TAKINGS LITIGATION

Compensable Regulatory Takings in Texas

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1. INTRODUCTION.

The purpose of this paper and the attached PowerPoint presentation is to summarize the view of one lawyer regarding the case to be made that municipal zoning regulations that prohibit (or effectively prohibit) oil and gas development constitute a “compensable regulatory taking” or inverse condemnation of the mineral estate under Article I, Section 17 of the Texas Constitution that provides, in relevant part, that no person’s property shall be taken, damaged or destroyed for or applied to public use without adequate compensation being made. This view is based on recent experience in the north Texas area representing clients involved in Barnett Shale gas well development. This presentation is not intended to be a comprehensive treatise on regulatory takings generally, but rather a brief and focused look at current Texas law; a starting point, so to speak, for those whose oil and gas operations are or may be coming into conflict with municipal zoning regulations. Neither is this presentation intended to address constitutional challenges to zoning regulations based on “due process” or “equal protection” claims. I leave to others more qualified, such as Professor Bruce Kramer (Maddox Professor of Law, Texas Tech University School of Law), the job of providing a broad and comprehensive look at local governmental zoning regulations and all of the constitutional challenges thereto.

This paper and presentation will address the police power of cities to regulate and prohibit oil and gas development; the “ripeness doctrine” as a jurisdictional prerequisite to any claim of a taking; the legal standard for a compensable regulatory taking (including “investment backed expectations” and “loss of all economically viable use”); the applicability of the “accommodation doctrine”; the compensation exception for “harmful and noxious uses”; claims for illegal exactions; and conclusions and recommendations.

1 I would like to acknowledge the valuable assistance of Jeff King, Misty Ventura, Martin Garza and Melissa Lindelow as well as the other Hughes & Luce lawyers with whom I work as part of the Property Rights Practice Group.

2. **JURISDICTIONAL CONTROL.**

The Texas Railroad Commission has jurisdiction over all oil and gas wells in Texas and over all persons owning or engaged in drilling or operating such oil or gas wells.\(^3\) The jurisdiction of the Railroad Commission, however, does not prevent a municipality from exercising its police power to regulate and control drilling.

In *Klepak v. Humble Oil & Refining*\(^4\), the City of Tomball adopted an ordinance that gave the city exclusive authority under its police power to regulate and control the drilling of oil and gas wells within the city, that divided the city into “drilling blocks,” that restricted drilling to one well per block, and that required a city-issued permit. Two years later Henry Klepak obtained a permit from the Railroad Commission to drill within the city on lots that were not within any of the drilling blocks designated by the ordinance. Klepak challenged the ordinance on the grounds, among others, that the Railroad Commission was the sole source of any authority to drill. The trial court dismissed the suit and the court of appeals affirmed, holding “there is no dispute - nor could there properly be under the settled law - that the Railroad Commission of Texas has authority under the statute conferring that duty upon it to regulate the production of oil and gas within this state, and to issue its permits accordingly.”\(^5\) The court continued, “the Legislature - in so delegating ... authority to the Railroad Commission - did not thereby intend to nor accomplish the repeal of the fundamental law thereof, as well as subsequently, existing, that municipalities in Texas have, under the police power, authority to regulate the drilling for and production of oil and gas within their corporate limits, when acting for the protection of their citizens and the property within their limits, looking to the preservation of good government, peace, and order therein.”\(^6\)

In *Unger v. State of Texas*\(^7\), the City of Burkburnett, a home-rule city, adopted Ordinance No. 309 that required a drilling permit within the city limits. Unger drilled an oil well without obtaining a permit and was convicted and fined for violating the ordinance. Unger appealed the conviction on the grounds, among others, that the Texas legislature authorized the Railroad Commission to regulate the oil and gas business and, therefore, that the city had no police power to prohibit it. The court of appeals upheld Unger’s conviction and held that the city had the full authority, under its police power, to regulate the drilling of oil wells within the city\(^8\) and that the ordinance was a valid exercise of such police power.\(^9\)

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\(^3\) TEX. NAT. RES. CODE ANN. §81.051 (Vernon 2001).

\(^4\) *Klepak v. Humble Oil & Refining*, 177 S.W.2d 215 (Tex.App. – Galveston 1944, writ refused w.o.m.).

\(^5\) Id at 217.

\(^6\) Id.

\(^7\) *Unger v. State*, 629 S.W. 2d 811 (Tex.App. – Fort Worth 1982, petition refused).

\(^8\) Id at 812.

\(^9\) Id at 813.
In both Klepak and Unger, the courts upheld the authority of the cities to regulate oil and gas development within their city limits; and in Unger, the court frequently referred to the city’s status as “home-rule.” These decisions raise two questions: first, does a city have the authority to regulate outside its city limits; and second, is there any distinction between the authority of a “home-rule” and “general-law” city?

The authority of a city (whether home-rule or general-law) to regulate beyond its corporate limits is open to question. If oil and gas development is regulated as part of a city’s comprehensive zoning ordinance pursuant to the authority granted by Chapter 211 of the Texas Local Government Code (Municipal Zoning Authority), then such powers are limited to the corporate limits of the city. If, however, oil and gas development is regulated as part of a city’s subdivision ordinance pursuant to the authority of Chapter 212 of the Texas Local Government Code (Municipal Regulations of Subdivisions and Property Development), then Section 212.003 allows such regulations to be extended, by ordinance, into the extraterritorial jurisdiction (“ETJ”) of the city. Consequently, the mere label given to oil and gas regulations by a city can define the area in which the city will enforce such regulations. The trend in north Texas is to include some degree of oil and gas development regulations as part of subdivision ordinances with the hope that they can be justified as merely regulating the subdivision of land. And at least one north Texas city has extended its gas regulations into its ETJ upon the authority of Section 401.002 of the Texas Local Government Code which provides, in relevant part, that a home-rule municipality may provide for the protection of and may police watersheds within its boundaries and its ETJ (the theory of the city being that gas well development represents an environmental risk to watersheds).

There are two types of cities in Texas, “home-rule” and “general-law.” Home-rule cities must have a population of 5,000 or more and a city charter that has been approved by the voters. Home-rule cities have full authority of local self-government, limited only by their charter, state law, and the Texas Constitution. General-law cities, however, have only the authority expressly granted to them by the legislature (and those necessarily implied). Both types of cities, however, have broad authority under the Texas Local Government Code to adopt ordinances. Despite the apparent emphasis of the Unger court on the fact that the City of Burkburnett was a

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10 Section 42.041 of the Texas Local Government Code defines extraterritorial jurisdiction as the unincorporated area that is contiguous to the corporate boundaries of the municipality and that is located within certain prescribed distances from those boundaries depending on the number of inhabitants within the municipality.
11 Texas Local Government Code, Section 401.002(a). A home-rule municipality may prohibit the pollution or degradation of land and may police a stream, drain, recharge feature, recharge area, or tributary that may constitute or recharge the source of water supply of any municipality.
12 Tex. Const. art. XI, Section 5; Texas Local Government Code, Section 9.001.
13 Texas Local Government Code, Section 51.072.
14 Texas Local Government Code, Section 51.012 (authority of Type A general-law cities), Section 51.032 (authority of Type B general-law cities), Section 51.051 (authority of Type C general-law cities).
home-rule city, there does not appear to be any reason to doubt the authority of both general-law and home-rule cities to regulate oil and gas development within their corporate limits.

3. MUNICIPAL POLICE POWER.

I believe it is well settled that Texas cities have the authority, under their police power, not only to regulate oil and gas development but to totally prohibit such development. The two cases most often cited (particularly by attorneys representing cities) for this proposition are *Unger v. State*\(^{15}\) and *Helton v. City of Burk Burnett*.\(^{16}\) Neither of these cases, however, address whether the ordinances complained of in *Unger* and *Helton* constitute a taking.

In *Helton v. City of Burk Burnett*, Robert Helton wanted to drill an oil well within a relatively undeveloped portion of the City. He refused, however, to obtain a permit as required by City Ordinance No. 375 (which also charged a fee of $250.00, required a surety bond and insurance, and prohibited wells within 50 feet, and tank batteries within 100 feet, of a residence or commercial structure unless approved by the owner). Helton asserted that the ordinance was unconstitutional on its face and as applied to his drilling operations because it gave the city the power to totally prohibit drilling. The ordinance provided, in relevant part, that the City Commissioners had the authority to refuse any permit to drill a well "where by reason of such particular location and the character and value of the permanent improvements already erected on or adjacent to the particular location in question, for school, hospital, park, civic purposes, health reasons, safety reasons, or any of them where the drilling of such wells on such particular location might be injurious or be a disadvantage to the city or its inhabitants as a whole or to a substantial number of its inhabitants or would not promote orderly growth and development to the city."\(^{17}\) The court rejected Helton’s argument finding that the ordinance "neither prohibits the drilling of oil and gas wells nor their maintenance and operation."\(^{18}\) The court concluded that "the ordinance merely provided rules facilitating the orderly and harmonious development of both oil exploration and city growth."\(^{19}\) But even if there had been a deprivation of Helton’s rights, the court held that "the deprivation of individual rights cannot prevent the operation of the police power, once it is shown that its exercise is within the meaning of due process of law."\(^{20}\)

\(^{15}\) *Supra.*

\(^{16}\) *Helton v. City of Burk Burnett*, 619 S.W.2d 23 (Tex.App. – Fort Worth 1981, writ refused, n.r.e.).

\(^{17}\) *Id* at 24.

\(^{18}\) *Id*.

\(^{19}\) *Id*.

\(^{20}\) *Id.*
In *Unger*, City Ordinance No. 309 was challenged by Unger on the grounds, among others, that the city had no police power to prohibit drilling. The city asserted that under its police power it had full authority not only to regulate but also to prohibit the drilling of wells within the city.\(^{21}\) The court of appeals agreed with the city and held that the ordinance was a valid exercise of the police power of the city.\(^{22}\)

*Unger* and *Helton* continue to be cited by city attorneys for the proposition that their cities can regulate (and even prohibit) oil and gas development without having to compensate the mineral owner. Clearly, however, neither case stands for this proposition. The fact that a city ordinance regulating or prohibiting oil and gas development constitutes a valid exercises of the police power does not defeat a claim that the ordinance constitutes a taking or inverse condemnation. The Texas Supreme Court has determined that one’s property may not be taken without compensation even in the exercise of police power.\(^{23}\)

4. **RIPENESS.**

Texas courts will not exercise jurisdiction over a regulatory takings claim unless it is “ripe” for review. In *Mayhew v. Town of Sunnyvale*\(^{24}\), landowners challenged the town’s refusal to rezone their property on the grounds that the refusal constituted a regulatory taking. The Court stated “ripeness is an element of subject matter jurisdiction.”\(^{25}\) In order for a regulatory takings claim to be ripe, “there must be a final decision regarding the application of the regulations to the property at issue.”\(^{26}\) A final decision “usually requires both a rejected development plan and the denial of a variance from the controlling regulations.”\(^{27}\) The term variance “is not definitive or talismanic; it encompasses other types of permits or actions [that] are available and could provide similar relief. The variance requirement is therefore applied flexibly in order to serve its purpose of giving the governmental unit an opportunity to grant different forms of relief or make policy decisions which might abate the alleged taking.”\(^{28}\)

5. **COMPENSABLE REGULATORY TAKINGS.**

The standard for compensable regulatory takings in Texas is set forth in detail by the Texas Supreme Court in *Mayhew*. A compensable regulatory taking can occur (i) if a

\(^{21}\) *Unger* at 812.

\(^{22}\) *Id*.

\(^{23}\) *City of Austin v. Teague*, 570 S.W. 2d 389 (Tex. 1978).

\(^{24}\) *Mayhew v. Town of Sunnyvale*, 964 S.W. 2d 922 (Tex. 1998).

\(^{25}\) *Id* at 928.

\(^{26}\) *Id* at 929.

\(^{27}\) *Id*.

\(^{28}\) *Id* at 930.
regulation does not substantially advance a legitimate governmental purpose, (ii) if the regulation denies the owner all economically viable use of the property, or (iii) if the regulation unreasonably interferes with the owner’s use and enjoyment of the property.\textsuperscript{29}

A compensable regulatory taking will occur if a property regulation does not substantially advance a legitimate governmental interest. The Court in \textit{Mayhew} gave examples of the broad range of governmental interests which may be advanced by regulations, including “protecting residents from the ill effects of urbanization,” “enhancing the quality of life,” and “protecting a beach system for recreation, tourism, and public health.”\textsuperscript{30} “The standard requires that the ordinance substantially advance the legitimate state interest sought to be achieved rather than merely analyzing whether the government could rationally have decided that the measure achieved a legitimate objective.”\textsuperscript{31} The application of this standard to municipal oil and gas regulations makes for an interesting academic discussion, but the probability that a regulation will fail to meet the “substantially advance” standard is remote.

A compensable regulatory taking can also occur when governmental restrictions deny landowners all economically viable use of their property. According to the Court in \textit{Mayhew}, “a restriction denies the landowner all economically viable use of the property or totally destroys the value of the property if the restriction renders the property worthless.”\textsuperscript{32} “Determining whether all economically viable use of a property has been denied entails a relatively simple analysis of whether value remains in the property after the governmental action.”\textsuperscript{33}

A compensable regulatory taking can also occur when governmental restrictions unreasonably interfere with the landowner’s use and enjoyment of his property.\textsuperscript{34} According to the Court in \textit{Mayhew}, there are two factors to be considered in determining whether an unreasonable interference has occurred. These factors are “the economic impact of the regulation and the extent to which the regulation interferes with distinct investment-backed expectations”\textsuperscript{35}. The first factor, economic impact, “merely compares the value that has been taken from the property with the value that remains in the property,” and “[t]he loss of anticipated gains or potential future profits is not usually considered in analyzing this factor.”\textsuperscript{36} The second factor, the investment-backed expectations of the owner, is primarily based on “the existing and permitted

\begin{itemize}
\item \textsuperscript{29} \textit{Mayhew} at 935.
\item \textsuperscript{30} Id at 934.
\item \textsuperscript{31} Id.
\item \textsuperscript{32} Id at 935.
\item \textsuperscript{33} Id.
\item \textsuperscript{34} Mayhew at 935, 936.
\item \textsuperscript{35} Id at 935.
\item \textsuperscript{36} Id at 936.
\end{itemize}
uses of the property. [T]he courts have traditionally looked to the existing use of property as a basis for determining the extent of interference with the owner’s primary expectation concerning the use of the parcel.”37

6. UNREASONABLE INTERFERENCE WITH USE AND ENJOYMENT.

The definitive case regarding “unreasonable interference with use and enjoyment” is Sheffield v. City of Glenn Heights 38 decided by the Texas Supreme Court in March 2004.

In 1986 the City of Glenn Heights, Texas approved a planned development zoning district (“PD-10”) covering approximately 236 acres and providing for a minimum single-family lot size of 6,500 square feet. The first phase of PD-10 (consisting of approximately 43 acres) was developed. In the mid 1990’s, the city adopted a new land use plan and zoning regulations, one purpose of which was to increase minimum residential lot sizes; however, the city did not rezone PD-10 or any of the other 13 planned development zoning districts in the city.

In July 1996, Gary Sheffield contracted to purchase the undeveloped land within PD-10. Over the next six months, he investigated the applicable city regulations and restrictions and met with the City Secretary, City Manager, Mayor, and members of the City Council. He advised them of his plans to develop under the standards set forth in PD-10, asked whether there were any plans to change the PD-10 zoning, and requested that he receive notice of any proposed zoning changes. None of the city representatives expressed any objection or reservation to his development plans.

During the same six-month period during which Gary Sheffield was conducting his due diligence and having various meetings with city representatives, those city representatives were also meeting behind closed doors to discuss a development moratorium and downzoning of the PD-10 property from 6,500 to 12,000 square foot lots. Sheffield was not told of these meetings for fear that he would take action to vest his rights by the filing of a preliminary plat. Sheffield wrote the city just days prior to his scheduled closing, again requesting that he be advised of any plans to rezone PD-10. Three days after the closing the City Council met in executive session to discuss the moratorium and downzoning, and three days after the executive session the City Council imposed a moratorium which prevented the development of PD-10.

Shortly after the moratorium was imposed, the city’s consultants presented a plan to downzone PD-10 to 12,000 square foot lots. Seventeen months later (during

37 Id.
38 Sheffield v. Glenn Heights, Texas Supreme Court No. 02-0033, March 5, 2004.
which time the city continued in effect the moratorium, 11 days of which were at the
direction of the City Manager with no City Council authorization) PD-10 was
downzoned.

The evidence at trial established that the downzoning reduced the value of the
PD-10 property by 37.5% – 50%, and the trial court rendered judgment for Sheffield for
$485,000.00 for downzoning damages. The court of appeals affirmed the award of
damages for the downzoning and remanded the case for a determination of damages on
Sheffield’s moratorium takings claim. The Supreme Court, however, reversed and held
that Sheffield could not recover damages for either the downzoning or the moratorium.

The Supreme Court acknowledged that the impact of the downzoning was
“ unquestionably severe,” however “it did not approach a taking.” The Court
acknowledged the diminution in value, but was more influenced by the fact that the
property, even after the downzoning, was worth more than Sheffield had paid for it.
“It is more important that, according to the jury verdict, the property was still worth
four times what it cost, despite the rezoning, because this makes the impact of the
rezoning very unlike a taking.” The Court found that “Sheffield’s expectations were
certainly reasonable … based in large part, and legitimately so, on its efforts to deal
with the city.… Sheffield met with city officials … and … its reliance on representations
made in those meetings was in good faith.… [T]he moratorium and rezoning blindsided
Sheffield, just as the city intended.… We do not agree that the rezoning went too far,
approaching a taking. Rather, we think, that the city’s zoning decisions, apart from the
faulty way they were reached, were not materially different from zoning decisions
made by cities every day.”

If the facts in Sheffield do not constitute an unreasonable interference with the use
and enjoyment of the PD-10 property by Gary Sheffield (meeting both the test of
economic impact and interference with investment-backed expectations), then it is
difficult for me to imagine a set of facts that would. The kindest characterization of the
officials and employees of Glenn Heights is that they “intentionally mislead” Gary
Sheffield. Clearly the Supreme Court (although labeling such conduct “faulty”)
believes such conduct is representative of how cities behave every day (which is not the
case and which is an insult to those hundreds of city officials and employees who, day
in and day out, serve in good faith and do not “mislead” their citizens). So, developers
beware, city officials and employees apparently have no duty to answer honestly

39 Sheffield at pg. 8.
40 In Mayhew, supra at 936, the Supreme Court stated that in determining whether the government has unreasonably
interfered with a landowner’s right to use and enjoy property, “[t]he loss of anticipated gains or potential future
profits is not usually considered.…”
41 Id at pg. 8.
42 Id at pg. 9.
questions from their citizens. I believe the concept of a compensable taking based on unreasonable interference with use and enjoyment is dead (or at least on life support) in Texas. I also believe that the seal of approval given by the Supreme Court to the “faulty” conduct of Glenn Heights officials and employees will embolden other cities to behave similarly. Surely “misleading” citizens like Gary Sheffield cannot be within the scope of authority of elected officials and public employees; in which case those officials and employees should not be shielded from personal liability based on a claim of immunity.

7. DENIAL OF ALL ECONOMICALLY VIABLE USE.

In light of the ease with which the “substantially advance” test can be met, and in light of the Supreme Court’s holding in *Sheffield v. Glenn Heights*, I believe that the only compensable regulatory taking left in Texas is one based on a claim that the regulation denies the owner all economically viable use of the property. Based on *Mayhew*, this means that the owner must establish that the regulation totally destroys the value of the property and renders it worthless.\(^{43}\)

Every city with which I have dealt (and including staff and attorneys for the Texas Municipal League) characterizes oil and gas development as just another use of land, and a surface use at that. Their attorneys and staffs believe (or at least take the position) that the “takings” analysis applicable to the regulation of oil and gas development (including the prohibition of such development) is no different than the takings analysis applicable to the regulation (including prohibition) of any other uses. In other words, the right to explore for and produce minerals is no different than the right to develop a parcel of property for single-family, office, or retail purposes. Oil and gas development is treated as just one “stick” in the “bundle of sticks” that constitute the universe of uses to which a parcel of property may be put. And if they are right, then the regulation, or even prohibition, of oil and gas development will never destroy the value of the regulated property and render it worthless because there will always remain some permitted use(s) that will have some value. But I believe they are wrong because in Texas the exploration for and production of oil and gas is not, and has never been, just another “use” to which the surface of land can be put.

It is clear in Texas that an owner has absolute title to the oil and gas under his land, that such oil and gas may be owned separately, and that the owner is entitled to all remedies against anyone who would destroy the value of such minerals. The Texas Supreme Court in *Elliff v. Texon Drilling*\(^{44}\) stated that in Texas the landowner is regarded as having absolute title in severalty to the oil and gas in place beneath his

\(^{43}\) *Mayhew*, supra at 936.

\(^{44}\) Elliff v. Texon Drilling, 210 S.W. 2d 558 (Tex. 1948).
land. The only qualification of that rule is that it must be considered in connection with the law of capture and is subject to police regulations. The oil and gas beneath the soil are considered a part of the realty. Each owner of land owns separately, distinctly and exclusively all the oil and gas under his land and is accorded the usual remedies against trespassers who appropriate the minerals or destroy their market value.

It is equally clear in Texas that the mineral estate is not only a separate estate in real property, but the dominant estate as compared with the surface estate. There are two Texas Supreme Court cases that are repeatedly cited for this proposition. In 1862 the Supreme Court, in *Cowan v. Hardeman*, held that it is a well established doctrine from the earliest days of the common law, that the right to the minerals thus reserved carries with it the right to enter, dig and carry them away, and all other such incidents thereto as are necessary to be used for getting and enjoying them.

In 1943 the Supreme Court, in *Harris v. Currie*, held that when the mineral estate in land has been severed from the balance of the land there come into existence two separate and distinct estates, each having all the incidents and attributes of an estate in land. The mere grant or reservation of minerals in place does not vest the grantee or reserver with any title to the surface. In spite of this, the grant or reservation of minerals carries with it, as a necessary appurtenance thereto, the right to use so much of the surface as may be necessary to enforce and enjoy the mineral estate conveyed or reserved. This is because a grant or reservation of minerals would be wholly worthless if the grantee or reserver could not enter upon the land in order to explore for and extract the minerals granted or reserved.

Although the existence and dominance of a separate mineral estate in Texas is clear, I am aware of no Texas case that has held a municipal regulation prohibiting (or effectively prohibiting) oil and gas development constitutes a compensable regulatory taking based on a claim that the regulation denied the mineral owner or lessee all economically viable use of the mineral interest. There are, however, three cases (*Trail Enterprises I*[^52], *Trail Enterprises II*[^53], and *Maguire Oil*[^54]) that have involved such a claim;

however, none of them were decided on the merits. All three cases arise out of the City of Houston’s regulations prohibiting drilling within a watershed near Lake Houston, the city’s main source of drinking water.

In *Trail Enterprises I*, the lessee challenged as a taking of its property a City of Houston ordinance adopted in 1967 that prohibited drilling near Lake Houston and in the city’s ETJ. In 1994, the lessee requested permission to drill in the form of a “variance”; however, the ordinance did not provide for a variance and the city refused to hear the request. The Houston Court of Appeals held that the ordinance was a valid exercise of the city’s police power and that the lessee’s takings claim was barred by the 10-year statute of limitations that started to run when the ordinance was adopted (and not when the lessee attempted to seek a variance which the city refused to hear). Although the Houston Court of Appeals did not reach the merits of the takings claim, extensive dicta in the case clearly suggests that the court believed that the drilling prohibition was an exercise of the city’s police power (in this case to protect the quality of the city’s drinking water) and, as such, would not result in a compensable taking. The court stated (or quoted from other opinions) that: (a) all property is held subject to the valid exercise of the police power, and that a municipality is not required to compensate a landowner for losses resulting therefrom; (b) governmental regulations, by definition, involve the adjustment of rights for the public good; (c) often this adjustment curtails some potential for the use or economic exploitation of private property; (d) to require compensation in all such circumstances would effectively compel the government to regulate by purchase; (e) [quoting Justice Holmes] government hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law; (f) [quoting Justice Holmes] as long recognized some values are enjoyed under an implied limitation and must yield to the police power; and (g) when a government regulates a right, prohibits some noxious use, or if the public need outweighs the private loss, compensation should not be allowed.

In *Trail Enterprises II*, the City of Houston annexed a portion of the lessee’s 985-acre leasehold into the corporate limits and then adopted a new ordinance prohibiting drilling within the city limits (which ordinance again did not provide for a variance). The lessee challenged the new ordinance as a taking. The court held that the lessee was collaterally estopped (based on *Trail Enterprises I*) from litigating whether the new ordinance serves legitimate state interests; that lessee was not estopped from litigating

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55 *Trail Enterprises I* at 630.
56 Id.
57 Id.
58 Id.
59 Id at 630, 631.
60 Id at 631.
61 *Trail Enterprises I* at 631.
whether the new ordinance resulted in a taking; and that issues of fact precluded summary judgment on whether the new ordinance denied the lessee all economically viable use of its property\(^{62}\) (the lessee’s expert testified that no drilling could occur anywhere within its 985-acre lease without violating the new ordinance; and the city’s expert testified that drilling could occur within the 985-acre lease without violating the ordinance). The court did not repeat or even refer to its extensive dicta from *Trail Enterprises I* suggesting that the lessee is not entitled to any compensation because the regulation is an exercise of the city’s police power.

In *Maguire Oil*, the City of Houston issued to Maguire Oil (on May 7, 1991) a permit to drill a well within the city limits. On May 22, 1991 the permit was ratified and modified by the city. On August 5, 1991, the permit was extended. On October 31, 1991 the city issued a stop work order. Concurrently with or shortly after the stop work order, the city sent a letter revoking the permit based on the City’s 1967 ordinance (which prohibited drilling within the city’s ETJ and within 1,000 feet of Lake Houston). During the period between May 7\(^{th}\) and October 31\(^{st}\) Maguire spent approximately $190,000.00 preparing the land, signing a drilling contract, purchasing leases, and moving equipment onto the drill site. Maguire filed suit alleging, among other claims, that the city’s revocation of the drilling permit constituted a taking of its mineral interests and that Maguire was entitled to recover the value of the minerals in place. The city claimed that Maguire’s takings claim was barred by the 10-year statute of limitations and that there was no evidence that Maguire has suffered any economic loss. The trial court granted the city’s motion for summary judgment on both claims (and others as well). The Texarkana Court of Appeals reversed, holding that both involved genuine issues of material fact. Although this case offers little guidance on Maguire’s takings claim, it does provide a very important precedent with regard to the measure of damages. The court recognized “the primacy of comparable sales evidence to determine market value of property taken. However, when comparable sales figures are lacking or the method is otherwise inadequate as a measure of fair market value, other methods of determining market value can be applied.”\(^{63}\) In this case, Maguire’s expert testified (based on geological reports and sample data) that he estimated there was present and recoverable under the Maguire lease 47,304,000 mcf of gas having a potential value of at least $33,586,000.00.\(^{64}\) Maguire’s expert also calculated the value of the gas, using a discounted cash flow analysis, to be $42,377,000.00.\(^{65}\) Maguire’s expert admitted that “he had no opinion concerning the price a willing buyer would pay a willing seller for the gas. In fact, he expressed doubt that a willing buyer would pay $33,586,000.00 for the mineral prospect.”\(^{66}\) The court agreed that “evidence of

\(^{62}\) *Trail Enterprises II* at pg. 5.
\(^{63}\) *Maguire Oil* at 363.
\(^{64}\) *Id* at 361.
\(^{65}\) *Id*.
\(^{66}\) *Id.*
comparable sales of mineral interests would provide a superior measure of market value, given that the existence of recoverable gas under Maguire’s lease is as yet unproven.” The court continued, that “[i]f competent comparable sales evidence exists, the parties will have the opportunity to present it at trial and the court must admit it to the exclusion of any other valuation evidence.”

8. MID-GULF AND VULCAN MATERIALS – OPPOSING VIEWS.

Although controlling Texas law on the subject of compensable regulatory takings of mineral interests based on a denial of all economically viable use remains to be written, there are many cases from which we can extrapolate. I have chosen two that I find interesting and that represent opposing views: Mid Gulf v. Bishop and Vulcan Materials v. City of Tehuacana. I do not believe Mid Gulf is or will be the law in Texas, and I hope Vulcan Materials (or a close version thereof) is or will be the law.

In the first case, Mid Gulf, Inc. entered into a lease with the Leavenworth Country Club in August of 1987. Shortly thereafter, Mid Gulf applied to the City of Lansing, Kansas, for a conditional use permit (“CUP”) to drill a well. Two days later the city imposed a drilling moratorium, and on December 13, 1987, adopted a drilling ordinance that, among other things, required a $100,000.00 surety bond, a $2,000,000.00 liability policy, prohibited any tank battery, imposed noise limitations, and limited evening activities. In August 1988 the city denied Mid Gulf’s CUP application. Mid Gulf filed suit, after which the city approved a CUP; however, by the time of the approval, Mid Gulf’s lease had expired. Mid Gulf filed suit again alleging that the requirements of the ordinance were unreasonable, that the ordinance was passed with the intent to prohibit drilling, and that the conditions imposed by the CUP were strict beyond reason and logic and served to make drilling economically unfeasible. The court conceded that there was evidence indicating the restrictions imposed by the ordinance and CUP were actually designed to foreclose, indirectly, drilling for oil and gas despite an ordinance which appeared to permit such activities. The court held that there were genuine issues of fact with respect to whether the city’s regulations were reasonably necessary to protect the public health, safety, etc.; however, the court also held that the mere fact that city’s ordinance may have deprived Mid Gulf of any economically viable use of its leasehold interest was not sufficient to constitute a taking. The parcel must be looked at as a whole, including Leavenworth Country Club.
Club’s surface rights.\textsuperscript{74} The court cited the United States Supreme Court in \textit{Penn Central}\textsuperscript{75} as follows: “[T]aking jurisprudence does not divide a single parcel into discrete segments and attempt to determine whether rights in a particular segment have been entirely abrogated. In deciding whether a governmental action has affected a taking, this Court focuses rather both on the character of the action and on the nature and extent of the interference with rights in the parcel as a whole.”\textsuperscript{76} The court observed that the surface rights retained by the country club, which were not affected by the regulations, retained their value. Based on its review of such federal jurisprudence, the court concluded: “It is apparent that the surface rights retained by Leavenworth County Club, which are not affected by the regulations, retain their value. When looked at as a whole, the regulations imposed by the city do not destroy all economic value of the property.”\textsuperscript{77}

In the second case, Vulcan Materials Company acquired a lease in October 1997 for the sole purpose of mining limestone from approximately 298 acres that included multiple, contiguous acres. Four of the tracts (Tracts 4-7), totaling approximately 48 acres, were located within the corporate limits of the City of Tehuacana. Prior to its acquisition, Vulcan’s lawyer met with the Mayor and City Secretary who advised him that no ordinance existed, nor were any in the planning stages, that would prevent Vulcan from pursuing its quarrying activities. During October and November 1998, Vulcan removed overburden, constructed berms, prepared the quarry floor, and conducted test shots (i.e., blasting). On December 8, 1998, after holding public hearings at which citizens complained about Vulcan’s activities, the city passed an ordinance prohibiting mining within the city limits. On December 15, 1998, Vulcan filed suit alleging that the ordinance constituted a taking of its leasehold interest. The district court granted summary judgment for the city. The district court held, as a matter of law, that the ordinance substantially advanced a legitimate state interest.\textsuperscript{78} The district court further held that the activity regulated by the ordinance constituted a nuisance and, therefore, was not a recognized property right; but that even if the ordinance did regulate a recognized property right, the district court held that “a taking under Texas law would not occur because Vulcan has not been deprived of all economically viable use of its property. Only a small portion of its property is affected by the ordinance, and the property still has an economically viable use.”\textsuperscript{79} The 5\textsuperscript{th} Circuit Court of Appeals vacated the district court’s grant of summary judgment and remanded the case. The court of appeals stated “it is simply undeniable that the ordinance specifically was adopted to completely prohibit Vulcan from engaging in mining of Tracts 4-7, and

\textsuperscript{74} Id.
\textsuperscript{76} \textit{Mid Gulf} at 1214.
\textsuperscript{77} Id.
\textsuperscript{78} Id.
\textsuperscript{79} \textit{Vulcan Materials} at 7.
that the only right possessed by Vulcan in Tracts 4-7 was the right to mine limestone.”

The court stated that “[g]iven the facts of this case and the limited nature of Vulcan’s property interest, i.e., a lease for the sole purpose of mining limestone, it is clear that the ‘denial of all economically viable use’ inquiry will be dispositive .... In resolving whether value remains in Vulcan’s lease, we must first examine which limestone mining rights are relevant to this determination – all of Vulcan’s leasehold interests [298 acres] or only Tracts 4-7 [48 acres].”

The district court held that the relevant parcel was not limited to the city-regulated 48 acres but included Vulcan’s entire 298-acre leasehold (including the 250 acres outside the city limits). The court of appeals noted that “[n]either party has cited a Texas case directly on point and we therefore must make an ‘Erie’ guess and follow the rule that we conclude the Texas Supreme Court would adopt.”

The court held “[i]ndeed, it appears self-evident that when a regulator exercises its regulatory jurisdiction to the fullest extent possible – stripping all value from the property within its reach – it has acted categorically – i.e., absolute or unqualified .... Furthermore, it would seem incongruous to say that when the regulating body has ‘seized’ through regulation all value possessed by the owner it has acted non-categorically; instead, when the regulating body takes all that the owner possesses there is perforce a categorical, not partial, taking by that body. Accordingly, we hold that the relevant parcel in this case is Vulcan’s leasehold interest on the property within the city limits – Tracts 4-7. In sum, the only property interest possessed by Vulcan is the right to mine limestone on the land. Further, the only portion of this property interest that is relevant to our takings analysis is the quarrying right within the city. Finally, .... we find that the ordinance effectively prohibits all mining of limestone on Tracts 4-7. Consequently, the ordinance deprives Vulcan of all value of its property interest – quarrying rights – in the relevant parcel – Tracts 4-7. We thus hold that the ordinance constitutes a categorical taking, which renders Vulcan’s relevant leasehold interest valueless.”

The court did, however, remand the case for a trial on whether Vulcan’s proposed operation of the quarry on Tracts 4-7 constituted a nuisance under Texas law.

9. INTERFERENCE WITH SURFACE USE.

A related, but perhaps somewhat different, line of cases provides additional authority for the view that municipal zoning regulations that prevent drilling deny all economically beneficial uses of the mineral estate. It is well settled that the grant or reservation of minerals would be wholly worthless if the grantee or reserver could not enter upon the land in order to explore for and extract the minerals granted or reserved.

80 Id at 13.
81 Id.
82 Id at 14.
83 Vulcan Materials at 18,19.
My favorite example of these cases is *Chambers-Liberty Counties Navigation District v. Banta.*\(^84\) In *Chambers-Liberty* David Banta owned a 7.6-acre tract, including both the surface and mineral estates. The navigation district condemned the tract for redevelopment (including docks, warehouses and railroad extensions). The condemnation reserved to Banta "all right, title, and interest in and to oil, gas, and other minerals in and under and that may be produced from said land, together with the right of ingress and egress in, over and upon said land for the purpose of or incidental to the exploration, development, production and transportation of such oil, gas and other minerals."\(^85\) The trial court awarded Banta damages for the surface but not for the mineral estate. The court of appeals reversed and held that the trial court's finding of no damages to the mineral estate was contrary to the great weight and preponderance of the evidence (based on expert testimony that if the surface were covered with structures so that a drilling rig could not get onto the lease, then the underlying minerals would have no value; or if the surface were used by the condemnor in such a way as to necessitate the drilling of a directional well, then the value of the minerals would be lowered because of the additional costs involved in directional drilling).\(^86\) The Supreme Court reversed, holding that "in condemnation proceedings wherein the surface and mineral estates are severed and the mineral estate is reserved unto condemnees together with the common law right to use the surface estate, such mineral estate is the dominant estate and condemnees' common law right to use the surface estate has superiority and priority over any purposes for which condemnor desires to use the surface. So long as condemnees possess their common law right to the reasonable use of the surface estate, as a matter of law there is no damage to the dominant mineral estate."\(^87\) The Supreme Court left open, however, the possibility that future "interference" by the condemnor with the condemnees' use of the surface could result in a taking of the mineral estate.

"If condemnor later interferes with condemnees' exercise of such common law right without condemnation proceedings then such interference will constitute a second taking by inverse condemnation. However, until there is such a second taking condemnor should not be required to pay compensation for an interest which has not yet been taken."\(^88\) Interference with the condemnees reserved mineral rights could take many forms, including zoning the surface to prohibit drilling. Perhaps the interference could take the form of the city approving building permits for the re-development (i.e., docks, warehouses and railroad extensions) for which the surface was condemned. It seems inevitable that at some point the prediction of the appellate court come true; whereupon the value of the minerals will indeed be rendered worthless and a taking


\(^{85}\) *Id* at 136.

\(^{86}\) *Id*.

\(^{87}\) *Chambers-Liberty* at 137.

\(^{88}\) *Id*.
will have occurred. And when that occurs, will the condemnor then be required to pay compensation for the interest taken?

10. **ACCOMMODATION DOCTRINE.**

    As noted above, it is a well established doctrine in Texas that the right to minerals carries with it the right to enter and extract them because a grant or reservation of minerals would be wholly worthless if the grantee or reserver could not enter upon the land in order to explore and extract the minerals granted or reserved. Although the mineral estate is clearly the dominant estate, the Texas Supreme Court, in *Getty Oil Co. v. Jones*\(^89\), held that the rights implied in favor of the mineral estate are to be exercised with due regard for the rights of the surface owner (i.e., the “accommodation doctrine”). If the mineral owner has but one means of surface use by which to produce the minerals, then the mineral owner has the right to pursue that use regardless of surface damages.\(^90\) If, however, the mineral owner has reasonable alternative uses of the surface, then the mineral owner must use the alternative that allows continued use of the surface by the owner.\(^91\) The surface owner has the burden of proof to show that the use of the surface by the mineral owner is not reasonably necessary and that there are alternatives based on established practices in the industry.\(^92\)

    The Supreme Court applied the “alternative means” or “accommodation doctrine” of *Getty Oil* to governmental entities in *Haupt, Inc. v. Tarrant County Water Control and Improvement District Number One*.\(^93\) Frances, Lillian and James owned the mineral estate to an 80-acre tract and had executed leases with Bar JB and Haupt. The District condemned the surface estate for the creation of Richland Chambers Reservoir, and when the reservoir filled, it inundated all but 12 acres. Bar JB attempted to drill on the inundated portion of the tract, but the water district obtained a temporary injunction prohibiting such drilling. Haupt unsuccessfully attempted to drill a directional well on the remaining 12 acres. The mineral owners and lessees sued the water district alleging an inverse condemnation resulting from the taking of their right of access to the minerals. The trial court held that no taking had occurred with respect to the mineral leases of Bar JB or Haupt. The court of appeals reversed and rendered judgment that an inverse condemnation has occurred as to all mineral owners and lessees and remanded the case to the district court for a trial on damages. The court of

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\(^{89}\) *Getty Oil Co. v. Jones*, 470 S.W. 2d 618 (1971).

\(^{90}\) *Id* at 622.

\(^{91}\) *Id*.

\(^{92}\) *Id*.

\(^{93}\) *Haupt, Inc. v. Tarrant County Water Control and Improvement District Number One*, 870 S.W. 2d 350 (Tex. 1993).
appeals concluded that a partial but permanent restriction of access to the minerals had occurred. The water district appealed asserting that the competing interests of the surface and mineral owners could not be analyzed without considering the accommodation doctrine. The Texas Supreme Court agreed stating “the question in this oil and gas case is whether the accommodation doctrine … should be applied in determining whether inverse condemnation of a mineral estate has occurred when a governmental entity that owns the surface estate restricts the use of the surface by the mineral owner and lessee.” The Court remanded the case to the court of appeals for a “reconsideration of the factual sufficiency of the evidence to support the trial court’s finding of access and the deemed finding of reasonableness in light of the accommodation doctrine.” The Court ended its opinion as follows: “The evidence may indicate that surface drilling is the only manner of use of the surface whereby the minerals can be reasonably be produced. In that event, the lessee has the right to pursue this use under the accommodation doctrine. If the Water District by its use of the surface has prevented this one manner of surface use by the mineral owner in order to protect the fresh water supply, then inverse condemnation of the mineral estates has occurred, even under the accommodation doctrine.”

11. HARMFUL OR NOXIOUS USES – NO PROTECTED PROPERTY RIGHT.

When a regulation is designed to prevent “harmful or noxious uses” of property akin to public nuisances, federal law provides that no compensation is owing under a takings claim regardless of the effect of the regulation on the value of the property. No compensation is owed if the regulation simply “makes explicit what already inheres in the title itself, in the restrictions that background principles of the state’s law of property and nuisance already place upon land ownership.” If the regulated activity is a nuisance at common law, the owner simply does not have a protected property right to the activity. This paper assumes that Texas courts would reach a similar result.

Texas cities have the statutory authority under the Texas Local Government Code to regulate nuisances. Type A general-law cities have the authority, within their corporate limits, to “define and declare what constitutes a nuisance and authorize and direct the summary abatement of the nuisance.” Type B general-law cities have the authority to “prevent to the extent practicable any nuisance.” Home-rule cities

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94 Id at 913.
95 Id.
96 Id.
98 Id at 2888.
99 Texas Local Government Code, Chapter 217, Municipal Regulation of Nuisances and Disorderly Conduct.
100 Texas Local Government Code, Section 217.002.
101 Texas Local Government Code, Section 217.022.
have the authority to define and prohibit any nuisance within the city and within 5,000 feet outside the city limits and may enforce all ordinances necessary to prevent and summarily abate and remove a nuisance. Cities cannot, however, merely declare (by the adoption of an ordinance) that an activity is a nuisance unless the activity is a nuisance at common law or a nuisance per se. A nuisance per se is an activity that is a nuisance under all circumstances; while a nuisance in fact depends on the circumstances.

To constitute a nuisance a condition must substantially interfere with a person’s use and enjoyment of land by causing unreasonable discomfort or annoyance to the user’s sensibilities. A nuisance which impairs the comfortable enjoyment of real property may give rise to damages for “annoyance and discomfiture.” Actionable nuisance is broken into three categories: negligent invasion of another’s interests; intentional invasion of another’s interests; or other conduct, culpable because abnormal and out of place in its surroundings, that invades another’s interests.

At least one Texas court has held that drilling an oil well is not a nuisance per se and, based on the specific facts in the case, was not a nuisance in fact. In *Domengeaux v. Kirkwood Company*, Kirkwood drilled an oil well approximately 60 feet from tourist facilities operated by Domengeaux. Drilling continued 24 hours a day for 20 days. Domengeaux claimed that the drilling was a nuisance that caused its tenants to vacate the facilities because of noise, fumes, light, and vibration. The trial court filed a conclusion of law that drilling was not a nuisance per se and (as corrected by the court of appeals) a finding of fact that the drilling was not a nuisance in fact. The court of appeals agreed with the trial court’s conclusion of law, calling it a “correct legal proposition.” The court of appeals further held that the trial court’s finding of fact was supported by evidence that the drilling was operated carefully and as quietly as possible and that steps had been taken to reduce noise.

The application of the “harmful or noxious use” analysis to a takings claim is well illustrated by the 5th Circuit’s opinion in *Vulcan Materials*. The City of Tehuacana’s ordinance prohibiting limestone mining was adopted after public hearings.

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102 Texas Local Government Code, Section 217.042.
103 Id.
104 City of Lucas v. North Texas Municipal Water District, 724 S.W. 2d 811 (Tex.App. – Dallas 1986, writ ref’d n.r.e.).
105 City of Sundown v. Schewmake, 691 S.W. 2d 57 (Tex.App. – Amarillo 1985, no writ).
106 City of Tyler v. Likes, 962 S.W. 2d 489 (Tex. 1997).
107 Id at 504.
108 Id at 503.
110 Id at 749.
111 Id.
112 Supra.
during which citizens testified that the test shots conducted by Vulcan made their houses shake, lifted furniture off the floor, jostled people, created noise, dust, smoke, and fear, caused wells to dry up, and tossed a 500 pound boulder into one person’s yard. The 5th Circuit remanded the case to the district court for a trial on whether Vulcan’s proposed quarry operation on the tracts within the city limits would constitute a nuisance under Texas law.\textsuperscript{113}

12. ILLEGAL EXACTIONS.

Cities may impose conditions upon the issuance of drilling permits which do not deny all economically viable use but which, nevertheless, constitute a “compensable taking.” For example, one city in the north Texas area recently conditioned the issuance of a gas well drilling permit upon payment of the city’s standard parkland dedication fee. The city calculated the fee as if the entire mineral leasehold were a “commercial” development. Consequently, the city required, as a condition to issuing the permit, the payment of a parkland dedication fee in the amount of $1,000 for each acre within the leasehold. The lessee offered to pay the fee based on the area within the proposed drill sites, but the offer was rejected on the grounds that development of the minerals constituted “commercial” development of the property and, therefore, should be treated the same as if the entire mineral leasehold were a shopping center or office-warehouse complex. The lessee paid the parkland fee and sued for its return (which case was settled and virtually all of the fee returned).

The legal standard in Texas by which such “exactions” are measured was recently established by the Texas Supreme Court in \textit{Stafford Estates v. Town of Flower Mound}.\textsuperscript{114} This case involved a phased, single-family residential development adjacent to Simmons Road, a two-lane asphalt rural collector that was in good repair. The development regulations of the Town required that abutting substandard local and collector streets be constructed or reconstructed to bring them up to certain minimum standards, including concrete streets. Consequently, as a condition to the development, Stafford was required to reconstruct Simmons Road. The Town rejected Stafford’s “pro rata” argument that the development only contributed approximately 18% of the traffic on the road and, therefore, should only pay a proportionate share of the reconstruction cost. Stafford reconstructed the road and sued the Town alleging that the condition was an illegal exaction, i.e., a “compensable taking.” The Texas Supreme Court found in Stafford’s favor holding that conditioning governmental approval of a development on an exaction is a compensable taking unless the condition (1) bears an essential nexus to

\textsuperscript{113} \textit{Vulcan Materials} at 29 (with the court stating “We make clear that we are deciding this case under Texas law and, because many of the issues discussed herein have not been decided by the Texas Supreme Court, we are making an Erie guess. Consequently, our holding here is likely to have limited precedential value.”

the substantial advancement of a legitimate government interest, and (2) is roughly proportional to the projected impact of the proposed development.\textsuperscript{115} The Court held that the burden was upon the Town to prove that the development condition met the test.\textsuperscript{116} No precise mathematical calculation is required, however, the Town was required to make some individualized determination that the development condition was related both in nature and extent to the impact of the proposed development.\textsuperscript{117} The Court held that the Town failed to show that the required improvements to Simmons Road bore any relationship to the impact of the Stafford Estates development on the road itself or on the Town’s roadway system as a whole.\textsuperscript{118} The Court further held that conditioning development on the rebuilding of Simmons Road with concrete and making other changes was simply a way for the Town to extract from Stafford a benefit to which the Town was not entitled.\textsuperscript{119} And last, but not least, the Court held that Stafford was not required to challenge the development condition at the time imposed, but could fulfill the condition and file suit afterward.\textsuperscript{120}

13. CONCLUSIONS.

A. The exploration for and production of minerals is not just another surface use of land. The mineral estate is a separate estate in real property and the dominant estate as compared with the surface estate. Each owner of land owns separately, distinctively and exclusively all the oil and gas under his land and is accorded the usual remedies against trespassers who appropriate the minerals or destroy their market value. The right to the minerals carries with it the right to enter, dig, and carry them away, and without the right to enter upon the land for such purposes, the minerals would be wholly worthless.

B. Cities (both general-law and home-rule) have (1) the police power and statutory authority to regulate and prohibit oil and gas development within their corporate limits and (2) the statutory authority to regulate oil and gas development within their ETJs to the extent related to the subdivision of land. Home-rule cities have additional statutory authority to regulate oil and gas development within their ETJ for the protection of watersheds. City regulation of oil and gas development is not preempted by the jurisdiction of the Texas Railroad Commission.

\textsuperscript{115} Stafford Estates at pgs. 13, 20, 21.
\textsuperscript{116} \textit{Id} at pg. 21.
\textsuperscript{117} \textit{Id} at pg. 12.
\textsuperscript{118} \textit{Id} at pg. 22.
\textsuperscript{119} \textit{Id}.
\textsuperscript{120} \textit{Id} at pg. 8.
C. Cities (both general-law and home-rule) have the statutory authority to regulate and prohibit nuisances within their corporate limits. Home-rule cities have the statutory authority to regulate and prohibit nuisances within 5,000 feet of their corporate limits.

D. Oil and gas development is not a nuisance \textit{per se}; however, there may be facts and circumstances under which such development would be a nuisance in fact.

E. A compensable regulatory taking is highly unlikely based on a claim that the regulation is not substantially related to a legitimate state objective or on a claim that the regulation unreasonably interferes with use and enjoyment of property (the concept of “investment-backed expectations” is virtually dead in Texas).

F. A compensable regulatory taking will likely be based on a claim that a regulation denies all economically viable use the property; i.e., totally destroys the value of the property or renders the property worthless. No compensable taking occurs, however, if the regulation regulates or prohibits a harmful or noxious use (i.e., a nuisance based on background principles of Texas law).

G. A compensable taking may also occur if a city imposes conditions upon oil and gas development that are not roughly proportional to the nature and extent of the development (based on an individualized determination by the city).

H. A claim for a compensable regulatory taking cannot be pursued until there is a “final decision” after all variances, appeals, or other forms of relief have been exhausted which would give the city an opportunity to abate any alleged taking.

I. A claim for a compensable regulatory taking will be subject to the “accommodation doctrine”; i.e., no taking will occur if there is a reasonable alternative means to produce the minerals that will not violate the regulation (with the city having the burden to establish such alternative exists based on established industry standards or practices).

14. RECOMMENDATIONS.

A. Sever the mineral from the surface estate by grant, reservation, or lease.

B. Determine the governing jurisdictions (corporate limits, ETJ, or county) and identify all applicable ordinances (zoning and subdivision as well as other “stand-alone” ordinances such as tree preservation or floodplain regulation) and monitor
changes (Planning & Zoning and City Council agendas are increasingly available through official city web sites).

C. Evaluate the applicable ordinances to identify those which: (1) prohibit mineral development; (2) do not allow mineral development as a “permitted use;” (3) allow mineral development but subject the mineral owner to a discretionary permit process (e.g., conditional use permits, special use permits, or other “permits” requiring notice and public hearings and City Council approval); and (4) allow mineral development pursuant to a ministerial permit process administered by city staff.

D. Evaluate the applicable ordinances to identify those requirements that effectively prohibit mineral development such as: (1) limitations on access (e.g., no access through the floodplain or through residential areas); (2) prohibited uses related to mineral development (e.g., gathering lines and tank batteries); (3) separation requirements (e.g., from property lines, zoning line, and structures); (4) noise limitations; (5) limitation on hours of operation and illumination; insurance requirements (general liability and environmental); and (6) operational constraints (e.g., closed loop systems, fracture-stimulation technology, below grade tank batteries, full masonry screening, 24-hour security, and leasehold fencing).

E. Evaluate the applicable ordinances for illegal exactions imposed as conditions to permit issuance such as parkland dedication, sidewalks, and road maintenance (e.g., the obligation, for the life of a well, to maintain and repair roads within a large geographical area near the well regardless of how the road damage may have occurred) and pay or comply under objection or protest.

F. Determine the applicable statute of limitations (10 years from the date of the offending ordinance if no provision for a variance is provided; otherwise, 10-years from the final decision resulting from any variance process).

G. Separate ownership of regulated property from non-regulated property and ownership of multiple regulated tracts.

H. Evaluate damages under *Maguire Oil*.

I. Evaluate “vesting” opportunities under Chapter 245 and Chapter 43 of the Texas Local Government Code (i.e., opportunities to protect rights by filing applications for preliminary plats with the applicable jurisdictions).

J. Apply the accommodation doctrine, specifically evaluating alternatives to produce the minerals that avoid violating the offending ordinance or that mitigate the
violation (e.g., maximize separation from a structure even though the full requirements of the ordinance cannot be met). In other words, “do the best you can.”

K. Evaluate activities (from site preparation through production) to identify and implement measures which will mitigate the risk that the activities could be a nuisance in fact and, therefore, potentially subject them to regulation without compensation (e.g., reduce noise, maximize separation distances from residences, shield light sources, maintain access roads for residents’ use, minimize duration of drilling activities, and employ dust and odor suppression techniques).

L. Evaluate the applicable ordinances for formal “variance” procedures and for any other process or procedure that would give the city an opportunity to grant relief that could avoid a takings claim (including rezoning of the property). These procedures must be pursued to a final decision before any takings litigation will be “ripe.” The same concept applies to illegal exactions.

M. Document your Sheffield “due diligence” with respect to all contacts with city officials and employees in the course of your dealings with them, with the expectation that it is outside the scope of their authority to provide intentionally misleading information.

N. Negotiate leases that take into consideration the potential for delays due to governmental interference.