at 927. Had the upzoning been granted, the value of the property would have been greater than \$15,000,000, such that the upzoning denial resulted in a diminution in value of 84%. *Id.* The Court in *Mayhew*, however, did not address the impact, if any, that the diminution in value had on its analysis, rather focusing instead on the Mayhews' lack of any reasonable investment-backed expectation to upzone their property. The *Mayhew* Court rejected the unreasonable interference takings claims based upon that factor, without addressing the economic impact factor. *Id.* at 937 ("After four decades of ranching their property in a Town with a population of no more than 2,000 people, the Mayhews did not have a reasonable investment-backed expectation that they could pursue an intensive development of 3,600 units that would more than quadruple the Town's population.").

Mayhew, within the context of a denial of an upzoning in a unique rural setting, provided a fairly simple roadmap to determining what constituted a taking. How the *Mayhew* standards would apply in the context of a downzoning in a typical, suburban setting remained unanswered until six years later in *Sheffield*.

VII.

THE SHEFFIELD DECISION

**Describing the land beyond *Lethe* as “A gulf profound as that
*Serbonian bog / Betwixt Damiata and Mount Casius old, / Where
armies whole have sunk.”***

John Milton, *Paradise Lost* 49, bk. II,
ll. 592-94 (Scott Elledge ed., Norton &
Co.1993)(1674).

**Describing the takings legal battlefield as a “sophistic Miltonian
Serbonian Bog.”**

Brazos River Auth. v. City of Graham,
354 S.W.2d 99, 105 (Tex. 1962); *City
of Austin v. Teague*, 570 S.W.2d 398,
391 (Tex. 1978).

“There are small islands in the bog.”

Sheffield, 140 S.W.3d at 671.

The Court entered into the “Serbonian Bog” again in its 2004 downzoning decision in *Sheffield*.

A. Case Background and Issues on Appeal

This case arose when, in 1996, Sheffield, a real estate development company, purchased approximately 194 acres in Glenn Heights. The property was zoned in 1986 as a planned development district (“PD”) allowing high-density, single-family development of primarily 6500-square foot (“sq. ft.”) lots. In January 1995, the City adopted a new comprehensive land use plan (“Plan”). In April 1995, as the first step in implementing the Plan, the City rezoned all properties except 14 that were zoned as PDs. In 1996, the City began a comprehensive effort to rezone the PDs to reduce development densities. At that time, Chapter 481 of the Government Code (the “Vested Rights Statute,” now codified as Chapter 245 of the Local Government Code) allowed a landowner to vest zoning rights by filing a plat. In January 1997, the City adopted an extendable development moratorium to prohibit the filing of plats while the City completed the PD rezonings. The moratorium on Sheffield’s property was terminated 15 months later when the City rezoned the property from primarily 6,500 to 12,000-sq. ft. lots. The City contended that the estimated market value of the property, which Sheffield purchased for \$600 an acre in November 1996, was \$4,000 per

acre before the rezoning and \$2,500 per acre after the rezoning, for a reduction in value of approximately 38%.

Sheffield asserted that the moratorium and the rezoning constituted a taking under the Texas Constitution. The trial court held the rezoning was a taking and a jury awarded damages of \$485,000, finding that the property had been reduced in value by 50%. The Waco Court of Appeals, in an opinion published at 61 S.W.3d 634, held that the rezoning and the moratorium each were a taking, and remanded the case for a determination of (1) damages for a temporary taking and (2) whether Sheffield's plat should be approved by operation of law.

B. Waco Court of Appeals' opinion and request for relief from the Supreme Court

The court of appeals' decision was unprecedented, not only in Texas but also in the nation. After determining that a rezoning of property from six lots to four lots per acre substantially advanced legitimate governmental interests, the court, without reference to any controlling authority, held that a reduction in property value of 38% constituted a taking under the standards articulated in *Mayhew*. Federal and state courts that have addressed the degree of economic impact necessary to result in a taking consistently have required a diminution in value of greater than 90% and, in most cases, a resulting value of close to zero. The implications of the court of appeals' decision were far reaching and would have affected municipalities in many ways. If a rezoning of property that reduces the value of land by only 38% can constitute a taking, as found by the court of appeals, municipalities would be forced to dramatically curtail the use of city-initiated rezoning, which is a well-established municipal land use and planning technique, because the threshold for establishing a taking of a 38% diminution in property value will, in many instances, result in compensation due to the property owner.

Based against this backdrop, Glenn Heights asked the Supreme Court to review the case and to determine, among others, the following issues:

1. Can a rezoning of property that reduces the value of land by only 38%, yet still leaves the land worth more than four times the claimant's purchase price, constitute a regulatory taking under the unreasonable interference with property rights standards articulated in *Mayhew*?
2. In determining whether a city's rezoning of property interferes with the property owner's investment-backed expectations, which *Mayhew* held was a required element to support a regulatory takings claim, are the owner's estimates of lost profits and the owner's interactions with city officials prior to purchasing the property appropriate factors to be considered in making this determination?
3. Does the "substantially advance a legitimate governmental interest" test apply to a rezoning of property?
4. In determining whether a city's moratorium on development constitutes a

regulatory taking, are the subjective motives of the members of the city council in adopting and maintaining the moratorium appropriate factors to be considered in making this determination?

5. Assuming that the City's motivation in maintaining the moratorium on Sheffield's property after April 21, 1997, was solely to allow the City to continue to negotiate with Sheffield on an agreed-upon set of uses for its property, did such negotiations (which if successful would avoid litigation) further a legitimate governmental interest sufficient to pass constitutional muster under *Mayhew*'s "substantially advances a legitimate governmental interest" test?

C. The Supreme Court Speaks

The unanimous *Sheffield* opinion, released on March 5, 2004, had been highly anticipated by governmental entities and their elected and appointed officials, city staff members, land planners, developers, homebuilders and land-use attorneys across the state, as well as across the nation. Amicus briefs were filed in support of Glenn Heights by the American Planning Association, the International Municipal Lawyers Association, the Texas Municipal League, the Texas City Attorneys Association, as well as seven Texas cities ranging in size from Dallas to Cedar Hill. Similarly, the landowner received support, both financially and through briefs filed on its behalf, by the National Association of Home Builders, Texas Association of Builders, Home Builders Association of Greater Dallas, Greater Fort Worth Builders Association, Texas Apartment Association, Texas Association of Realtors and the Pacific Legal Foundation. In short, the stakes were high in this case, as demonstrated by the array of diverse interests providing support on both sides of the case.

The *Sheffield* opinion, while reversing a clearly erroneous and potentially devastating appellate opinion to government land-use efforts, does little to provide greater clarity to the law of regulatory takings beyond that set forth in *Mayhew*. In fact, to be blunt about it, *Sheffield* muddies the waters in many regards and raises as many questions as it answers.

1. *There is No Single Test to Determine a Taking*

In *Mayhew*, the Texas Supreme Court, in a case involving the denial of an upzoning, set forth a general framework within which to analyze regulatory takings claims. Relying primarily on United States Supreme Court precedent, the Court held that "[a]s a general rule, the application of a general zoning law to a particular property constitutes a regulatory taking if the ordinance 'does not substantially advance legitimate state interests' or it denies an owner all 'economically viable use of his land.'" *Id.* at 933. Later, in an apparent refinement of this general test, the Court held that "[e]ven if the governmental regulation has not entirely destroyed the property's value, a taking can occur if the regulation has a severe enough economic impact and the regulation interferes with distinct investment-backed expectations." *Id.* at 937.

In *Sheffield*, the Court appears to have applied a balancing test to these *Mayhew* factors,

holding that there is no single test or issue that will typically resolve takings claims.

There is . . . no one test and no single sentence rule. . . . The need to adjust the conflicts between private ownership of property and the public’s interests is a very old one which has produced no single solution.

Sheffield at 670 (quoting *Turtle Rock Corp.*, 680 S.W.2d at 804). Citing United States Supreme Court Justice Holmes from that Court’s first takings case in the seminal 1922 decision in *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922), the *Sheffield* Court stated “that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking,” adding “this is a question of degree--and therefore cannot be disposed of by general propositions.” *Sheffield* at 670. According to the *Sheffield* decision, “the question at bottom is upon whom the loss of the changes desired *should* fall.” *Id* (emphasis in original).

In fact, throughout its opinion, the Court emphasizes the concept of balancing or weighing of public and private interests to determine when this constitutional measure of fairness dictates that a taking be found. *Id.* (“The need to adjust the conflicts between private ownership of property and the public’s interests is a very old one which has produced no single solution.” “[The United States Supreme 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, rather than remain disproportionately concentrated on a few persons.”); *Id.* at 671-72 (“[W]hether regulation has gone ‘too far’ and become too much like a physical taking for which the constitution requires compensation requires a careful analysis of how the regulation affects the balance between the public’s interest and that of private landowners.” “The analysis ‘necessarily requires a weighing of private and public interests’ and a ‘careful examination and weighing of all the relevant circumstances in this context.’”).

While a balancing test allows a reviewing court greater flexibility to promote constitutional fairness, it by necessity militates against any set rules or guiding principles that dictate a result and, as the *Sheffield* Court notes, forces courts to “consider all of the surrounding circumstances” in applying “a fact-sensitive test of reasonableness.” *Id.* at 672-73.

2. *The Substantially Advances Test Survives the Day, But Remains Highly Deferential to Cities*

As an opening gambit, Glenn Heights urged the Court to discard the “means-ends” substantially advances test set forth in *Mayhew* and in *Agins*. *Sheffield* at 673. In *Mayhew*, the Texas Supreme Court, citing the United States Supreme Court in *Agins*, held that “[a]s a general rule, the application of a general zoning law to a particular property constitutes a regulatory taking if the ordinance ‘does not substantially advance a legitimate state interest’ or it denies an owner ‘all economically viable use of his land.’” *Mayhew*, 964 S.W.2d at 933.

a. Reasons to discard the “means-ends” test

Glenn Heights urged the Court to hold that the *Agins* means-ends test was not a valid test of takings liability and should not be applied to adjudge whether the City's rezoning or moratorium was a taking. The City's arguments, in a nutshell, were as follows:

- The *Agins* inquiry is grounded in due process case law (*Nectow v. City of Cambridge*, 277 U.S. 183 (1928)) and should be conducted as a due process inquiry, not a takings inquiry. The confusion created by *Agins* stems from an era prior to *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304 (1987), in which courts failed to distinguish between due process and takings analysis because a violation of either clause often resulted in invalidation of the offending regulation.
- The *Agins* inquiry is inconsistent with the fundamental notion that the Takings Clause does not serve as a substantive limit on governmental authority, but merely conditions otherwise valid government action on the payment of just compensation (*Eastern Enterprises v. Apfel*, 524 U.S. 498 (1998); *First English*).
- The *Agins* inquiry is inconsistent with the requirement in the Takings Clause that a compensable taking be for a public use.
- The *Agins* inquiry is inconsistent with the Supreme Court's use of physical appropriation as a benchmark for determining whether a land use regulation constitutes a taking.
- The *Agins* inquiry is unfair because it requires taxpayers to pay compensation even though they do not benefit from the challenged government action.
- Although the Supreme Court has not expressly repudiated the *Agins* means-ends inquiry, five Justices disavowed it in *Eastern Enterprises*.
- *Del Monte Dunes, supra*, provides additional support that the *Agins* test is in serious jeopardy. The majority opinion conceded that the Supreme Court has never given a "thorough explanation of the nature or applicability" of the test, and the concurring and dissenting opinions expressly declined to reaffirm the test's propriety.
- The Supreme Court has never squarely endorsed and applied the *Agins* means-ends test to find a taking, and lower courts have largely ignored the test. And while the Supreme Court has repeated the "substantially advance" formulation in several cases, its severely limited application greatly diminishes its precedential value.

- Although *Nollan* and *Dolan* cite *Agins*, those cases are expressly grounded in the special rules that govern unconstitutional conditions and permanent physical occupations of property. They apply only to compelled dedications of property and, thus, do not justify a generalized means-ends inquiry for all land use regulation.

The Court, while recognizing that the United States Supreme Court “appears to have equivocated somewhat on its statement in *Agins* outside of the context of cases involving required dedications or exactions,” nonetheless declined to reject the “means-ends” test since the United States Supreme Court had not expressly overruled its *Agins* standard. *Sheffield* at 673-75.

In light of the United States Supreme Court’s decision last summer in *Lingle, supra*, which rejected the “mean-ends” test for the same reasons unsuccessfully urged by Glenn Heights in *Sheffield*, it remains to be seen whether the Texas Supreme Court will retain the *Agins* formulation under the Texas Takings Clause.

b. What is the standard?

Significantly, it is the Texas Supreme Court’s view that even if the United States Supreme Court did not apply a “means-ends” test to judge the constitutionality of an action under the federal Takings Clause, the Texas Constitution’s Takings Clause would require such an inquiry in certain circumstances. *Id.* at 674-75. The Court’s language is worth repeating here:

Furthermore, apart from what the Supreme Court has said, we continue to believe for purposes of state constitutional law, as we held in *Mayhew*, that the statement in *Agins* is correct: that whether regulation substantially advances legitimate state interests is an appropriate test for a constitutionally compensable taking, ***at least in some situations***. In this case, for example, *Sheffield* argues that the City did not rezone Stone Creek for any legitimate purpose, such as to avoid the ill effects of urbanization and provide for orderly development, but simply to muscle *Sheffield* into modifying its development proposals or going away altogether. If *Sheffield* were correct, we think the lack of a legitimate purpose alone would make the rezoning a taking, just as it would have in *Mayhew*.

Sheffield at 674-75 (emphasis added). The Court does little more to elaborate as to what circumstances would implicate the “means-ends” test and what circumstances would not. While this is an academic discussion at this point, should the United States Supreme Court expressly overrule the application of the *Agins* “substantially advances” standard to determine a taking, the stand-alone application of the standard under our Texas Constitution will no doubt generate significant debate over what circumstances the *Sheffield* Court believes should be governed by the standard.

The good news for Texas cities is that the standard that the Court applied in *Sheffield* to test the legitimacy of Glenn Heights’ actions is a highly deferential one, which the Court analogized to an equal protection standard:

For equal protection purposes, government action has a rational basis if one can be conceived, regardless of whether the government had it in mind when it took the action complained of. Sheffield does not explain why the basis for takings analysis should be more constricted, and we know of no reason.

Sheffield at 675.

The Court is less than clear, however, as to when a “heightened standard” may be applicable to review a land-use decision challenged as a taking.

Sheffield does not argue that the government must always be held to a heightened standard of judicial review when its purposes are assessed in a takings context, but only that a heightened standard is appropriate when the government has targeted a particular landowner or piece of property. . . . We agree, but we read [the cases cited by Sheffield] to mean, not that an elevated standard of review must be applied, but that it ordinarily is, and should be, harder for the government to show that its interests have been substantially advanced by regulation directed at one lone landowner.

Id. at 675-76. The Court seems to imply that there is no higher standard to be applied in cases where regulation is directed at a single property owner, but that the burden on the government to prove substantial advancement in such cases is greater. Of course, if it is harder to prove, is this not a higher standard by another name? The author remains perplexed by the distinction drawn by the Court.

Fortunately for Glenn Heights, the Court found that the “harder to show” standard it had articulated did not apply because the record did not support Sheffield’s argument that it was singled out, but rather that it demonstrated that the city-initiated downzonings were city-wide and did not impact only Sheffield’s property. *Id.* at 676-76. Relying on the more deferential standard, the Court determined that the City’s interests in “preserving a smaller community environment” and concerns over “controlled growth” were valid and were supported by the record. *Id.*

3. *What Must the Record Show for a City to Win a Substantially Advances Argument*

Sheffield had urged the Court to limit its review to the evidence that was before the City Council when it made its decisions and to not consider evidence and arguments brought forth to support the City’s decisions that were not contained in the so-called “legislative record.” *Id.* at 675. The Court rejected Sheffield’s attempts to convert judicial review of land-use decisions into an administrative substantial evidence review, holding that governmental actions could pass the “substantially advances” test if “a rational basis . . . can be conceived, regardless of whether the government had it in mind when it took the action complained of.” *Id.* The Court further stated that while a mere theoretical reason might not meet the “substantially advances” test, cities would not be required to prove to any degree of certainty that its factual predictions would come to pass.

Sheffield argues that the most the evidence shows is that rezoning could *theoretically* advance the City's legitimate purposes, and that is not enough. We agree that the substantial advancement requirement must be, in the Supreme Court's words, "more than a pleading requirement, and compliance with it ... more than an exercise in cleverness and imagination." But we do not think it must be proved to a certainty. Indeed, the actual effects of the City's rezoning are for the future and can only be projected and estimated. The City offered evidence that rezoning the PDs would lower its potential population by about 6,000, from about 31,000 to 25,000, and that rezoning PD 10 accounted for about one-fourth of this reduction. The City could reasonably conclude that this would substantially advance its legitimate interest in preserving a smaller community environment.

Id. at 676 (emphasis in original). Thus, while a city's evidentiary record need not be mathematically precise, it should be defensible as a reasonably valid predictor of the conditions and concerns that justified the challenged decisions.

This is consistent with prior case law on what a legislative body may consider in making legislative decisions, as there is no requirement that local governments create an administrative or legislative record of the reasons or bases of their zoning, planning and land-use decisions. Texas jurisprudence has expressly held that courts are not limited to the historical record before a city or the evidence that was actually presented to a city in determining the constitutionality of legislative decisions. *See, e.g., T & R Assocs., Inc. v. City of Amarillo*, 688 S.W.2d 622, 627 (Tex.App.-Amarillo 1985, writ ref'd n.r.e.) ("After all of those who wish to be heard have been heard, the [governing body], like any other legislative body, ha[s] the right to act on its own knowledge of the community and its own appraisal of the public welfare."); *Eudaly v. City of Colleyville*, 642 S.W.2d 75, 77 (Tex.App.-Fort Worth 1982, writ ref'd n.r.e.) (After receiving comments from the public, the city council "was then free to make its decision based on whatever factors it desired."); *Charlestown Homeowners Ass'n., Inc. v. LaCoke*, 507 S.W.2d 876, 879 (Tex.Civ.App.-Dallas 1974, writ ref'd n.r.e.) ("The court must consider all the circumstances, not merely the evidence before the [city council], and determine as a substantive matter whether reasonable minds may differ as to whether the particular zoning regulation has a substantial relationship to the public health, safety, morals or general welfare."). It is incumbent upon a reviewing court in deciding the validity of a zoning ordinance or land use decision to consider "all the circumstances of the city, the object sought to be attained and the necessity existing for the ordinance." *City of Waxahachie v. Watkins*, 275 S.W.2d 477, 481 (Tex. 1955). *See also City of El Paso v. Donohue*, 352 S.W.2d 713, 716 (Tex. 1962) ("The governing body of a city, in discharging its legislative functions with regard to city planning and zoning, is entitled to consider all the facts and circumstances which may affect the property and occupants of the area involved, as well as the general welfare of the people of the city as a whole.").

4. The Downzoning Takings Analysis

After determining that the "substantially advances" test remained viable to determine a taking

and that Glenn Heights had passed that test, the Court turned to the economic impact elements of the takings formula. The Court, after noting that “the three *Penn Central* factors [are not] the only ones relevant in determining whether the burden of regulation ought ‘in all fairness and justice’ to be borne by the public” (*Sheffield* at 672), began its analysis with those factors, “mindful as we do that our analysis cannot be merely mathematical.” *Sheffield* at 677. Ironically, the Court appears to hold that the downzoning met the *Mayhew/Penn Central* factors, but nevertheless was not a taking due to the fact that the land was still worth more than what Sheffield had paid for it, even after the City’s actions.

a. Economic Impact

The Court agreed that the rezoning “clearly had a severe economic impact on Sheffield,” based on the City’s own evidence that the rezoning reduced the value of the land by 37.5% and the jury’s determination that the land was reduced in value by 50%. *Sheffield* at 677. In the same breath, however, the Court quickly pointed out that these values were still more than what Sheffield paid for the land and that, even at a 50% diminution, the land “was still worth more than four times what Sheffield paid for it.” *Id.* Relying on the jury’s determination of a 50% reduction, the Court held that “while the impact of rezoning on Sheffield was unquestionably severe, it did not approach a taking.” *Id.*

The Court, adhering to its newly-minted *ad hoc* approach to takings, stated that “diminution in value is not the only, or in this case even the principal, element to be considered. It is more important that, according to the jury verdict, the property was still worth four times what it cost, despite the rezoning, because this makes the impact of the rezoning very unlike a taking.” *Id.* The Court clearly focused its attention on the actual investment involved in this case, rather than the potential value of the investment.

b. Lost Profits

One troubling aspect of the opinion is the Court’s willingness to consider lost profits in its takings analysis.

From Sheffield’s perspective as a developer, the economic impact of the rezoning included more than \$8 million in lost profits from the planned development. There was no existing market for the larger lots required by the rezoning, and the evidence was disputed whether one would ever develop. The City argues that evidence of lost profits should be ignored, but we agree with the court of appeals that lost profits are clearly one relevant factor to consider in assessing the value of property and the severity of the economic impact of rezoning on a landowner.

Id.

In this instance, however, Sheffield’s assertion that lost profits should be considered arguably

opened the door for the Court to similarly consider investment profits, which showed that the land after the rezoning was still worth more than four times what the land cost to buy. *Id.*

c. **Investment-Backed Expectations**

The Court also found that Sheffield had reasonable, investment-backed expectations, with which the City had interfered.

[T]he rezoning significantly interfered with Sheffield's reasonable, investment-backed expectations. Sheffield's expectations were certainly reasonable. The PD 10 zoning had been in place for ten years before Sheffield acquired the property, and part of the subdivision had already been developed under that zoning scheme consistent with the City's comprehensive land use plan. Moreover, Sheffield's expectations were not merely those of any landowner, or even those of any developer; rather, Sheffield's expectations were based in large part, and legitimately so, on its efforts to deal with the City. Sheffield met with city officials to present his plans for development and inquire about any contemplated zoning changes, and as the trial court found, its reliance on representations made in those meetings was in good faith.

Id. at 677-78.

It is important to note that the Court has expressly recognized the proposition that a landowner or developer may create, or at least justify, his investment-backed expectations by his course of dealings with city officials and staff. As a result, city officials and staff must be careful in the manner and method in which they provide information to landowners and developers so as not to create an unrealistic expectation that a permit will be issued, a zoning request granted or the status quo maintained.

Once again, however, the pragmatic reality of Sheffield's bargain basement acquisition price gutted a finding of a taking.

[T]he investment backing Sheffield's expectations at the time of rezoning--the \$600/acre purchase price and the expenses of exploring development with the City--was minimal, a small fraction of the investment that would be required for full development. And as with most development property, Sheffield's investment was also speculative, as evidenced by the fact that the property Sheffield acquired had not been developed in the ten years since it was first zoned PD 10.

Id. at 678.

d. Character of the Governmental Action

As previously noted, the United States Supreme Court has held that even if a regulatory action does not render property valueless, a taking may still result after evaluation of the three factors promulgated in *Penn Central*. Those factors are (1) the character of the governmental action, (2) the economic impact of the regulation upon the claimant and (3) the extent to which the regulation has interfered with distinct investment-backed expectations. *Lucas*, 505 U.S. at 1016-20; *Penn Central*, 438 U.S. at 122. In *Mayhew*, the Texas Supreme Court recognized two of these three factors ("the economic impact of the regulation and the extent to which the regulation interferes with distinct investment-backed expectations"), but did not address the third factor – the character of the government action. *Id.* at 935-36.

In *Sheffield*, the Court for the first time addressed this third factor and has now explicitly added the character of the government action into the takings mix. In describing this factor, the Court, citing *Penn Central*, noted that

[i]n engaging in these essentially ad hoc, factual inquiries, the [United States Supreme] Court's decisions have identified several factors that have particular significance. The economic impact of the regulation on the claimant and, particularly, the extent to which the regulation has interfered with distinct investment-backed expectations are, of course, relevant considerations. So, too, is the character of the governmental action. A "taking" may more readily be found when the interference

with property can be characterized as a physical invasion by government, than when interference arises from some public program adjusting the benefits and burdens of economic life to promote the common good.

Sheffield at 672. Applying this factor to the case at hand, the Court once again stated that the rezoning “was general in character and not exclusively directed at Sheffield.” *Id.* at 678. In fact, the Court noted that “[z]oning changes are to be expected, especially in growing communities like Glenn Heights. The rezoning here was typical of such changes.” *Id.*

e. Bad Behavior does not a Takings Make

The Court, in no uncertain terms, believed, as did the Waco Court of Appeals, that the City had acted improperly and unfairly towards Sheffield in its course of dealings. *Sheffield* at 678-79. The process used by the City, however, did not override the results, which the Court found were valid: “[W]hile the City’s conduct is troubling, it must also be said that the benefits the City legitimately sought to achieve from rezoning were not thereby diminished.” *Id.* at 679. On the whole, and once again emphasizing a balancing approach that does not prioritize any particular factor, the Court held that no taking had occurred, in spite of the bad facts surrounding the City’s conduct.

Taking all of these factors into account, the trial court concluded that the rezoning was not unreasonable, and a divided court of appeals disagreed. . . . [W]e do not agree that the rezoning in this case went too far, approaching a taking. Rather, we think that the City’s zoning decisions, apart from the faulty way they were reached, were not materially different from zoning decisions made by cities every day. On balance, we conclude that the rezoning was not a taking.

Id.

So, at the end of the day, the Court concluded in essence that Glenn Heights’ downzoning was a garden-variety, land-use decision with some twists and turns and some bad facts that, on the whole, did not justify saddling the taxpayers of Glenn Heights with a takings judgment when the land still retained substantial value when compared to the actual dollar investment in the land.

5. *The Moratorium Takings Analysis*

The last significant issue that the Court addressed was the validity of the City’s 15-month development moratorium. The Court, while critical of the length of the moratorium and the City’s apparent conduct in using the moratorium to exert pressure on Sheffield to agree to a compromise zoning, found that the moratorium substantially advanced the City’s legitimate governmental interests in allowing an orderly city-initiated rezoning process.

The fact is that during eight months of the moratorium, the City rezoned seven PDs. It took time. There is no evidence that the City meant to unfairly pressure all of the affected landowners. On the contrary, the evidence reflects an orderly, albeit slow,

process toward resolving the differences between the City Council, the Planning and Zoning Commission, and the City's consultant. One can wish that the process had hurried along, but we cannot say that the moratorium did not substantially advance a legitimate governmental purpose.

Id. at 680. In sum, the Court attributed the moratorium to a delay in decision making, which while long, was not unconstitutionally unreasonable, given that it was applied to all properties in the City.

No other aspects of the moratorium make it more like a temporary taking--that is, an unreasonable prohibition in the use of property for a defined period --than a mere delay in decision. We can easily imagine circumstances in which delay was aimed more at one person, or was more protracted with less justification, and more indicative of a taking. But the evidence in this case does not approach that situation.

Id.

VIII.

RECENT DECISIONS

- A. ***Rischon Dev. Corp. v. City of Keller*, 2007 WL 4233561 (Tex.App.-Fort Worth, Nov. 29, 2007, rehearing overruled, Dec. 20, 2007, pet. filed).**

In this case, the Fort Worth Court of Appeals distinguished *Stafford* by holding that a developer that does not clearly lodge objections to development exactions, while accepting the benefits of development approval, consents to any alleged taking. In this matter, a developer purchased land in the City of Keller and applied for a change in zoning to a planned development to develop the heavily wooded, hilly, and creek-burdened property. City staff suggested additional conditions to the planned development to address fire safety, sidewalks, fencing, and the provision of sanitary sewer. The developer did not object to the added planned development conditions and the property was rezoned.

The developer then submitted a plat, which was also approved, but with additional conditions added based on staff comments. Again, the developer did not object to the additional conditions and the plat was approved. The City and the developer then entered into a development agreement, whereby the developer agreed to pay for certain construction costs related to the extension of sewer service, the building of sidewalks, and other agreed upon matters.

Immediately after the agreement was approved, however, the developer had an apparent change of heart and he requested changes to the planned development zoning that, if granted, would have relieved the developer of some of the matters to which it had agreed to in the planned development, the plat, and its development agreement. The City declined to amend the zoning. The developer then sued, alleging a *Stafford*-type taking for the development exactions imposed for water and sewer extensions, fencing, sidewalks, and fire sprinkler systems. The case was tried to the court, which held that the developer had consented to the exactions and, therefore, there was not taking.

The Fort Worth Court of Appeals Court agreed, stating that “[a] landowner may consent to property being taken or damaged without payment of any compensation,” and that “[c]onsent is an act of the will; it need not be written, but may be spoken, acted, or implied.” The developer argued that its case was like *Stafford*, where the Texas Supreme Court had held that a landowner who objects to city-imposed requirements at every opportunity and administrative level does not consent to a taking by exaction even if the landowner waits until after receiving permit approval and after performing the complained-of requirements, and like *Sefzik v. City of McKinney*, 198 S.W.3d 884, 895 (Tex.App.-Dallas 2006, no pet.), where the court rejecting a city’s waiver and estoppel defenses when the developer objected to the condition imposed for plat approval at every administrative level.

The court distinguished those cases by holding that no objections had been lodged in the instant case:

This case is unlike [*Stafford*] and *Sefzik* because [the developer] did not object at “every opportunity” and “every administrative level” to the requirements it now identifies as exactions. To the contrary: [the developer] raised no objections to the requirements of which it now complains until after the City approved the plat and after [the developer] and the City entered into the Developer’s Agreement.

As a result, the court held that the developer had consented to the requirement and that there was not a taking by unconstitutional exaction.

B. *Rowlett/2000 Ltd. v. City of Rowlett*, 231 S.W.3d 587 (Tex.App.-Dallas 2007, no pet. h).

In this case, a developer’s gamble of putting all of its legal eggs into the *Lucas* “denial of all economically viable use” standard did not pay off. Factually, the case concerned a developer who was seeking an “upzoning” from minimum 1-acre lot zoning to a zoning density of approximately 2.57 units per acre. The upzoning request was denied, as was another request for density of 2.19 units per acre, as well as a further zoning change request. While the developer sued under a variety of takings theories, on appeal it only asserted the *Lucas* “total regulatory takings.” In *Lucas*, the U.S. Supreme Court held that “a property owner has suffered a taking when he has been called upon to sacrifice *all* economically beneficial uses in the name of the common good.”

The Supreme Court has recognized that the *Lucas* holding is limited to the “extraordinary circumstance when no productive or economically beneficial use of land is permitted” and “the landowner is left with a token interest.” *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Regional Planning Agency*, 535 U.S. 302, 330, (2002) (citing *Lucas*, 505 U.S. at 1017); *Lingle*, 544 U.S. at 540. The Texas Supreme Court applies the *Lucas* test to state constitutional takings. See *Sheffield* 140 S.W.3d at 671; *Mayhew*, 964 S.W.2d at 935.

Given the severe limitations of the *Lucas* test, it is not surprising that the Dallas Court of Appeals found that the factual record did not support a denial of all value by the City’s refusal to upzone from the minimum 1-acre zoning. The court, while acknowledging that both parties agreed that “due to market conditions and the current zoning, the cost to develop 1-acre lots would exceed the potential for revenue,” nevertheless held that “the absence of profit potential does not equate with impossibility of development.” The court stated that “[w]e do not read *Lucas* to state the value of a property is a function of whether it can be profitably developed.”

The court indicated that profit potential and investment-backed expectations would be relevant to a *Sheffield*-type unreasonable interference takings claim, but noted “that the issue of unreasonable interference is not before us because it was neither preserved for or raised on appeal.” The court further noted that the developer’s arguments on the City’s motives in its zoning decisions were not relevant, once again, due to the tactical choice of limiting the appeal to the *Lucas* “no value” standard, stating that “[e]vidence of this nature might have significance to the determination of whether the ordinance substantially advances a legitimate government interest.”

Given that it only had the “no value” argument before it, and in light of the clear law on what constitutes “no value” for a *Lucas* determination, the court, while appearing to be receptive to other more traditional regulatory takings claim theories, nonetheless held that the record did not support a no value finding.

Appellant further argues the property is valueless because if it can not be developed as a residential subdivision it will remain vacant, with a value equivalent to that of park land. The fallacy of this approach is that it equates the lack of availability of a property for its most economically valuable use with “valueless.” As recognized in the *Lucas* dissent, even when a regulation completely precludes development, a “valueless” finding is implausible. *Lucas*, 505 U.S. at 1076 (Blackmun, J., dissenting). Although the regulation in *Lucas* precluded the development of ocean-front property, the property still retained value. Property owners could enjoy other attributes of the property: they could picnic, camp in a tent, or live on the property in a mobile trailer. The owners also retained other valuable property rights--the right to exclude others and the right to alienate the land. *Id.* In this case, a jury could reasonably conclude the property retained similar residual uses, and therefore retained some value.

While the author is sure that there were sound strategic reasons for the developer to limit its appeal to the *Lucas* claim only (although those reasons are not evident from the face of the appellate

decision), the moral of this story is that establishing a *Lucas* denial of all value claim is an extraordinarily difficult burden.

C. *Hallco Texas, Inc. v. McMullen County*, 221 S.W.3d 50 (Tex. 2006).

A landowner brought an action against the county, contending that county's denial of a variance from an ordinance prohibiting the location of landfills within three miles of a water-supply reservoir caused a taking of property, and asserting a claim under the State Private Real Property Rights Preservation Act. The Supreme Court held that (1) landowner's as-applied takings claim was ripe for adjudication in landowner's prior suit challenging ordinance on its face and, thus, was barred under doctrine of res judicata; (2) court of appeals' unappealed judgment in landowner's prior suit challenging ordinance on its face barred landowner's as-applied takings claim; (3) court of appeals' unappealed judgment in landowner's prior suit challenging ordinance on its face barred landowner's claim under the State Private Real Property Rights Preservation Act; and (4) landowner's as-applied federal takings claim was barred under the full-faith-and-credit statute.

Hallco addressed the frequently asked, but rarely litigated question, of whether a landowner, who loses a regulatory takings challenge to a zoning ordinance, can get a second bite at the litigation apple simply by seeking a variance and then challenging the variance denial. Factually, this case started when, in 1991, Hallco bought 128 acres of land situated less than two miles from Choke Canyon Lake, the reservoir that supplies drinking water to the City of Corpus Christi. It intended to operate an industrial waste landfill on the site. Shortly after Hallco's purchase, the county adopted a resolution opposing use of the site as a landfill due to the hazards posed to the water supply. In 1993 the county enacted an ordinance banning waste disposal within three miles of the lake. Hallco contended that, prior to the ban; it spent more than \$800,000 preparing the site for use as a landfill.

In 1995, Hallco filed a takings challenge to the ordinance in state court. Hallco lost in the trial court and at the court of appeals, both courts of which against Hallco, concluding that it lacked a cognizable property interest in the disposal of waste because the disposal was subject to a state permitting process. Two years later, Hallco requested a variance to the ordinance, arguing that the ban lacked a scientific basis and that it had been singled out for unfair treatment, but the county took no action. Hallco then sued again in state court to challenge the refusal to grant a variance, asserting a state law takings claim, reserving a federal takings claim, and adding a claim under the Texas Private Real Property Rights Preservation Act. Hallco argued it suffered losses exceeding \$20 million.

In a 5-3 ruling, the Texas Supreme Court concluded that the second suit is barred by claim preclusion (also know as res judicata). It did not matter to the Court that the prior suit was a facial challenge and the pending suit was as-applied because the claims both arose out of the same subject matter. The Court also rejected Hallco's argument that its as-applied challenge was not ripe at the time it litigated its facial challenge, concluding that nothing in the ordinance suggested any exceptions would be made, thereby making all claims ripe upon enactment. According to the Court, the "ordinance's wholesale prohibition, the manner in which it would be applied, and the nature of

the damage suffered” were all clear at the time of the prior suit. The variance request was actually little more than a request that the county reconsider its longstanding position.

While expressing sympathy for Hallco’s contention that it was unfairly singled out, the Court observed that Hallco could have argued in the prior suit that the ordinance failed to advance a legitimate government purpose, but it failed to do so. Thankfully, the Court further noted that at least under the federal Constitution, this theory of takings liability is no longer valid in the wake of *Lingle v. Chevron*. The judgment from the prior suit barred re-litigation, regardless whether it was correct as a matter of law.

Finally, relying on the U.S. Supreme Court’s ruling in *San Remo Hotel v. San Francisco* (2005), the majority ruled that res judicata also barred Hallco’s federal takings claim, even though Hallco had attempted to reserve that claim. Although *San Remo* involved issue preclusion (collateral estoppel) and not claim preclusion, the Court concluded that the federal Full Faith and Credit Act applies to both doctrines and requires that the prior state court judgment be given preclusive effect. The dissent disagreed with the majority regarding whether the challenged ban was absolute or allowed for exceptions, and it expressed concern that taking claimants could be “whipsawed” by ripeness requirements. The dissent also contended that while *Lingle* makes clear that the “substantially advance” test is not a stand-alone test for takings liability, it is still relevant to the overall analysis to consider whether the county unfairly singled out Hallco in a way that failed to advance the public interest.

In the end, respect for finality and the need to prevent repetitive litigation prevented Hallco from litigating serial lawsuits against the county. Moreover, the Court observed that county protections for a public water supply should “hardly ever give rise to takings liability.” The case thus serves as a splendid example of how local governments can use arguments based on both procedural fairness and the important objectives underlying land use controls to defeat takings claims.

D. *City of Dallas v. Blanton*, 200 S.W.3d 266 (Tex.App.-Dallas 2006, no pet.h.).

Landowners brought an inverse condemnation action against the city, who implemented a plan to replace old, substandard sewer mains and who told landowners that they would have to reroute their plumbing at their expense from the old main in the back of their properties to the new service lines in the front. The trial court denied the city’s plea to the jurisdiction, and city the appealed. The court of appeals held that (1) evidence submitted by landowners did not establish a claim for physical taking of property, and (2) the city’s relocation of sewer main and refusal to pay to reroute landowners’ plumbing did not constitute a regulatory taking.

On the physical takings claim, the court held that the evidence submitted by the landowners, did not establish a claim for a physical taking of property because there was no claimed damage other than having to pay to reroute the plumbing, and the evidence did not show any physical invasion of the properties or that any physical harm was expected to occur in the future.

On the regulatory takings claim, the court held that City's relocation of sewer main and its refusal to pay to reroute landowners' plumbing did not constitute a regulatory taking because the landowner's own testimony concerning value and expenses showed that the expense to reroute plumbing and to repair any damages would decrease the value of the landowner's properties by only 2.75% to 9%. Further, the landowners did not plead or submit evidence that their properties had been rendered completely useless or deprived of all economically beneficial use. The evidence showed that the landowners' plumbing had to be rerouted because current main was substandard and deteriorating, which was for the betterment of the landowners, and the City's code authorized the City to require landowners to reroute their plumbing at their own expense when necessary to connect to a relocated main.

E. *Sefzik v. City of McKinney*, 198 S.W.3d 884 (Tex.App.-Dallas 2006, no pet.).

Developer's assignees brought an action to challenge a city's condition of subdivision development approval on the payment of certain road construction costs. The trial court granted the city's motion for summary judgment, and the assignees appealed. The court of appeals held that (1) the developer's agreement to pay the city money to build a road as a condition for approval of a subdivision was not, as a matter of law, a waiver of claims for regulatory taking based on city's exaction; (2) sovereign immunity did not prevent assignees from bringing takings claim against the city; (3) interlocutory order granting the city summary judgment on claim for payment of amounts due under facilities agreement did not conclusively established that the agreement and payment did not constitute a taking; and (4) the exaction was not a legitimate regulation of subdivision development pursuant to the city's police power.

F. *City of San Antonio v. El Dorado Amusement Company, Inc.*, 195 S.W.3d 238 (Tex.App.-San Antonio 2006, pet. denied).

The owner of a tavern building brought a takings action against the city after the city denied the owner's application for a non-conforming use to operate a bar with on-premises alcohol consumption. The trial court entered judgment for the owner, and the city appealed. The court of appeals held that (1) the trial court's failure to make additional findings and conclusions was not fatal to the owner's ability to recover for the city's alleged taking; (2) the owner was not required to establish that the taking was for a public use or allege that the city knew the act would cause an identifiable harm; (3) the ordinance did not deny the owner all economically viable use of its property; (4) the evidence was sufficient to support a finding that the ordinance had a severe economic impact on the owner's business and unreasonably interfered with the owner's investment-backed expectations; (5) the damages award for both lost profits and the difference in market value was a double recovery; (6) the evidence was sufficient to award of damages under the income method; and (7) the owner was required to challenge adjustment board's denial of non-conforming use permit application through statutory writ of certiorari proceeding.

IX.

CONCLUSION

Land use law continues to evolve both at the federal and state court level. The ever-present tension between property rights advocates and community rights advocates will continue to provide disputes that our courts must decide. Hopefully, the courts will protect and preserve the rights of municipalities to engage in reasonable land-use planning, while at the same time protecting individual property rights in the manner envisioned by our Founding Fathers.

Concepts like urban sprawl, environmental protection, historic preservation and protecting the quality of life in our neighborhoods, only add vigor to the debate between landowners and government as to when a regulation goes too far and becomes a taking. The answer continues to elude easy definition and will remain at the forefront of the judicial and legislative arenas for the foreseeable future.