REGULATORY TAKINGS:
THE DEVELOPERS PERSPECTIVE

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State Bar of Texas
18TH ANNUAL SUING AND DEFENDING GOVERNMENTAL ENTITIES COURSE
July 13 – 14, 2006
San Antonio

CHAPTER 14

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Zoning, Regulatory Takings and Eminent Domain Seminars, CLE International, Dallas, Austin, Fort Worth, 1996-2001, 2005
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I. INTRODUCTION

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. However, disputes about zoning classifications, variances and permits remain common place.

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? The facts can turn the result. An example of how a court addressed this issue can be found in *Hartsell v. Town of Talty*.[1]

II. TEXAS CONSTITUTIONAL PROTECTIONS

One of the first practical decisions in filing litigation is whether to file in federal or state court. For procedural reasons, land use cases are typically filed in state, not federal, court. In addition, the Federal constitutional provision states "nor shall private property be taken for public use without just compensation."[2] 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; . .[3]

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….[4]

The Texas Constitution may therefore provide greater protections than those provided by the United States Constitution.[5] 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.[6]

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. PROPERTY INTEREST

Another element of initially analyzing a case is to determine if the property owner or developer has had a constitutionally protected property interest taken from him. For example, in Texas a developer's option contract is not a constitutionally protected property interest. Leases and easements, on the other hand, are considered to be protected property interests.

In *City of Heath v. Duncan*,[7] the issue of whether or not a restrictive covenant is a protected property interest was addressed by the Dallas Court of Appeals. Thirteen landowners owned large lots with recorded covenants restricted to residential use. Without notifying the lot owners, the City purchased a lot in the subdivision 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 such as a deed restriction is a compensable property right. This represents the view of a majority of states, and the Texas Supreme Court denied the City's petition for review in June 2006.

IV. STANDING AND JURISDICTION

An additional element to consider is whether the plaintiff meets the procedural requirements to file a suit: "Generalizations about standing to sue are largely worthless as such."[8] To have standing, a plaintiff must have suffered "injury in fact, economic or otherwise."[9] In addition, that injury must be "distinct and palpable,"[10] such that the plaintiff has a "'personal stake in the outcome of the controversy.'"[11]

True jurisdictional issues include lack of subject matter jurisdiction, lack of standing, failure to exhaust administrative remedies, lack of ripeness, mootness, or an improper amount in controversy. Sovereign immunity also is jurisdictional in instances where a governmental unit's immunity from suit and liability are co-extensive.[12]

A plea to the jurisdiction challenges the trial court's authority to determine the subject matter of the action.[13] A petition must allege facts that affirmatively demonstrate the court's jurisdiction to hear the cause.[14] Courts construe the pleadings liberally in the plaintiff's favor.[15]

V. SOVEREIGN IMMUNITY

In *City of Rowlett v. Rowlett/2000, Ltd*,[16] the City argued that a developer does not have a cause of action for inverse condemnation under Article I § 17 of the Texas Constitution because the Texas Constitution does not expressly waive immunity for this cause of action.[17] The trial court denied the City's plea to the jurisdiction; and the city appealed.

The Texas Supreme Court has held numerous times over the years that sovereign immunity has been waived for inverse condemnation causes of action. In 1941, the Texas Supreme Court stated that sovereign immunity is waived in inverse condemnation causes of action under the Texas Constitution:[18]

> However, the power of the State to take, damage, or destroy private property for public use is subject to the right of the owner thereof to adequate compensation for the taking, damaging, or destroying of such property . . . The language used in Section 17 of Article I of the Constitution, supra, which says that no person's property shall be taken or damaged for public use without adequate compensation being made, has no exceptions or limitations attached thereto. It is a clear, definite statement of the rule which prevails in this State, which controls all the departments of the State government.[19]

The Texas Supreme Court has never wavered from this holding. For example, the Court has held that if any government appropriates property without paying adequate compensation, the owner may recover the resulting damages in an inverse condemnation suit.[20] The Supreme Court expressly held that governmental entities do not have sovereign immunity in inverse condemnation cases.

VI. RIPENESS

In *Mayhew v. Town of Sunnyvale*, the Texas Supreme Court specifically addressed the ripeness requirement in the context of regulatory takings cases. The Court stated:

> The federal courts have recognized, as a prudential matter, an essential prerequisite to the ripeness of federal regulatory takings and related constitutional claims. This "essential prerequisite" requires "a final and authoritative determination of the type and intensity of development legally permitted on the subject property. A court cannot determine whether a regulation has gone 'too far' unless it knows how far the regulation goes." In other words, the federal courts have reasoned that a court cannot determine whether a taking or other constitutional violation has occurred until the court can compare the uses prohibited by the regulation to any permissible uses that may be made of the affected property.
>
> Accordingly, in order for a regulatory takings claim to be ripe, *there must be a final decision regarding the application of the regulations to the property at issue.*[21]

The Court's opinion in *Mayhew* provides an indication of the types of efforts a claimant must put forth to ripen its regulatory takings claim. In that case, the Court found the claim was ripe because the plaintiffs: (i) made an original request to develop their property, (ii) spent over a year negotiating with the town, (iii) negotiated with both the town's planning committee and individual council members, (iv) submitted an alternative development request in order to reach a compromise, and (v) sought and obtained the vote of the town council (the town's ultimate decision-maker) rejecting the alternative proposal.[22]

The actions taken in Mayhew contrast with those cases in which governmental bodies have not been given "an opportunity to 'grant different forms of relief or make policy decisions which might abate the alleged taking'" and courts thus have held that the claimants' takings claims were not ripe.[23] For example, in *Howard v. City of Kerrville*, the San Antonio Court of Appeals addressed Howard's claims that the City's floodplain regulations denied him all economically viable uses of his property or, alternatively, dramatically, reduced the available uses of the property, thereby interfering with his reasonable, investment-backed expectations:

> Here, Howard only applied for a permit under the pre-1994 City regulations, but at the time, the City had issued a moratorium on development After the City lifted the moratorium, Howard abandoned his application. The only other instance in which Howard attempted to apply for a permit was to build a car dealership, in 1996, but he later withdrew that application as well. Therefore, Howard has not completed the application process for any permit, under the post-moratorium ordinances that are the basis his regulatory takings claims. In fact, Howard concedes that he has not made such an attempt because he believes the regulations are financially prohibitive. Because Howard has not completed any application process under the City's present ordinances, his regulatory takings claims are not ripe for judicial review.[24]

There have been occasions when landowners have gone to great lengths to secure permits for the development of their property, only to be forced to resort to litigation to secure relief from an alleged regulatory taking.[25] However, while the required steps will vary depending on the nature of the regulation in dispute and the governmental body's response to a landowner's application, the relevant Texas authorities do not suggest the necessity for a protracted application process.[26] Of course, the greater the efforts to secure the desired relief, the more likely it is that the claimant will ultimately be able to prevail on its claim.

Another example of the application of this type of rule is found in the U.S. Supreme Court's opinion in *City of Monterrey v. Del Monte Dunes*.[27] 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*,[28] 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.[29] 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.[30]

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.

VII. EXHAUSTION

In *Williamson County Regional Planning Comm'n v. Hamilton Bank*,[31] the United States Supreme Court addressed the prerequisites for asserting a Fifth Amendment takings claim against a state or local government. The Court observed that the Fifth Amendment does not proscribe the taking of property; rather, it prohibits the taking of property without just compensation.[32] Before a landowner can recover under the Fifth Amendment, therefore, the landowner must demonstrate that there is no adequate procedure for the assessment and recovery of compensation under stat law. The Court explained:

> If the government has provided an adequate process for obtaining compensation, and if resort to that process "yield[s] just compensation," then the property owner "has no claim against the Government" for a taking. Thus, we have held that taking claims against the Federal Government are premature until the property owner has availed itself of the process provided by the Tucker Act, 28 U.S.C. § 1491. Similarly, if a State provides an adequate procedure for seeking just compensation, the property owner cannot claim a violation of the Just Compensation Clause until it has used the procedure and been denied just compensation.[33]

In subsequent cases, federal courts have repeatedly refused to consider Fifth Amendment claims for compensation when the claimants failed to pursue available remedies under state takings laws before bringing suit.[34]

In cases decided after *Williamson County*, some courts indicated that a claimant desiring to pursue federal takings claims in federal court could "reserve" those claims while pursuing relief under state law in state court.[35] The Supreme Court addressed this issue during its last term in *San Remo Hotel, L.P. v. City and County of San Francisco*.[36] In that case, the owners of the San Remo Hotel sought to challenge under the Fifth Amendment a San Francisco city ordinance prohibiting the conversion of residential hotel units into tourist units except upon the payment of a substantial conversion fee. The Court rejected the challenge, holding that the full faith and credit statute - 28 U.S.C. Section 1738 - precluded consideration of the claim, because in earlier state court litigation the California courts denied the claimants relief under state takings law that was coextensive with federal law.

The state trial court dismissed plaintiffs' claims, and the California Supreme Court upheld the trial court's judgment. The court noted that the Takings Clause in the California Constitution was interpreted similarly to the Fifth Amendment.[37] The trial court held that there was a "reasonable relationship" between the conversion fee and the loss of residential housing and rejected the plaintiffs' takings claims.[38] The plaintiffs then returned to federal court.

The U.S. Supreme Court ruled that under the federal Full Faith and Credit Act, 28 U.S.C.A. § 1728, federal courts are required to apply normal principles of issue preclusion when any takings case is first tried in state court and then comes to federal court. The Court noted that: "State courts are fully competent to adjudicate constitutional challenges to local and land-use decisions."[39] Takings claimants may file federal takings claims in state court "in the alternative" which may provide some opportunity for the state court to handle the state issues first and then the federal takings claim only if the claimant loses on the state claim.

A minority of the court directly criticized *Williamson County*: "It is not clear to me that *Williamson County* was correct in demanding that, once a government entity has reached a final decision with respect to a claimant's property, the claimant must seek compensation in state court before bringing a federal takings claim in federal court."[40] In light of the majority opinion, there is no longer a judicial option to

try a federal takings claim prior to litigating the state takings claim. Moreover, after the state law claim is adjudicated, the ruling on the state law claim will likely be *res judicata* as to the federal claim.

VIII. REGULATORY TAKINGS

A. Acquisitory intent

An often overlooked cause of action under Texas law involves acquisitory intent. This is similar to a torts cause of action. An important benefit to the plaintiff of bringing an acquisitory intent claim is the ability to address both liability and damages claims before a jury rather than a judge.

An example is where the government's action is against the owner's economic interest for the government's own advantage.[41] 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.[42]

Another 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.[43]

The author represented a developer whose property was downzoned from a multi-family district to a single-family district in the midst of negotiations over the purchase of the tract 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. This case was settled with the developer by the city granting new zoning on other tracts owned by the developer and paying to construct streets to benefit the developer's remaining tracts.

Another example of an acquisitory intent case involved the City of Dallas' refusal to issue building permits in a subdivision where the city wanted to acquire an aviation easement. The property is located in the vicinity of the former Naval Air Station which closed in the early 1990's. A rezoning application, plat application and infrastructure construction were approved with no requirement by the city for an aviation easement. When the city entered into negotiations with a defense contractor to renovate the airport and use it for test flights for military aircraft, it denied the requested building permits and filed suit against the homebuilder.

After the city initially started the litigation process, the developer filed acquisitory intent and vested rights counterclaims. After discovery and prior to trial, the parties settled. Unbeknownst to the developer, negotiations between the city and the military contractor had soured. As part of settlement, the city agreed that houses could be built in the subdivision, provided that the developer include a disclosure in its homeowner contracts that the airport might reopen someday. In addition, the city paid the developer $200,000 compensation as part of the settlement package.

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.[44]

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 case where a city constructed a street on what it thought was dedicated right-of-way. The only issue in this case is the amount of damages. Typically, liability is not at issue. Instead, most of the focus in these disputes is determining the proper level of compensation for the trespass.

The Texas Supreme Court in *City of Keller v. Wilson*[45] recently provided clarification regarding the relationship between municipal plat approval and the requirements of the Texas Local Government Code and inverse condemnation under Article I, Section 17 of the Texas Constitution. The Second Court of Appeals ruled that the City of Keller, by approving a residential subdivision that allegedly flooded downstream property, was liable for inverse condemnation.[46]

Following an appeal by Keller, the Texas Supreme Court reversed the Second Court of Appeals and rendered judgment on behalf of the City of Keller.[47] The City required a developer of a new subdivision to submit plans for removal of run-off water that did not increase the flow or the velocity of water to downstream property in conjunction with plat submittal. After review and satisfaction that the developer's drainage plans met Keller's criteria and requirements, Keller approved the plans and final plat and authorized construction of infrastructure improvements. The following issues were presented: Was Keller liable under inverse condemnation for downstream flooding because it approved the developer's plans and plat? Was Keller liable under inverse condemnation for downstream flooding even though it did not design or construct the drainage improvements?

As part of the process for plat approval and, ultimately, the building of the subdivisions, Keller required the developer to provide for the removal of run-off water resulting from a 100-year rain event. Keller required that the developer's drainage plan could not increase either the flow or velocity of the water reaching downhill properties. These requirements were part of Keller's Master Drainage Plan.[48]

The engineer that designed the Permanent Drainage Easement and channel for the developers testified that the Permanent Drainage Easement and channel were designed to comply with Keller's drainage requirement that neither the flow nor velocity of water reaching downstream properties would increase.[49] To insure that the developer's design of the Permanent Drainage Easement would not increase the flow or velocity of water on downstream properties, Keller instituted several reviews of the design. First, Keller's engineering department reviewed the design and found that it complied with Keller's Master Drainage Plan. The Director of Public Works for Keller, a professional engineer, testified that the developer's design placed the Permanent Drainage Easement in the area where water already flowed so as to follow the water's natural flow. He also testified, that based on his training and experience, the developer's design did not increase the flow or velocity of water on downstream properties.[50]

Second, Keller inspectors inspected the construction of the drainage improvements to assure the construction complied with the developer's design.

Third, Keller made a final inspection after the Permanent Drainage Easement and drainage improvements were completed and found they complied with the developer's design.

Fourth, Keller commissioned an independent engineering firm to review the developer's design to insure that the design conformed to Keller's Master Drainage Plan and other regulations.[51]

An engineer with the independent engineering firm commissioned by Keller testified that he reviewed the developer's design for the Permanent Drainage Easement and concluded the design was adequate to carry stormwater flow resulting from a 10- to 100-year rain event. Keller's independent engineer also concluded that the developer's design conformed to standard accepted engineering practices and procedures and that it would not increase the floodwater run-off to downstream properties. Thereafter, Keller approved the final plat and the developer's drainage plans.

According to the Texas Supreme Court, the fact that Keller had previously adopted a master drainage plan that called for a drainage easement across the Wilson property did not show a necessity or public purpose in allowing the flooding of the Wilson property when an alternate plan eliminating the need for such drainage was approved many years later.[52] To prevail, the Wilsons had to establish that a taking of their property was "necessarily incidental" to a governmental action.[53]

The Court of Appeals rejected Keller's contention that all engineering testimony be included in the review by holding that it must consider only the evidence and inferences that tend to support the findings of the trial court and disregard all evidence and inferences to the contrary.[54] The Texas Supreme Court reversed and rejected the scope of review of the Second Court of Appeals by holding that a reviewing court must consider "all of the evidence" in the light favorable to the verdict (the "inclusive standard").[55]

The critical question in this case was the City of Keller's state of mind – the Wilsons had to prove Keller *knew* (not should have known) that flooding was substantially certain to result from approval of the plans. A reviewing court cannot evaluate what Keller knew by disregarding most of what the court was told by three sets of reviewing engineers. Moreover, when a case involves scientific or technical issues requiring expert advice (as this one did), jurors cannot disregard a party's reliance on experts hired for that very purpose without some evidence supplying a reasonable basis for doing so.[56] In *Keller*, three sets of engineers certified that the development plans and plat met

Keller's codes and regulations and, thus, would not increase downstream flooding.[57] None of the evidence showed Keller knew more than it was told by the engineers. The Wilsons' expert testified that flooding was (in his opinion) inevitable, but not that the City *knew* it was inevitable.[58] Keller witnesses admitted knowing that development would increase runoff at the head of this drainage system, but not flooding at its foot.[59] The omission of a drainage channel across the Wilsons' property obviously raised concerns as to whether Keller properly investigated, but was not evidence that Keller knew the advice it received in response was wrong.[60]

More important, the Supreme Court noted that this ignores what the Wilsons had to prove – not that Keller *might* have disbelieved the engineers' reports, but that it *did*. This requires evidence of "objective indicia of intent" showing Keller knew identifiable harm was occurring or substantially certain to result.[61] Accordingly, Keller's approval of the development plan and plat was not an intentional taking under Article I, Section 17 of the Texas Constitution.

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, particularly as to the value a tract must retain after the taking to qualify under the test. However, it has been addressed in at least two United States Supreme Court Cases.

Lucas v. South Carolina Coastal Council[62] established the *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.[63]

In *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*,[64] the Court upheld a jury finding that a taking occurred on the grounds that the City's numerous 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*[65], 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."[66] 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.[67] 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.[68]

However, the city also claimed that Vulcan's activities constituted a nuisance precluding recovery under *Lucas v. South Carolina Coastal Comm.*[69] 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.[70]

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.

In *2128 Bryan Street, Ltd. v. City of Dallas*,[71], the Dallas Court of Appeals held that the purchaser of property in downtown Dallas was not entitled to a permit to demolish an old high school on the property that was included in a historic overlay district designated after the permit application was submitted. In addition, the Court of Appeals held that the developer would not prevail on its denial of all economically viable uses claim. The appellant owner purchased the property after the city landmark commission instituted proceedings to consider whether it should be designated a historic district. Under the Dallas City Code, the institution of such proceedings triggered a moratorium on the acceptance of any applications for permits to alter or demolish structures on the property. The moratorium was in effect when the appellant submitted its first application for a demolition permit. At the time, the code provided that the moratorium would end on the 180th day after the filing of a written request for hardship relief. The appellant filed the request, which was not granted.[72]

Before the 180-day period expired, the city adopted a new ordinance amending its historic regulations to delete the 180-day provision and add new standards for demolition permits. The landowner demanded a demolition permit, which was refused. The city contended that the application was incomplete under the new regulations. Soon thereafter, the city adopted an ordinance designating a portion of the appellant's property, including the school, as a historic overlay district.[73]

The landowner then sued for a writ of mandamus ordering the city building official to issue a demolition permit and for damages from alleged regulatory taking and due process violations. The trial court granted the city's motion for summary judgment on the permit issue. After a bench trial, the court ruled for the city on the regulatory taking and due process claims.[74]

On appeal, the court considered the appellant's argument that Chapter 245 of the Texas Local Government Code required the city to issue the demolition permit, despite the adoption of the later ordinances for historic districts. The landowner contended that either its initial application or its hardship request triggered the protection of Section 245.[75] However, the Court of Appeals agreed with the city that Chapter 245 did not apply because no permit application could be filed during the moratorium. The court also agreed that because new demolition standards were adopted for properties under consideration for historic designation before the end of the moratorium, those standards properly applied to any subsequent permit application.[76]

The court also upheld the trial court's denial of the owner's due process and regulatory taking claims. It rejected the regulatory taking claim, finding that the opinions and conclusions of the owner's appraiser on the impact of the permit denial on the property's value were not credible.[77] Specifically, the trial court found that, unlike *Vulcan*, the developer owned adjacent tracts which could be incorporated in a development with the existing high school.

D. Substantial advancement test

In *Agins v. City of Tiburon*, the United States Supreme Court set forth the following 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].[78]

Both the Texas and the U.S. Supreme Court have struggled with defining this test in an inverse condemnation content. In 2005, the United States Supreme Court removed this historical regulatory takings test from U.S. takings law in *Lingle v. Chevron U.S.A., Inc.*[79] 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. It is unclear if the U.S. Supreme Court opinion will be incorporated in Texas law.

E. Unreasonable restriction on use

Until 1987, the U.S. Supreme Court was consistently deferential to governmental regulation.[80] *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.*[81] 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.[82]

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.[83] 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.[84]

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.[85] 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*.[86]

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.[87] 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 Supreme Court initially determined that it would look to federal jurisprudence on regulatory takings for guidance.[88] 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.[89] 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. The Court held that the substantial advancement test has support under Texas case law separate and apart from federal court precedent. 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.[90] In light of the recent *Lingle* opinion by the U.S. Supreme Court, it is unclear whether 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."[91] 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. According 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."[92]

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.[93] 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").[94] 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".[95] 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.[96]

Finally, the Court held that the issue of the filing of the preliminary plat was ripe for adjudication.[97] The *Sheffield* case was recently settled to the benefit of both parties. The parties then entered into settlement discussions. Sheffield's preliminary plat theoretically would have allowed 850 lots to be developed. However, many of these lots were located in floodplains or otherwise would have been very difficult to develop.

Since the 1997 downzoning, a large number of smaller lot subdivisions were approved by subsequent Glenn Heights city councils. Under the 1997 zoning, about 425 lots could be developed on the property.

Sheffield submitted a planned development application which included an activity center, parks, a mixture of lot sizes, right-of-way for Loop 9 and hike and bike trails. Following several meetings and public hearings, the Council approved a site plan with 679 lots, thus bringing an end to nine years of litigation.

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.*[98] 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.

An example where an inverse condemnation was found is *City of San Antonio v. El Dorado Amusement Company, Inc.,*.[99] El Dorado owned a building which housed various businesses which sold alcoholic beverages. San Antonio downzoned the property to delete the sale of alcoholic beverages as an allowed use. After the city denied El Dorado's application for a non-conforming use, El Dorado sued in inverse condemnation.

The trial court ruled that a taking had occurred and entered a judgment awarding damages and attorney's fees. According to the witnesses, the value of the property was significantly devalued as a result of the loss of the liquor license. As a result, the court of appeals agreed with the trial court that the downzoning had a severe economic impact. Because the property had been utilized with businesses which sold alcoholic beverages for 18 years, the downzoning also unreasonably interfered with El Dorado's investment-backed expectations.

The trial court's award of $662,301 in actual damages consisted of $420,301 in past lost profit and $242,000 for the loss of property value. Agreeing with the city, the court of appeals held that El Dorado could not recover both lost profits and the decrease in market value. Therefore, El Dorado was only awarded $242,000.

IX. QUASI-VESTED RIGHTS AND ESTOPPEL

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.[100] 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.[101] 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.[102] 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.[103] 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.[104]

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.[105] The primary Texas case supporting equitable relief is *Rosenthal v. City of Dallas.*[106] 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.[107] On retrial, the position was affirmed.[108]

The general rule has historically been that when a unit of government is exercising its governmental powers, it is not subject to estoppel.[109] There is more recent authority for the proposition that a municipality may be estopped only in those cases where justice requires its application, and there is no interference with the exercise of its governmental functions.[110]

These issues are often addressed in board of adjustment cases. In 2006, the Texas Supreme Court reversed the Dallas Court of Appeals and held that a personal and self-created hardship did not authorize variance relief by the Dallas Zoning Board of Adjustment in *City of Dallas v. Vanesko*.[111] 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 and they were reversed by the Texas Supreme Court.

The Court distinguished the facts in this case from the *Cantu* and *McBride* opinions.[112] Dallas' zoning ordinance did not allow the hardship flexibility as did the zoning ordinances in those two cases. This was not a situation where a physical hardship had arisen due to the area, shape or slope of the parcel. Instead, the condition was self-created. The Vaneskos' estoppel case was severed and not addressed in this opinion.

In 2006, the Texas Supreme Court also restricted the application of estoppel in *City of White Settlement v. Super Wash, Inc.*[113] The Supreme Court reversed the Fort Worth Court of Appeals which 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 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."[114]

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.

In reversing the court of appeals, the Supreme Court emphasized that estoppel is only available in exceptional cases, for example, where a city acts deliberately to induce a party to act in a way that benefits the city but prejudices the party weighs in favor of applying the exception. The Court decided that this was not an exceptional case. The business had been operating for years without the second entrance. Additionally, Super Wash could have sought a variance or repeal of the ordinance. Furthermore, the city acted quickly after discovering the error in enforcing the ordinance.

The Court also pointed out that a city will not be estopped if doing so would interfere with its ability to perform its governmental functions. This is the first case where the Court had the opportunity to clarify what it means to "interfere" with a governmental function. The test established by the Court was whether estopping the city in a single instance would bar the future performance of that governmental function or impede the city's ability to perform its other governmental functions. In estopping a city's enforcement of a duly enacted ordinance, the court should consider whether estoppel will affect public safety, bar future enforcement of the ordinance, or otherwise impede the city's ability to serve the general public.

Although the court of appeals held that there was a disputed fact issue, the Supreme Court noted that the evidence demonstrated that estopping the city would impede the city's attempt to answer the neighborhood's concern. Estopping the city in this instance would prevent the city from employing its chosen method of regulating traffic and remove its discretion from enforcing its classic governmental functions.

This recent Supreme Court opinion is somewhat at variance with lower court opinions. For example, 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.[115] 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.[116] Specifically, the city could enforce its sign ordinance at other locations in the future.

The San Antonio Court of Appeals held in *City of San Antonio v. TPLP Office Parks Properties, Ltd.* 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.[117] 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)."[118]

Another type of estoppel was addressed by the Austin Court of Appeals in *City of Austin v. Garza*.[119] 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."[120] 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.

A result more consistent with *Super Wash* was reached in *Weatherford v. City of San Marcos*.[121] 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."[122]

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 were formed well after the property was zoned single-family residential.[123]

It is difficult to predict how the Supreme Court's *Super Wash* opinion will impact lower courts in evaluating estoppel cases. The critical fact situation in this case involved minimal construction work and a "mistake" by the building official in issuing the site development permit. In addition, the "mistaken" construction by the developer was minor and could relatively easily be corrected. A much more difficult fact situation would involve a developer spending millions of dollars in infrastructure, only to find that

the city approved the subdivision construction plans "by mistake."

X. 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 and is now included in Chapter 245, TEXAS LOCAL GOV'T CODE.

The vested rights statute applies to municipalities.[124] 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."[125] 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.[126] 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."[127] 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."[128] A political subdivision is "a political subdivision of the state, including a county, school district, or a municipality."[129]

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*,[130] 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)".[131]

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*.[132] 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."[133] 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*,[134] 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.[135]

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 new landscaping or tree preservation standards to a pending project. Senate Bill 848 restricts a city's ability to refuse to accept a site plan or plat application.

XI. 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*,[136] 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.[137] 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.[138]

Dedication of a "scenic easement" at the time of platting is also impermissible. In *City of Austin v. Teague*,[139] 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.[140]

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*.[141] 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.[142]

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.[143] 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.[144] 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.[145] 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."[146] 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*.[147] 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.[148] 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.[149] 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.[150] The Court likened the governmental action to a "permanent physical occupation."[151] A land-use regulation must be scrutinized to assure that an "essential nexus" exists and the regulation must "substantially" advance the state's objective.[152]

The most recent and important U.S. Supreme Court opinion on the nexus test is found in *Dolan v. City of Tigard*[153] 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.[154] 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.[155]

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."[156] 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).[157] 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.[158]

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.[159] 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.[160] 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.[161] In *Dolan* the constitutional right being given up was the right to receive just compensation when property is taken for public use.[162] 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

In 2004, the Texas Supreme Court handed down its opinion in *Town of Flower Mound v. Stafford Estates.*[163] 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.[164] 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.[165] 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.[166] 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.[167]

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.[168]

Further, the Court held that this standard applies to both the conditioning of a permit and denial of a permit.[169] 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.[170] 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.[171]

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.[172] 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.[173] 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 . . ."[174] 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.[175]

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.

HB 1385

An important statute that will have a dramatic impact on exactions law was recently enacted in § 212.904, Texas Local Govt. Code, which was enacted by HB 1835 in Spring 2005. The statute codifies *Stafford Estates* by requiring that local governments justify all exactions with a proportionality analysis.

Specifically, a licensed engineer retained by the city must prepare a report showing that the required public improvements are roughly proportional to the development. The developer then may appeal the city's decision to the city council. The council may consider all testimony related to the appeal and render a decision within thirty (30) days.

If the developer is dissatisfied with the Council's decision, he can file suit in state or county court within thirty (30) days of the final determination. Attorneys' fees and costs can be awarded to a developer who prevails in his or her appeal.

XII. 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. Texas courts generally favor vested rights claims over causes of action for monetary relief. 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.

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 likely be rendered during the next year.

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[1] 130 S.W.3d 325 (Tex.App.—Dallas 2004, pet. den.).
[2] 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).
[3] Tex. Const. art. I, § 17.
[4] *Ft. Worth & R.G. Ry. Co. v. Jennings*, 76 TEX. 373, 13 S.W. 270, 270-271 (1890).
[5] *See Heitman v. State*, 815 S.W.2d 681, 683 (Tex.Crim.App. 1991).
[6] *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).
[7] 152 S.W.3d 147 (Tex. App.—Dallas 2005, pet. den.).
[8] *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).
[9] *Id.* at 152, 90 S.Ct. at 829, 25 L.Ed.2d at 187.
[10] *Sears v. Hull*, 192 Ariz. 65, ¶ 16, 961 P.2d 1013, ¶ 16 (1998).
[11] *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).
[12] *Id.* at 104; *Miranda v. Texas Dep't of Parks & Wildlife*, 133 S.W.3d 217, 224-25 (Tex. 2004).
[13] *See Dolenz v. Texas State Bd. of Med. Exam'rs*, 899 S.W.2d 809, 811 (Tex. App.—Austin 1995), *aff'd*, 981 S.W.2d 487 (Tex. App.—Austin 1998).
[14] *Texas Ass'n of Bus. v. Texas Air Control Bd.*, 852 S.W.2d 440, 446 (Tex. 1993).
[15] *Texas Dept. of Transp. v. Ramirez*, 74 S.W.3d 864, 867 (Tex. 2002); *Texas Ass'n of Bus.*, 852 S.W.2d at 446.
[16] No. 05-05-00964-CV - 2005 Tex. App. LEXIS 9888 (Tex. App. -- Dallas, Nov. 30, 2005, no pet.)
[17] *Wichita Falls State Hospital v. Taylor*, 106 S.W.3d 692 (Tex. 2003)
[18] *State v. Hale*, 146 S.W.2d 731 (Tex. 1941)
[19] *Id.* at 736.
[20] *See, e.g., City of Austin v. Teague*, 570 S.W.2d 389 (Tex. 1978); *City of Abilene v. Burk Royalty Co.*, 470 S.W.2d 643 (Tex. 1971). In *General Services Comm'n v. Little-Tex Insulation Company*, 39 S.W.3d 591 (Tex. 2001)
[21] *Id*. at 929 (citations omitted) (emphasis added).
[22] *Id*. at 931.
[23] *Id*. at 930.
[24] 75 S.W.3d 112 (Tex. App. – San Antonio 2002).
[25] *See, e.g., City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687, 695-98 (1999) (detailing the significant efforts the landowner made to obtain a development permit); *Mayhew*, 964 S.W.2d at 931 (same); *cf. Town of Flower Mound v. Stafford Estates Ltd. P'ship*, 135 S.W.3d 620 623-24 (Tex. 2004) (detailing efforts made to obtain exception to condition on development).
[26] *See e.g., City of Houston v. Kolb*, 982 S.W.2d 959, 953-54 (Tex. App.-Houston [14th Dist.] 1999, pet. denied) rejecting assertion that further efforts were required where such efforts would be futile).
[27] 526 U.S. 687 (1999)
[28] 134 S.W.3d 449 (Tex. App.—Ft. Worth 2004, no pet).
[29] *Id.* at 453.
[30] *Id.* at 458.
[31] 105 S.Ct. 3108 (1985).
[32] *Id.* at 3120.
[33] *Id*. at 3121.
[34] *See e.g., Liberty Mut. Ins. Co. v. Brown*, 380 F.3d 793, 797-99 (5th Cir. 2004); *Pascoag Reservoir & Dam, L.L.C. v. Rhode Island*, 337 F.3d 87, 94-96 (1st Cir. 2003); *Southview Assocs., Ltd. V. Bongartz*, 980 F.2d 84, 99-100 (2nd Cir. 1992).
[35] *e.g., Fields v. Sarasota Manatee Airport Auth.*, 953 F.2d 1299 (11th Cir. 1992); *see also DLX, Inc. v. Kentucky*, 381 F.3d 511, 522-23 (6th Cir. 2004); *Front Royal & Warren County Indus. Park Corp. v. Town of Front Royal*, 135 F.3d 275, 283 (4th Cir. 1998).
[36] 125 S. Ct. 2491 (2005).
[37] *Id.* at 2498 (quoting *San Remo Hotel*, 41 P.3d at 100-01).
[38] *Id.* at 2499 (quoting *San Remo Hotel*, 41 P.3d at 107).
[39] 125 s. Ct. at 23.

[40] *Id.* at 2508.
[41] *See City of Austin v. Teague*, 570 S.W.2d 389, 393 (Tex. 1978).
[42] *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.).
[43] *State of Texas v. Biggar*, 873 S.W.2d 11 (Tex. 1994)
[44] *See Sheffield*, 140 SW.3d at 671.
[45] 168 S.W.3d 802 (Tex. 2005).
[46] *Keller*, 168 S.W.3d. at 808.
[47] *City of Keller v. Wilson*, 168 S.W.3d 802, 831 (Tex. 2005).
[48] *Id.* at 808.
[49] City of Keller v. Wilson, 86 S.W.3d 693, 704 (Tex.App.-Fort Worth 2002, no pet.).
[50] *Id.* at 706.
[51] *Id.*
[52] *Id.* at 705-06.
[53] *Keller*, 86 S.W.3d at 701 (citing Texas Highway Department v. Weber, 147 Tex. 628, 631, 219 S.W.2d 70, 72 (Tex. 1949); Tarrant County v. English, 989 S.W.2d 368, 373 (Tex. App. – Fort Worth 1998, pet. denied)).
[54] 86 S.W.3d 693, 700.
[55] *Keller*, 168 S.W.3d at 809.
[56] *Keller*, 168 S.W.3d at 829 (citing Provident Am. Ins. Co. v. Castaneda, 988 S.W.2d 189, 194-95 (Tex. 1998)).
[57] *Keller*, 168 S.W.3d at 829.
[58] *Id.*
[59] *Id.*
[60] *Cf.* Nissan Motor Co. Ltd. v. Armstrong, 145 S.W.3d 131, 140 (Tex. 2004) (holding complaint letters may require manufacturer to investigate, but are not evidence that complaints are true).
[61] *Keller*, 168 S.W.3d at 830 (citing Tarrant Reg'l Water Dist. v. Gragg, 151 S.W.3d 546, 555 (Tex. 2004) (emphasis added)).
[62] 505 U.S. 1003 (1992).
[63] *Id.* at 1019.
[64] 526 U.S. 687 (1999).
[65] 369 F.3d 882 (5th Cir. 2004).
[66] *Id.* at 885.
[67] *Id.* at 891.
[68] *Id.* at 891.
[69] 505 U.S. 1003, 112 S.Ct. 2886, 120 L.Ed. 798 (1992).
[70] 369 F.3d at 893.
[71] 175 S.W.3d 58 (Tex.App.-Dallas 2005, pet. filed)
[72] *Id.* at 62.
[73] *Id.*
[74] *Id.*
[75] *Id.* at 62-63.
[76] *Id.* at 63.
[77] *Id.* at 64-65.
[78] 447 U.S. 255, 260 (1979).
[79] 2005 U.S. Lexis 4342, 73 U.S.C.W.; 4333 (May 23, 2005).
[80] *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).
[81] 140 S.W.3d 660 (Tex. 2004).
[82] *Id.* at 665.
[83] *Id.*
[84] *Id.*
[85] *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).
[86] 964 S.W.2d 922 (Tex. 1998).
[87] *Id.* at 935-6.
[88] 140 S.W.3d at 669.
[89] 438 U.S. 104, 124, 98 S.Ct. 2647, 57 L.Ed.2d 631 (1978).
[90] 140 S.W.3d at 676.
[91] *Id.* at 677.
[92] *Id.*
[93] *Id.* at 678.
[94] *Id.* at 678.
[95] *Id.*

[96] *Id.* at 680.
[97] *Id.* at 681.
[98] 2004 WL 624554 (Tex. App.—San Antonio, March 31, 2004) (not designated for publication).
[99] ___ S.W. 3d ___, 2006 Tex. App. LEXIS 1179 (Tex. App. - San Antonio).
[100] *See Coffee City v. Thompson*, 535 S.W.2d 758 (Tex. Civ. App.—Tyler 1976, writ ref'd n.r.e.).
[101] *See Bartlett v. Cinemark, USA*.908 S.W.2d 229 (Tex. App.—Dallas 1995, no writ).
[102] *City of Addison v. Dallas Ind. Sch. Dist.*, 632 S.W.2d 771 (Tex. App.—Dallas 1982, no writ).
[103] *Gulbenkian v. Penn*, 412 S.W.2d 929 (Tex. 1952).
[104] *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).
[105] *Id*. at 836.
[106] 211 S.W.2d 279 (Tex. Civ. App.—Dallas 1948, writ ref's n.r.e.).
[107] *Id.*, at 291-93.
[108] *City of Dallas v. Rosenthal*, 239 S.W.2d 636 (Tex. Civ. App.—Dallas 1951, writ ref'd n.r.e.).
[109] *City of Hutchins v. Prasifka*, 450 S.W.2d 829, 835 (Tex. 1970).
[110] *Id.* at 836.
[111] ____ S.W.3d ___, 49 Tex. Sup. Ct. J. 487 (Tex. 2006).
[112] *Bd. of Adjustment v. McBride*, 676 S.W.2d 705, 706 (Tex. App.—Corpus Christi 1984, no writ); *Town of S. Padre Island, Tex. v. Cantu*, 52 S.W.3d 287, 288-89 (Tex. App.—Corpus Christi 2001, no pet.).
[113] ____ S.W.3d ___, 2006 WL 508628, 49 Tex. Sup. Ct. J. 404 (2006).
[114] *Id.*, at 260.
[115] *City of Fredericksburg v. Bopp*, 126 S.W.3d 218 (Tex. App.—San Antonio 2003, no pet.).
[116] *Id*. at 223.
[117] *City of San Antonio v. TPLP Office Parks Properties, Ltd.*, 2004 WL 2191716 (Tex.App.—San Antonio).
[118] *Id*. at 10.
[119] 124 S.W.3d 867 (Tex. App.—Austin 2003, no pet.).
[120] *Id.* at 874.
[121] 2004 WL 2813777 (Tex. App.—Austin, December 9, 2004).
[122] *Id.* at 10.
[123] *Id.* at 12.
[124] § 245.001, et.seq., TEXAS LOCAL GOV'T CODE.
[125] *Id.*
[126] *Id.*
[127] *Id.*
[128] *Id.*
[129] *Id.*
[130] 149 S.W.3d 674 (Tex. App.—Austin, May 6, 2004, no pet.).
[131] *Id.* at 6.
[132] 124 S.W.3d 867 (Tex. App.—Austin 2004, no pet.).
[133] *Id*. at 871.
[134] 130 S.W.3d 325 (Tex. App.—Dallas 2004, pet. denied).
[135] *Id.* at 328.
[136] 436 S.W.2d 923 (Tex. Civ. App. 1968 writ ref'd n.r.e.).
[137] *See Id.*
[138] *See Id.* at 927.
[139] 570 S.W.2d 389 (Tex. 1978).
[140] *See Id*.
[141] 680 S.W.2d 802 (Tex. 1984).
[142] *See Id*. at 805 (citations omitted).
[143] *See Id*. at 805-07.
[144] *See Id*.
[145] *See Id*.
[146] *Id*. at 807.
[147] 483 U.S. 825 (1987).
[148] *See Id* at 837.
[149] *See Id*.
[150] *Id*. at 842.
[151] *Id*. at 832.
[152] *Id*. at 841.

[153] 512 U.S. 374 (1994).
[154] *See Id* at 385.
[155] *See Id* at 387.
[156] *Id*. at 386.
[157] *See Id*. at 391.
[158] *See Id*. at 394-95.
[159] *See Dolan*, 512 U.S. at 395-96.
[160] *See Id*. at 391 n.8.
[161] *See Id*. at 385.
[162] *See Id*. at 385-86.
[163] 135 S.W.3d 620 (Tex. 2004).
[164] *Town of Flower Mound v. Stafford Estates*, 71 S.W.3d 18 (Tex. App.—Ft. Worth 2002, pet. gr.).
[165] *Id.* at 629.
[166] *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).
[167] 35 S.W.2d at 634.
[168] *Id.* at 636.
[169] *Id.* at 638.
[170] *Id.* at 641.
[171] *Id.* at 642.
[172] *Id.* at 643.
[173] *Id.* at 644.
[174] *Id.* at 644.
[175] *Id.* at 645.