TAKINGS JURISPRUDENCE AND MUNICIPAL PLANNING AND ZONING PRACTICES: THE PRACTICAL IMPACT OF SHEFFIELD AND STAFFORD

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I.

INTRODUCTION


Nine years have passed since the Court provided governments and landowners with the guiding principles articulated in *Sheffield* and *Stafford*. While considered by many at the time of their release as cases that would forever change the legal landscape regarding how Texas cities could engage in legitimate planning and zoning practices, the actual impact of these cases, in both the courts and in day-to-day city practices, warrants closer consideration. This paper, authored by the attorney that represented the cities in *Sheffield* and *Stafford*, provides an analysis of these two cases, how the courts have interpreted and applied them over the last nine years and, most importantly, how these cases impact planning and zoning practices today.

II.

THE SPECTRUM OF TAKINGS CASES

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

Both the Texas and Federal Constitutions recognize a claim for a taking of property. *Mayhew*, 964 S.W.2d at 933; *Agins v. City of Tiburon*, 447 U.S. 255, 260 (1980). There are three general categories of takings claims: (1) physical occupation, (2) exactions and (3) regulatory
takings. \textit{Stafford}, 135 S.W.3d at 630; \textit{Sheffield}, 140 S.W.3d at 671-72; \textit{Mayhew}, 964 S.W.2d at 933. The U.S. 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 \textit{Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency}, 535 U.S. 302, 330 (2002); \textit{Lucas v. South Carolina Coastal Council}, 505 U.S. 1003, 1015 (1992); \textit{Loretto v. Teleprompter Manhattan CATV Corp.}, 458 U.S. 419, 435-440 (1982). See also \textit{Mayhew}, 964 S.W.2d at 933 (recognizing physical takings as takings category).

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

The third category of takings claims -- regulatory takings -- encompass the majority of takings cases and involve the most complex analysis. See \textit{Mayhew}, 964 S.W.2d at 933 (recognizing regulatory takings as category of takings claim). Within the context of regulatory takings, the U.S. 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.” \textit{Lucas}, 505 U.S. at 1015-16. The Texas Supreme Court also recognized this rule in \textit{Mayhew}, wherein it held that a compensable taking occurs when a governmental restriction “denies the landowner all economically viable use of the property or totally destroys the value of the property….” \textit{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 \textit{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. \textit{Lucas}, 505 U.S. at 1016-20; \textit{Penn Central}, 438 U.S. at 122. The Texas Supreme Court in \textit{Mayhew} recognized two of these three factors (“the economic impact of the regulation and the extent to which the regulation interferes with distinct investment-backed expectations”), but did not address the third factor – the character of the government action. \textit{Id.} at 935-36. This third factor would not be addressed until the Texas Supreme Court’s 2004 decision in \textit{Sheffield}. 
III. SHEFFIELD

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


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

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

“There are small islands in the bog.”

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

In 2004, the Court entered into the “Serbonian Bog” in its downzoning decision in Sheffield.

A. Case Background

This case arose when, in 1996, Sheffield, a real estate development company, purchased approximately 194 acres in the City of Glenn Heights. The property was zoned in 1986 as a planned development district (“PD”) allowing high-density, single-family development of primarily 6500-square foot (“sq. ft.”) lots. In January 1995, the City adopted a new comprehensive land use plan (“Plan”). In April 1995, as the first step in implementing the Plan, the City rezoned all properties except 14 that were zoned as PDs. In 1996, the City began a comprehensive effort to rezone the PDs to reduce development densities. 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. Sheffield asserted that the moratorium and the rezoning constituted a taking under the Texas Constitution. The trial court held the rezoning was a taking and a jury awarded damages of $485,000, finding that the property had been reduced in value by 50%. The Waco Court of Appeals, in an opinion published at 61 S.W.3d 634, held that the
rezoning and the moratorium each were a taking, and remanded the case for a determination of (1) damages for a temporary taking and (2) whether Sheffield’s plat should be approved by operation of law.

B. The Supreme Court’s Opinion

The Sheffield opinion 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.

Sheffield, while reversing the court of appeals opinion in favor of the city, provided a diverse opinion that probably provided as much aid and comfort to the development community as it did the regulatory community. The primary holdings in Sheffield can be broken down as discussed below.

1. There is No Single Test to Determine a Taking

Eight years before Sheffield was decided, the Texas Supreme Court in Mayhew, supra, in a case involving the denial of an upzoning, set forth a general framework within which to analyze regulatory takings claims based on use restrictions. Relying primarily on U.S. 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., 964 S.W.2d at 933. Later, in an apparent refinement of this general test, the Court held that “[e]ven if the governmental regulation has not entirely destroyed the property’s value, a taking can occur if the regulation has a severe enough economic impact and the regulation interferes with distinct investment-backed expectations.” Id. at 937.

In Sheffield, the Court applied a balancing test to these Mayhew factors, holding that there is no single test or issue that will typically resolve takings claims.

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

Sheffield at 670 (quoting City of College Station v. Turtle Rock, 680 S.W.2d 802, 804 (Tex. 1984), Citing U.S. 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), *Sheffield* stated “that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking,” adding “this is a question of degree--and therefore cannot be disposed of by general propositions.” *Sheffield* at 670. According to *Sheffield*, “the question at bottom is upon whom the loss of the changes desired should fall.” *Id.* (emphasis in original).

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

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

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

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

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

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

- The *Agins* inquiry is grounded in due process case law (*Nectow v. City of Cambridge*, 277 U.S. 183 (1928)) and should be conducted as a due process inquiry, not a takings inquiry. The confusion created by *Agins* stems from an era prior to
*First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304 (1987), in which courts failed to distinguish between due process and takings analysis because a violation of either clause often resulted in invalidation of the offending regulation.

- The *Agins* inquiry is inconsistent with the fundamental notion that the Takings Clause does not serve as a substantive limit on governmental authority, but merely conditions otherwise valid government action on the payment of just compensation (*Eastern Enterprises v. Apfel*, 524 U.S. 498 (1998); *First English*).

- The *Agins* inquiry is inconsistent with the requirement in the Takings Clause that a compensable taking be for a public use.

- The *Agins* inquiry is inconsistent with the U.S. 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 U.S. Supreme Court had not expressly repudiated the *Agins* means-ends inquiry at that time, five Justices had disavowed it in *Eastern Enterprises*.

- *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687, 704 (1999), provided additional support that the *Agins* test was in serious jeopardy. The majority opinion conceded that the U.S. 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 U.S. Supreme Court had never squarely endorsed and applied the *Agins* means-ends test to find a taking, and lower courts had largely ignored the test. And while the U.S. Supreme Court had repeated the “substantially advance” formulation in several cases, its severely limited application greatly diminished its precedential value.

The Texas Supreme Court in *Sheffield*, while recognizing that the U.S. 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 U.S. Supreme Court had not expressly overruled its *Agins* standard. *Sheffield* at 673-75.

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

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

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

To date, however, the Texas Supreme Court has not addressed the substantial advancement takings test since *Sheffield* and it remains the law in Texas in spite of the U.S. Supreme Court’s *Lingle* decision.

b. **What is the standard?**

Significantly, the Court in *Sheffield* indicated that even if the U.S. Supreme Court did not apply a “means-ends” test to judge the constitutionality of an action under the federal Takings Clause (which subsequently occurred in *Lingle*), the Texas Constitution’s Takings Clause would require such an inquiry in certain circumstances. *Id.* at 674-75. The Court’s language is worth repeating here:

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

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

*Sheffield* at 675.

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

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

*Id.* at 675-76. The Court seemed to imply that there is not a higher standard to be applied in cases where regulation is directed at a single property owner, but rather that the burden on the government to prove substantial advancement in such cases is greater. This, of course, may simply be an exercise in semantics as it would seem that if something is harder to prove, that it is a higher standard.

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

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

Sheffield argues that the most the evidence shows is that rezoning could \textit{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.

\textit{Id.} at 676 (emphasis in original). Thus, while a governmental entity’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.

4. \textit{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 first noted the factors discussed in \textit{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. \textit{Id.} at 122. After noting, however, that “the three \textit{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” (\textit{Sheffield} at 672), the Court began its analysis with those factors, “mindful as we do that our analysis cannot be merely mathematical.” \textit{Sheffield} at 677. Ironically, as is explained below, the appeared to hold that the downzoning met the \textit{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.

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

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

b. Lost Profits

One significant aspect of Sheffield was the Court’s willingness to consider lost profits in its takings analysis.

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

Id.

In this instance, however, Sheffield’s assertion that lost profits should be considered arguably opened the door for the Court to similarly consider investment profits, which showed that the land after the rezoning was still worth more than four times what the land cost to buy. Id.

c. Investment-Backed Expectations

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

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

*Id.* at 677-78.

Another significant aspect of the decision is that the Court 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, government official should be cautious in the manner and method in which they provide information to landowners and developers so as not to create an unrealistic expectation that a permit will be issued, a zoning request granted or the status quo maintained.

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

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

*Id.* at 678.

d. **Character of the Governmental Action**

As previously noted, the U.S. Supreme Court has held that a taking may 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. *Id.* 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 explicitly added the character of the government action into the takings mix. In describing this factor, the Court, citing *Penn Central*, noted that

[i]n engaging in these essentially ad hoc, factual inquiries, the [United States Supreme] Court’s decisions have identified several factors that have particular significance. The economic impact of the regulation on the claimant and, particularly, the extent to which the regulation has interfered with distinct investment-backed expectations are, of course, relevant considerations. So, too, is the character of the governmental action. A “taking” may more readily be found when the interference with property can be characterized as a physical invasion by government, than when interference arises from some public program adjusting the benefits and burdens of economic life to promote the common good.

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

e. **Bad Behavior does not a Takings Make**

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

Taking all of these factors into account, the trial court concluded that the rezoning was not unreasonable, and a divided court of appeals disagreed. . . . *We* 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.
IV.

POST-SHEFFIELD CASES

Since 2004, 52 Texas cases have cited to Sheffield. Most are of little interest to takings jurisprudence and do nothing to meaningfully apply the takings guideposts pronounced in Sheffield. A few cases, however, are worth discussion and they are addressed below in chronological order from the oldest to the most recent.


In this case, the owner of a tavern building brought a takings action against the city after the city denied the owner’s application for a non-conforming use to operate a bar with on-premises alcohol consumption. This occurred after the city rezoned the property to a use that did not permit alcohol sales or on-premises alcohol consumption. The trial court entered judgment for the owner, and the city appealed. Id. at 243-44.

The court, applying Sheffield, first looked at “whether the government unreasonably interfered with the landowner’s right to use and enjoy the property.” Id. at 246. The court noted that this inquiry required consideration of two factors: “the economic impact of the regulation and the extent to which the regulation interferes with distinct investment-backed expectations.” Id. The court, following Sheffield, held that lost profits was a relevant factor to consider in assessing the value of property and the severity of the economic impact of rezoning on a landowner claiming a regulatory taking, as well as reliance on historical uses of property. Against this framework, the court held, based on the particular facts before it, that the evidence was sufficient to support a finding that the city’s enactment of the rezoning ordinance, which prohibited the sale of alcoholic beverages for on-premises consumption, had a severe economic impact on the building owner’s tavern’s business and unreasonably interfered with the owner’s investment-backed expectations and, thus, constituted a compensable regulatory taking. Id. at 246-47.

The court put significant emphasis on the fact that the property had always been operated as a business that served alcohol, that the owner’s shareholder had invested over $800,000 in the property and leased the property for between $8,000 to $10,000 per month prior to the re-zoning, but that he was only able to rent the property for $3,000 to $5,000 per month following the rezoning, and ultimately sold the property for $418,000. Id.


In this dispute, the landowners brought an inverse condemnation action against the city, who implemented a plan to replace old, substandard sewer mains and who told landowners that they would have to reroute their plumbing at their expense from the old main in the back of their
properties to the new service lines in the front. The trial court denied the city’s plea to the jurisdiction, and the city appealed. The court of appeals held that the city’s relocation of sewer main and refusal to pay to reroute landowners’ plumbing did not constitute a regulatory taking.

Applying the three-part Sheffield/Penn Central takings test, the court first focused on the economic impact on the landowners. Blanton, 200 S.W.3d at 274-75. Focusing on the landowners’ own testimony that the expense to reroute plumbing and to repair any damages would decrease the value of the landowners’ properties by only 2.75% to 9%, the court found that this did not constitute a “severe economic impact” under Sheffield. Id.

The court next considered the interference with the landowners’ investment-backed expectations. At issue was whether a city ordinance required the city to reroute the plumbing at city expense or, at the very least, created an expectation that such rerouting would occur at city expense. Id. at 275-79. Based on the court’s reading of the city’s ordinances, the court concluded that “any investment-backed expectations appellees had that the City would reroute their plumbing at city expense were not reasonable as a matter of law.” Id. at 279.

The court then turned to the final of the three Sheffield/Penn Central factors, the character of the governmental action. The landowners argued that the city’s poor judgment in its planning decisions by allowing buildings to be built over a sewer main resulted in them “being asked to pay for the City’s planning mistakes.” Id. at 279. The court, however, noted that the landowners did not contend the city made the decision to relocate the main to take unfair advantage of landowners, as was alleged in Sheffield, and thus this factor did not support a taking. Id.

Taking these factors into account, as well as evidence that the landowners’ plumbing had to be rerouted because the current main was substandard and deteriorating, which was for the betterment of the landowners, and that the city’s code authorized the city to require the landowners to reroute their plumbing at their own expense when necessary to connect to a relocated main, the court found that there was no taking. Id. at 280.


In this case, a business owner brought an inverse condemnation action against the city, alleging that the city negligently rezoned his property for a golf driving range because it failed to warn him about the city’s fence height restrictions. Analyzing the takings claim under Sheffield, the court looked at the impact of the loss of one use of the property – the loss of the driving range – on the owner’s claim. As noted by the court:

Park argues that the City’s regulation caused him to lose one of the economically beneficial uses of the property—indeed, to Park, its most economically beneficial use—to wit, the driving range. When a takings claim is based on an allegation that a regulation has destroyed only some of the property’s value, through a restriction which only affects one or some of its economically viable uses, the court must
examine the totality of the relevant circumstances and balance the public and private interests.

Park, 230 S.W.3d at 868.

In looking at the various balancing factors, the court first looked at the economic impact of the re-zoning on the owner. Based primarily on the landowner’s lack of evidence of the economic impact of the loss of the driving range on the overall business, which included batting cages, a putting green and a clubhouse, the court declined to find that the severe economic impact factor had been met.

Because Park did not attempt to sell the property during the year after the driving range closed and was therefore not able to testify regarding the specific amount of income lost when that occurred, there is no way to quantify the value lost. While there is little doubt that Park was impacted adversely due to the fence height limitation in the regulation, the lack of economic information, partly due to Park’s inaction, weighs against him in the overall balance of public versus private interest.

Id. at 869.

The court next turned to the investment-backed expectations analysis. The court found that the owner did not have a reasonable, investment-backed expectation of operating a driving range on his property at time the city rezoned the property to allow a golf driving range. Among the factors considered that weighed against a finding of reasonable investment-backed expectations was that the owner had initiated the zoning change. The court determined that it was fair to assume that the owner had some knowledge of the city’s fence height restrictions; that he understood very early in the development process that high fences were part of operating a driving range; and that the property did not have a historical use as a driving range. As a result, the court determined that “at the time the City re-zoned the property at Park’s request, he did not have a reasonable, investment-backed expectation of operating a driving range on the property.” Id. at 870.

In looking at the final Sheffield/Penn Central factor – the character of the government action – the court determined that while the city, like the city in Sheffield, certainly could have handled things better, that whatever the line was that needed to be crossed to implicate this factor had not been crossed in this case.

[W]hile we would have preferred that the City had considered its own fence-height restrictions before approving the zoning change and Park’s site plan, the regulatory act itself is not so far outside the zone of reasonableness as to constitute a taking, based on this factor alone.

There is no doubt that Park’s situation is an unfortunate one. However, having reviewed the totality of the facts and circumstances in light of the Penn Central
factors, we conclude that the City’s actions following the re-zoning, which Park requested, were not ones which should, “in all fairness and justice,” be paid for by the public. Therefore, we hold there was no regulatory taking for which Park is entitled to compensation . . . .

_Park_, 230 S.W.3d at 871 (citations omitted).


In a case where one must tip his cap to the landowner’s attorneys, the landowner was able to convince both the trial court and the court of appeals that the city’s enforcement of its residential zoning ordinance to recently purchased property deprived the owner of all viable use of the property based on the jury’s finding that the market value of the property with the zoning applied to it was zero.

Factually, the case involved property that had been used since 1958 as a Texas National Guard armory and vehicle storage building. In 1964, the city zoned the property for residential use, prohibiting all commercial and industrial uses. In 1999, the property was decommissioned and in 2001, it was sold through a bid process to the plaintiff, who believed that the property was grandfathered and not subject to the residential zoning ordinance. When the owner became aware that the city intended to enforce the residential zoning, the owner sought a zoning change to commercial. After the zoning request was denied, suit was filed asserting a taking. _Id_. at 39-40.

As a threshold matter, the court did acknowledge that the substantial advancement test had been overruled at the federal level in _Lingle_, but noted that the Texas Supreme Court had yet to revisit the test in Texas jurisprudence. _Wayne_, 266 S.W.3d at 43. The court did not apply this test, however, in its determination of a taking and it is referred to only in passing. It did not need to reach this test given that the evidence in the case supported the jury’s finding that the market value of the property with the residential zoning enforced was zero and the market value without the zoning enforced was $250,000. _Id_. at 40. Based on what the appellate court noted were “the unique facts of this case” (_id_. at 44), the court upheld the taking based on the denial of all economically viable use of the property. _Id_. at 47.

In an interesting twist, because the court found that the property had no value, such that the regulatory taking was tantamount to a physical taking of the land, it awarded title to the land to the city, even though the city did not ask for such relief until after trial. _Id_. at 50.

E. _2800 La Frontera No. 1A, Ltd. v. City of Round Rock_, 2010 WL 143418 (Tex.App.-Austin 2010, no pet.)

In this memorandum opinion, the owners of an apartment complex sued the city for a taking based on the city’s re-zoning of land adjacent to the apartment complex, which land was part of an overall planned development zoning that included the apartment complex. The court analyzed the
takings claim based upon the Sheffield/Penn Central factors. Looking first at the economic impact factor, the court noted that there was evidence that the rezoning reduced the value of the property by $2.7 million. While this number, standing alone, was significant, the court also noted that this only reflected a loss of only about 4% of the property’s total value. *Round Rock*, 2010 WL 143418 at *4. As a result the court found that the 4% loss “weighs heavily against [the owner’s] claim.” *Id.*

Looking next at the owner’s interference with reasonable investment-backed expectations claim, the court rejected the owner’s novel argument that planned development zoning could not be unilaterally amended by the city like conventional straight zoning categories. *Id.* (“Owners’ reasonable investment-backed expectations are no greater than any other land owner subject to ‘conventional’ municipal zoning”). Consequently, the court found that the zoning amendment “caused minimal interference with the Owners’ reasonable investment-backed expectations.” *Id.* (emphasis in original).

The court then analyzed the character of the governmental action, which the court opinioned was “the least concrete, and also appears to carry the least weight” of the Sheffield/Penn Central factors. *Id.* at *6. This court viewed this factor through the Sheffield “targeted landowner” lens.

This factor’s purpose, when viewed in light of the goal of the takings test-to determine if the constitution requires the burden of the regulation to be borne by the public or the landowner-is to elicit consideration of whether a regulation disproportionately harms a particular property. If the re-zoning was general in character, that weighs against the property owner, whereas if the re-zoning impacted the claimant’s property disproportionately harshly, that weighs in the owner’s favor.

*Id.* (citation omitted).

In applying this factor, the court considered the owner’s argument that the city rezoned part of the planned development solely to satisfy the desires of the owners of the property rezoned, thereby increasing competition for the plaintiff’s apartment complex. *Id.* Assuming this to be true and, hence, finding that the government action favored a finding of a taking, the court nevertheless found there was not taking when all of the factors were considered together.

All three questions are part and parcel of the same essential inquiry: whether the City created PUDs 70 and 72 for the public welfare or did so to benefit the private interests of the La Frontera Developer. The Owners presented evidence that could lead a reasonable fact-finder to conclude that one of the City’s purposes, or perhaps even its primary purpose, for enacting the ordinances was to benefit the La Frontera Developer. That evidence does not preclude summary judgment for the City, however, because the other two Penn Central factors-particularly the first-weigh so heavily against the Owners that, as a matter of law, there is no taking here.
The ordinances in this case simply do not go “too far” such that fairness and justice require their cost to be borne by the public. The relative diminution in value of the Owners’ property is very small. The degree of interference with their reasonable investment-backed expectations is modest, as the City’s re-zoning merely allowed increased competition and did not prohibit any current or future use of their property. The ordinances were also not specifically targeted at the Owners, particularly given that “[z]oning changes are to be expected, especially in growing communities.” With respect to the attendant circumstances, even assuming the City’s primary motivation was to assist the La Frontera Developer, the first two Penn Central factors weigh too heavily against the Owners’ claims. In sum, this case is not one in which the “regulatory actions [ ] are functionally equivalent to the classic taking in which government directly appropriates private property or ousts the owner from his domain.”

Id. at 6-7.

The court also addressed the substantial advancement takings prong. While noting that “[w]e believe that, post-Lingle, the Texas Supreme Court would no longer recognize the substantial-advancement test” (id. at *7), the court nevertheless addressed the test and found that “[e]ven assuming that the test is still valid, however, we find no taking.” Id. In applying the test, the court noted that it could “consider the City’s statements, positions, or findings issued before or after the re-zoning decision,” and that “[t]he City need not prove with certainty that its re-zoning will substantially advance the supposed legitimate state interest.” Id. at *8. The court held that a zoning decision meets the substantial advancement test if a zoning authority “could reasonably conclude that the [zoning decision] would substantially advance a legitimate state interest.” Id. The court added that “[w]e do not review the wisdom of the City’s decision, only its constitutionality.” Id.

Against this extremely deferential standard, the court had little problem finding that the city’s rezoning passed constitutional muster, stating as follows: “[W]e are not required to consider the City’s actual purpose. Instead, we look for a ‘nexus between the effect of the ordinance and the legitimate state interest it is supposed to advance.’ We hold that the City’s stated goal passes this test.” Id. (citation omitted; emphasis in original).

F. City of Houston v. Trial Enterprises, Inc., 377 S.W.3d 873 (Tex.App.-Houston [14th Dist. 2012, pet. filed)

In the latest chapter of this long-running battle between the City of Houston and landowners who were prohibited from drilling additional oil and gas wells on land in the area of Lake Houston, the court of appeals reversed and rendered in favor of the City a $17 million takings verdict. After four appellate opinions (Trail Enters., Inc. v. City of Houston, 957 S.W.2d 625, 633 (Tex.App.-Houston [14th Dist.] 1997, writ denied; Trail Enters., Inc. v. City of Houston, No 14–01–00441–CV, 2002 WL 389448 (Tex.App.-Houston [14th Dist.] Mar. 14, 2002, no pet.) (not designated for publication); Trail Enters., Inc. v. City of Houston, 255 S.W.3d 105 (Tex.App.-Waco 2007); City of
Houston v. Trail Enters., Inc., 300 S.W.3d 736 (Tex.2009)), the trial court was finally able to try the case on the merits, finding that a taking valued at $17 million has occurred.

In reversing the trial court judgment, the court of appeals used Sheffield as its guide, calling it the “seminal case in Texas on” whether a taking has occurred. Id. at 878. After noting that all economic value had not been taken, given that there were existing wells on the land that were still allowed to operate, the court turned to the three Sheffield/Penn Central factors. Trail Enterprises, 377 S.W.3d at 878-79. The court first reviewed the character of the governmental action involved, finding that the protection of drinking water was an important goal that was furthered by the drilling ban and that this factor favored the ban. Id. at 880 (“Given the importance of protecting the community’s drinking water and possible pollution from new drilling near Lake Houston, we conclude that the first factor weighs heavily in favor of the City and against a finding of a compensable taking.”).

In reviewing the reasonable investment-backed expectations, the court noted that the landowners invested in the land after the drilling ban went into effect and with full knowledge of the ban. Id. at 881-82. The landowners argued that mineral interests are different since the only use that can be made of a mineral estate is extraction of the minerals. Id. at 882-83. The court held that the landowners misunderstood the nature of protected investment-backed expectations and that mineral interests were entitled to no special protection under takings law.

If appellees’ argument were correct, a person could entitle him or herself to compensation by obtaining a mineral interest in any property, even for a nominal sum, where extraction of the minerals was prohibited. This is not the case. By definition, the purpose of the investment-backed expectation requirement is to assess whether the landowner has taken legitimate risks with the reasonable expectation of being able to use the property, which, in fairness and justice, would entitled him or her to compensation. This is true regardless of the nature of the property interest owned.

Where, as here, landowners have failed to demonstrate that investments were made (i.e., put at risk) in the property with the reasonable expectation that new wells could be drilled, concepts of fairness and justice do not militate in favor of compensation. Most, if not all, of appellees’ evidence of investment pertains to periods of time during which new drilling was prohibited by ordinance. Under Sheffield, Mayhew, and the similar cases discussed above, such investment does not relate to reasonable expectations of a recovery beyond that from the existing wells. The second factor heavily favors the City.

Id. at 883 (citations omitted).

Finally, the court looked at the economic impact factor. The court noted that a diminution in value of $17 million was a significant economic impact and assumed this finding was correct even
though the city contended that the impact was not that great. \(\text{Id.} \) at 883-84. The reason the court assumed this factor to be correct, and found that “this factor necessarily favors the [landowners],” is because when weighed against the other two factors, the court found a taking was lacking. As concluded by the court:

Of the three Penn Central factors, the first two, concerning the nature of the governmental action and the investment-backed expectations of the property owners, weigh quite heavily in favor of the City. As discussed, protection of a water source from pollution is a primary governmental function, and appellees demonstrated minimal, if any, reasonable and distinct investment-backed expectations. The third factor, concerning the economic impact of the regulation on the property owner, weighs in favor of appellees. Even if the City is correct that appellees were not completely restricted from drilling new wells to access the minerals, appellees established a significant economic impact. However, given the degree to which the first two factors favor the City, we do not find the weight of the third factor sufficient to demonstrate that a compensable taking has occurred under Penn Central and Sheffield. With substantial government interests at stake and minimal-to-no investment-backed expectations, justice and fairness do not require compensation in this case.

\(\text{Id.} \) at 884-85 (citations omitted).


The final meaningful case to apply the Sheffield/Penn Central factors is best remembered for determining that landowners have a vested property right in the ground water beneath their land and that such right is subject to constitutional protection. Day, 369 S.W.3d at 822-38. The case also, however, applied a takings analysis to determine whether a denial of a right to withdraw certain amounts of water from beneath a landowner’s property could be a taking in order to defeat the summary judgment granted to the State on that issue. As a preamble of sorts, the Court noted that all of the takings tests shared a common theme, stating that “[e]ach aims to identify regulatory actions that are functionally equivalent to the classic taking in which government directly appropriates private property or ousts the owner from his domain,” and that “each of these tests focuses directly upon the severity of the burden that government imposes upon private property rights.” \(\text{Id.} \) at 839.

The Court first determined that “Day’s permit will not allow him to irrigate as much as his predecessors, who used well water flowing into the lake,” and that “[b]y making it much more expensive, if not impossible, to raise crops and graze cattle, the denial of Day’s application certainly appears to have had a significant, negative economic impact on him, though it may be doubted whether it has denied him all economically beneficial use of his property.” \(\text{Id.} \) at 840.

Looking at investment-backed expectations, the Court held that its application in this context was “difficult to apply.” \(\text{Id.} \) While the Court noted that the landowner either knew or should have
known that the law allowed his water withdrawal to be restricted, the Court went on to say that “the government cannot immunize itself from its constitutional duty to provide adequate compensation for property taken through a regulatory scheme merely by discouraging investment.” *Id.* The Court ultimately determined that the record was incomplete and did not “illuminate what his expectations were or reasonably should have been.” *Id.*

In analyzing the character of the governmental action, the Court acknowledged that the State was empowered to regulate groundwater production (*id.*), but noted that nevertheless “a landowner cannot be deprived of all beneficial use of the groundwater below his property merely because he did not use it during an historical period and supply is limited.” *Id.* at 843.

At the end of the day, however, given the summary judgment standards in favor of the non-movant, the Court held that “the three *Penn Central* factors do not support summary judgment for the Authority and the State,” and that “[a] full development of the record may demonstrate that [the State’s] regulation is too restrictive of Day’s groundwater rights and without justification in the overall regulatory scheme.” *Id.*

V.

**STAFFORD**

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

**A. ** *Nollan* and *Dolan*

Two U.S. Supreme Court cases articulate the federal tests for determining whether conditions that require the dedication of land, and possibly all exactions, constitute a taking under the Fifth Amendment. The first, *Nollan*, requires a court to evaluate the nexus between (1) what the municipality seeks to exact from the developer by way of imposing a condition that takes land and (2) the projected impact of the proposed development. In *Nollan*, the Court required that in cases involving permanent dedication of title, an “essential nexus” must exist between the title condition imposed and the stated police power objective of requiring development to meet the needs created by the development. *Id.*, 483 U.S. at 837. Under this test, the dedication must serve the same governmental purpose as the regulation. The Court employed a heightened level of scrutiny, differentiating the ad hoc, factual inquiry balancing test of an economic take as enunciated in *Penn Central*. 
Following *Nollan*, there was uncertainty regarding the degree of nexus that a municipality was required to establish in order for a land dedication condition to pass constitutional muster. In *Dolan*, the Supreme Court clarified *Nollan* by adopting the “rough proportionality” test as the means for determining the degree of nexus required between a real property exaction imposed by a municipality and the projected impact of a proposed development. In *Dolan*, the Court addressed the question of a second nexus required between the city’s conditions of title transfer and the projected impact caused by the proposed development. *Id.*, 512 U.S. at 388.

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

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

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

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

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

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

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

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

B. Stafford: Texas gets its First Nollan and Dolan Case

While the U.S. Supreme Court issued its decision in Dolan in 1994, there had not been a reported decision in Texas addressing how Dolan would be applied in Texas until the 2004 decision in Stafford. Stafford is a regulatory takings case challenging the constitutionality of a plat approval condition under the two-prong test articulated in Dolan. In a bifurcated trial, the trial court held, based upon a stipulated record, that the Town’s plat approval condition (that Stafford reconstruct and improve an abutting substandard street from which the subdivision development would take access) was a taking under the Texas and United States Constitutions. After a trial on damages, the court awarded Stafford damages, as well as attorney’s fees, expert fees and costs.

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

1. **Factual Background**

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

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

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

At that time, roadway impact fees were assessed at the maximum impact fee per service unit for each service area at the time of plat approval for most developments. The Town’s impact fee ordinance heavily discounts impact fees for single-family dwellings. The ordinance thus establishes a fee to be collected of $1,140 per single-family dwelling unit, roughly 32% of the maximum allowable fee. As a result, although Stafford was assessed impact fees in the amount of $3,559 per single-family dwelling unit at the time of final approval for each phase of the Subdivision, Stafford was only required by pay impact fees in the amount of $1,140 per single-family dwelling unit.
After the lawsuit was filed, the Town retained an expert to perform a rough proportionality analysis. That expert concluded that the Town’s requirement that Stafford improve Simmons was roughly proportional and, at trial, he testified that the Town’s regulatory objective of providing an adequate roadway network concurrent with new development was implemented through road impact fees, paid for by builders, in conjunction with mandatory right-of-way dedication and road construction requirements for perimeter roads that provide access to new development. Road impact fees are used to finance major arterial roads within the Town and are established by the impact fee ordinance. In Service Area No. 2, which includes Stafford Estates, the fee is roughly 32% of the impact of the development’s traffic. Pursuant to the Town’s regulatory strategies for providing roads, developers must dedicate right-of-way and construct perimeter roads, including access points, as established by the Town’s subdivision ordinance. Developers are required to construct two of four lanes for major collectors or arterials, and two lanes for rural collectors. No developer, however, is ever required to build more than two lanes.

The Town’s expert further testified that only the costs for major roads can be financed with impact fees. An impact fee shortfall (maximum fee allowed less actually fee charged) must be taken into account in evaluating the impact on roads created by new development. As applied to the Subdivision, the maximum impact fees are $3,560 per dwelling unit. Stafford paid $1,140 per unit, which created a shortfall of about $600,000. This shortfall was roughly proportional to the total cost of the improving Simmons. Based upon this analysis, the Town contended that the Simmons improvements were roughly proportional and did not violate Dolan.

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

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

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

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

3. **The Dedications Only Limitation is Rejected**

The Town had urged the Court to find that the Fort Worth Court of Appeals had erred by extending the land dedication tests from *Nollan* and *Dolan* to the Town’s concrete road requirement. *Nollan* and *Dolan* involved, and as a result were particularly concerned with, forced dedications of land. See *Nollan*, 483 U.S. at 841 (“We are inclined to be particularly careful. . . where the actual conveyance of property is made a condition to the lifting of a land-use restriction.”); *Dolan*, 512 U.S. at 385 (distinguishing permit conditions from “a requirement that [Mrs. Dolan] deed portions of the property to the city.”).
Thus, the Town urged the Court to recognize the limitation found by other courts in limiting *Dolan* to land dedication cases. See, e.g., *Texas Manufactured Hous. Ass’n v. Nederland*, 101 F.3d 1095, 1105 (5th Cir. 1996) (holding that *Nollan* and *Dolan* do not apply because “the Nederland Ordinance does not ‘extract benefits’ from [the plaintiff] in the *Nollan* sense of requiring some dedication of property …”); *Harris v. City of Wichita*, 862 F. Supp. 287, 294 (D. Kan. 1994), aff’d, 74 F.3d 1249 (10th Cir. 1996) (“The Supreme Court’s decision in *Dolan* was based on the facts of that case, namely that the City had required a dedication of property as a condition for granting a redevelopment permit.”); *Clajon Prods. Corp. v. Petera*, 70 F.3d 1566, 1578-79 & n.21 (10th Cir. 1995) (“[W]e believe that the ‘essential nexus’ and ‘rough proportionality’ tests are properly limited to the contexts of development exactions where there is a physical taking or its equivalent.”); *Southeast Cass Water Resource Dist. v. City of Burlington*, 527 N.W.2d 884, 896 (N.D. 1995) (holding that *Dolan* is not applicable to a duty to pay for culvert improvements); *GST Tucson Lightwave, Inc., v. City of Tucson*, 949 P.2d 971, 978-79 (Ariz. Ct. App. 1997) (holding that *Nollan* and *Dolan* do not apply because “this case does not involve the City forcing Lightwave ‘to dedicate a portion of its public property to public use’”); *Sprenger, Grubb & Assocs. v. City of Hailey*, 903 P.2d 741, 747 (Idaho 1995) (*Dolan* is limited to real property exactions); *Waters Landing Ltd. Partnership v. Montgomery County*, 650 A.2d 712, 724 (Md. Ct. App. 1994) (impact tax “does not require landowners to deed portions of their property to the County”).

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

4. **The Legislative/Adjudicative Distinction is Rejected**

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

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

*Dolan*, 512 U.S. at 385.

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

The Texas Supreme Court, however, was not persuaded.

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

Stafford at 641.

5. **The Taking is Upheld, but the Attorneys’ Fees are Not**

Having determined that Dolan applied fully to the street improvement requirement at issue, the Court held that Stafford’s development, which would only account for 18% of the increased traffic on the road in question, could not be charged for 100% of the costs to improve the road. Stafford at 645 (“[C]onditioning development on rebuilding Simmons Road with concrete and making other changes was simply a way for the Town to extract from Stafford a benefit to which the Town was not entitled.”).

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

C. A Legislative Response: Section 212.904 of the Local Government Code

In 2005, the Texas Legislature expanded the reach of *Stafford* in its enactment of Section 212.904 of the Local Government Code. Section 212.904 provides as follows:

**Sec. 212.904. APPORTIONMENT OF MUNICIPAL INFRASTRUCTURE COSTS.**

(a) If a municipality requires as a condition of approval for a property development project that the developer bear a portion of the costs of municipal infrastructure improvements by the making of dedications, the payment of fees, or the payment of construction costs, the developer’s portion of the costs may not exceed the amount required for infrastructure improvements that are roughly proportionate to the proposed development as approved by a professional engineer who holds a license issued under Chapter 1001, Occupations Code, and is retained by the municipality.

(b) A developer who disputes the determination made under Subsection (a) may appeal to the governing body of the municipality. At the appeal, the developer may present evidence and testimony under procedures adopted by the governing body. After hearing any testimony and reviewing the evidence, the governing body shall make the applicable determination within 30 days following the final submission of any testimony or evidence by the developer.

(c) A developer may appeal the determination of the governing body to a county or district court of the county in which the development project is located within 30 days of the final determination by the governing body.

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

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

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

*Tex. Loc. Gov’t Code Ann. § 212.904.*
This new law provides developers with the attorneys’ fees and expert fees denied the developer in *Stafford* should they prevail in an appeal under the statute. Among the many unanswered questions presented by Section 212.904 are the following:

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

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

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

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

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

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

**VI. POST-STAFFORD DECISIONS**

Since 2004, 28 Texas cases have cited to *Stafford*. All but three are cited for general propositions of takings law. The three cases that apply Stafford in a meaningful way are set out below.

**A. Rischon Dev. Corp. v. City of Keller, 242 S.W.3d 161**
*(Tex.App.-Fort Worth 2007, pet. denied)*

In this case, the Fort Worth Court of Appeals distinguished *Stafford* by holding that a developer that does not clearly lodge objections to development exactions, while accepting the benefits of development approval, consents to any alleged taking. In this matter, a developer purchased land in the City of Keller and applied for a change in zoning to a planned development to develop the heavily wooded, hilly, and creek-burdened property. City staff suggested additional conditions to the planned development to address fire safety, sidewalks, fencing, and the provision of sanitary sewer. The developer did not object to the added planned development conditions and the property was rezoned.
The developer then submitted a plat, which was also approved, but with additional conditions added based on staff comments. Again, the developer did not object to the additional conditions and the plat was approved. The City and the developer then entered into a development agreement, whereby the developer agreed to pay for certain construction costs related to the extension of sewer service, the building of sidewalks, and other agreed upon matters.

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

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

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

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

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

B. City of Carrolton v. RIHR Inc., 308 S.W.3d 444 (Tex.App.-Dallas 2010, no pet.)

In this case, the plaintiff, owner of two residential development lots, filed suit against city, alleging that the city’s refusal to issue it building permits to complete construction of homes on the lots was an unconstitutional taking. The city refused to issue building permits unless the owner of the lots first reimbursed the city for a portion of the city’s cost to remediate a collapsed retaining
wall on lots located in the same subdivision as the owner’s lots, but not on lots owned by the plaintiff. The trial court found that the condition was an unlawful exaction. The city appealed.

On appeal, the court, applying Stafford, Nollan and Dolan, upheld the trial court’s illegal exaction finding. The court stated as follows:

[C]onditioning government approval of a development of property on some exaction is a compensable taking unless the condition (1) bears an essential nexus to the substantial advancement of some legitimate government interest and (2) is roughly proportional to the projected impact of the proposed development.

The court found that the city’s exaction did not pass the first prong “essential nexus” test. Id. (“Even if the collapsed wall presented a condition adverse to public safety and Carrollton properly acted to eliminate the danger by remediating lots in which RIHR had no interest, there is no connection between remediation of the collapsed wall and Carrollton’s exaction.”). Because the city’s exaction failed the first prong of Nollan, Dolan and Stafford, the court did undertake whether the second prong – rough proportionality – had been met. Id. at 451-52 (“[H]aving determined that the exaction imposed by Carrollton was not related to a legitimate government interest, we need not consider whether the exaction is roughly proportional to the projected impact of the proposed development.”).


In this fact intensive case, a developer, after utilizing the exactions appeal process provided in Texas Local Government Code Section 212.904 (“Section 212.904”), challenged various development conditions as unlawful exactions under Stafford. Factually, the developer purchased land to develop a residential subdivision and, as part of the development process, became involved in multiple conflicts with the city on the development standards imposed as a condition of development approval. Id. at 372. After selling the developed lots, the developer contended that delays and city-mandated changes to its development plans increased its costs and reduced the sale price of the lots. The developer demanded the city compensate it for the increased costs and reduced sale price. Id.

The developer requested a hearing before the city council under Section 212.904 and, after being awarded a fraction of the compensation that it sought (approximately $50,000 out of approximately $793,000), appealed the decision to the district court. The district court upheld the city’s compensation findings and the developer further appealed. Id. at 373. On appeal, the appellate court reviewed, in a component by component fashion, each complained of development
requirement to determine “whether each requirement was an exaction and, if so, whether the City established (1) an essential nexus to the substantial advancement of a legitimate government interest and (2) the rough proportionality to the projected impact of the development.” Id. at 377.

On street curbs, the court determined that the requirement to build straight curbs in the subdivision instead of rolled curbs bore an essential nexus to the advancement of the legitimate government interest of public safety and was roughly proportional to the projected impact of the proposed development, and thus, did not constitute a compensable exaction. The record conclusively showed the city made an individualized determination that the proposed streets (which were the same design as those in another subdivision) were too narrow, and its requirement that the streets in the developer’s subdivision be wider if they were to have rolled curbs was necessary for the public safety, and the street-width requirement was limited to the streets in the subdivision and did not require the improvement of any property outside the subdivision.

Regarding the city’s requirement that the developer add two extra drainage outlets where two streets in the subdivision formed a T-junction, the court found that this bore an essential nexus to the advancement of a legitimate government interest and was roughly proportional to the projected impact of the proposed development, and thus, did not constitute a compensable exaction. The court noted that the city engineer determined, based on the unique conditions of the development, that the additional drainage outlets were necessary to prevent flooding of some of the lots in the subdivision, and that the additional outlets affected only the subdivision and not any other property.

Regarding the requirement to construct an offsite sidewalk, the court determined that the developer was entitled to compensation for the cost of building a sidewalk outside of the subdivision.

On over-fill for pad sites, the court held that the city’s requirement that the developer raise the elevation of the “pad site” or building location on two of the lots as a condition for approval of the subdivision bore an essential nexus to the advancement of a legitimate government interest and was roughly proportional to the projected impact of the proposed development, and thus, did not constitute a compensable exaction. The evidence showed that the city required the additional height to prevent flooding of pad sites that were at the bottom of a down slope at a T intersection, and the requirement was a result of the design of the subdivision.

Regarding additional storm drain construction and riprap, the court determined that the city’s requirement that the developer extend drainage pipe for the subdivision did not bear an essential nexus to a legitimate government interest, and thus, it constituted a compensable exaction. The court was unable to award damages for this element as a genuine issue of material fact existed as to whether city required drainage pipe for the subdivision to be extended 20 feet or 120 feet, thus requiring further trial court consideration of this element.

As for the city’s requirement for an extra manhole, the court held that requirement - that the developer add a sewer manhole as a condition for approval of the subdivision - bore an essential
nexus to the advancement of a legitimate government interest and was roughly proportional to the projected impact of the proposed development, and thus, did not constitute a compensable exaction. The court determined that the extra manhole was necessary for the efficiency of the sewage drainage system, and the beneficial effect of the manhole was confined to the subdivision.

On the **waterline concrete caps**, the court found that the city’s requirement that the developer use concrete waterline caps as a condition for approval of the subdivision bore an essential nexus to the advancement of a legitimate government interest and was roughly proportional to the projected impact of the proposed development, and thus, did not constitute a compensable exaction. The evidence established that the concrete caps were necessary for the road to support traffic and were required as a result of extending waterlines into the subdivision, which benefited only the residents of the subdivision.

Regarding **screen wall exterior columns**, the court found that the city’s requirement that the developer build a screen wall around the subdivision with columns on the exterior portion of the wall and to have landscaping near the wall as a condition for approval of the subdivision bore an essential nexus to the advancement of a legitimate government interest and was roughly proportional to the projected impact of the proposed development, and thus, did not constitute a compensable exaction. The court found that the wall was necessary to maintain the aesthetic values of the city.

In reviewing the city’s requirement for **retaining walls and a four-to-one slope**, the court determined that a genuine issue of material fact existed as to whether the city required the developer to build retaining walls as a condition of approving subdivision, thus precluding a resolution of the developer’s claim that the requirement was a compensable exaction. The court did, however, determine that the city’s requirement that the developer change the slopes from three-to-one to four-to-one as a condition of approving the subdivision was not related to a legitimate government interest, and thus, was a compensable exaction.

Regarding the developer’s claim that the city required **redundant excavation in the floodplain**, the court held that although the city required the developer to comply with its ordinance prohibiting work in the floodplain, that the requirement was not a condition for approval of the subdivision, and thus, it was not an exaction subject to a *Stafford* analysis.

On the developer’s complaints regarding **floodplain study checking and floodplain delay**, the court held that the city’s $2000 fee for review of the developer’s floodplain study was not a compensable exaction and that the city had an interest in the accurate determination of the floodplain since any inaccuracies in the location leading to flooding of the lots would be the long-term concern of the city rather than the developer.

On **park fees**, the court held that a genuine issue of material fact existed as to the amount of the park fees that would be roughly proportionate to the development’s impact on the park system, thus precluding a resolution of the developer’s claim that that park fee assessed by city on development constituted an uncompensated taking.
Regarding tree mitigation fees, the court held that the fee, which was used for the planting of trees on public property and the purchasing of wooded areas, constituted an exaction where there was no evidence that the removal of trees in the development would harm the air quality, increase noise and glare, remove ecosystems, bring down property values, or reduce the other benefits of trees.

The court next considered the city’s roadway, water and wastewater impact fees. The Court determined that because the city did not condition approval of the development on payment of the water and sewer impact fees, those fees were not exactions from the developer requiring compensation. The court held that the roadway impact fees, however, were an exaction as the city conditioned their payment as part of the subdivision’s approval. The court found that all of the impact fees were unlawful, holding that roadway, water, and sewer impact fees bore an essential nexus to the substantial advancement of legitimate government interests, and thus, the city’s assessment of these fees as a condition of approving subdivision did not constitute a compensable exaction.

Turning to construction inspection fees, the court held that a genuine issue of material fact existed whether the city inspections bore an essential nexus to a legitimate state interest and the safe and lawful development of the property, and whether some of the fees could be roughly proportional to the projected impact of the development, thus precluding a resolution of the developer’s claim that the city’s assessment of construction inspection fees constituted a compensable exaction.

On claims regarding redundant water-bacteria testing, the court determined that the city’s requirement that the developer conduct two water-bacteria tests as a condition for approval of the subdivision bore an essential nexus to the advancement of a legitimate government interest and was roughly proportional to the projected impact of the proposed development, and thus, did not constitute a compensable exaction. The court found that the tests protected the city’s water system from bacteria that could pollute the water system.

Regarding the developer’s claim that the city required it to surrender .725 acres, the court found that a genuine issue of material fact existed as to whether city conditioned approval of the subdivision on resolving a boundary dispute, precluding a resolution of the developer’s claim that his sale of a .725 acre tract to a neighbor below market value to settle the dispute constituted a compensable exaction.

On the city’s requirement for roadway cleanup, the court held that clearing the roadway right of way as a condition of the city’s approval of the subdivision was a compensable exaction. On the additional professional fees charged to the developer, the court found that a genuine issue of material fact existed as to the cost of additional professional fees incurred by the developer in meeting certain conditions the city imposed prior to approval of the subdivision, precluding a resolution of the developer’s claim that the professional fees constituted compensable exactions.

Finally, the court determined that claims of delay were not subject to a Stafford analysis as
the developer’s delays in construction while waiting for plat approval and building permits were not exactions by the city because they were not conditions for approval of the subdivision.

VII.

THE IMPACT OF SHEFFIELD AND STAFFORD NINE YEARS LATER

While Sheffield and Stafford were considered by many in 2004 as cases that would forever change the legal landscape regarding how Texas cities could engage in legitimate planning and zoning practices, the actual impact of these cases, in both the courts and in day-to-day city practices, appears to be fairly measured. While Sheffield over the last nine years has percolated and been applied by the lower courts, and occasionally revisited by the Texas Supreme Court, due in large part to its fact-intensive balancing test, subsequent decisions have not provided us with any new measuring tools to determine if a taking has occurred. Regulatory takings law through use restrictions remains an ad hoc determination that seeks to apportion constitutional fairness between those doing the regulating and those being regulated.

The application of Stafford over the last nine years was been surprisingly slight. Perhaps it is because development exactions stem from development and, hence, there is some deal at work that merits resolution of disputes versus litigation, or perhaps governmental entities are being more cautious on exactions and using development and facilities agreements to address such matters by agreement; nevertheless, it is clear that neither Stafford nor Texas Local Government Code section 212.904 has spawned much by way of reported disputes.

So, in sum, neither Sheffield nor Stafford appear to have created any major shift in the real life playing field between developers and local government. While the ever-present tension between property rights advocates and community rights advocates will continue to provide disputes that our courts must decide, Sheffield and Stafford remain the most recent takings cases of significance that seek to protect and preserve the rights of municipalities to engage in reasonable land-use planning, while at the same time protecting individual property rights in the manner envisioned by our Founding Fathers.
TAKINGS JURISPRUDENCE AND MUNICIPAL PLANNING AND ZONING PRACTICES: THE PRACTICAL IMPACT OF SHEFFIELD AND STAFFORD

Land Use Planning Conference
March 21, 2013

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Foundational Principles

• “[N]or shall private property be taken for public use, without just compensation.” U.S. Const. amend. V (the Federal Takings Clause).

• “No 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.
Overview of Takings Claims

There are three basic categories of takings claims recognized by the U.S. Supreme Court and the Texas:

1. Physical occupations;
2. Compelled dedications or exactions; and
3. Regulatory takings.

Physical Occupations

- 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.
- Categorical rule.
Compelled Dedications - Exactions

- The second category of takings claims is found where an exaction, such as a required dedication of land, is made a condition of development approval.
- Non-categorical rules.
- Involves measurements of means and ends, *i.e.*, “essential nexus” and “rough proportionality.”

Regulatory Takings

- The third category of takings claims -- regulatory takings -- encompass the majority of takings cases and involve the most complex analysis.
- Typically involve use restrictions.
- Have categorical and non-categorical rules.
Regulatory Takings Claims in Texas

Mayhew standard: 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 the property or totally destroys the value of the property.”

Regulatory Takings Claims in Texas

The legitimacy prong: whether the challenged regulation substantially advances a legitimate governmental interest. Mayhew 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.
Lingle v. Chevron USA, Inc. Rejects the Legitimacy Prong

- The U.S. Supreme Court ruled in May, 2005, that the “substantially advances” prong of this test is not a proper test to determine a taking.
- Remains to be seen whether Texas will reject “substantially advances” prong (or legitimacy prong) as a test for a Texas takings.

Regulatory Takings Claims in Texas

- Second prong – economic impact of the regulation.
- Even if a governmental action substantially advances a legitimate state interest, “[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.”
Regulatory Takings Claims in Texas

“Even 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.”

Glenn Heights v. Sheffield

Court of Appeals held that a city’s rezoning of land from six to four lots per acre, and the imposition of a development moratorium on the property prior to the rezoning, constituted a regulatory taking, even through the court assumed that the rezoning reduced the land’s value by only 38%.
Sheffield – Supreme Court

• In Sheffield, the Texas Supreme Court released a unanimous decision reversing and rendering the takings claims in the City’s favor.

• While a good decision for Texas cities, the opinion muddied the waters in many regards.

Sheffield – Supreme Court

• Court adopted an *ad hoc* balancing test that seeks to weigh public and private interests to determine when this constitutional measure of fairness dictates that a taking is found.

• Fact-sensitive inquiry that considers all circumstances.

• “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 – Supreme Court

• Court retained the “substantially advances” (means-end) test, while recognizing that the U.S. Supreme Court has “equivocated somewhat” on the test.

• Court found that the test had independent viability under the Texas Constitution in certain circumstance but failed to elaborate on such circumstances.

Sheffield – Supreme Court

• “Substantially advances” test remains a highly deferential one to cities, analogous to equal protection rational basis review – government action has a rational basis if one can be conceived regardless of whether the government had it in mind when it took the complained of action.

• Test may be tougher if regulation directed at a single land owner or piece of property.

• What the tougher standard is, however, is unknown.
**Sheffield – Supreme Court**

- Court reviewed the 3 *Penn Central* factors to judge whether the downzoning was a taking.

- Review not limited to those factors: “[T]he 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.”

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**Sheffield – Supreme Court**

- Economic impact review: The rezoning had a clear economic impact on Sheffield (37.5% decrease per the City, 50% decrease found by the jury).

- Even at a 50% reduction the rezoning was a “severe economic impact,” but not enough for a taking since the land “was still worth more than four times what Sheffield paid for it.”

- 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.”
Sheffield – Supreme Court

Lost profits are to be considered, but so are investment profits, which gutted the takings claim here since the land after the rezoning was still worth four times what the land cost.

Sheffield – Supreme Court

- Investment-backed expectations were found to have been present and to have been unreasonably interfered with.

- Court 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.
Sheffield – Supreme Court

• “[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….”

Sheffield – Supreme Court

• Character of governmental action (the third Penn Central factor) is now a factor; not included in Mayhew.

• “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 – Supreme Court

- Applying this factor to the case at hand, the Court stated that the rezoning “was general in character and not exclusively directed at Sheffield.”

- 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.”

POST-SHEFFIELD CASES

- Since 2004, 52 reported Texas cases have cited to Sheffield.
- 7 are discussed.

- City rezoned tavern to use that did not allow alcohol consumption; shut tavern down.
- Found severe economic impact and unreasonable interference with investment-backed expectations.
- Significant emphasis on the fact that the property had always been operated as a business that served alcohol; that the owner’s shareholder had invested over $800,000 in the property and leased the property for between $8,000 to $10,000 per month prior to the re-zoning; but was only able to rent the property for $3,000 to $5,000 per month following the rezoning, and ultimately sold the property for $418,000.

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

- Forced rerouting of sewer lines to new replacement sewer main.
- Court applied the three-part Sheffield/Penn Central factors.
- Value decline was between 2.75 to 9% - not severe economic impact.
- No reasonable investment-backed expectations that city would pay for reroute.
**City of Dallas v. Blanton, 200 S.W.3d 266**
(Tex.App.-Dallas 2006, no pet. h.)

- On character of government action, the landowners argued that the city’s poor judgment in its planning decisions by allowing buildings to be built over a sewer main resulted in them “being asked to pay for the City’s planning mistakes.”
- The court, however, noted that the landowners did not contend the city made the decision to relocate the main to take unfair advantage of landowners, as was alleged in *Sheffield*, and thus this factor did not support a taking.


- Inverse condemnation claim due to city’s rezoning, per the owner’s request, to allow a gold driving range.
- Court noted losing only one use of property – the driving range – did not necessarily mean a severe economic impact.
- Used the three *Sheffield/Penn Central* factors.

- Did not find severe loss due to lack of evidence of loss.
- Court found that the owner did not have a reasonable, investment-backed expectation of operating a driving range on his property at time the city rezoned the property to allow a golf driving range due to required fence height restrictions.

On character of government action, court found this did not cross the Sheffield line.

“While we would have preferred that the City had considered its own fence-height restrictions before approving the zoning change and Park’s site plan, the regulatory act itself is not so far outside the zone of reasonableness as to constitute a taking, based on this factor alone.”
**City of Sherman v. Wayne**, 266 S.W.3d 34 (Tex.App.-Dallas 2008, no pet.)

- *Lucas* total take case.
- Found rezoning of old Texas National Guard Armory to residential use reduced value from $250,000 to $0.
- Denial of all economically viable use.
- In an interesting twist, because the court found that the property had no value, such that the regulatory taking was tantamount to a physical taking of the land, it awarded title to the land to the city, even though the city did not ask for such relief until after trial.

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**2800 La Frontera No. 1A, Ltd. v. City of Round Rock**, 2010 WL 143418 (Tex.App.-Austin 2010, no pet.)

- Rezoning of part of a PD, allegedly to help a particular developer.
- Owners of apartment complex in the PD sued, alleging a taking due to impacts on its apartments.
- Court found value loss of $2.7 million, but that was only 4% of total value, so not severe economic impact.
2800 La Frontera No. 1A, Ltd. v. City of Round Rock, 2010 WL 143418
(Tex.App.-Austin 2010, no pet.)

- Investment-backed expectations argument was that PD zoning gave expectations that PD would not be unilaterally amended by city.
- Court held no greater expectations on not being rezoned than straight zoning.
- On character of government action, court found for plaintiff, but still found no taking.

2800 La Frontera No. 1A, Ltd. v. City of Round Rock, 2010 WL 143418
(Tex.App.-Austin 2010, no pet.)

- “The Owners presented evidence that could lead a reasonable fact-finder to conclude that one of the City’s purposes, or perhaps even its primary purpose, for enacting the ordinances was to benefit the La Frontera Developer. That evidence does not preclude summary judgment for the City, however, because the other two Penn Central factors—particularly the first—weigh so heavily against the Owners that, as a matter of law, there is no taking here.”
City of Houston v. Trial Enterprises, Inc., 377 S.W.3d 873
(Tex.App.-Houston [14th Dist. 2012, pet. filed)

• Long running battle over drilling around Lake Houston.
• $17 million verdict for landowners overturned using the Sheffield/Penn Central factors.
• Character of government action ruled the day here - “Given the importance of protecting the community’s drinking water and possible pollution from new drilling near Lake Houston, we conclude that the first factor weighs heavily in favor of the City and against a finding of a compensable taking.”

City of Houston v. Trial Enterprises, Inc., 377 S.W.3d 873
(Tex.App.-Houston [14th Dist. 2012, pet. filed)

• Purchase of land with drilling restrictions in place defeated reasonable investment-backed expectations.
• Mineral interests not treated differently than other property interests.
• “[L]andowners have failed to demonstrate that investments were made (i.e., put at risk) in the property with the reasonable expectation that new wells could be drilled . . . .”
**City of Houston v. Trial Enterprises, Inc.,** 377 S.W.3d 873 (Tex.App.-Houston [14th Dist. 2012, pet. filed)

- Economic impact – loss of $17 million from new wells was found to be a significant economic impact.
- Weighing all three factors did not result in a taking.
- Protecting safe drinking water and finding minimal investment-backed expectations, outweighed the $17 million loss.

**Edwards Aquifer Authority v. Day,** 369 S.W.3d 814 (Tex. 2012)

- Applied a takings analysis to determine whether a denial of a right to withdraw certain amounts of water from beneath a landowner’s property could be a taking in order to defeat the summary judgment granted to the State on that issue.
- Held on the facts presented, it was hard to determine economic impact and impact of investment-backed expectations.
- Held that “the three Penn Central factors do not support summary judgment for the Authority and the State,” and that “[a] full development of the record may demonstrate that [the State’s] regulation is too restrictive of Day’s groundwater rights and without justification in the overall regulatory scheme.”
Two United States Supreme Court cases articulate the current tests for determining whether conditions that require the dedication of land constitute a taking under the Fifth Amendment.

The first, *Nollan v. California Coastal Comm’n*, 483 U.S. 825 (1987), requires a court to evaluate the nexus between (1) what the municipality seeks to exact from the developer by way of imposing a condition that takes land and (2) the projected impact of the proposed development.

The second case, *Dolan v. City of Tigard*, 512 U.S. 374 (1994), clarified *Nollan* by adopting the “rough proportionality” test as the means for determining the degree of nexus required between a real property exaction imposed by a municipality and the projected impact of a proposed development.
Flower Mound v. Stafford

• First reported Texas appellate decision to apply Nollan and Dolan.

• Supreme Court held that the Town's plat approval condition (that Stafford reconstruct and improve an abutting substandard street from which the subdivision development would take access) was a taking under Dolan.

Flower Mound v. Stafford

Court addressed the two issues that lower courts have struggled with since Nollan and Dolan were issued: (1) whether Nollan/Dolan applies to nonpossessory exactions and (2) whether Nollan/Dolan applies to development conditions imposed through generally applicable legislation.
Flower Mound v. Stafford

- The Town’s threshold defense that the Developer could not assert a takings claim because he accepted the benefits of plat approval was denied.
- Courts from other jurisdictions require such permit holders to file suit before accepting the benefits of permit approval.

Flower Mound v. Stafford

- The land dedications only limitation recognized by other courts is rejected.

- “For purposes of determining whether an exaction as a condition of government approval of development is a compensable taking, we see no important distinction between a dedication of property to the public and a requirement that property already owned by the public be improved.”
Flower Mound v. Stafford

- The legislative/adjudicative distinction is rejected.

- “While we recognize that an ad hoc decision is more likely to constitute a taking than general legislation, we think it entirely possible that the government could ‘gang up’ on particular groups to force extractions that a majority of constituents would not only tolerate but applaud, so long as burdens they would otherwise bear were shifted to others.”

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POST-STAFFORD CASES

- Since 2004, 28 reported Texas cases have cited to Stafford.
- Only 3 apply it.
Rischon v. City of Keller

- Distinguished Stafford
- Developer that does not clearly lodge objections to development exactions, while accepting the benefits of development approval, consents to any alleged taking.

City of Carrollton v. RIHR Inc., 308 S.W.3d 444
(Tex.App.-Dallas 2010, no pet.)

- City refusal to issue building permits unless developer reimbursed city for a portion of city’s cost to fix a collapsed retaining wall on other lots found to be a Stafford unconstitutional exaction.
- “[C]onditioning government approval of a development of property on some exaction is a compensable taking unless the condition (1) bears an essential nexus to the substantial advancement of some legitimate government interest and (2) is roughly proportional to the projected impact of the proposed development.”
City of Carrolton v. RIHR Inc., 308 S.W.3d 444 (Tex.App.-Dallas 2010, no pet.)

- Found that the city’s exaction did not pass the first prong “essential nexus” test.
- “Even if the collapsed wall presented a condition adverse to public safety and Carrolton properly acted to eliminate the danger by remediating lots in which RIHR had no interest, there is no connection between remediation of the collapsed wall and Carrolton’s exaction.”
- No need to address 2nd prong.

MIRA MIRA DEV. CORP. V. CITY OF COPPELL, 364 S.W.3D 366 (TEX.APP.-DALLAS 2012, NO PET.)

- Very detailed analyses of whether development conditions were (1) exactions and (2) if exactions, did they meet the essential nexus and rough proportionality Stafford tests.
TAKINGS JURISPRUDENCE AND MUNICIPAL PLANNING AND ZONING PRACTICES: THE PRACTICAL IMPACT OF SHEFFIELD AND STAFFORD

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