TAKINGS UPDATE: BORING TITLE, INTERESTING CASES

RYAN HENRY, *San Antonio*
Law Offices of Ryan Henry, PLLC

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CHAPTER 1

Ryan Scott Henry
Law Offices of Ryan Henry, PLLC
1380 Pantheon Way, Suite 110
San Antonio, Texas 78232
(210)257-6357
Fax: (210) 569-6494
Ryan.henry@rshlawfirm.com
Website: rshlawfirm.com

Ryan Henry graduated with honors from New Mexico State University with dual bachelor's degrees in Criminal Justice and Psychology in 1995. He attended law school at Texas Tech School of Law and graduated in May of 1998.

While attending law school, Ryan began clerking for the Lubbock City Attorney's Office. He received his third-year practice card and began prosecuting municipal court complaints and appearing in Justice of the Peace court for the City. As a result, he began defending governmental entities even before he graduated from law school and so began his career supporting local governments. Upon graduation, Ryan began working in Brownsville, Texas, with the same focus. In June of 2002, Ryan moved to San Antonio and joined a local law firm doing the same thing. In 2012, Ryan started the Law Offices of Ryan Henry, PLLC. In June 2016, and again in 2017, Ryan was listed as one of the best lawyers practicing municipal law in the San Antonio area by S.A. Scene Magazine. Ryan is also on the board for the State Bar of Texas - Government Law Council.

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TAKINGS UPDATE – BORING TOPIC, INTERESTING CASES

I. BASICS

The subject of a "taking" under the Texas and U.S. Constitutions has a wide-reaching spectrum. But the primary objective of this paper is to simply provide an update on takings law in Texas from June of 2016 to June of 2017.

To understand the impact of the update, it is important to go through a quick refresher of the basics. While this is by no means comprehensive, a refresher of the basics makes it easier to understand the holdings behind the update.

The Just Compensation Clause of the Fifth Amendment provides that "private property [shall not] be taken for public use, without just compensation." This prohibition has been incorporated through the Fourteenth Amendment to apply to the individual states. *Williamson Planning Comm'n v. Hamilton Bank*, 473 U.S. 172, 175 n. 1, 105 (1985); *Chicago, B. & Q.R. Co. v. Chicago*, 166 U.S. 226, 241, 17 (1897). Similarly, article I, section 17 of the Texas Constitution provides, in pertinent part, that no "person's property shall be taken, damaged or destroyed for or applied to public use without adequate compensation being made...." Tex. Const. art. I, §7; *Mayhew v. Town of Sunnyvale*, 964 S.W.2d 922, 933 (Tex. 1998).

Property rights are created and defined by state law. *See Stratton v. Austin ISD*, 8 S.W.3d 26, 29 (Tex. App.—Austin 1999, no pet.) (citing *Bd. of Regents of State Colls. v. Roth*, 408 U.S. 564, 577, 92 S.Ct. 2701, 33 L.Ed.2d 548 (1972)). Generally, a property owner has no vested right to use its property in a certain way without restriction. *See Azadpour v. City of Grapevine*, No. 02–13–00323–CV, 2014 WL 2566024, at *4 (Tex. App.—Fort Worth June 5, 2014, pet. denied) (mem. op.); *272 *Mr. W. Fireworks, Inc. v. Comal County*, No. 03–06–00638–CV, 2010 WL 1253931, at *8 (Tex. App.—Austin Mar. 31, 2010, no pet.) (mem. op.); *FLCT, Ltd. v. City of Frisco*, 493 S.W.3d 238, 271–72 (Tex. App.—Fort Worth 2016, pet. denied).

The restriction under Tex. Const. art. I, §7 is not a grant of powers to the State, but a limitation on the inherent sovereign power of eminent domain by imposing the requirements that the State take property only for "public use" and pay "adequate compensation" whenever doing so. *McInnis v. Brown Co. Water Improvement Dist. No. 1*, 41 S.W.2d 741, 744 (Tex. App.—Austin 1931, writ ref'd); *Whittington v. City of Austin*, 174 S.W.3d 889, 896 (Tex. App.—Austin 2005, pet. denied).

A. Elements Required- General Description.

The description of the elements for a takings case has varied depending on the type of taking alleged, but all center on the same general principles. If a governmental entity takes, damages, or destroys property for public use without process or proper condemnation proceedings, governmental immunity is waived, and an action for inverse condemnation will lie. *City of Keller v. Hall*, 433 S.W.3d 708, 713–14 (Tex. App.—Fort Worth 2014, pet. denied). To establish the claim, the claimant must prove: (1) a governmental entity **intentionally** performed certain acts (2) that resulted in a **taking or damaging or destruction** of property (3) for **public use**. *Dallas, Garland & Ne. R.R. v. Hunt County*, 195 S.W.3d 818, 821 (Tex. App.—Dallas 2006, no pet.) (*emphasis added*). A physical taking, as opposed to a regulatory taking, is an unwarranted physical appropriation or invasion of the property. *Blanton*, 200 S.W.3d at 271. "When damage is merely the accidental result of the government's act, there is no public benefit and the property cannot be said to be taken or damaged for public use." *City of Dallas v. Zetterlund*, 261 S.W.3d 824, 828 (Tex. App.—Dallas 2008, no pet.) (citing *City of Dallas v. Jennings*, 142 S.W.3d 310, 313 (Tex. 2004). Mere negligence that eventually contributes to property damage does not constitute a taking. *City of Keller v. Hall*, 433 S.W.3d 708, 713–14 (Tex. App.—Fort Worth 2014, pet. denied)

A plaintiff has the burden of alleging facts that affirmatively demonstrate that the trial court has subject-matter jurisdiction. Whether particular facts rise to the level of a taking is a **question of law**. *Id.* at 712, 713. *(emphasis added).* Section 17 of the Texas Constitution waives immunity for a taking. *Id*. at 713.

B. Intentional Acts

Not every intentional act by a governmental entity will give rise to a taking claim. *City of Keller* at 714. A plaintiff's taking claim may not be solely based on an assertion that the governmental entity intended to do the act that caused the damage; but neither must a government intend to damage the property. *Id.* It is enough the entity was substantially certain damage would occur. Thus, liability for a taking arises when a governmental entity physically damages private property in order to confer a public benefit if that entity "(1) knows that a specific act is causing identifiable harm; or (2) knows that the specific property damage is substantially certain to result from an authorized government action—that is, that the damage is 'necessarily an incident to, or necessarily a consequential result of the government's action.'" *Id.* (citing *Jennings* at 314).

When dealing with the "intentional" prong of the test, governmental attorneys and their entities may not have considered that an act would have any form of property damage consequence. And while, theoretically, that should assist in disposing of the case, many times the element of intent becomes a question of fact. Individuals challenging an act of the entity will

look to historical reports, records, complaints, call logs, and anything else they can latch onto in trying to establish that the entity was "substantially certain" the damage would occur.

Further, for a takings claim to be ripe, there must have been a final decision regarding the application of the regulations to the property at issue. *Mayhew v. Town of Sunnyvale*, 964 S.W.2d 922, 929 (Tex. 1998). "A 'final decision' usually requires both a rejected development plan and the denial of a variance from the controlling regulations." *Id.* (quoting *Williamson County. Reg'l Planning Comm'n v. Hamilton Bank*, 473 U.S. 172, 187–88 (1985)). "However, futile variance requests or re-applications are not required." *Id.*; *see also Hallco Tex., Inc. v. McMullen County.*, 221 S.W.3d 50, 60 (Tex. 2007). In other words, the "variance requirement is ... applied flexibly in order to serve its purpose of giving the governmental unit an opportunity to 'grant different forms of relief or make policy decisions which might abate the alleged taking.'" *Mayhew*, 964 S.W.2d at 930 (quoting *S. Pac. Transp. Co. v. City of L.A.*, 922 F.2d 498, 503 (9th Cir. 1990)). We have said that ripeness requires action by both the landowner and the government. *City of Dallas v. Chicory Court Simpson Stuart, L.P.*, 271 S.W.3d 412, 417 (Tex. App.–Dallas 2008, pet. denied). The landowner must give the government an opportunity to exercise its discretion, and the government must make a final decision. *City of Dallas v. Trinity East Energy, LLC*, 05-16-00349-CV, 2017 WL 491259, at *5 (Tex. App.—Dallas Feb. 7, 2017, pet. filed) (mem. op.) (citing *Chicory Court Simpson Stuart* at 417).

C. Taking, Damaged or Destroyed Property (i.e. causation)

Causation is intrinsic in any takings claim. *Guadalupe County v. Woodlake Partners, Inc.*, 04-16-00253-CV, 2017 WL 1337650, at *3 (Tex. App.—San Antonio Apr. 12, 2017, no pet. h.) (mem. op.) (citing *Hearts Bluff Game Ranch, Inc. v. State*, 381 S.W.3d 468, 483 (Tex. 2012). Additionally, "owners of inversely condemned property can not recover damages the government did not cause." *Kopplow Dev., Inc. v. City of San Antonio*, 399 S.W.3d 532, 536 (Tex. 2013). As an element of a takings claim, proximate cause can be considered a jurisdictional fact when it is necessary to resolve whether a plaintiff has alleged a valid takings claim. *See State v. Lueck*, 290 S.W.3d 876, 881 (Tex. 2009).

The causal connection must be tied to a destruction or diminution of value in some property interest. The most obvious form is when the government utilizes eminent domain proceedings and acquires full ownership in an interest of law for, perhaps, expansion of a roadway. The owner is deprived of all ownership and use of the property and must be compensated for the loss in ownership. However, takings jurisprudence is not limited to permanent, physical appropriation.

1. Physical Taking

Takings can be classified as either physical or regulatory takings. Physical takings occur when the government authorizes an unwarranted physical occupation of an individual's property. *See Yee v. City of Escondido*, 503 U.S. 519, 522, 112 (1992).

An entity that has property taken must be paid for what it has lost. *State v. Ware*, 86 S.W.3d 817, 825 (Tex. App. – Austin 2002, no pet.) "He is entitled to be put in as good a position pecuniarily as if his property had not been taken. He must be made whole but is not entitled to more." *City of Houston v. Texan Land & Cattle Co.*, 138 S.W.3d 382, 388 (Tex. App.—Houston [14th Dist.] 2004, no pet.).

"Physical possession is, categorically, a taking for which compensation is constitutionally mandated...." *Tahoe–Sierra Pres Council, Inc. v. Tahoe Regl Planning Agency*, 535 U.S. 302, 322, 122 (2002).

2. Regulatory Taking

Regulatory action short of physical confiscation or invasion may also result in a taking. *Tahoe–Sierra Pres. Council, Inc.* at 322. A regulatory takings claim is a type of inverse condemnation claim. *Edwards Aquifer Auth. v. Bragg*, 421 S.W.3d 118, 134 (Tex. App.—San Antonio 2013, pet. denied) (op. on reh'g).

As a general example, the application of a general zoning law to a particular property constitutes a regulatory taking if the ordinance "does not substantially advance legitimate state interests" or it denies an owner all "economically viable use of his land." *Mayhew v. Town of Sunnyvale*, 964 S.W.2d 922, 933 (Tex. 1998) (citing *Agins v. City of Tiburon*, 447 U.S. 255, 260 (1980)).

The "legitimate state interest" prong can be satisfied with a broad range of regulatory topics including, preventing slum areas of town, preventing or reducing flooding, and promoting the presence of defendants at trial by regulating bail bonds. Promoting the general welfare of the community is a legitimate government interest. *Hackbelt 27 Partners, L.P. v. City of Coppell*, 661 F. App'x 843, 849 (5th Cir. 2016).

The "substantial advancement" requirement examines the nexus between the effect of the ordinance and the legitimate state interest it is supposed to advance. *See Yee v. City of Escondido*, 503 U.S. 519, 530 (1992). This requirement is not, however, equivalent to the "rational basis" standard applied to due process and equal protection claims. *Nollan v. California Coastal Comm'n*, 483 U.S. 825, 834, fn. 3, 107 S.Ct. 3141, 3147, 97 L.Ed.2d 677 (1987). The standard requires that the ordinance "substantially advance" the legitimate state interest sought to be achieved rather than merely analyzing whether the

government could rationally have decided that the measure achieved a legitimate objective. *Mayhew v. Town of Sunnyvale*, 964 S.W.2d 922, 934 (Tex. 1998). However, since *Mayhew*, the "substantial advancement" prong has been called into question. In deciding whether a governmental decision "substantially advances" a legitimate state interest, Texas courts have looked to whether the government's legitimate interests were furthered by its action. *Hackbelt 27 Partners, L.P. v. City of Coppell*, 661 F. App'x 843, 849 (5th Cir. 2016). But it has not been expressly rejected by the Texas Supreme Court.

Regardless, even if a regulation substantially advances a legitimate governmental interest, the takings analysis has an alternative prong. A compensable regulatory taking can also occur when governmental agencies impose restrictions that either (1) deny landowners of all economically viable use of their property, or (2) unreasonably interfere with landowners' rights to use and enjoy their property. *Mayhew* at 934.

A restriction denies the landowner all economically viable use of the property or totally destroys the value of the property if the restriction renders the property valueless. *Id.* This simply means there is NO value left or it is a negative value. In contrast, determining whether the government has unreasonably interfered with a landowner's right to use and enjoy property requires a consideration of two factors: the economic impact of the regulation and the extent to which the regulation interferes with distinct investment-backed expectations.

The economic impact of the regulation merely compares the value that has been taken from the property with the value that remains in the property. *Keystone*, 480 U.S. at 497. The loss of anticipated gains or potential future profits is not usually considered in analyzing this factor. *Andrus v. Allard*, 444 U.S. 51, 66, 100 (1979); *see also Moore v. City of Costa Mesa,* 886 F.2d 260, 263 (9th Cir. 1989), *cert. denied*, 496 U.S. 906 (1990). The second factor is the investment-backed expectation of the landowner. The existing and permitted uses of the property constitute the "primary expectation" of the landowner that is affected by regulation. *Mayhew.* at 935–36. "Historical uses of the property are critically important when determining the reasonable investment-backed expectation of the landowner." *Id*. at 922, 933. Regulations at the time of purchase should be considered in determining whether the regulation interferes with investment-backed expectations. *Id*. at 938. And knowledge of existing regulations "is to be considered in determining whether the regulation interferes with investment-backed expectations." *Id.* at 936.

In determining whether an unreasonable interference has occurred, Texas courts follow the U.S. Supreme Court's "*Penn Central* inquiry, which requires [a court] to consider all of the circumstances surrounding the alleged taking." *City of Lorena v. BMTP Holdings, L.P.*, 409 S.W.3d 634, 644 (Tex. 2013) (citing *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 124, 98 (1978)). Under *Penn Central*, "three key factors" guide the analysis: "(1) the economic impact on the claimant; (2) the extent of interference with the claimant's investment-backed expectations; and (3) the character of the government's action." *BMPT Holdings*, 409 S.W.3d at 644 (citing *Penn Cent.*, 438 U.S. at 124–25,); *Hackbelt 27 Partners, L.P. v. City of Coppell*, 661 F. App'x 843, 850 (5th Cir. 2016). When analyzing the economic impact of a regulation, the "loss of anticipated gains or potential future profits" is typically not considered. *Id*. Not every investment-backed expectation can form the basis for a regulatory takings claim; instead, a claimant must establish interference with a "*reasonable* investment-backed expectation." *Id.* at 937 (emphasis added). Thus, "[k]nowledge of existing zoning is to be considered in determining whether the regulation interferes with investment-backed expectations." *Id.*

Even if a governmental regulation has not completely destroyed or removed the property's value, a taking occurs if the governmental action unreasonably interferes with the owner's rights to use and enjoy his property. *Mayhew* at 935.

A property owner is also entitled to compensation for the diminution in the value of property as long as he proves that there was a "material and substantial impairment" of access to the property. *State v. Heal*, 917 S.W.2d 6, 10 (Tex.1996). Like determinations of whether property has been damaged under the constitution generally, determining whether there is a material and substantial impairment to the property as a result of the taking is a question of law. *Id.* at 9; *State v. Schmidt*, 867 S.W.2d 769, 777 (Tex.1993). In order to show a material and substantial interference with access, the property owner must show that (1) there has been a total but temporary restriction of access, (2) a partial but permanent restriction of access, or (3) a temporary limited restriction of access caused by illegal or negligent activity. *City of Austin v. Avenue Corp.*, 704 S.W.2d 11, 13 (Tex. 1986).

But is it not all forms of diminution in investment or in access that rise to the level of a taking. It is also well-settled that diminution in the value of property due to diversion of traffic, diminished exposure to traffic, or altered accessibility to the roadway does not amount to a material and substantial impairment of access. *State v. Petropoulos*, 346 S.W.3d 525, 532 (Tex. 2011); *Schmidt*, 867 S.W.2d at 773–74 (collecting cases). "[A]n abutting property owner does not have a vested interest in the traffic that passes in front of his property." *Schmidt*, 867 S.W.2d at 774 (quoting *DuPuy*, 396 S.W.2d at 109). Because "highways primarily are for the benefit of the traveling public, and are only incidentally for the benefit of those who are engaged in business

along its way," business owners necessarily assume the risk that new roads may be built that will "largely take away the traveling public." *State Highway Comm'n v. Humphreys*, 58 S.W.2d 144, 145 (Tex. Civ. App.—San Antonio 1933, writ ref'd) (quoted in *Schmidt*, 867 S.W.2d at 773). Thus, a property owner cannot recover for damages when traffic is merely required to travel a more circuitous route to reach the property in question. *State v. Bhalesha*, 273 S.W.3d 694, 698–99 (Tex. App.—Houston [14th Dist.] 2008, no pet.) (citing *State v. Wood Oil Distrib., Inc.*, 751 S.W.2d 863, 865 (Tex. 1988)).

So, in essence, the government's actions must have a causal connection (i.e. cause or impact) a value tied to a property interest and make such interest decrease. Otherwise, there is no taking, damage, or destruction.

D. For Public Use

The courts have not issued a bright line rule for what is and what is not a public use, but analyze the question on a fact intensive, case-by-case basis. *Hous. Auth. of City of Dallas v. Higginbotham*, 135 Tex. 158, 166, 143 S.W.2d 79, 84 (1940).

Texas courts have adopted a liberal view concerning what is a public use. *Dyer v. Texas Elec. Serv. Co.*, 680 S.W.2d 883, 884–85 (Tex. App.—El Paso 1984, writ ref'd n.r.e.). Whether or not a governmental taking is incident to a public use depends upon the character, and not the extent of such use. *Housing Auth. of Dallas v. Higginbotham*, 135 Tex. 158, 166, 143 S.W.2d 79, 84 (1940). The critical factor is the right the public has to such use and not the extent to which the public may exercise the right. *Higginbotham*, 135 Tex. at 166–67, 143 S.W.2d at 84. The number of people who avail themselves of the public benefit is immaterial so long as the benefit is open to all who choose to use it. *Bowles v. Clipp*, 920 S.W.2d 752, 756 (Tex. App.—Dallas 1996, writ denied).

The question for the courts is whether there results to the public some definite right or use in the project or undertaking to which the property is devoted. *See Dyer v. Tex. Elec. Serv. Co.*, 680 S.W.2d 883, 884–85 (Tex. App.-El Paso 1984, writ ref'd n.r.e.); *Loyd*, 956 S.W.2d at 128. A key primary consideration in assessing whether a particular taking was for a public use is whether the public is bearing a cost for which it received a benefit. *Thornton v. Ne. Harris County MUD 1*, 447 S.W.3d 23, 37 (Tex. App.—Houston [14th Dist.] 2014, pet. denied).

II. WINDS OF CHANGE…SORT OF.

A change in longstanding traditional takings jurisprudence occurred, temporarily, due to the case of *Harris County Flood Control Dist. v. Kerr.* This case made it all the way to the Texas Supreme Court. The original opinion in *Kerr* was released on June 12, 2015 and was a 5-4 split. The majority opinion changed around takings jurisprudence significantly by holding an entity which merely issues permits pursuant to an enacted ordinance or rule can be liable for a taking in a flooding case. Upon rehearing, Justice Guzman switched her opinion. That caused the majority to shift to a 5-4 opinion upholding the longstanding precedent that an entity cannot be held liable for a taking due to simply granting permits under an ordinance or rule. *Harris County Flood Control Dist. v. Kerr*, 499 S.W.3d 793, (Tex. June 17, 2016) (op. on reh'g).

In the *Kerr* case, landowners and former landowners whose properties were damaged by flooding brought action against flood control district and county for inverse condemnation and nuisance. The homeowners claim that the flooding of their homes was caused by the County's approval of "unmitigated" upstream development, combined with a failure to fully implement the Pate Plan. The majority in the original opinion focused on the fact the County and District had engineering reports indicating that if regulations were not put in place to prevent upstream development, the upstream impervious cover would get to a point the downstream properties would be flooded. The then-majority focused on the substantial certainty that it asserted was created by the reports and, that by continuing to grant permits for development, it was ignoring the consequences.

However, the opinion on rehearing held only affirmative conduct by the government will support a takings claim. *Id* at 799. In addition, a specificity element runs through the case law. A governmental entity must be aware that its action will necessarily cause physical damage to certain, identifiable private property. *Id.*

While the jurisprudence remained intact, the prodigy of the *Kerr* case began incorporating, flexing, or restricting, the holding.

Summary of the update includes:

- If the government does more than issue permits, it can commit a taking (but it's a little confusing on the timing).
- If the City's contractors actually do the work, it's still a taking.
- Negligent act of employees cannot equal a taking – no really, it doesn't count as intentional.
- Negligent acts serve no public purpose.
- Leasing mineral interests is a proprietary function; however, the issuing of permits is acting as a regulatory agency which can qualify for a taking.
- If the City does not take affirmative steps to trigger a reverter, no taking occurs under a restricted deed transfer.
- Alleviating street flooding is a "benefit" qualifying as a public use under a takings analysis.

- Opposing engineers who cannot agree on what an engineering/flooding report says can create a fact issue preventing dispositive motions on "substantial certainty" elements.
- If you are going to sue for a taking, you must do so within 10 years. You cannot wait 140 years before bringing suit.
- Damages peculiar to a property owner, such as impaired access, are not barred by the concept of community injury.
- Lost profits are not obtainable if market value factored in profitability of sustaining a business as such amounts to a double-recovery.
- Abatement of a true public nuisance cannot equate to a taking.
- Only the ones who owned the property when the actual taking occurred can sue, absent an assignment of claims. Takings accrue when the entity passes an ordinance/rule authorizing the taking.
- Passing an ordinance which does nothing more than adopt federal guidelines already imposed cannot constitute a taking because nothing actually changed due to the ordinance.
- The thirty-day window to file suit and challenge the Council's determination of a nuisance/dangerous structure created by ordinance does not qualify as a statutory/jurisdictional prerequisite to suit. It's an affirmative defense.
- Simply because an expert appraisal report is issued prior to trial does not mean it is untimely as to the market.
- Project diminution offset can be used in establishing true market value for takings analysis if a governmental project is the factor which reduced market value in the first place.

III. INTENTIONAL ACTS

A. *City of Socorro v. Campos*, 510 S.W.3d 121, 132 (Tex. App.—El Paso 2016, pet. denied.)

This is an interlocutory appeal from the denial of a plea to the jurisdiction. The procedural status of the case is important as the opinion turns on the fact the Plaintiffs plead a proper case, regardless of whether they can actually establish the case in court.

The residents contend that the City of Socorro intentionally caused flooding by constructing a ditch, and later two embankments, that were intended to protect one subdivision (Valley Ridge) at the expense of their neighborhood (Patti Jo Neighborhood). The City of Socorro attempted to remedy prior flooding by building a drainage channel. The storm water plan made detailed recommendations to address the risk of flooding to downstream communities caused by Socorro's actions, but the City did not implement them. In a three-day period in September 2013, the area received over six inches of rainfall. Socorro's diversion channel worked in the sense that the Valley Ridge subdivision was spared any flooding from the upstream direction, but the water and mud from the Spark's arroyo collected on the east side of Thunder Road to such an extent that the Valley Ridge subdivision was once again threatened with flooding. So, the City sent crews out with sandbags and created two temporary sand embankments to stop the flooding. Unfortunately, the redirection of water poured onto the Patti Jo Neighborhood, flooding the Plaintiffs' homes. The Patti Jo residents sued under a takings theory.

The City asserted the Plaintiffs could not establish the City "intended" to take their property. However, from a pleading standpoint, the Plaintiffs alleged the City intentionally redirected water in a way where it was substantially certain the water would flood their homes. And while the court held the case law supports that a single flood event is not usually the basis of a taking, the court held multiple floods are not a requirement. As a result, the Plaintiffs properly pled a takings claim.

As noted above, the "intent" element turns on what the City knew and what that knowledge would mean as far as "substantial certainty." Even if the City had not simply challenged the pleadings and challenged the facts behind the pleadings, the City could risk a fact issue as to what was known and exactly when it was known.

B. *Padilla v. Metro. Transit Auth. of Harris County*, 497 S.W.3d 78, 87 (Tex. App.—Houston [14th Dist.] 2016).

Restaurant owners brought inverse condemnation action against county transit authority, alleging that construction of a light rail line blocked access to the restaurant for significant periods of time, forcing the closure of the restaurant.

The 14th Court of Appeals held various fact issues existed preventing a summary judgment. The Authority argued, among other things, that it hired contractors, who in turn, hired subcontractors, to build the rail system. The Authority was not aware the construction would block access to property, let alone for a long enough time period to cause the restaurant to close. However, the court held a governmental entity responsible for a construction project can not avoid its constitutional obligation to compensate private property owners for resulting damage simply by proving that the project was carried out by contractors rather than the entity itself.

A governmental entity is substantially certain that its actions will damage property when the damage is necessarily an incident to or necessarily a consequential result of the governmental entity's action. An awareness that damage is a mere possibility is not evidence of the governmental entity's intent. The government's knowledge must be determined as of the time it acted,

not with the benefit of hindsight. So, if the contractors knew the access was substantial, then such knowledge can potentially be imputed to the entity.

C. *City of Floresville v. Starnes Inv. Group, LLC,* 502 S.W.3d 859 (Tex. App.—San Antonio 2016, no pet.)

A negligent act by employees can not equal a taking. Starnes Investment Group, LLC ("Starnes") began looking at property to develop as a commercial recreational vehicle park. Starnes filed a rezoning application to allow for the RV park. The City Attorney advised the property was outside of the City limits and not subject to zoning restrictions. However, after Starnes purchased the property and the City completed a map digitization initiative, it discovered the property was partially inside and partially outside of the City limits. The City ultimately approved a zoning change application to allow the RV park. However, Starnes still sued. The premise of Starnes's lawsuit is that it was harmed by the City's delay in approving its zoning application and delay in providing water and sewage due to the misunderstanding.

In a takings case, "the requisite intent is present when a governmental entity knows that a specific act is causing identifiable harm or knows that the harm is substantially certain to result." A taking cannot rest on the mere negligence of the government. Moreover, "[w]hen damage is merely the accidental result of the government's intentional act, there is no public benefit and the property cannot be said to have been taken or damaged for *public use*." Starnes's amended petition alleges no facts that the information was the result of anything more than either a mistake or negligence on the City Attorney's part. Further, Starnes does not point to any change in the City's existing "orders, regulations, ordinances, rules, expiration dates, or other properly adopted requirements" that occurred after Starnes filed its zoning application. The property was always partially in and partially outside of the City limits. An employee's mistaken belief of the location of the boundary line is not a change in adopted regulation. As a result, there is no takings claim.

D. *City of Laredo v. Northtown Dev., Inc.,* 04-15-00736-CV, 2016 WL 4211825, at *1 (Tex. App.—San Antonio Aug. 10, 2016, pet. denied) (mem. op.).

Northtown Development, Inc. and Gateway Centennial Development Co. ("Northtown") conveyed land to a utility district to build a wastewater treatment plan. It contained a reverter that if the property was ever stopped being used for a public purpose, the property would revert back to Northtown. The utility district was eventually annexed by the City which assumed the waste water treatment plant and the property with the reverter. By 2011, the City had constructed a new wastewater treatment plant on the Property. The original plant was built on the western side of the Property, while the new plant was built on the eastern side. Northtown took the position the City had abandoned the old plant on the western side which, therefore, reverted back to Northtown.

The possibility of a reverter is a future interest in real property, and the taking of such a future interest is compensable under the Takings Clause of the Texas Constitution. However, the deed controls the triggering of the reverter. In this case, reading the plain language of the deed, the possibility of reverter addresses the use of the "tract" of land and upon the expiration of the use as to the "tract" of land, the determinable fee terminates and "title to the entirety" of the "tract" reverts. As a result, the reverter is triggered only when none of the property is in use for the intended purpose. The City never took affirmative action to abandon the entire property and took intentional actions to keep use of portions. Since it was undisputed the City was using portions of the land, the reverter was never triggered and no takings can occur.

E. *City of Dallas v. Trinity E. Energy, LLC*, 05-16-00349-CV, 2017 WL 491259, at *5 (Tex. App.—Dallas Feb. 7, 2017, pet. filed).

The City was suffering a budgetary shortfall and decided to seek an additional source of revenue by leasing the minerals on City-owned property to a private party for developing the oil and gas. Trinity asserted, if it bid, it would need surface access to two City sites. Trinity and the City entered into two leases for mineral interests. Afterwards, Trinity began the long process of preparing to drill, including geological and engineering tests, designing drill sites, roads, and pipelines, and multiple City meetings. Trinity sought permits to drill on the designated sites. However, in the spring of 2013, the Planning Commission voted to deny the applications. Trinity appealed to the City Council. But because the Planning Commission had denied the applications, the Council was required to override that denial by a vote of three-fourths of its members; the vote to approve received only a majority of the votes of the Council members. Consequently, the applications were denied. Later, the City passed new ordinances changing setback requirements and making the sites impossible for Trinity to use for drilling. The leases then expired. Trinity sued.

Citing the Texas Supreme Court's expansion in *Wasson Interests, Ltd. v. City of Jacksonville*, 489 S.W.3d 427 (Tex. 2016) of the proprietary-governmental dichotomy to contracts the Dallas Court of Appeals held the City was acting in its proprietary capacity. Mineral leases, even if on park or flood plains, are proprietary as to the ownership use or lease. Further, since immunity does not already exist, Chapter 271 of the Texas Local Government Code (waiving immunity

for goods or services) does not apply. The City was acting as a property owner as to the lease, however, the City was also acting as a regulatory agency as to the permits. Thus, the denial of the permit can also act as an inverse condemnation of a property interest. Given the change in ordinances making drilling impossible, Trinity presented evidence the City denied all economically viable use of the mineral leases. Fact questions exist, which prevent the granting of any dispositive motions.

IV. PUBLIC USE

A. *City of Rollingwood v. Brainard*, 03-17-00077-CV, 2017 WL 2417388, at *1 (Tex. App.—Austin May 31, 2017, no pet. h.) (mem. op.).

In the *City of Rollingwood* case, the Austin Court of Appeals held alleviating street flooding is a "benefit" qualifying as a public use under a takings analysis. In other words, by diverting water away from the streets to allow the public to use right-of-ways, it is considered a public use under a takings analysis.

As part of a plat approval, the City required a prior property owner to construct a flume to address flooding. Several purchases later, a property owner downstream from the flume, but part of a subdivided property from the original owner who requested the plat, sued alleging the City's drainage system flooded his property. The City had approved a permit for a house with a drainage retention pond which allegedly caused the flooding of the Plaintiff's property. A factual dispute between engineers occurred in the record regarding what certain reports meant so the court simply denied the City's plea to the jurisdiction based on the dispute. Even though the City asserted when it approved a permit based on engineering reports and how the City interpreted the reports, the court held a fact issue existed as to whether the City is charged with knowledge of substantial certainty of causing damage. The Austin Court of Appeals brought the case closer to the retracted opinion in *Kerr* than the opinion issued after rehearing.

The "intentional" actions contained within the arguments and the dispute between the engineers seems to center on the permit approvals for the subsequent home with drainage pond. They also seem to be the normal types of processes which occur when evaluating and granting a permit. However, in order to avoid the *Kerr* opinion applying to the case, the Court distinguished the situation by holding the City did more than simply approve a permit, it did the work on the roadway drainage system which contributed to the flooding. However, the roadway work occurred two years before the house permit and the Plaintiffs asserted the flooding did not occur until the house drainage pond was installed.

V. TAKING, DAMAGE, OR DESTRUCTION

A. *Galan Family Trust, through Galan Family, LLC v. State*, 03-15-00816-CV, 2017 WL 744250, at *1 (Tex. App.—Austin Feb. 24, 2017, pet. filed) (mem. op.).

The Galan Family Trust ("Trust" or "Plaintiff") sued the State of Texas for mineral interests the Trust asserts they own due to a 1767 Spanish land grant. A patent in favor of the Galan heirs was issued in 1852 by the Texas Legislature, but the patent was cancelled by the State of Texas in 1874. In this context, "patent" is an instrument by which the State conveys land to a private person. Once the State canceled the patent, the State became the titleholder. The Trust did not sue for a takings claim until more than 140 years after the cancellation, which far exceeds the ten-year limitations period established for takings claims. The State was only required to establish when the cause of action accrued to establish limitations, not to provide uncontroverted evidence of every element of the defense. Given that the elements for the statute of limitations defense are contained within the pleadings, the State was allowed to bring the defense in a plea to the jurisdiction.

B. *Padilla v. Metro. Transit Auth. of Harris County*, 497 S.W.3d 78, 87 (Tex. App.—Houston [14th Dist.] 2016), *reh'g overruled* (Sept. 6, 2016).

The same restaurant owners listed above brought inverse condemnation action against the county transit authority, alleging that construction of a light rail line blocked access to the restaurant. The damages portion of the opinion notes property owners may not recover for injuries sustained in common with the community where the property is situated, such as damage from noise, dust, increased traffic, diversion of traffic, circuity of travel, and other inconveniences incident to road or highway construction. Damages peculiar to a property owner, such as impaired access, are not barred by the concept of community injury. The plaintiff must show that there has been: (1) a total but temporary restriction of access; (2) a partial but permanent restriction of access; or (3) a temporary limited restriction of access brought about by an illegal activity or one that is negligently performed or unduly delayed. *Id*. If the plaintiff does so, the property owner is entitled to compensation for the lost profits arising from the denial of access. *Id*. Whether there has been a material and substantial impairment of access is a question of law for the court.

C. *City of Beaumont v. Ermis*, 09-15-00451-CV, 2017 WL 1178348, at *1 (Tex. App.—Beaumont Mar. 30, 2017, no pet. h.) (mem. op.).

In this dangerous structure/demolition case, the Beaumont Court of Appeals reaffirmed the longstanding

principle that abatement of a true public nuisance can not equate to a taking. Further, only the ones injured have standing to bring suit. Ermis acquired her property interest in 2002 Park Street in 2008 from the Seymours. However, in 2007 the City found the structure to be dangerous and scheduled it for demolition. The notice that the structure was dangerous came at multiple levels including an initial order by a field supervisor, an ordinance signed by the acting mayor declaring the property dangerous and a public nuisance, formally mailed notice to the owners of the property in 2007 (the Seymours) that the building must be demolished within 10 days, and a signed certified mail return receipt from the Seymours noting it was received within one week of being mailed.

Ermis did not own the structure when the City declared it dangerous and ordered that it be repaired or demolished. Under Texas law, the injury occurred when the City made the declaration. Her pleadings must establish she had standing to pursue her claims against the City when the injury occurred. Her standing can not rest on rights owned by the Seymours in the absence of an express assignment. Subsequent purchasers of a property can not recover for injuries to the property that were committed prior to their purchase. A municipality's abatement of a nuisance is within the scope of its police powers. Accordingly, the government commits no taking when it abates what is, in fact, a public nuisance.

D. *Guadalupe County v. Woodlake Partners, Inc.,* 04-16-00253-CV, 2017 WL 1337650, at *3 (Tex. App.—San Antonio Apr. 12, 2017, no pet. h.) (mem. op.).

The County is not liable for adopting FEMA updated maps changing the 100-year floodway and floodplains.

In 2007, FEMA revised its 100-year Flood Insurance Rate Maps for Guadalupe County. After the revisions, several lots owned by Woodlake Partner Defendants became encompassed in a floodway and floodplain. The Woodlake Partners later submitted a development permit application. However, the County asserted the applicant was now required to submit No-Rise documentation from an engineer and that federal regulations required the construction to have the lowest floor elevated to or above the base flood level. Woodlake Partners filed suit asserting a taking and that the new regulations would require new homes to be built 8-12 feet above ground, which was against their restrictive covenants. They also asserted it would negatively affect home values.

Woodlake Partners based their takings claim on the portions of the County's Order requiring them to obtain a No-Rise Certificate and construct the houses eight to twelve feet above ground level. However, these same requirements appear in the federal regulations, setting forth flood plain management criteria for flood-prone areas, specifically 44 C.F.R. §60.3. Additionally, uncontested evidence established that if the County had not adopted the FEMA maps, neither flood insurance nor financing would be available for homes built on the lots. Woodlake Partners was required to follow the same federal standards regardless, so the County's adoption of the FEMA maps did not cause any damage.

E. *State v. Luby's Fuddruckers Restaurants, LLC,* 13-16-00173-CV, 2017 WL 2608296, at *1 (Tex. App.—Corpus Christi June 1, 2017, no pet. h.) (mem. op.).

The State filed a condemnation suit to take a strip of the cafeteria's parking lot for purposes of a highway expansion project. Both parties agreed that the taking rendered the cafeteria incapable of operating in its current form. Luby's further contended that the parking situation was inadequate to meet customer demand and would also breach a restriction in the cafeteria's deed which set minimum parking requirements. A jury returned an award of $1,334,183, which was the amount proposed by the State on the property value. Separately, the jury also awarded $480,000 for lost profits, to which the State objected.

If a governmental entity condemns only part of a tract, adequate compensation is required for both the part taken and any resulting damage to the remainder, but not all types of damages are compensable. Texas law allows income from a business operated on the property to be considered in a condemnation proceeding in two situations: (1) when the taking, damaging, or destruction of property causes a material and substantial interference with access to one's property, lost profits may be awarded as damages and (2) when only a part of the land has been taken, evidence relating to lost profits is admissible, not as a separate item of damage, but as a means of demonstrating the taking's effect on the market value of the remaining land and improvements. Absent one of these two situations, income from a business operated on the property is not recoverable and should not be included in a condemnation award. The State argued since this was a full taking, instead of a partial taking, the lost profit analysis was inapplicable. A property's ability to foster profit is "an inherent factor [in comparable sales approach] because a willing buyer will normally pay more for a tract containing a profitable enterprise than for a similar tract containing an unprofitable enterprise. Thus, '[t]he ability of a business to make a profit is reflected in its market value.'" Because "the profitability of [the] restaurant was a factor in arriving at the 'market value' of the property, it cannot also recover for lost profits." The court reversed the jury award for lost profits. Luby's challenges to the jury charge were also not sustained. Not all statements of law belong in a jury charge and

broad statements are preferred to avoid improper comments on the weight of the evidence.

F. *Wedgeworth v. City of Amarillo*, 07-15-00301-CV, 2016 WL 2941123, at *1 (Tex. App.—Amarillo May 17, 2016) (mem. op.) *reh'g overruled* (July 8, 2016).

Wedgeworth owned a house which was damaged by a fire. The property was vacated and two years later the City informed Wedgeworth she had two months to repair the structure. The City posted the property for condemnation. The City Council conducted a hearing at which Wedgeworth appeared and declared the structure as a public nuisance. The City demolished the structure three months later. After demolition, Wedgworth sued alleging a takings claim. The City filed a plea to the jurisdiction asserting Wedgeworth did not appeal the demolition resolution to district court within 30 days as she was entitled to; therefore, she did not exhaust her administrative remedies. The trial court granted the City's plea and Wedgeworth appealed.

Even under a takings claim, immunity from suit is not waived by a governmental unit until a claimant complies with all statutory prerequisites to suit. See Tex. Gov't Code § 311.034 (West 2013). However, the thirty-day window to file suit and challenge the Council's determination is created by ordinance and does not qualify as a statutory prerequisite. Therefore, the trial court was not deprived of its jurisdiction and the plea should not have been granted.

G. *Babaria v. City of Southlake, Texas*, 02-14-00068-CV, 2016 WL 287523, at *1 (Tex. App.—Fort Worth Jan. 14, 2016) (mem. op.), *reh'g overruled* (Feb. 11, 2016).

Southlake planned to convert the road that runs in front of the Babarias' property from a two-lane road into a four-lane divided road. The special commissioner's court awarded $97,000. The Babarias objected, noting it was not sufficient. They appealed to district court. At the jury trial, the Babarias submitted expert testimony the lots damaged property was valued at $167,000. They objected to the City's expert, Stearman, and his report, noting the appraisals occurred too far removed from the time of the taking to be relevant. After analyzing the discovery provided to the Babarias, the court held that the date of Stearman's report did not make it inadmissible. As a general rule, sales occurring within five years before the taking are not too remote to be admissible. Further, Stearman's testimony that the report is reliable only as to its issue date, was intended as a method to prevent unauthorized use of the report for some other purpose. It was not an assertion that the market was in flux. "This is no different from any other expert's testimony at trial based upon a report completed before trial." After a detailed analysis, the court held his methodology was also proper.

After analyzing the City engineer's testimony, the court held it was not error for her to testify as a fact witness regarding the Babarias' dedication of portions of the land. The "testimony on that point was not an opinion about how the ordinance might hypothetically apply in the future, it was an assertion of fact about something that had already happened."

In the end, the court upheld the jury award, which was $7,000 less than the Commissioners, bringing the total to $90,000.

H. *Caffe Ribs, Inc. v. State*, 487 S.W.3d 137 (Tex. 2016).

Caffe Ribs, Inc. ("Caffe") purchased the condemned property in 1995 from Reeves and Weatherford. The property was contaminated, so Reeves and Weatherford agreed to clean up the contamination. In 2000, Reeves and Weatherford had identified the source of contamination and placed the property with the TCEQ for voluntary cleanup. In 2003, the State notified Caffe Ribs that it intended to condemn the property, or at least part of it, in connection with the Texas Department of Transportation's project to expand Interstate 10. However, the TCEQ kept delaying any determination the property was properly cleaned up. Essentially, the TCEQ required four additional ground-watering wells be installed, but the TxDOT's condemnation required all wells be plugged and abandoned, and any new wells be installed after construction was complete. The contamination was then used by the State to argue a decreased value of the property in condemnation proceedings. When Caffe moved to admit evidence of the State's interference with clean-up processes, the State moved to exclude which was granted. After a jury returned a verdict with a valuation of the property, Caffe appealed. The Court of Appeals determined the error was harmless. The Texas Supreme Court disagreed.

In condemnation proceedings, the constitution requires payment of the "market value" of the condemned property—that is, "the price which the property would bring when it is offered for sale by one who desires, but is not obligated to sell, and is bought by one who is under no necessity of buying." An impending condemnation project, however, can distort the value of property. The inflationary effects of such a project are referred to as "project enhancement" while the deflationary effects are referred to as "condemnation blight", or "project diminishment". Since neither project enhancement nor project diminishment reflects true "market value", they are subject to exclusion. However, exclusion is not mandatory and "[w]e believe the use of a proper instruction, as opposed to an evidentiary exclusion, is particularly appropriate…" when dealing with project diminishment. "In this case, the trial court enforced the project-influence rule with a sweeping evidentiary exclusion." As the United States Supreme

Court has observed, "it would be manifestly unjust to permit a public authority to depreciate property values by a threat of the construction of a government project and then to take advantage of this depression in the price which it must pay for the property when eventually condemned." *United States v. Va. Elec. Power Co.*, 365 U.S. 624, 636 (1961). Because the Texas Supreme Court believed that is exactly what the State did in this case, it concluded the exclusion was harmful error. The case was remanded for a new trial.