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Zoning and Land Use

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I. TAKINGS AND INVERSE CONDEMNATION

IN 2004, the Texas Supreme Court handed down two highly anticipated opinions involving regulatory takings of property. The court upheld a developer's monetary award in an exactions case involving a required street improvement and reversed an award against a municipality in a downzoning case.

A. *TOWN OF FLOWER MOUND V. STAFFORD ESTATES*

On May 7, 2004, the Texas Supreme Court handed down its opinion in *Town of Flower Mound v. Stafford Estates.*[1] In *Stafford Estates*, the supreme court explored application of the takings analysis to non-dedicatory exactions. Between 1994 and 1997, Stafford applied for, and the town of Flower Mound ("Town") approved, a residential subdivision known as Stafford Estates. Stafford's primary access was to and from the McKamy Road. At the time Stafford acquired its property, Simmons Road was an existing two-lane asphalt road adjacent to the proposed subdivision. Simmons Road was designated as a rural collector roadway on the Town's thoroughfare plan.

In December 1995, Stafford applied for record plat approval. As a condition of plat approval, the Town required Stafford to demolish part

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1. 135 S.W.3d 620 (Tex. 2004).

of Simmons Road, replace it with a two-lane concrete road with three-foot concrete shoulders, and pay one hundred percent of the cost of these improvements. These costs were approximately $485,000. The Town denied Stafford's request for an exception from this requirement. In 1998, after completing construction of the Simmons Road improvements, Stafford sued the Town, contending that the condition was a taking without just compensation in violation of Article I, Section 17 of the Texas Constitution and the Fifth and Fourteenth Amendments of the United States Constitution.

The liability phase of the trial was tried to the court based on stipulated facts. At the close of the liability phase, the trial court entered judgment for Stafford. The trial court then heard evidence on damages and attorney fees and rendered a final judgment awarding Stafford damages, expert witness fees, attorney's fees, and costs.

The Fort Worth Court of Appeals upheld the damages award under the Texas Constitution but reversed on the issue of attorney's fees.[2] The Town appealed to the Texas Supreme Court.

The court first noted that Texas does not have statutes that require pre-approval challenges to conditions imposed during the platting process. Due to the developer's consistent objections, the court held that the developer did not waive its rights by waiting until after the project was finished to file suit.[3] The court noted that if the Town was truly concerned about the possibility it might have to pay damages, it could have allowed Stafford to defer rebuilding Simmons Road and escrow the cost pending a judicial determination of the issue.

After acknowledging development exactions as a species of regulatory takings, the court stated that it would follow the guidance of the United States Supreme Court and summarized the two key opinions on this issue.[4] The court recited the two prongs of the *Dolan* test: (1) an essential nexus must exist between a legitimate state interest and the condition exacted; and (2) the exaction must be roughly proportional to the proposed impact of the proposed land use.[5]

The Town argued that *Nollan/Dolan* should not apply to this situation. First, the Town argued that the *Dolan* analysis should not be applied to exactions that do not involve dedication of real property. Both *Nollan* and *Dolan* involved real-property dedication exactions. Because both non-dedicatory exactions and required dedications involve "conditional governmental leveraging," the court held that the same constitutional test applied to both.[6]

Further, the court held that this standard applies to both the condition-

2. Town of Flower Mound v. Stafford Estates, 71 S.W.3d 18 (Tex. App.—Fort Worth 2002), *aff'd*, 135 S.W.3d 360 (Tex. 2004).

3. *Stafford Estates*, 135 S.W.3d at 629.

4. Dolan v. City of Tigard, 512 U.S. 374 (1994); Nollan v. Cal. Coastal Comm'n, 483 U.S. 825 (1987).

5. *Stafford Estates*, 135 S.W.3d at 634.

6. *Id.* at 636.

ing of a permit and the denial of a permit.[7] The court acknowledged the Town's argument that applying the *Dolan* test to all development conditions (such as whether houses should be brick or wood) might be too onerous. Because the Town's examples differed significantly from the exaction in this case, however, the court disagreed with the Town.

The second challenge by the Town asserted that the *Dolan* test did not apply since the ordinances in question were legislatively created and not an adjudicative action.[8] Without expressly passing upon whether *Dolan* might apply to legislative exactions, the court held that the Town's requirement to construct the roadway was the result of adjudicative decisions. Because the Town exercised its discretion in denying the requested exceptions to the standards and admitted that other developers had been excepted on a case-by-case basis, the exactions were adjudicative in nature.[9]

The court then held that a compensable taking had occurred in this case. Road safety is a legitimate public concern, and the Town's upgrade requirements for Simmons Road met the first nexus prong of the *Dolan* test.[10] However, the Town did not satisfy the second *Dolan* prong—the rough proportionality test.

In reviewing the second prong of the *Dolan* test, the court held that while the Town was not required to make a pre-development determination of rough proportionality, it had failed to do so at trial. Although the Town should have made its rough proportionality determination prior to imposing the condition, the court held that *Dolan* does not preclude the government from making the determination after the fact.[11] Traffic from Stafford's development would only increase traffic on the road by eighteen percent. While the Town could have taken into account the impact on the Town's entire system, measuring the impact must be in a "meaningful, though not precisely mathematical way. . . ."[12] Because the required improvements to Simmons Road did not bear any relationship to the impact of the Stafford Estates development on the road itself or on the Town's roadway system as a whole, the Town's exaction was a taking. Therefore, the Town was required to reimburse Stafford for eighty-two percent of the total construction cost for the road which represented the impact on the road by the general public.[13]

The *Stafford Estates* opinion is significant because it limits the government's ability to force developers to build public infrastructure unrelated to the impacts from the development. Because the Texas Supreme Court's opinion is broad in scope, it will be applied to future dedications, construction, and fees imposed in the development process.

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7. *Id.* at 638.
8. *Id.* at 641.
9. *Id.* at 642.
10. *Id.* at 643.
11. *Id.* at 644.
12. *Id.*
13. *Id.* at 645.

B. *Sheffield v. City of Glenn Heights*

Both the municipality and the developer could claim partial victory in the court's second significant regulatory takings case of 2004. In *Sheffield Development Co. v. City of Glenn Heights*,[14] the Texas Supreme Court held that a developer whose property had been downzoned could not recover damages in an inverse condemnation case. However, the court held that the developer might have vested rights and remanded this issue to the trial court.

In 1986, the City approved a planned development ("PD") residential district allowing development of small lots. In the summer of 1996, Sheffield entered into a contract to purchase the undeveloped property in the PD. Sheffield actively conducted a due-diligence investigation of the zoning on the property, as well as the possibility of it being rezoned. Numerous meetings with City officials were held to confirm the development rights on the property. Nobody at the City ever indicated to Sheffield that the property might be rezoned by the City. Approximately two weeks after the closing on the land, the City (without notifying Sheffield) imposed a thirty day moratorium preventing Sheffield from developing the property. The City subsequently extended the moratorium numerous times.[15]

During a lapse in the moratorium, Sheffield submitted a preliminary plat application for development under the PD zoning that was rejected by the City Secretary on the ground that the City Manager had continued the moratorium in effect without council action.[16] Not until April 1998 did the City Council vote on the zoning of the property. At that meeting, the City Council voted to downzone the property from minimum 6,500 square-foot lots to minimum 12,000 square-foot lots. Sheffield filed suit for an inverse condemnation arguing that both the downzoning and the moratorium extensions constituted regulatory takings.

The trial court held that the downzoning substantially advanced a legitimate government interest and that the moratorium was not a taking. Further, the court held that Sheffield's vested-rights claim was not ripe. The trial court determined that the downzoning, however, constituted a regulatory taking, and a jury subsequently found that the parcel had been diminished in value by fifty percent from $970,000 to $485,000. In accordance with the jury's verdict, the trial court rendered judgment awarding Sheffield $485,000 in damages.

On appeal to the Waco Court of Appeals, the City contested the determination that there was a taking of Sheffield's property.[17] The court of appeals agreed with the trial court that, although the downzoning substantially advanced legitimate governmental interests, it unreasonably in-

14. 140 S.W.3d 660 (Tex. 2004).
15. *Id.* at 665.
16. *Id.*
17. Sheffield Dev. Co. v. City of Glenn Heights, 61 S.W.3d 634, 642 (Tex. App.—Waco 2001), *aff'd in part, rev'd in part*, 140 S.W.3d 660 (Tex. 2004).

terfered with Sheffield's property rights. The court noted that lowering density was Glenn Heights's method to reduce the effects of urbanization and control the rate and character of growth and found that this was a legitimate governmental interest. While the downzoning may have advanced a legitimate governmental interest, however, a further determination of whether the downzoning unreasonably interfered with Sheffield's right to use and enjoy the property under the "unreasonable interference" test was necessary.

The court of appeals agreed with the trial court and found a taking based on the Texas Supreme Court's holding in *Mayhew v. Town of Sunnyvale*.[18] There, the supreme court formulated a test of whether the Town had unreasonably interfered with the landowner's right to use and enjoy property based on "a consideration of two factors: (1) the economic impact of the regulation; and (2) the extent to which the regulation interferes with distinct investment-backed expectation."[19]

The first factor, the economic impact of the regulation, compares the value that has been taken from the property with the value that remains in the property. Sheffield put on evidence that the downzoning had a severe economic impact on the value of the property, decreasing the value of the property over ninety percent. The City presented evidence that the downzoning decreased the value of the property thirty-eight percent. The court of appeals held that the undisputed evidence of at least a thirty-eight percent decline in value as a direct result of the downzoning satisfied, as a matter of law, the first factor of the unreasonable-interference test.[20]

The second factor involves the investment-backed expectations of the owner. The existing and permitted uses of the property constitute the "primary expectation" of the owner affected by the regulation.[21] According to *Mayhew*, the existing uses permitted by law are what shape the owner's reasonable expectations. Courts have historically looked at existing uses of property as a basis for determining the extent of interference with the owner's expectations. The court of appeals found that Sheffield met both of these tests and affirmed the trial court's holding that the downzoning was a taking.

The court of appeals also held that the moratorium beyond the initial three-month period did not substantially advance a legitimate governmental purpose but was utilized in an attempt to extort Sheffield to accede to the City's downzoning demands.[22] Because the extensions deprived Sheffield of his constitutional rights, the court of appeals reversed on the moratorium issue and remanded for a determination of damages for a temporary taking.

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18. 964 S.W.2d 922 (Tex. 1998).
19. *Sheffield Dev. Co.*, 61 S.W.3d at 647-48 (citing *Mayhew*, 964 S.W.2d at 935).
20. *Id.* at 648.
21. *Id.* at 935-36.
22. *Id.* at 657.

The supreme court reversed the court of appeals on all of Sheffield's inverse-condemnation causes of action. However, the court found that Sheffield's claim that its preliminary plat was invalidly rejected was ripe for review. As a result, the issue whether Sheffield has statutory vested rights to develop under the 1986 PD zoning was remanded to the district court.

Similar to *Stafford Estates*, the court initially determined that it would look to federal jurisprudence on regulatory takings for guidance.[23] Rather than relying on its 1998 decision in *Mayhew*, the court focused on the three-part test in *Penn Central Transportation Co. v. City of New York*:[24] (1) the economic impact of the regulation on the claimant; (2) the extent to which the regulation has interfered with distinct investment-backed expectations; and (3) the character of the governmental action.

As a threshold matter, the supreme court disposed of the City's argument that a regulation should not be considered a taking merely because it does not substantially advance a legitimate governmental interest. According to the City, the substantial-advancement test is really a due process claim and not a test for determining whether the government must compensate for a taking of property rights. The supreme court held that the substantial-advancement test remains a separate test to determine if a regulatory taking has occurred. Because the lowering of density advanced a legitimate governmental purpose and Sheffield's property was contemporaneously rezoned along with other tracts of land in the City, the court agreed with the lower courts that the downzoning substantially advanced legitimate governmental interests.[25]

The court then applied the three *Penn Central* factors. First, the court agreed that the downzoning "clearly had a severe economic impact on Sheffield."[26] The evidence at the trial on the merits showed the downzoning devalued Sheffield's property from thirty-eight percent to ninety-five percent, and the jury found that the value had been reduced in half. According to the court, however, the dimunition in market value was not as important as the investment of the developer in buying the land. Because the land in this case was still worth more after the taking than the purchase price, this "makes the impact of the rezoning very unlike a taking."[27]

Second, the court found that Sheffield's expectations to develop under the 1986 zoning were reasonable. Sheffield's due diligence was sufficient to meet this standard. The court pointed out, however, that Sheffield's purchase price was a small fraction of the investment that would be required for full development, and his investment was deemed to be speculative because the property had not been developed for ten years.[28] The

23. *Sheffield Dev. Co.*, 140 S.W.3d at 669.
24. 438 U.S. 104, 124 (1978).
25. *Sheffield Dev. Co.*, 140 S.W.3d at 676.
26. *Id.*
27. *Id.*
28. *Id.* at 678.

court essentially ignored its holdings in *Mayhew* with respect to the importance of the historical zoning on the land.

As to the third test (character of the governmental action), the court pointed to the fact that the City rezoned properties in addition to Sheffield's to justify its holdings that the downzoning on Sheffield's tract substantially advanced a legitimate governmental interest ("City's downzoning of residential property was virtually city-wide") and did not affect Sheffield's investment-backed expectations ("not exclusively directed at Sheffield").[29] According to the court, zoning changes such as these are to be anticipated.

The supreme court also chastised the City in finding that the downzoning "clearly had a severe economic impact on Sheffield[,] . . . the moratorium and rezoning blindsided Sheffield [and]. . . the City attempted to take unfair advantage of Sheffield."[30] Despite these bad faith actions, the court found they did not rise to the level of a taking.

With respect to the moratorium-extension issue, the court found that the City's delay was not in bad faith. While the City was dilatory in not acting sooner, the delay did not rise to the level of a taking. Because other tracts were also subjected to the moratorium, the court held they substantially advanced a legitimate governmental interest.[31]

Finally, the court held that the issue of the filing of the preliminary plat was ripe for adjudication.[32] If, upon remand, the district court finds that the developer has statutory vested rights under Chapter 245, Texas Local Government Code, then Sheffield can possibly still develop under the 1986 zoning.

Sheffield makes it more difficult for landowners and developers to recover monetary compensation from governmental entities in cases not involving exactions like *Stafford Estates*. While the court retains the substantial advancement test, the test has been diluted so that virtually all governmental actions will be deemed to advance a governmental interest. While the court has made it more difficult to obtain monetary compensation for regulatory takings, it appears to have expressed a preference that developers utilize the vested rights statute to complete a project.

C. Public Use

Under the Texas and United States Constitutions, government may use its eminent domain powers to condemn property for a public use. Historically, "public use" has been defined broadly to include acquisition of land (whether blighted or not) to be conveyed to developers for large private-development projects. In recent years, many state supreme courts have begun to limit the breadth and use of this power. Currently,

29. *Id.* at 676, 678.
30. *Id.* at 677-78.
31. *Id.* at 680.
32. *Id.* at 681.

a case is pending before the United States Supreme Court on this issue.[33]

The Amarillo Court of Appeals held that the city of Lubbock could utilize eminent domain powers for a development project in *Hardwicke v. City of Lubbock*.[34] Upon the request of property owners, the City created a tax increment reinvestment zone under the Tax Increment Financing Act.[35] The City agreed to a project plan for the area. A developer in the reinvestment zone entered into an agreement with the City whereby the City was required to condemn Hardwicke's tract-and the developer was obligated to reimburse the City for the condemnation costs.[36]

Hardwicke argued that his property would be sold (after the city acquired it) to a developer for private rather than public use in violation of the Constitution. However, the City introduced a report at trial describing the neighborhood as an area in distress, characterized by high vacancy and crime rates and properties in poor condition.[37] The City's director of planning and transportation testified that aggregation of all of the properties in the area was necessary to develop a viable large-scale economic project. The court of appeals held that the condemnation of the holdout tracts was necessary to complete the development project.[38] In response to Hardwicke's argument that the City had unconstitutionally delegated its legislative power to private landowners, the court held that the developer's requirement to implement the plan satisfied the public use requirement.

D. Ripeness

In order to prosecute an inverse-condemnation cause of action, the claim must be ripe for adjudication. In *Coble v. City of Mansfield*,[39] an owner of vacant property that was partially condemned for a road by the City was determined not to be entitled to damages on the ground that the City's subdivision ordinance provided that a screening wall might need to be built in the future. Appraisers for both the City and the landowner testified in the condemnation case that the highest and best use of the property was for future residential development. Coble, however, also testified that the actual use of the property would be commercial rather than residential. The City contended that the landowner had not chosen to develop a residential subdivision, and the City did not have the opportunity to approve a variance to its regulations to address the issue. The City's motion for summary judgment contended that only a subsequent decision to develop the property as a residential subdivision—not the taking itself—would potentially trigger the subdivision ordinance's screening

33. Kelo v. City of New London, 125 S. Ct. 27 (2004).
34. Hardwicke v. City of Lubbock, 150 S.W.3d 708 (Tex. App.—Amarillo 2004, no pet.).
35. Tex. Tax Code Ann. ch. 311 (Vernon 2002 & Supp. 2004).
36. *Hardwicke*, 150 S.W.3d at 712.
37. *Id.* at 714.
38. *Id.*
39. 134 S.W.3d 449 (Tex. App.—Fort Worth 2004, no pet.).

requirement. The trial court granted the City's motion.[40] Because the City had not reached a "final decision" as to whether or not Coble would be required to build a masonry screening wall in conjunction with a residential development, the court of appeals held that the regulatory takings claim was not ripe for review and affirmed.[41]

E. Partial Takings

The issue whether a restrictive covenant is a compensable property interest under the Texas Constitution was addressed in *City of Heath v. Duncan*.[42] After the City purchased a lot in a subdivision deed restricted to single family use for the purposes of building a water tower and a park, the thirteen lot owners who benefited from the restrictions obtained an injunction to prevent the project. The City then filed a condemnation suit by counterclaim to acquire the benefited interests and a panel of three special commissioners awarded a total of $331,280.00 to the thirteen lot owners. The City then filed a plea to the jurisdiction, arguing that the property owners did not have a compensable property interest in the restrictions. Following the trial court's denial of the plea, the City filed an interlocutory appeal. According to the Dallas Court of Appeals, a recorded restriction on the use of property is a constitutionally protected property right for which compensation may be recovered.[43] The court distinguished deed restrictions from property interests such as options or rights of first refusal, which do not run with the land.

In *Vulcan Materials Co. v. City of Tehuacana*,[44] the Fifth Circuit considered whether a city ordinance banning the use of explosives and heavy machinery for a quarrying operation to mine limestone in the city limits constituted an inverse condemnation. Vulcan's leasehold interest was for quarrying purposes only and included land in the City's corporate and extraterritorial-jurisdiction boundaries. Prior to acquiring the leasehold, City representatives told Vulcan that no ordinance prohibited mining activities. The district court held that the City's ordinance affected only that portion of the quarry in the city limits and that explosives and heavy machinery were not "required to extract the stone to build the pyramids."[45] As a result, it granted the City's Motion for Summary Judgment dismissing Vulcan's takings claim under the Texas Constitution.

Upon appeal, the Fifth Circuit reversed and held that the ordinance went too far to be considered a mere exercise of the City's police power. The court considered the impact of the ordinance under the denial of all economically viable use inquiry.[46] The City argued that only a portion of the property subject to the quarrying lease was located within the City

40. *Id.* at 453.
41. *Id.* at 458.
42. 152 S.W.3d 147 (Tex. App.—Dallas 2004, pet. filed).
43. *Id.* at 152.
44. 369 F.3d 882 (5th Cir. 2004).
45. *Id.* at 885.
46. *Id.* at 891.

limits with the vast portion located in the extraterritorial jurisdiction. Because only a portion of the land covered by Vulcan's lease was affected by the ordinance, the City argued that was not a total deprivation of Vulcan's property interest. Vulcan asked the court to consider the leasehold interest on only the property subject to the City's jurisdiction as the part taken. The court of appeals ruled in Vulcan's favor, holding that when a regulator exercises its regulatory power to take an entire property interest, it acts categorically. As a result, Vulcan's property rights had been rendered valueless and had been taken.[47]

However, the City also claimed that Vulcan's activities constituted a nuisance precluding recovery under *Lucas v. South Carolina Coastal Council*.[48] The Fifth Circuit agreed that there was an issue of material fact as to whether or not the quarrying operation constituted a nuisance and remanded this issue to the district court for its consideration.[49]

Because only a portion of a structure was required to be demolished, the San Antonio Court of Appeals held that no inverse condemnation had occurred in *Centeno v. City of Alamo Heights*.[50] The Centenos purchased a former military barracks with the knowledge that the existing zoning requirements would not permit a portion of the structure to be utilized for single-family residential purposes. Alamo Heights's Board of Adjustment approved some of the Centenos' variance requests and denied others. The Centenos claimed that the City's actions constituted an inverse condemnation because a portion of the structure would have to be removed and the City routinely granted zoning variances to similarly situated landowners. Following a jury verdict in the Centenos favor, the trial court granted judgment notwithstanding the verdict to the City.

According to the San Antonio Court of Appeals, the City's regulations affected only a portion of the Centenos' property, so they failed to meet the denial of the economically viable use test. With respect to the *Penn Central* regulatory takings test, the jury found there was a thirty percent diminution in value to the entire property due to the regulation. The court found this was not a severe economic impact. In addition, because the Centenos were aware at the time of purchase that variances were needed for their intended use, they did not have a reasonable investment-backed expectation that the variances would be granted and the use allowed. Accordingly, the court held that no taking had occurred.

A city's unilateral closing of an existing private driveway that connected a public street in a business park to a public street in a residential neighborhood was held to be an inverse condemnation in *City of San Antonio v. TPLP Office Park Properties, Ltd.*[51] The City's 1971 zoning

47. *Id.* at 891-92.
48. 505 U.S. 1003 (1992).
49. *Vulcan Materials Co.*, 369 F.3d at 893.
50. Centeno v. City of Alamo Heights, No. 04-02-006677-CV, 2004 WL 624554 (Tex. App.—San Antonio March 31, 2004, no pet.) (not designated for publication).
51. City of San Antonio v. TPLP Office Park Props., 135 S.W.3d 365 (Tex. App.—San Antonio 2004, pet. filed).

ordinance for the Park Ten Subdivision stated there would be no access to Freiling Drive from the commercial zone. Regardless of the stated prohibition, developers subsequently obtained City approval and built a driveway linking Freiling driveway to the office park. From the time Freiling Driveway was constructed, several businesses either purchased or built commercial facilities in the Park Ten Subdivision. The Freiling Driveway then became the primary means of access for the subdivision. In 2001, the City Council enacted an ordinance to close the driveway and enforce the 1971 ordinance. Following the filing of suit by the commercial landowners, the trial court found that the attempted closure was an invalid exercise of the police power and a material and substantial impairment of access. The court of appeals agreed that the attempted termination of the driveway access was an invalid exercise of the police powers. While the City had the power to regulate access to its streets, the evidence on the record showed that traffic through the driveway did not create a safety hazard. Because there was a material and substantial impairment of access, the court of appeals held that a regulatory taking had occurred.

II. ZONING

In *Joe v. Two Thirty Nine Joint Venture*,[52] the Texas Supreme Court considered the "applicability of legislative and official immunity to legislators, who are also practicing attorneys, [and their law firms,] when their public and private professional responsibilities conflict." Harry Joe was a shareholder at Jenkens & Gilchrist, P.C. law firm ("Jenkens"), who also served as a member of the Irving City Council.[53]

The law firm represented Two Thirty Nine Joint Venture ("239 JV"), which owned land zoned multi-family in Irving. At an Irving City Council meeting, the Council voted to impose a 120 day moratorium on apartment construction within the City. Joe voted to approve the 120 day moratorium and the ordinance passed unanimously. He also voted to extend the moratorium. As a result of the moratorium, the potential buyer of 239 JV's multifamily tract cancelled its contract.[54] Joe had not told anyone at Jenkens or 239 JV about the meeting, its agenda, or his position on the moratorium.

239 JV filed suit, claiming that Joe and Jenkens owed a fiduciary duty and that "timely disclosure of the [City Council] meeting would have allowed [239 JV] to grandfather its property before the moratorium passed."[55] Both Joe and Jenkens moved for summary judgment. The trial court granted summary judgment in favor of Joe based on official immunity and subsequently granted Jenkens's motion for summary judgment. A divided court of appeals reversed and remanded all claims

52. Joe v. Two Thirty Nine Joint Venture, 145 S.W.3d 150, 154 (Tex. 2004).
53. *Id.*
54. *Id.*
55. *Id.* at 155.

against Joe and Jenkens. The Texas Supreme Court reversed the court of appeals decision and rendered judgment in favor of Joe and Jenkens.

The court recognized that "individuals acting in a legislative capacity are immune from liability for those actions" and this "immunity applies to legislators at the federal, state, regional and local levels of government—including city council members—who are performing legitimate legislative functions."[56] In finding that Joe's alleged leadership role in supporting the moratorium and opposing apartment construction constituted a legitimate legislative function, the court noted that the ordinance at issue was a law of general application based on concerns over zoning and commercial development. The court concluded, "[b]ecause Joe is immune from liability for any conflict of interest that may have been created by acts within the sphere of legitimate legislative activity, Jenkens cannot be liable for those activities or for a conflict of interest created by those activities."[57]

Based on Joe's summary judgment evidence and accompanying affidavit, the court ruled that Joe established that he acted in objective good faith when he prepared for the City Council meetings and voted on the moratorium and its extensions. Thus, the court ruled that "Joe established as a matter of law that he was officially immune from liability for the alleged conflict of interest arising from his activities as an Irving city councilperson."[58]

The Fort Worth Court of Appeals addressed the issue of contract zoning and reverts in *Super Wash, Inc. v. City of White Settlement*.[59] Super Wash received approvals and permission from the City to build a car wash in accordance with the plans and specifications contained on the site plan previously submitted to the City for approval. The building official was unaware at the time he issued the building permit that there were conditions imposed on the property by a 1986 ordinance that were inconsistent with the approved site plan.[60]

Less than one week after the building permit was issued, the adjacent residential neighbors informed the building official of the 1986 ordinance. Based on the complaint, the building official required Super Wash to (1) construct a wooden fence with brick columns along Longfield Drive and (2) increase the width of the curb-cut along Longfield Drive. Super Wash modified its previously approved site plans and complied with both requests. Over the next few weeks, the City conducted further research concerning the 1986 ordinance and subsequently informed Super Wash that the fence would have to be extended along the entirety of Longfield Drive and the curb-cut removed.[61] When the building official requested these further changes, the construction on the car wash was approxi-

56. *Id.* at 157.
57. *Id.* at 159.
58. *Id.* at 165.
59. 131 S.W.3d 249 (Tex. App.—Fort Worth 2004, pet. granted).
60. *Id.* at 253.
61. *Id.*

mately forty-five percent complete.[62] Under protest, Super Wash amended its site plan again, removed the curb-cut and driveway, and submitted a revised site plan that was approved by the City.[63]

Super Wash filed suit challenging the validity and enforceability of the 1986 ordinance.[64] Both Super Wash and the City filed motions for partial summary judgment, and the City's motion was granted without comment.

Super Wash contended that the fence requirement contained in the 1986 ordinance constituted invalid contract zoning. The court of appeals disagreed and characterized the requirement as conditional zoning. Distinguishing contract zoning from conditional zoning, the court defined contract zoning as "a bilateral agreement where a city binds itself to rezone land in return for the landowner's promise to use or not use his property in [a] certain manner" and "is invalid because the city surrenders its authority to determine proper land use and bypasses the entire legislative process."[65] Conditional zoning means that the "city unilaterally requires a landowner to accept certain restrictions on his land without a prior commitment to rezone the land as requested."[66] The court held that the City did not make a bilateral agreement and that the screening fence condition was reasonably related to the public welfare.[67]

The 1986 ordinance also contained a reversionary clause that states: "Failing these conditions, there shall occur an automatic reversion to 'MFM' Multi Family Density zoning classification."[68] The court found this clause to be void *ab initio*, noting that a zoning regulation should be amended only when public interest requires the amendment. The court distinguished this reversionary clause from a special use permit. Furthermore, the reversionary clause was found to be an unlawful delegation of legislature power.[69]

Challenges to the proposed construction of a Wal-Mart store in the city of Canyon resulted in two courts of appeals opinions. Whether a zoning ordinance can be the subject of initiative and referendum was addressed in *City of Canyon v. Fehr*.[70] The city commissioners of the city of Canyon approved the rezoning of two tracts of land to allow the Wal-Mart store. Upon the adoption of the amendments, residents and voters of Canyon tendered a petition demanding either the "(1) adoption of a resolution negating the rezoning ordinances, (2) repeal of the amendments, or (3) submission of the rezoning issue to a referendum election."[71] Canyon argued the lawsuit was barred by governmental immunity and averred that neither of the appellees had standing to assert the claims mentioned

62. *Id.* at 253-54.
63. *Id.* at 254.
64. *Id.*
65. *Id.* at 257.
66. *Id.*
67. *Id.* at 257-58.
68. *Id.* at 259
69. *Id.*
70. 121 S.W.3d 899 (Tex. App.—Amarillo 2003, no pet.).
71. *Id.* at 902.

in their pleading.[72]

The trial court rejected both of these contentions and issued a temporary injunction "(1) suspending the effectiveness of the amendments and (2) directing the city clerk to present the initiative and referendum petition to the city commission. Canyon appealed the interlocutory decree."[73]

The court of appeals noted that zoning changes historically have not been subject to initiative and referendum.[74] In response, the appellees argued that recently enacted sections of the Texas Local Government Code authorized the trial court to order compliance with Canyon's ordinances regarding popular vote.[75]

To decide this issue, the court examined both prior case law and section 211.015 of the Texas Local Government Code, which was adopted in 1993. The statute allows for repeal through a general-charter election or by popular referendum. The court focused on the fact that section 211.015(a)(2) provides for repeal by this method only "on the initial adoption of the regulation."[76] "Given that the plain or common meaning of the word 'initial' encompasses the idea of the first or the beginning," the court of appeals held that it was clear that the legislature intended for section 211.015 to be utilized only when the municipality attempts to create and impose, for the first time, upon its citizenry a body of zoning ordinances when none previously existed. The court emphasized that "the focus of the legislation is not on the piecemeal repeal of particular zoning ordinances but rather on the repeal of all zoning laws."[77] Thus, the court reversed the trial court's order granting appellees a temporary injunction.

A direct attack on the Wal-Mart rezoning case was addressed by the Amarillo Court of Appeals in *City of Canyon v. McBroom*.[78] Mike McBroom and his grandson John Curtis McBroom (acting through his father) alleged that the commercial zoning for Wal-Mart did not comply with legal requirements for zoning.

Appellee Mike McBroom alleged that he purchased his home because the City had a policy of not allowing construction in floodplain areas. He asserted that if Wal-Mart constructed a Super Center, the value of his property would be adversely affected, and his flood insurance premium might increase. John McBroom alleged that he was a student at an elementary school located several hundred feet from the proposed site. He claimed that children attending the school would be exposed to an increased risk of harm from increased automobile traffic if Wal-Mart built a Super Center on the property.

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72. *Id.* at 902-03.
73. *Id.* at 902.
74. *Id.* at 903.
75. *Id.*
76. *Id.* at 904.
77. *Id.* at 905.
78. 121 S.W.3d 410 (Tex. App.—Amarillo 2003, no pet.).

The City challenged the trial court's subject matter jurisdiction, asserting that (1) it had sovereign immunity from suit and (2) both McBroom plaintiffs lacked standing. The trial court denied Canyon's plea to the jurisdiction. The court of appeals reversed the decision of the trial court in part, affirmed in part, and remanded the case for further proceedings.

Because John McBroom merely alleged that he attended a public school located several-hundred feet from the property and that he and other children attending the school would be subjected to an increased risk of harm because of increased traffic, the court held his future attendance at the school was speculative, and he was not the appropriate party to assert the public interest in the zoning issue.[79] On the other hand, the court concluded that Appellee Mike McBroom had standing to challenge the zoning amendments. Mike McBroom testified that he was in danger of sustaining a direct, individual injury from increased flooding of his land as well as decreased value of his property as a result of the zoning amendments and the proposed construction.[80] He was held to have standing and the case was remanded to the trial court.

III. BOARDS OF ADJUSTMENT

Several appellate opinions involved review of decisions of zoning boards of adjustment, including a supreme court opinion establishing limits on the liability of individual board members. In *Ballantyne v. Champion Builders, Inc.*,[81] the supreme court determined, for the first time, whether the individual members of a board of adjustment were entitled to official immunity from suit in response to a lawsuit against the individual members. The complaining party sued the individual members of the Terrell Hills Board of Adjustment under state-law claims of negligence and gross negligence in voting to revoke a building permit for an apartment project. A transcript of the board of adjustment's executive session revealed subjective and often derogatory views of some of the members concerning the types of residents attracted to an apartment development. However, different legal opinions were presented to the Board members as to whether or not they had the legal authority to revoke the permit.

Upon a review of existing cases providing for official immunity, the supreme court held that members of Boards of Adjustment are entitled to raise the affirmative defense of official immunity. Further, the court found that the Board members had proven that they (1) were acting within the scope of their authority, (2) were performing a discretionary function, and (3) satisfactorily established "objective good faith." The court held that board-of-adjustment members are an appellate body and perform a discretionary function as a matter of law.[82] Because the final prong of the immunity test is solely based upon an objective standard, it

79. *Id.* at 414-15.
80. *Id.* at 415.
81. 144 S.W.3d 417 (Tex. 2004).
82. *Id.* at 426.

"does not permit an inquiry into what subjectively could have motivated the [Board of Adjustment's] decision."[83] A majority of the high court concluded that official immunity had been established.

In a split opinion, the Dallas Court of Appeals ruled in *City of Dallas v. Vanesko*[84] that a homeowner was entitled to a variance even though his hardship was primarily self-created. The homeowner, Vanesko, had designed and begun construction of his home pursuant to plans that were specifically reviewed and approved by the City's building inspector. Only after construction was nearing completion did the City official discover that the plans provided for a height that exceeded that allowable under the zoning ordinance. The homeowner was directed by the City to apply for a variance, which he did, and he was denied the request by the Board of Adjustment. The homeowner filed suit, and the trial court reversed the Board. The evidence showed that it would cost the Vaneskos between $50,000 and $100,000 to remove and replace the roof. Further, eighty percent of the neighbors supported the Vaneskos' variance request.[85]

Upon the City's appeal, a divided court of appeals determined that a variance was warranted and remanded the case to the Board of Adjustment for a consistent ruling. The determinative factors in finding that a variance was appropriate included a finding that because construction of the house had begun in reliance upon the erroneously approved plans, the "real property became subject to a unique oppressive condition."[86] Further, the court found that requiring reconstruction of the roof would not be as aesthetically pleasing and would inappropriately stand out in the neighborhood. These factors led the court to conclude that the hardships were not merely personal to the Vaneskos, but "also linked to the realty."[87] A vigorous dissent argued that the Vaneskos' hardship was self-created, not a physical hardship, and therefore would have upheld the Board's decision. The Texas Supreme Court has granted a petition by the City to review this case.

Finally, the Austin Court of Appeals upheld in *Ferris v. City of Austin*[88] the granting of a variance from lot size, lot width and other requirements of the city of Austin, which was acting in the unusual position of a developer of a low-income townhome project. The City had requested and received from the Board of Adjustment a variance to lot width, lot size, site area and setback requirements. The appeal in *Ferris v. City of Austin* was pursued by a local neighbor who urged that the Board's granting of a variance amounted to "rezoning by variance" and that any hardship was self-imposed by the City's desire to increase the allowed residential density. The court disagreed and determined that unusual lot size and slope,

83. *Id.* at 428.
84. 127 S.W.3d 220 (Tex. App.—Dallas 2004, pet. granted).
85. *Id.* at 223.
86. *Id.* at 227.
87. *Id.*
88. 150 S.W.3d 514 (Tex. App.—Austin 2004, no pet.).

the existence of historically significant structures and tree preservation requirements acted as a hardships on the property that were not self imposed.[89] Further the court found that the Board's decision was supported by non-economic evidence of a hardship and therefore not solely based upon financial gain. Finally, the court concluded that no "rezoning by variance" had occurred since the variance allowed the City to develop residential housing in a manner available to other similar property owners.

IV. SUBDIVISION REGULATIONS

The San Antonio Court of Appeals addressed the availability of mandamus and injunctive relief with respect to county-platting authority in *The Integrity Group v. Medina County Commissioners Court.*[90] Integrity's tract was located near a lake with an aquifer-recharge zone. The County denied the developer's plat because it would impose minimum lot size standards on the grounds that the aquifer needed to be protected. The County alleged that it could impose a one-acre limitation under the Texas Health and Safety Code when use of on-site septic tanks were to be used. The trial court granted the County's Motion for Summary Judgment.

However, the court of appeals reversed and held that Medina County's plat review powers were *limited* to those allowed by the state platting statute. (Chapter 232, Texas Local Government Code.) The court of appeals also held that the County could not exceed its statutory authority, which did not allow limitations on lot size to deny Integrity's plat.

V. VESTED RIGHTS/PROMISSORY ESTOPPEL

Several opinions were rendered during the Survey period interpreting the doctrine of common-law estoppel and the vested-rights statute contained in Chapter 245, Texas Local Government Code.

A. Statutory Vested Rights

Numerous courts held during the Survey period that developments were vested under previously enacted ordinances. In *Save Our Springs Alliance v. City of Austin*,[91] the Austin Court of Appeals summarized Chapter 245 as follows:

> Chapter 245 of the Local Government Code creates a system by which property developers can rely on the land-use regulations in effect at the time "the original application for [a] permit is filed." At the same time, because the "laws, rules, regulations, or ordinances of a regulatory agency" may change and those changes may

89. *Id.* at 521.

90. No. 04-03-00413-CV, 2004 WL 2346620 (Tex. App.—San Antonio October 20, 2004, no pet.) (not designated for publication).

91. 149 S.W.3d 674 (Tex. App.—Austin 2004, no pet.).

"enhance or protect the project," it allows a permit holder to take advantage of those changes without forfeiting any of its [C]hapter 245 rights.[92]

An environmental group ("SOS") and a neighborhood association challenged a settlement-development agreement between the city of Austin and the developers of the Circle C Ranch. SOS was one of the primary supporters of the Save Our Springs Ordinance enacted in the early 1990s that was intended to protect watersheds in the City. The development agreement provided a procedure for reviewing and approving permits under Chapter 245 and reformed Chapter 245 as it applies to the Circle C. In this case, SOS wanted to apply the terms of the SOS ordinance in effect at the time the initial development permits were submitted. The developer and the City wanted to apply the terms of the development agreement which was a subsequently enacted ordinance. A plea to the jurisdiction was filed by the defendants on the ground that SOS lacked jurisidictional authority to challenge the agreement. Both the trial court and the court of appeals concurred and granted the plea.

The constitutionality of Chapter 245 was also addressed by the Austin Court of Appeals in *City of Austin v. Garza*.[93] Garza obtained approval of a plat that allowed development over the Barton Creek watershed. A note on the plat stated that development must comply with the watershed ordinance in effect in 1988 that was greatly beneficial to the developer. The City argued that the approval was a mistake. Garza noted Chapter 245.002(d) of the Texas Local Government Code, which would allow him to develop pursuant to the regulatory scheme described in the recorded plat. The City's complaint was that Chapter 245 grandfathered developments and allowed the developer to "cherry pick what other regulations will govern development of his project."[94] Because Garza was not making his own rules but simply choosing between two validly enacted City rules and ordinances, the Austin Court of Appeals held that Chapter 245 was constitutional and that Garza's development rights were protected.

It does not matter under Chapter 245 if the newly enacted ordinances impact health, safety and public welfare. In *Hartsell v. Town of Talty*,[95] the Dallas Court of Appeals held that the Town could not apply its newly enacted building code to previously platted subdivisions in the Town's extraterritorial jurisdiction. It was undisputed that the original applications for the developer's single-family subdivisions were the approved plats. The Town argued that it could make the determination as to whether applying its building code constituted a different "project" for the property under Chapter 245.002(b) of the Texas Local Government Code, because building codes are health and safety ordinances. In addition, the Town argued that the subdivision process and the building per-

92. *Id.* at 681 (citing TEX. LOC. GOV'T. CODE ANN. ch. 245.002(a), (d) (Vernon 2004)).
93. 124 S.W.3d 867 (Tex. App.—Austin 2003, no pet.).
94. *Id.* at 871.
95. 130 S.W.3d 325 (Tex. App.—Dallas 2004, pet. denied).

mit process constituted two different projects. Further, the Town disputed the developer's claim that as a matter of general law the Town could not extend its building code to the extraterritorial jurisdiction without express statutory authority. Following a trial before the court, the trial court ruled in favor of the Town. Upon appeal, the Dallas Court of Appeals rejected the Town's argument and held that the project included the development of the infrastructure for the subdivision and the building of the houses in the subdivision and refused to apply the newly enacted ordinances to the developer's projects. The court could find no legal precedent to follow the Town's interpretation of the statute and reversed the trial court.[96]

B. Estoppel

The general rule has historically been that "when a unit of government is exercising its governmental powers, it is not subject to estoppel."[97] There is, however, authority for the proposition that a municipality may be estopped in those cases where justice requires its application and there is no interference with the exercise of its governmental functions.[98] Numerous courts of appeals examined this doctrine during the Survey period.

The Fort Worth Court of Appeals held that a municipality can be estopped from applying its zoning and land use ordinances when a private landowner relied on the City's promises to its detriment. In *Super Wash, Inc. v. City of White Settlement*[99] the Fort Worth Court of Appeals held that equitable estoppel could apply because the City induced the developer to act in a particular manner, and the City should not be allowed to adopt an inconsistent position and thereby cause loss or injury to the developer. The developer's work was about forty-five percent completed pursuant to an approved site plan when the City issued a stop work order. The court of appeals pointed out that to apply estoppel, "the trial court must determine whether the landowner is relying on an authorized act of a city official or employee, whether the case is one in which justice requires estoppel, and whether its application would interfere with the city's governmental functions."[100]

The building official testified that he reviews the building plans, authorizes issuance of permits, is responsible for anything regarding zoning and site plans, and also oversees code enforcement. He also testified that he issued a building permit to Super Wash and that he later requested revised plans regarding a wider curb cut and a fence, which Super Wash provided. Super Wash further showed that it obtained a building permit and, acting in reliance on the permit, began building. The building was

96. *Id.* at 328.
97. City of Hutchins v. Prasifka, 450 S.W.2d 829, 835 (Tex. 1970).
98. *Id.* at 836.
99. 131 S.W.3d 249 (Tex. App.—Fort Worth 2004, pet. granted).
100. *Id.* at 260.

forty-five percent complete when Super Wash was informed that the fence had to be continuous with no curb cut or the City would issue a stop-work order. Finding that these issues of material facts existed, the court of appeals reversed and remanded the case solely on the estoppel cause of action.[101]

Similarly, the San Antonio Court of Appeals held that, by granting a sign permit and making oral representations, a city was estopped from revoking the permit.[102] Bopp owned and operated a German restaurant. At the time of its annexation by the city of Fredericksburg, a free-standing sign existed. He then obtained a permit to build a wall sign. After the wall sign was constructed, the City sued Bopp claiming that the two signs taken together exceeded the allowable square footage in the City's sign ordinance. The trial court entered the judgment permitting both signs to remain and the court of appeals affirmed. Because the City issued a valid permit without any conditions and Bopp relied on the permit by expending substantial sums to build a sign that complied with the permit, the court held that equitable estoppel applied. Although the city building official testified at trial that Bopp told him he would remove the pole sign, the trial court believed Bopp's testimony to the contrary. Further, owing to the City's unclean hands, this is a situation where justice required estoppel and no governmental function was involved.[103] Specifically, the City could enforce its sign ordinance at other locations in the future.

The San Antonio Court of Appeals also held that a city can be estopped from closing a driveway when a developer constructed an office park based on previous approvals with the driveway as the primary access point.[104] The driveway was constructed in accordance with prior plat approvals by the City. The developer then spent millions of dollars buying land and constructing office buildings. Because the City was not properly executing its police power, estoppel "was necessary to prevent injustice to the tenants of (the office parks)."[105]

Another type of estoppel was addressed by the Austin Court of Appeals in *City of Austin v. Garza*.[106] In this case, Garza donated land to the City for open space to increase the impervious coverage on his tract. The City approved Garza's plat but refused to approve the permits of a prospective purchaser on the grounds that the plat was mistakenly approved. Because the City retained the donated land, the Austin Court of Appeals concluded "that it would be manifestly unjust for the City to

101. *Id.* at 260-61.

102. City of Fredericksburg v. Bopp, 126 S.W.3d 218 (Tex. App.—San Antonio 2003, no pet.).

103. *Id.* at 223.

104. City of San Antonio v. TPLP Office Parks Props., Ltd., 155 S.W.3d 365 (Tex. App.—San Antonio 2004, pet. filed).

105. *Id.*

106. 124 S.W.3d 867 (Tex. App.—Austin 2003, no pet.).

retain the benefits of its mistake yet avoid its obligations."[107] In essence, Garza paid consideration (donated land) for development rights. By accepting the consideration, the City was estopped from revoking its approval of the plat.

A contrary result was reached in *Weatherford v. City of San Marcos*.[108] Weatherford sought on numerous occasions to have portions of his property zoned to allow the development of multi-family and commercial projects. His neighbors consistently opposed these plans. In November 1997, the neighbors, the City and Weatherford entered into a "mediated resolution" allowing some future multi-family and commercial development on his property. The City's comprehensive plan was amended to reflect the mediated settlement. Weatherford submitted rezoning requests consistent with the mediated plan, but they were not approved. The City Council then enacted a revised plan that reduced the acreage Weatherford could develop as multi-family residential.

Weatherford filed equal protection, due process, equitable estoppel, Open Meetings Act, Chapter 245 and inverse condemnation (among others) claims against the City. The City prevailed on these causes of action by summary judgment and the court of appeals affirmed. Because Weatherford was not being treated differently than other citizens and the City had concerns about traffic, urban sprawl and utilities, there were sufficient governmental reasons to deny Weatherford's rezoning attempts.

Weatherford argued that the City should be estopped to deny the rezoning application after the mediated settlement, particularly since the City amended its comprehensive plan to reflect the agreement reached at the mediation. Although comments were made in public hearings and Weatherford incurred costs in reliance on the plan, the court held that the circumstances in this case did not demand application "to prevent manifest injustice."[109]

With respect to Weatherford's Chapter 245 claim, an application to rezone land is not the first of a series of required permits, but rather a preliminary step in seeking to develop property. A municipality has the power to change land use plans and amend zoning regulations to affect prospective development of land. The court also rejected Weatherford's inverse condemnation claims. Because the change to the comprehensive plan had no direct impact on Weatherford's property, there was not a direct adverse economic effect on Weatherford. Furthermore, Weatherford had no "investment-backed expectations" to develop his property when he purchased it. His expectations formed well after the property was zoned single-family residential.[110]

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107. *Id.* at 874.
108. No. 03-03-00350-CV, 2004 WL 2813777 (Tex. App.—Austin, December 9, 2004, no pet.).
109. *Id.* at *10.
110. *Id.* at *12.

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