LAND USE AND ZONING:
PRODUCTION ISSUES AFFECTED BY URBAN SPRAWL

by

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I. SCOPE OF ARTICLE

What is the value of oil and gas if one cannot extract it from the ground? The answer is simple – nothing. That is the layman’s explanation for the long-standing principle that the mineral estate is the dominant property estate over the surface. The Texas Supreme Court has repeatedly stated:

It is well settled that an oil and gas estate is the dominant estate in the sense that use of as much of the premises as is reasonably necessary to produce and remove the minerals is held to be impliedly authorized by the lease; but that the rights implied in favor of the mineral estate are to be exercised with due regard for the rights of the owner of the servient estate.¹

This common law right was created because the minerals would be “wholly worthless” if the owner could not enter upon the surface in order to explore for and extract the minerals.² Until recent times, the only limitation on this fundamental property right has been that the mineral interest owner must reasonably accommodate the surface owner’s use of the surface.³ But, if the accommodation of the surface would be unreasonable for the production of oil and gas, there is no need for the producer to comply.⁴ This basic rule of oil and gas law is the same whether the surface owner is a private individual or a governmental entity.⁵ In fact, if the surface owner is a governmental entity and by its use of the surface prevents the mineral owner from reasonably extracting oil and gas, then an inverse condemnation has occurred of the mineral estate.⁶

Today, though, oil and gas producers and mineral interest owners face a new challenge. It comes in the form of municipal regulation of the surface. As explained below, urbanization is reaching certain sections of the oil patch. Further, new geology is revealing producible formations within municipal jurisdictions. Municipal ordinances that ban surface use for the production of oil and gas, or that require producers to obtain specific use permits, have producers
dealing with zoning boards and municipal permitting departments much like surface developers have for years. Mineral interest owners are not accustomed to this extra layer of regulation.

This paper will discuss the obstacles producers are facing due to urbanization and the accompanying regulations. It will also analyze Federal and Texas “takings” law as it might be applied to the mineral estate that is burdened with surface regulation that prohibits or hinders its exploitation. It should be noted that this paper will not be an exhaustive discussion of land use regulation and its compliance with the Fifth Amendment to the United States Constitution. Such a discussion would fill volumes. It is our intent to make the reader aware of the issues for future consideration. For demonstrative purposes, we utilize the available data for the growing Dallas/Fort Worth metroplex.

II. GROWTH OF URBANIZATION INTO THE OIL AND GAS PATCH

From 1990 to 2000, the Dallas-Fort Worth region experienced the largest percentage of population growth of any of the ten (10) largest metropolitan areas in the United States. The Dallas-Fort Worth vicinity is comprised of the following counties: Collin, Dallas, Denton, Ellis, Henderson, Hunt, Kaufman, and Rockwall. To accommodate this rapid growth, these counties grew by approximately 448 square miles of urban area. Specifically, the urbanization of Denton County alone increased from 158 square miles in 1990 to 197 square miles in 2000. In fact, the city of Denton itself is growing. In 1990, the population of Denton was only 66,270. By the 2000 census, the population had increased to 80,537. The 2003 estimated population of Denton is 90,200 in a land area of approximately 66.2 square miles. These statistics clearly show that urbanization is ever increasing and slowly eating away at the rural aspect of the Texas landscape. Instead of grazing cattle, you are more apt to see soccer fields and business plazas. Regardless of what your personal position is on this urban sprawl, it appears to be here to stay.
Around this same area of North Texas lies a large dependable formation for natural gas called the Barnett Shale.\textsuperscript{13} In 1994, there were 121 wells in the Barnett Shale field covering 260,000 acres in Denton, Wise, and Tarrant Counties.\textsuperscript{14} As of February 2002, there were approximately 1,120 wells in the Barnett Shale field covering seven counties: Wise, Denton, Tarrant, Jack, Palo Pinto, Parker, and Hood.\textsuperscript{15} Records show that in November 2001 daily field production was approximately 369,000 mcf, with monthly production consistently greater than 10 Bcf.\textsuperscript{16} This current monthly output is almost equal to the total amount produced in the Barnett Shale field during the entire year of 1993.\textsuperscript{17} Why has a field, first recognized in 1981, suddenly become such a major play? The answer in one word is technology. The ability of the production companies to use a larger fracture stimulation method, which allows for the rock to be cracked open and the gas released, has led to increased drilling and a more productive field.\textsuperscript{18} According to one producer, it is believed that recoverable gas from the formation rests directly under the established, and as built, City of Denton.

With the urban areas of North Texas ever expanding and natural gas development in that same vicinity on the rise, it was only a matter of time before the two met and conflicts arose. That time has now come and residents in the city and county of Denton, for example, are noticeably concerned.\textsuperscript{19} At a town hall meeting in June of 2003, residents expressed concerns regarding property rights, safety precautions, noise, and homeowner compensation for the inconveniences and hassles caused by the drilling occurring in and around their neighborhoods.\textsuperscript{20} However, residents also stand to gain great economic potential with this drilling. For example, in 2001 Denton was considering annexing a 2,226-acre development that was to have approximately 80 gas wells drilled on the property.\textsuperscript{21} Why? Denton would gain nearly $4.3 million in ad valorem tax revenue over 20 years if the 80 wells were drilled, the county would
receive nearly $2 million, and the area school districts would receive approximately $14 million. Denton is not the only city facing such permitting issues. Houston is also dealing with the permitting process within its extraterritorial jurisdiction and in the areas around Lake Houston. Accordingly, cities are being forced to weigh the interests of mineral owners, homeowners, and the prospect of an increased tax base in deciding how to best handle the possibility of increased drilling.

III. WHO HAS THE POWER TO REGULATE?

With these conflicting interests, the question arises as to whom is the proper governmental entity to make the decisions regarding regulation and development of oil and gas. The Texas Legislature in 1983 enacted a statute to provide a mechanism that allowed the orderly development of lands and minerals in tandem. Clearly, the Texas Legislature recognized the potential for conflict between developers, cities, and the producers, all of whom seek to develop the same property, but have competing interests. The legislative purpose of the statute is instructive. It states:

It is the finding of the legislature that the rapidly expanding population and development of the cities and towns of this state and the concomitant need for adequate and affordable housing and suitable job opportunities call for full and efficient utilization and development of all the land resources of this state, as well as the full development of all the minerals of this state. In view of that finding, it is the intent of the legislature that the mineral resources of this state be fully and effectively exploited and that all land in this state be maintained and utilized to its fullest and most efficient use. It is the further finding of this legislature that it is necessary to exercise the authority of the legislature pursuant to Article XVI, Section 59, of the Constitution of the State of Texas to assure proper and orderly development of both the mineral and land resources of this state and that the enactment of this chapter will protect the rights and welfare of the citizens of this state.

While setting forth a comprehensive plat approval process, Chapter 92 does not affect the authority of cities to require approval of subdivision plats or the authority of a home rule city to
Regulate development activities within its boundaries. In fact, cities generally have very broad powers to regulate activities within their city limits and extraterritorial jurisdictions. However, the type of city, which in some regards is related to its size, will have an impact over the extent to which a city can regulate activities within its jurisdiction. Having said this, the general legislative grant, which empowers all municipalities, allows for the adoption of “ordinances for good government, peace or order . . . which are necessary or proper for carrying out a power granted by law . . . “ There are two types of incorporated cities — general law and home-rule — of which one should have a basic understanding.

A. The General Law City

A community can become incorporated when it reaches 200 citizens through a procedure set out in the Texas Local Government Code § 7.01. Section 5.901 of the Texas Local Government Code sets forth the territorial requirements for incorporation of all general law cities. There are three types of general law cities, all of which have the power to pass ordinances for the general welfare of the community. General law cities cannot adopt a charter, nor create a distinct body of law, but they may pass ordinances. In short, general law cities can only exercise powers expressly granted by the Legislature or those powers that are necessarily implied through the Legislature’s grant of powers. Notably, while these powers may appear limited, in practice general law cities have broad powers within their jurisdiction pursuant to the laws of the State of Texas and their basic police power.

B. The Home Rule City

A community can become a home rule city when it reaches a population of 5,000. A home rule city has the authority to adopt a charter and is granted the “full power of local self government.” In this regard, home rule cities may amend their charters, adopt ordinances, and comprehensively regulate activities within their jurisdiction, so long as such regulation remains
consistent with the Texas Constitution.\textsuperscript{35} As a home rule city’s power is derived from its charter and its authority is equivalent to that of the State’s Legislature (as long as it does not conflict with state law), it has a much broader potential to regulate than does a general law city.

\textbf{C. Drilling Ordinances}

Through these grants of power, many Texas cities are enacting ordinances restricting or prohibiting drilling within their city limits and extraterritorial jurisdiction.\textsuperscript{36} The size of the extraterritorial jurisdiction over which a city has authority varies based upon the population, but can range from one-half mile beyond the corporate city limits to as far as five miles beyond those limits.\textsuperscript{37} Based upon legislative pronouncements, the ability of municipalities to regulate drilling within their city limits does not appear to be in question.\textsuperscript{38} Moreover, the manner and method by which municipalities chose to regulate the drilling process is often times discretionary, which leads to different rules in every city in which a producer wishes to drill.\textsuperscript{39} Municipalities have a long history of regulating land use as it pertains to residential and commercial surface developers and are seeking to impose similar regulations upon the surface of the drilling site. Producers are finding these regulations time consuming and forever changing at the discretion of the city officials. Not only are these regulations somewhat new, producers are finding that the incompatible interests of the nearby homeowners (all of whom make up the local electorate), and the municipal uses the city foresaw for the land, are moving many municipalities to simply keep drilling out of their city limits and extraterritorial jurisdiction regardless of the positive economic impact it may receive. While this may be economically shortsighted of the city, such regulations have the ability to make it substantially more expensive (if not virtually impossible) to drill in urban areas than it would be to drill the same well in a rural community.
IV. TWO TIERS OF REGULATION

Although it is evident that municipalities can regulate the method and manner of drilling in their jurisdictions, the Railroad Commission of Texas has jurisdiction over all of the oil and gas wells in Texas and those people owning or engaged in drilling or operating oil or gas wells in Texas. Based upon that jurisdiction, the Railroad Commission has set forth specific rules governing and regulating the operations pertaining to oil and gas wells. For example, the Railroad Commission has a detailed system for obtaining a permit, comprehensive reporting, and financial security requirements. A producer must comply with all of the applicable Railroad Commission requirements in order to maintain its permit and a violation of the commission orders is punishable by a penalty that may not exceed $10,000.00 a day for each violation.

However, this exhaustive system set forth by the Railroad Commission is just the tip of the iceberg for those producers who seek to drill within the jurisdiction of many municipalities. As stated above, a municipality may adopt any ordinance, law, or rule it feels is reasonably related to the duty to protect the public health, safety, or welfare. Many cities, such as Denton and Fort Worth have determined that surface ordinances governing drilling are necessary "to prevent imminent destruction of property or injury to persons and to make these activities conform to the [city's plan] and development regulations."

A. Denton, Texas: A Model Ordinance.

The City of Denton, Texas is a model example of a home-rule municipalities' drilling ordinance. For example, this ordinance has more stringent requirements when it comes to permitting, insurance, and financial security than does the Railroad Commission. With regard to the permitting process, if the proposed well is within 500' of a previously platted residential subdivision (unless you are between 500' and 250' feet and get the express written approval of all
of the property owners within that area), the permit applicant must first obtain a Specific Use Permit or be within a Planned Development Zoning District.\textsuperscript{47} Next, regardless of whether the drilling is by right or within one of the special districts, a Gas Well Development Plat must be submitted and approved, which among other things includes a road repair agreement.\textsuperscript{48} Further, in order to receive the gas well permit, the producer must agree to fully indemnify the City, which includes indemnification from acts arising from the sole negligence of the City during the course and scope of the City's inspecting and permitting of gas wells.\textsuperscript{49} The City also requires financial security in addition to that required by the Railroad Commission in a minimum amount of $50,000 for a single well and $100,000 for multiple wells on a "blanket" basis.\textsuperscript{50} All of these restrictions placed upon the approval of the gas well permit act to increase the costs associated with drilling and the time it takes before the producer can begin extracting its minerals and making a profit.

Once a producer applies for a permit to drill within a city and complies with all of the applicable requirements for obtaining the drilling permit, the permitting body must issue the drilling permit and allow the drilling to go forward. Should the permitting body refuse to issue the permit after all requirements have been satisfied, the applicant should seek a writ of mandamus to compel the public permitting body to perform the ministerial act, \textit{i.e.} issue the permit.\textsuperscript{51} The overriding issue, however, is whether the permitting body was in fact merely performing a ministerial function or whether the deliberation was left to the discretion of that body. To be ministerial, the action taken by the permitting body must "require obedience to orders or the performance of a duty to which the actor has no choice."\textsuperscript{52} Conversely, "[a]ctions requiring personal deliberation, decision, and judgment are considered discretionary."\textsuperscript{53} Making such a determination is often difficult, as it is one of degrees and relies heavily upon the laws
regulating the acts of the official. Moreover, there is authority that suggests that anytime there is an objection that the application fails to comply with all of the city's requirements, the permitting body is being asked to interpret and apply the disputed requirement, and the permitting body's decision is *ipso facto* discretionary. As there will likely always be a resident who will object to a producers application for a drilling permit, a likely scenario is that these objections will transform what should be a ministerial act, subject to a writ a mandamus, into a discretionary act that is almost certainly immune from review.

If the act is considered discretionary, the government officials who performed (or failed to perform) the act are immune from suit so long as they acted in good faith and within the scope of their authority. Good faith is determined based upon a standard of objective reasonableness, thus permitting bodies, if found to have acted in good faith, are immune from suit even if they acted negligently in performing the discretionary function. However, if you can establish bad faith and traditional negligence on the part of the government official, then you would be entitled to recover damages for the denial of your permit.

**B. Does Preemption Apply?**

This two-tier regulation may cause some producers to question whether the extensive regulations set forth by the Railroad Commission preempts those enacted by the municipalities. As there has been no express preemption, the easy answer is no. Additionally, Texas law is clear that just because a state agency has authority to regulate "does not automatically preempt that field from city regulation; local regulation, ancillary to and in harmony with the general scope and purpose of the state enactment is acceptable." Having said that however, should a municipality enact an ordinance that is in direct conflict with the Railroad Commission rules, it could be argued that the portion of the municipal ordinance in conflict is preempted. Such an argument has the greatest chance for success in instances where a municipality has sought to
regulate a technical aspect of drilling that is so costly or restrictive (when compared to the Railroad Commission's rules) as to make the drilling in that area unreasonable. Nevertheless, as courts are predisposed to construe the commission's rules and the municipal ordinances in a manner that allows them to be reconciled so that both have concurrent operation, many preemption arguments are sure to be timely and costly in their own right with no clear chance of success. Accordingly, not only do the producers have to meet all of the Railroad Commission's rules and regulations, they must also comply with the rules set out by the municipality in which they seek to drill.

These ordinances prohibiting or regulating drilling within a municipalities' limits or extraterritorial jurisdiction are clearly land restrictions for the public's use. As discussed below, a producer whose interest has been affected by such an ordinance may find that the act of the city has entered into the realm of an unconstitutional taking. For that reason, the remainder of this paper will discuss an analysis of both Federal and Texas law as it relates to the taking issue, along with a discussion regarding the appropriate method of calculating damages and the authors' view on bringing such a claim.

V. REGULATORY TAKINGS IN GENERAL

The basic question is:

Can a municipal zoning ban on drilling for oil and gas constitute a “taking” of property without just compensation in violation of the 5th Amendment, as applied to the states through the 14th Amendment, of the United States Constitution, and article I, §17 of the Texas Constitution?

Yes it can. It is axiomatic that governmental units may regulate land use for the public health, safety and welfare. It is also axiomatic, however, that when a governmental regulation eliminates all economically beneficial use of a property interest, the United States and Texas Constitutions require the regulating governmental unit to pay the property owner just
compensation for the lost interest.\textsuperscript{65} Just compensation in such “categorical regulatory takings” cases\textsuperscript{66} is usually the fair market value of the property.\textsuperscript{67} The purpose of this fundamental American right is to prevent the government from “forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.”\textsuperscript{68} Furthermore, even if the categorical regulatory taking is temporary, the governmental unit may be required to compensate the property owner for the value of the use during the period of the taking.\textsuperscript{69}

A property interest is determined by State law.\textsuperscript{70} For over 100 years, Texas has recognized that a right to the minerals carries with it the right to enter onto the surface, use the surface and extract the minerals.\textsuperscript{71} As of this date, mineral extraction will always result in some surface damage. These fundamental statements of Texas state law make clear to these authors that an unequivocal prohibition of surface use for the purposes of drilling for oil and gas should be a taking of the minerals requiring just compensation under the United States Constitution and the Texas Constitution. Furthermore, it is our opinion that ordinances that permit drilling but place conditions upon the use that renders extraction unreasonable and, thus, unaccommodating; should also constitute a taking. We see no difference between an occupation of the surface by the government that cannot be accommodated, such as in the \textit{Haupt}\textsuperscript{72} case, and a regulation of the surface that cannot be accommodated. Having said that, however, what we have discussed above is a general statement. Another opinion we share is that in the area of takings jurisprudence, the cases create cloudy pictures of the status of the law and these are arguments that support both sides of the issue. The murkiness of the picture is caused by the clash of divergent interests. On the one hand we have the government’s (i.e. those elected by the local citizenry) right and duty to pass laws for the public’s health, safety and welfare. On the other
hand is the right of those whose legal property is taken as a result of that valid exercise of governmental power to be appropriately compensated for the losses caused therefrom.

VI. REASONABLE INVESTMENT BACKED EXPECTATIONS

The situation becomes more complex when zoning does not categorically ban drilling, but regulates the conduct in such a manner as to lessen the value of the mineral estate without rendering it worthless. Additionally, there are arguments to be made that drilling bans are not compensable takings in circumstances where the mineral and surface estates have not been severed. Finally, mineral interest owners and producers will have to deal with arguments that no taking occurs when they acquire minerals or leases subsequent to the passing of anti-drilling ordinances. In these instances, mineral interest owners, regulators and courts will have to engage in a balancing test first enunciated in *Penn Central Transportation v. New York City* to determine whether a compensable taking has occurred.

Surface use regulations that place limitations on access to the mineral estate, but which fall short of eliminating all economic beneficial use of the minerals, may still constitute a taking. Whether a compensable taking occurs under these circumstances, though, depends upon certain factors that include the regulation’s economic effect on the landowner, the extent to which the ordinance interferes with reasonable investment backed expectations, and the character of the government action. In the oil and gas context, we suggest that some of the factors to be examined include:

a. the timing of the passage of the ordinance;
b. the prior existence of producing wells in the regulated area;
c. the geological parameters of the formation to be exploited;
d. the ability to utilize pooling of the regulated area with leases outside the regulated area;
e. the physical characteristics of the gas to be produced and the needed infrastructure in the event it possesses liquid hydrocarbons or hydrogen sulfide.

f. the estimated value of the reserves;

g. the additional cost of production caused by regulatory requirements, if drilling will be permitted at all;

h. the mineral estate’s severance or nonseverance from the surface estate;

i. the date the mineral interest owner learned of the potential for oil and gas production;

j. the expansiveness of the regulation;

k. the conditions placed on the use; and

l. the reason for the regulation.

This is not an exclusive list. We would suggest, though, that all of these factors should be included in any discussion of the mineral interest owners reasonable investment backed expectations. It should be safe to say, however, that any mineral interest owner’s or producer’s reasonable investment backed expectation would be to produce every profitable btu of gas and/or barrel of crude from their interest as possible.

One issue that may be problematic is what is the reasonable investment backed expectations of a landowner who has not severed the surface from the minerals and who purchased his land after the prohibitive ordinance was in place? Under those circumstances, the landowner will own all of the bundles of sticks recognized under property law. A drilling ban will not eliminate all uses of the entire bundle. In fact, there are probably many valuable uses of the surface that are permitted under this hypothetical. Additionally, when land is purchased with knowledge of a prohibited use, how valid is an argument that they had an expectation to be able to make a prohibited use of the land? We have not found an oil and gas case dealing with this
exact fact pattern that discussed the merits of a takings claim. A case that will be central to an analysis of this type of fact pattern, though, is *Mayhew v. Town of Sunnyvale.*

In *Mayhew*, the Texas Supreme Court analyzed a regulatory takings claim wherein a surface developer sought a zoning variance from a one unit per acre ordinance to allow him to build 3600 houses on 1200 acres. In doing so, the Court applied the principles set forth by the United States Supreme Court in *Lucas v. South Carolina Coastal Council* and *Penn Central Transportation v. New York City.* The court ruled that an ordinance constitutes a regulatory taking if it does not substantially advance legitimate state interests or it denies an owner of all economically viable use of his land. Even if the regulation is not facially invalid and there is not a categorical taking, the court further held that a taking occurs if the government unreasonably interferes with the landowner’s right to use and enjoy his/her property based upon the economic impact of the regulation and the extent of interference with the landowner’s distinct investment-backed expectations. In reviewing whether the ordinance unreasonably interferes with a property owner’s right to use and enjoyment, the Court looked at two factors. The first factor merely compares the value of the land that has been taken away by the regulation with the value that remains in the property. The second factor reviews how the owner could have reasonably viewed his/her plans for the use of the property at the time of acquisition.

In comparing the value of the land under the first prong, the Court found that the Mayhews’ property had a value of $2.4 million with the ordinance in place. Thus, the development limitation did not destroy all economic value. As for the second factor, the Court ruled, as a matter of law, that the Mayhews’ did not have a reasonable investment backed expectation to construct 3600 homes on the 1200 acres. In this portion of the discussion, the Court focused on the fact that the claimant had owned large tracts of the subject acreage for
many years both prior to the passage of the ordinance and subsequent to its enactment. After the development prohibition went into effect, the Mayhews purchased additional land for development purposes. In light of that fact, the Court ruled that the regulation did not unreasonably interfere with the Mayhews’ right to use and enjoy their property.

When applying *Mayhew* to the oil and gas context, i.e. what are the reasonable investment backed expectations of the mineral interest owner who acquires his interest after a drilling ban was enacted or has not severed the surface and the minerals, we make the following observations that should render a different result from *Mayhew*. First, regardless of when a regulation was passed, most mineral interest owners do not know they have producible minerals until a geological survey is completed on the property. This is usually done by an oil and gas producer who contacts the property owner seeking a lease. The facts set forth in section II above, bears this out. Under that typical scenario, it seems somewhat draconian to block compensation if exploitation is not allowed. Second, Mayhew focused on the fact that the land as a whole retained substantial value. If the surface and mineral estates have not been severed, we believe the regulatory authority will argue that value has been retained through surface use despite the ordinance, and will rely upon *Mayhew*. Our view is that the regulators’ potential position violates the public policy of the State of Texas and that the non-severance of the two estates is irrelevant. As shown above it is the public policy of the State of Texas to maximize production and to protect the right to exploit oil and gas reserves. It follows that if it is the State of Texas’ expectation is to maximize production, how could it not be the private land owners?

**VII. OBTAINING “JUST COMPENSATION”**

The existence of an offending ordinance does not, by itself, create a taking. Municipalities that pass ordinances that ban certain land uses are also blessed with a great deal of
discretion to grant variances from the ordinance to permit the otherwise banned use. It follows that the governmental unit must be given the opportunity to permit the use, despite the prohibition, before a “takings” claim becomes ripe.\textsuperscript{91} The property owner must, therefore, seek a permit (usually a “specific use permit”) from the municipality.\textsuperscript{92} The zoning authority may then permit the use as applied for, condition the use, or disallow it completely. The landowner must, though, obtain a final decision from the state authority before a “takings” claim can become ripe for adjudication.\textsuperscript{93} It is the finality of the government’s decision that sets the parameters of the permitted use and allows a court to determine whether there has been an unconstitutional taking.\textsuperscript{94}

A final decision disallowing a land use does not, however, mean that the property owner can file suit in federal court. The United States Supreme Court has repeatedly held that federal courts do not have jurisdiction over a takings case until the claimant has sought compensation through the procedures provided by the state for doing so.\textsuperscript{95} The purpose for this second hurdle to the doors of the federal courts is that only takings without “just compensation” infringe the Constitution.\textsuperscript{96} If the state does not provide an adequate procedure for seeking just compensation, however, the claimant may immediately seek relief in federal court.\textsuperscript{97} Many states, such as Texas, allow causes of action for inverse condemnation which the United States Supreme Court has implied to be adequate.\textsuperscript{98}

A. How Does A Property Owner Seek “Just Compensation” In Texas?

A taking without just compensation is a tort.\textsuperscript{99} In Texas, when the government prohibits access to property by regulatory bar and, thus, appropriates property but fails to compensate for it; the property owner may sue for inverse condemnation and assert causes of action for constitutional violations for takings without just compensation.\textsuperscript{100} Whether particular facts are
enough to constitute a taking is a question of law. The elements of an inverse condemnation claim are:

1. the State intentionally performed certain acts;
2. that resulted in a “taking” of property; and
3. for public use.

In such cases, the burden of proof is on the property owner who must also plead and prove the amount of compensation owed. Though the United States Supreme Court has recognized that such procedures disadvantage the property owner, it has, as stated above, implied that the procedure is appropriate.

B. What is the Status of Texas Takings Law?

Unfortunately, Texas cases have not presented a consistent picture of how to analyze a potential takings case as a result of prohibitive land use regulation. The Texas Supreme Court has not had a problem finding a taking of the mineral estate when a governmental unit physically occupies the surface and prohibits drilling, taking into consideration the accommodation doctrine. But, regulatory actions that prohibit land use have resulted in opinions that appear to be inconsistent.

As discussed above, Mayhew provided an in-depth analysis of the Texas Supreme Court’s view of regulatory takings as of 1998. There are, though, older Texas Supreme Court cases that offer a more restrictive view of takings jurisprudence. For example, in City of College Station v. Turtle Rock Corp., the Texas Supreme Court reviewed an ordinance that required a developer to dedicate a portion of its land as a park in order to obtain a plat for development. The extent of the analysis was limited to determining whether the ordinance violated substantive due process. The Court did not discuss the reasonable investment backed expectations of the
owner holding that all property is held subject to the valid exercise of the police power.\textsuperscript{110}

Importantly, the court stated:

A city may enact reasonable regulations to promote the health, safety, and general welfare of its people. [citations omitted] Thus, in order for this ordinance to be a valid exercise of the city’s police power, not constituting a taking there are two requirements. First, the regulation must be adopted to accomplish a legitimate goal; it must be “substantially related” to the health, safety, or general welfare of the people. [citations omitted] Second, the regulation must be reasonable; it cannot be arbitrary. [citations omitted].\textsuperscript{111}

The Court went on to hold that there is a strong presumption of validity and that the public welfare has a broad range.\textsuperscript{112}

There are two cases that assert a taking of the mineral estate due to surface regulation, \textit{Trail Enterprises, Inc. v. City of Houston},\textsuperscript{113} and \textit{Maguire Oil Co. v. City of Houston}.\textsuperscript{114} These cases dealt with either the denial or revocation of a drilling permit to drill gas wells near Lake Houston, which was within the extraterritorial jurisdiction of the City of Houston.\textsuperscript{115} Unfortunately, neither opinion addressed the merits of the producer’s takings claim. In both cases, the principle issue on appeal was whether the claim was barred by a ten (10) year statute of limitations,\textsuperscript{116} which will be discussed below. In dicta, though, the \textit{Trail Enterprises} court, which rendered its opinion one year before the \textit{Mayhew} opinion, stated that whether a taking occurred would be based upon a substantive due process analysis.\textsuperscript{117}

\textbf{C. \textit{What Damages are Recoverable Under Texas Law?}}

Consistent with United States Supreme Court precedent, Texas awards a property owner the market value of his/her property that was taken by a governmental unit.\textsuperscript{118} Market value is determined at the time of the taking, regardless of the government’s actions prior thereto that may have depreciated the property’s value.\textsuperscript{119} Market value can be determined by comparable sales, the cost approach or the income approach.\textsuperscript{120} Comparable sales evidence is the preferred
method for determining market value. But, when comparable sales evidence is lacking, the court may admit valuation evidence based upon the cost approach or income approach. The cost approach looks at the cost of replacing the taken property, but is best suited for valuing improved property that is unique in character in the marketplace. Due to the fact that this method takes the property’s depreciation into account, it tends to set the upper limit of real market value. The income approach is appropriate when property would, in the open market, be priced according to the income that it already generates. Additionally, the court in *Maguire Oil* held that, in the absence of comparable sales evidence, valuation of reserves in a takings case based on discounted cash flow from the estimated reserves is admissible as damages.

**D. Is The Texas Inverse Condemnation Procedure “Adequate?”**

The authors have not located any Texas cases that thoroughly address this issue. Based upon our research, however, there is at least an “argument” that the recognized procedure is inadequate when taking into consideration certain hurdles not discussed by the United States Supreme Court, or that are in contradiction to Supreme Court authority. The issue of adequacy is key in a takings case because one cannot file an action in federal court under 42 U.S.C. § 1983 until adequate state procedures have been exhausted. As stated above, the recognized procedure in Texas contending a regulatory taking is to file a lawsuit in the appropriate district court asserting a common law cause of action for inverse condemnation.

Inverse condemnation cases require the land owner to prove that the applicable regulation prohibiting the use of land constitutes a compensable taking under the 5th Amendment to the United States Constitution and article 1, Section 17 of the Texas Constitution. It is also incumbent upon the claimant to prove the amount of compensation due as a result of the taking. Of significance, Texas has not provided a statutory means of seeking just compensation as a
result of a regulatory governmental taking. The means of redress is purely a creature of common law.

The facts to be presented at trial and the elements of an inverse condemnation cause of action are significantly similar to those required to prove a takings claim in federal court. At least one Fifth Circuit case has held that the state court inverse condemnation proceeding will, in most circumstances, act as collateral estoppel and *res judicata* in any subsequent federal proceeding. However, if the litigant is “involuntarily” in state court and an appropriate reservation of his/her federal rights is made within it petition, the litigant may qualify for an exception to the generally applicable *res judicata* principles. We do not express an opinion as to the validity or soundness of such a reservation.

The property owner also must overcome another obstacle in inverse condemnation proceedings that are not present in a federal court action based on 42 U.S.C. § 1983. At least one Texas appellate court has held that a takings claim based on a land use ordinance depriving the property of any or all economic value must be filed within 10 years from the date the ordinance was enacted. While superficially this does not appear to be a draconian rule, in the oil and gas context, it can have a devastating effect and deprive a mineral interest owner or a lessee of his due process rights. In many instances, a mineral interest owner does not know the value, or the extent of the potential value, of the mineral estate until a geological study is prepared concerning his land. Most, if not all, mineral interest owners do not hire geologists or petroleum engineers to conduct such studies due to the sheer expense involved. In most instances, a mineral interest owner learns that he/she owns producible oil or gas when a production company contacts them and seeks to lease the mineral estate. If the mineral estate is subject to a municipal zoning ordinance that prohibits drilling, and a variance from the ordinance cannot be obtained, it is
arguable that a compensable taking has occurred. If a period of ten years has passed, from the
date the ordinance was enacted until action was taken by the mineral interest owner to seek
compensation; the *Trail Enterprises* case would bar the mineral interest owner’s rights.

Arguably, the ten-year statute of limitations announced in *Trail Enterprises* runs afoul of
The United States Supreme Court pronouncements in *Palazzolo v. Rhode Island*. In
*Palazzolo*, the offending regulations have been in place since at least 1971. By the time suit
was filed asserting inverse condemnation, more than 20 years had passed since the offending
regulation had been enacted and, more importantly, ownership to the property at issue had
changed hands. A new property owner who acquired title after the passage of the blocking
ordinance is charged with the knowledge of the ordinance’s existence. The State of Rhode
Island stated that, under these facts, a compensable taking had not occurred since a state may
always regulate land use for the public good and the owner took title with full knowledge of the
existing prohibition. According to Rhode Island, the property owner could not have any
reasonable investment backed expectations when he purchased the land and could not, therefore,
claim any injury from lost value. The United States Supreme Court had little trouble
completely rejecting Rhode Island’s contention. In doing so, Justice Kennedy, on behalf of the
majority, opined that:

“The State may not put so potent a Hobbesian stick into the
Lockean bundle…. Just as a perspective enactment, such as a new
zoning ordinance, can limit the value of land without effecting a
taking because it can be understood as reasonable by all concerned,
other enactments are unreasonable and do not become less so
through the passage of time or title. Were we to accept the state’s
rule, the post-enactment transfer of title would absolve the state of
its obligation to defend any action restricting land use, no matter
how extreme or unreasonable. A state would be allowed, in effect,
to put an expiration date on the Takings Clause. This ought not to
be the rule. Future generations, too, have a right to challenge
unreasonable limitations on the use and value of land….”
rule would work a critical alteration to the nature of property, as the newly regulated landowner is stripped of the ability to transfer the interest which was possessed prior to the regulation. The State may not by this means secure a windfall for itself.”

Based on the Supreme Court’s announcement in *Palazzolo*, it certainly appears that a ten-year statute of limitations in an inverse condemnation regulatory takings case is violative of the United States Constitution. It follows, then, that the Texas inverse condemnation proceeding with a ten-year statute of limitations may be inadequate.

There is another adequacy issue concerning the Texas proceeding. Since a taking is a tort, Texas does not permit the landowner to recover his attorneys’ fees in the event he is successful in his inverse condemnation claim. Attorneys’ fees in a case of this sort can be substantial. The property claimant is at the mercy of the scruples of the deeper pocketed governmental entity. If the governmental entity wished to increase the litigation burden upon the property owner, it may do so by merely utilizing the Texas Rules of Civil Procedure as those rules relate to discovery in trial. It follows, consequently, that the attorneys’ fees incurred by the landowner could far exceed the value of the taken property depending upon the circumstances and facts of each case. For example, if the fair market value taken as a result of a municipal regulation was $100,000, it is conceivable that attorneys’ fees incurred over the normal life of a lawsuit (approximately one and one half to two years) would far exceed the value of the taken estate. The end result would be that landowners may restrain themselves from seeking “just compensation” due to litigation costs and the result *Palazzolo* seeks to avoid, i.e. the state securing a windfall for itself, would occur under the Texas inverse condemnation proceeding. Having said that, however, at least one Texas state appellate court has held that the inability to recover attorneys’ fees in an inverse condemnation case did not render the proceeding inadequate."
Some practitioners may assert that the attorneys’ fees dilemma may be avoided by seeking a declaratory judgment pursuant to Texas Civil Practice and Remedies Code § 37.001, et seq. It is true that a property owner may seek a declaratory judgment from the trial court that compensable taking has occurred, and seek to recover its attorneys fees as allowed by Texas Civil Practice and Remedies Code § 37.009. It should be noted, though, that by seeking a declaratory judgment and attorneys’ fees thereunder, the landowner is also opening himself up for a counterclaim from the municipality for a countervailing declaratory judgment and for the landowner to pay the municipality’s attorneys’ fees. The municipality can up the ante, so to speak, by forcing the landowner to realize that he may have to pay not only his attorney for the prosecution of the inverse condemnation suit, but also pay the attorneys’ fees for the city in the event that the city was successful in defending the case. Such a result can lead to landowners being hesitant to enforce their rights.

VIII. TAKINGS CASES IN FEDERAL COURT

Problems with the Texas procedure can be completely avoided if the procedure was found to be inadequate, or if there is not a finding of res judicata in the event the federal claim has been properly reserved. If the state proceeding is inadequate or federal claims has been properly reserved, a property owner may sue in federal court and assert a claim under 42 U.S.C. § 1983. Section 1983 provides:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person with in the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer’s judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated of declaratory relief was
unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia. (R.S. § 1979; Pub.L. 96-170, § 1, Dec. 29, 1979, 93 Stat. 1284; Pub.L. 104-317, Title III, § 309(c), Oct. 19, 1996, 110 Stat. 3853.)

Under § 1983, the property owner sues the governmental entity claiming a violation of the Fifth Amendment, as applied to the states through the Fourteenth Amendment, for a taking of private property for public use without just compensation. The property owner may also sue the individuals who participated in the taking, in our context those governmental officials who denied the producer the right to drill, personally and seek compensation. To be liable for § 1983 violations, the property owner must demonstrate that the individual governmental officials knew his/her conduct was unconstitutional, and knowingly violated the Fifth Amendment. The official’s conduct is based upon an objective standard and whether a reasonably prudent governmental official would have acted in the same manner under like or similar circumstances. Under § 1983, other typical causes of action are for violations of substantive due process, procedural due process, and equal protection under the law. Furthermore, pursuant to 42 U.S.C. § 1988, the property owner may recover his/her attorneys’ fees incurred during the prosecution of the case. Finally, the Texas judicially created ten (10) year statute of limitations from the date the ordinance was passed should be inapplicable under Palazzolo.

IX. CONCLUSION

Municipal regulation of the surface that deprives, or potentially deprives, a mineral owner or producer of the right to drill for oil and gas is a relatively new issue. It has caused producers to feel the pinch that has nagged surface developers for years, that is having to deal with the permitting process brought on by local governmental bureaucracies. However, unlike the surface developer who generally has many uses for his/her land, the mineral interest owner has only one, the production of oil and gas. In dealing with local governments, the producer and mineral
interest owner needs to keep in mind that a drilling block may amount to a violation of the Bill of Rights of both the United States and Texas Constitutions. In difficult negotiating sessions with city governments for the right to drill, we suggest that producers and mineral interest owners make local officials aware of this issue in the hopes that costly litigation can be avoided, and so that all concerned persons may enjoy the fruits of the land in the form of sales revenues, royalty payments and ad valorem taxes.

1. E.g., Getty Oil Co. v. Jones, 470 S.W.2d 618, 621 (Tex. 1971).
3. Haupt, 854 S.W.2d at 912; Getty Oil Co., 470 S.W.2d at 622.
4. Id.
5. Id.
6. Haupt, 854 S.W.2d at 913.
7. Per the United States Census Bureau, see http://www.census.gov/population.
8. U.S. Census Bureau, County and City Data Book: 2000, Table B-3, Metropolitan Areas and Component Counties, page B-7.
11. U.S. Census Bureau, County and City Data Book: 2000, Table D-1, Places—Area and Population.
12. See, http://factfinder.census.gov/home, for a searchable database of all of the cities in the United States, which provides highlights of the 2000 census, population estimates, maps, geography and much more.
15. Id.
16. Id.
17. Id.
21. See, Curry, supra note 11.
22. Id.
24. TEX. NAT. RES. CODE ANN. § 92, et. seq. (Vernon 2001)(providing a statutory procedure for adopting a plat that binds all mineral owners within a qualified subdivision).
25. TEX. NAT. RES. CODE ANN. § 92.001 (Vernon 2001).
27. TEX. LOC. GOV’T CODE ANN. § 51.001 (Vernon 1999); see also, Unger v. State, 629 S.W.2d 811, 812 (Tex. App.—Ft. Worth 1982, writ ref’d.).
29. TEX. LOC. GOV’T CODE ANN. § 5.901(1)-(3) (Vernon 1999).
30. TEX. LOC. GOV’T CODE ANN. §§ 6.001 (1)-(3), 7.001 (1)-(3); 8.001(1)-(3) (Vernon 1999).
See, e.g., ch. 52 (Vernon 1999).

Id.

Tex. Const. art. XI, §5.

TEX. LOC. GOV’T CODE ANN. § 51.072.

See, e.g., Tex. Const. art. XI, §5, ch. 9 and 51.

See, ABILENE, TX., CODE OF ORDINANCES ch. 21, art. II (1965); WICHITA FALLS, TX., ZONING ORDINANCES appx. A; §6; DENTON, TX., DEVELOPMENT CODE subch. 22; see, e.g., Maguire Oil Co. v. City of Houston, 69 S.W.3d 350 (Tex. App.—Texarkana 2002, pet. denied).

See, TEX. LOC. GOV’T CODE ANN. § 42.021 et. seq. (Vernon 2003); see also, Unger, 629 S.W.2d at 812.

See, e.g., TEX. NAT. RES. CODE ANN. §93.001 and §93.007.

See, e.g., DENTON, TX., DEVELOPMENT CODE subch. 22.

TEX. NAT. RES. CODE ANN. § 81.051 (Vernon 2001).


16 TEX. ADMIN. CODE § 3.78 (2003) (Tex. R.R. Comm’n, Oil & Gas Div.).

TEX. NAT. RES. CODE ANN. § 81.0531 (Vernon 2001).

DENTON, TX., DEVELOPMENT CODE subch. 22 § 35.22.1.

DENTON, TX., DEVELOPMENT CODE subch. 22 § 35.22.4.

DENTON, TX., DEVELOPMENT CODE subch. 22 § 35.22.5.

DENTON, TX., DEVELOPMENT CODE subch. 22 § 35.22.8.

DENTON, TX., DEVELOPMENT CODE subch. 22 § 35.22.9.

Medina County Comm’s Court v. Integrity Group, Inc., 21 S.W.3d 307 (Tex. App.—San Antonio 1999, pet. denied) (stating that "a writ of mandamus will issue to compel a public official to perform a ministerial act").

Champion Builders v. City of Terrell Hills, 70 S.W.3d 221, 228 (Tex. App.—San Antonio 2001, pet. granted).

Id.; see, also, City of Lancaster v. Chambers, 883 S.W.2d 650, 654 (Tex. 1994) (stating that ministerial acts are those "where the law prescribes and defines the duties to be performed with such precision and certainty as to leave nothing to the exercise of discretion or judgment").

Id.

Id. (finding that the "construction and application of a city ordinance-necessarily required of the Board members deliberation, decision, and judgment").

City of Lancaster, 883 S.W.2d at 653; Barker v. City of Galveston, 907 S.W.2d 879 (Tex. App.—Houston [1st Dist.] 1995, writ denied).

The standard test for objective reasonableness is whether a reasonably prudent employee, under the same or similar, could have believed that his acts were justified. See, City of Lancaster, 883 S.W.2d at 656.

Champion Builders, 70 S.W.3d at 229.

Id. at 227.

Unger, 629 S.W.2d at 812.

Brookside Village v. Comeau, 633 S.W.2d 790 (Tex. 1982).

Houston v. Reyes, 527 S.W.2d 489, 494 (Tex. Civ. App.—Houston 1st Dist., 1975, writ ref’d n.r.e.).


See Palm Beach Isles Assoc. v. United States, 231 F.3d 1354, 1357 (Fed. Cir. 2000).

E. g., Palazzolo, 121 S. Ct. at 2461.


First English Evangelical Lutheran Church, 107 S. Ct. at 2388.

Simi Investment Company, Inc. v. Harris County, Texas, 236 F.3d 240, 250 (5th Cir. 2000).

Haupt, 854 S.W.2d at 911; Cowan v. Hardeman, 26 Tex. 217, 222 (1862).

Haupt, 854 S.W.2d at 912.


Id.

964 S.W.2d 922 (Tex. 1998).

Id. at 925-26.

Id. at 935.

Id.

Id.

Id. at 936.

Id. at 937.

Id. at 936.

Id. at 937.

Id. at 938.

Id. at 937-38.

Id.

Id. at 938.

TEX. NAT. RES. CODE § 92.001 (Vernon 2003).


Id.; Palazzolo, 121 S. Ct. at 2458; Lucas, 112 S. Ct. at 2886.


Palazzolo, 121 S. Ct. at 2458.

Suitum, 117 S. Ct. at 1665; Williamson County, 105 S. Ct. at 3116.

Suitum, 117 S. Ct. at 1665; Williamson County, 105 S. Ct. at 3121.

Id.; Samaad v. City of Dallas, 940 F.2d 925, 933 (5th Cir. 1991).


Mayhew, 964 S.W.2d at 926; Trail Enters, Inc. v. City of Houston, 957 S.W.2d 625, 630 (Tex. App.—Houston [14th Dist.] 1997, pet. denied).

Mayhew, 964 S.W.2d at 936.

General Servs. Comm’n v. Little-Tex Insulation Co., 39 S.W.3d 591, 598 (Tex. 2001); Steele v. City of Houston, 603 S.W.2d 786, 788-92 (Tex. 1980).

Id.; Maguire Oil.

City of Monterey, 119 S. Ct. at 1640.

Agins, 100 S. Ct. at 2140.

Haupt, 854 S.W.2d 913; Chambers-Liberty Counties Navigation Dist., 453 S.W.2d at 137.

680 S.W.2d 802 (Tex. 1984).

Id. at 804.

Id. at 804-05.

Id. at 804.

Id. at 805.

Id.


Trail Enters., Inc., 957 S.W.2d at 628; Maguire Oil, 69 S.W.3d at 356.

Trail Enters., Inc., 957 S.W.2d at 631; Maguire Oil, 69 S.W.3d at 358.

957 S.W.2d at 630.


Id. at 183.

Id.; Maguire Oil, 69 S.W.3d at 363.

Id.; Maguire Oil, 69 S.W.3d at 363.

Estate of Sharboneau, 48 S.W.3d at 183.

Id.

Id.
Maguire Oil, 69 S.W.3d at 361-63.

John Corp. v. City of Houston, 214 F.3d 573, 581 (5th Cir. 2000).

Trail Enters., Inc., 957 S.W.2d at 630.

Mayhew v. Town of Sunnyvale, 964 S.W.2d 922, 933 (Tex. 1998).

Vulcan Materials Co. v. City of Tehuacana, 238 F.3d 382, 386 (5th Cir. 2001).


Trail Enters., Inc., 957 S.W.2d at 631.


Id. at 2456.

Id. at 2462.

Id.

Id. at 2462.

Id.

Id. at 2462-63.

Town of Flower Mound v. Stafford Estates, 71 S.W.3d 18, 51 (Tex. App. – Fort Worth 2002, no pet.).
