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Zoning and Land Use

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I. INTRODUCTION

WHILE Texas is generally viewed as a pro-property and constitutional rights state, Texas courts have tended to uphold governmental regulations that impinge on those rights. However, the only important Texas Supreme Court land use opinion during the Survey period struck down a city's attempt to prevent the free exercise of religion. Texas courts continue to struggle with determining the appropriate breadth and scope of governmental regulation of private property.

This article presents the key zoning and land use developments from the Survey period under the topic areas of zoning and platting, inverse condemnation, and annexation.

II. ZONING AND PLATTING

A. CITY PROHIBITED FROM IMPINGING ON PRACTICE OF RELIGION

In *Barr v. City of Sinton*, the Texas Supreme Court considered whether a zoning ordinance prohibiting the location of correctional rehabilitation facilities in defined areas violated the Texas Religious Freedom Restoration Act (TRFRA).[1] At issue in this case was Barr's operation of a halfway house where he offered housing, religious guidance, and counseling to individuals recently released from prison as part of a religious ministry supported by Barr's church. Following Barr's public discussions regarding his ministry, the City passed a zoning ordinance that effectively prohibited Barr from operating his ministry anywhere within the City of Sinton.[2] Barr eventually sued the City under the TRFRA, seeking, among other things, a declaratory judgment.[3] Ruling in favor of the City, the trial court held "that the ordinance did not violate [the] TRFRA" because the zoning ordinance (1) "did not substantially burden Barr's . . . free exercise of religion," (2) furthered a compelling governmental interest, and (3) "was the least restrictive means of furthering that interest."[4] The court of appeals affirmed.[5]

In applying the TRFRA and modifying the trial court's three-part test, the supreme court set out the following four questions: (1) "Does the City's Ordinance 1999-02 burden Barr's 'free exercise of religion' as defined by [the] TRFRA? [(2)] Is the burden substantial? [(3)] Does the ordinance further a compelling governmental interest? [(4)] Is the ordi-

1. 295 S.W.3d 287, 289-90 (Tex. 2009).
2. *Id.* at 287, 289.
3. *Id.* at 292-93.
4. *Id.* at 293.
5. *Id.* (citing Barr v. City of Sinton, 295 S.W.3d 334, 344 (Tex. App.—Corpus Christi 2005), *rev'd*, 295 S.W.3d 287 (Tex. 2009)).

nance the least restrictive means of furthering that interest?"[6]

With respect to the first question, the supreme court "defined 'free exercise of religion' [under the TRFRA] as 'an act or refusal to act that is substantially motivated by sincere religious belief.'"[7] The supreme court confirmed that the TRFRA guarantees such protection, comparing the treatment of a halfway house that is operated for a religious purpose versus one that is not to that of a bible-study group versus a book club.[8] On this issue, the supreme court concluded "that Barr's ministry was 'substantially motivated by sincere religious belief,'" affirmatively answering the first of the four questions.[9]

In answering the second question about whether Barr's free exercise of religion was substantially burdened, the supreme court applied the standard that the United States Court of Appeals for the Fifth Circuit set forth in *Adkins v. Kaspar*,[10] which held that a "substantial burden" is created "if it truly pressures the adherent to significantly modify his religious behavior and significantly violate his religious beliefs."[11] The supreme court reasoned that the City's zoning ordinance effectively put an end to Barr's ministry by prohibiting him from operating his ministry on his property.[12] Although the court of appeals had concluded that "nothing in the ordinance preclude[d] Barr from providing his religious ministry" elsewhere, there was "no evidence of any alternate location in the City of Sinton where the ordinance would have allowed Barr's ministry to operate."[13] Accordingly, the supreme court held that the City's zoning ordinance substantially burdened Barr's ministry.[14]

As to the third question, the supreme court noted that the TRFRA "places the burden of proving a compelling state interest on the government."[15] In this case, the supreme court rejected the City's contention that "[z]oning itself is a compelling state interest" because zoning ordinances are not "per se superior" to the free exercise of religion.[16] In addition, the supreme court also noted that "the City's argument is undercut by the fact that it made no effort to enforce [the ordinance] for over a year after it was adopted."[17]

Finally in addressing the fourth question, the supreme court concluded that the "TRFRA requires that even when the government acts in furtherance of a compelling state interest, it must show that it used the least

6. *Id.* at 299.
7. *Id.* at 300 (quoting TEX. CIV. PRAC. & REM. CODE ANN. § 110.001(a)(1) (Vernon 2004)).
8. *Id.*
9. *Id.* at 301.
10. 393 F.3d 559 (5th Cir. 2004).
11. *Barr*, 295 S.W.3d at 301 (quoting *Adkins*, 393 F.3d at 570).
12. *Id.* at 302.
13. *Id.*
14. *Id.*
15. *Id.* at 307.
16. *Id.* at 305-06.
17. *Id.* at 307.

restrictive means of furthering that interest."[18] The supreme court held that even if the City had a compelling interest, the City put forth no evidence to show that it employed the least restrictive means of furthering that interest.[19] Accordingly, the supreme court reversed the judgment of the court of appeals, holding that ordinance 1999-02, as applied to Barr's ministry, did indeed violate the TRFRA.[20]

While Texas courts have generally not been proactive in protecting private property rights, they continue to assist parties whose First Amendment rights are violated. *Barr* is an example of the supreme court ensuring that governmental entities do not infringe on First Amendment religious rights.

B. Ten-Day Deadline for Appealing Board of Appeals Decision is Jurisdictional

Chapter 211 of the Texas Local Government Code establishes the procedures for approving and appealing zoning variances. In *Boswell v. Board of Adjustment and Appeals of Town of South Padre*,[21] landowners appealed a trial court's dismissal of a petition for a writ of certiorari, in which the landowners sought district court review of the Board's decision that granted zoning variances to a developer.[22] The landowners argued that the variances "were granted without a unique showing of hardship."[23] The petition alleged that the Board "exceeded its authority" in granting the variances and that the town employees misled the landowners, who received no notice of when the Board filed its decision.[24] The Board argued that the landowners did not present their petition within ten days of the Board's filed decision, as section 211.011(b) of the Texas Local Government Code requires.[25] The district court granted the Board's motion for dismissal for lack of jurisdiction, and the landowners appealed.[26]

The landowners argued that the trial court incorrectly ruled that it lacked jurisdiction and that the Board should be estopped from enforcing the variances because it misled the landowners.[27] On the jurisdictional issue, the landowners argued that the ten-day provision in section 211.011(b) was "procedural rather than mandatory and jurisdictional."[28] The Corpus Christi Court of Appeals did not agree, because the statute "states that the petition 'must' be presented within ten days" and "the

18. *Id.* at 308.
19. *Id.*
20. *Id.*
21. No. 13-08-642-CV, 2009 WL 2058914, at *1 (Tex. App.—Corpus Christi July 16, 2009, no pet.) (mem. op.).
22. *Id.*
23. *Id.*
24. *Id.*
25. *Id.*
26. *Id.*
27. *Id.*
28. *Id.*

word 'must' creates . . . a condition precedent."[29] The court of appeals further explained that the Texas Supreme Court in *Tellez v. City of Socorro*[30] "stated that jurisdiction exists once a party files a petition within ten days," which "strongly suggests . . . that the ten day requirement is jurisdictional."[31] In addition, the court of appeals relied on another Texas Supreme Court case, *Davis v. Zoning Board of Adjustment*,[32] in which the supreme court stated that "[o]nce a party files a petition within [the ten-day period], the court has subject matter jurisdiction."[33] Because the supreme court considered the ten-day requirement to be jurisdictional, the court of appeals affirmed the trial court's dismissal for lack of jurisdiction.[34]

Having ruled in favor of the Board on the jurisdictional question, the court of appeals moved on to the landowners' estoppel claims.[35] The court of appeals noted that Texas law generally prohibits a court from "acquir[ing] subject-matter jurisdiction through estoppel."[36] Accordingly, the court of appeals overruled the landowners' estoppel claims and affirmed the district court's dismissal for lack of jurisdiction.[37] The court of appeals expressed no sympathy towards the landowners' equitable position that the city staff effectively prevented them from filing their appeal within the ten-day period.

C. Conflicting Evidence Supports Board's Finding of No Nonconforming Use

The Board of Adjustment is the fact finder on zoning appeals. In *Tellez v. City of Socorro*,[38] the El Paso Court of Appeals determined that the Board of Adjustment (the Board) of the City of Socorro (the City) did not abuse its discretion by denying a request for nonconforming use based upon conflicting evidence.[39] The court of appeals considered the case following remand by the Texas Supreme Court.[40] In 1988, Tellez purchased an unzoned piece of property adjacent to his existing auto-parts business. Tellez used the property to store salvaged cars and auto parts and allowed trucks to park on the property in exchange for payment. In 1989, the City enacted an ordinance restricting wreckage and junkyards to industrial districts and zoned Tellez's property as residential.[41]

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29. *Id.* at *2.
30. 226 S.W.3d 413 (Tex. 2007).
31. *Boswell*, 2009 WL 2058914, at *2 (quoting *Tellez*, 226 S.W.3d at 414).
32. 865 S.W.2d 941 (Tex. 1993).
33. *Boswell*, 2009 WL 2058914, at *2 (quoting *Davis*, 865 S.W.2d at 942).
34. *Id.*
35. *Id.* at *3.
36. *Id.* (citing Wilmer–Hutchins Indep. Sch. Dist. v. Sullivan, 51 S.W.3d 293, 294 (Tex. 2001)).
37. *Id.*
38. 296 S.W.3d 645 (Tex. App.—El Paso 2009, pet denied).
39. *Id.* at 652.
40. *Id.* at 647.
41. *Id.*

Several years later, the City sent Tellez zoning violation notices "alleging that he was storing junk on a residential lot."[42] The City advised Tellez that he must produce evidence to support a legal nonconforming use (i.e., a use that existed legally when the zoning restriction became effective and has continued to exist). Tellez could not provide such support and, as an alternative, attempted to have the property rezoned from residential to industrial. The city planning commission denied Tellez's rezoning request. Then Tellez appealed to the city council, which heard and denied his appeal. Finally, the Board voted to deny his request. Tellez filed a petition for a writ of certiorari, and the trial court affirmed the Board's decision.[43]

On appeal to the El Paso Court of Appeals, Tellez claimed "that the trial court abused its discretion by denying him a non-conforming use."[44] The court of appeals applied "a legal presumption in favor of the [Board's] order and [Tellez had] the burden of establishing that the Board clearly abused its discretion."[45] In order to establish this burden, Tellez must "demonstrate that the Board acted arbitrarily and unreasonably."[46]

The court of appeals held that the Board did not abuse its discretion.[47] Based on the record reviewed, the court of appeals stated that the Board "heard conflicting evidence" as to (1) whether Tellez used the property as a wrecking or junkyard when the City enacted the ordinances and (2) whether Tellez continually used the property as a wrecking or junkyard after the City enacted the ordinances.[48] The court of appeals reasoned that "[a] board of adjustment does not abuse its discretion by basing its decision on conflicting evidence."[49] Since "Tellez failed to carry his burden of establishing that the [Board] abused its discretion by denying his request for a non-conforming use," the court of appeals affirmed the judgment of the trial court.[50] *Tellez* stands for the proposition that the decision of the board of adjustment will usually be upheld unless there is no evidence to support the claim or the issue can be decided as a matter of law.

D. Conflicting Evidence Sufficient to Uphold Denial of Demolition Request

A result similar to *Tellez* was recorded in *Christopher Columbus Street Market LLC v. Zoning Board of Adjustments of Galveston*,[51] in which the Houston Fourteenth Court of Appeals considered the denial of a permit

42. *Id.*
43. *Id.* at 647-48.
44. *Id.* at 648.
45. *Id.* at 649.
46. *Id.* at 652.
47. *Id.* at 651.
48. *Id.*
49. *Id.*
50. *Id.* at 652.
51. 302 S.W.3d 408 (Tex. App.—Houston [14th Dist.] 2009, no pet.).

to demolish a historic structure. The historic property consisted of a home constructed in 1880 with two additions made in 1920. As an historic property, approval of the landmark commission was necessary to obtain a demolition permit. The property owner initially applied to demolish only the additions, and this permit was approved. However, shortly after this approval, the property owner's structural engineer determined that the main structure was unsafe, and furthermore, that the additions could not be demolished without damaging the main structure. Then the property owner made another application to the landmark commission for demolition of the main structure.[52]

Thereafter, the city presented its own structural engineer to rebut the property owner's engineer. The landmark commission sided with the city and denied the permit. The property owner appealed this decision to the board of adjustment, which upheld the decision of the landmark commission based on the findings of the city's structural engineer. The property owner then filed a writ of certiorari to the district court, but the district court found no abuse of discretion by the board of adjustment.[53]

The property owner appealed the district court decision with no luck as well. The court of appeals held that "[f]or the property owners to prevail in their attack on the legality of the Zoning Board's order, they had to prove that the Zoning Board could have reached but one decision and not the decision it made."[54] The findings of the city's structural engineer were enough to uphold the district court's decision.[55]

The court of appeals continued in the vein of extreme deference to public bodies such as landmark commissions and boards of adjustment. So long as there is some evidence to support a board's decision, the court of appeals will uphold it.

E. City's Tree Ordinance Can Be Extended to ETJ

Chapter 212 of the Texas Local Government Code authorizes a municipality to extend its subdivision ordinance to its extraterritorial jurisdiction (ETJ).[56] Texas cities have become more aggressive in recent years in extending their ordinances beyond their corporate boundaries.

In *Milestone Potranco Development, Ltd. v. City of San Antonio*,[57] the San Antonio Court of Appeals construed a city ordinance that extended the City's tree protection regulations to land outside its corporate limits. Milestone Potranco Development, Ltd., challenged the applicability of the City's Tree Preservation Ordinance and Streetscape Tree Planting Standards (Tree Ordinance) to property located in the City's ETJ. The court of appeals concluded that the City properly adopted the Tree Ordi-

52. *Id.* at 410-11.
53. *Id.* at 412.
54. *Id.* at 418.
55. *Id.* at 419.
56. Tex. Loc. Gov't Code Ann. §§ 212.002-.003 (Vernon 2008).
57. 298 S.W.3d 242 (Tex. App.—San Antonio 2009, pet. denied).

nance and could extend it to the City's ETJ.[58]

In construing the ordinance, the court of appeals looked at "the plain language of the [statute] unless a contrary intention or absurd result is apparent from the context."[59] The City contended that pursuant to section 212.002 of the Local Government Code (the state platting statute), it "may adopt *rules governing plats and subdivisions of land* within the municipality's jurisdiction to promote the health, safety, morals, or general welfare of the municipality and the safe, orderly, and healthful development of the municipality."[60] A city may generally extend the application of municipal ordinances to the ETJ, subject to a few exceptions.[61] One such exception is that "a municipality shall not regulate *the use of any building or property* for business, industrial, residential, or other purposes" in the ETJ.[62]

Milestone argued that the Tree Ordinance was an aesthetic regulatory scheme that did not regulate basic infrastructure and, therefore, was not a "rule governing plats and subdivisions of land" under section 212.002 of the Local Government Code.[63] The court of appeals disagreed, holding that under section 212.002, a municipality is authorized to adopt rules that "promote the health, safety, morals, or general welfare of the municipality and the safe, orderly, and healthful development of the municipality."[64]

After reviewing the statement of purpose of the Tree Ordinance, which explained the objectives and purposes it intended to accomplish, the court of appeals held that the Tree Ordinance was more than an aesthetic regulation and was intended "to promote the health of the municipality and the orderly and healthful development of the community," and therefore section 212.002 of the Local Government Code governed.[65]

Milestone alternatively claimed that the Tree Ordinance was overly broad in its application because it "appli[ed] not only to those [who wanted] to plat and subdivide property, but also to every person who simply want[ed] to reduce the number of trees on his or her property."[66] The court of appeals considered the Tree Ordinance in the context of the entire Unified Development Code of which it is a part.[67] The court of appeals determined that the Tree Ordinance was limited to development and did not purport to regulate property on which the construction of a home was already complete, and therefore was not overly broad in its

58. *Id.* at 248.
59. *Id.* at 243.
60. *Id.* at 243-44 (quoting TEX. LOC. GOV'T CODE ANN. §212.002 (Vernon 2008)).
61. *Id.* at 244 (citing TEX. LOC. GOV'T CODE ANN. § 212.003).
62. *Id.* (quoting TEX. LOC. GOV'T CODE ANN. § 212.003).
63. *Id.*
64. *Id.*
65. *Id.* at 245.
66. *Id.*
67. *Id.* (citing Tex. Dep't of Transp. v. City of Sunset Valley, 146 S.W.3d 637, 642 (Tex. 2004)).

application.[68]

The court of appeals then turned to the question of whether one of the exceptions to extending the Tree Ordinance to the ETJ applied. "Milestone argue[d] the Tree Ordinance should be treated as a prohibited 'land use' regulation under subsection 212.003(a)(1), which contains an exception that prohibits a municipality from regulating, 'the use of any building or property for business, industrial, residential or other purpose.'"[69] The court of appeals held that the Tree Ordinance did not regulate the use of property as section 212.003 intended.[70] After analyzing the Code's language describing the exceptions to extending ordinances as well as "the similarities between the zoning ordinances a municipality may adopt and the list of items a municipality is prohibited from regulating under section 212.003," the court of appeals reasoned that the legislature intended to "prohibit a municipality from regulating zoning-type uses in the ETJ."[71] The legislative amendments to the vested rights statutes provided the court with further indication that a municipality may not regulate zoning-type uses under section 212.003.[72] The court of appeals recognized a developer's vested rights under the Local Government Code, requiring a regulating agency to consider a permit application "based on regulations and ordinances in effect at the time the original application [was] filed."[73] In recent years, legislative amendments "clarif[ied] that while zoning regulations are excepted from the vested rights statutes, regulations governing tree preservation [were] not excepted."[74] The court of appeals "liken[ed] tree preservation ordinances to other land development regulations that govern plats and subdivisions as opposed to zoning ordinances governing the use of property."[75] The court of appeals also looked at applicable case law and made a distinction between zoning on one hand and planning or platting on the other, the latter of which "contemplate[d] adequate provision for orderly growth and development."[76] The court of appeals, held "[T]he Tree Ordinance does not regulate the physical use of the land or the specific purpose for which it is used but regulates the manner in which trees must be preserved in developing the land for any use or purpose."[77]

Municipalities are increasingly taking the opportunity to extend their ordinances outside corporate boundaries. For example, several cities now enforce their building codes in the ETJ. *Milestone* provides additional

68. *Id.* at 246-47.
69. *Id.* at 247 (quoting TEX. LOC. GOV'T CODE ANN. § 212.002 (Vernon 2008)).
70. *Id.*
71. *Id.*
72. *Id.* at 248.
73. *Id.*
74. *Id.* (citing Act of April 27, 2005, 79th Leg., R.S., ch. 31, § 1, 2005 Tex. Gen. Laws 40, 41).
75. *Id.*
76. *Id.* (quoting Lacy v. Hoff, 633 S.W.2d 605, 609 (Tex. App.—Houston [14th Dist.] 1982, writ ref'd n.r.e.)).
77. *Id.* at 248-49.

support for the proposition that ordinances can be extended to affect landowners who do not enjoy the benefit of receiving city services.

III. INVERSE CONDEMNATION

A. STOP-WORK ORDER CAN BE POTENTIAL TAKING

Most of the opinions on inverse condemnation during the Survey period focused on procedural issues. Cities typically file a plea to the jurisdiction in order to prevent a plaintiff from reaching trial on a takings claim on the merits.

In *City of Carrollton v. McPhee*, the Dallas Court of Appeals considered the issues of governmental immunity and ripeness in relation to McPhee's claim for inverse condemnation and ultimately affirmed the trial court's order denying the City's plea to the jurisdiction.[78] "Governmental immunity protects a City from suit when it exercises its governmental functions unless the immunity is clearly waived."[79] But because the Texas constitution "waives governmental immunity for a valid inverse condemnation claim," the governmental immunity issue in this case turns on whether McPhee asserted a valid claim for inverse condemnation.[80]

McPhee owned commercial property in the City on which he operated an automobile business.[81] In connection with a desired remodel of his business space, McPhee presented plans to the City, and the City approved his plans and issued a permit for the work.[82] After McPhee commenced with the approved remodeling work, but before he completed it, the City revoked McPhee's permit and served him with a stop-work order.[83] To apply for a new permit, the City required McPhee "to submit new drawings with significantly more rigorous construction requirements."[84] McPhee claimed that he would not have pursued the remodeling project "if he had known about these more rigorous standards when he first applied for a permit."[85] McPhee sued the City for, among other claims, inverse condemnation, and the City responded by filing "a plea to the jurisdiction asserting that [(1)] governmental immunity barred McPhee's claims and [(2)] McPhee failed to exhaust his administrative remedies."[86] The trial court partially granted the City's plea, dismissing all of McPhee's claims except his inverse condemnation claim.[87] The City appealed.

78. No. 05-08-01018-CV, 2009 WL 2596145, at *1 (Tex. App.—Dallas Aug. 25, 2009, no pet.) (mem. op.).
79. *Id.* at *2 (citing City of Dallas v. Blanton, 200 S.W.3d 266, 271-72 (Tex. App.—Dallas 2006, no pet.)).
80. *Id.* (citing TEX. CONST. art. I, § 17; Gen. Servs. Comm'n v. Little-Tex Insulation Co., 39 S.W.3d 591, 598 (Tex. 2001)).
81. *Id.* at *1.
82. *Id.*
83. *Id.*
84. *Id.*
85. *Id.*
86. *Id.*
87. *Id.*

The City's first issue on appeal was that McPhee failed to establish an intentional act resulting in a public-use taking.[88] The court of appeals stated that a compensable regulatory taking can occur when a governmental agency denies a permit for development.[89] And the court of appeals further stated that "public use is not a necessary component of a regulatory taking."[90] In analyzing the facts of this case (and liberally construing McPhee's pleadings in his favor as *Texas Department of Parks & Wildlife v. Miranda* required[91]), the court of appeals held that McPhee's allegations did in fact assert a valid taking claim and resolved the City's first issue against it.[92]

The City's second issue on appeal was that McPhee's claim was not ripe for adjudication because McPhee failed to exhaust available administrative remedies.[93] Although both parties agreed that McPhee never filed an administrative appeal of the City's stop-work order, the trial court's evidence "raised a fact issue with respect to whether such an administrative appeal existed."[94] Based on the record, the court of appeals concluded that the City had not met its burden of showing that McPhee failed to exhaust his administrative remedies and resolved the City's second issue against it as well.[95] Thus, the court of appeals affirmed.[96]

While many takings claims never make it to trial because of procedural obstacles, this court of appeals went to great lengths to ensure that the property owner would have his day in court. *McPhee* also shows that the denial or revocation of a permit can constitute an intentional government act to support an inverse condemnation claim.[97]

B. Floodplain Ordinance Allowing Development Not Prima Facie Taking

During the last Survey period, the Houston First Court of Appeals held that a Federal Emergency Management Association (FEMA) map revision, standing alone, that resulted in a taking, was ripe for adjudication in *City of Houston v. O'Fiel*.[98] In 2007, the O'Fiels filed suit against the City after FEMA approved new maps that placed their property in the floodway. They argued that the City's floodplain regulations resulted in a taking because the City's code prohibited all property development within

88. *Id.* at *2.
89. *Id.* (citing Mayhew v. Town of Sunnyvale, 964 S.W.2d 922, 933 (Tex. 1998)).
90. *Id.* (citing City of San Antonio v. El Dorado Amusement Co., 195 S.W.3d 238, 244 (Tex. App.—San Antonio 2006, pet. denied)).
91. 133 S.W.3d 217, 226 (Tex. 2004).
92. *McPhee*, 2009 WL 2596145, at *2.
93. *Id.* at *3.
94. *Id.*
95. *Id.*
96. *Id.*
97. *Id.* at *2.
98. No. 01-08-00242-CV, 2009 WL 214350, at *1 (Tex. App.—Houston [1st Dist.] Jan. 29, 2009, pet. denied) (mem. op.).

the floodway.[99]

The court of appeals pointed out that a challenge to a land use regulation can be on its face or as applied to a particular development.[100] The O'Fiels' claim was based on the theory that, in their case, the City's code amounted to an unconstitutional taking.[101] As a result, the court of appeals held that "the issue of whether the Code constituted an unconstitutional regulatory taking of the O'Fiels' property was ripe for adjudication."[102]

City of Houston v. HS Tejas, Ltd. addresses the City's subsequent amendment to its floodway ordinances.[103] In September 2008, HS Tejas brought an inverse condemnation claim against the City of Houston alleging that the amendment to the City's ordinance regulating development in floodways, when applied to its property, resulted in an unconstitutional taking of its property that was located in the floodway for the first time following FEMA's 2007 adoption of new flood insurance rate maps.[104] "The City also filed a plea to the jurisdiction contending that, although HS Tejas alleged that it acquired the property for the purpose of developing it and selling it, HS Tejas did not allege any specific improvement or sale that was impacted by the 2006 amendment."[105] The trial court denied the City's plea.[106] Upon review, the Houston First Court of Appeals reversed the trial court's order, holding that HS Tejas failed to allege a concrete injury sufficient to establish that the claim was ripe for adjudication.[107]

In July 2008, however, the City amended its floodplain ordinance, removing the absolute floodway prohibition and giving the City greater discretion to issue development permits for floodway property.[108] In assessing the case, the court of appeals agreed with the City's argument that HS Tejas's claim, which was "based solely on a hypothetical possibility of improving or selling its property between the effective dates of the 2006 and 2008 amendments, [did not assert] the type of specific injury sufficient to support a regulatory takings claim."[109] The court of appeals stated that "[a] case is not ripe when the determination of whether the plaintiff has a concrete injury depends on contingent or hypothetical facts, or upon events that have not yet come to pass."[110] The court of appeals concluded that because HS Tejas had not specifically alleged

99. *Id.*
100. *Id.* at *3 (citing Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470, 494 (1987)).
101. *Id.*
102. *Id.* at *6.
103. 305 S.W.3d 178, 180 (Tex. App.—Houston [1st Dist.] 2009, no pet.).
104. *Id.* at 182.
105. *Id.*
106. *Id.*
107. *Id.* at 185.
108. *Id.* at 181 (citing Houston, Tex., Code of Ordinances § 19-43 (2009)).
109. *Id.* at 184.
110. *Id.* (citing Waco Indep. Sch. Dist. v. Gibson, 22 S.W.3d 849, 852 (Tex. 2000)).

some actual development or sales plan that the 2006 amendment impeded before the passage of the less restrictive 2008 amendment, HS Tejas failed to allege a concrete injury sufficient to support a regulatory takings claim.[111]

HS Tejas argued that the decisions of the Houston First Court of Appeals in *City of Houston v. O'Fiel* and *City of Houston v. Noonan*, which both involved identical challenges to the City's 2006 amendment to the ordinance, should apply.[112] The court of appeals distinguished the *HS Tejas* case by stating that it upheld the trial court's denial of the City's plea to the jurisdiction on ripeness grounds in both of those other cases because the plaintiffs in those cases alleged a concrete injury, where HS Tejas had not.[113] Because HS Tejas "made no allegation of any specific plans for improvement or sale that were adversely affected by the 2006 amendment," HS Tejas alleged no concrete injury and thus failed to properly establish its cause of action.[114]

C. Ordered Demolition of Substandard Buildings Not a Taking

Many home rule cities have passed ordinances requiring multifamily developers and owners to maintain their structures to certain standards. If the buildings are maintained in a substandard condition, then they can be ordered to be demolished if certain due process standards are met.

In *Patel v. City of Everman*, Patel sued the City in an inverse condemnation proceeding after the City decided to demolish some of Patel's apartment buildings that allegedly did not comply with city codes.[115] The City filed a motion for summary judgment in which it argued that Patel's suit was an improper collateral attack on a city agency's ruling because, although Patel initially attempted to enjoin the City from demolishing his buildings, he later nonsuited his complaint.[116] The trial court granted the City's summary judgment motion, and Patel appealed.[117]

Upon review, the Fort Worth Court of Appeals affirmed the trial court's decision to grant the City's motion for summary judgment, holding that Patel was collaterally estopped from bringing his suit because he voluntarily terminated his original attack on the agency's ruling regarding demolition of his buildings and because he did not pursue any other means of review regarding the ruling within the thirty-day period set forth in section 214.0012 of the Texas Local Government Code.[118]

Patel also argued that his challenge should not be based on the sub-

111. *Id.* at 184-85.
112. *Id.* at 185.
113. *Id.*
114. *Id.*
115. No. 2-07-303-CV, 2009 WL 885916, at *1 (Tex. App.—Fort Worth Apr. 2, 2009, pet. filed) (mem. op.).
116. *Id.* at *1-2.
117. *Id.* at *2.
118. *Id.* at *7.

stantial evidence rule.[119] In its analysis, the court of appeals noted that, pursuant to authority granted by chapter 214, "[c]ity ordinances that provide for judicial review of administrative determinations that buildings constitute a public nuisance or otherwise provide for their demolition can mandate the substantial evidence standard of review."[120] The court of appeals further noted that when a city ordinance is based on chapter 214, section 214.0012 will serve to fill in any gaps in judicial procedure where nothing is specifically set forth in the ordinance.[121] Accordingly, because chapter 214 provided the authority for the City's substandard building ordinance, the court of appeals held that the review provisions set forth in section 214.0012 were applicable to Patel's claims.[122]

D. AGREEMENT TO BUILD IMPROVEMENTS WAIVES EXACTIONS CHALLENGE

One of the exceptions to cities' immunity defense is the enforcement of settlement agreements resulting from previous litigation.[123] The dispute in *City of Corinth v. NuRock Development, Inc.* stemmed from the alleged breach of a settlement agreement (the Agreement) that the parties entered into to resolve prior litigation between them.[124] Pursuant to the Agreement, NuRock was, among other things, to construct an affordable housing project.[125] In its suit against NuRock, the City alleged that NuRock breached the Agreement by failing to fund a required escrow account for certain infrastructure projects.[126] NuRock filed counterclaims against the City, seeking damages, injunctive relief, and a declaratory judgment.[127] Specifically, NuRock alleged that "the City was interfering with and delaying [NuRock's] construction . . . by refusing to perform inspections or issue building permits or certificates of occupancy."[128] The City responded by alleging sovereign immunity.[129] The trial court denied the City's plea to the jurisdiction, and the City appealed.[130]

In addressing the City's argument that it had immunity from NuRock's claims for breach of the Agreement, the Fort Worth Court of Appeals relied on *Texas A&M University—Kingsville v. Lawson* to support its

119. *Id.* at *6.
120. *Id.*; *see* TEX. LOC. GOV'T CODE ANN. § 214.001(a) (Vernon 2008); *see also* Cedar Crest # 10, Inc. v. City of Dallas, 754 S.W.2d 351, 353 (Tex. App.—Eastland 1988, writ denied).
121. *Patel*, 2009 WL 885916, at *6 (citing TEX. LOC. GOV'T CODE ANN. § 214.0012 (Vernon Supp 2009)).
122. *Id.* at *6.
123. *See* City of Corinth v. NuRock Dev., Inc., 293 S.W.3d 360, 365 (Tex. App.—Fort Worth 2009, no pet.).
124. *Id.* at 363.
125. *Id.* at 363-64.
126. *Id.* at 364.
127. *Id.*
128. *Id.*
129. *Id.*
130. *Id.*

holding that the City was not immune.[131] In that case, a plurality concluded that when a governmental entity settles a claim for which immunity from suit has been waived, immunity from suit is also waived for a breach of the settlement agreement.[132]

The City also challenged the trial court's jurisdiction over the matter, arguing that NuRock's inverse condemnation claim was improper because NuRock voluntarily agreed to make the improvements (the subject of its taking claim) pursuant to the Agreement.[133] In addressing this issue, the court of appeals reasoned that the City's acceptance of the improvements did not constitute a compensable taking under the Texas constitution, because the City acted pursuant to colorable contract rights set forth in the Agreement, rather than pursuant to its powers of eminent domain.[134] The court of appeals went on to note that even if it were determined that the City breached the Agreement, it would not change the fact that the improvements were agreed to prior to the alleged breach, and the alleged breach would not affect a determination regarding the City's intent (i.e., whether the City intended to take the improvements when it executed the Agreement).[135] Consequently, the court of appeals agreed with the City and held that the trial court did not have jurisdiction over NuRock's inverse condemnation claim.[136]

E. Procedural Constitutional Injury Does Not Confer Standing

The Austin Court of Appeals addressed the issues of associational standing and the sufficiency of public notice under the Texas Open Meetings Act[137] in *Save Our Springs Alliance, Inc. v. City of Dripping Springs*.[138] After notice and a public hearing, the City entered into two separate development agreements (collectively, the Development Agreements), whereby two companies could develop land in Hays County, Texas, according to agreed-upon standards.[139] Save Our Springs Alliance, Inc. (SOS) filed suit against the City claiming (1) the City did not have authority to enter into the Development Agreements, (2) the public notices did not give sufficient information, and (3) the Development Agreements impinged on the right of self-government because they contracted away legislative powers, thereby violating the Texas constitu-

131. *Id.* at 365-67.

132. Tex. A&M Univ.—Kingsville v. Lawson, 87 S.W.3d 518, 521-22 (Tex. 2002).

133. *City of Corinth*, 293 S.W.3d at 367.

134. *Id.* (citing Tex. Const. art. I, § 17; State v. Holland, 221 S.W.3d 639, 644 (Tex. 2007)).

135. *Id.* at 367-68.

136. *Id.*

137. Tex. Gov't Code Ann. § 551.041 (Vernon 2004).

138. Save Our Springs Alliance, Inc. v. City of Dripping Springs, 304 S.W.3d 871, 877 (Tex. App.—Austin 2010, pet. struck).

139. *Id.* at 876.

tion.[140] SOS sought declaratory judgment and injunctive relief.[141]

The court of appeals set forth the elements of associational standing as follows: (1) at least one member of the association would otherwise have standing, "(2) the interests [the association] seeks to protect are germane to the organization's purpose, and (3) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit."[142] SOS alleged several injuries to its members, thus asserting standing.[143]

SOS first alleged environmental injury on behalf of members who regularly swim in the Barton Springs pool.[144] The court of appeals held that environmental impact alone was not enough to establish injury sufficient for standing absent an interest in property that is affected that makes the alleged injury distinct from injury sustained by the public at large.[145]

Second, SOS alleged that injury to the well water of landowners who live near the subject land and who use the well amounted to injury sufficient for standing.[146] The court of appeals disagreed, holding that the alleged harm must be actual or imminent, rather than hypothetical.[147]

Third, SOS asserted standing based on constitutional violations.[148] SOS alleged that the Development Agreements impinged on the right of local governments to self-govern and contracted away legislative and police powers.[149] The court of appeals stated that in order to establish standing based on alleged constitutional violations, SOS must show an injury in fact.[150] The only injury that SOS alleged was a "procedural injury suffered by those members who reside within the [C]ity."[151] Consequently, the court of appeals "decline[d] to hold that SOS [had] standing based on harm to its members' non-specified procedural interests."[152]

Fourth, SOS alleged standing based on injury to tax-paying members "from the City's expenditure of public funds under the [Development] Agreements."[153] The court of appeals held that the language in the Development Agreements did not require the expenditure of public funds and, therefore, did not support a claim for taxpayer standing.[154]

The court of appeals also addressed the sufficiency of the City's public notice given in connection with the execution of the Development Agree-

140. *Id.* at 876-77.
141. *Id.* at 877.
142. *Id.* at 878.
143. *Id.*
144. *See id.*
145. *Id.* at 882.
146. *Id.* at 878.
147. *Id.* at 884.
148. *Id.* at 878.
149. *Id.* at 884.
150. *Id.*
151. *Id.*
152. *Id.* at 885.
153. *Id.* at 878.
154. *Id.*

ments.[155] The Texas Open Meetings Act requires that a governmental body "give written notice of the date, hour, place, and subject of each meeting held by the governmental body."[156] SOS alleged that the notice insufficiently notified the public of the subject of the meeting because it did not alert the public to the substantial impact of the Development Agreements.[157] Specifically, SOS alleged the notices lacked not only property locations that the Development Agreements affected but also the applicable alteration time periods.[158] Despite SOS's arguments, the court of appeals held that the City's notices were sufficient under the Texas Open Meetings Act.[159] The notices sufficiently identified the parties, stated that a development agreement was being considered, and referenced the section in the Texas Local Government Code that sufficiently informed the reader of the general location of the property affected; therefore, the court of appeals held that the notices were sufficient.[160]

The opinions handed down during the Survey period on inverse condemnation illustrate the importance of developers or builders obtaining a decision on a permit application and making the proper administrative appeals prior to filing land use litigation. The plaintiff must show a specific, concrete injury to reach a trial on the merits. As the case law shows, a litigant faces a real threat of losing its rights to pose such a challenge if it does not jump through the correct procedural hoops.

IV. ANNEXATION

A. Annexation Statute in Effect Prior to Completion of Annexation Applies

In *Five Land, Ltd. v. City of Rowlett*,[161] Five Land appealed a trial court's dismissal, for lack of standing, of a mandamus action against the City under section 43.056(*l*) of the Texas Local Government Code.[162] Five Land, which owned land that the City annexed in June 1998, brought the mandamus action to enforce the terms of a service plan that the City enacted in 1998 in an attempt to force the City to provide sewer service to Five Land's property.[163] The City contended that Five Land, which did not reside in the annexed area, lacked standing because, at the time of the annexation, section 43.056(i) of the Texas Local Government Code allowed residents, but not landowners, to bring a mandamus action to enforce a service plan.[164] However, effective September 1, 1999, section

155. *Id.* at 888.
156. Tex. Gov't Code Ann. § 551.041 (Vernon 2004).
157. *Save Our Springs Alliance, Inc.*, 304 S.W.3d at 888.
158. *Id.*
159. *Id.* at 890.
160. *Id.* at 889.
161. 293 S.W.3d 917 (Tex. App.—Dallas 2009, no pet.).
162. *Id.* at 918.
163. *Id.*
164. *Id.* at 918-19 (citing Act of May 29, 1995, 74th Leg., R.S., ch. 1062, § 1, 1995 Tex. Gen. Laws 5240 (codified at Tex. Local Gov't Code Ann. § 43.056(l) (Vernon 2008))).

43.056(i) was moved to section 43.056(*l*) and amended to give those who own property within municipalities having a population under 1.6 million, but do not reside within the municipality, the right to file a mandamus action.[165]

The Dallas Court of Appeals considered whether the change in section 43.056 applied to Five Land's property, which the City annexed before the effective date of the change.[166] Looking at the legislative history of the amendment to section 43.056, the court of appeals held that the amendment was intended to apply to (1) statutorily required annexations included in a municipality's three-year annexation plan and (2) "annexations not required to be included in such a plan *if* the first public hearing or first notice required as part of the annexation process occurred on or after September 1, 1999."[167]

Since the annexation of Five Land's property was completed before the statute was amended, the court of appeals concluded that the earlier version applied.[168] This, the court of appeals explained, was consistent with the legislature's prior practice.[169]

The court of appeals rejected Five Land's argument that the legislature intended only to make the statute prospective with respect to procedural requirements of annexation, stating that such an interpretation "would make the legislature's prospective language with respect to section 43.056(*l*) meaningless."[170] Because the City's annexation was complete before 1999, the court of appeals stated that the annexed "area was never included in a three-year annexation plan," and that no "notices or hearings required for the annexation occurred after the effective date of the [amendment]."[171] Thus, the court of appeals held that Five Land had no standing and affirmed the trial court's dismissal of the mandamus action.[172]

B. Opposition of Contiguous Landowners Cannot Thwart Annexation

Another standing issue was addressed in *Village of Salado v. Lone Star Storage Trailer, II Ltd.*[173] The Village appealed the district court's grant of summary judgment in favor of Lone Star's voiding the Village's annex-

165. *Id.* at 919.

166. *Id.*

167. *Id.* (citing Act of May 30, 1999, 76th Leg., R.S., ch. 1167, § 17(c), (d) & (e), 1999 Tex. Gen. Laws 4079, 4090 (Vernon)).

168. *Id.*

169. *Id.* (citing Act of May 29, 1995, 74th Leg., R.S., ch. 1062, §§ 1, 3, 1995 Tex. Gen. Laws 5240, 5241 (Vernon); Smith v. City of Brownwood, 161 S.W.3d 675, 679 (Tex. App.—Eastland 2005, no pet.)).

170. *Id.* at 919-20.

171. *Id.* at 920.

172. *Id.*

173. No. 03-06-00572-CV, 2009 WL 961570 (Tex. App.—Austin Apr. 10, 2009, pet. denied) (mem. op.).

ation of Lone Star's property.[174] The Village annexed land located immediately to the east of the Village, pursuant to section 43.025 of the Texas Local Government Code, after a majority of the qualified voters within the area being annexed voted in favor of annexation.[175] Lone Star, which opposed annexation, owned approximately fourteen acres of the annexed land, including all of the annexed land that abutted the Village's boundary.[176] At trial, both Lone Star and the Village filed summary judgment motions, and the district court granted Lone Star's motion, declaring the annexation ordinance void.[177]

On appeal, the Village contended that the annexation was proper, having complied with the requirements of section 43.025.[178] Lone Star did not dispute that the Village met the procedural requirements of the Local Government Code.[179] Instead, Lone Star challenged the annexation because it owned all of the land "contiguous" to the Village and did not consent to annexation.[180] Lone Star's argument relied on the language of section 43.025, which provides that "a majority of the qualified voters of an area contiguous to [the] municipality [must] vote in favor of becoming a part of the municipality."[181]

The Austin Court of Appeals disagreed and reversed. First, it noted that section 43.025 only requires a majority of the qualified voters in an area to be annexed to vote in favor of annexation, and the Code does not require unanimous consent.[182] The statute also makes no distinction between voters who own property along a municipality's borders and those who do not, and it contains no exception for situations where one party owns all of the property that physically borders the municipality.[183] Second, the court of appeals explained that "Lone Star's construction of [the statute] would frustrate the intent of the legislature and lead to arbitrary results."[184] "Specifically, Lone Star's interpretation would deprive the majority of voters of a right afforded them by the legislature and would elevate the rights of owners of property abutting municipalities."[185] For example, the court of appeals explained, under Lone Star's interpretation, even if all qualified voters but one voted in favor of annexation, that one voter could prevent annexation if it happened to own property along the border of the municipality.[186] On the other hand, annexation would be allowed under Lone Star's interpretation if just one voter favoring annexation owned property that abutted the border of the municipality,

174. *Id.* at *1.
175. *Id.*
176. *Id.*
177. *Id.*
178. *Id.* at *2.
179. *See id.*
180. *Id.*
181. *Id.* at *1. (quoting TEX. LOC. GOV'T CODE ANN. § 43.025(a) (Vernon 2008)).
182. *Id.* at *3.
183. *Id.*
184. *Id.*
185. *Id.*
186. *Id.*

even if a majority were against annexation.[187]

Lone Star also argued that the court should consider its property separately from the remainder of the annexed land and determine whether the requirements of section 43.025 had been met for each parcel.[188] In support of this argument, Lone Star relied on *City of Waco v. City of McGregor*.[189] The court of appeals distinguished *McGregor*, noting that "the Village was not attempting to annex a strip of land in order to reach property that it already owned" and that no one claimed that any part of the land the Village sought to annex was outside of its ETJ.[190] The court of appeals thus rejected Lone Star's argument that its land and the remaining annexed land should be considered separately under section 43.025.[191] Thus, the court of appeals reversed the district court's judgment, rendered judgment that the Village's annexation was valid and enforceable, and remanded the case to the district court for a determination on the issue of attorneys' fees.[192]

C. Consent Statute Serves as Statute of Limitations

Even municipalities face procedural hurdles in challenging annexation by other cities. *City of Celina v. City of Pilot Point* concerns a dispute between the cities of Celina and Pilot Point over Pilot Point's annexation of certain land.[193] Celina brought suit in 2006, seeking to void an annexation that Pilot Point completed in 2000, on the grounds that the annexed land extended into Celina's ETJ, the annexation improperly annexed land that was less than 1,000 feet wide at its narrowest point, and Pilot Point annexed land outside of its ETJ.[194] Talley Ranch Management, Ltd. (Talley), which owns a portion of the land involved in the dispute, intervened in the case.[195] Each of the parties moved for summary judgment, and the trial court granted the motions of Talley and Pilot Point for summary judgment in which they claimed that section 43.901 of the Texas Local Government Code time-barred Celina's suit because Celina filed the action more than two years after the annexation.[196]

In its first issue on appeal, Celina argued that Pilot Point and Talley were not entitled to summary judgment, that Celina's consent could not be presumed, that section 43.091 does not cure any defect in Celina's annexation other than the lack of consent to the annexation, and that Pilot

187. *Id.*
188. *Id.* at *4.
189. *Id.* (citing City of Waco v. City of McGregor, 523 S.W.2d 649, 650, 652 (Tex. 1975)).
190. *Id.* at *5.
191. *Id.*
192. *Id.*
193. City of Celina v. City of Pilot Point, No. 02-08-230-CV, 2009 WL 2750978, at *1 (Tex. App.—Fort Worth Aug. 31, 2009, pet. denied).
194. *Id.*
195. *Id.* The authors represented Talley.
196. *Id.* at *1-2.

Point's annexation was void.[197]

In addressing Celina's first issue, the Fort Worth Court of Appeals explained that the language of section 43.091, in effect at the time of Pilot Point's annexation, provided that an annexation ordinance is "conclusively presumed to have been adopted with the consent of *all appropriate persons*" if a legal challenge was not filed within a two-year time period.[198] It further explained that the "legislature amended section 43.901 [in 2001] to provide that 'all appropriate persons' [did] not include municipalities, but it did not make the amendment retroactive."[199] The court of appeals noted that it earlier addressed this issue in 2003, and at that time relied on the Texas Supreme Court's decision in *City of Murphy v. City of Parker* to conclude that section 43.901 acts as "a complete bar, as a matter of law, to any challenge after two years."[200] In doing so, the court of appeals rejected Celina's argument that *Murphy*'s holding was limited only to those challenges based on lack of consent.[201]

Celina also challenged the trial court's refusal to grant Celina's motion to dismiss Talley's intervention for lack of subject matter jurisdiction, saying that Talley should not have been allowed to challenge Celina's annexation ordinances.[202] But Talley, the court of appeals explained, "intervened not to challenge Celina's ordinances[,] but as an interested party to Celina's challenge to Pilot Point's actions" in connection with certain annexations, including Pilot Point's development agreement with Talley, which Celina sought to have ruled void ab initio.[203] Since Celina sought to void the Talley agreement, the court of appeals held that Talley had a justiciable interest in Celina's suit against Pilot Point and affirmed the trial court's ruling.[204]

D. Boundaries Created by Decades-Old Annexations Upheld

The Dallas Court of Appeals ruled against another municipal challenge in *Town of Fairview v. City of McKinney*.[205] The court of appeals considered a boundary dispute between Fairview and McKinney in which McKinney questioned the validity of several Fairview annexation ordinances.[206] Although the parties settled a portion of their dispute, a trial was held to settle the remaining dispute involving three tracts of land. McKinney prevailed at trial, and Fairview appealed.[207]

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197. *Id.* at *2.
198. *Id.* (citing Act of Apr. 30, 1987, 70th Leg., R.S., ch. 149, § 1, 1987 Tex. Gen. Laws 707, 766, *amended by* Act of May 15, 2001, 77th Leg., R.S., ch. 401, § 1, 2001 Tex. Gen. Laws 733-34).
199. *Id.*
200. *Id.*
201. *Id.* at *3.
202. *Id.* at *5.
203. *Id.*
204. *Id.*
205. 271 S.W.3d 461, 477-78 (Tex. App.—Dallas 2008, pet. denied).
206. *Id.*
207. *Id.*

The court of appeals addressed the validity of annexation ordinances passed by McKinney in 1958 and 1959 and by Fairview in 1970.[208] While the disputed tracts were not located within the boundaries of either McKinney or Fairview, the relevant ordinances dealt with the boundaries of the party's ETJ and thus affected each party's claims to the disputed tracts.[209]

In 1963, the Municipal Annexation Act, which first created the concept of a municipality's ETJ, became effective.[210] This Act limited "a municipality's ability to annex property" to only those properties either owned by the municipality or located within its ETJ.[211] In February 1970, Fairview passed an annexation ordinance for 200 acres of land near the disputed tracts, but "located outside of Fairview's ETJ and . . . not contiguous to its city limits."[212] In March 1970, McKinney passed several annexation ordinances extending its ETJ to include not only all of the disputed tracts but also some of the 200 acres that Fairview previously annexed.[213] Thereafter, McKinney filed the original suit against Fairview.[214]

On appeal, Fairview first argued that McKinney's 1958 annexation ordinance was void as a matter of law for two reasons. First, "the metes and bounds description of the annexed property set forth in the [1958] ordinance [did] not close" (i.e., it was missing a metes and bounds call along the eastern border of McKinney).[215] Fairview argued, with some support in Texas case law, that this error made the annexation ordinance void.[216] But the court of appeals noted that the trial court allowed into evidence two different versions of the ordinance, and in one of these versions the metes and bounds description did close.[217] The court of appeals rejected Fairview's claim that only the copy containing the error should have been allowed into evidence.[218] The court of appeals concluded that the version of the ordinance that contained the error was not conclusive proof of the contents of the original ordinance, and that there was evidence to support the trial court's finding that the version containing the complete property description accurately described the land McKinney sought to annex.[219]

Fairview next argued that McKinney's 1958 annexation ordinance was void ab initio because it improperly included a 600-foot strip of land that was already part of Fairview.[220] Noting a well-established rule that no

208. *Id.*
209. *Id.*
210. *Id.* at 464.
211. *Id.*
212. *Id.* at 465.
213. *Id.*
214. *Id.*
215. *Id.* at 466.
216. *Id.* (citing Alexander Oil Co. v. City of Sequin, 825 S.W.2d 434, 438 (Tex. 1991)).
217. *Id.*
218. *Id.* at 468.
219. *Id.*
220. *Id.* at 468-69.

city has the authority "to annex the territory of another,"[221] the court of appeals agreed that the 1958 ordinance was void ab initio, "to the extent it sought to annex the 600-foot strip of land."[222] However, it did not agree with Fairview that this made the entire 1958 ordinance void.[223] Discussing Texas case law on annexation, the court of appeals stated that this issue has rarely been addressed, for two reasons. First, determining what part of a specific territory, short of its entirety, may be annexed is generally beyond the authority of the judicial branch.[224] And second, most annexation cases involve "whether a private-party has standing to complain of the annexation."[225] "Thus, most annexation challenges hinge—not on whether the annexation is attacked as void in whole or in part—but on whether the complaint asserted, if sustained, would render the ordinance void or voidable."[226]

The court of appeals relied on *City of West Lake Hills v. State ex rel. City of Austin*, in which the Texas Supreme Court decided "whether a city's original incorporation, which [attempted to improperly] incorporate non-contiguous territories, was void in whole or in part."[227] Based on the holding in *West Lake*, the court of appeals upheld the remaining boundaries set by McKinney in the 1958 ordinance, concluding that the facts of the case warranted its decision and that the court of appeals would not usurp a home-rule city's authority to determine its own boundaries.[228]

The court of appeals then turned to Fairview's second issue, claiming that it had rights to the disputed tracts because its February 1970 ordinance annexed tracts adjacent to the disputed tracts (thus extending Fairview's "ETJ to include the disputed tracts") before McKinney passed ordinances annexing the tracts.[229] Fairview admitted that its 1970 ordinance was void at the time it was adopted, since the territory it purported to annex was neither contiguous nor adjacent to Fairview.[230] However, Fairview argued that the Texas Legislature's 1979 Validation Act later validated the 1970 ordinance, effective as of the date that Fairview adopted the 1970 ordinance.[231] The court of appeals concluded that the language of the 1979 Validation Act did not support Fairview's position.[232] The 1979 Act, the court of appeals explained, validated both the boundary lines of the municipalities that it covered and the previous in-

221. *Id.* (citing City of Houston v. State *ex rel.* City of W. Univ. Place, 176 S.W.2d 928, 929-30 (1943)).
222. *Id.*
223. *Id.*
224. *Id.*
225. *Id.* at 470.
226. *Id.*
227. *Id.* at 473 (citing City of W. Lake Hills v. State *ex el.* City of Austin, 466 S.W.2d 722, 727 (Tex. 1971)).
228. *Id.* at 474.
229. *Id.* at 476.
230. *Id.*
231. *Id.*
232. *Id.*

corporation proceedings of those municipalities.[233] But while the section validating incorporation proceedings includes the words "as of the date on which they occurred," the provision validating boundary lines contains no such language.[234] Thus, the court of appeals held that the 1979 Validation Act did not act to extend Fairview's ETJ into McKinney's existing ETJ, and it upheld the trial court's judgment in favor of McKinney, modifying its judgment only to reflect that McKinney's 1959 ordinance was valid as to all but the 600-foot strip.[235]

E. Limited-Purpose Annexation Challenged as Takings

In *City of Houston v. Guthrie*,[236] lessees and landowners claimed that the City used limited-purpose annexations to unlawfully extend the City's fireworks ordinances to areas outside of the city limits. After the City entered into strategic partnerships with certain municipal utility districts, the City annexed roads adjacent to the plaintiffs' properties.[237] Then, the City threatened to extend its fireworks ordinances to these roadways, effectively preventing the sale of fireworks on land adjacent to these roads.

The property owners' primary cause of action was brought under the Private Real Property Rights Preservation Act (PRPRPA) found in section 2007.001, Texas Government Code.[238] The Code states, "To have standing to bring a claim under PRPRPA, plaintiffs must be 'owners' who allege a 'taking.'"[239] The Houston Fourteenth Court of Appeals first held that the owners of the fireworks stands who had a lease on property were not "owners" under the statute and therefore lacked standing.[240] On the other hand, the court of appeals held that the landowners had standing under the PRPRPA.[241]

The plaintiffs also sought to have the limited purpose annexations declared void. Arguing that these annexations were voidable and not void, the City argued that the landowners did not have standing because suit was not brought as a quo warranto action. Because the plaintiffs did not allege substantive defects in the annexations that would render them void, the court of appeals held that they lacked standing.[242]

While the plaintiffs in *Guthrie* successfully fought the City's attempt to prevent their businesses from operating, the court of appeals denied their challenge to the annexation ordinance. *Guthrie* is an example of the court's refusal to overturn municipal annexations, particularly those en-

233. *Id.*
234. *Id.* (quoting Act of May 25, 1979, 66th Leg., R.S., ch. 473, § 4, 1979 Tex. Gen. Laws 1043, 1043-44).
235. *Id.* at 477-78.
236. No. 01-08-00712-CV, 2009 WL 5174258 (Tex. App.—Houston [1st Dist.] Dec. 31, 2009, pet. filed) (mem. op.).
237. *Id.* at *1.
238. *Id.* at *3-4.
239. *Id.* at *4 (citing Tex. Gov't Code Ann. § 2007.002(5) (Vernon 2008)).
240. *Id.* at *14.
241. *Id.* at *16.
242. *Id.*

acted many years ago.[243]

V. CONCLUSION

Of the numerous appellate challenges to a governmental regulation during the Survey period, only twenty to twenty-five percent were successful, as Texas courts continued their trend of upholding municipal zoning and land use decisions. The cases highlighted in this Article illustrate the importance of plaintiffs exhausting all potential administrative remedies prior to filing suit. They also show the difficulty of overturning a governmental action unless the action is egregious.

243. *Id.*