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Zoning and Land Use

Arthur J. Anderson

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This article covers cases from the Survey period of June 28, 2001, through December 11, 2002, that the author believed were noteworthy because they added to the jurisprudence on the applicable subject. Because this Survey article is the first for this topic, the Survey period is slightly longer than that of other articles. The author is indebted to Jimmy Schnurr and Jason Marshal for their assistance with the review of cases and drafting portions of this article.

I. ZONING

ZONING and rezoning of land by Texas cities is governed by the provisions of the Texas Zoning Enabling Act.[1] The few cases arising during the Survey period with respect to the validity of zoning amendments follow the general rule that zoning ordinances are presumed valid.[2] In *City of San Antonio v. Arden Encino Partners, Ltd.*,[3] the City of San Antonio zoned a 22-acre tract of land to a multi-family district. The property was never developed. Fourteen years later, the council member for the area proposed that the tract be zoned to an office district. Arden Encino Partners ("AEP") argued in its summary judgment motion to invalidate the downzoning on the ground that the City had no legitimate public reason warranting a change in zoning, and the trial court granted the landowner's motion.[4]

In reversing the trial court, the San Antonio Court of Appeals held that a broad range of governmental purposes will support a city's decision to

* B.B.A. Austin College, M.P.A., J.D., University of Texas School of Law; Attorney at Law, Winstead Sechrest & Minick P.C., Dallas, Texas.

1. TEX. LOC. GOV'T CODE ANN. § 211.001-.021 (Vernon 1999).

2. *See, e.g.*, City of Pharr v. Tippett, 616 S.W.2d 173 (Tex. 1981).

3. City of San Antonio v. Arden Encino Partners, Ltd., No. 04-01-00008-CV, 2003 WL 1090544 (Tex. App.—San Antonio Mar. 12, 2003, no pet. h.).

4. *Id.* at *1.

zone land to a particular classification.[5] The City presented summary judgment evidence that the rezoning would provide a buffer to adjacent single-family developments and avoid three story residential structures overlooking nearby family residences. Because AEP failed to meet its burden to show there were no conclusive facts or conditions supporting the City's exercise of its zoning authority, the court of appeals reversed and remanded the case to the trial court.[6]

City of Laredo v. Villareal[7] involves the legislative construction of a zoning ordinance that authorized the construction of a communications tower. The Villareals constructed a tower without a required zoning permit. They then sought and received a zoning permit with conditions allowing only the existing tower to remain on the site. One of the conditions to the zoning approval was that the permit was not transferable.[8]

The Villareals attempted to construct a new tower meeting the conditions, but the city refused the application because of the non-transferability condition. The plaintiffs argued that the first permit clearly envisioned a second tower being built on the premises. As the administrative agency enforcing the ordinance, the City argued that its interpretation was entitled to serious consideration. The trial court ruled in favor of the Villareals, but the court of appeals found that the City's interpretation, limiting the first permit to the existing tower, was consistent with the non-transferability condition and the overall intent to limit the tower since it was built without permission and in violation of the zoning ordinance. Because the City's construction of its ordinance was deemed reasonable, the court of appeals reversed the judgment of the trial court and rendered judgment in favor of the City.[9]

II. BOARDS OF ADJUSTMENT

Numerous cases were reported during the Survey period regarding the legal standard for reviewing the decisions of a board of adjustment or similar administrative agency. The board hears appeals from decisions of the city building inspector on interpretations of the city's zoning ordinance.[10] An appeal from a board's decision is by certiorari on the record to the district court. In a certiorari proceeding to review an order of a city board of adjustment, "the only question which may be raised by petition is that of the legality of the board [of adjustment's] order."[11] "A legal presumption exists in favor of the board, and the burden of proof to establish illegality rests upon those who attempt to overcome the pre-

5. *Id.* at *2 (citing Mayhew v. Town of Sunnyvale, 964 S.W.2d 922, 934 (Tex. 1998)).
6. *Id.* at *3.
7. City of Laredo v. Villareal, 81 S.W.3d 865 (Tex. App.—San Antonio 2002, no pet.).
8. *Id.* at 866-67.
9. *Id.* at 867-69.
10. TEX. LOC. GOV'T CODE ANN. § 211.008 (Vernon 1999).
11. City of San Angelo v. Boheme Bakery, 190 S.W.2d 67, 70 (Tex. 1945).

sumption of validity."[12]

Boards of adjustment often make determinations on nonconforming uses. In *Board of Adjustment of San Antonio v. Wende*,[13] the board found that land leased but not used for quarrying purposes before being annexed and subsequently zoned for residential use was a "preexisting nonconforming use" as a quarry.[14] The trial court upheld the board's decision, but the San Antonio Court of Appeals reversed and rendered.[15]

Martin Marietta leased a large tract of land for quarrying operations. At the time of its annexation and zoning for residential purposes, a portion of the quarry was actually being used for quarrying purposes and a portion was planned for future quarrying operations. Martin Marietta filed a registration statement of nonconforming use that was accepted by the City Building Office. City taxpayers and a nearby municipality appealed to the board in order to prevent the quarrying operation on the leased (but unused) land.[16]

San Antonio's code definition of a preexisting use is more liberal than other cities because it allows an "intended" use to obtain nonconforming rights.[17] The court of appeals held that nonconforming use status should not apply merely by the act of leasing. The Texas Supreme Court agreed with the board that the ordinance defined "use" in such a way that it dealt with planned development, proposed use, or proposed occupancy as exemplified by the quarrying lease executed in this case. In interpreting the City's zoning ordinance, the court applied various canons of construction, but did not express any deference to the City's interpretation of its own ordinance. While other cases have found that actual use is required in order to have a nonconforming use, the language of the City's ordinance is broader and encompasses planned uses. Having made a policy decision to expand the definition, the City's interpretation was found to be consistent with the remaining provisions of the ordinance. Because the property was clearly leased and intended for the use, Martin Marietta met the test in San Antonio's zoning ordinance.[18]

Another opinion addressing nonconforming uses can be found in *Pearce v. City of Round Rock*.[19] Pearce obtained permits from the Texas Department of Transportation to erect nine billboards in the City's extraterritorial jurisdiction ("ETJ"). After construction began on some of the structures, the Round Rock City Council adopted an ordinance extending the City's authority to regulate billboards in the ETJ. The City's building

12. Swain v. Bd. of Adjustment of Univ. Park, 433 S.W.2d 727, 730 (Tex. Civ. App.—Dallas 1968, writ ref'd n.r.e.).

13. Bd. of Adjustment of San Antonio v. Wende, 92 S.W.3d 424 (Tex. 2002).

14. *Id.* at 427.

15. *Id.*

16. *Id.* at 426.

17. *Id.* at 429.

18. *Id.* at 430-32.

19. Pearce v. City of Round Rock, 78 S.W.3d 642 (Tex. App.—Austin 2002, pet. denied).

official then ordered Pearce to stop construction.[20]

Two of the signs were then treated as nonconforming uses while the remaining seven were treated as requiring a City permit. The Development Review Board (similar to a board of adjustment) upheld all of the official's decisions and plaintiffs sought judicial review.[21] The key issue in this case was whether any of the seven structures qualified as nonconforming uses at the time the City enacted its ETJ sign ordinance. Pearce contended that (i) all of the signs were nonconforming structures; (ii) the structures were signs; and (iii) they were entitled to be "grandfathered."[22] The board upheld the building official, and Pearce filed suit in district court, which upheld the board. The Austin Court of Appeals held that the board's decision was not supported by the legal definition of "sign" contained in the sign ordinance. The City official determined that a sign only attains nonconforming status if it contains third-party advertising prior to the effective date. Because the language of the sign ordinance did not contain this requirement, signs were construed to be any structures with symbols or words. Those structures that did not have a constructed surface face upon which symbols could be attached were held not to be signs.[23]

The court of appeals held that the City's ordinance prohibiting Pearce from utilizing the three structures that contained no writing or symbols was constitutional. Because the record did not contain any evidence of the economic impact of the regulation on Pearce, the court of appeals held that Pearce did not meet its burden to support its takings claim.[24]

Boards of adjustment also rule on requests for variances or special exceptions to a city's zoning ordinance. *Fincher v. Board of Adjustment of Hunters Creek Village*[25] illustrates the need to file a variance request in a timely manner. The City rejected a homebuilder's plans, in 1995, for a covered porch or carport as a violation of the City's zoning ordinance. Approximately one year later, the building official discovered the Finchers were proceeding with construction and ordered them to halt. The Finchers applied to the board of adjustment for a variance.[26]

Hunters Creek's zoning ordinance provides that an appeal to the board of adjustment must be made within thirty days after the decision of the building official. The trial court held that the Finchers should have appealed the building official's April 1995 rejection of their building plans. The trial court dismissed on the ground that it did not have subject matter jurisdiction. While the Houston Court of Appeals held that the court did

20. *Id.* at 645.

21. *Id.* In the initial litigation, the trial court dismissed the suit for want of jurisdiction but was reversed on appeal. *See* Pearce v. City of Round Rock, 992 S.W.2d 668 (Tex. App.—Austin 1999, pet. denied).

22. *Pearce*, 78 S.W.3d at 645.

23. *Id.* at 649-50.

24. *Id.* at 650-51.

25. Fincher v. Bd. of Adjustment of Hunters Creek Vill., 56 S.W.3d 815 (Tex. App.—Houston [1st Dist.] 2001, no pet.).

26. *Id.* at 816.

have jurisdiction, it reached the same result as the trial court on the merits and rendered judgment against the Finchers.[27]

Town of South Padre Island v. Cantu[28] addresses a different type of fact situation where the homeowner proceeds in good faith. The Cantus prepared plans for their new house, which were approved by the Town. When the house was almost completed, the Cantus discovered that a portion of the bedroom over the garage protruded twenty-two inches over the building setback line. The Cantus requested a variance for the protrusion, and the Cantus' neighbors supported the request at the board hearing. A majority of the adjustment board voted to approve the Cantu's variance request, but it did not pass by the required 75% majority of the board's membership.[29]

The trial court found the board abused its discretion by not granting the variance. While the general rule is that a trial court may not substitute its judgment for the board's, if a hardship exists and the exception would not adversely affect the public interest, then the request should be granted. The court pointed out that the Cantus had spent tens of thousands of dollars building their house in good faith reliance on the City approvals and denying the variance request would benefit no one. The Corpus Christi Court of Appeals upheld the trial court, holding that a hardship existed and the variance did not adversely affect the public interest.[30]

III. SUBDIVISION REGULATIONS

State statute regulates subdivision of land for development.[31] *City of Hedwig Village Planning and Zoning Commission v. Howeth Investments, Inc.*[32] addressed the issue of whether a potential purchaser of property has standing to file a plat application for subdivision of property instead of the property owner In *Hedwig Village*, the developer had two adjacent tracts of land under contract from two separate owners. Both contracts allowed the developer to apply to the Planning Commission, on behalf of the owners, to subdivide each tract. Following the filing of the applications with the Commission, the Commission met and discussed the applications, but took no action.[33]

After thirty days lapsed, the developer, pursuant to Texas Local Government Code § 212.009(a), requested two "Certificates of No Action Taken" from the chairman of the Commission. The Texas Local Government Code provides that "the municipal authority responsible for ap-

27. *Id.* at 817.
28. Town of S. Padre Island v. Cantu, 52 S.W.3d 287 (Tex. App.—Corpus Christi 2001, no pet.).
29. *Id.* at 288-89; TEX. LOC. GOV'T. CODE ANN. § 211.009(c) (Vernon 1999).
30. *Cantu*, 52 S.W.3d at 289-91.
31. TEX. LOC. GOV'T CODE ANN. §§ 213.001-.005 (Vernon 2001).
32. City of Hedwig Vill. Planning & Zoning Comm. v. Howeth Invs., Inc., 73 S.W.3d 389 (Tex. App.—Houston [1st Dist] 2002, no pet.).
33. *Id.* at 390.

proving plats shall act on a plat within 30 days after the date the plat is filed."[34] Further, "[a] plat is considered approved by the municipal authority unless it is disapproved within that period.[35] The chairman of the Commission refused to issue the Certificates. Following a second hearing concerning the plat applications, the Commission denied both of the requested subdivisions. The developer then submitted a second set of plats to the Commission that were also denied. The developer subsequently sued seeking a writ of mandamus to compel the chairman to issue the previously requested "Certificates of No Action Taken."[36]

The Commission filed a plea to the jurisdiction of the trial court arguing that the developer did not have standing to bring suit because the developer did not own either of the two tracts at the time the plat applications were denied by the Commission. The trial court denied the Commission's plea. The Houston Court of Appeals conceded that Texas Local Government Code, § 212.004(a) "requires ownership to actually subdivide property."[37] However, the court clarified that "[Texas Local Government Code § 212.004(a)] does not require ownership to file an application to subdivide. It is logical that a developer's decision to purchase property would be contingent on the approval of his plans to subdivide the property."[38] Thus, the court held that the developer had standing to bring suit and that the property owner is not the only person with standing to file a plat application and remanded the case to the trial court.[39]

The Fort Worth Court of Appeals in *Brunson v. Woolsey*[40] addressed a similar issue (with a different result). The Woolseys, who owned a single lot within the Oakwood Estates subdivision, began efforts to subdivide and revise the plat of their lot. The developer of the subdivision had signed the original approved plat. Following a public hearing before the Parker County Commissioners Court regarding the proposed plat revision, the commissioners voted to deny the revised plat. Woolsey subsequently filed suit against various county officials ("Brunson"), seeking declaratory relief from the court that Woolsey's plat revision complied with the requirements contained in the Texas Local Government Code. The trial court granted summary judgment in favor of the Woolseys.[41]

Brunson argued on appeal that § 232.009 of the Local Government Code established two exclusive categories of people: "[a] person who has subdivided land" and "non-developer owners."[42] Because Woolsey was a "non-developer owner," he lacked standing to proceed under the

34. TEX. LOC. GOV'T CODE ANN. § 212.009(a) (Vernon 1999).
35. *Id.*
36. *Hedwig Vill.*, 73 S.W.3d at 390-91.
37. *Id.* at 393.
38. *Id.*
39. *Id.* at 393-94.
40. Brunson v. Woolsey, 63 S.W.3d 583 (Tex. App.—Fort Worth 2002, no pet.).
41. *Id.* at 585.
42. *Id.* at 589.

statute.[43]

In analyzing § 232.009(b), the court compared and contrasted the language contained in Texas Local Government Code § 232.008(b), pertaining to the cancellation of subdivisions. Interpreting § 232.008(b), the court stated that "[c]learly, this section authorizes an owner of land in a subdivision who is not the original developer to submit an application for the cancellation of the subdivision."[44] The court concluded that the legislature could have defined those authorized to seek a *revision* of a subdivision as it did those persons eligible to seek the cancellation of all or part of a subdivision, but did not.[45] In distinguishing the two provisions, the court additionally relied on the fact that both § 232.008 and § 232.009 were enacted in the same legislative session. The court further construed the phrase "has subdivided," contained in § 232.009(b), as referring to what the court termed the "developer owner" in preparing the original plat.[46] Therefore, the court held that because Woolsey was not the original developer that filed the subdivision plat, Woolsey lacked standing pursuant to § 232.009(b) to file suit seeking declaratory judgment to revise the plat.[47]

In *Miller v. Elliot*,[48] the court addressed the requirements for a dedication of streets in a subdivision. The property at issue in this case was previously part of a larger tract that was platted as a subdivision by the Commissioners' Court of Van Zandt County and Canton County. Actual development of the subdivision was never pursued and the property was sold to the Millers ("Miller Property"). Elliot owned the adjacent tract ("Elliot Property"). The Wilsons began to prepare the Elliot Property as a future home site and constructed a driveway across the Elliot Property, connecting it to an adjacent road. In a neighborly fashion, the Wilsons installed a gate, placed locks on the gate, posted "no trespassing" signs and made demands to the Millers that the Millers not use the Wilson's driveway. The Millers filed suit seeking to enjoin the Wilsons from restricting their use of the Wilson's driveway, claiming they were entitled to use of the driveway by virtue of an implied easement and dedication by plat. Elliot filed with the trial court a no-evidence summary judgment with the trial court, which was granted.[49]

The Tyler Court of Appeals agreed with the trial court that the Millers failed to present any evidence to support their claim of the existence of an implied easement. Next, the court addressed the Millers' allegation that they were entitled to the use of the Wilson's driveway based on the previous owners' filing of a subdivision plat in 1971, which contained a notation that all streets and easements shown thereon are dedicated to

43. *Id.* at 590.
44. *Id.* at 589 n.31.
45. *Id.*
46. *Id.*
47. *Id.* at 590.
48. Miller v. Elliot, 94 S.W.3d 38 (Tex. App.—Tyler 2002, pet. denied).
49. *Id.* at 41-42.

the public use.[50]

The court noted that in order to prove a dedication of a subdivision, "the Millers are required to show that the land in question was, in fact, both dedicated *and* accepted."[51] Further, the "[d]edication is a mere offer and the filing does not constitute an acceptance of the dedication."[52]

The Millers presented the court with an affidavit that stated that the previous owner of the property allowed access to the roads. The court pointed out, however, that the affidavit made no mention as to the length of time, if any, the Millers, or any other member of the public, could actually make use of the roads. Thus, the court found that the Millers presented no evidence to support their claim that there was acceptance by public use and upheld the trial court.

IV. PHYSICAL TAKINGS

In *City of Austin v. Travis County Landfill Company, L.L.C.*,[53] the court considered the constitutional standard necessary to establish a "taking" of private property by aircraft overflights under the Texas Constitution. The landfill property was previously subject to a military overflight easement. The United States' transfer of ownership and operation of Bergstom Airport to the City of Austin extinguished the military overflight easement. A jury held there was a taking and awarded the landfill company $2,950,000 in damages.[54]

According to the United States Supreme Court, flights over private land must be so low and frequent as to constitute a direct interference with the use and enjoyment of the property.[55] The fact that civilian aircraft overflew the landfill site, without more, did not establish an inverse condemnation. Both parties' experts testified that the value of the property decreased. Unfortunately for the landfill operator, the record did not show that "overflight-related effects directly impacted the property's surface and caused the property's value to decline."[56] The landfill operator's expert appraiser failed to show that the civilian overflights, separate and apart from the burdens imposed by the military aviation easement, "substantially increased risks and costs associated with the property's use as a landfill."[57] The court rejected the owner's claim that it had a right to exclude civilian overflights as a matter of common law property rights. Thus, the trial court's conclusion relating to direct interference with the plaintiff's property right, based in part on the invasion of airspace, could also be ignored. Proof of a decline in property values, by itself, does not justify a finding of direct interference. There was no evidence that the

50. *Id.* at 44.
51. *Id.* at 45.
52. *Id.*
53. City of Austin v. Travis County Landfill Co., 73 S.W.3d 234 (Tex. 2002).
54. *Id.* at 237-38.
55. United States v. Causby, 328 U.S. 256, 266 (1946).
56. *Id.* at 242.
57. *Id.* at 243.

overflights through vibrations, noise, physical damage, or fumes caused the alleged decline in the value of the surface estate. The evidence, according to the Texas Supreme Court, also failed to show that the overflights would cause any interference with the ability of the owner to use the premises for landfill purposes. Instead of remanding for a new trial, the court rendered judgment that the plaintiff take nothing under its inverse condemnation claim.[58]

In *City of Keller v. Wilson*,[59] the court of appeals examined whether a city could be held liable for inverse condemnation and whether developers of adjacent property and/or a city could be held liable for water code violations resulting from the platting and construction of a new development. Wilson was the owner of property located in Keller ("Wilson Property"). In 1991, the City of Keller adopted a Master Drainage Plan that required developers to provide for removal of run-off water resulting from a 100-year rain event. Prior to development in the area, the natural flow of surface water generally was from north to south towards the Wilson Property through a creek or ditch and continuing into an adjacent creek watershed. The drainage plan called for a drainage easement across the Wilson Property as the surrounding properties developed.[60]

The city reversed and approved plats for two new subdivisions to the northwest of the Wilson Property. As a condition of approving the plats, the City required the developers to build drainage improvements ending at the edge of the Wilson Property. As a result of the construction of the drainage improvements required by the City, the volume and velocity of water flowing across the Wilson Property increased, causing damage to the property.[61]

Wilson brought multiple claims against the City and the developers, including allegations of inverse condemnation of the Wilson Property by the City and violations of the water code by the developers and the City. Following jury findings in favor of Wilson on both claims against the City, Wilson elected to recover on his inverse condemnation claim and the trial court entered judgment for Wilson on that theory. As for Wilson's claims against the developers, the trial court granted summary judgments in favor of the two developers. Both the City and Wilson appealed.[62]

The City first argued to the Fort Worth Court of Appeals that it never intended to damage the Wilson Property; and therefore, could not be found liable under an inverse condemnation claim.[63] The City further contested that it "endeavored in every way possible to avoid increasing the flow of water" by hiring an independent engineering firm to review the developer's design for the drainage easement.[64] Finally, the City

58. *Id.* at 242-44.
59. City of Keller v. Wilson, 86 S.W.3d 693, (Tex. App.—Fort Worth 2002, pet. filed).
60. *Id.* at 698.
61. *Id.*
62. *Id.*
63. *Id.* at 701.
64. *Id.*

complained that it should not be held liable for inverse condemnation simply "because it approved the developer's design for the drainage easement."[65]

The Court began its review of the City's claim that Wilson failed to prove intent on the part of the City, stating, ". . . an inverse condemnation plaintiff must prove more than just negligence. An invasion is considered intentional, rather than negligent, when the State acts for the purpose of causing the invasion or knows that it is substantially certain to result from its conduct."[66] In reviewing the evidence presented at trial, the court noted that the drainage plan required the construction of an earthen channel running across a portion of the property as well as the construction of an earthen channel across approximately 2.8 acres of the Wilson Property.[67]

The testimony at trial "established that, at the platting stage, the City required the two developers to purchase an easement on the City's behalf . . . and to construct the earthen channel."[68] In addition, the City constructed a box culvert immediately to the south of the Wilson Property that the Drainage Plan also required. Thus, Wilson presented evidence that the City required the completion of the upper portion of the Drainage Plan by the developers and completed the lower portion of the Drainage Plan itself, but left uncompleted the portion of the Drainage Plan that provided for drainage across the Wilson Property. Wilson further presented a hydrological engineering study showing increased flow, as well as photos of the previously-channeled water flowing uncontrollably over the Wilson Property.[69] The City's Director of Public Works testified "that the City was bound by the Drainage Plan and that there were no exceptions to it."[70]

The Fort Worth Court of Appeals noted that "[i]ntent may be inferred from the circumstances of the case and the conduct of the actor, not just the overt expression of intent by the actor . . . . [T]riers of fact are free to discredit defendants' protestations that no harm was intended and to draw inferences necessary to establish intent."[71] The Court then found that, based on the record,

> the jury could have reasonably inferred that the City intentionally disregarded its own [Drainage] Plan requirement that an easement and large earthen drainage channel be created across the Wilson Property and that the City knew flooding of the Wilson Property was substantially certain to result from the City's decision to leave the portion of the Drainage Plan concerning the Wilson Property

65. *Id.*
66. *Id.*
67. *Id.* at 702.
68. *Id.*
69. *Id.* at 703.
70. *Id.* at 704.
71. *Id.*

uncompleted.[72]

The court clarified that the "City's liability for inverse condemnation was not based on any flaw in the developer's design or construction of the detention basin or Sebastian easement, but instead on the City's own intentional choice to leave uncompleted portion of its Plan addressing drainage across the Wilson Property."[73] The court concluded that because the City was directly involved in the drainage plans of the two developments and required compliance with the Drainage Plan, it was the City that caused the flooding of the Wilson Property and not the developers who only did as they were instructed.[74] The Texas Supreme Court granted the City's petition for review in this case.

Howard v. City of Kerrville[75] addressed another flooding case. The San Antonio Court of Appeals examined a landowner's "taking by flooding" inverse condemnation claim, determining whether the landowner's claim was ripe for consideration by the court. Howard purchased property, in 1989, that was subject to a permanent flood easement, established in 1977, across approximately 6.03 acres of the property to construct a dam on the Guadalupe River by Upper Guadalupe River Authority ("UGRA"). Howard's predecessor in title was required to fill the property to 1641.5 feet mean sea level in order to build on the property. The dam was built and subsequently destroyed by a flood. In 1985, the dam was rebuilt in the same place, using the same general specifications as the original dam. That same year, Howard's predecessor in title obtained approval for a subdivision plat. The plat showed the contours of the permanent flood easement and further contained the express condition that any floodway fill or development required prior certification by an engineer and approval by the City and UGRA.[76]

In 1989, the City and UGRA discovered that the earlier "FEMA flood plain maps did not account for the impact that the original dam had on the flood plain."[77] A study commissioned by the City revealed that the dam had increased the existing flood plain to 1646 feet mean sea level, five feet higher than Howard's property had been filled. Around this same time, Howard submitted an application for a permit to build a shopping center on the property. After Howard's application was placed on the City Council's agenda, the City passed a moratorium on all land development believed to be located in the expanded floodplain identified in the study. The moratorium lasted approximately seven months and Howard's permit was denied pending the outcome of the FEMA floodplain map revisions.[78]

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72. *Id.* at 705.
73. *Id.* at 707.
74. *Id.* at 715.
75. Howard v. City of Kerrville, 75 S.W.3d 112 (Tex. App.—San Antonio 2002, pet. denied).
76. *Id.* at 114-15.
77. *Id.* at 115.
78. *Id.*

Another later study indicated that the base flood elevation of Howard's property was 1648 feet mean sea level, 7.5 feet higher than the property had been previously filled. The City then expanded the scope of the moratorium to the new base flood elevation line. In 1997, based on the City's studies, FEMA published new findings concerning the base flood elevations, determining that the base flood level for Howard's property was 1648.5 feet mean sea level. This required Howard to fill his property to 1649.5 feet mean sea level, eight feet higher than previously filled. Following the City's adoption of the new regulations, Howard did not request a reconsideration of his original application. Instead, Howard later applied for a permit to build a used car dealership. Before City Council consideration, Howard withdrew the application. Later that year, Howard filed suit against the City and UGRA, alleging inverse condemnation, trespass, and breach of contract (claiming to be a third-party beneficiary). The trial court granted summary judgment in favor of the City and UGRA.[79]

On appeal, Howard claimed that the dam constructed by the City and UGRA, in 1984, (which increased the base flood elevation on his elevation by six feet), coupled with the City's ordinances regulating the floodplain, created an easement for public use and amounted to a physical taking of Howard's property. In reviewing Howard's claims, the court emphasized that a "'taking' by flooding is a specific type of taking.[80] Citing the Texas Supreme Court's holding in *Brazos River Authority v. City of Graham*, the court of appeals noted that in order to establish a taking by flood, "a claimant must show that the flooding occurred repeatedly or continuously."[81] Because Howard failed to present any evidence that the property was "actually inundated with flood water due to the dam," the court agreed with the trial court that summary judgment was appropriate in favor of the City and UGRA on this issue.

Howard additionally claimed that the City's ordinances caused a partial taking because the regulations dramatically reduced Howard's investment-backed expectations. The court of appeals initially set forth that "before a court can determine whether such a taking occurred, the claim must be ripe for judicial review."[82] The court of appeals focused on the fact that Howard only applied for a permit under the pre-1994 City regulations and that the moratorium was imposed on development prior to any action on the permit by the City. Once the permit was lifted, Howard abandoned the application. While Howard later submitted an application for a used car dealership, he again withdrew the application prior to any City action on the permit request. Therefore, the court found that Howard failed to establish a ripe claim. Had the City actually denied Howard's applications, Howard's claims would have been ripe for

79. *Id.* at 115-16.
80. *Id.* at 117.
81. *Id.* (citing Brazos River Auth. v. City of Graham, 354 S.W.2d 99, 107 (Tex. 1961)).
82. *Id.* at 118.

consideration by the court. The trial court's ruling was upheld.[83]

V. SUBDIVISION EXACTIONS

In *Town of Flower Mound v. Stafford Estates*,[84] the Fort Worth Court of Appeals explored application of the takings analysis to non-physical exactions. In *Stafford Estates*, the Town's ordinances required developers to upgrade existing boundary streets to current standards. Upon filing for a final plat for the second phase, the City required reconstruction of a boundary street. On stipulated facts, the trial court held that a takings had occurred and awarded damages, attorneys fees and costs.[85]

The court first noted that Texas does not have statutes that require pre-approval challenges to platting, but does articulate deadlines for challenges regarding board of adjustment decisions, impact fees, and the "takings statute." Absent such restriction for plat approval, and noting the developers consistent objections, the court held that the developer did not waive its rights by waiting until after finishing the project to file suit.[86]

After acknowledging development exactions as a species of regulatory takings, the court recited the two prongs of the *Dolan* test: (1) does an essential nexus exist between a legitimate state interest and the condition exacted, and (2) was the exaction roughly proportional to the proposed impact of the proposed land use.[87] The City's first challenge to the lower court decision was that the *Dolan* analysis should not be applied to exactions that do not involve dedication of real property. Because both nondedicatory exactions and required dedications involve "conditional governmental leveraging," the court held that the same constitutional test applied to both.[88]

The second challenge by the City asserted that the *Dolan* test did not apply since the ordinances in question were legislatively created, and were not an adjudicative action. Without passing upon whether *Dolan* might apply to legislative exactions, the court held that the Town's requirement to construct the roadway was the result of adjudicative decisions. Because the Town exercised its discretion in denying the requested exceptions to the standards and admitted that other developers have been excepted on a case-by-case basis, the exactions were adjudicative in nature.[89]

Finally, observing that the United States Constitution sets the floor for constitutional protections and the Texas Constitution establishes the ceiling, the court held that the *Dolan* analysis does apply in a Texas constitu-

83. *Id.*
84. Town of Flower Mound v. Stafford Estates Ltd., 71 S.W.3d 18 (Tex. App.—Fort Worth 2002, pet. granted).
85. *Id.* at 25-26.
86. *Id.* at 28-29.
87. *Id.* at 30.
88. *Id.* at 33.
89. *Id.* at 34-35.

tional takings claim. The court found that protecting the public from the dangers of increased traffic was a legitimate state interest that had a nexus with the improvement of the subject roadway. Thus, the first prong of the *Dolan* test was established.[90]

In reviewing the second prong, the court held that while the City was not required to make a pre-development determination of rough proportionality, it failed to do so at trial. The developer showed that the subdivision would account for only 18% of the traffic trips on the improved road. The court also rejected the notion that the difference between the maximum and actual impact fees collected could justify the exaction, since the subject roadway was not on the capital improvement plan. The court held that the City's requirement to replace the roadway was not roughly proportional with traffic increases caused by the subdivision.[91]

The court upheld the award of damages equal to approximately 88% of the cost of the improvements, finding that it reflected the amount paid by the developer in excess of any amount roughly proportional to the impact of the subdivision and took into account any special benefit accrued to the subdivision as a result of the improved roadway. The court overruled the award of attorney's fees and expert fees, noting that the federal claims were not ripe, and the takings award was pursuant to the Texas constitutional remedy.[92] Oral arguments were made before the Texas Supreme Court in this case on March 6, 2002.

VI. DOWNZONING CASES

In a case of first impression, the court of appeals held in *City of Glenn Heights v. Sheffield Development Co.*[93] that a city could be required to pay for the downzoning of a developer's tract of land. Sheffield sued in inverse condemnation on the ground that the downzoning deprived him of his investment-backed expectations. The trial court ruled in Sheffield's favor, and a jury awarded $485,000 in damages.[94]

In 1986, the City first enacted a zoning ordinance applicable to Sheffield's later-purchased 194-acre tract. The district was a PD residential district allowing development on lots of 6500 square feet. A 43-acre portion of the tract was developed pursuant to the concept site plan. In 1995, the City adopted a unified development code but did not change the zoning classification for the tract. The PD zoning was consistent with the City's comprehensive plan.[95]

In the Summer of 1996, Sheffield entered into a contract to purchase the subject property and certain unbuilt lots. Sheffield actively conducted

90. *Id.* at 39-40.
91. *Id.* at 41-43.
92. *Id.* at 46, 51.
93. City of Glenn Heights v. Sheffield Dev. Co., 61 S.W.3d 634 (Tex. App.—Waco 2001, pet. granted).
94. *Id.* at 640.
95. *Id.* at 639-40.

a due diligence investigation of the zoning on the property as well as the possibility of it being rezoned. Sheffield had numerous meetings with the City secretary, City manager, mayor, and various council members during the Fall of 1996, to confirm his development rights. The sales contract was closed in two stages with the final closing occurring on December 13, 1996. Approximately two weeks after the closing, the City (without notifying Sheffield) imposed a thirty day moratorium preventing Sheffield from developing the Property.[96]

At its April 21, 1997, meeting, the City Council refused to vote on the zoning and enacted a resolution to extend the moratorium. Not until April 27, 1998, did the City Council vote on the zoning of the Property. At that meeting, no written materials justifying a downzoning were presented. The City Council voted to downzone the property from minimum 6,500 square foot lots to minimum 12,000 square foot lots. Sheffield filed suit for an inverse condemnation.[97]

In a bifurcated trial, the trial court determined that the downzoning, but not the moratorium, constituted a regulatory taking and awarded monetary damages based on the diminution in property value before and after the downzoning. The jury found that the parcel had been diminished in value by some 50% from $970,000 to $485,000, while the City urged that the downzoning at most diminished the value by only 38%.[98]

The initial issue for the court of appeals was whether there are any differences between regulatory taking analysis under state or federal constitutional principles. Sheffield's claims were based on state constitutional grounds alone. While the Texas just compensation clause contains the additional protections relating to the damage or destruction of property, the court held that it should review the case under both Texas and federal law standards.[99]

On appeal to the Waco Court of Appeals, the City contested the determination that there was a taking of Sheffield's property. The Waco Court of Appeals held that, although the downzoning substantially advanced legitimate governmental interests, it unreasonably interfered with Sheffield's property rights. The court noted that less density was Glenn Heights' method to reduce the effects of urbanization and control the rate and character of growth and found that this was a legitimate governmental interest. However, the court noted that even though the downzoning advanced a legitimate governmental interest, a further determination of whether the downzoning unreasonably interfered with Sheffield's right to use and enjoy the property under the "unreasonable interference" test was necessary.[100]

Here, the court found there was a taking based on the Texas Supreme

96. *Id.* at 640.
97. *Id.*
98. *Id.* at 641.
99. *Id.* at 643-44. The court relies on *Fort Worth & Rio Grande Ry. Co. v. Jennings*, 13 S.W. 270 (1890), for support of potentially greater state protection.
100. *Sheffield*, 61 S.W.3d at 646-47.

Court's holding in *Mayhew v. Town of Sunnyvale*.[101] There, the court held that government has unreasonably interfered with the landowner's right to use and enjoy property based on a consideration of two factors: (1) the economic impact of the regulation; and (2) the extent to which the regulation interferes with distinct investment-back expectations.[102]

"The first factor, 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."[103] Sheffield put on evidence that the downzoning had a severe economic impact on the value of the property, decreasing the value of the property over 90%. The city presented evidence that the downzoning decreased the value of the property 38%. The court of appeals held that the undisputed evidence of at least a 38% decline in value of the property as a direct result of the downzoning satisfied, as a matter of law, the first factor of the unreasonable interference test.[104]

The City criticized the court of appeals' holding that the 38% diminution in market value due to the downzoning was not significant enough to constitute a taking. *Mayhew* simply requires the consideration of two elements in the unreasonable interference test: the economic impact of the regulation and the extent to which the regulation interferes with investment-backed expectations.[105] The opinion does not establish any *per se* yardsticks with respect to the two elements because there is no "set formula" for determining when "justice and fairness" result in a regulatory takings finding.[106]

> The second factor involves the investment-backed expectations of the owner. The existing and permitted uses of the property constitute the "primary expectation" of the owner that is affected by regulation. The existing uses permitted by law are what shape the owner's reasonable expectation. Courts have traditionally looked to existing uses of property as a basis for determining the extent of interference with the owner's "primary expectation concerning the parcel."[107]

Because the Mayhews were ranchers and purchased land with agricultural or large lot zoning districts, the Texas Supreme Court held that they did not have reasonable investment-backed expectations to obtain an upzoning to triple the residential density on their property. Sheffield, on the other hand, was an experienced real estate developer who (according to the trial court's finding of fact) reasonably relied on city ordinances, historical zoning in Glenn Heights and official representations that it could develop in accordance with the PD 10 zoning.[108]

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101. Mayhew v. Town of Sunnyvale, 964 S.W.2d 922 (Tex. 1998).
102. *Id.* at 935.
103. *Sheffield*, 61 S.W.3d at 648.
104. *Id.*
105. *Mayhew*, 964 S.W.2d at 935.
106. Palazolla v. R.I., 533 U.S. 603, 633 (2001).
107. *Sheffield*, 61 S.W.3d at 648 (internal citations omitted).
108. *Id.* at 652.

The trial court found that the City's moratorium was constitutional. The court of appeals, however, held that the moratorium beyond the initial three-month period did not substantially advance a legitimate governmental purpose. Because the extension deprived Sheffield of his constitutional rights, the court of appeals reversed on the moratorium issue and remanded for a determination of damages.[109]

Sheffield involved the deprivation of a previously established development right. If the use has not already been authorized, then the landowner's investment-backed expectations cannot be deprived according to *Hallco Texas, Inc. v. McMullen County*.[110] Hallco informed the County of its proposed plans to use its 128-acre tract that was located near a reservoir as a nonhazardous industrial waste disposal site. Hallco applied for a disposal permit from the Texas Natural Resource Conservation Commission ("TNRCC").[111]

Immediately after the TNRCC approved a draft permit for Hallco, the County passed an ordinance prohibiting disposal of solid waste in the County within three miles of a reservoir. By that time, Hallco had invested $800,000 in the site and permit process. Hallco filed an as-applied takings claim against the County, reserving its federal takings claim for presentation in federal court. The trial court granted summary judgment in favor of the County on the inverse condemnation issue.[112]

In support of its claim, Hallco argued that it had spent significant sums in its attempt to obtain the permit, and the County had unreasonably interfered with its vested right to develop a waste disposal site that existed at the inception of its title. In ruling in favor of the County, the court of appeals pointed out that Hallco sought but had not received the final TNRCC permit. The court held that, without an approved permit, Hallco did not have a distinct investment-backed expectation that it could use the property for solid waste disposal, and the use of the property for that purpose was not allowed. For those reasons, the County prevailed on its summary judgment motion.[113]

The Houston Court of Appeals also addressed this concept in *Maguire Oil Company v. City of Houston*,[114] where the City revoked a permit authorizing Maguire to drill a gas well near Lake Houston, a freshwater reservoir and the City's main source of drinking water. Relying on the issued permit, Maguire prepared the land for drilling, purchased nearby leases, and began moving equipment into the drilling site. The City then issued a stop work order, claiming that the permit had been issued in

109. *Id.* at 658.

110. Hallco Tex., Inc. v. McMullen County, 94 S.W.3d 735 (Tex. App.—San Antonio 2000, pet. filed).

111. *Id.* at 736-37.

112. *Id.* at 737.

113. *Id.* at 738.

114. Maguire Oil Co. v. City of Houston, 69 S.W.3d 350 (Tex. App.—Texarkana 2002, pet. filed).

error.[115]

Elements of investment-backed expectations, such as the existing uses and zoning of property, the plaintiff's reasons for purchasing the property, and municipal permit approvals pursuant to the zoning are similar to the elements of promissory or equitable estoppel. As stated in *Maguire*, these elements include (1) a promise; (2) foreseeability of reliance by the promissor; and (3) substantial reliance by the promissee to his detriment constitute these elements.[116] In *Maguire*, the drilling permits were held to constitute a promise that Maguire could commence drilling operations. Furthermore, the substantial monetary expenditures spent in reliance upon the issuance of the permits were held to be reasonable.[117]

While *Maguire Oil* focuses primarily on the equitable estoppel issue, there is also a discussion about Maguire's investment-backed expectations claim. In a motion for summary judgment, the City contended that there was no evidence Maguire suffered economic loss or damage as a result of its permit revocation.[118] Maguire's expert witnesses, utilizing a geological report and a discounted cash flow analysis, argued that the market value of the untapped natural gas reserves exceeded $33,586,000.00. The City sought to exclude this testimony "because it was not based on an estimate of the market value of what was taken, i.e. the right to drill for gas, and speculative because it presumed minerals were present" and could be exploited.[119] The court of appeals acknowledged that valuation techniques other than the comparable sales methodology can be utilized if comparable sales are unavailable.[120] The court, therefore, held that summary judgment was inappropriate on Maguire's inverse condemnation claim and the investment-backed expectations matter should be remanded to the trial court.[121]

Champion Builders v. City of Terrell Hills[122] addressed the issue of proximate cause in inverse condemnation cases The City's board of adjustment revoked Champion's building permit for a multi-family project in 1994. Litigation was filed and Champion's building permit was reinstated.[123] However, Champion never asked the City to reissue the permit, and subsequently the City increased the minimum square foot requirements for apartment units from 800 square feet to 1200 square feet.[124] Champion filed a takings suit which went to the jury. Despite the findings by the jury that the City's actions constituted an inverse condem-

115. *Id.* at 356.
116. *Id.* at 369.
117. *Id.*
118. *Id.* at 361.
119. *Id.*
120. *Id.* at 363.
121. *Id.* at 372.
122. Champion Builders v. City of Terrell Hills, 70 S.W.3d 221 (Tex. App.—San Antonio 2002, pet. granted).
123. *Id.* at 225.
124. *Id.* at 225-26.

nation, the trial court entered a take nothing judgment.[125]

The court of appeals, however, rejected the plaintiffs claim that the permit revocation constituted a regulatory taking. The court took the *Mayhew* approach of examining the economic impact of the regulation and the interference with reasonable investment-backed expectations.[126] Most regulatory takings claims involve the restriction on the use of land imposed by a zoning ordinance, not the denial of a single permit. The fact that the permit denial, even if wrongful, led to a chain of events causing the project to fail does not constitute an inverse condemnation claim. The court buttressed its conclusion by noting that the trial court reversed the board's permit revocation decision within two months, so whatever collateral losses the plaintiffs incurred were not caused by the revocation decision.[127]

According to the court, the term "regulatory takings refers to situations in which the government restricts the use of land."[128] The collateral implications from the resulting legal dispute between the residents and Champion did not constitute a regulatory taking by the City.[129]

Similarly, according to the court of appeals in *Grunwald v. City of Castle Hills*,[130] the City's failure to act cannot constitute a regulatory taking. The Grunwalds brought suit against the City and Casa Norte del Sol, Ltd., the owners of an office building located adjacent to their residential property. The Grunwalds asked the court to declare the office building to be in violation of the City's zoning regulations and to issue a mandatory injunction compelling the City to enforce those regulations. The Grunwalds also claimed the City's failure to act against Casa Norte amounted to a regulatory taking. The City moved for summary judgment on all of the Grunwald's claims and the trial court granted the motion. In several issues on appeal, the Grunwalds argued that summary judgment was erroneously granted because the City failed to establish as a matter of law that the statute of limitations barred their claim under article 1, section 17 of the Texas Constitution and the City failed to establish as a matter of law that it did not commit a regulatory taking. The court held that the City's failure to enforce its zoning ordinances, rather than taking an affirmative action, cannot constitute a regulatory taking.[131]

125. *Id.* at 226-27.
126. *Id.* at 231 (citing *Mayhew*, 964 S.W.2d at 933).
127. *Id.*
128. *Id.* at 232.
129. *Id.*
130. Grunwald v. City of Castle Hills, No. 04-02-00217-CV, 2002 WL 31753616 (Tex. App.—San Antonio Dec. 11, 2002, no pet.).
131. *Id.* at *2-4.

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