GOVERNMENT TAKINGS:
WHAT THE GOVERNMENT CAN DO TO YOUR CLIENT

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PUBLICATIONS (PARTIAL LIST)

"Zoning and Land Use", SMU Law Review Annual Survey, July 2003, 2005
"Actions Arising Out of Zoning, Planning and Other Land Use Regulations," <u>Texas Real Estate Litigation Manual</u> (West 2001)
"The Landowner's Approach to Land Use Litigation," <u>The Urban Lawyer</u>, Summer 2000
<u>Texas Forms: Pleading and Practice</u>, Chapter Author, 1997
<u>Texas Zoning and Land Use Forms</u>, Lexis-Nexis, 1992 (co-author)
<u>Texas Land Use Law</u>, Wylie 1989, Supp. 1990

LECTURES (SINCE 1996):

Short Course on Planning and Zoning for Public Officials, The Center for American and International Law, Dallas, 1996, 1997, 1998, 1999, 2000, 2001, 2002, 2003, 2004
Land Use Litigation, The Center for American and International Law, Dallas, 1996, 1997, 1998, 1999, 2000, 2001, 2002, 2003
Zoning, Regulatory Takings and Eminent Domain Seminars, CLE International, Dallas, Austin, Fort Worth, 1996, 1997, 1998, 2000, 2001
UT Land Use Law Conference, Austin, 1999, 2000, 2001, 2002, 2003, 2004, 2005
Advanced State Bar Civil Trial Law Course, 2000
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I. INTRODUCTION

During the last twenty years, the author has represented landowners and developers in processing land use applications and litigating land use disputes. Significant legal opinions in this area have been historically reported on a sporadic basis. Since Spring 2004, however, there has been a flurry of activity at the Texas Supreme Court, the United States Supreme Court and the Texas Legislature.

For the most part, courts have been deferential in upholding local governmental regulations. As a result, many municipalities have aggressively applied stringent new ordinances to on-going developments. Changing the rules in the middle of the game has adversely impacted many developers and builders. The Texas Legislature has reacted to this aggressive regulatory posture by enacting legislation to protect development rights.

The axiom "bad facts make bad law" is especially true in land use litigation. Regulatory takings opinions often turn on the facts in a particular case. Therefore, this paper will focus on the facts upon which opinions are based. Unless the facts are egregious, Texas courts tend to uphold local land use decisions. Disputes about zoning classifications, variances and permits are common place. This paper seeks to provide an overview of the constitutional causes of action brought against local governments in the land use arena with particular emphasis on two Texas cases which were decided last year by the Texas Supreme Court.[1]

There are numerous factors to consider in deciding whether to file a lawsuit in a land use dispute. For example, assume a town decides to apply its building code requirements to houses being built in its extraterritorial jurisdiction. Homebuilders are now required to process a building permit application and pay an application fee. If the city is attempting to improve the quality of houses being built, the judicial response may be to allow this extra layer of regulation.

But what if the houses being built in the ETJ are already being constructed in accordance with the International Residential Building Code and the only reason the city extended its building code was to extract building permit application fees for its general revenue fund? An example of how a court addressed this issue can be found in *Hartsell v. Town of Talty*.[2]

II. TEXAS CONSTITUTIONAL PROTECTIONS

In *Sheffield* and *Stafford Estates*, none of the parties argued that the judicial standard for evaluating an inverse condemnation case under the United States and Texas Constitutions is different. Because the developers in both cases prevailed at the Court of Appeals, the difference in the constitutional provisions was not raised by their counsel. There was no incentive for the cities' counsel to focus on the distinction.

The Federal constitutional provision states "nor shall private property be taken for public use without just compensation." [3] The Texas Constitution is worded as follows:

> 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; and, when taken, except for the use of the State, such compensation shall be first made, or secured by a deposit of money; . . [4]

The language of the current Texas Constitution was changed from earlier versions which were similar to the U.S. Constitution. In 1890, the Texas Supreme Court noted:

> The constitution of 1869 provided that "no person's property shall be taken or applied to public use without just compensation being made, unless by the consent of such person." Const. 1869, art. 1, § 14; 2 Pasch. Dig. 1101. The owner's rights in property are better guarded under the constitution of 1876. It declares that "no person's property shall be taken, damaged, or destroyed for, or applied to, public use without adequate compensation being made, unless by consent of such person." Const. 1876, art. 1 § 17….[5]

The Texas Constitution may therefore provide greater protections than those provided by the United States Constitution.[6] Another difference between the United States and Texas Constitutions involves the timing of payment of compensation:

> Section 17 of article 1, State Constitution, secures every person against the exercise of the governmental right and power of eminent domain without adequate compensation, and article 5 of the United States Constitution also provides that private property shall not be taken for public use without just compensation. Under both instruments the exercise of the power of eminent domain is regulated. But, so far as the question presented enters this case under the record, the provisions of the state Constitution alone concern us, because there is no specific inhibition in the United States Constitution against taking private property in any event

> until after compensation is paid; whereas, on the other hand, the state Constitution provides that—
>
> > "No person's property shall be taken, damaged or destroyed for, or applied to, public use without adequate compensation being made, * * * and when taken, except for the use of the State, such compensation shall be first made, or secured by a deposit of money."
>
> It is to be observed that the express requirement inheres to this provision for compensation to be first made when property is actually taken for a public use and that this requirement does not obtain when the property is damaged or destroyed for a public use.[7]

It can certainly be argued that there are differences between the "takings" provision in the two constitutions and that the Texas Supreme Court has left the door open to expand Texas regulatory takings law in those cases brought under the Texas Constitution.

III. RIGHT TO TAKE

The United States Supreme Court is expected to rule prior to the seminar date on a Connecticut case which could change the face of eminent domain. *Kelo vs. City of New London*[8] challenges the authority of cities and municipalities to condemn land for the sole purpose of encouraging private redevelopment. Eminent domain powers are increasingly being used to facilitate projects for the private sector. In recent years, many governments have expanded the definition of "public use" to include projects such as shopping centers, office complexes, factories and mixed-use developments.

The Connecticut case began in 2000 when the New London City Council decided to transform 90 acres of Fort Trumball into a conference center, office space, and hotel complex in order to accommodate an earlier investment in the area by Pfizer Inc. The city and state agreed to contribute millions of dollars to the effort and transferred eminent domain power to the New London Development Corporation. Following the decision, residents of the Fort Trumball area received eviction notices saying they had four months to move.

The government offered to pay Susette and Tim Kelo for their home. If they refused to accept the offer, the government said it would take their property by eminent domain. In a neighborhood that once housed about 80 families and businesses, only seven property owners chose to stay and fight to keep their land. The Connecticut Supreme Court ruled in favor of New London in a decision that placed the benefits of economic development over private property rights.

It appears that the Texas Supreme Court may grant petition for review in a case involving compensability of deed restrictions. In *City of Heath v. Duncan*,[9] the issue of whether or not a restrictive covenant is a protected property interest was addressed by the Dallas Court of Appeals. The thirteen landowners owned large lots with recorded covenants restricted to residential use. Without notifying the lot owners, the City purchased a lot with the intent to erect a water tower and construct park improvements.

The Dallas Court of Appeals affirmed the trial court's ruling that a "negative easement" in land is a compensable property right. This represents the view of a majority of states but has not been directly addressed by the Texas Supreme Court.

IV. STANDING AND JURISDICTION

The first issue to address in any land use litigation is to determine if the plaintiff meets the procedural requirements to file a suit. "Generalizations about standing to sue are largely worthless as such."[10] To have standing, a plaintiff must have suffered "injury in fact, economic or otherwise."[11] In addition, that injury must be "distinct and palpable,"[12] such that the plaintiff has a "'personal stake in the outcome of the controversy.'"[13]

From both a declaratory judgment and inverse condemnation perspective, a controversy must also be "ripe" in order to file litigation challenging a land use regulation. An essential prerequisite to the ripeness of regulatory takings and related constitutional claims is "a final and authoritative determination of the type and intensity of development legally permitted on the subject property."[14] The premise of the doctrine is that a court cannot determine whether a taking has occurred until it can compare the uses prohibited by the regulation to any permissible uses to be made on the property. An as-applied takings claim is ripe only if the plaintiff can establish that (1) "the government entity charged with implementing the regulations has reached a final decision regarding the application of the regulations to the property at issue, and (2) the claimant has sought compensation through the procedures the State has provided for doing so."[15]

Another standing and jurisdictional issue is the exhaustion of remedies doctrine. While the policies underlying the two concepts often overlap, the finality requirement is concerned with whether the initial decision maker has arrived at a definitive position on the issue that inflicts an actual, concrete injury. The exhaustion requirement generally refers to administrative and judicial procedures by which an injured party may seek review of an adverse decision and obtain a remedy if the decision is found to be unlawful or otherwise inappropriate.[16] If a decision does not "conclusively determine" an issue but, rather, "leaves open the possibility" that the decision is subject to change, then it is not final or ripe for review.[17]

Until the Texas Supreme Court's *Mayhew* decision, the "safest" approach for developers in zoning or platting cases has been to proceed under the "three strikes rule".[18] In order to ensure that a case is ripe for adjudication, three meaningful applications would be filed. If all three applications were denied, then there should be no argument that the city had made a final determination with respect to development activity on the site.

In *Mayhew*, the landowners presented a modified application which reduced the number of units they were seeking from their original request. According to the Texas Supreme Court, such a compromise proposal can be sufficient to satisfy the variance requirements. Furthermore, the Supreme Court held that the modified application was not the most profitable use envisioned by the Mayhews, rather the minimum number of units the Mayhews believed was necessary to make an economically viable use of their land. In other words, the Mayhews alleged that anything less than the town allowing their development would deny them the only economically viable use of their property. According to the Court, the ripeness doctrine does not require a property owner to seek permits for development if the property owner does not deem them economically viable. Therefore, the Mayhews were not required to submit alternative proposals, especially after they spent a year of negotiations and $500,000 in expenses to ripen the complaint.

Another example of the application of this type of rule is found in *City of Monterrey v. Del Monte Dunes.*[19] In this case, five formal meaningful development applications were denied by the Monterrey City Council. The jury and, subsequently, the appellate courts determined that this string of denials constituted a decision of the City that all meaningful development would be prohibited on the tract.

In *Coble v. City of Mansfield,*[20] an owner of vacant property which was partially condemned for a road by the city was held not to be entitled to damages on the ground that the city's subdivision ordinance provided that a screening wall might need to be built in the future. Appraisers for both the city and the landowner testified in the condemnation case that the highest and best use of the property was for future residential development. Coble, however, also testified that the actual use of the property would be commercial rather than residential. The city contended that the landowner had not chosen to develop a residential subdivision, and the city did not have the opportunity to approve a variance to its regulations to address the issue. The city's motion for summary judgment contended that only a subsequent decision to develop the property as a residential subdivision – not the taking itself – would potentially trigger the subdivision ordinance's screening requirement. The trial court granted the city's motion.[21] Because the city had not reached a "final decision" as to whether or not Coble would be required to build a masonry screening wall in conjunction with a residential development, the Court of Appeals held that the regulatory takings claim was not ripe for review and affirmed.[22]

It appears that an official governmental decision must be made in order to obtain standing to bring an inverse condemnation claim. For example, simply receiving a staff recommendation of denial of a site plan probably will not meet the standing threshold. A city council's denial or conditional approval of the same site plan would meet this test. To meet the standing threshold in a declaratory judgment case, actual or potential injury must be shown as a result of the challenged ordinance.

V. REGULATORY TAKINGS

A. Acquisitory intent

One of the unique theories of Texas inverse condemnation law is based on acquisitory intent. An example is where the government's action is against the owner's economic interest for the government's own advantage.[23] If a governmental entity makes a land use decision to indirectly acquire a property interest or to depress the value of the land in order to lower a condemnation award, the courts may find that an inverse condemnation has occurred. Governmental restrictions on the use of property can be so burdensome that they result in a compensable taking.[24]

An example of acquisitory intent is a municipality enacting a height restriction on structures to be built on a hillside to protect others' views. In addition, denying or delaying development approvals to reduce acquisition costs for a state highway has been ruled a taking by the Texas Supreme Court.[25]

The author represented a developer whose property was downzoned from a multi-family to a single-family district in the midst of negotiations over the purchase of land to expand a city park. An advantage to developer's counsel in this type of case is that the issue of intent goes to the jury. In this case, the jury found that the city intended to depress the value of the land prior to the acquisition and awarded several million dollars in compensation to the developer.

B. Physical takings

Another category of claims involves government-authorized physical occupations and invasions of private property. The government can invade or occupy property by flying planes low over private property or damming a river and causing flooding upstream. The Texas Supreme Court has recognized physical occupations as a categorical taking.[26]

While there are few "smoking guns" in most land use cases, actual involuntary physical occupation by the government meets this test. For example, sometimes a pipeline company will lay a pipeline under the mistaken impression there is a valid easement on the property. If the pipeline was installed without landowner consent, then the pipeline company is de facto liable. Our firm is currently representing a landowner in a situation where a city constructed a street on what it thought was dedicated right-of-way. Typically, liability is not at issue. Instead, most of the focus in these disputes is determining the proper level of compensation for the trespass.

On June 10, 2005, the Texas Supreme Court reversed a Fort Worth court of appeals' ruling against a city in a flooding case. In *City of Keller v. Wilson*,[27] the City approved plans for a new subdivision, including plans for stormwater drainage. The Wilsons owned property southeast of a proposed subdivision. Before development, surface water flowed generally north to south across the Wilsons' property and into the Little Bear Creek Watershed.

In 1991, the city adopted a Master Drainage Plan providing for drainage easements across both the Wilson property and thence into Little Bear Creek. The City's codes required developers to comply with the Master Plan, to provide drainage for a 100-year rain event, and to avoid increasing the volume or velocity of water discharged upon downhill properties.

In accordance with the master plan, the city built a box culvert south of the Wilsons' property. But as the developers' drainage ditch ended at the Wilsons' north property line, there was no link between the two. The Wilsons alleged and the jury found this omission increased flooding on the Wilsons' property, ruining eight acres of farmland the jury valued at almost $300,000.

To recover damages for inverse condemnation, the Wilsons had to prove the City intentionally took or damaged their property for public use, or was substantially certain that would be the result. They did not allege the City intentionally flooded their land, but did allege it approved revised plans that it knew were substantially certain to have that effect. The City contended no evidence supported the jury's finding of an intentional taking. It presented evidence that engineers for the developers, for the City, and for an outside firm retained by the City all certified that the revised drainage plan complied with the City's regulations including the ban against increasing downstream runoff. Thus, the City asserts it had no reason to be substantially certain flooding would occur, until it did.

A divided court of appeals rejected this contention.[28] In its legal sufficiency review, the Court refused to consider the various engineers' certifications because "we are to consider only the evidence and inferences that tend to support the finding and disregard all evidence and inferences to the contrary."[29]

The Supreme Court reversed on the ground that the City did not know (not should have known) that flooding was substantially certain. Because three different engineers certified that the plans would not increase flooding, there was only one logical reference the jury could draw. As a result, the court reversed the court of appeals on this particular issue.

A concurring opinion by Justice O'Neill focused on the legal theories of inverse condemnation. According to Justice O'Neill, the City's "mere approval of the private development plans" did not result in a taking for public use. Because the primary responsibility for a developer's design rests with the developer, the City's approval was not the proximate cause of the damage to the Wilson property.

C. Denial of all economically beneficial use

A separate test for determining a taking is whether a governmental restriction is so onerous as to deny an owner all economically beneficial use of his property. There are no Texas cases where this test has been directly addressed. However, it has been addressed in at least two United States Supreme Court Cases.

Lucas v. South Carolina Coastal Council[30] established the second *per se* rule that a governmental regulation which deprives a tract of all economically viable use automatically constitutes a taking. Justice Scalia held that the injury to the landowner required compensation, regardless of the importance and value of the governmental action.[31]

In *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*,[32] the Court upheld a jury finding that a taking occurred on the grounds that the City's denials of the developer's permit applications deprived the property of all economically beneficial use.

In the 2004 case of *Vulcan Materials Co. v. City of Tehuacana*[33], the U.S. Fifth Circuit Court of Appeals considered whether a city ordinance banning the use of explosives and heavy machinery for a quarrying operation to mine limestone in the city limits constituted an inverse condemnation. Vulcan's leasehold interest was for quarrying purposes only and included land in the City's corporate and ETJ boundaries. Prior to acquiring the leasehold, City representatives told Vulcan that no ordinance prohibited mining activities. The district court held that the city's ordinance only affected that portion of the quarry in the city limits and explosives and heavy machinery were not "required to extract the stone to build the pyramids."[34] As a result, it granted the City's motion for summary judgment dismissing Vulcan's takings claim under the Texas Constitution.

Upon appeal, the Fifth Circuit reversed and held that the ordinance went too far to be considered a mere exercise of the city's police power. The Court considered the impact of the ordinance under the denial of all economically viable use inquiry.[35] The city argued that only a portion of the property subject to the quarrying lease was located within the city limits with the vast portion located in the extraterritorial jurisdiction. Because only a portion of the land covered by Vulcan's lease was affected by the ordinance, the city argued that was not a total deprivation of Vulcan's property interest. Vulcan asked the court to consider the leasehold interest on only the property subject to the city's jurisdiction as the part taken. The Court of Appeals ruled in Vulcan's favor, holding that when a regulator exercises its regulatory power to take an entire property interest within its limits, it had acted categorically. As a result, Vulcan's property rights had been rendered valueless and had been taken.[36]

However, the city also claimed that Vulcan's activities constituted a nuisance precluding recovery under *Lucas v. South Carolina Coastal Comm.*[37] The Fifth Circuit agreed that there was an issue of material fact as to whether or not the quarrying operation constituted a nuisance and remanded this issue to the district court for its consideration.[38]

Despite the *Vulcan* opinion, there are relatively few situations where a tract of land will be rendered valueless by a governmental action. A more frequent fact situation involves tracts used for agricultural purposes which are ready for immediate development. However, due to the cost impacts of city zoning and subdivision ordinances, the property is effectively undevelopable because the developer's expenses exceed lot revenue. A similar type of fact situation is present in a pending case before the Dallas Court of Appeals.[39]

D. Substantial advancement test

In *Agins v. City of Tiburon*, the United States Supreme Court set out a test to determine if a land use regulation amounts to a taking.

> The application of a general zoning law to particular property effects a taking if the ordinance does not substantially advance legitimate state interests [citation omitted], or denies an owner economically viable use of his land [citation omitted].[40]

Both Texas and the U.S. Supreme Court have struggled with defining this test in an inverse condemnation content. On May 23, 2005, the United States Supreme Court removed this historical regulatory takings test in *Lingle v. Chevron U.S.A., Inc.*[41] Due to its distant location from the mainland, Hawaii has the highest retail gasoline prices in the United States. In response to public concerns about the effects of market concentration on gas prices, the Hawaii Legislature passed a statute limiting the amount of rent an oil company could charge a lessee-dealer to 15% of the dealer's gross profits from gasoline sales plus 15% of gross sales of products other than gasoline.

Chevron USA was the largest refiner and marketer of gasoline in Hawaii. Typically, Chevron would buy or lease land from a third party, build a service station and then lease the station to a dealer on a turn key basis. Chevron filed suit claiming that the statute's rent cap was a taking under the U.S. Constitution because it did not substantially advance a legitimate governmental interest.

The federal district court held there was a taking because the statute would not actually reduce lessee-dealer's costs or retail prices. As a result, the court struck down the Hawaii statute, and the Ninth Circuit Court of Appeals affirmed because the statute did not substantially advance a legitimate governmental interest.

In reversing and remanding, the U.S. Supreme Court held that the "substantial advancement" test would no longer be part of federal takings jurisprudence. Citing to takings precedent, the Court states that each takings test "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." The Court goes on to state that the "substantially advances" formula was derived from due process, not takings, precedence. The removal of this test from federal takings law will likely be applied to Texas takings law by Texas state courts.

E. Unreasonable restriction on use

Until 1987, the U.S. Supreme Court was consistently deferential to governmental regulation.[42] *Penn Central* established three regulatory takings factors: (1) the character of the governmental action, (2) the economic impact of the regulation, and (3) the extent to which the regulation interfered with investment-backed expectations. In 2004, the Texas Supreme Court applied the *Penn Central* factors in a significant opinion involving the involuntary downzoning of land.

Both the municipality and the developer could take partial comfort from the Court's holdings in *Sheffield Development Company v. City of Glenn Heights.*[43] The Supreme Court held that a developer whose property had been downzoned could not recover damages in an inverse condemnation case. However, the Court held that the developer might have vested rights in the previous zoning and remanded this issue to the trial court.

In 1986, the city approved a planned development (PD) residential district on a 200 acre tract allowing development of small lots. Approximately 20% of the land in the PD was then developed with small lots. In the summer of 1996, Sheffield entered into a contract to purchase the undeveloped property in the PD. Sheffield actively conducted a due diligence investigation of the zoning on the property, as well as the possibility of it being rezoned. Numerous meetings with city officials were held during the fall of 1996 to confirm the development rights on the property. Nobody at the city ever indicated to Sheffield that the property might be rezoned by the city. Approximately two weeks after the closing on the land, the city (without notifying Sheffield) imposed a thirty-day moratorium preventing Sheffield from developing the property. The city subsequently extended the moratorium numerous times.[44]

During a lapse in the moratorium, Sheffield submitted a preliminary plat application for development under the PD zoning which was rejected by the city secretary on the ground that the city manager had continued the moratorium in effect without council action.[45] Not until April 1998, did the city council vote on the zoning of the property. At that meeting, the city council voted to downzone the property from minimum 6,500 square foot lots to minimum 12,000 square foot lots. Sheffield filed suit for an inverse condemnation arguing that both the downzoning and the moratorium extensions constituted regulatory takings.[46]

The trial court held that the downzoning substantially advanced a legitimate government interest and that the moratorium was not a taking. Further, the Court held that Sheffield's vested rights claim was not ripe. The trial court determined that the downzoning, however, constituted a regulatory taking because it deprived Sheffield of its rights to use and enjoyment of the property. A jury subsequently found that the parcel had been diminished in value by 50% from $970,000 to $485,000. In accordance with the jury's verdict, the trial court rendered judgment awarding Sheffield $485,000.00 in damages.

On appeal to the Waco Court of Appeals, the city contested the determination that there was a taking of Sheffield's property.[47] The court of appeals agreed with the trial court that, although the downzoning substantially advanced legitimate governmental interests, it unreasonably interfered with Sheffield's property rights. The court noted that lowering density was Glenn Heights' method to reduce the effects of urbanization and control the rate and character of growth and found that this was a legitimate governmental interest. While the downzoning may have advanced a legitimate governmental interest, however, a further determination of whether the downzoning unreasonably interfered with Sheffield's right to use and enjoy the property under the "unreasonable interference" test was necessary.

The court of appeals agreed with the trial court and found a taking based on the Texas Supreme Court's holding in *Mayhew v. Town of Sunnyvale*.[48] There, the Supreme Court formulated a test of whether the town had unreasonably interfered with the landowner's right to use and enjoy property based on a consideration of two factors: (1) the economic impact of the regulation, and (2) the extent to which the regulations interferes with distinct investment-back expectation.

The first factor, the economic impact of the regulation, compares the value that has been taken from the property with the value that remains in the property. Sheffield put on evidence that the downzoning had a severe economic impact on the value of the property, decreasing the value of the property over 90%. The city presented evidence that the downzoning decreased the value of the property 38%. The court of appeals held that the undisputed evidence of at least a 38% decline in value as a direct result of the downzoning satisfied as a matter of law the first factor of the unreasonable interference test.

The second factor involves the investment-backed expectations of the owner. The existing and permitted uses of the property constitute the "primary expectation" of the owner affected by the regulation.[49] Accordingly to *Mayhew*, the existing uses permitted by law are what shape the owner's reasonable expectations. Courts have historically looked at existing uses of property as a basis for determining the extent of interference with the owner's expectations. The court of appeals found that Sheffield met both of these tests and affirmed the trial court's holding that the downzoning was a taking.

The court of appeals also held that the moratorium beyond the initial three-month period did not substantially advance a legitimate governmental purpose, but was utilized in an attempt to extort Sheffield to accede to the city's downzoning demands. Because the extensions deprived Sheffield of his constitutional rights, the court of appeals reversed on the moratorium issue and remanded for a determination of damages for a temporary taking.

The Supreme Court reversed the court of appeals on all of Sheffield's inverse condemnation causes of action and held for the city on these issues. However, the Court found that Sheffield's cause of action that its preliminary plat was invalidly rejected was ripe for review. As a result, the issue of whether Sheffield has statutory vested rights to develop under the 1986 PD zoning was remanded to the district court.

The Court initially determined that it would look to federal jurisprudence on regulatory takings for guidance.[50] Rather than relying on its 1998 decision in *Mayhew*, the Court focused on the three part test in

Penn Central Transportation Co. v. City of New York: (1) the economic impact of the regulation on the claimant; (2) the extent to which the regulation has interfered with distinct investment-backed expectations; and (3) the character of the governmental action.[51] Furthermore, the Court stated that these were just some of the tests the Court could use in evaluating a regulatory takings case.

As a threshold matter, the Supreme Court disposed of the city's argument that a regulation should not be considered a taking merely because it does not substantially advance a legitimate governmental interest. According to the city, the substantial advancement test is really a due process claim and not a test for determining whether the government must compensate for a taking of property rights. The Supreme Court held that the substantial advancement test remains a separate test to determine if a regulatory taking has occurred. Because the lowering of density advanced a legitimate governmental purpose and Sheffield's property was contemporaneously rezoned along with other tracts of land in the city, the Court agreed with the lower courts that the downzoning substantially advanced legitimate governmental interests.[52] In light of the recent *Lingle* opinion by the U.S. Supreme Court, it is likely that the Texas Supreme Court will omit this test from Texas inverse condemnation law.

The Court then applied the three *Penn Central* factors. First, the Court agreed that the downzoning "clearly had a severe economic impact on Sheffield."[53] The evidence at the trial on the merits showed the downzoning devalued Sheffield's property from 38-95%, and the jury found that the value had been reduced in half. Accordingly to the Court, however, the diminution in market value was not as important as the investment of the developer in buying the land. Because the land in this case was still worth more after the taking than the purchase price, this "makes the impact of the rezoning very unlike a taking."[54]

Second, the Court found that Sheffield's expectations to develop under the 1986 zoning were reasonable. Sheffield's due diligence was sufficient to meet this standard. The Court pointed out, however, that Sheffield's purchase price was a small fraction of the investment that would be required for full development and his investment was deemed to be speculative because the property had not been developed for ten years.[55] The Court essentially ignored its holdings in *Mayhew* with respect to the importance of the historical zoning on the land as the most important factor justifying developer expectations.

As to the third test (character of the governmental action) the Court pointed to the fact that the city rezoned properties in addition to Sheffield's to justify its holdings that the downzoning on Sheffield's tract substantially advanced a legitimate governmental interest ("City's downzoning of residential property was virtually city-wide") and did not affect Sheffield's investment-backed expectations ("not exclusively directed at Sheffield").[56] However, these bad faith actions did not rise to the level of a taking because the City's rezoning program was not exclusively directed at Sheffield. According to the Court, zoning changes are to be anticipated by developers. As a result, Sheffield did not have sufficient investment-backed expectations to result in a taking.

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. The Supreme Court chastised the city in finding that the downzoning "clearly had a severe economic impact on Sheffield", and "the moratorium and rezoning blindsided Sheffield (and). . . the City attempted to take unfair advantage of Sheffield".[57] Despite these bad faith actions, the Court found they did not rise to the level of a taking due primarily to the remaining value of the property after the taking event and the fact that the City had enacted a city-wide rezoning program.

With respect to the moratorium extension issue, the Court found that the city's delay was not in bad faith. While the city was dilatory in not acting sooner, the delay did not rise to the level of a taking. Because other tracts were also subjected to the moratorium, the Court held they substantially advanced a legitimate governmental interest.[58]

Finally, the Court held that the issue of the filing of the preliminary plat was ripe for adjudication.[59] If, upon remand, the district court finds that the developer has statutory vested rights under Chapter 245, TEX. LOC. GOV'T CODE, then Sheffield can possibly still develop under the 1986 zoning.

Sheffield makes it more difficult for landowners and developers to recover monetary compensation from governmental entities in cases not involving exactions like *Stafford Estates*. While the Court has made it more difficult to obtain monetary compensation for regulatory takings, it has expressed a preference that developers utilize the vested rights statute and estoppel to complete a started project.

The San Antonio Court of Appeals held that no inverse condemnation had occurred under *Penn Central* in *Centeno v. City of Alamo Heights*.[60] The Centenos purchased a former military barracks with the knowledge that the existing zoning requirements would not permit a portion of the structure to be utilized for single-family residential purposes. Alamo Heights' Board of Adjustment approved some of the Centenos' variance requests and denied others. The Centenos claimed that the city's actions constituted an inverse condemnation because a portion of the structure would have to be removed. Following a jury verdict in the

Centenos favor, the trial court granted judgment notwithstanding the verdict to the city.

According to the San Antonio Court of Appeals, the city's regulations affected only a portion of the Centenos' property, so they failed to meet the denial of all economically viable use test. With respect to the *Penn Central* regulatory takings test, the jury found there was a 30% diminution in value to the entire property due to the regulation. This was found not to be a severe economic impact by the Court. In addition, because the Centenos were aware at the time of purchase that variances were needed for their intended use, they did not have a reasonable investment-backed expectation that the variances would be granted. Accordingly, the Court held that no taking had occurred.

VI. QUASI-VESTED RIGHTS

While Texas courts have not specifically recognized common law vested rights, there are other legal remedies that have the effect of protecting developers against the denial of permits or plats that are nondiscretionary in nature. Texas courts have recognized development rights where developers have substantially relied on approved permits. If an act is ministerial or administrative, then a person may seek mandamus relief to force execution of that act.[61] Further, government employees can be held personally liable for damages caused by the refusal to perform their ministerial duties. Because the approval of subdivision plats or site plans is considered an "administrative" task under Texas law, the effect is that submittal of a developer's valid plat acts to "quasi-vest" the development by providing relief by mandamus or injunction in the event that the plat or site plan is not approved.[62] Likewise, because the approval of a building permit is ministerial if all code requirements have been met, applicants are provided some legal protection by the ability to sue to force issuance of the permit.[63] Of course, these rights only protect the developer in light of rules existing when the plat or permit should have been approved, so they provide much less protection than true common law vested rights.

The doctrine of estoppel, in its simplest form, applies against a party who knowingly misrepresents a fact to an innocent party, intending that the listener rely on the statement. If the innocent party does rely on the false statement to his detriment, estoppel acts to prevent the party who made the false statement from raising as a defense the falsity of the statement or from denying its truth.[64] The general law in Texas is that a municipality is not estopped from enforcing its zoning ordinances unless the zoning violator has detrimentally relied upon an authorized act of the municipality.[65]

A municipality may be estopped, however, in those cases where justice requires its application, and there is no interference with the exercise of its governmental functions.[66] The primary Texas case supporting equitable relief is *Rosenthal v. City of Dallas.*[67] The Rosenthal court held that the City of Dallas was estopped from revoking a permit for a meat processing plant that was in violation of zoning ordinances. The court reached this result due to a building inspector's statements coupled with the city's failure to timely object as work progressed and substantial monies were spent.[68] On retrial, the position was affirmed.[69]

The general rule has historically been that when a unit of government is exercising its governmental powers, it is not subject to estoppel.[70] There is more recent authority for the proposition that a municipality may be estopped in those cases where justice requires its application, and there is no interference with the exercise of its governmental functions.[71] Numerous courts of appeal have recently examined this doctrine.

A significant estoppel case is pending before the Texas Supreme Court. In *City of Dallas v. Vanesko,*[72] the City attempted to revoke Vanesko's building permit because it was not in compliance with the height regulation in the zoning ordinance. The Vaneskos purchased their property in Dallas in 1991 and lived in an existing single family residence until 1996, when they moved into an apartment located above their garage. The Vaneskos then had the existing home demolished in order to build a newer and larger home.

Vanesko designed his own home and acted as his own general contractor. Realizing he was a novice contractor, Vanesko paid the city building inspector an additional sum of money to approve his construction plans. The city not only approved these plans, but also made periodic inspections to monitor the construction.

As the home was nearing completion, and after the structure's steel truss roof was completely framed in, the building inspector stated he thought that the roof appeared two feet too high. The Vaneskos were not advised or ordered to stop construction, but were told to seek a variance from the Board of Adjustment. With the support of the building inspector's office, the Vaneskos filed for a variance.

The evidence indicated that it would cost the Vaneskos between $50,000 - $100,000 to remove and replace the roof. Further, 80% of the neighbors surrounding the property supported the granting of the variance, while the remaining 20% expressed no opinion other than to indicate that they were unhappy with the City that the situation had gotten to that point.

During the hearings before the Board on the request for a variance, the Board was specifically instructed by an assistant city attorney to not consider the fact that the permit had been issued in error or that the home was already completely built. Accordingly, the Board denied the request for a variance. The trial court and Dallas Court of Appeals ruled for the

Vaneskos. The Texas Supreme Court has granted petition for review, and oral argument has been held in this case.

The Ft. Worth Court of Appeals held that a municipality can be estopped from applying its zoning and land use ordinances when a private landowner relied on the city's promises to its detriment. In *Super Wash, Inc. v. City of White Settlement*,[73] the Fort Worth Court of Appeals held that equitable estoppel could apply because the city induced the developer to act in a particular manner, and the city should not be allowed to adopt an inconsistent position and thereby cause loss or injury to the developer. The developer's work was about 45% completed pursuant to an approved site plan when the city issued a stop work order. The Court of Appeals pointed out that to apply estoppel, "the trial court must determine whether the landowner is relying on an authorized act of a city official or employee, whether the case is one in which justice requires estoppel, and whether its application would interfere with the city's governmental functions."[74]

The building official testified that he reviewed building plans, authorized issuance of permits and was responsible for zoning and site plans. He also testified that he issued a building permit to Super Wash and that he later requested revised plans regarding a wider curb cut and a fence, which Super Wash provided. Super Wash further showed that it obtained a building permit and, acting in reliance on the permit, began building. The building was forty-five percent complete when Super Wash was informed that the fence had to be continuous with no curb cut or the City would issue a stop-work order. Finding that these issues of material facts existed, the Court of Appeals reversed and remanded the case solely on the estoppel cause of action.[75]

Similarly, the San Antonio Court of Appeals held that, by granting a sign permit and making oral representations, a city was estopped from revoking the permit.[76] Bopp owned and operated a German restaurant. At the time of its annexation by the City of Fredericksburg, a free-standing sign existed. He then obtained a permit to build a wall sign. After the wall sign was constructed, the city sued Bopp claiming that the two signs taken together exceeded the allowable square footage in the City's sign ordinance. The trial court entered the judgment permitting both signs to remain and the Court of Appeals affirmed. Because the city issued a valid permit without any conditions and Bopp relied on the permit by expending substantial sums to build a sign that complied with the permit, the Court held that equitable estoppel applied. Although the City building official testified at trial that Bopp told him he would remove the pole sign, the trial court believed Bopp's testimony to the contrary. Further, owing to the City's unclean hands, this is a situation where justice required estoppel and no governmental function was involved.[77] Specifically, the city could enforce its sign ordinance at other locations in the future.

The San Antonio Court of Appeals also held in *TPLP* that a city can be estopped from closing a driveway when a developer constructed an office park based on previous approvals with the driveway as the primary access point.[78] The driveway was constructed in accordance with prior plat approvals by the city. The developer then spent millions of dollars buying land and constructing office buildings. Because the city was not properly executing its police power, estoppel "was necessary to prevent injustice to the tenants of (the office parks)."[79]

Another type of estoppel was addressed by the Austin Court of Appeals in *City of Austin v. Garza*.[80] In this case, Garza donated land to the city for open space to increase the impervious coverage on his tract. The city approved Garza's plat but refused to approve the permits of a prospective purchaser on the grounds that the plat was mistakenly approved. Because the city retained the donated land, the Austin Court of Appeals concluded "that it would be manifestly unjust for the city to retain the benefits of its mistake yet avoid its obligations."[81] In essence, Garza paid consideration (donated land) for development rights. By accepting the consideration, the city was estopped from revoking its approval of the plat.

While most recent estoppel cases favored developers, a contrary result was reached in *Weatherford v. City of San Marcos*.[82] Weatherford sought on numerous occasions to have portions of his property zoned to allow the development of multi-family and commercial projects. His neighbors consistently opposed these plans. In November 1997, the neighbors, the city and Weatherford entered into a "mediated resolution" allowing some future multi-family and commercial development on his property. The city's comprehensive plan was amended to reflect the mediated settlement. Weatherford submitted rezoning requests consistent with the mediated plan, but they were not approved. The city council then enacted a revised plan which reduced the acreage Weatherford could develop as multi-family residential.

Weatherford filed equal protection, due process, equitable estoppel, Open Meetings Act, Chapter 245 and inverse condemnation (among others) claims against the city. The city prevailed on these causes of action by summary judgment and the Court of Appeals affirmed. Because Weatherford was not being treated differently than other citizens and the city had concerns about traffic, urban sprawl and utilities, there were sufficient governmental reasons to deny Weatherford's rezoning attempts.

Weatherford argued that the city should be estopped to deny the rezoning application after the mediated settlement was executed, particularly since the City amended its comprehensive plan to reflect the agreement reached at the mediation. Although comments were made in public hearings and Weatherford incurred costs in reliance on the plan, the Court held that the circumstances in this case did not demand application of estoppel "to prevent manifest injustice."[83]

With respect to Weatherford's Chapter 245 claim, an application to rezone land is not the first of a series of required permits, but rather a preliminary step in seeking to develop property. A municipality has the power to change land use plans and amend zoning regulations to affect prospective development of land. The Court also rejected Weatherford's inverse condemnation claims. Because the change to the comprehensive plan had no direct impact on Weatherford's property, there was not a direct adverse economic effect on Weatherford. Furthermore, Weatherford had no "investment-backed expectations" to develop his property when he purchased it. His expectations formed well after the property was zoned single-family residential.[84]

VII. CHAPTER 245

While the common law vested rights doctrine has proven to be somewhat limited, the Texas Legislature provided significantly stronger protection in 1987. The statutory law of the State of Texas with regard to the protection of vested rights was originally included in Chapter 481 of the Government Code. In 1987, the Texas Legislature enacted what is commonly known as House Bill 4 and which was codified into § 481.141, et seq. of the Texas Government Code:

The vested rights statute applies to municipalities.[85] A "permit" is broadly defined in the statute, as a "license, certificate, approval, registration, consent, permit or other authorization required by law, rule, regulation or ordinance that must be obtained by a person in order to perform an action or initiate a project for which the permit is sought."[86] This definition includes all actions regulated by the city not in its legislative capacity. There are two primary features of the legislation. First, if a permit application is filed, then only those ordinances which were in effect at the time of the permit submittal can be applied during the permit review and approval process. In other words, a snapshot is taken at the moment in time that a permit request, such as a preliminary plat or a building permit, was submitted, and any changes to the regulations of the city (including zoning ordinances) would not be applied to that particular review.

The second important feature is that the statute addresses "projects" which include phased and multiple development permit approvals. If ordinances are amended between the time a preliminary plat is filed and the time the building permit is issued, these ordinances are to be of no force and effect with respect to the property.[87] A project is a specific land development endeavor that requires action by a city regulatory agency. The statute specifies that a project is "an endeavor over which a regulatory agency exerts its jurisdiction and for which a permit is required before initiation of the endeavor."[88] A regulatory agency is "an agency, bureau, department, division, commission of the state or any department or other agency of a political subdivision which processes and issues permits."[89] A political subdivision is "a political subdivision of the state, including a county, school district, or a municipality."[90] House Bill 4 was amended in 1995 to more clearly define permits and to add certain exemptions to statutory protection.

When a "series of permits" is necessary for a development project, regulations are vested as of the date "the original application for the first permit in that series [was] filed" and that "all permits required for the project [should] be considered to be a single series of permits." A series of permits consists of "[p]reliminary plans and related subdivision plats, site plans, and all other development permits for land covered by such preliminary plans or subdivision plats." Another key provision of the 1995 amendments provided a laundry list of regulations to which the law did not apply, including an exemption that no rights can vest in "municipal zoning regulations that do not affect lot size, lot dimensions, lot coverage, or building size."

Numerous courts have held that developments are protected from subsequently enacted ordinances. In *Save Our Springs Alliance v. City of Austin*,[91] the Austin Court of Appeals summarized Chapter 245 as follows:

> "Chapter 245 of the Local Government Code creates a system by which property developers can rely on the land-use regulations in effect at the time 'the original application for [a] permit is filed.' TEX. LOC. GOV'T. CODE ANN. 245.002(a). At the same time, because the 'laws, rules, regulations, or ordinances of a regulatory agency' may change and those changes may 'enhance or protect the project,' it allows a permit holder to take advantage of those changes without forfeiting any of its chapter 245 rights. Id. 245.002(d)".[92]

An environmental group ("SOS") and a neighborhood association challenged a settlement development agreement between the City of Austin and the developers of the Circle C Ranch. SOS was one of the primary supporters of the Save Our Springs Ordinance enacted in the early 1990's which was intended to protect watersheds in the city. The development agreement provided a procedure for reviewing and approving permits under Chapter 245 and reformed

Chapter 245 as it applies to the Circle C. In this case, SOS wanted to apply the terms of the SOS ordinance in effect at the time the initial development permits were submitted. The developer and the City wanted to apply the terms of the development agreement which was a subsequently enacted ordinance. A plea to the jurisdiction was filed by the defendants on the ground that SOS lacked jurisdictional authority to challenge the agreement. Both the trial court and the court of appeals concurred and granted the plea.

The constitutionality of Chapter 245 was also addressed by the Austin Court of Appeals in *City of Austin v. Garza*.[93] Garza obtained approval of a plat which allowed development over the Barton Creek watershed. A note on the plat stated that development must comply with the watershed ordinance in effect in 1988 which was greatly beneficial to the developer. The city argued that the approval was a mistake. Garza noted § 245.002(d), Tex. Loc. Govt. Code, which would allow him to develop pursuant to the regulatory scheme described in the recorded plat. The City's complaint was that Chapter 245 grandfathered developments and allowed the developer to "cherry pick what other regulations will govern development of his project."[94] Because Garza was not making his own rules but simply choosing between two validly enacted city rules and ordinances, the Austin Court of Appeals held that Chapter 245 was constitutional and that Garza's development rights were protected.

It does not matter under Chapter 245 if the newly enacted ordinances impact health, safety and public welfare. In *Hartsell v. Town of Talty*,[95] the Dallas Court of Appeals held that the Town could not apply its newly enacted building code to previously platted subdivisions in the Town's extraterritorial jurisdiction. It was undisputed that the original applications for the developers' single-family subdivisions were the approved plats. The Town argued that it could make the determination as to whether applying its building code constituted a different "project" for the property under § 245.002(b), TEX. LOC. GOV'T CODE, because building codes are health and safety ordinances. In addition, the Town argued that the subdivision process and the building permit process constituted two different projects. Further, the Town disputed the developer's claim that a general law town could not extend its building code to the extraterritorial jurisdiction without express statutory authority. Following a trial before the court, the trial court ruled in favor of the Town. Upon appeal, the Dallas Court of Appeals rejected the Town's argument and held that the project included the development of the infrastructure for the subdivision and the building of the houses in the subdivision and refused to apply the newly enacted ordinances to the developer's projects. The Court could find no legal precedent to follow the Town's interpretation of the statute and reversed the trial court.[96]

In 2005, the Texas Legislature strengthened the vested rights statute in enacting Senate Bill 574 and Senate Bill 848. Senate Bill 574 prohibits a city from applying a new zoning classification to a pending project. In addition, new landscaping or tree preservation standards cannot be applied to a pending project. Senate Bill 848 restricts a city's ability to refuse to accept a site plan or plat application.

VIII. EXACTIONS

Sheffield involves use restrictions as regulatory takings. Another type of takings category is exactions. Courts in all states have long held that cities, by their regulatory police powers, may impose conditions on subdivision development, including the required donation of street rights-of-way. Similar to recent federal court decisions, Texas courts have historically required a nexus of some type between a governmental exaction on a developer and the benefits and burdens that will result to and from the proposed development.

A. State Nexus Test

In *City of Corpus Christi v. Unitarian Church of Corpus Christi*,[97] the church's building permit was subject to approval of a plat that was conditioned on the dedication of property for street purposes. The trial court required the city to approve the plat as submitted by the church without dedication of the property.[98] The court of appeals affirmed the lower court's decision, holding that even though the city had the authority to require dedication in the platting process, the city could not require a nonsubdividing property owner to make a dedication for street purposes when the primary purpose of the church's plat application was not to divide the tract into two or more parcels, but only to obtain a building permit in accordance with city requirements.[99]

Dedication of a "scenic easement" at the time of platting is also impermissible. In *City of Austin v. Teague*,[100] the Texas Supreme Court held that the city's action in denying development permits was designed to acquire scenic easements over property without compensation. The court held that the city's action damaged the developer's property and that the city was liable for any provable damages.[101]

A more detailed analysis of the required link between an exaction and the benefit to the landowner can be found in *City of College Station v. Turtle Rock Corporation*.[102] The Texas Supreme Court set forth a test to determine the validity of ordinances requiring dedications, or fees in lieu of dedicating property, for park purposes. Drawing upon previous Texas Supreme Court cases, the court held that a city may enact reasonable regulations to promote the health, safety, and general welfare of its citizens provided the ordinance meets two requirements: (1) the regulation must accomplish a legitimate goal; and (2) the regulation must be reasonable and not arbitrary.[103]

The first requirement depends upon whether or not reasonable minds could differ that the ordinance has a substantial relationship to the public health, safety, morals, or general welfare. The court recognized that cities may impose reasonable regulations as a condition for the use of property or as a condition precedent to the subdivision of land and held that the College Station ordinance was a regulatory response to park needs created by the developer's use of land.[104] As a result, the ordinance satisfied the first level of judicial scrutiny.

The more important holding of the court concerned the second test which identified the reasonableness requirement for a valid ordinance.[105] The court stated that the test for this second requirement for the park land dedication was whether a reasonable connection exists between the increased population arising from the subdivision development and the increased park and recreation needs in the neighborhood.[106] Citing the American Law Institute, the Supreme Court held as follows: "The Code adopts the position that developers may be required to provide streets and utilities but only of the quality and quantity reasonably necessary for the proposed development."[107] Therefore, the requested exaction would be deemed reasonable if imposed to offset the need created by the proposed development.

B. Federal Nexus Test

The U.S. Supreme Court made a similar but slightly modified holding in *Nollan v. California Coastal Commission*.[108] In *Nollan*, a property owner desired to obtain a building permit to rebuild a house situated on a beach. As a condition to the approval of the building permit, the California Coastal Commission required the dedication of a public easement across the beachfront in order to connect two public beaches. The property owner attacked the condition as a "taking" of his property under the Fifth Amendment.

The *Nollan* court held that the condition imposed on the developer must serve the same governmental purpose as the development ban.[109] Thus, the requirement for the access easement between the beaches across the property owner's land must further the same purpose as a ban on the proposed development. Because the condition did not serve the public purpose directly related to the building permit, the exaction was confiscatory.[110] Although conceding that the State of California would be served by a continuous strip of publicly assembled beach along the coast, the court held in *Nollan* that "if [the State] wants an easement across the Nollans' property, it must pay for it" in accordance with the Fifth Amendment.[111] The Court likened the governmental action to a "permanent physical occupation."[112] A land-use regulation must be scrutinized to assure that an "essential nexus" exists and the regulation must "substantially" advance the state's objective.[113]

The most recent and important U.S. Supreme Court opinion on the nexus test is found in *Dolan v. City of Tigard*[114] where the Court faced a similar issue as to whether a condition placed on the granting of a redevelopment permit was an unconstitutional taking. The City of Tigard adopted a land management program which required the preservation of greenways within the city's floodplain. To minimize traffic congestion, the city also required new developers within a delineated area to dedicate land for pedestrian/bicycle pathways.

Dolan wanted to enlarge her store and parking lot and applied to the city for a redevelopment permit. The city granted the permit on the condition that Dolan dedicate to the city for greenway all of that portion of her land within the floodplain and an additional portion of land for a pedestrian/bicycle path. At the Oregon state trial court, court of appeals, and supreme court stages, Dolan lost her argument that the city's conditions amounted to illegal exactions.

The U.S. Supreme Court analyzed the conditions under a two-step approach. First, it considered whether an "essential nexus" existed between the legitimate state interest and the conditions exacted by the city.[115] The Court had previously developed this step of the analysis in *Nollan*. In *Dolan*, the court did find the essential nexus between the city's interests and the conditions.[116]

Having found an essential nexus, the court moved beyond *Nollan* to consider "the required degree of the connection between the exactions and the projected impact of the proposed development."[117] The Court determined that the required degree of connection was "rough proportionality," which is similar to the "reasonable relationship" standard adopted by the majority of state courts (including Texas).[118] The Court ruled in favor of Dolan because the city had failed to show that its conditions were "roughly proportional" in nature and extent to the burdens imposed by Dolan's proposed development.[119]

In *Dolan*, the court held that the city, not the property owner, must make some effort to quantify the need for the public dedication requirements.[120] In evaluating the applicability of most development regulations, the burden rests on the challenger to prove that it constitutes an arbitrary regulation of property rights. However, in *Dolan*, the city made an adjudicative decision to condition the building permit application on an individual parcel and, in those cases, the burden rests on the city.[121] In effect, government may not require a person to give up a constitutional right in exchange for a discretionary benefit conferred by the government where the right lost has little or no relationship to the benefit.[122] In *Dolan* the constitutional right being given up was the right to receive just compensation when property is taken for public use.[123] In *Dolan*, a hike and bike trail was required to be dedicated for public use and in *Nollan* an access easement was required to be dedicated to public use. It also appears that the holdings revolved around the property owners' ability to exclude others from their properties.

C. Stafford Estates

On May 7, 2004, the Texas Supreme Court handed down its opinion in *Town of Flower Mound v. Stafford Estates.*[124] In *Stafford Estates*, the Supreme Court explored the application of the takings analysis to non-dedicatory exactions. Between 1994 and 1997, Stafford applied for, and the Town approved, a residential subdivision known as Stafford Estates. Stafford's primary access was to and from the McKamy Road. At the time Stafford acquired its property, Simmons Road was an existing two-lane asphalt road adjacent to the proposed subdivision. Simmons Road was designated as a rural collector roadway on the Town's thoroughfare plan.

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 Town's Land Development Code ("LDC") required that all builders/developers construct concrete streets adjacent to their developments. Section 4.04(a) of the LDC allowed property owners to apply for and the Town Council to grant an exception to the street design standards "provided that the Council finds and determines that such standards work a hardship on the basis of utility relocation costs, right-of-way acquisition costs, and other related factors."

In December 1995, Stafford applied for record plat approval. As a condition of plat approval, the Town required Stafford to demolish part of Simmons Road, replace it with a two-lane concrete road with three-foot concrete shoulders, and pay 100% of the cost of these improvements. These costs were approximately $485,000.00. The Town denied Stafford's request for an exception from this requirement. In 1998, after completing construction of the Simmons Road improvements, Stafford sued the Town, contending that the condition was a taking without just compensation in violation of Article I, Section 17 of the Texas Constitution and the Fifth and Fourteenth Amendments of the United States Constitution.

The liability phase of the trial was tried to the court based on stipulated facts. At the close of the liability phase, the trial court entered judgment for Stafford. The trial court then heard evidence on damages and attorney's fees, and rendered a final judgment awarding Stafford damages, expert witness fees, attorney's fees, and costs. The Fort Worth Court of Appeals upheld the damages award under the Texas Constitution but reversed on the issue of attorneys' fees.[125] The Town appealed to the Supreme Court.

The Supreme Court first noted that Texas does not have statutes that require pre-approval challenges to conditions imposed during the platting process. Due to the developer's consistent objections, the Court held that the developer did not waive its rights by waiting until after the project was finished to file suit.[126] The Court noted that, if the Town were truly concerned about the possibility it might have to pay damages, it could have allowed Stafford to defer rebuilding Simmons Road and escrow the cost pending a judicial determination of the issue.

After acknowledging development exactions as a species of regulatory takings, the Court stated that it would follow the guidance of the U.S. Supreme Court and summarized the two *Nollan* and *Dolan* opinions on this issue.[127] The Court recited the two prongs of the *Dolan* test: (1) an essential nexus must exist between a legitimate state interest and the condition exacted, and (2) the exaction must be roughly proportional to the proposed impact of the proposed land use.[128]

The Town argued that *Nollan/Dolan* should not apply to this situation. First, the Town argued that the *Dolan* analysis should not be applied to exactions that do not involve dedication of real property. Both *Nollan* and *Dolan* involved real property dedication exactions. Because both non-dedicatory exactions and required dedications involve "conditional governmental leveraging," the Court held that the same constitutional test applied to both.[129]

Further, the Court held that this standard applies to both the conditioning of a permit and denial of a permit.[130] The Court acknowledged the Town's argument that applying the *Dolan* test to all development conditions (such as whether houses should be brick or wood) might be too onerous. Because the Town's examples differed significantly from the exaction in this case, however, the Court disagreed with the Town.

The second challenge by the Town asserted that the *Dolan* test did not apply since the ordinances in question were legislatively created, and not an adjudicative action.[131] Without expressly passing upon whether *Dolan* might apply to legislative exactions, the Court held that the Town's requirement to construct the roadway was the result of adjudicative decisions. Because the Town exercised its discretion in denying the requested exceptions to the standards and admitted that other developers had been excepted on a case-by-case basis, the exactions were adjudicative in nature.[132]

The Court then held that a compensable taking had occurred in this case. Road safety is a legitimate public concern, and the Town's upgrade requirements for Simmons Road met the first nexus prong of the *Dolan* test.[133] However, the Town did not satisfy the second *Dolan* prong – the rough proportionality test.

In reviewing the second prong of the *Dolan* test, the Court held that while the Town was not required to make a pre-development determination of rough proportionality, it had failed to do so at trial. Although the Town should have made its rough proportionality determination prior to imposing the condition, the Court held that *Dolan* does not preclude the government from making the determination after the fact.[134] Traffic from Stafford's development would only increase traffic on the road by 18%. While the Town could have taken into account the impact on the Town's entire system, measuring the impact must be in a "meaningful, though not precisely mathematical way . . ."[135] Because the required improvements to Simmons Road did not bear any relationship to the impact of the Stafford Estates development on the road itself or on the Town's roadway system as a whole, the Town's exaction was a taking. Therefore, the Town was required to reimburse Stafford for 82% of the total construction cost for the road which represented the impact on the road by the general public.[136]

The *Stafford Estates* opinion is significant because it limits the government's ability to force developers to build public infrastructure unrelated to the impacts from the development. Because the Supreme Court's opinion is broad in scope, will be applied to future dedications, construction and fees imposed in the development process.

IX. CONCLUSION

In most vested rights cases, the facts will be undisputed and the judge will usually apply the language of the statute to the agreed-to facts. In an inverse condemnation case, on the other hand, the facts need to be carefully presented. Damages may be awarded in an inverse condemnation while the vested rights statute offers only declaratory, injunctive and mandamus relief.

While the *Mayhew* test is multi-pronged, it is advisable to provide evidence of the adverse economic impact due to the governmental action at trial. *Sheffield* stands for the proposition that competent appraisal evidence should be presented in both the liability and the damages stages of trial.

An engineer's testimony will normally be required to show that the project could be engineered and developed in accordance with an approved site plan or other permit. He may also be able to prove up development costs in the liability and damages issues. Finally, the developer's testimony is critical to prove up his investment-backed expectations and his reliance on previously approved permits.

In an exactions case, a variance request to the City's subdivision ordinance will often be needed. Technical information regarding the need for the proposed facility and the costs of the facility should be presented to the governmental body making the decision.

This is an exciting transitional time for land use law practitioners. There is much flux at all levels of the federal and state courts, and the Texas Legislature has felt free to insert its will. More landmark opinions in this area will be rendered during the remainder of 2005.

[1] Sheffield Development Company, Inc. v. City of Glenn Heights, Texas, 140 S.W.3d 660 (Tex. 2004), and Town of Flower Mound, Texas v. Stafford Estates Limited Partnership, 135 S.W.3d 620 (Tex. 2004).

[2] 130 S.W.3d 325 (Tex.App. – Dallas 2004, pet. den.).

[3] This prohibition has been incorporated through the Fourteenth Amendment to apply to the individual states. *Chicago, B. & Q.R. Co. v. Chicago*, 166 U.S. 226, 241 (1897).

[4] Tex. Const. art. I, § 17.

[5] *Ft. Worth & R.G. Ry. Co. v. Jennings*, 76 TEX. 373, 13 S.W. 270, 270-271 (1890).

[6] *See Heitman v. State*, 815 S.W.2d 681, 683 (Tex.Crim.App. 1991).

[7] *Dallas Hunting & Fishing Club v. Dallas County Bois D'Arc Island Levee Dist.*, 235 S.W. 607, 609 (Tex.Civ.App.–Dallas 1921, no writ).

[8] 843 A.2d 500 (Conn. 2004).

[9] 152 S.W.3d 147 (Tex. App. – Dallas 2005, pet. pending).

[10] *Ass'n of Data Processing Serv. Orgs., Inc. v. Camp*, 397 U.S. 150, 151, 90 S.Ct. 827, 829, 25 L.Ed.2d 184, 187 (1970).

[11] *Id.* at 152, 90 S.Ct. at 829, 25 L.Ed.2d at 187.

[12] *Sears v. Hull*, 192 Ariz. 65, ¶ 16, 961 P.2d 1013, ¶ 16 (1998).

[13] *Warth v. Seldin*, 422 U.S. 490, 498, 95 S.Ct. 2197, 2205, 45 L.Ed.2d 343, 354 (1975), *quoting Baker v. Carr*, 369 U.S. 186, 204, 82 S.Ct. 691, 703, 7 L.Ed.2d 663, 678 (1962).

[14] *Mayhew v. Sunnyvale*, 964 S.W.2d 922 (Tex. 1998).

[15] 473 U.S. at 186, 194; *see also Suitum v. Tahoe Reg'l Planning Agency*, 520 U.S. 725, 733-34 (1977).

[16] *Id*. at 193, 105 S.Ct. at 3120, 87 L.Ed.2d at 142-43.

[17] *Id.* at 193-94, 105 S.Ct. at 3120, 87 L.Ed.2d at 143.

[18] *Mayhew v. Town of* Sunnyvale, 969 S.W.2d 922 (Tex. 1994).

[19] 526 U.S. 687 (1999)

[20] 134 S.W.3d 449 (Tex. App. – Ft. Worth 2004, no pet).

[21] *Id.* at 453.

[22] *Id.* at 458.

[23] *See City of Austin v. Teague*, 570 S.W.2d 389, 393 (Tex. 1978).

[24] *San Antonio River Auth. v. Garrett Brothers*, 528 S.W.2d 266, 273 (Tex.Civ.App.-San Antonio 1975, writ ref 'd n.r.e.).

[25] *State of Texas v. Biggar*, 873 S.W.2d 11 (Tex. 1994)

[26] *See Sheffield*, 140 SW.3d at 671.

[27] *City of Keller v. Wilson*, 86 S.W.3d 692 (Tex. App. — Fort Worth 2002, pet. gr.)

[28] *Id.* at 415.

[29] *Id.* at 400.

[30] 505 U.S. 1003 (1992).

[31] *Id.* at 1019.

[32] 526 U.S. 687 (1999).

[33] 369 F.3d 882 (5th Cir. 2004).

[34] *Id.* at 885.

[35] *Id.* at 891.

[36] *Id.* at 891.

[37] 505 U.S. 1003, 112 S.Ct. 2886, 120 L.Ed. 798 (1992).

[38] 369 F.3d at 893.

[39] *2218 Bryan Street v. City of Dallas,* (Dallas Court of Appeals, Cause No. 05-04-00064)

[40] 447 U.S. 255, 260 (1979).

[41] 2005 U.S. Lexis 4342, 73 U.S.C.W.; 4333 (May 23, 2005).

[42] *See e.g., Penn Central Transp. Co. v. New York City*, 438 U.S. 104 (1978); *Agins v. City of Tiburon*, 447 U.S. (1978).

[43] 140 S.W.3d 660 (Tex. 2004).

[44] *Id.* at 665.

[45] *Id.*

[46] *Id.*

[47] *Sheffield Development Company v. City of Glenn Heights*, 61 S.W.3d 634 (Tex. App.—Waco 2001, aff'd in part, rev'd in part, remanded).

[48] 964 S.W.2d 922 (Tex. 1998).

[49] *Id.* at 935-6.

[50] 140 S.W.3d at 669.

[51] 438 U.S. 104, 124, 98 S.Ct. 2647, 57 L.Ed.2d 631 (1978).

[52] 140 S.W.3d at 676.

[53] *Id.* at 677.

[54] *Id.*

[55] *Id.* at 678.

[56] *Id.* at 678.

[57] *Id.*

[58] *Id.* at 680.

[59] *Id.* at 681.

[60] 2004 WL 624554 (Tex. App.—San Antonio, March 31, 2004) (not designated for publication).

[61] *See Coffee City v. Thompson*, 535 S.W.2d 758 (Tex. Civ. App.—Tyler 1976, writ ref'd n.r.e.).

[62] *See Bartlett v. Cinemark, USA*.908 S.W.2d 229 (Tex. App.—Dallas 1995, no writ).

[63] *City of Addison v. Dallas Ind. Sch. Dist.,* 632 S.W.2d 771 (Tex. App.—Dallas 1982, no writ).

[64] *Gulbenkian v. Penn*, 412 S.W.2d 929 (Tex. 1952).

[65] *See e.g., City of Hutchins v. Prasifka*, 450 S.W.2d 829, 835 (Tex. 1970); *City of Amarillo v. Stapf*, 101 S.W.2d 229 (Tex. 1937); *City of San Angelo v. Deutsch*, 91 S.W.2d 308, 311-312 (Tex. 1936).

[66] *Id*. at 836.

[67] 211 S.W.2d 279 (Tex. Civ. App.—Dallas 1948, writ ref's n.r.e.).

[68] *Id.*, at 291-93.

[69] *City of Dallas v. Rosenthal*, 239 S.W.2d 636 (Tex. Civ. App.—Dallas 1951, writ ref'd n.r.e.).

[70] *City of Hutchins v. Prasifka*, 450 S.W.2d 829, 835 (Tex. 1970).

[71] *Id.* at 836.

[72] 127 S.W.3d 220 (Tex. Civ. App.—Dallas, pet. gr.)

[73] 131 S.W.3d 249 (Tex. App.—Fort Worth 2004, pet. filed).

[74] *Id.*, at 260.

[75] *Id.* at 260-261.

[76] *City of Fredericksburg v. Bopp*, 126 S.W.3d 218 (Tex. App.—San Antonio 2003, no pet.).

[77] *Id*. at 223.

[78] *City of San Antonio v. TPLP Office Parks Properties, Ltd.*, 2004 WL 2191716 (Tex.App.—San Antonio).

[79] *Id*. at 10.

[80] 124 S.W.3d 867 (Tex. App.—Austin 2003, no pet.).

[81] *Id.* at 874.

[82] 2004 WL 2813777 (Tex. App.—Austin, December 9, 2004).

[83] *Id.* at 10.

[84] *Id.* at 12.

[85] *Id*. at § 481.142.

[86] *Id.* at § 481.142.

[87] *Id.*

[88] *Id.*

[89] *Id.*

[90] *Id.*

[91] _____ S.W.3d _____, 2004 WL 962864 (Tex. App.—Austin, May 6, 2004, no pet.).

[92] Id. at 6.

[93] 124 S.W.3d 867 (Tex. App.—Austin 2004, no pet.).

[94] *Id*. at 871.

[95] 130 S.W.3d 325 (Tex. App.—Dallas 2004, pet. denied).

[96] *Id.* at 328.

[97] 436 S.W.2d 923 (Tex. Civ. App. 1968 writ ref'd n.r.e.).

[98] *See Id.*

[99] *See Id.* at 927.

[100] 570 S.W.2d 389 (Tex. 1978).

[101] *See Id*.

[102] 680 S.W.2d 802 (Tex. 1984).

[103] *See Id*. at 805 (citations omitted).

[104] *See Id*. at 805-07.

[105] *See Id*.

[106] *See Id*.

[107] *Id*. at 807.

[108] 483 U.S. 825 (1987).

[109] *See Id* at 837.

[110] *See Id*.

[111] *Id*. at 842.

[112] *Id.* at 832.

[113] *Id.* at 841.

[114] 512 U.S. 374 (1994).

[115] *See Id* at 385.

[116] *See Id* at 387.

[117] *Id*. at 386.

[118] *See Id*. at 391.

[119] *See Id*. at 394-95.

[120] *See Dolan*, 512 U.S. at 395-96.

[121] *See Id*. at 391 n.8.

[122] *See Id*. at 385.

[123] *See Id*. at 385-86.

[124] 135 S.W.3d 620 (Tex. 2004).

[125] *Town of Flower Mound v. Stafford Estates*, 71 S.W.3d 18 (Tex. App.—Ft. Worth 2002, pet. gr.).

[126] *Id.* at 629.

[127] *Nollan v. California Coastal Comm'n*, 483 U.S. 825 (1987); *Dolan v. City of* Tigard, 512 U.S. 374, 114 S.Ct. 2309, 129 L. Ed. 2d 304 (1994).

[128] 35 S.W.2d at 634.

[129] *Id.* at 636.

[130] *Id.* at 638.

[131] *Id.* at 641.

[132] *Id.* at 642.

[133] *Id.* at 643.

[134] *Id.* at 644.

[135] *Id.* at 644.

[136] *Id.* at 645.