MUNICIPAL REGULATION OF NATURAL GAS DRILLING IN TEXAS

The University of Texas at Austin
Land Use Planning Law Conference
March 23, 2012

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For years, natural gas drilling was a matter that was significant in many parts of rural Texas; however, with the advent of natural gas drilling in the Barnett Shale in North Texas, gas wells and associated facilities have steadily encroached upon both urban and suburban areas, often leading to vocal demands by residents that local government protect them from the sometimes hazardous effects of natural gas drilling. Indeed, in the last several years, there have been serious concerns raised by residents that gas drilling is unsafe, with benzene and carbon disulfide being poured into the air, cancer clusters in residential subdivisions located nearby gas well pad sites, and unhealthy air quality resulting from such drilling. These concerns have been compounded by fears that the State of Texas is doing little or nothing to address these issues, citing a lack of manpower to monitor thousands of well sites around the State. Cities around the State have recently completed or are in the process of reviewing existing natural gas drilling regulations, including Dallas, Fort Worth, Denton, Flower Mound, Southlake and Arlington. The purpose of this paper is to address the seminal issue in municipal regulation of natural gas drilling: does such regulation amount to an unconstitutional taking of property and if not, how far can a local government go in regulating natural gas drilling? Additionally, while some cities view the siting of gas wells as a zoning matter, others view it as a land use matter not directly associated with traditional zoning concepts. Which approach is more defensible and why? Practical suggestions will be offered about both approaches.

I. The Key Issue: Is Natural Gas Drilling Regulation by Municipalities an Unconstitutional Taking?

The application of oil and gas restrictions to property owners who own the mineral estate, as well as the surface estate, rarely will result in a taking since the applicable test looks at whether the value of the entire property (surface and mineral estates) has been reduced in value so severely as to result in a taking. A finding of a taking, however, may result if regulations deprive separate mineral estate owners of all productive value of their mineral rights. While there are factors that might defeat such a takings claim, such as the owner’s reasonable investment-backed expectations to drill in residentially-zoned areas of a city, the risk of a takings finding in these instances cannot be discounted. A final determination, as in all takings cases, will depend on the particular facts.

A. Basic Principles of Texas and Federal Takings Law

While a takings analysis of any proposed land use regulation affecting oil and gas interests will turn on the particular facts presented, it is helpful to briefly review the basic concepts underlying current takings jurisprudence under both the Texas and Federal Constitutions.

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.”). Consequently, while this paper will utilize Texas takings cases where available, due to the dearth of modern takings cases that address mining regulations, including oil and gas regulations, substantial reliance on non-Texas cases from federal courts and from other states will be necessary for a full discussion of the issues.

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 categories of takings claims: (1) physical occupation, (2) compelled dedications, and (3) regulatory takings. 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, 321-23 (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 a takings category).

The second category of takings claims is found where a 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—encompasses the majority of takings cases and involves the most complex analysis. See Mayhew, 964 S.W.2d at 933 (recognizing regulatory takings as a 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, where 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, 505 U.S. at 1016-20; Penn Central, 438 U.S. at 122. The United States Supreme Court consistently has 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.”).

While there are many cases that discuss whether regulations that prohibit or regulate mining and mineral extraction (including oil and gas drilling) are constitutional, most of them are older cases that do not clearly delineate whether the holding is based on the Takings Clause, and most predate and do not address the Penn Central factors upon which modern takings jurisprudence places so much emphasis. A review of these older cases, nevertheless, is warranted as they provide the historical backdrop for the development of the modern cases that address the uneasy tension between private property rights of mineral owners and the community rights that local governments protect through their powers to zone and regulate land uses.

B. Early Cases

Two California cases reflect the inconsistent approach taken in dealing with ordinances which attempted to limit mining activities in a newly developing urban area. The earliest of these two cases, Ex parte Kelso, 82 P. 241 (Cal. 1905), involved a challenge to a San Francisco ordinance directly prohibiting the operation of a rock or stone quarry within a large portion of the city. In a terse opinion, the court determined that the ordinance “deprives the owners of real property within such limits of a valuable right incident to their ownership, viz., the right to extract therefrom such rock and stone as they may find it to their advantage to dispose of.” Id. While admitting that all property interests are held subject to the valid exercise of the police power, the court deemed this regulation a taking of private property without due process of law. Id. at 242.
Of course, this case found a “taking” under a substantive due process analysis because there was no regulatory takings jurisprudence at the time since the case predated the birth of the regulatory takings doctrine in Pennsylvania Coal v. Mahon, 260 U.S. 393 (1922). The Kelso court used a less restrictive means approach, suggesting that the regulation of quarrying could be validly accomplished if the regulation was more narrowly drawn to deal with the impact of quarrying on neighbors’ rights. The court, however, found that the total prohibition went too far. In response to the public safety claim made by San Francisco—the blasting involved in quarrying—the court recognized the city’s right to regulate blasting, but not its right to protect the public safety through a total ban on quarrying activities. Kelso, 82 P. at 242. Holding that lawful uses may not be prohibited unless they become nuisances, the court determined that the blanket prohibition was overbroad and invalid.

Since the case is not a modern regulatory takings case, the court did not discuss the diminution in value of the owner’s land and whether it could be used for other purposes. To date, however, Kelso has not been overruled by the California Supreme Court. Further, there are other older cases where the courts emphasized that a total prohibition against quarrying or other mining activities would be unconstitutional on substantive due process or takings grounds. See People v. Hawley, 279 P. 136 (Cal. 1929) (public nuisance); Midland Elec. Coal Corp. v. Knox County, 115 N.E.2d 275 (1953); Bartsch v. Ragonetti, 207 N.Y.S. 142 (N.Y. Sup. Ct. 1925), aff’d, 210 N.Y.S. 825 (N.Y. App. Div.1925); Cordts v. Hutton Co., 262 N.Y.S. 539 (N.Y. Sup. Ct. 1932), aff’d, 269 N.Y.S. 936, aff’d, 195 N.E. 124 (1934); East Fairfield Coal Co. v. Booth, 143 N.E.2d 309 (Ohio 1957).

Fewer than 10 years after Kelso, the California Supreme Court and the United States Supreme Court reached a contrary ruling in the landmark case of Hadachek v. Sebastian, 132 P. 584 (Cal. 1913), aff’d, 239 U.S. 394 (1915). The facts were very similar to Kelso, supra. The City of Los Angeles enacted an ordinance prohibiting the operation of a brickyard or brick kiln in specified areas of the city. Many years prior to the adoption of the ordinance, Hadachek purchased the land in question because it contained valuable deposits of clay. He operated a brick kiln on the premises, which was subsequently rendered unlawful on the date the ordinance became effective. The total area of Los Angeles at that time was 107.62 square miles, 3 square miles of which lay in the “no-kiln” zone. At the time the ordinance was adopted, the district was sparsely populated. Numerous other brick kilns in the city were not covered by the ordinance.

The California Supreme Court treated the case as a classic substantive due process attack on the wisdom of the ordinance. Hadachek, 132 P. at 586. Finding that the police power clearly encompassed the right to protect the public from the noxious effects of brick kilns and opting for a deferential scope of judicial review of such police power actions, the California Supreme Court had no difficulty upholding the validity of the ordinance:
Whether or not this trade, however strictly the manner of its conduct may be regulated, can be pursued at all in a residential district without causing undue annoyance to persons living in the district, is certainly a question upon which reasonable minds may differ. If this be so, the propriety of entirely prohibiting the occupation within such districts is one for the legislative determination. The courts will not substitute their judgment upon this issue for that of the legislative body.

Id.

When the case reached the United States Supreme Court, however, the issue of the diminution in value of the owner’s business and land arose for the first time. The Court reiterated the owner’s allegations that, as a situs for a brick kiln and clay mine, the site was worth approximately $800,000, but as a residential district, was worth not more than $60,000. Notwithstanding this fact, the Supreme Court focused on a traditional substantive due process analysis. Specifically, the Court addressed whether a limited prohibition against brick kiln operators fell within the city’s authority to regulate to protect the public health, safety, morals or general welfare, holding that the police power goes beyond regulating nuisances per se, and that even lawful businesses may be outlawed to prevent the serious inconvenience to the neighbors of the brick kiln.

Importantly, the Supreme Court did not treat the prohibition against brick kilns as the functional equivalent of a prohibition against mineral extraction, finding that Hadachek was still free to mine all the clay he wanted. While the record was clear that the economic realities of the brick-making business made it impossible to compete if kilns were not at the mine site, this concern was held insufficient to defeat the public interest in protecting the public health, safety, morals or general welfare. The Court, however, specifically declined to answer the question of whether a total prohibition of clay mining in areas containing clay deposits would be unconstitutional.

One of the first major state court decisions dealing with the impact of a comprehensive zoning ordinance prohibiting mining uses in residential zones was West Brothers Brick Co., Inc. v. City of Alexandria, 192 S.E. 881 (Va. 1937). Factually, West Brothers owned an 18-acre tract located near the center of the city, bounded on one side by railroad right-of-way. West Brothers had purchased a lot in 1927 for $47,000, intending to use it as a source of clay for its brick-making operations. In 1931, the City of Alexandria adopted a comprehensive zoning ordinance which placed the bulk of the 18-acre track in a residential district where mining operations were prohibited. After reviewing the expert testimony regarding the value of the clay deposits and the externalities that would be caused by allowing mining, the court emphasized the nuisance-like conditions that would attend both the mining and post-mining phases of the development. The key to the court’s decision upholding the constitutionality of the zoning ordinance was its very deferential scope of judicial review. Applying the fairly debatable test, and giving a reasonably expansive view of the scope of the police power, the court concluded: “We have an
expert city planner with twenty years’ experience; we have the judgment of the Zoning Commission; we have the judgment of the mayor and city council. . . . It would be extraordinary, indeed, if their conclusions upon questions of fact were so utterly wrong as not to be debatable.” Id. at 886.

The Township of Hempstead’s regulation of sand and gravel operations led to the United States Supreme Court’s only major land use decision between 1928 and 1974. Town of Hempstead v. Goldblatt, 189 N.Y.S.2d 577 (N.Y. Sup. Ct. 1959), aff’d mem., 196 N.Y.S.2d 573 (N.Y. App. Div. 1959), aff’d, 172 N.E.2d 562 (N.Y. 1961), aff’d, 369 U.S. 590 (1962). The mining operator had continually mined gravel from a pit on a 38-acre tract since 1927. In 1945, the Town of Hempstead adopted an ordinance establishing several performance standards for gravel pits, including fencing and yards around the edge and limits on the slope of the excavation. In 1958, the Town enacted a second ordinance which prohibited any excavation below the water table and required owners of water-filled pits to fill them in. Due to the continuous excavation, by 1958, the pit had become a 20-acre lake with an average depth of 25 feet. In addition, the Town had undergone substantial residential development so that 1800 persons resided within two-thirds of a mile from the pit and four schools, with over 4500 students, were located in the immediate vicinity. The Town filed an action seeking to enjoin further excavations and enforce the reclamation provisions of the ordinance.

The miner’s basic defense was that the ordinance was unconstitutional on either substantive due process or takings grounds. The New York courts emphasized the public safety concerns of the town regarding the unfenced lake. In a brief Supreme Court decision, the Court relied in large part on its rationale in Hadacheck that there was no constitutional right to continue an admittedly beneficial use when the local legislative power properly exercises its police power. Goldblatt, 369 U.S. at 592. The Court further concluded that depriving the owner of the most beneficial use of his land was also not per se unconstitutional. Id. at 592-93. Importantly, the Supreme Court rejected applying a separate test to mining operations. In reviewing the safety objectives of the ordinance, both in terms of the deepening prohibition and the prohibition against expanding the lake by further excavations, the Court applied a fairly deferential scope of judicial review. If the ordinance were reasonable under any set of facts, it would be upheld.

The Supreme Court summarily addressed the taking claim by merely referring to the large loss imposed on the brick kiln operation in Hadacheck. The Court also found no evidence in the record to show how much of a loss would be suffered by the mining operator, even though future excavation of sand and gravel was prohibited. The Court noted that “[h]ow far regulation may go before it becomes a taking we need not now decide, for there is no evidence in the present record which even remotely suggests that prohibition of further mining will reduce the value of the lot in question.” Goldblatt, 369 U.S. at 594. Thus, the Court avoided the very real possibility that not only would the regulation diminish the value of the land to zero, but the regulation would impose substantial reclamation costs on the owner. Nonetheless, Goldblatt
stands for the proposition that prohibitions against pre-existing mining operations do not necessarily violate either the Due Process or Takings Clause.

At most, these early cases reflect a basic divergence in views regarding how land use regulations affect mineral operations. *Kelso* and similar cases emphasize the locational peculiarities of regulating mining. The minerals are not movable and if a mining use is prohibited, the minerals will not be developed at all. On the other hand, *Hadacheck* and *Goldblatt* do not treat mining operations any differently than other commercial ventures when it comes to land use regulation. This divergence continues in various forms to the present as the courts have struggled to deal with land use regulations affecting mineral development.

C. Moving into the Modern Era: After *Mahon*, but before *Penn Central*

There are numerous cases, decided after *Mahon* but before *Penn Central*, that have upheld zoning ordinances that have regulated mining activities, including prohibiting the drilling for oil and gas in all or certain areas within a municipality. In *Cromwell-Franklin Oil Co. v. Oklahoma City*, 14 F.Supp. 370 (D. Okla. 1930), a property owner challenged a city ordinance as being unreasonable, confiscatory and arbitrary because it permitted the drilling of oil wells in another more densely populated zone and forbade such operations on the owner’s tract. The property at issue was farmland and largely vacant, although it included some expensive and highly developed residential property and other property potentially suitable for such development. Nevertheless, the court upheld the zoning prohibition in dispute.

In *K. & L. Oil Co. v. Oklahoma City*, 14 F.Supp. 492 (D. Okla. 1936), the court upheld the validity of provisions of the same municipal zoning ordinance prohibiting drilling for oil within the limits of the municipality except in a certain zone, and denied the contention that it was unjust to the owner of a 40-acre tract which constituted a portion of that mentioned in the preceding case, and which was as yet unimproved and in the heart of the same residential district. The court said that the ultimate test, in a case where a municipality allowed oil drilling in one zone and prohibited it in another, was "[[taking the situation as it now exists, can reasonable men honestly differ as to the zoning of this tract for oil? If they can, then the council and not the court is the one to determine the question." *Id.* at 493.

In *Wood v. City Planning Comm’n*, 279 P.2d 95 (Cal. 1955), an appeal was taken from a judgment ordering the establishment of an oil-drilling district pursuant to the city's zoning ordinance. The plaintiff contended that since he had complied with the requirements for applying for the establishment of an oil-drilling district, the rezoning of his property to such district was mandatory. The court of appeals disagreed, noting that the authority to authorize drilling in a previously prohibited zone was discretionary with the city. The court further rejected the plaintiff’s argument that the municipality could not absolutely prohibit oil drilling, but could only impose reasonable regulations upon such drilling. The court held that cities had the unquestioned right not only to regulate the drilling and operation of oil wells, but to
entirely prohibit their operation within certain areas and districts, if reason appeared for doing so.

A city zoning ordinance prohibiting exploration for oil and gas within areas classified as residential was held in *Blancett v. Montgomery*, 398 S.W.2d 877 (Ky. 1966), to be valid. The court rejected the argument that a state statute, declaring it to be the state’s public policy to encourage maximum recovery of oil and gas from all deposits which might be discovered, pre-empted the authority of municipalities under their police power to regulate oil and gas activities within their city limits. The Kentucky Supreme Court held that reasonableness is the test of the validity of an exercise of the police power, and that a valid exercise of the police power is not a taking of property.

In *Friel v. County of Los Angeles*, 342 P.2d 374 (Cal.1959), the court addressed whether a county could prevent drilling for oil and gas in a residential zone. Affirming a judgment in favor of the county, the court stated that the county unquestionably had the right to regulate drilling for and operation of oil wells and to prohibit their drilling if such prohibition was reasonably necessary for the protection of the public health, safety and welfare. It was pointed out that there was no evidence that oil drilling conducted on contiguous property, located in a zone where drilling was permitted, was draining oil from beneath the plaintiff’s property; and it was further stated that the mere fact that plaintiff’s property was adjacent to a district which permitted drilling for oil did not, in and of itself, violate equal protection.

In contrast, however, there are cases where a zoning ordinance prohibiting oil and gas wells within municipal limits has been held invalid. In *Pacific Palisades Assoc. v. Huntington Beach*, 237 P. 538 (Cal. 1925), the owner of land brought an action to enjoin a municipality from enforcing the provisions of a zoning ordinance prohibiting him from erecting derricks, installing machinery and drilling oil wells in a residential district. It was alleged that the municipality permitted the drilling of oil wells and the production of oil in other parts of the city more densely populated than the vicinity of the owner’s premises, in such a manner as to constitute an unfair scheme of zoning. The court reversed a judgment for the city and held that the owner should be allowed to establish, if he could, the unreasonableness and discriminatory character of the ordinance.

In *North Muskegon v. Miller*, 227 N.W. 743 (Mich. 1929), a zoning ordinance prohibiting the drilling of an oil well in an area zoned residential was held to be invalid as applied to those seeking to drill, where it appeared that the municipality itself had shown its lack of regard for the ordinance by using a portion almost adjacent to that in dispute as a dumping ground for garbage and refuse. The property consisted largely of marshy lowlands which were unfit for the purposes to which they were limited by the ordinance, and there was testimony that there had been no material expansion of residential activities or increases in values of property for residence purposes in the area over a long period of years. The evidence as a whole tended to show, if not a
deterioration, a tendency toward use for purposes other than residences of the area immediately surrounding the proposed drilling area.

In *Clouser v. Norman*, 393 P.2d 827 (Okla. 1964), the court found that an ordinance zoning the defendant’s property for residential use only, on which oil drilling was not permitted, was unreasonable, arbitrary and void as to the particular tract and others similarly situated, since the evidence showed that the area was not densely populated, the only persons on the entire tract being the defendant and his family, that the only improvements belonged to him, and that the development of the tract would not affect other areas of the city. As applied to the particular tract, the ordinance was found to have no reasonable relation to the public health, safety or general welfare.

Drilling prohibitions imposed on a tract from beneath which oil is being drained without compensation by the operation of other wells in the same general area may also constitute a taking. In *Braly v. Board of Fire Commr’s*, 321 P.2d 504 (Cal.App. 1958), the petitioners contended that because oil was being drained from under their property by other producing wells in the vicinity, the provisions of a city ordinance that prohibited the drilling of an oil well on their property constituted a taking. The court was of the opinion that the future possibility of the petitioners joining their property to contiguous property owned by the city, should the city at some time drill for oil on its property, afforded no adequate means of protection or substitute for their right to extract oil from their property, and therefore the ordinance in question was unconstitutional and invalid.

D. Modern Mining Cases: After *Penn Central*

A modern approach to dealing with zoning and rezoning decisions that prohibit mining activities on lands where valuable minerals are located is illustrated in *Pompa Construction Corp. v. City of Saratoga Springs*, 706 F.2d 418 (2d Cir. 1983). A 68-acre parcel of land was located between two existing stone quarries. Prior to 1971, quarrying was permitted as of right on the 68 acres. That year, the city amended its comprehensive development plan and zoning ordinance designating the 68-acre tract in a conservancy district. Permitted uses, which still required site plan review, included single family residential and farming. Uses allowed after the issuance of a discretionary permit included cemeteries, private recreation facilities, cultural facilities and drive-in theaters. The purchase of most of the parcel for approximately $150,000 by the owners took place after the 1971 change was in effect. The owners brought a rezoning petition to the planning commission which recommended its adoption. The city council chose to deny the rezoning request.

In reviewing the validity of the existing zoning, the court looked to see if the restrictions were consistent with the city’s concerns as expressed in its comprehensive plan. The court found that the preservation of open space and discouraging premature development are clearly substantial public purposes which can be achieved through a zoning ordinance.
The owners also brought a takings claim, asserting that they would suffer a substantial loss if they were not allowed to quarry stone. The court noted that the raw land value was somewhere between the owners’ estimate of $34,000 and other estimates ranging to $68,000, which did not take into account potential uses for agricultural or residential development. While the loss would be substantial, in the range of 50-66%, two factors militated against finding that a taking had occurred. The first was that the purchase took place after the zoning ordinance prohibiting quarrying was in effect. The second was that the Supreme Court had found similar, if not greater, losses acceptable in *Hadachek*.

An important case is *Keystone Bituminous Coal Ass’n v. DeBenedictis*, 480 U.S. 470 (1987), which held that a regulation that required 50% of coal beneath certain structures kept in place to provide surface support was not a taking given the public purpose for the regulation and the fact that the coal that was to remain in place was only 2% of the total coal estate owned by the petitioners. Id. at 485. Pennsylvania recognizes three separate estates in land—the mineral estate, the surface estate and the support estate. While the petitioners argued that the regulation took the entirety of the support estate, the Court, under the “parcel as a whole” rule, rejected this argument:

> Because our test for regulatory taking requires us to compare the value that has been taken from the property with the value that remains in the property, one of the critical questions is determining how to define the unit of property “whose value is to furnish the denominator of the fraction.” In *Penn Central* the Court explained:

> “‘Taking’ jurisprudence does not divide a single parcel into discrete segments and attempt to determine whether rights in a particular segment have been entirely abrogated. In deciding whether a particular governmental action has affected a taking, this Court focuses rather both on the character of the action and on the nature of the interference with rights in the parcel as a whole—here the city tax block designated as the ‘landmark site.’”

Similarly, in *Andrus v. Allard*, we held that “where an owner possesses a full ‘bundle’ of property rights, the destruction of one ‘strand’ of the bundle is not a taking because the aggregate must be viewed in its entirety.” Although these verbal formulations do not solve all of the definitional issues that may arise in defining the relevant mass of property, they do provide sufficient guidance to compel us to reject petitioners’ arguments.

The parties have stipulated that enforcement of the . . . 50% rule will require petitioners to leave approximately 27 million tons of coal in
place. Because they own that coal but cannot mine it, they contend that Pennsylvania has appropriated it for the public purposes described in the Subsidence Act.

This argument fails for the reason explained in *Penn Central* and *Andrus*. The 27 million tons of coal do not constitute a separate segment of property for takings law purposes. Many zoning ordinances place limits on the property owner’s right to make profitable use of some segments of his property. A requirement that a building occupy no more than a specified percentage of the lot on which it is located could be characterized as a taking of the vacant area as readily as the requirement that coal pillars be left in place. Similarly, under petitioners’ theory one could always argue that a setback ordinance requiring that no structure be built within a certain distance from the property line constitutes a taking because the footage represents a distinct segment of property for takings law purposes. There is no basis for treating the less than 2% of petitioners’ coal as a separate parcel of property.

* * *

When the coal that must remain beneath the ground is viewed in the context of any reasonable unit of petitioners’ coal mining operations and financial-backed expectations, it is plain that petitioners have not come close to satisfying their burden of proving that they have been denied the economically viable use of that property. The record indicates that only about 75% of petitioners’ underground coal can be profitably mined in any event, and there is no showing that petitioners’ reasonable “investment-backed expectations” have been materially affected by the additional duty to retain the small percentage that must be used to support the structures protected by § 4.

*Id.* at 497-99 (citations omitted). This parcel as the whole rule will be critical in determining whether a restriction prohibiting or restricting oil and gas drilling will be deemed a taking.

In *Bernardsville Quarry, Inc. v. Borough of Bernardsville*, 608 A.2d 1377 (N.J. 1992), the New Jersey Supreme Court upheld an ordinance as not constituting a taking where the ordinance restricted the depth below which property could be quarried. The court found that the property in question still retained value, even if property could not be further quarried:

The trial court here found that the property could continue to be used for the production of blacktop and concrete and could generate “significant revenue” as the site of a telephone tower, and might even be used for an office complex. Furthermore, [plaintiff’s] expert testified that the property could be used for residential purposes. [Plaintiff’s] property
clearly retains substantial value and may be put to other economically-viable uses.

Iid. at 1387.

The court also rejected the plaintiff’s claim that its investment-backed expectations had been taken by the regulation:

One aspect of the relevance of investment-backed expectations as a factor relates generally to “whether the claimant reasonably relied to her economic detriment on an expectation that the government would not act as it did—that is, would not deprive her of the property at issue.” Reliance is not necessarily the focus of the test, but rather whether the regulation permits the claimant to make reasonable use of his or her property.

In the present case, plaintiff has not demonstrated that its expectation that it would be able to quarry over 10,000,000 metric tons without being subject to significant governmental restrictions was itself realistic or reasonable. A quarrying operation is one that generally can cause severe impacts on surrounding properties and the environment, and significantly affect the public interest. . . . As recently observed by the United States Supreme Court: “It seems to us that the property owner necessarily expects the use of his property to be restricted, from time to time, by various measures newly enacted by the State in legitimate exercise of its police power. . . .” Thus, the borough in the legitimate exercise of its police powers could reasonably be expected to require needed restrictions that would control the continued quarry operations of the property in the public interest.

Another aspect of the test for investment-backed expectations addresses the actual connection between the investment and the specific regulatory interference with the use of property. That focus is on the particular interest that is purchased to determine the scope of the investment and the effect of the regulation on that investment. The evidence of record fails to establish a definite economic nexus between [the plaintiff’s] investment and the restrictions on the quarry. It is true that [the plaintiff’s] purchase of the property was undoubtedly motivated by the expectation of engaging in a lucrative quarry operation. However, [the plaintiff] did not merely acquire a quarry—it purchased a large tract of land that had been used as a quarry, as well as for several other commercial and economic purposes. . . . The evidence does not establish that the investment in the property made by [the plaintiff] was referable only to the acquisition of a quarry as such or based exclusively on [the plaintiff’s] anticipated quarrying operations alone.
Il. at 1387-88 (citations omitted).

The court also applied the parcel as a whole rule to reject the plaintiff’s argument that its mineral estate had been taken, even if the surface estate retained valuable uses under the regulatory scheme at issue:

[The plaintiff] further contends that its economic loss is compensable because it has been deprived of a separate estate or interest in property. It asserts that the prohibition against the removal of stone from its property is the loss of a distinct property interest. . . .

The issue was . . . considered by the Supreme Court in Keystone. There, it noted, Pennsylvania property law recognizes three separate and distinct estates in land—the surface, the mineral, and the right of surface support. The Court ruled that it would not be bound by state law property distinctions in determining the extent to which a regulation economically affects a landowner. “It is clear, however, that our takings jurisprudence forecloses reliance on such legalistic distinctions within a bundle of property rights.”

* * *

The Supreme Court rejected a similar claim by a property owner concerning the right to continue to quarry and remove materials from the land. In Goldblatt v. Town of Hempstead, supra, the Supreme Court observed that when addressing the constitutionality of a regulation, it is not “of controlling significance that the ‘use’ prohibited here is of the soil itself as opposed to a ‘use’ upon the soil.” In any event, [the plaintiff] did not purchase mining rights or mineral rights in property as such. Rather, it purchased a tract of land that could be put to a variety of uses that included the quarrying of stone.

Il. at 1389 (citations omitted).

In Machipongo Land and Coal Co., Inc. v. Commonwealth of Pennsylvania, 799 A.2d 751 (Pa. 2002), the Pennsylvania Supreme Court reversed and remanded a lower court decision that had found a taking based upon a regulation that prohibited surface mining on land owned by the plaintiff coal company. The court began its takings analysis by rejecting the coal company’s argument that the restriction be viewed the same as a physical taking of property:

If a regulation authorizes a physical invasion of private property, no matter how slight, the U.S. Supreme Court has consistently concluded that a taking has occurred. Clearly, “[a] taking may more readily be found when the interference with property can be characterized as a physical invasion by government[.]”
In this case, we are not unsympathetic to the claim of [the coal company] that the regulation “had the same effect as if the Commonwealth had mined the coal and hauled it away.” The reality is, however, that the regulation did not authorize the removal of any coal or any physical invasion of or access to their land. Indeed, as this Court explained in Commonwealth v. Plymouth Coal Co., requiring landowners to leave coal in the ground is not the equivalent of an appropriation of that coal. In holding that the statute at issue in Plymouth Coal did not constitute a taking, we said:

“The coal itself is not taken. The property right affected by the statute is not ownership, but use, of the material thing—the right to mine it out. Nor does the state take that right for public use. The act does not transfer the right to mine out the coal from the owner to some one else, for the public benefit, but prohibits that right from being exercised by anyone. . . .”

Id. at 763 (citations omitted).

The court also rejected the argument that the coal company’s mineral estate should be viewed as a separate property interest for takings analysis, rather than simply as part of the bundle of sticks that comprised the coal company’s interests in the land:

[T]here is a threshold question, frequently referred to as the “denominator problem,” which must be answered: what is the parcel against which the takings tests are applied? For if we define the area broadly, almost no government action—no matter how intrusive—will be found to be a taking. Similarly, if we define the land too narrowly, virtually all government action that affects private property will be a taking that requires compensation and government will be inhibited from enacting necessary legislation.

Because property is conceptualized as a “bundle” of “property rights,” courts have had to struggle with what has been referred to as "severance" issues in defining the relevant parcel. In other words, the courts have been called upon to consider whether some of the property rights in the bundle may be severed from the others and viewed separately as the relevant parcel. Severance issues have involved the following: (1) the horizontal, physical division of property—is the relevant parcel all the land in a given geographic area that one owns or some smaller portion of that acreage; (2) the vertical division of property—can the parcel be divided among air rights, surface rights, and mineral rights;
or (3) the temporal division of property—can the property be viewed in discrete temporal units.

* * *

[T]he U.S. Supreme Court has not instructed conclusively how the denominator problem should be resolved. However, that Court has refused to allow: vertical severance of the mineral estate in Keystone; vertical segmentation of air and surface rights in Penn Central; or temporal division of property in Tahoe-Sierra. Thus, in this case, the relevant parcel cannot be vertically segmented and must be defined to include both the surface and mineral rights.

*Id.* at 765-68 (citations omitted).

Since the lower courts had used the wrong property interests to determine whether a taking had occurred, the court remanded the case for an analysis under the Penn Central factors. *Id.* at 771.

E. Texas Cases

No discussion whether oil and gas drilling regulations in Texas would be a taking would be complete without a reference to Texas cases that address the issue. Unfortunately, there are no Texas cases (at least of recent vintage) that provide any substantive guidance on the issue. Texas, with its rich oil and gas history, has certainly recognized the value and importance of mineral rights. In fact, the Texas Supreme Court in *Marrs v. Railroad Comm’n*, 177 S.W.2d 941 (Tex. 1944), noted as follows:

> Under the settled law of this State oil and gas form a part and parcel of the land wherein they tarry and belong to the owner of such land or his assigns; and such owner has the right to mine such minerals subject to the conservation laws of this State. Every owner or lessee is entitled to a fair chance to recover the oil or gas in or under his land, or their equivalent in kind, and any denial of such fair chance amounts to confiscation.

*Id.* at 948 (citations omitted). *See also Imperial American Resources Fund, Inc. v. Railroad Comm’n*, 557 S.W.2d 280, 286 (Tex. 1977) (recognizing "[t]he basic right of every landowner or lessee to a fair and reasonable chance to recover the oil and gas under his property. . . .")]. Even though Texas cases have recognized that Texas municipalities possess the authority to enact drilling ordinances as an exercise of the police power (*see Unger v. State*, 629 S.W.2d 811, 812-13 (Tex.App.-Fort Worth 1982, writ ref’d) and cases cited therein), there is little discussion in those cases about the extent to which local governments may regulate gas (or oil) drilling inside a city.
Later cases, however, have recognized that the right to recover oil or gas under one’s land is not unlimited and is subject to reasonable regulation.

While [the plaintiffs] are correct that it is an elementary rule of property that a landowner is entitled to an opportunity to produce his fair share of oil from a common reservoir, this rule is qualified by both the rule of capture and the Commission’s authority to prevent waste. In Corzelius v. Harrell, it was held that the rule in this state recognizes the ownership of oil and gas in place, and gives to the lessee a determinable fee therein. It is also held that such rule should be considered in connection with the law of capture, which is recognized as a property right, and both rules are subject to regulation under the police power of this state. Thus, the right to be protected against confiscation under the Commission’s oil and gas rules is not unconditional or unlimited.

The business of producing, storing and transporting oil and gas is a business affected with a public interest and subject to regulation by the state.

Texaco, Inc. v. Railroad Comm’n, 583 S.W.2d 307, 310 (Tex. 1979) (citations omitted). See also R. D. Oil Co. v. Railroad Comm’n, 849 S.W.2d 871 (Tex.App.-Austin 1993, no writ) (“The right of an entity to conduct oil and gas activities in the state is not an absolute right, but a qualified right subject to reasonable restriction by the state.”); Trail Enterprises, Inc. v. City of Houston, 957 S.W.2d 625, 635 (Tex.App.-Houston [14th Dist.] 1997, writ denied) (same); Shelby Operating Co. v. City of Waskom, 964 S.W.2d 75, 83 (Tex.App.-Texarkana 1998, writ denied) (same).

There are also cases that have upheld the authority of Texas cities to prohibit or regulate oil and gas drilling, and which have upheld such regulations as constitutional. See Shelby Operating Co., 964 S.W.2d at 83; Unger, supra; Helton v. City of Burk Burnett, 619 S.W.2d 23, 24 (Tex.Civ.App.-Fort Worth 1981, writ ref’d n.r.e.). See also Mills v. Brown, 309 S.W.2d 919, 925-26 (Tex.Civ.App.-Amarillo 1958), rev’d on other grounds, 159 Tex. 110, 316 S.W.2d 720 (1958). These cases, however, are rudimentary at best, and contain no discussion of the takings factors that support the conclusion of no taking.

F. Bringing it All Together: Where are We Now in Texas?

Assuming that Texas continues in its effort to follow federal law relative to what constitutes a taking, the following can be stated regarding any regulations that a municipality might adopt regulating oil and gas drilling within its corporate limits:

If the property owner owns the entire estate (surface rights and mineral rights), a prohibition on oil and gas well drilling would most likely not result in a taking since it is unlikely that the diminution in value of the property (taken as a whole) caused by the prohibition would be severe enough to result in a taking. As many of the cases
discuss, if the property still retains value (even with the mining prohibition), there will be no taking. Given the value of land in most municipalities for surface development, any owner of the fee will not be able to successfully mount a takings challenge.

If there are mineral estate owners, without surface rights, the analysis becomes more difficult. Clearly, a regulation that prohibits a mineral rights-only owner access to his minerals may deprive the owner of all productive use of his mineral rights. Factors that would need to be considered in determining whether a taking occurs would be the reasonable investment-backed expectations of the mineral owner and whether state law provides the owner with a reasonable expectation to harvest those minerals. While the right to access mineral interests in Texas is not absolute, Texas courts, if faced with this question, probably would hold that such a right exists.

While it could be argued that mineral extraction is a regulated industry that should expect, from time to time, that laws will be passed that would prohibit or severely limit the ability of landowners in cities to drill for oil and gas, there are no cases that directly hold that this argument would prevail. Pragmatically, unless there are oil and gas companies that hold current mineral rights in a city and in sufficient quantities to make the extraction process economically feasible on a large scale, this may not be a real threat. In general, in the cases reviewed above there were very few property owners who brought suit that were not mining companies or oil producers. The risk of a taking, however, of mineral estate-only owners, cannot be discounted.

In sum, absent a substantial mineral interest-only property owner, a municipality’s risk of a finding of a taking is small. If, however, there are separately owned mineral estates, of sufficient size to make oil and gas production economically feasible, then a municipality must address those situations, on a case-by-case basis, to evaluate any potential takings exposure.

II.

How and To What Extent May a Municipality Regulate Gas Drilling?

When considering the adoption of an ordinance to regulate oil and gas drilling (and particularly variances from the terms of such an ordinance), a city council inevitably asks whether it should (i) consider gas wells to be a zoning issue (that is, either rezone property for such a use, or consider a specific/special/conditional use permit to allow such a use in certain zoning districts), or (ii) utilize a board or commission, such as the Zoning Board of Adjustment, as an oil and gas board of appeals to consider such variances. It is the author’s opinion that traditional zoning review by a city’s planning and zoning commission and thereafter the city council of well applications and setback variance requests, utilizing zoning procedures as the mechanism by which to review such variance requests, is not desirable. Indeed, as detailed below, we strongly recommend against this approach because (i) it in all likelihood will lead to litigation against the city for unconstitutional takings of property; (ii) the cities in North Texas that utilize zoning procedures to review applications for
wells and variance requests have uniformly approved all applications and variances and consequently, the use of zoning procedures is untested and of little or no value when considering a city’s legal options and potential liability; and (iii) if zoning procedures are adopted, the city council may be required to approve any setback variance request by a super-majority vote in those cases where the planning and zoning commission denied a variance, thus requiring the city council to choose between siding with residents who invariably will oppose the setback variance or unconstitutionally denying a subsurface landowner his/her rights to mine or otherwise exploit the mineral estate.

A. Traditional Euclidian Zoning Approach versus Board of Appeals/Board of Adjustment Approach

Several municipalities in North Texas utilize zoning procedures when considering gas well applications and well setback variances. By “zoning procedures,” it is meant that applicants apply for a rezoning of property or for a specific use permit (often called special use or conditional use permits) to allow for the extraction of minerals from the subsurface (or mineral) estate. Thus, any application or well setback variance request would be subject to notice provisions similar to standard zoning cases (200-foot rule notification and newspaper notice), with a public hearing before the planning and zoning commission followed by a public hearing before the city council. Further, as in all zoning cases, any application or variance request denied by the planning and zoning commission would require a super-majority vote (75%) by the city council to be approved. See Tex. Local Gov’t Code § 211.006.

While cities that utilize the zoning model appear to be fairly evenly split whether a well site requires a zoning classification change or simply a specific use permit, in none of those cities has that process been challenged since every (or almost every) application for a well ultimately has been approved. Additionally, in light of a 2004 Texas federal court case, it is clear that a zoning ordinance that goes too far in regulating land use may constitute a taking of property in violation of the Constitution. In Vulcan Materials Co. v. City of Tehuacana, 369 F.3d 882 (5th Cir. 2004), the Fifth Circuit addressed land use/takings issues in the zoning context. The City of Tehuacana, a small city (300-350 residents) located in Limestone County south of the Dallas/Fort Worth Metroplex, adopted an ordinance in 1998 that prohibited certain mining activities inside the city limits due to property damage, smoke, dust and loss of springs and water wells caused by quarry blasting. Id. at 884-85. In this instance, the city prohibited mining on 48 acres inside the city’s corporate limits, but mining was allowed on 250 acres on land adjacent to the city. Vulcan Materials Company (“Vulcan”) owned a mineral lease, but not the surface estate, to quarry minerals and sued the city in federal district court since it could not mine limestone inside the city limits. Id. at 885. The Fifth Circuit, ruling against the city, held that the ordinance in question was not a “health and safety” regulation under the city’s police powers but instead a land use regulation; the ordinance deprived Vulcan of all value of its property interest (quarrying rights); the ordinance constituted a categorical taking of
property, rendering Vulcan’s leasehold interest valueless; and the city had a defense to the takings claim only if quarrying is considered a nuisance under Texas law. Id. at 887-92. The Fifth Circuit remanded the case to the lower court for factual determinations on the nuisance issue, but opined that quarrying probably is not a nuisance. Id. at 894-95.

The use of a board of adjustment (sometimes denoted an oil and gas board of appeals) I believe is the preferable approach. First, an appeal board takes the city council out of the “crosshairs” of the community. In almost every city where gas drilling is an issue, there are strong feelings in the community whether gas drilling should even be allowed. Requiring the city council to consider each and every permit or variance request places the city council in an untenable position. There often are intense lobbying efforts by citizens to approve or reject gas well drilling sites and more often than not, as gas drilling creeps closer to urban areas, the pressure is to deny all well permits. Second, the issues and factors to be considered by a board of appeals are significantly different than the issues and factors a city council utilizes in traditional zoning/land use cases. The inherent tension between surface and mineral rights is rarely, if ever, an issue in a traditional Euclidian zoning case, which addresses the concept of separating incompatible land uses through the establishment of fixed legislative rules. Third, traditional zoning permits uses of property in certain zoning districts while not permitting those same uses in other zoning districts. If that model is utilized in a gas drilling context, there could be serious concerns about takings as a consequence. Fourth, if small tracts of land are rezoned for gas drilling, then there may be a violation of state law, which requires that all zoning must be in accordance with a comprehensive plan. See Tex. Local Gov’t Code § 211.004. Comprehensive plans traditionally do not contain provisions for gas drilling and as a consequence, if a small tract is rezoned for gas drilling, there may arise an issue of illegal spot zoning. It is the author’s belief that where the boards of appeal approach has been utilized, it appears that it has been successful and the boards have been diligent in making findings and accommodating both residents and gas drilling applicants.

The inherent advantages of board consideration distinct from a city council’s traditional zoning consideration include the following. First, the board looks at well siting issues unrelated to zoning districts and zoning classifications. This approach may be utilized to address adjacent uses of property (regardless of underlying zoning/land use districts or classifications) and land features, such as water wells, habitat, floodplain, existing nearby structures, property/tract lines, nearby parks and roadways. Second, an appeals board, much like a zoning board of adjustment, is a quasi-judicial body (not a legislative body) and as such, is afforded more inclusive quasi-judicial immunity in litigation rather than less broad legislative immunity. Third, the board of appeals, after considering variances and other gas-related issues over time, develops an expertise and understanding of such issues, and may not be subject to political whims, particularly since members may only be removed for cause. Last, appeals from the decision of a board of appeals proceed directly to court via a writ of certiorari process which, in the long run, is more expeditious and less costly.
Moreover, if there is a serious takings issue at play, the city will have the opportunity to consider settlement without having had incurred major attorney’s fees.

B. Municipal Regulation of Gas Drilling: *Texas Midstream Gas Services, L.L.C. v. City of Grand Prairie* Provides a Clue

Regardless of the application and gas well permitting review method selected by a city (either the traditional Euclidian zoning versus board of appeals/board of adjustment approach), the next question is to what extent a city may regulate gas drilling in its corporate limits. While any municipal regulation of gas drilling implicates Chapter 211 of the Texas Local Government Code in some respect since such regulation is a land use function, the answer to the question unfortunately remains less than clear at present; however, a 2008 case out of Grand Prairie (and affirmed by the Fifth Circuit on June 1, 2010) provides some guidance.

In the Grand Prairie case, *Texas Midstream Gas Services, L.L.C. v. City of Grand Prairie*, Civil Action No. 3:08-CV-1724-D, 2008 WL 5000038 (N.D. Tex.), in a November 25, 2008, unreported opinion, U.S. District Judge Sidney Fitzwater addressed a municipality’s authority to regulate through zoning various safety and aesthetic aspects of the design and construction of an intrastate gas compressor station. Texas Midstream acquired land in Grand Prairie to build a compressor station and informed the City of its intent to do so. After becoming aware of Texas Midstream’s intentions, the City amended its development code to require a specific use permit (SUP) to build a compressor station in certain zoning districts and added conditions that must be met before the City would issue the SUP. Specifically, the amended code subjected compressor stations to the following requirements (besides the SUP requirement): (1) minimum setback and yard requirements; (2) enclosure of the parcel by a security fence; (3) enclosure of the station equipment within a structure meeting certain specifications; (4) the restriction of noises to certain defined levels; and (5) certain landscaping specifications.†

In addressing the Grand Prairie zoning regulation, the federal court struck a

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* May a city regulate gas drilling in its extraterritorial jurisdiction (ETJ)? In the authors’ opinion, the answer is no. If a traditional Euclidian zoning approach is utilized, it is undisputed that a Texas municipality may not zone property outside its corporate limits. See, e.g., Tex. Local Gov’t Code § 211.005(a) (“The governing body of a municipality may divide the municipality into districts. . . . “). If the board of appeals/board of adjustment approach is utilized, there remains no statutory authority that would authorize municipal regulation of gas drilling activities in the ETJ. See Welch, *Municipal Regulation of the ETJ*, found at http://www.bhlaw.net/articles/.

balance between the gas utility’s decision about where to locate its compressor station (a decision within the utility’s sole discretion) and the local government’s authority to subject the gas utility company to its reasonable oversight concerning issues of aesthetics and similar community interests. The federal court held that the Grand Prairie ordinance did not prohibit Texas Midstream from constructing a compressor station on the land it selected for that purpose. It does not “zone out” compressor stations from the district in which [Texas Midstream’s] land is located. Rather, . . . it regulates the aesthetics and noise level of compressor stations. . . . Further, . . . if the City cannot regulate the aesthetics and noise level of compressor stations within its boundaries, these will be entirely within [Texas Midstream’s] discretion, which may be detrimental to the surrounding community.

Texas Midstream at *17. The only provision of the City ordinance that could not be enforced was the eight-foot high “security fence” provision since that provision was adopted for safety reasons, a purpose which is covered by federal law.‡ Id. at *12. Thus, while safety issues are addressed by federal law relative to pipelines, aesthetic and community interests are within the purview of local zoning and land use regulations. In an interesting footnote, Judge Fitzwater wrote that “[c]ommon sense suggests that [Texas Midstream] will opt to erect a fence, if for no other reason than to protect its property from loss or damage, prevent or reduce personal injuries, and mitigate the potential for premises liability claims. So although the City cannot compel [Texas Midstream] to erect a security fence, if [it] chooses to construct one, it must meet the other requirements of [the Grand Prairie ordinance].” Id.

As a consequence of the Texas Midstream decision, and its affirmation by the Fifth Circuit on June 1, 2010 (see Texas Midstream Gas Services, L.L.C. v. City of Grand Prairie, 608 F.3d 200 (5th Cir. 2010), it appears that a Texas municipality may impose reasonable zoning and land use regulations on either gas utilities or their facilities, even though a city cannot “zone out” such facilities in the municipality. This means as a practical matter that any land use ordinance that is adopted by a local government should be based on aesthetics and other land use issues, with the local government not addressing these matters as safety-related. Permissible areas of regulation would include construction standards and materials, setbacks, buffers, landscaping requirements, noise mitigation, fence standards and related issues.

A similar concern for local governments is what happens if a city has no land use and/or zoning standards relative to gas wells and gas facilities? While many citizens would like to believe that the absence of standards would prohibit a gas company from engaging in any drilling activities in the city, the opposite is likely true: since gas companies are utilities with condemnation powers (see generally Tex. Util.

Code §§ 181.001-181.005), any attempt to “zone out” or failure to address such activities could result in liability:

[a] utility provider is vested with discretion over the location of utility infrastructure to ensure its ability to meet its service obligations, which might be hindered by purely local concerns that do not adequately consider interests at larger levels. On the other side, [a] local government is vested with authority to subject the utility to reasonable non-siting regulations to force internalization of some of the costs the facilities may impose on local interests, especially the “character” of the neighborhood in which the facilities are located.

Kent Article at 29. Thus, the decision whether and where to place a gas facility is left to the gas utility; however, a city may impose reasonable regulations related to aesthetics and community interests. In brief, a city cannot prohibit a gas utility from locating a facility (or facilities) in the city, but the city may impose zoning and land use regulations on the gas utility’s facilities

III.

Conclusion

With technological improvements in natural gas production resulting in more drilling activities in Texas, particularly in more heavily-populated areas in North Texas, municipal regulation of natural gas production has become an important issue for municipal attorneys and municipal planning departments. If a city you represent or for whom you work has not adopted land use or zoning standards for gas wells and gas production facilities, an internal determination by the city as to which is more appropriate must be made. If the city has no regulatory framework in place, then you should be knowledgeable of the many issues the city may face when a gas producer seeks to drill for natural gas and construct related production facilities. The intensity of the political pressures and public interest in natural gas drilling and production cannot be overstated. Due to the dearth of Texas cases on point, the issues that undoubtedly will confront a city in responding to natural gas production are novel and the city truly will be in uncharted territory. §

§ The author wishes to thank his law partners, Edwin P. Voss, Jr., and Robert F. Brown, for their input, review and comments.
About the author, Terrence S. Welch:

In 1981, Terry began his legal career in the Dallas City Attorney’s Office and he is one of the founding partners of Brown & Hofmeister, L.L.P. Since 1991, Terry has served as the Town Attorney for the Town of Flower Mound, Texas, and also represents other growing communities in North Texas. He routinely represents and advises local governments on a variety of issues, including employment, land use, civil rights, police, election, natural gas drilling and other regulatory matters.

Terry received his Bachelor of Arts degree at the University of Illinois at Urbana-Champaign in 1976, his law degree in 1979 from the University of Houston College of Law and a Master of Public Affairs in 1981 at the Lyndon Baines Johnson School of Public Affairs at The University of Texas at Austin. Terry has authored and presented over 200 papers to various groups, including the American Bar Association, the Texas City Attorneys Association, the Texas Municipal League, the American Planning Association, the North Central Texas Council of Governments, CLE International, the National Business Institute and The University of Texas at Austin Continuing Legal Education Program. He has had four law review articles published in *The Review of Litigation*, *Southern Illinois University Law Journal*, *Baylor Law Review* and *The Vermont Journal of Environmental Law*. Terry also had published an article on urban sprawl in Texas in the June 2008 edition of the *Zoning and Planning Law Report*. He was the 2004-05 Chair of the State and Local Government Law Section of the American Bar Association and Immediate Past Section Chair of the State and Local Government Relations Section of the Federal Bar Association. He also serves on the Board of Trustees and is the Vice Chair of the Executive Committee of Dallas Academy, an exceptional school for children with learning differences, located in the White Rock Lake area of East Dallas. In 2011, Terry was appointed by the Dallas City Council as a member of its Gas Drilling Task Force, making recommendations in 2012 to the City Council for natural gas drilling ordinance revisions.

In his free time, while accepting the fact that knee replacement surgery is inevitable, Terry enjoys long distance running, having competed in thirty-one half-marathons as well as many 20Ks, 25Ks and 30Ks. He completed his thirtieth marathon in Austin in February 2012. He has competed in the Chicago, New York, San Diego, White Rock, Cowtown, Illinois, Marine Corps, Canadian International (Toronto), St. Louis, Austin and Berlin Marathons, all of which he ran very slowly!
The author wishes to gratefully acknowledge the assistance of Dr. Kenneth S. Tramm of Modern Geosciences for the use of this explanatory slide, which may be found at http://www.flower-mound.com/env_resources/pix/pdf/032510TCPresentations/KLF-AmbientAirOverview-March2010.pdf.