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SMALL ISLANDS IN THE SERBONIAN BOG: AN ANALYSIS OF SHEFFIELD V. GLENN HEIGHTS

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**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 Dev. Co., Inc. v. City of
Glenn Heights, Texas*, 2004 WL
422594, at *7 (Tex. March 5, 2004).

I.

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 the ill effects of rapid and intense urbanization.

While each of these issues is 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

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extremely voluminous. Rather, this paper seeks to provide an analysis of the Texas Supreme Court's March 5, 2004 decision in *Sheffield Development Company, Inc. v. City of Glenn Heights, Texas*, 2004 WL 422594 (Tex. March 5, 2004), which is the Court's most recent entry into the "Serbonian Bog." *Sheffield* concerns a number of issues of first impression in Texas, which issues 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 navigating the troubled waters that fill our zoning and land use seas. For ease of reference, a copy of the *Sheffield* decision, as printed off of Westlaw, is attached to this paper as an appendix. Citations to *Sheffield* will refer to the page numbers assigned by Westlaw in the upper right-hand corner of the printout.

II.

The Road to *Sheffield*

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 has historically relied upon interpretations of the federal Takings Clause in construing the Texas takings provision and analyzing 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.2d 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. 1998) ("[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.").

A. Federal Standards

In *Agins v. City of Tiburon*, 447 U.S. 255 (1980), the United States Supreme Court 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].

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Id. at 260. 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 v. South Carolina Coastal Council*, 505 U.S. 1003, 1015-16 (1992). 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*, 505 U.S. at 1016-20; *Penn Central*, 438 U.S. at 122. The United States Supreme Court has consistently reaffirmed the viability of the *Penn Central* standards. See *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 122 S. Ct. 1465, 1478 (2002) (“[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.”).

B. State Standards and the Federalization of Texas Takings Law in *Mayhew*

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).

Mayhew

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 *Brown & Hofmeister, L.L.P.*

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, *Brown & Hofmeister, L.L.P.*

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*.

III.

Sheffield: Small Islands in the Serbonian Bog

A. Case Background and Issues on Appeal

A full description of the facts of this case, as determined by the courts, and the analysis and holdings of the trial court and the Waco Court of Appeals, are set out in detail in the *Sheffield* opinion, and will not be repeated here. *Sheffield* at 4-7. In summary, however, 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.

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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.

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*?

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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?

B. *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.

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C. *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.

A balancing test

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 8 (quoting *City of College Station v. Turtle Rock Corp.*, 680 S.W.2d 802, 804 (Tex. 1984)). 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 8. 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.* at 8 (“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 9 (“[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 9.

D. *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 9. 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.

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*.
- *City of Monterey v. Del Monte Dunes, Ltd.*, 526 U.S. 687 (1999), 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 v. California Coastal Commission*, 483 U.S. 825 (1987), and *Dolan v. City of Tigard*, 512 U.S. 374 (1994), 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 10.

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 10. 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 10 (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 *Agin*s “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 11.

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 11. 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.* Relying on the more deferential standard, the *Brown & Hofmeister, L.L.P.*

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.*

E. *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 10-11. 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.* at 11. 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. (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
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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.”).

Building a record

Nevertheless, local governments should strongly consider creating a record in zoning matters, even if one is not required, to enhance the defensibility of the decision in a takings attack. As *Sheffield* demonstrates, takings cases are fact intensive and typically turn on the facts of the case. The United States Supreme Court has admonished against *per se* rules of takings liability and has repeatedly emphasized that each case must turn on its own particular facts. See, e.g., *Palazzolo*, 533 U.S. at 633 (courts have eschewed “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”) (quoting *Penn Central*, 483 U.S. at 124).

Government losses, however, can occur if the record is deficient. For example, the Justices in *Lucas* took issue with the findings, or lack thereof, of the South Carolina Coastal Commission, in finding a taking in that case, which was premised upon a trial court finding that the challenged regulation rendered the land in question valueless. See *Lucas*, 505 U.S. at 1020 & n.9. Justice Kennedy, concurring in the judgment, expressed “reservations” about the “curious finding” of no value. *Id.* at 1033-34. Justice Blackmun, in dissent, noted that the no value finding was “almost certainly erroneous.” *Id.* at 1043-44. Justice Stevens, also in dissent, stated that in spite of the record, the “land is far from valueless.” *Id.* at 1065 n.3. Justice Souter added that the finding was “highly questionable.” *Id.* at 1076. Additionally, Justice Brennan, in his dissenting opinion in *Nollan*, certainly suggests that the government could have won that case if it had presented its findings more effectively in the administrative record. *Nollan*, 483 U.S. at 863 (suggesting that in future cases the California Coastal Commission “should have little problem presenting its findings in a way that avoids a takings problem”).

To insulate against takings claims, or at the very least provide a defensible record of the decision under attack, the following suggestions are offered.

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1. Make sure that the administrative **staff is made aware of the need for**, and importance of, creating and maintaining **an administrative record** of the zoning and land-use decisions of the planning and zoning commission and city council.

2. **Document the harmful impacts** of the proposed project or land use in a written report. This report, as well as letters and comments from interested persons on the harms of the project or land use, should be placed in the record, along with all comments made at any public hearings or meetings.

3. In addition to the regular minutes taken of such matters, **tape record the various meetings** and hearings and maintain the tape recordings should the need to transcribe them arise.

4. If the matter is one that is likely to be controversial (and potentially result in a takings challenge), **consider having a court reporter** attend and transcribe the public hearings.

5. If the matter is one that is likely to be controversial (and potentially result in a takings challenge), **consider retaining experts** and consultants to develop evidence of the harm that would result from the proposed project or land use. Have the consultants prepare written reports to be included in the record, as well as have the consultants testify at the public hearings on the request.

6. **Coach your planning and zoning commissioners and city council members** ahead of time. Give them written questions to ask both the applicant and the consultants that are designed to elicit evidence and rationales to support a denial.

7. **Prepare draft findings** for the decision-making bodies that help support a decision to deny the project or requested land-use. To the extent possible, each finding should be supported by reference to evidence in the record and should use a cause and effect logic, *i.e.*, because the project will increase traffic at this site by 25%, the increased traffic will be harmful to the existing neighborhood. State your findings with certainty and avoid words such as “could cause,” “might increase,” or “may result in.” If you are conditionally approving a project, make sure that your findings connect each condition to a harmful impact or impacts of the proposed project.

8. **If the record and draft findings are not 100% ready** at the time that the decision-makers are ready to render a decision, strongly suggest that the planning and zoning commission or city council issue a tentative indication only, and **table the matter** until formal findings can be prepared and adopted by the decision-maker that will support the decision and, if needed, incorporate any new evidence. Many times, the decision-makers will not completely follow staff recommendations, or will indicate an intent to make a finding that departs materially from the draft findings and staff recommendations. Sometimes, new evidence is presented that is not included in the draft findings prepared by staff; and sometimes, staff simply has not prepared and presented proposed findings to the decision-maker. If these, or similar instances arise, the

local government should not hesitate to table the decision until it can cross all of the takings “t’s” and dot all of the inverse condemnation “i’s.”

F. *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 9), began its analysis with those factors, “mindful as we do that our analysis cannot be merely mathematical.” *Sheffield* at 12. 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.

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 12. 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.

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

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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.*

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. 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.

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 9. 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 12. 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.*

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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 12-13. 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 13. 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.

G. *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 13-14. 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.

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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. at 14.

IV.

So Where Are We Now, and What Do We Do In The Future?

While the *Sheffield* decision is far from precise in its reasoning and does little to establish workable standards to guide local governments in predicting what is and is not a taking, there are some practical impacts of the decision worth noting.

- For Glenn Heights, the decision threw out a monetary judgment against it, which as of the date of the decision was close to \$770,000.
- For all levels of government in Texas, the opinion reversed the Waco Court of Appeals' decision, which contained a bright-line holding that a 38% diminution in value due to government action was a taking.
- The Texas Supreme Court, while espousing the viability of our Texas Takings Clause, continues in its trend to federalizing our Texas takings jurisprudence by attempting to follow the lead of the United States Supreme Court.
- The standards for determining a taking are now broader than before, with the three *Penn Central* factors (economic impact, investment-backed expectations, and character of the government action) being part of the equation, but not necessarily the entire equation or the determining factors. The Court's balancing test suggests a case-by-case resolution that will take into account a number of factors in an effort to achieve constitutional fairness.
- While courts will continue to test the legitimacy of government actions under the "substantially advances" test, the standard appears to be akin to the rational basis

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standard utilized in equal protection and due process analysis, which is a very deferential standard for cities. While the standard may be more difficult to meet in cases where a landowner is singled out for a regulatory purpose, the Court does not tell us how that standard would be analyzed.

- While creation of a legislative record is not required to justify the legitimacy of government actions, it is highly recommended that governments do so given the *ad hoc* inquiry into takings blessed by the Court.
- Bad facts do not necessarily create a taking. If this case tells us anything, it is that the Takings Clause is a tough nut to crack. Or, to put it another way, if a developer can't win on these facts, when can he win?

All in all, *Sheffield* is a step in the right direction when compared to the dramatic missteps taken by the court of appeals. *Sheffield*, however, provides numerous opportunities for developers to now argue in earnest that lost profits, as well as the representations of city staff and officials, are relevant to a takings analysis. Additionally, downzonings that are not part of a city-wide or comprehensive effort may run a fiercer constitutional gauntlet.

If *Sheffield* has, as the Court proclaims, provided us with “small islands in the bog,” it remains to be seen whether the tenuous footholds the Court has provided will allow Texas cities to successfully navigate the bog and avoid the takings quicksand that lies between.