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MUNICIPAL REGULATION OF GROUNDWATER AND TAKINGS

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MUNICIPAL REGULATION OF GROUNDWATER

I. INTRODUCTION [1]

The exceptional drought conditions persisting in Texas for more than a year at the time of the initial presentation prompted questions about many water management issues and among them is the extent to which municipalities can regulate groundwater well drilling and production within their city limits and extraterritorial jurisdiction ("ETJ"). As exceptional drought has gripped large parts of the United States in 2012, questions regarding authority to regulate water usage have become more pronounced in many jurisdictions. This paper devotes its focus to the authority cities have to regulate groundwater, looking first at statutory and constitutional authority, with special attention to Texas cities' authority to regulate pursuant to their police powers. As with all groundwater regulation, the possibility exists that cities may face a takings claim from property owners. ***Consequently this paper looks at essential takings law with its basis in federal jurisprudence, such that the fundamental takings analysis is essentially the same for virtually any city in any state.*** Although the primary focus of this presentation is on Texas law, analysis of key cases from other jurisdictions relevant to the issue of municipal groundwater regulation has been included in this update. This presentation also analyzes cases where cities have successfully defended takings or due process claims when exercising their police powers in regulating oil and gas well drilling within their jurisdiction.

Regarding conclusions drawn from the examination of current case law, it appears that in a regulatory takings analysis using a balancing test, courts will typically weigh in favor of supporting a governmental regulation as not effecting a taking when the regulation addresses important public health and safety concerns.

Before examining the relevant cases, it's beneficial to start with a broader look at statutory and state constitution grants of power to municipalities, how courts have interpreted municipal authority to exercise police powers, and how Texas courts have analyzed takings claims with regard to regulations imposed by various municipal ordinances.

[1] The views expressed in these materials do not necessarily represent those of the City of Austin.

II. STATUTORY AND CONSTITUTIONAL GRANTS OF POWER TO CITIES RELEVANT TO AUTHORITY TO REGULATE GROUNDWATER

A. Overview of statutory and constitutional authority

The focus of this paper is on municipal authority in Texas to regulate groundwater as an exercise of police power and whether such municipal groundwater regulation could amount to a compensable taking. As touched on in the section on police powers, the legislature has made a general grant of such police powers to all Texas cities by statute, and for general law cities, such statutory grant is the only source of police power authority. Home rule cities, in addition to statutory grants, have police powers stemming directly from the Texas Constitution. In addition to the general statutory grant of police powers to all cities, there also exists other specific statutory authority pursuant to which cities may regulate groundwater wells. Should a city base its actions regulating groundwater on these specific statutory grants discussed herein, the city would nonetheless likely find that in defending any exercise of such authority, it would ultimately rely on the assertion that it acted pursuant to its police powers that underlie the specific grant of authority or its general statutory grant of police powers or both. This is the reason for devoting much of the analysis in this presentation to the city's exercise of police powers to regulate groundwater. The following discusses statutes related to municipal authority to regulate groundwater.

B. Statutory grant of police power to every type of Texas city

The primary municipal authority for regulating groundwater wells is a municipality's police power. Texas has four primary types of cities, home rule cities, as well as Type A, B and C cities. As discussed below, home rule cities derive their authority to exercise police powers both from the Texas Constitution and statutory grants of power. In addition, the Texas legislature, by statute, has granted police power authority to every type of city. *Grothues v. City of Helotes*, 928 S.W.2d 725, 729 n.6 (Tex. App.–San Antonio 1996, no writ) (citations omitted).

The court in *Grothues* noted that, "[a] general grant of such power is found at section 54.001 of the Local Government Code, which states: (a) The governing body of a municipality may enforce each rule, ordinance, or police regulation of the municipality and may punish a violation of a rule, ordinance, or police regulation . . .". *Id.* The court explains, "[t]he term 'municipality' as used in § 54.001 encompasses general-law municipalities, home-rule municipalities, and special-law municipalities." *Id.* (citing Tex. Loc. Gov't Code Ann. § 1.005(3) (West 2008).

Another general grant of authority to Texas cities is found in Section 51.001 of the Local Government Code whereby a city may adopt an ordinance or police regulation that is for good government, peace, order or trade and commerce and is necessary for carrying out a power granted the

city, which includes its police power. Tex. Loc. Gov't Code Ann. § 54.001 (West 2008).

Besides the general statutory grant of police powers to every type of city, the police power has also been expressly conferred on home rule cities by statute. *Texas River Barges v. City of San Antonio*, 21 S.W.3d 347, 355 (Tex. App.--San Antonio 2000, pet. denied) (citing Tex. Loc. Gov't Code Ann. § 54.004 (West 2008) which states, "[a] home-rule municipality may enforce ordinances necessary to protect health, life, and property and to preserve the good government, order, and security of the municipality and its inhabitants.") Other specific grants related to police power authority for general law cities are included in Sections 51.012 (Type A city) and 51.032 (Type B city). Tex. Loc. Gov't Code Ann. §§ 51.012, 51.032 (West 2008).[2] As the *Grothues* court explained, the police power "is vested in the state and flows to a general law municipality through a legislative grant." *Grothues* at 729 n.6.

C. Home rule cities also derive powers directly from Texas constitution

Home rule cities derive their power from the Texas Constitution as the Texas Supreme Court has explained:

> A home rule city derives its power not from the Legislature but from Article XI, Section 5, of the Texas Constitution. Accepting cities and towns of more than 5,000 population have 'full power of self-government, that is, full authority to do anything the legislature could theretofore have authorized them to do. The result is that now it is necessary to look to the acts of the legislature not for grants of power to such cities but only for limitations on their powers.'

Lower Colorado River Authority v. City of San Marcos, 523 S.W. 2d 641 (Tex. 1975) (citations omitted). The court further held that "[t]he powers of home rule cities are subject to and may be limited only by their charters or by the Constitution or by general law." *Id.* Expressed in another manner, a home rule city has all the powers of the state not inconsistent with the Texas Constitution, the general laws, or the city's charter. *Proctor v. Andrews*, 972 S.W.2d 729, 733 (Tex.1998). This concept is embodied in the Local Government Code provision, applicable only to home rule cities, which states, "[t]he municipality has full power of local self-government." Tex. Loc. Gov't Code Ann. § 51.072 (a) (West 2008).

D. Home rule city's charter incorporation of police power

A home rule city's charter is its organic act.

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[2] In addition Type B and C cities have generally been granted Type A city authority to the extent that authority does not conflict with other provisions specific to those classes of cities. Tex. Loc. Gov't Code Ann. §§ 51.035, 51.051 (West 2008).

Antonio, 67 S.W.2d 1036, 1037 (Tex. 1934). It is the fundamental law of the municipality just as a constitution is the fundamental law of a state. *Texas River Barges* at 354. A city can exercise only such powers as are expressly granted by the charter, such powers as may be reasonably implied from the powers granted, and such powers as are incidental to the purpose for which the city was created. *Anderson* at 1037.

The opinion in *Texas River Barges* provides a helpful example of how a home rule city charter provision incorporates police powers:

> The City Charter authorizes the City to enact ordinances "as shall be needed for the government, interest, welfare and good order of the city and the interest, welfare, health, morals, comfort, safety and convenience of its inhabitants." San Antonio, Tx., Charter art. I, § 3, ¶ 1. This provision incorporates the police power as a power of the City.

Texas River Barges at 355. (citations omitted). Like provisions which incorporate police powers are common to Texas home rule city charters.

E. Municipal authority to regulate nuisances

Other statutory authority which is, at least in some instances, applicable to the regulation of groundwater wells, are statutes authorizing the regulation of nuisances. The Local Government Code authorizes cities to define and regulate nuisances. Tex. Loc. Gov't Code Ann. § 217.042 (a) (West 2008). Although the language differs from the grant to home rule cities, Chapter 217 generally grants such authority to regulate nuisances to Type A and Type B cities.[3] Tex. Loc. Gov't Code Ann. §§ 217.002, 217.022 (West 2008). At least one Texas city has declared private groundwater wells a nuisance if they either pollute or tend to pollute the city's water supply in a manner which cannot be corrected. Victoria, Tex., Code of Ordinances ch. 13, art. II, § 13-74.[4]

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[3] Type C cities are not given an express grant regarding regulating nuisances, although pursuant to Section 51.051(a) such authority appears to be granted indirectly. This provision states:

> The governing body of a Type C general-law municipality with 501 to 4,999 inhabitants has the same authority and is subject to the same duties as a Type A general-law municipality unless the authority or duties conflict with a provision of this code relating specifically to a Type C general-law municipality.

Tex. Loc. Gov't Code Ann. § 51.051 (West 2008). Type B cities have a similar grant of Type A municipal authority at Section 51.035 and thus the authority to *define* a nuisance which is granted specifically only to Type A cities may by virtue of these provisions also be a power granted to Type B and C cities.

[4] This City of Victoria ordinance states:

> Any well or other opening now constructed or which may hereafter be constructed penetrating the city's underground water supply, and which has polluted or contaminated or tends, in the judgment of the director, water and wastewater

Common law distinguishes between nuisances per se and nuisances in fact. A "nuisance per se" is a nuisance at all times and locations. A "nuisance in fact" is a condition that is a nuisance because of its particular surroundings. *GTE Mobilnet of South Texas Ltd. Partnership v. Pascouet*, 61 S.W.3d 599, 614 (Tex. App.--Houston [14 Dist.] 2001, pet. denied) (citations omitted). For example, courts have expressed that although an oil and gas well is not a nuisance per se, considering the circumstances, wells clustered in an urban area may be considered a nuisance. *See eg. Marrs v. City of Oxford*, 32 F.2d 134, 139–40 (8th Cir. 1929).[5] The *Marrs* court commented on the multiplier effect—the more wells in a residential area, the more problems. The court stated:

> The greater the number of wells in a city block the greater will be the annoyance and hazards to the public. Indeed, it would be hard to say that an ordinance prohibiting the drilling and operation of any well within the business or residential districts of a city would be an unreasonable and invalid exercise of the police power.

Marrs at 140. Although for somewhat different reasons, it may be possible in some instances to describe as a nuisance the proliferation of groundwater wells in a crowded urban setting. This may be the case where there are significantly increased chances of pollution of both the aquifer and the public water supply due to numerous perforations of the aquifer, providing a route for pollutants and possible cross-connections with the public system that would require vigilant

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> department, to pollute or contaminate the city's water supply and which cannot be corrected, in the judgment of the director, to prevent pollution or contamination, is hereby declared a nuisance, and on notice to the owner of such well or opening, or to the owners agent in charge of it or on the property of which is situated, issued by the director, such nuisance shall be abated by the owner within sixty (60) days from date of such notice, by filling and plugging the well or opening in the manner provided for in this division of abandoned wells, and if such owner or agent shall fail to abate such nuisance within such time or if after exercising reasonable diligence, the director is unable to locate the owner or the owner's agent, the director shall go on the land or property upon such the well is situated, and abate such nuisance in the manner above provided, the owner thereof shall be liable to the city for the cost of such work.

[5] The *Marrs* court stated, "[w]hile oil and gas wells are not nuisances per se, and the business of drilling and operating them is ordinarily legitimate and harmless, it is conceivable that they may become detrimental in a high degree. . . . when work of the kind under consideration is carried on in residential or business sections of a town or city without some limit to the number of wells in a given area, they will necessarily become nuisances of a most aggravated sort to its inhabitants and its business interests. *Id.*

monitoring to avoid.[6] A city regulating or seeking to regulate groundwater wells for health and safety reasons may consider defining as a nuisance the drilling or operation of groundwater wells in a certain manner within the city's jurisdiction if the facts justify such a definition. However, by no means is it necessary for a city to contend that groundwater wells are a nuisance before regulation for public health and safety or other police power objectives can be considered. In cases discussed herein where courts have upheld municipal regulation of oil and gas wells, cities have typically not relied on the characterization of oil and gas wells as a nuisance.[7]

F. Other statutory authority for municipal regulation of groundwater--Municipal Settings Designation, Protection of Watersheds and Water Quality

In order to prevent the use of or contact with groundwater that presents an actual or potential threat to human health, all types of Texas cities may regulate the pumping, extraction, or use of groundwater by persons other than retail public utilities by establishing a municipal setting designation. Tex. Loc. Gov't Code Ann. §§ 551.005 (West Supp. 2011); Tex. Health & Safety Code §§ 361.801-.808 (West 2010 & Supp. 2011). This provision is applicable in places where there has been serious contamination of groundwater and may be useful in a "brownfields" recovery programs.[8]

Some home rule cities may find authority to regulate groundwater wells in a statute relating to the protection of streams and watersheds by home rule cities. Tex. Loc. Gov't Code Ann. § 551.002 (West Supp. 2011). Among other things this provision authorizes a home rule municipality to prohibit the pollution of and police recharge features and areas and to protect and police watersheds. To the extent that the purpose in regulating groundwater wells can be related to the purpose of and authority granted by this statute,

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[6] Even though more and more areas are now regulated by groundwater districts, there may still be municipal areas without a district where a proliferation of private residential wells in an aquifer that is or at some point may become an important supply for municipal water could result in dangerously unregulated drainage of the aquifer in times of severe drought.

[7] Note that if a property use has been restricted based on a state's common law of nuisance, it can serve as an exception to the general rule that a regulation totally depriving the owner of all economically beneficial use is a compensable taking. In this regard the U.S. Supreme court has explained, "[w]e held in *Lucas* that the government must pay just compensation for such 'total regulatory takings,' except to the extent that "background principles of nuisance and property law" independently restrict the owner's intended use of the property." *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 538 (2005).

[8] The MSD Legislation provided a mechanism for allowing a developer to limit or avoid conducting a cleanup of contaminated groundwater if access to the groundwater has been restricted from use as potable water by an ordinance. The intent of the legislation is to encourage redevelopment of vacant or abandoned Brownfield properties while protecting the public health. City of Dallas, Municipal Settings Designation http://www.dallascityhall.com/oeq/msd.html (lasted visited Jan. 18, 2012).

home rule cities may consider this as additional authority to their police powers.[9]

If one of a municipality's objectives in regulating groundwater wells is the protection of water quality, then authority to regulate groundwater wells may also stem from Water Code Section 26.177, whereby a city may establish a water pollution control and abatement program for the city.[10] Tex. Water Code Ann. § 26.177 (West 2008). This authority may be extended to areas within the ETJ which in the judgment of the city should be included for achieving the program objectives within the city.[11] *Id.* at § 26.177 (b).

G. Texas Water Well Driller Rules

Texas Water Well Driller rules promulgated pursuant to the Texas Occupations Code, Chapters 1901 and 1902, although not granting authority to municipalities, recognize municipal ordinance authority with regard to groundwater well drilling. The state agency rules state expressly that they operate in addition to any requirements under municipal ordinance (or groundwater district), providing that "[w]ells shall be completed in accordance with the following specifications and in compliance with the local groundwater conservation district rules or incorporated city ordinances." 16 Tex. Admin. Code § 76.1000(a) (2012) (Tex. Dep't of Licensing & Regulation, Water Well Drillers Rules). With regard to well drilling, the rules are primarily related to well spacing and construction. Although at first review it appears that the state spacing rules would preclude well drilling on most typically-sized residential lots in a city, the rules provide for exceptions and variances such that they would allow for a well unless otherwise prohibited by city ordinance.

By way of example, the property line set back in the rules is 50 feet, *Id.* at § 76.1000(a)(4), and without an exception, the set back rule could not be met on a common residential lot with dimensions of 50 feet by 100 feet, for example. Only lots with both a width and a length of more than 100 feet would possibly have space if other setbacks or obstructions did not prevent the well drilling. The rule, however, provides for wells to be drilled as close as 5 feet from a property line if certain

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[9] One commentator notes that a north Texas city (not named in presentation) has extended its gas regulations into its ETJ upon the authority of Local Government Code Section 401.002 (now Section 551.002) based on the theory that gas well development represents an environmental risk to watersheds. Dwight Shupe, *Takings Litigation: Compensable Regulatory Takings in Texas*, Rocky Mountain Mineral Law Foundation, Development Issues and Conflicts in Modern Gas and Oil Plays (2004).

[10] Chapter 26 of the Water Code, in its definitions section, includes groundwater in the definition of "water" and the definition of "discharge" includes relevant terms such as conduct, drain, run, and allow to seep. Tex. Water Code Ann. § 26.001(5), 26.001(20) (West 2008).

[11] Authority to extend these regulations to the ETJ is subject to Section 26.179. *Id.* This section, however, is aimed at surface water issues. Tex. Water Code Ann. § 26.179 (West 2008). Subsections (c) and (o) also limit the applicability of Section 26.179 to certain municipalities.

well construction standards are met, *Id.* at § 76.1000(a)(2), and in addition, a property owner can seek a variance from the 5 foot distance to drill even closer to the property line. *Id.* at § 76.1009 (a). Other considerations under the rules are distances from septic as well as public and private sewer lines. Again the distance requirements vary with the type of construction of the well.

H. Zoning authority to regulate wells

Zoning has long been widely recognized by courts as a valid exercise of municipal police powers. *See Lombardo v. City of Dallas*, 73 S.W.2d 475 (Tex. 1934) (quoting extensively from *Village of Euclid v. Ambler Realty Co.,* 272 U.S. 365 (1926)). Texas courts have plainly held that, "[t]he enactment of zoning laws is an exercise of the police powers of the State by the legislative branch of the government. The State of Texas has delegated some of this legislative authority to municipalities." *Lawton v. City of Austin*, 404 S.W.2d 648 (Tex.Civ.App.--Austin 1966, writ ref'd n.r.e).

Consistent with this recognition, the list of purposes for the statutory grant of zoning authority to cities in Local Government Code Section 211.001 reads like a description of police power objectives, stating that "[t]he powers granted under this subchapter are for the purpose of promoting the public health, safety, morals, or general welfare . . . ." Tex. Loc. Gov't Code Ann. § 211.001 (West 2008). Regarding the use of this authority to regulate wells, one commentator, for example, recognizes Texas cities may regulate oil and gas drilling pursuant to their zoning authority within the municipal limits.[12] Zoning authority is also a means available to cities for regulating groundwater wells as long as statutory requirements in Chapter 211 of the Local Government Code are met.

Zoning statutes in fact do provide a specific grant of authority to regulate groundwater production in the instance where contact with groundwater may present a threat to human health, similar to authority in Local Government Code Sections 551.005 and 212.003(a). Specifically Local Government Code Section 211.003 relating to Zoning Regulation Generally provides, "[t]he governing body of a municipality may regulate: . . . the pumping, extraction, and use of groundwater by persons other than retail public utilities, as defined by Section 13.002, Water Code, for the purpose of preventing the use or contact with groundwater that presents an actual or potential threat to human health." Tex. Loc. Gov't Code Ann. § 211.003(a)(6) (West 2008). This same section also provides broad authority to cities to regulate "the location and use of buildings, other structures, and land

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[12] *See* Dwight Shupe, *Takings Litigation: Compensable Regulatory Takings in Texas*, Rocky Mountain Mineral Law Foundation, Development Issues and Conflicts in Modern Gas and Oil Plays (2004). (noting that "[i]f 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." Page 2)

for business, industrial, residential and other purposes . . . ." Tex. Loc. Gov't Code Ann. § 211.003(a)(5) (West 2008).

State law requires that zoning regulations be adopted in accordance with a comprehensive plan designed to accomplish various specified purposes. Tex. Loc. Gov't Code Ann. § 211.004 (West 2008). Relevant to the regulation of groundwater, those purposes include regulations designed to "promote health and the general welfare," as well as to "facilitate the adequate provision of transportation, water, sewers, schools, parks, and other public requirements." *Id.*

Texas courts have held, however, that with regard to cities regulating oil and gas well drilling, the exercise of police power by ordinance requiring a permit within the city limits did not require the city to include in its ordinance all statutory requirements for zoning regulations. *Unger v. State*, 629 S.W.2d 811, 813 (Tex. App.—Fort Worth 1982, writ ref'd). Thus the exercise of police powers for regulating wells is an authority independent of a city's zoning powers, although zoning authority may be used in addition to a city's general grant of police powers.[13]

I. Subdivision regulations to regulate wells

Similar to zoning, the authority granted to cities to regulate subdivisions and plats also has similar police power objectives and provides another means by which cities can regulate private water well drilling. Statutory authority for municipal subdivision regulation provides that:

> After a public hearing on the matter, the governing body of a municipality may adopt rules governing plats and subdivisions of land within the municipality's jurisdiction to promote the health, safety, morals, or general welfare of the municipality and the safe, orderly, and healthful development of the municipality.

Tex. Loc. Gov't Code Ann. § 212.002 (West 2008). That authority can be extended to a city's extraterritorial jurisdiction and this includes, besides a general extension of the subdivision authority into the ETJ, a specific provision of authority to regulate groundwater use for preventing a threat to human health. Tex. Loc. Gov't Code Ann. § 212.003 (West 2008).[14]

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[13] The Texas Supreme Court in *Lombardo* noted that zoning-type actions had been already authorized by courts pursuant to police powers before the enactment of zoning regulations. In this regard the Court stated, "[i]t is not to be doubted that long before the enactment of zoning legislation in the United States the courts of the country had found ample authority in the dominance of the police power to regulate, govern, and restrict the construction of buildings, and in some instances prohibit their location and construction for certain uses, and to prohibit certain occupations in specified localities." *Lombardo* at 479.

[14] Regarding other municipal subdivision authority related to groundwater, s*ee also* Local Government Code Section 212.0101, whereby city can require certification of groundwater availability with the submission of a subdivision plat when the

J. Municipal authority to regulate outside their corporate limits (ETJ)

A patchwork of statutes provides cities some ability to exercise ordinance authority related to groundwater well regulation in their ETJ. As mentioned a city can elect to apply subdivision regulations in the ETJ, but zoning regulation is limited to areas within the city limits. The authority to protect recharge areas and watersheds under Section 551.002 of the Local Government Code may be enforced by certain cities within and their ETJ and even beyond that area in some instances. *See* Tex. Loc. Gov't Code Ann. § 551.002 (c) (West Supp. 2011). Authority to police watersheds in the ETJ, depending on the given facts, may support municipal regulation of groundwater wells in the ETJ. A city may apply an ordinance establishing a municipal setting designation under Section 551.005 (b) of the Local Government Code in the extraterritorial jurisdiction. Tex. Loc. Gov't Code Ann. § 551.005 (b) (West Supp. 2011). Water Code Section 26.177, as discussed, also provides authority to extend a water pollution abatement program to the ETJ. In addition, pursuant to Local Government Code Section 217.042, a home rule city can prohibit a nuisance within 5000 feet (a little less than a mile) outside its limits. Tex. Loc. Gov't Code Ann. § 217.042 (a) (West 2008).

K. Conclusion—regarding municipal regulation of groundwater, statutory grant of police powers most significant

Although there are a variety of statutes (and in the case of home rule cities constitutional provisions) authorizing some extent of municipal regulation of groundwater, the broadest and most significant of these is the grant of police powers to cities. The remainder of this presentation is dedicated to the interplay between municipal police powers and property owners' constitutional rights and the relevancy of this interplay to municipal regulation of groundwater.

intended source of water for the subdivision is groundwater under the land. Tex. Loc. Gov't Code Ann. § 212.0101 (West 2008).

III. POLICE POWERS

A. Introduction: Exercise of police powers to protect public health and safety supports defense to takings claim

Although, as discussed, there are a variety of statutory authorizations by which a city may regulate groundwater, the most likely challenge to that authority will be a claim that the regulation constitutes a taking of property in violation of the U.S. and Texas Constitutions. When police power is protective of public health and safety, courts will weigh that in a regulatory takings analysis against impacts to property rights using a balancing test. This section provides an overview of fundamental aspects of municipal police power. Texas courts' approach to assessing a takings claim and how that relates to municipal groundwater regulation is discussed further below in Sections IV and V.

B. What are police powers? Power to prevent detrimental uses of property

The Texas Supreme Court has explained that "[t]he police power may be loosely described as the power of the sovereign to prevent persons under its jurisdiction from conducting themselves or using their property to the detriment of the general welfare." *DuPuy v. City of Waco*, 396 S.W.2d 103, 107 (Tex.1965). This same court on another occasion declared that, "[t]he police power is a grant of authority from the people to their governmental agents for the protection of the health, the safety, the comfort and the welfare of the public. In its nature it is broad and comprehensive." *Spann v. City of Dallas*, 235 S.W. 513, 515 (Tex. 1921). Besides the statutory and constitutional grants of police powers discussed above, the Texas Supreme Court has also recognized that a municipal corporation is considered an arm of the State, and has the police power to protect the safety of the public. *Town of Ascarte v. Villalobos*, 223 S.W.2d 945, 950 (Tex. 1949).[15]

C. All property held subject to valid exercise of police power

A landmark Texas Supreme Court case regarding the extent of municipal police powers is *Lombardo v. City of Dallas*, 73 S.W.2d 475 (Tex. 1934). *Lombardo* concerned the validity of the state's zoning statutes and Dallas' zoning ordinances, in particular the aspect of excluding businesses from residential areas. *Lombardo* at 476, 479. The court held both the zoning statute and ordinance to be valid. *Id.* at 483. In setting up the discussion on police powers and their extent, it is worth reviewing some of the holdings from this authoritative opinion as it makes numerous clear and essential pronouncements relating to municipal exercise of police powers with regard to both the due process and takings claims.[16]

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[15] Texas courts have also recognized the grant of police power authority to districts created under Article XVI, Section 59 of the Texas Constitution. *See Banker v. Jefferson County Water Control and Imp. Dist. No. One*, 277 S.W.2d 130, 133-4 (Tex. Civ. App.—Beaumont 1955, writ ref'd n.r.e.)

[16] It is important to consider earlier takings cases in light of clarifications made by the U.S. Supreme Court in *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528 (2005).

Regarding the constitutionality of police power regulations that affect private property under due process, the court confirmed the principle that:

> All property is held subject to the valid exercise of the police power; **nor are regulations unconstitutional merely because they** operate as a restraint upon private rights of person or property or will **result in loss** to individuals. The infliction of such loss is not a deprivation of property without due process of law; the **exertion of the police power** upon subjects lying within its scope, **in a *proper* and lawful manner, is due process** of law.

Lombardo at 478 (emphasis added). Besides affirming that the proper exercise of police power meets the constitutional due process requirements, the court also addressed police powers' relationship with the constitutional protection from property being taken without just compensation stating:

> Moreover, **police regulations do not constitute a taking** of property under the right of eminent domain; and **compensation is not required** to be made **for such loss** as is **occasioned by the *proper* exercise of the police power**. . . . It may be invoked to abridge the right of the citizen to use his private property when such use will endanger public health, safety, comfort or welfare,-- and only when this situation arises.

Lombardo at 478-9 (emphasis added).[17] However, as discussed in more detail below, the Texas Supreme Court has also stated that, "a restriction in the permissible uses of property or a diminution in its value, resulting from regulatory action within the government's police power, may or may not be a compensable taking . . . not every regulation is a compensable taking, although some are." *Sheffield Development Company, Inc. v. City of Glenn Heights*, 140 S.W.3d 660, 670 (Tex. 2004). Also discussed in

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Although *Lingle* has not yet been fully adopted by the Texas Supreme Court, even in the recent *Day* opinion discussed herein, at least one appeals court has expressed that they expect it to be adopted when the Texas Supreme Court has an opportunity. *2800 La Frontera No. 1A, Ltd. v. City of Round Rock*, No. 03-08-00790-CV, 2010 WL 143418 (Tex. App.--Austin Jan. 12, 2010, no pet.) (mem. op.). The *Lingle* opinion, among other things, makes a clear distinction between takings and substantive due process claims and the standards for analyzing these. *Lingle.* At 540-3. Importantly, the *Lingle* Court concluded that the test whether a regulation substantially advances legitimate state interests prescribes an inquiry in the nature of a due process, not a takings, test, and that it has no proper place in takings jurisprudence. *Id.* at 540.

[17] As discussed below in greater detail, today whether a regulation is a "proper" exercise of police power that would not be a taking and consequently not require compensation is now determined by a balancing test with factors adopted by the Texas Supreme Court from *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104 (1978).

detail below, in determining whether a regulation effects a taking, Texas courts now apply a balancing test adopted from federal takings jurisprudence. *Id.*

D. Under due process test, validity of police power action founded on reasonableness

Aside from the threat of a compensable taking, the validity of an ordinance can be challenged by a due process claim. With regard to substantive due process claims, the validity of a police power action is founded in its reasonableness and a measure of its reasonableness is whether it is reasonably necessary to achieve a legitimate police power objective. The court in Lombardo stated plainly that, "[e]very regulation adopted under the police power must be a reasonable one." *Lombardo* at 479. Further the court held that, "to be valid as an exercise of this [police] power, an ordinance must be reasonable in its operation upon the persons whom it affects . . . ." *Lombardo* at 479 (emphasis added). The court held more specifically that, "[t]o be valid and constitutional ordinances . . . [they must] have a reasonable relation to the preservation of the public health, safety, morals and comfort of the inhabitants." *Lombardo* at 481.

In regard to reasonableness, courts in assessing a substantive due process challenge also assess whether the regulation has a rational relationship to its purpose. The Texas Supreme Court, for example, has held that, "[i]f it is at least fairly debatable that the decision was rationally related to legitimate government interests, the decision must be upheld. The ordinance will violate substantive due process only if it is *clearly* arbitrary and unreasonable." *Mayhew v. Town of Sunnyvale*, 964 S.W.2d 922, 938 (Tex. 1998). Relevant to the reasonableness of governmental authority to regulate groundwater, in *Barshop v. Medina County Underground Water Conservation District*, 925 S.W.2d 618 (Tex. 1996) the Texas Supreme Court upheld the Edwards Aquifer Act (creating the Edwards Aquifer Authority and authorizing it to regulate groundwater) in response to a claim that it was unconstitutional on its face under various constitutional provisions. With regard to a challenge that the act denied property owners substantive due process, claiming it had no rational basis and was "an overbroad application of the police power," the court held that the provisions of the Act were "all rationally related to legitimate state purposes in managing and regulating this vital resource." *Id.* at 633.

As a general principle, presumptions favor the validity of a municipal ordinance enacted pursuant to police powers. As one court held, "[i]n determining the constitutionality of an ordinance passed pursuant to the police power of the city, it must be borne in mind that the presumptions favor the ordinance. For a challenge to be successful, the ordinance must clearly appear to be unreasonable and arbitrary." *Shelby Operating Company v. City of Waskom*, 964 S.W.2d 75, 82 (Tex. App.—Texarkana 1998, pet. denied).

E. Police power does not authorize ad hoc actions—but rather must be exercised by ordinance

Police power is not a carte blanche grant of authority to a governmental entity to act at any time as deems necessary. As courts have explained, "[p]olice power does not authorize government officials to make an *ad hoc* determination that a particular activity is detrimental to the public good and then mete out an *ad hoc* punishment. The police power must ordinarily be exercised through properly enacted statutes, ordinances, or regulations." *Texas River Barges* at 356 (citations omitted). The court in *Texas River Barges* recognized that pursuant to its police power, a municipality may enact ordinances designed to promote the public safety and welfare. *Texas River Barges* at 355 (citations omitted).

F. Conflicts: Municipal police power controlling despite regulation of same subject by state law

As discussed in more detail below, several Texas courts have also found that city regulation of oil and gas drilling is permissible under a city's police power, even in instances where a mineral right owner has obtained a well permit from the Railroad Commission under state law. Similarly, zoning regulations, which are an exercise of police power, recognize this principle by statute whereby standards set by municipal ordinance higher than those set by statute are controlling.[18]

Home rule cities have broad powers subject to the Texas Constitution which provides that "[t]he adoption or amendment of charters is subject to such limitations as may be prescribed by the Legislature, and no charter or any ordinance passed under said charter shall contain any provision inconsistent with the Constitution of the State, or of the general laws enacted by the Legislature of this State." Tex. Const. art. XI, §5. Specifically with regard to home rule cities courts have held that the fact that the legislature has addressed a subject does not ordinarily prevent a home rule city from regulating the same subject. See *Dallas Merchant's and Concessionaire*' *s Ass*' *n v. City of Dallas,* 852 S.W.2d 489, 491 (Tex.1993).[19] The Texas Supreme

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[18] The Local Government Code in a section relating to Conflict With Other Laws provides that:

> ***If a zoning regulation*** adopted under this subchapter requires a greater width or size of a yard, court, or other open space, requires a lower building height or fewer number of stories for a building, requires a greater percentage of lot to be left unoccupied, or otherwise ***imposes higher standards than those required under another statute or local ordinance or regulation, the regulation adopted under this subchapter controls.*** If the other statute or local ordinance or regulation imposes higher standards, that statute, ordinance, or regulation controls.

(emphasis added) Tex. Loc. Gov't Code Ann. § 211.013(a) (West 2008).

[19] Quoting earlier Texas Supreme Court opinions the court in *Dallas Merchant's and Concessionaire*' *s Ass*' *n* held:

> "the mere fact that the legislature has enacted a law addressing a subject does not mean the complete subject matter is completely preempted." *City of Richardson v. Responsible Dog Owners,* 794 S.W.2d 17, 19 (Tex.1990). "[A] general law and a

Court has held that, "if the Legislature chooses to preempt a subject matter usually encompassed by the broad powers of a home-rule city, it must do so with unmistakable clarity." *Id.*[20]

G. Police power not static; broad discretion

Importantly, what may not have been considered a valid police power action in the past, due to changed circumstances may be considered today a proper exercise of this authority. For this reason, courts have recognized the importance of police powers remaining broad and flexible, as one court expressed, "[p]olice power is not static or unchanging. As the affairs of the people and government change and progress, so the police power changes and progresses to meet the needs." *City of Breckenridge v. Cozart*, 478 S.W.2d 162, 165 (Tex.App.—Eastland 1972, writ ref'd n.r.e.) (citations omitted).

H. Limits to police powers

Police powers extend only so far as is reasonably necessary to achieve the objective of the regulation. The Texas Supreme Court has held that police power "is commensurate with, but does not exceed, the duty to provide for the real needs of the people in their health, safety, comfort and convenience as consistently as may be with private property rights." *Lombardo* at 478. The court further elaborated that:

> [T]o be valid as an exercise of this [police] power, an ordinance must be reasonable in its operation upon the persons whom it affects, and must not be unduly oppressive--that is, it must appear that the means adopted are reasonably necessary and appropriate for the accomplishment of a legitimate object falling within the domain of the police power.

Lombardo at 479 (emphasis added). Other opinions have similarly expressed that police power extends only to regulations reasonably necessary to protection of public health, safety and morals, and "attempted regulations which extend beyond this legitimate scope run afoul of due process requirements of both state and federal Constitutions." *Falfurrias Creamery Co. v. City of Laredo*, 276 S.W.2d 351, 353

> city ordinance will not be held repugnant to each other if any other reasonable construction leaving both in effect can be reached." *City of Beaumont v. Fall*, 116 Tex. 314, 291 S.W. 202, 206 (1927).

In *Dallas Merchant's and Concessionaire's Ass'n* the court based its holding on specific language in state law that preempted local ordinances concerning alcohol sales on express statutory language stating "[i]t is the intent of the legislature that this code shall exclusively govern the regulation of alcoholic beverages in this state . . ." *Dallas Merchant's and Concessionaire's Ass'n* at 491.

[20] An example of courts requiring this unmistakable clarity can be found in *Texas River Barges* where the court concluded that the city's police powers authorized the city "to enact ordinances regulating navigation on the River within the City's boundaries and that the exercise of this authority does not conflict with the legislation creating SARA [San Antonio River Authority]." *Texas River Barges*, at 355. The court found that similar authority to that exercised by the city included in the enabling legislation of the river authority had never been triggered since SARA never constructed a certain statutorily authorized canal project. *Id.* at 353-4.

(Tex.Civ.App.—San Antonio 1955, writ ref'd n.r.e.).

IV. STANDARDS FOR ASSESSING CONSTITUTIONALITY OF AN ORDINANCE ADOPTED PURSUANT TO POLICE POWER

A. Introduction: police powers and takings

As the Texas Supreme Court has explained:

> The Just Compensation Clause of the Fifth Amendment provides that 'private property [shall not] be taken for public use, without just compensation.' This prohibition has been incorporated through the Fourteenth Amendment to apply to the individual states. Similarly, article I, section 17 of the Texas Constitution provides, in pertinent part, that no "person's property shall be taken, damaged or destroyed for or applied to public use without adequate compensation being made...."

Mayhew v. Town of Sunnyvale, 964 S.W.2d 922, 933 (Tex. 1998) (citations omitted).[21] How these few words have actually been interpreted to determine whether property has indeed been taken, and hence compensation required, has been the subject of extensive analysis by the courts as discussed below. Takings can be classified as either physical or regulatory takings. *Mayhew* at 933. Although physical takings are discussed briefly herein, the great majority of this presentation is devoted to a discussion of regulatory takings and ultimately how a claim of regulatory taking in the context of a municipal groundwater regulation may be analyzed by a court.

B. Physical takings--compensation for actual taking

If the exercise of police power results in property being actually taken and applied to public use, it will require compensation. In *DuPuy* the Texas Supreme Court states:

> [I]t is universally conceded that when land or other property is actually taken from the owner and put to use by the public authorities, the constitutional obligation to make just compensation arises, however much the use to which the property is put may enhance the public health, morals or safety.

DuPuy v. City of Waco, 396 S.W.2d 103, 107 (Tex.1965). Physical takings occur when the government authorizes an unwarranted physical occupation of an individual's property. *Mayhew* at 933.

[21] The Fifth Amendment to the U.S. Constitution also provides the guarantee of due process before a person can be deprived of property. ("No person shall . . . be deprived of life, liberty, or property, without due process of law. . . .") U.S. Const. amend. V.

C. Regulatory takings--regulatory restrictions on uses of property under police powers may or may not be compensable taking

Some broader context is helpful before discussing the specific factors courts use in determining whether a regulatory taking has occurred. As mentioned, the Texas Supreme Court in *Sheffield* stated that, "a restriction in the permissible uses of property or a diminution in its value, resulting from regulatory action within the government's police power, may or may not be a compensable taking . . . not every regulation is a compensable taking, although some are." *Sheffield* at 670. Ultimately only a takings analysis conducted as a result of a claim which takes into account all of the circumstance can determine whether a regulation of groundwater wells by a city has gone so far that compensation would be required. Note that the Texas Supreme Court looks to federal jurisprudence for guidance in regulatory takings analysis. *Sheffield* at 669. The U.S. Supreme Court in *Penn Central* referred to these determinations as "ad hoc factual inquiries" and noted that whether a regulation amounts to a taking depends largely upon the particular circumstances in that case. *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 124 (1978).

D. Justice Holmes' dilemma: Government cannot pay for every impact of regulation, but if regulation goes too far it's a taking

U.S. Supreme Court Justice Holmes famously stated in the first regulatory takings case in the United States Supreme Court, "[g]overnment hardly could go on if to some extent values incident to property could not be diminished [by government regulation] without paying for every such change in the general law." *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 413 (1922). Justice Holmes further explained that the general rule is that "while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking." *Id.*

E. When does regulation go too far? No one test for a takings.

The Texas Supreme Court has stated that there is "no one test" for determining a compensable taking and "[t]he need to adjust the conflicts between private ownership of property and the public's interests is a very old one which has produced no single solution." *City of Austin v. Teague*, 570 S.W.2d 389, 392 (Tex.1978). The U.S. Supreme Court similarly explained that, "this Court, quite simply, has been unable to develop any 'set formula' for determining when 'justice and fairness' require that economic injuries caused by public action be compensated by the government . . . ." *Penn Central* at 124. The Texas Supreme Court has, in fact, described the attempt to decide when a regulation has gone too far as a "sophistic Miltonian Serbonian Bog", explaining by footnote that a Serbonian Bog is described by John Milton in his book Paradise Lost as a place "[w]here armies whole have sunk." *Sheffield* at 671, n. 52.[22]

[22] Over time, by clarifying the tests for and categories of takings it is arguable there has been improvement. For example, bringing at least some categorical

F. Taking compensable when regulations result in physical invasion or deprive all economically beneficial use

The Texas Supreme Court does note a few "small islands in the bog" where the U.S. Supreme Court has identified two types of regulatory action which are compensable without case-specific inquiry. *Id.* A regulation that compels property owner to suffer a physical invasion is compensable. An example of a physical invasion by regulation is found in the U.S. Supreme Court decision which held that a "law requiring landlords to allow television cable companies to emplace cable facilities in their apartment buildings constituted a taking." *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 435–40 (1982). The Texas Supreme Court will find a compensable taking where regulation has deprived a property owner of all economically beneficial or productive use of the owner's land; however, the Court cautions that this is limited to the "extraordinary circumstance" in which no productive or economically beneficial use of land is allowed. *Sheffield* at 671. (A taking of all economically beneficial or productive use is commonly referred to as a "*Lucas*-type" taking based on the U.S. Supreme Court decision in *Lucas v. S. Carolina Coastal Council*, 505 U.S. 1003, 1019 (1992)).[23]

G. The *Penn Central* Factors

If a compensable taking cannot be determined for one of the above-stated reasons, a careful analysis will be required using what has popularly become known as the *Penn Central* factors (based on *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 123–24 (1978)), which essentially balance the public and private interests. This test looks at

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organization to the bog, a Texas appeals court citing *Lingle* recently summarized the various regulatory takings as:

> A plaintiff potentially may invoke multiple distinct theories in challenging a government regulation as an unconstitutional taking. The plaintiff may assert (1) a physical taking, which occurs when regulatory action requires an owner to suffer physical invasion of his property; (2) a *Lucas*-type total regulatory taking, which occurs when regulatory action completely deprives an owner of all economically beneficial use of his property; (3) a *Penn Central* taking, which occurs when regulatory action unreasonably interferes with a property owner's right to use and enjoy his property; or (4) a land-use exaction, which occurs when the government requires an owner to give up his right to just compensation for property taken in exchange for a discretionary benefit conferred by the government. *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 548, 125 S.Ct. 2074, 161 L.Ed.2d 876 (2005).

City of Houston v. Maguire Oil Co., 342 S.W. 726 (Tex. App.—Houston [14th Dist.] 2011, pet. denied).

[23] Note that the *Sheffield* court also held that a regulation will effect a taking if it fails to substantially advance a legitimate state interest. *Sheffield* at 671. However, if the Texas Supreme Court follows its practice of relying on federal constitutional law in regard to takings, then it is expected that this would change in response to *Lingle.*

(1) the economic impact of the regulation on the claimant, (2) the extent to which the regulation interferes with reasonable investment-backed expectations, and (3) the character of the governmental action.[24] *Sheffield* at 672.

The *Sheffield* Court warned that these factors are not formulaic, but serve as guideposts, and that the Court considers all of the surrounding circumstances. *Id.* at 672-3. In addition, the Texas Supreme Court has identified another test for considering whether a compensable taking has occurred, stating that there can be recovery of damages "when the government's action against an economic interest of an owner is for its own advantage." *City of Austin v. Teague,* 570 S.W.2d 389, 393 (Tex.1978).

H. *Lingle* and the "government character" *Penn Central* factor

In 2005 the U.S. Supreme Court opinion *Lingle, supra* changed the regulatory takings landscape. Besides holding that a requirement that a regulation substantially advance legitimate state interests is not a valid takings test, the *Lingle* Court also clarified that regulatory takings analysis "aims to identify regulatory actions that are functionally equivalent to the classic taking in which government directly appropriates private property or ousts the owner from his domain. Accordingly, each of these tests focuses directly upon the severity of the burden that government imposes upon private property rights." *Lingle* at 548, 539. Further, in a statement that has caused some to question the importance of the third prong of the *Penn* Central factors the Court stated that, "the *Penn Central* inquiry turns in large part, albeit not exclusively, upon the magnitude of a regulation's economic impact and the degree to which it interferes with legitimate property interests." *Lingle* at 540.

On this score the U.S. Court of Appeals, Federal Circuit has asserted, "we do not believe *Lingle* caused any diminution in the importance of the *Penn Central* character prong, at least with respect to public health and safety regulations." *Rose Acre Farms v. United States*, 559 F.3d 1260, 1281 (Fed.Cir.2009), *cert. denied*, 130 S.Ct. 1501 (2010). In addressing the *Lingle* Court's treatment of the third *Penn Central* factor this federal appeals court states:

> In our view, although *Lingle* alters one aspect of analyzing regulatory takings, it leaves unchanged a substantial body of case law concerning the character prong. The asserted taking in *Lingle* had nothing to do with the safety or health of the public.

Id. at 1279. The court further pronounced that, "[w]e think it is clear that *Lingle* neither addressed nor disturbed *Penn Central*'s

[24] Note that in both the *Penn Central* and *Sheffield* opinions the court initially refers to "distinct" investment-backed expectations but both courts in their later analysis refer to "reasonable" investment-backed expectations. *See Penn Central* at 125; *Sheffield* at 677.

consideration of the health and safety aspect of the regulations." *Id.*

The *Rose Acre Farms* opinion concerned a claim of regulatory taking for hens and eggs lost due to new United States Department of Agriculture salmonella regulations for which the court found no compensable taking. Regarding the takings analysis under Penn Central the court opined that, "[t]here is little doubt that it is appropriate to consider the harm-preventing purpose of a regulation in the context of the character prong of a *Penn Central* analysis." *Id.* at 1281. Regarding the character of the government's act, the court agreed with the U.S. government that, "protecting the public health by identifying diseased eggs and forcing their owner to remove them from the table market, weighs strongly against finding a taking here." *Id.*

In explaining its holding the *Rose Acre Farms* court stated:

> [t]he character of the governmental action factor requires a court to consider the purpose and importance of the public interest underlying a regulatory imposition, by obligating the court to 'inquire into the degree of harm created by the claimant's prohibited activity, its social value and location, and the ease with which any harm stemming from it could be prevented.'

Id. at 1283 (quoting *Maritrans Inc. v. United States*, 342 F.3d 1344, 1356 (Fed.Cir.2003)). This has prompted one commentator to conclude, "[e]xercises of the police power that directly protect public health and safety remain unlikely, even after *Lingle*, to be a taking under *Penn Central*." [25]

I. Due Process and Equal Protection Claims

In addition to claims under the takings provision of the Fifth Amendment to U.S. Constitution and/or Article 1, Section 17 of the Texas Constitution, which require compensation when the government takes private property for public use, claimants contesting municipal regulations have asserted their constitutional rights have been violated under the due process[26] and

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[25] Robert Meltz, *Substantive Takings Law: A Primer*, The 14th Annual Conference on Litigating Takings Challenges to Land Use and Environmental Regulations, Georgetown University Law Center, November 18, 2011, p. 26. The author reached this conclusion after noting there is disagreement among courts regarding the importance of the third *Penn Central* factor after *Lingle*.

[26] The court in *Mayhew v. Town of Sunnyvale*, 964 S.W.2d 922 (Tex. 1998) court well summarizes the due process standard stating:

> A generally applicable zoning ordinance will survive a substantive due process challenge if it is designed to accomplish an objective within the government's police power and if a rational relationship exists between the ordinance and its purpose. This deferential inquiry does not focus on the ultimate effectiveness of the ordinance, but on whether the enacting body could have rationally believed at the time of enactment that the ordinance would promote its objective. If it is at least fairly debatable that the

equal protection clauses.[27] The trend in more recent Texas regulatory takings litigation, such as the *Sheffield* case, however has been to simply assert a takings claim under Article, 1, Section 17 of the Texas Constitution. Nonetheless, there are several, mostly older cases involving municipal regulation of oil and gas wells that have analyzed challenges to the ordinances under due process and equal protection claims which assess the validity of the police power regulation.[28] If litigated today, these cases would likely include a takings claim and analysis separate from the due process or equal protection claims. Therefore it is important to be mindful of this change in approach as the analysis and holdings in some older cases may require some degree of interpolation into the more recent standards such as the *Penn Central* factors to assess how a court might treat similar cases today. What follows is a brief discussion of certain standards used to assess earlier challenges to municipal regulation of oil and gas wells and the linkage to the *Penn Central* takings analysis more recently adopted by the courts. Although takings analysis has become more detailed or refined over time, as an aspect of the balancing test used to assess a takings claim, courts continue to apply a fact-sensitive test which includes a consideration of the character of the governmental action.

> decision was rationally related to legitimate government interests, the decision must be upheld. The ordinance will violate substantive due process only if it is *clearly* arbitrary and unreasonable.

Mayhew at 938.

[27] The Texas Supreme Court with regard to equal protection claims has explained that, "[a]n as-applied equal protection claim requires that the government treat the claimant different from other similarly-situated landowners without any reasonable basis. The ordinance generally must only be rationally related to a legitimate state interest to survive an equal protection challenge, unless the ordinance discriminates against a suspect class." *Mayhew* at 939 (citations omitted). Regarding oil/gas well drilling the court in *Helton*, for example, held in its equal protection analysis that the ordinance applied "to all persons similarly situated within the city limits." *Helton* at 24.

[28] One commentator observed that earlier cases concerning regulation of oil and gas wells blended their constitutional analysis stating:

> Modern challenges, however, face the backdrop of cases decided under what I have earlier called the "sausage" approach to constitutional law. In these cases, substantive due process, equal protection and regulatory takings analysis tend to be blended into one big sausage.

Bruce M. Kramer, *Local Land Use Regulation of Oil and Gas Development*, Rocky Mountain Mineral Law Foundation, Surface Use for Mineral Development in the New West: Finding Good Ground, p. 16 (2008).

V. VARIOUS JURISDICTIONS ADDRESS TAKINGS CHALLENGES AND PREEMPTION CLAIMS RELATED TO RESTRICTIONS ON GROUNDWATER.

In *Allegretti & Co. v. County of Imperial* (2006) 138 Cal.App.4th 1261, 1267-8 [42 Cal.Rptr.3d 122, 125] the property owner, Allegretti, challenged the constitutionality of a permit restricting the property owner's usage of groundwater to 12,000 acre-feet per year for his entire property. (As discussed below in *Baldwin* the county's authority to regulate stems from the same state constitutional grant of police powers to cities and counties.) Allegretti purchased 2400 acres of farm land and claimed the permit limit restricted his ability to cultivate and irrigate only 800 acres or less. *Id.* at 1276. Allegretti claimed that the county's action constituted (1) a physical taking, (2) a per se taking for depriving him of all economically beneficial use of his land and (3) a regulatory taking under the *Penn Central* standards. Id. at 1267. The court decided that the county's action in approving the permit with use restrictions "did not effect a physical or regulatory taking." *Id.*[29]

The court provided a detailed analysis of the takings claim, addressing each theory in turn. Regarding the claim of physical invasion the court concluded that, "[t]he County's permit decision does not effect a per se physical taking under any reasonable analysis." *Id.* at 1273. Allegretti based his claim for physical invasion on the federal court decision in *Tulare Lake Basin Water Storage Dist. v. United States* (2001) 49 Fed.Cl. 313 (*Tulare Lake*).[30] The court made clear it was not bound to follow a lower federal court opinion, that the opinion was distinguishable and that the opinion was later undercut in *Klamath Irrigation District v. United States* (2005) 67 Fed.Cl. 504. *Allegretti* at 1274. The court concluded on this point strongly repudiating the *Tulare Lake* decision declaring:

> [W]e disagree with *Tulare Lake's* conclusion that the government's imposition of pumping restrictions is no different than an actual physical diversion of water. (*Tulare Lake, supra,* 49 Fed.Cl. at pp. 319–320.) The reasoning is flawed because

[29] Allegretti's Petition for writ of certiorari to the Court of Appeal of California, Fourth Appellate District, Division One, was denied. Allegretti & Co. v. Imperial County, Cal., 549 U.S. 1113, 127 S. Ct. 960, 166 L. Ed. 2d 706 (2007).

[30] The court summarized the facts and holding in Tulare Lake, "In *Tulare Lake,* water districts argued that their water rights, which were contractually conferred by certain governmental agencies, were taken in violation of the Fifth Amendment by use restrictions imposed by the State Water Resources Control Board (the Board) under the Endangered Species Act. (*Id.* at pp. 314–316.) Comparing the circumstances to the overflights of aircraft found to constitute a taking in *United States v. Causby*, *supra*, 328 U.S. 256, 66 S.Ct. 1062, the *Tulare Lake* court held the restrictions caused a physical taking of the plaintiffs' contractual entitlement to a particular amount of water from the Board's facilities." *Id.* at 1273-74.

> in that case the government's passive restriction, which required the water users to leave water in the stream, did not constitute a physical invasion or appropriation like the government's diversion in *International Paper Co. v. United States*, *supra*, 282 U.S. 399, 51 S.Ct. 176, 75 L.Ed. 410, or its low flight of army and navy airplanes in *Causby*, *supra*, 328 U.S. at page 259, 66 S.Ct. 1062. *Tulare Lake's* reasoning disregards the hallmarks of a categorical physical taking, namely, actual physical occupation or physical invasion of a property interest.

Id. at 1275. The court quickly dispensed with Allegretti's claim that he had been denied all economically beneficial use of his property, noting that, "[a] governmental regulation that restricts certain private uses of a portion of an owner's property does not constitute a categorical taking." *Id.* The court found that the county's action was taken under the authority of its police powers and should be analyzed under regulatory takings jurisprudence. The court's *Penn Central* analysis, concluded among other things that regarding economic impact that "mere diminution in value of property, however serious does not constitute a taking," and that a reasonable investment backed expectation must be more than a unilateral expectation or an abstract need. Ultimately the court concluded that "Allegretti's claim of a regulatory taking under *Penn Central* is not persuasive." Id. at 1280.

A. Courts in various jurisdictions uphold municipal regulation of groundwater as not preempted by state law

California courts have consistently supported county regulation of groundwater, as when the California County of Tehama faced a challenge from landowners that state law preempted the county's regulation of groundwater pumping practices. *Baldwin v. County of Tehama* (1994) 31 Cal.App.4th 166, 171-72 [36 Cal.Rptr.2d 886, 889]. As discussed above, the court interchangeably refers to the county regulation as municipal regulation, having established that the police power authority to regulate flows from the same state constitutional provision. *Id.* at 173, 175. In 1992, Tehama enacted an ordinance requiring a permit is required to extract groundwater for the purpose of use on land other than where the extraction occurs. A permit could only be granted if the board found that it would not result in: "a withdrawal of more water from the groundwater basin than will be replenished over time ("overdraft"), saltwater intrusion, adverse effects upon the rate of flow of water through the aquifer, [or] adverse effects upon the water table," among other impacts. Id. at 171-2. In response to the property owners challenge to the county regulation as preempted by state law the court explained that:

> The fact that a matter is of state-wide concern does not oust municipal governments of police power. "Even in

> matters of state-wide concern the city or county has police power equal to that of the state so long as the local regulations do not conflict with general laws."

Id. a 175 (citations omitted). One reason relied on the court in not finding municipal authority preempted by state law was that the state statutes manifest a purpose in encouraging local water agencies to address groundwater management. The court found, however, that, "[s]ince many of these agencies are not municipalities and have no reservoir of police power, they are limited to powers specifically conferred by statute." *Id.* at 181. The court in rejecting the landowners' claim of preemption concluded, "[n]o implication can be drawn that the Legislature intended to impair the constitutional exercise of the police power over groundwater because it has granted limited authority over groundwater to local agencies which draw their power solely from state legislation. *Id.* at 182.

Regarding preemption the Supreme Court of Indiana recently upheld the Town of Avon's authority to regulate groundwater in face of challenges of, among other things, preemption by state law. Town of Avon v. W. Cent. Conservancy Dist., 957 N.E.2d 598 (Ind. 2011). Similar to the court in *Baldwin* the Indiana court found gaps of coverage in the state law that municipalities could fill in. *Id.* at 608.

VI. Landmark Texas Supreme Court decision on groundwater ownership—*Day v. EAA*

A critical threshold question as to whether there may be a taking is whether there exists a property right for which there may be a compensable taking. Whether property, and in this instance, groundwater, is a property right compensable under the U.S. Constitution or a state constitution takings clause is a matter for state law to determine. Hence, the first order of business is to look at whether the relevant state law considers groundwater to be a constitutionally protected property right, or whether the issue has been clearly addressed. Until recently, for example, the issue had not been addressed with certainty in Texas. The *Day* opinion changed that.

A. *Day* facts and decision in a nutshell

In the recent landmark decision, *Edwards Aquifer Auth. v. Day,* 369 S.W.3d 814 (Tex. 2012), reh'g denied (June 8, 2012) the property owners R. Burrell Day and Joel McDaniel (collectively "Day") applied to the Edwards Aquifer Authority (EAA or the Authority) for authorization to pump 700 acre-feet of groundwater annually for irritation. The EAA General Manager proposed the denial of the application on the basis that withdrawals from the owners' well during the historical period were not put to beneficial use. After a contested case hearing on the matter EAA agreed that based on water use during a historical period of 21 years that Day should be issued a an Initial Regular Permit ("IRP") for 14 acre-feet of water a year. Day appealed the decision to district court and sued for takings under the Texas Constitution and other alleged constitutional violations. The district court granted summary judgment for Day on his appeal of the permit decision, but also granted summary judgment for EAA on Day's constitutional claims, including the takings claim. Both appealed and the appeals court affirmed EAA's decision to issue a permit for 14 acre-feet, but, while rejecting Day's other constitutional arguments, held that Day's taking claim should not have been dismissed and remanded the case to district court for further proceedings. *Id*. at 820-21.

At the district court level, EAA had impleaded the State of Texas as a third-party defendant on Day's takings claim asserting indemnification and contribution. The Texas Supreme Court granted EAA's, the State's and Day's petitions for review. The court succinctly summarized its decision stating:

> We begin by considering whether, under the EAAA [Edwards Aquifer Authority Act], the Authority erred in limiting Day's IRP to 14 acre-feet and conclude that it did not. Next, we turn to whether Day has a constitutionally protected interest in the groundwater beneath his property and conclude that he does. We then consider whether the Authority's

> denial of an IRP in the amount Day requested constitutes a taking and conclude that the issue must be remanded to the trial court for further proceedings. We end with Day's other constitutional arguments, concluding that they are without merit.

Id. at 822. The question of whether the application of the EAAA to Day has resulted in a compensable taking has been remanded to the trial court. It appears likely that the trial court will apply a *Penn Central* analysis to the facts in the *Day* case.

B. *Day* court affirms that for both groundwater and oil and gas, ownership in place is subject to police powers

The Court in *Day* held that as with oil and gas, ownership of groundwater in place is subject to police powers, stating that:

> In *Elliff*, we restated the law regarding ownership of oil and gas in place: In our state the landowner is regarded as having absolute title in severalty to the oil and gas in place beneath his land. **The only qualification of that rule of ownership 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. **We now hold that this correctly states the common law regarding the ownership of groundwater in place.**

(emphasis added). *Edwards Aquifer Auth. v. Day*, 369 S.W.3d 814, 831-32 (Tex. 2012), reh'g denied (June 8, 2012).

The *Day* opinion again reaffirmed that whether the exercise of police powers in regulating groundwater goes "too far" and constitutes a compensable taking can only be determined by a court employing a takings analysis. The Texas Supreme Court noted, as it did in *Sheffield*, that "in construing article I, section 17 of the Texas Constitution, we have generally been guided by the United States Supreme Court's construction [of] . . . the Fifth Amendment of the United States Constitution . . . ." *Id.* at 838. In this regard, as to the fundamental approach to takings analysis, the *Day* court quoted extensively from the 2005 U.S. Supreme Court opinion *Lingle*, stating among other things that, "[t]he *Penn Central* factors—though each has given rise to vexing subsidiary questions—have served as the principal guidelines for resolving regulatory takings claims that do not fall within the physical takings or *Lucas* rules [regulations that completely deprive owners of all economically beneficial use of their property]." *Id.* at 839.

C. The *Day* court's *Penn Central* analysis

Again, on remand, it appears most likely that the trial court will apply a *Penn Central* analysis. The *Day* court offered their own preliminary takings analysis. Regarding the *per se* takings, the court stated that a physical invasion "does not apply to the present case," and the court found it doubtful a *Lucas*-type taking occurred.[31] In regard this, as well as the first of the *Penn Central* factors—economic impact—the court opined that:

> [T]he denial of Day's application certainly appears to have had a significant, negative economic impact on him, though it may be doubted whether it has denied him *all* economically beneficial use of his property.

Id. at 840. With regard to the second factor of investment-backed expectations the court, although noting that Day presumably was aware of the restrictions under the EAAA before purchasing the property, the court did not think that settled the issue. The court commented that "government cannot immunize itself" from a taking "by discouraging investment," and went on to say:

> While Day should certainly have understood that the Edwards Aquifer could not supply landowners' unlimited demands for water, we cannot say that he should necessarily have expected that his access to groundwater would be severely restricted.

Id. Concerning the third *Penn Central* factor, the character of the government action, the court offered a more lengthy analysis. The court did acknowledge that "[r]egulation is essential to its conservation and use." *Id.* However, the court also commented that regulation is to assure property owners each get their fair share stating that, "[a]s with oil and gas, one purpose of groundwater regulation is to afford each owner of water in a common, subsurface reservoir a fair share." *Id.*

The *Day* opinion with regard to the third *Penn Central* factor also touched on the historic use requirement in the EAAA, comparing it with groundwater district regulations under Chapter 36 of the Texas Water Code. The court characterized historic use in the Water Code as just one of several factors a district may consider in permitting groundwater production. *Id.* at 841. The court found that, "[b]y contrast, the EAAA requires

[31] Although concluding that physical invasion did not apply in the *Day* case, something for consideration by municipalities is that the court nonetheless, offered that, "[i]t is an interesting question, and one we need not decide here, whether regulations depriving a landowner of all access to groundwater—confiscating it, in effect—would fall into the [physical invasion] category." *Id.* at 839. The Texas Supreme Court appears to leave the door open to a property owner plaintiff to assert that they have suffered a *per se* taking in the form of a physical invasion of their property in groundwater when a regulation denied them all access to that groundwater.

that permit amounts be determined based solely on the amount of beneficial use during the historical period," and appeared to express concern that, "[u]nder the EAAA, a landowner may be deprived of all use of groundwater other than a small amount for domestic or livestock use, merely because he did not use water during the historical period." *Id.* On this third factor of the character of government action the court seemed to express the opinion that the EAA was more restrictive than necessary, stating:

> Neither the Authority nor the State has suggested a reason why the EAAA must be more restrictive in permitting groundwater use than chapter 36, nor does the Act suggest any justification.

Id. at 843. Although remanding the matter back to the trail court for further development of the record, the court, without reaching a final determination in its *Penn Central* analysis, none-the-less sounded a negative note regarding the EAAA in its test of whether a regulation has gone "too far" concluding that:

> In sum, the three *Penn Central* factors do not support summary judgment for the Authority and the State. A full development of the record may demonstrate that EAAA regulation is too restrictive of Day's groundwater rights and without justification in the overall regulatory scheme.

Id.

D. Distinguishing "fact-sensitive test of reasonableness" for takings claims affirmed by *Day*, from reasonableness test used in due process claims

The Texas Supreme Court, after providing the summary of takings analysis from *Lingle*, concluded that:

> We followed this analytical structure in *Sheffield*, adding that all of the surrounding circumstances must be considered in applying "a fact-sensitive test of reasonableness", but in the end, "whether the facts are sufficient to constitute a taking is a question of law."

Id. The court further commented that, "no single *Penn Central* factor is determinative; all three must be evaluated together, as well as any other relevant considerations." *Id.* at 840.

A key aspect of the *Lingle* opinion is that it makes clear that a test that examines whether a regulation substantially advances a governmental interest may be part of a due process analysis of a regulation, but it should not be a part of a takings analysis. *See Lingle* at *540-41*. The Court also acknowledges some blurring of the lines by courts in the past in conducting due process and takings analyses, in effect overlapping the two. ("*Agins'* apparent commingling of due process and takings inquiries had some precedent in the Court's then-recent decision in *Penn Central.*" *Lingle* at 541.) The *Lingle*

Court seeks to draw a clear distinction. Whereas a regulatory takings analysis is based on the inquiries found in *Loretto, Lucas* and *Penn Central*, a due process analysis generally looks to whether a regulation is clearly unreasonable or arbitrary. *Id.* at 539-41. The due process inquiry is essentially a reasonableness inquiry.

It is important to note then that when the Texas Supreme Court concludes that its takings analysis considers all of the surrounding circumstances in applying "a fact-sensitive test of reasonableness", this is ***not*** the same reasonableness test used in a due process analysis. This fact-sensitive test of reasonableness taken in context to the Texas Supreme Court's analysis in *Day* as discussed above is clearly considered with and along side the three-prong *Penn Central* analysis as part and parcel of that analysis. It is an enhancement of that analysis—looking at all surrounding circumstances, and not a departure from that analysis which stands alone. An aspect of this fact-sensitive test of reasonableness will necessarily include a balancing of the private and public interests embodied in *Penn Central's* three-prong test and thus does not run afoul of *Lingle's* bright line between takings and due process analyses.

E. Does the *Day* court's pronouncement that this is the first time it has decided the ownership of groundwater issue affect an analysis of investment-backed expectations?

The Texas Supreme Court asserted multiple times that their decision in *Day* is the first time that the court had ever addressed the issue of groundwater ownership. In this regard the court stated, for example, "[w]hether groundwater can be owned in place is an issue we have never decided. But we held long ago that oil and gas are owned in place, and we find no reason to treat groundwater differently." *Day* at 823. Further the court stated, "[n]o issue of ownership of groundwater *in place* was presented in *East*, and our decision implies no view of that issue. . . . [i]n four cases since *East*, we have considered the rule of capture as applied to groundwater. In none of them did we determine whether the water was owned in place. *Id.* at 826.

Since the second prong of the *Penn Central* analysis requires a determination of the extent to which a regulation has interfered with a property owner's distinct and reasonable investment backed expectations, one has to ask the question: Until the *Day* opinion issued on February 24, 2012, or possibly the action taken by the Legislature in 2011 to amend 36.002 of the Texas Water Code (approved June 17, 2011 and effective September 1, 2011),[32] to what extent could a property owner claim that they had a distinct and reasonable investment-backed expectation based on the understanding that they owned the groundwater in place underneath the property they were purchasing?

[32] Acts 2011, 82nd Leg., ch. 1207 (S.B. 332), § 1, eff. Sept. 1, 2011.

What was the nature of groundwater ownership rights prior to *Day*? The *Day* court stated in this regard, "[t]he effect of our decision denying East a cause of action was to give the Railroad ownership of the water pumped from its well *at the surface.*" *Day* at 826. The court further commented regarding its opinion in *East* that, "we could have meant only that a landowner is the absolute owner of groundwater flowing at the surface from its well, even if the water originated beneath the land of another." *Id*.

The Texas Supreme Court in *Barshop* in summarizing the parties' arguments commented that, "[t]he State insists that, until the water is actually reduced to possession, the right is not vested and no taking occurs." *Barshop v. Medina County Underground Water Conservation Dist.*, 925 S.W.2d 618, 625 (Tex. 1996). In light of the *Day* court's insistence that the issue had not been previously decided, and the *Day* court's further statements that the effect of the *East* opinion, "was to give the Railroad ownership of the water pumped from its well *at the surface,"* was the State's argument in *Barshop* a correct statement of the law pre-*Day*? If so, what level of investment-backed expectations could be based on that? The court in *Barshop*, however, noted that:

> The State concedes that Plaintiffs have significant rights to the water under their land. In the [Edwards Aquifer Authority] Act, the Legislature specifically recognized the ownership and rights of the landowner in the underground water and that action taken pursuant to the Act may not be construed as depriving or divesting the owner of these ownership rights. *See* Act of May 30, 1993, *supra*, § 1.07.

Id. at 626. According to the court, the plaintiff property owners in *Barshop* maintained, "that they own the water beneath their land and that they have a vested property right in this water." *Id.* The *Barshop* court summed up the matter declaring that "[t]he parties simply fundamentally disagree on the nature of the property rights affected by this Act." *Barshop* at 625. Ultimately the court at the time found that, "it is not necessary to the disposition of this case to definitively resolve the clash between property rights in water and regulation of water." *Id.* at 626.

Since the state of the law was unclear and fiercely debated prior to the *Day* decision, to what degree could any property owner be said to have reasonably relied on any particular property right in groundwater when there was such great uncertainty over ownership rights? The *Day* opinion essentially confirmed that uncertainty had existed until the court issued its opinion. Up until that time it could be arguable that it was not reasonable to have distinct investment backed expectations based on an assumption of ownership of groundwater *in place*, as such ownership was so unsettled a

matter that it could not be reasonably relied upon.

VI. MUNICIPAL POLICE POWER CASES APPLYING TAKINGS ANALYSIS

A. Overview

There do not appear to be any reported Texas cases regarding a challenge to municipal authority to restrict or prohibit a groundwater well. As discussed below, however, there have been some Texas cases that address municipal authority to limit or prohibit oil and gas wells. Until more recently, property owners have typically asserted due process and equal protections challenges in these instances and the courts' response has been that the restrictions on oil and gas drilling by a municipality is a valid exercise of police powers for the protection of public health and safety. More lawsuits of this nature, including takings claims as well, may emerge with the prevalence of gas wells using hydraulic fracturing methods in urban areas.[33]

Texas cases supporting municipal police power regulations of oil and gas wells as a valid exercise of police power (discussed below) have typically been based on a finding that the municipal ordinance does not violate a property owner's substantive due process rights (and some further find that equal protection rights were also not violated).[34] In making such findings with regard to due process claims, the courts' holdings are based on an assessment that the municipal regulation is *not unreasonable or arbitrary*—or put otherwise courts have held that a constitutional violation could only be found where an ordinance is *clearly* unreasonable or arbitrary and the court would not substitute its judgment for that of the city.[35]

Most likely if these cases were brought today, Texas claimants would assert a taking and courts would assess them under the takings standards established in the *Mayhew* and *Sheffield* cases based on federal jurisprudence (in particular *Penn Central*).[36] As discussed, it appears that the public health and safety purpose of these regulations would now be evaluated in the *Penn Central* balancing test under the third *Penn Central* factor for takings analysis.

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[33] *See* Sabrina Tavernise, *As Gas Drilling Spreads, Towns Stand Ground Over Control*, N.Y. Times, December 14, 2011, http://www.nytimes.com/2011/12/15/us/towns-fighting-to-stand-ground-against-gas-drillers.html?_r=1&ref=sabrinatavernise (stating "[i]n Texas, a restrictive gas drilling ordinance adopted by an affluent suburb of Dallas called Flower Mound has drawn several lawsuits charging that it amounts to an unconstitutional seizure of mineral rights.")

[34] *Unger v. State of Texas*, 629 S.W.2d 811 (Tex. App.—Fort Worth 1982, writ ref'd); *Helton v. City of BurkBurnett*, 619 S.W.2d 23 (Tex. Civ. App.—Fort Worth 1981, writ ref'd n.r.e.; *appeal dismissed* 456 U.S. 940 (1982); *Klepak v. Humble Oil & Refining Co.*, 177 S.W.2d 215 (Tex. Civ. App.--Galveston 1944, writ ref'd n. r. e.); *Tysco Oil Co. v. Railroad Commission of Texas*, 12 F.Supp. 202 (S.D. Tex. 1935) (disposed of due process and equal protection challenges to oil and gas drilling ordinance).

[35] *Id.*

[36] Note that *Mayhew* has a substantive due process analysis that looks specifically at whether an ordinance is arbitrary. In addition *Mayhew* includes an equal protection analysis.

B. Municipal regulation of oil and gas wells

1. Overview of facts and general holdings

Although, as mentioned, there do not appear to be any reported Texas cases in which a property owner has challenged municipal authority to regulate groundwater wells, there have been some cases where property owners have challenged a city's right to regulate oil and gas wells. Texas courts have upheld cities' authority in such cases as a valid exercise of municipal police power. In *Unger v. State of Texas*, 629 S.W.2d 811 (Tex. App.—Fort Worth 1982, writ ref'd) a property owner was convicted and issued a fine for $105 for drilling an oil well within the city limits of Burkburnett, Texas, a home rule city, without securing a drilling permit as required by city ordinance. On appeal the appeals court held, among other things, that the city, "under its police power has full authority to both regulate and prohibit the drilling of oil wells within its city limits." *Id.* at 812.

The court in *Unger* relied in part on an opinion it had issued just a year earlier with regard to the same city and ordinance. In *Helton v. City of BurkBurnett*, 619 S.W.2d 23 (Tex. Civ. App.—Fort Worth 1981, writ ref'd n.r.e.; *appeal dismissed* 456 U.S. 940 (1982) property owner Helton refused to obtain an oil well drilling permit required by municipal ordinance. The city obtained a permanent injunction and Helton challenged the constitutionality of the city ordinance, asserting the ordinance violated the 14th Amendment of the U.S. Constitution on its face by denying due process and equal protection. Helton argued that the ordinance did not merely regulate drilling, but by purporting "to provide the power to totally prohibit drilling" went "beyond the legitimate use of the city's police power." *Id.* at 24. The court, however found 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" and held also that the ordinance "is neither unreasonable, arbitrary, nor discriminatory upon its face or as applied. Its enforcement does not deprive Helton of his property rights without due process of law." *Id.*

The *Unger* court, in reaching its conclusion also cited several earlier cases on the subject including *Klepak v. Humble Oil & Refining Co.*, 177 S.W.2d 215 (Tex. Civ. App.--Galveston 1944, writ ref'd n. r. e.) in which the plaintiff sought, among other things, an order declaring the city ordinance regulating oil wells invalid. In *Klepak*, the plaintiff had obtained a permit from the Railroad Commission, the validity of which the city refused to recognize, and prohibited the property owners and their oil and gas lessee, Klepak, from drilling without a city permit. *Klepak* at 216-7. The court affirmed municipal police power authority "to regulate the drilling for and production of oil and gas within their corporate limits," for the protection of citizens and property as well as the preservation of good government, peace, and order therein. *Klepak* at 218.

Municipal authority to regulate oil and gas drilling had earlier been

strongly confirmed in a federal opinion based on Texas law (with jurisdiction in federal court due to U.S. Constitutional issues and amount in controversy), wherein the court held:

> That plaintiff's title to the oil and gas estate owned by it is held subject to reasonable regulations by the state under the police power is not an open question. . .Nor can it be doubted that the state may delegate such power to a municipal corporation such as is the city of South Houston. Nor that it has been so delegated [by statute].

Tysco Oil Co. v. Railroad Commission of Texas, 12 F.Supp. 202 (S.D. Tex. 1935) (additional facts provided below). More recently a court of appeals opinion in a challenge to a municipal ordinance, which required surface property owner consent to a well drilled within 500 feet of a building, affirmed that this remains the law in Texas, pronouncing:

> The right of an oil and gas operator to conduct drilling activities is not an absolute right, but is subject to reasonable restriction by the state. *Elliff v. Texon Drilling Co.*, 146 Tex. 575, 210 S.W.2d 558, 561 (1948). A city may enact reasonable regulations to promote the health, safety, and general welfare of its people. *City of College Station v. Turtle Rock Corp.*, 680 S.W.2d 802, 805 (Tex.1984). The development of oil and gas within the city limits is clearly an area subject to regulation under the police powers of a municipality.

Shelby Operating Co. v. City of Waskom, 964 S.W.2d 75, 83 (Tex. App.—Texarkana 1998, pet. denied). In addition, most of the key cases on municipal regulation of oil and gas wells pursuant to a valid exercise of police power cite as authority a 1929 Eighth Circuit opinion from Kansas *Marrs v. City of Oxford*, 32 F.2d 134 (8th Cir. 1929), *cert. denied*, 280 U.S. 563 (1929), and *cert. denied* 280 U.S. 573 (1929). In *Marrs* the plaintiffs (lot owners and oil and gas lessees) had been arrested and fined for not obtaining a drilling permit from the city and brought suit asking the court to enjoin enforcement of the ordinance on grounds that it denied constitutionally protected rights. *Marrs* at 134-5. The *Marrs* court, although addressing a claim that asserted the ordinance was void, expressly stated that this exercise of police power did not result in a compensable taking announcing that, "it is well settled that the enforcement of uncompensated obedience to a legitimate regulation established under the police power is not a taking of property without compensation." *Id.* at 138-9. [37]

[37] In *Marrs* the court found that the regulations protected the public welfare and safety and found this sufficient to determine that the city ordinance was not an arbitrary and unreasonable exercise of the city's police power. The court went further to

2. Key legal issues addressed in opinions on municipal regulation of oil and gas wells

a. No conflict with state law regulating same subject

The decision in *Klepak* brings home starkly the point that oil and gas drilling permit requirements by cities are not in any manner preempted by state law. As discussed, surface owner and lessee in *Klepak* had actually obtained a drilling permit from the Railroad Commission as an exception to the commission's Rule 37 spacing rules. *Klepak* at 216. The fee simple owners and their lessee complained that the city ordinance "forbade the honoring of such subsequently granted permit by the Railroad Commission." The appeals court in response declared:

> There is no dispute--nor could there properly be under the settled law--that the Railroad Commission of Texas had 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.
>
> However, it is held that the Legislature--in so delegating that authority to the Railroad Commission--did not thereby intend to nor accomplish the repeal of the fundamental law theretofore, 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.

Klepak v. Humble Oil & Refining Co., 177 S.W.2d 215, 218 (Tex. Civ. App.--Galveston 1944, writ ref'd w.o.m) (citations omitted). Thus Texas courts have concluded that state regulation of oil and gas drilling does not preempt municipal police power regulation of the same activity and it follows that courts could adhere to this same principle with regard to municipal regulation of groundwater.[38]

The court in *Unger* held as well that "the subject ordinance [requiring drilling permit from city] is not in conflict with a state law on the same subject," noting as well this was the "gist of the opinion" in the federal

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state that the ordinance essentially protected other property owners' rights in a state such as Kansas where at the time of the opinion there was "no property in oil and gas because of their migratory nature, until they have been captured, though each surface owner may take without limit . . ." *Marrs* at 140. The Texas courts have relied on the public health and safety reasons for supporting the municipal ordinances' exercise of police powers in regulating oil and gas wells rather than arguments regarding protection of other property owners' interests.

[38] *See, supra, Dallas Merchant's and Concessionaire' s Ass' n v. City of Dallas*, 852 S.W.2d 489, 491 (Tex.1993).

case *Tysco 1*.[39] *Unger* at 812-3. In *Tysco 1*, lot owners in the City of South Houston, joined by Tysco Oil Company, which had obtained oil and gas leases for the lots, had sought exceptions to the Railroad Commission's well spacing rules under Rule 37. *Tysco Oil Co. v. Railroad Commission of Texas*, 12 F.Supp. 195, 198-9 (S.D. Tex. 1935). The Railroad Commission denied the exceptions and instead adopted special field rules for South Houston that matched rules the city had enacted by ordinance for safety purposes that divided the city into four drilling districts of approximately 16 acres and allowed only one well per drilling district. *Id.* at 200, 197. As the lot owners and Tysco Oil Company (lessee) challenged the Railroad Commission's order as invalid under the U.S. Constitution, the court held that the commission orders, including spacing limits that conformed with but did not replace the city's ordinance, were not unreasonable, arbitrary, or confiscatory. *Id.* at 201. In *Tysco 2* against the City of South Houston the court similarly held that considering the dangers of oil drilling in a residential area the evidence failed to show the city's ordinance to be arbitrary or unreasonable. *Tysco Oil Co. v. Railroad Commission of Texas*, 12 F.Supp. 202, 203 (S.D. Tex. 1935).

b. Regulation of vested rights upheld with regard to municipal regulation of oil and gas wells

As discussed above, the court in *Unger* held that the city, "under its police power has full authority to both regulate and *prohibit* the drilling of oil wells within its city limits." *Unger* at 812 (emphasis added).[40] *In Helton v. City of BurkBurnett,* 619 S.W.2d 23 (Tex. Civ. App.—Fort Worth 1981, writ ref'd n.r.e.; *appeal dismissed* 456 U.S. 940 (1982) the court, among other things, addressed constitutional challenges to a city's authority to not merely regulate but to prohibit oil well drilling.

The court in response to Helton's argument that the ordinance was invalid in that the ordinance presumed "to grant the city the authority to take away or impair his vested right to reach the oil underlying his property," held that "**the deprivation of individual**

[39] The court in *Tysco* noted that the court divided the case and tried in separate proceedings the case against the Railroad Commission (12 F.Supp. 195, herein "Tysco 1") and the claim against the City of South Houston (12 F.Supp. 202, herein "Tysco 2").

[40] The Texas Supreme Court in the zoning context in *Lombardo* made it clear that police power may be used not only to regulate uses of private property but to prohibit them completely. The court held that '[u]ses of private property detrimental to the community's welfare may be regulated or even prohibited." *Lombardo* at 483. The court further explained:

> [T]he police power may be exerted to regulate the use, and where appropriate or necessary prohibit the use, of property for certain purposes in aid of the public health, morals, safety, and general welfare, and that the constitutional limitations form no impediment to its exertion where the enactment is reasonable and bears a fair relationship to the object sought to be attained.

Lombardo at 481.

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." *Id.* (emphasis added).[41] The court quoted portions of the city ordinance, which stated that the city could refuse any permit to drill a well for health and safety reasons, among several others. The court ultimately found that the ordinance overall did not prohibit the drilling of oil and gas wells (apparently meant in the broader sense as an individual permit could be denied) and that the ordinance "merely provides rules facilitating the orderly and harmonious development of both oil exploration and city growth." *Id.*

Although an evaluation of a due process and equal protection claim, rather than a takings claim, the discussion of vested rights in *Helton* is still relevant to municipal regulation of groundwater wells in light of the *Day* opinion's holding that property owners own groundwater in place as discussed. In this instance, the *Helton* court stated clearly that the deprivation of individual rights cannot prevent the exercise of the police power within the meaning of due process. *Id.*

Courts have recognized in these opinions relating to municipal regulation of oil and gas wells that a valid exercise of police power can regulate and even prohibit well drilling. Thus cities have already regulated well drilling in the oil and gas context where courts expressly recognize that property owners do have ownership of oil and gas in place. *Brown* at 940. Should courts apply the same reasoning in the groundwater context, it appears that the same results could be expected.

c. Standard applied by courts in oil and gas cases to assess constitutional challenges

As discussed above, because many of the cases regarding municipal regulation of oil and gas drilling pre-date the *Mayhew/Sheffield* decisions, the standard used by courts in evaluating a constitutional challenge in these instances is typically based on an assessment as to whether due process or equal protection rights have been violated. The court in *Helton*, for example, analyzing the constitutional challenge under a substantive due process standard, stated that the ordinance would have to be shown to be *clearly arbitrary and unreasonable* and that the court could not substitute its judgment for that of the city. Specifically the court stated:

> In determining the constitutionality of an ordinance passed pursuant to the police power of the city it must be borne in mind that the presumptions favor the ordinance. For a challenge to be successful the ordinance must clearly appear to be unreasonable and arbitrary. *Zahn v. Bd. of Public Works*, 274 U.S.

[41] Relevant to this, the Texas Supreme Court, in *Brown v. Humble Oil & Refining Co.*, 83 S.W.2d 935, 940-1 (Tex. 1935) recognized the ownership of oil and gas in place and yet also clearly affirmed the right of the state legislature and the Railroad Commission to regulate oil and gas production as a valid exercise of the state's police powers.

> 325, 47 S.Ct. 594, 71 L.Ed. 1074 (1927). In making this determination this court is not entitled to substitute its judgment for that of the city and its officers. *Zahn v. Bd. of Public Works*, supra.

Helton at 24. Concerning the constitutional challenges, the court found that the ordinance did not deprive Helton of his property rights without due process, stating it was "neither unreasonable, arbitrary, nor discriminatory upon its face or as applied." *Id.* With regard to the equal protection claim the court held that "[t]his ordinance applied to all person similarly situated within the city limits." *Id.*

The *Unger* court dispensed in a cursory manner with similar constitutional challenges to those brought in *Helton*, stating that those challenges had already been rejected in *Helton. Unger* at 813. The court went further to state that certain principles applied including the presumption in favor of the constitutionality of enactments of all law-making bodies. The court found that the constitutionality with regard to due process and equal protection rested in essence on a finding of reasonableness of regulation, and that a city's decision regarding reasonableness is controlling on the courts, "unless the unreasonableness of the ordinance is fairly free from doubt." *Id.*

The court in *Klepak* had, similar to *Helton*, dispensed with the due process challenges briefly, stating that the ordinance was "neither unreasonable, arbitrary, nor discriminatory, upon its face," and that the enforcement to protect citizens and their property and the preservation of good government "does not deprive any of its citizens (including these appellants) of their property, without due process of law." *Klepak* at 218. The court in *Tysco 2* provided substantially the same reason as that found in *Helton* for rejecting a claim that the city had unlawfully deprived plaintiff of its rights under the Constitution. The court in relying on the U.S. Supreme Court decision in *Zahn*, *supra* noted that "whether the ordinance under consideration there was unreasonable or arbitrary was 'fairly debatable,' yet the ordinance was upheld." *Tysco 2* at 203.

Although the constitutional challenges in these municipal regulation of oil and gas cases were subject to a due process analysis, a constitutional challenge today regarding regulatory impacts to property rights in oil and gas--or groundwater--would now likely be a takings claim analyzed under a balancing test as provided by the *Penn Central/Sheffield* factors. Considering the courts' recognition of the significant public health and safety concerns behind the municipal regulation of oil drilling, if such a takings balancing test had been applied, it appears most likely that it would have yielded similar results.

d. Earlier decisions: No compensable taking for valid exercise of police power

On this issue the *Marrs* court, quoting the U.S. Supreme Court held that:

> [A]ll contract and property rights are held subject to "a fair exercise of the police power . . . And it is well settled that the **enforcement of** uncompensated obedience to a **legitimate regulation** established under the police power **is not a taking of property without compensation**, or without due process of law, in the sense of the Fourteenth Amendment . . . Necessarily these regulations will encroach, when the power is exercised, on private rights; but that does not render them void."

Marrs at 138-9 (citations omitted). Similar language is also relied upon by the Texas Supreme Court in *Lombardo. Lombardo* at 479. In *Marrs* the court found that the regulations protected the public welfare and safety and found this sufficient to determine that the city ordinance was not arbitrary and unreasonable exercise of the city's police power.[42] As mentioned, although courts now apply a balancing test, the health and safety considerations would no doubt factor in significantly when weighing the competing public and private rights and concerns. In addition, although not as developed as in current takings jurisprudence, there appears to be at least a rudimentary balancing involved in these earlier due process based decisions in the courts' consideration of the public health and safety dangers associated with this particular usage of private property.

With regard to factors that may have influenced the *Marrs* court and others thinking about constitutional challenges, it is important to note that the discussed ordinances regulating oil and gas production generally contained a provision whereby the property owners who did not have a permit, or did not have a contract with the permittee, nonetheless could obtain a share of the proceeds from the well. Regarding the ordinance in the *Marrs* case, for example, the court explained that:

> If one or more lot owners have given a lease for which no permit is obtainable their lessee may join a lessee who has a permit in the same block on terms that are fair to both lessor and lessee. If a lot owner has not given a lease he is protected by the asking in a fair proportion of the mineral produced by a permittee. The regulations make every effort to protect, rather than to destroy rights.

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[42] As mentioned, the *Marrs* court went further to state that the ordinance essentially protected other property owners' rights in a state such as Kansas where at the time of the opinion there was "no property in oil and gas because of their migratory nature, until they have been captured, though each surface owner may take without limit . . ." *Marrs* at 140. The Texas courts have relied on the public health and safety reasons for supporting the municipal ordinances' exercise of police powers in regulating oil and gas wells rather than arguments regarding protection of other property owners' interests.

Marrs at 140. Similarly, in *Tysco 1* the court provided excerpts of the municipal ordinance regulating oil wells, and these in part relate the sharing arrangement established by the regulation stating:

> [I]n case a permit for the drilling of a well be issued to a person, persons, or corporation not owning or holding oil and gas leases, or drilling contracts with the owners of all the area in a drilling district, it shall be a condition of the permit that the **permittee**, its successors and assigns, **shall deliver to the credit of each of such owners whose land shall not be under lease held by the permittee**, free of cost, in the pipe line to which the well may be connected, **a share of oil produced** …
>
> [I]n case a permit be issued to persons or corporations who do not own or hold leases or other valid drilling contracts in writing from the owners of all of the land within the said district other than streets and alleys, **any owner of unleased land** in the said drilling district and any person or corporation other than the permittee, holding oil and gas leases on land in the drilling district, **shall have the right to share in the ownership and benefits of such oil or gas well** in the proportion that the area of his or its land or lease bears to the area of the drilling district . . .

Tysco 1 at 197 (emphasis added). Again such provisions may have influenced the courts thinking about whether the ordinance effected a compensable taking. Note, however, that the court's description of the ordinance in *Helton* (also same ordinance in *Unger*) does **not** mention any such sharing provision, as the general nature of the ordinance appeared to be different. Rather than dividing the city into districts, the ordinance required distance setbacks from residents unless the oil driller obtained a release from the property owner. In addition the ordinance allowed the city to refuse a permit in certain instances "where the drilling of such wells on such particular location might be injurious or be a disadvantage to the city or it's [*sic*] inhabitants . . . ." *Helton* at 24. Also, the ordinance in the *Trail Enterprises* case discussed below does not have a sharing provision. Thus, Texas courts upholding municipal regulations of oil wells and not finding a compensable taking cannot be attributed in every case to such a sharing provisions.

e. Recent cases—*Maguire, Trail Enterprises*

There are a few cases involving the City of Houston's attempt to protect its water supply through regulation of oil well drilling that at first blush may appear to reflect different thinking about the extent of municipal police power authority to regulate well drilling, however, one case turns on some unusual facts which distinguishes it from the cases

discussed and the other has yet to be resolved. In *City of Houston v. Maguire Oil Co.,* 342 S.W. 726 (Tex. App.—Houston [14th Dist.] 2011, pet. denied) Maguire Oil Co. ("Maguire") obtained oil and gas leases on five tracts near Lake Houston a significant source of drinking water for the city. Maguire obtained a permit from the City of Houston to drill at a location about 300 feet from Lake Houston. City Code at the time prohibited drilling in areas that are both (1) within 1000 feet of Lake Houston and (2) within a "control area" defined by the ordinance. City employees who spotted preparations for drilling close to the lake mistakenly issued a stop work order, assuming that the city permit had been issued in error and that the location violated the ordinance. In subsequent meetings with Maguire, city officials continued to assert that the location violated the ordinance, although in subsequent litigation the city admitted that the ordinance was inapplicable because the control area had been defined as the city's extraterritorial jurisdiction and the well site was within the city limits.[43]

In terms of municipal regulation of oil and gas well takings litigation, the *Maguire* case seems to stand alone, based on the peculiar facts of the mistaken enforcement of an inapplicable ordinance. In *Maguire* the court held that "the *ordinance's inapplicability* to Maguire's drilling site *supports the conclusion* that the *City's interference was unreasonable* . . . the City effected a taking when it intentionally and *unreasonably* interfered with Maguire's right to use and enjoy its mineral estate." *Maguire* at 747 (emphasis added).

In essence, the *Maguire* court held that the City's action was not taken pursuant to the city's ordinance and therefore was not reasonable, ostensibly doing a *Penn Central* analysis but apparently only applying a test that a taking occurs when regulatory action unreasonably interferes with a property owner's right to use and enjoy his property. Although the *Maguire* court stated that all property is held subject to the *valid* exercise of police power and "thus not every regulation is a compensable taking, although some are (citations omitted)", this again is not an action that the court considered valid, nor can it be characterized as a *valid* exercise of police power. As such the *Maguire* case is not an example of a *valid* police power action where a court nonetheless found that a compensable taking had occurred.

The same ordinance litigated in *Maguire*, when correctly applied by the City in another case (in the initial phase of this extensively litigated matter), was upheld as a valid exercise of police power. *Trail Enterprises, Inc. v. City of Houston*, 957 S.W.2d 625, 635 (Tex. App.—Houston [14th Dist] 1997, pet. denied), *cert. denied*, 525 U.S. 1070 (1999), *and reh'g denied*, 525 U.S. 1172 (1999). In *Trail Enterprises* plaintiffs brought an inverse condemnation claim in response to

[43] The original control area in 1967 had been 5 miles from the lake but a 1977 ordinance amended that area to be just the ETJ—a change which employees enforcing the ordinance apparently did not realize in the early enforcement of the ordinance. *Id.* at 729.

the ordinance (same one as in *Maguire*) prohibiting oil and gas wells within a certain proximity of a lake serving as a primary source of municipal water supply for Houston. The appeals court in 1997 held that "the Ordinance is a valid exercise of the City's police power as a matter of law." *Id.* It is noteworthy as well that the court in *Trail Enterprises 1* concluded a more extensive discussion on the issue of compensation for a taking stating:

> When a government regulates a right, prohibits some noxious use, or if the public need outweighs the private loss, compensation should not be allowed. *Teague,* 570 S.W.2d at 393.

Trail Enterprise 1 at 631.

When the City of Houston annexed Trail Enterprises' proposed drilling site, the ordinance by its terms no longer applied; however, the City amended its ordinance so that it would again apply. As a result of this reapplication of the ordinance to their property, Trail Enterprises got another bite at the apple and sued again for inverse condemnation. *Trail Enterprises, Inc. v. City of Houston*, No. 14-01-00441-CV, 2002 WL 389448 (Tex. App.--Houston [14th Dist.] March 14, 2002) [referred to herein as *Trail Enterprise 2* and the original case as *Trail Enterprise 1*]. The history of this matter is convoluted, but *Trail Enterprises 2* resulted in a remand to the trial court. The matter ultimately returned to the appeals court, which reversed the trial court's decision that plaintiff's claim was not ripe due to failure to apply for a drilling permit, and rendered a money judgment imposing significant damages on the city. *Trail Enterprises, Inc. v. City of Houston*, 255 S.W.3d 155 (Tex. App.—Waco 2007), *rev'd* 300 S.W.3d 736 (Tex. 2009). This resulted in a brief Texas Supreme Court opinion *City of Houston v. Trail Enterprises, Inc.*, 300 S.W.3d 736 (Tex. 2009), reversing the appeals court and remanding to the trial court so that it can reach final judgment and provide the parties an opportunity to challenge the judgment as well as an opportunity further litigate the takings issue.[44]

Trail Enterprises—Still not the end of trail?

Subsequently, the matter was remanded to the trial court which found there was a taking and awarded mineral interest owners $17 million, but the trial court also awarded certain mineral interests to the City of Houston. Both sides appealed. Based on a *Penn Central*

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[44] The Texas Supreme Court in its opinion stated:

> Certainly the trial court should determine if additional exploration is warranted into whether the owners have met their burden of demonstrating a taking under the balancing test articulated in *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104 (1978). *See also Sheffield Dev. Co. v. City of Glenn Heights*, 140 S.W.3d 660, 670–71 (Tex. 2004); *Hallco*, 221 S.W.3d at 56. Likewise, the trial court may consider other appropriate issues before entering its final judgment. However, we do not reach any such issues with our ruling today.

Id. at 737-8.

analysis of a regulatory taking, the appeals court, in a yet unpublished opinion, reversed and rendered judgment that appellees take nothing. *City of Houston v. Trail Enterprises, Inc.,* 14-10-00944-CV, 2012 WL 3223662 (Tex. App.--Hous. [14th Dist.] Aug. 9, 2012, no. pet. h.). The decision included reversal of the portion of the trial court's judgment giving a mineral interest to the City. *Id.* at n. 20.

The appeals court, concluding that neither of the *per se* takings applied,[45] conducted the *Penn Central* analysis, which indeed illustrated that a takings analysis turns on the unique facts of the case. Taking up first the character of the governmental action the court concluded that:

> Given the importance of protecting the community's drinking water and possible pollution from new drilling near Lake Houston, we conclude that the first factor weighs heavily in favor of the City and against a finding of a compensable taking.

Id. at 4. Regarding the investment-backed expectations test, the court found only one instance where a property owner obtained an interest prior to the enactment of the regulation. *Id.* at 5. Although acknowledging the U.S. Supreme Court's rejection of a blanket rule of no taking whenever a purchaser should have been aware of land-use regulations reducing market value in *Palazzolo v. Rhode Island,* 533 U.S. 606 (2001), the court none-the-less concluded that:

> Under *Sheffield*, *Mayhew*, and the similar cases discussed above, such investment [after drilling prohibited by ordinance] does not relate to reasonable expectations of a recovery beyond that from the existing wells. The second factor heavily favors the City.

Id. at 6-7. Regarding the third factor of economic impact, although acknowledging that the mineral interest owners "produced evidence of fairly significant economic impact" *Id.* at 8, the court concluded that:

> [G]iven the degree to which the first two factors favor the City, we do not find the weight of the third factor sufficient to demonstrate that a compensable taking has occurred under *Penn Central* and *Sheffield.*

Id. Justice Frost dissented noting that article I, section 17 of the Texas Constitution, unlike the Fifth Amendment of the U.S. Constitution, besides a requirement for compensation for a taking, allows compensation when property is damaged or destroyed. The dissent

[45] Interestingly even post-*Lingle*, this appeals court still followed the *Sheffield* court's determination that a property owner can prove a taking by showing that the regulation did not advance a legitimate state interest, however, in this instance the court found appellees had not argued this test applied. *Id.* at 3.

argued that the plaintiff's inverse condemnation claim included claims for both a takings and damages, but that the City's second issue on appeal, on which the majority based its opinion, only disputed the takings claim. The dissent consequently disagreed that sustaining the City's second issue (reversing the takings finding) was dispositive, however, Justice Frost did not appear to argue that a damages analysis be conducted under article I, section 17, but rather suggested that, "this court instead should address the City's first and third issues, and if necessary the Mineral Interest Owner's cross-issue." The first issue being that "the City adversely possessed the mineral interests and appellees' claims are therefore barred by the applicable statute of limitations," and the third issue being the "appellees failed to present competent evidence of compensable damages," with property owners contesting in their cross appeal the award of an interest to the City. *Id.* at 2. The majority countered the dissent argument stating that the trial court told the jury in the jury charge only that the City's ordinance has resulted in a taking. The majority concluded that, "we disagree with the dissent's conclusion that the judgment might be confirmable on the alternative damage-in-the-absence-of-a-taking theory." *Id*. at n. 21. It remains to be seen whether this case will be taken up again by the Texas Supreme Court. For the moment it represents confirmation of municipal authority to significantly limit well production under its police powers for public health and safety purposes.

f. Parcel-as-a-whole issue

As stated, a *Lucas*-type takings analysis will examine whether a regulation has deprived a property owner of all economically beneficial or productive use of their land. *Sheffield* at 671. Integral to this analysis in a potential groundwater or oil and gas takings claim is whether the court views the groundwater or the mineral rights as a portion of the surface estate affected by the regulation, such that despite restricted access to groundwater or the mineral estate significant value still remains in the estate as a whole.[46]

The U.S. Supreme Court in this regard has made the general pronouncement that:

> 'Taking' jurisprudence does not divide a single parcel into discrete segments and

[46] One commentator with regard to oil and gas regulations termed this the "aggregate/disaggregate" issue and noted that the majority of opinions in the U.S. have considered the overall value of the property and not just the impact to the mineral estate. Bruce M. Kramer, *Local Land Use Regulation of Oil and Gas Development*, Rocky Mountain Mineral Law Foundation, Surface Use for Mineral Development in the New West: Finding Good Ground, p. 23 (2008) (stating, "[t]he predominant test now in use applies the 'aggregate' or 'parcel as a whole' theory, taking into consideration the economic expectations of the property owner."). Although the presentation did not appear to reference Texas cases on this point, it noted a Colorado Supreme Court opinion in which, "[a] county zoning ordinance prohibited certain types of mining activities. . . .The court determined that there is neither a *Lucas* nor a *Penn Central* taking because the entire parcel owned by the plaintiff included areas where economically viable uses could take place." *Id.* at 23.

> attempt to determine whether rights in a particular segment have been entirely abrogated. In deciding whether a particular governmental action has effected 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 . . . .

Penn Central at 130-1. The U.S. Supreme Court affirmed this approach again in *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 535 U.S. 302, 327 (2002) stating that, "where an owner possesses a full bundle of property rights, the destruction of one strand of the bundle is not a taking." *See also, Estate of Scott v. Victoria County*, 778 S.W.2d 585, 590 (Tex. App.—Corpus Christi 1989, no writ).

Groundwater, unless severed, is part of the surface estate. *Sun Oil Co. v. Whitaker*, 483 S.W.2d 808, 811 (Tex.1972). Although it is possible that a groundwater lease may be affected by a municipal regulation of groundwater, in a municipal setting where leases are generally not common that appears to be less likely of a concern. For a residential lot within a city that has not leased its groundwater rights, whatever property interest the lot owner has in groundwater, the groundwater will be considered as part of the surface estate.

In sum, it appears much more likely that a city regulating groundwater use would end up defending any takings claim against a *Penn Central*-type analysis, taking into consideration the value of the land parcel as a whole, rather than against a *Lucas*-type analysis, in which the groundwater is considered as separate property where a denial of access might be characterized as a deprivation of all economically beneficial use.[47]

C. Takings analysis summary

For non-exaction regulatory takings claims particularly regarding regulations that address threats to public health and safety, when neither a physical nor *Lucas*-type taking applies, then Texas courts apply the balancing test set forth in the *Penn Central* factors. This test looks at (1) the economic impact of the regulation on the claimant, (2) the extent to which the regulation interferes with reasonable investment-backed expectations, and (3) the character of the governmental action. These factors are not formulaic, but serve as guideposts that Texas courts use to consider all of the surrounding circumstances in applying a fact-sensitive test of reasonableness. Applying the *Penn Central* balancing test to police power actions that are for the purpose of protecting public health and safety, as in the case of the several cases examined concerning municipal regulation of oil and gas drilling, courts are unlikely to conclude that the municipal

[47] With regard to a *Penn Central*-type analysis, in terms of reasonable investment-backed expectations when a person purchases a residential lot which is already served or readily served by a public water system, purchasers are generally not thinking of drilling a groundwater well and often have no idea whether groundwater is even available.

regulation effects a compensable taking. As mentioned, one commentator concluded, "[e]xercises of the police power that directly protect public health and safety remain unlikely, even after *Lingle*, to be a taking under *Penn Central*. *See, e.g., Rose Acre Farms, Inc.*, 559 F.3d at 1281."[48]

D. Application of takings law to municipal regulation of groundwater

To the extent it is shown, for example, that a multiplicity of private water wells may create numerous pathways for pollutants to reach a shared public water supply or a protected habitat for endangered species or otherwise environmentally sensitive waters, then a municipal regulation that limits or prohibits the drilling of private water wells to prevent such hazards, may be held as not effecting a taking and not requiring compensation. Other reasons for regulating private water wells may include protecting the public water supply from dangerous cross connections between private wells and the public distribution system by which contaminants or pathogens could be introduced into the drinking water supply of a large population. Regulations reasonably aimed at conserving public water supply in severe drought also have a good prospect of being held as not a taking. Municipal regulations which protect both the quantity and quality of water in an aquifer which serves as a significant municipal water supply are also good candidates for regulations a court would conclude are a valid exercise of police power not effecting a taking. In addition, private water well regulations which create a buffer zone around a municipal groundwater well field are likely to be held reasonable and not a taking.

Regulations may also be designed to avoid possible disruptions and dangers that might result in established neighborhoods with typical residential sized lots when private water wells are drilled. Although regulated by the state, the potential in private water well drilling for hitting or disturbing existing infrastructure exists, such as the drilling rig hitting high voltage electric lines or drilling into or near existing sewer or water lines multiplies with the number of wells drilled.

If a public water system might fail financially and leave a significant portion of a city without water service because a large number of residents drilled private water wells, then a court may not find a taking. As discussed earlier, one test for considering whether a compensable taking has occurred, is "when the government's action against an economic interest of an owner is for its own advantage." *Teague* at 393. Although a prohibition on drilling water wells where municipal water service is available may appear to be for the city's advantage, in the larger picture in such an instance it would be for the purpose of protecting the health and safety of the city's citizens by maintaining a viable public water supply. Of course, as discussed above maintaining the financial

[48] Robert Meltz, *Substantive Takings Law: A Primer*, *supra*, p. 26.

viability of a municipal water utility may be only one of several reasons that a city has for regulating private water wells.

Ultimately only a takings analysis which takes into account all of the circumstance can determine whether a regulation of groundwater wells by a city has gone too far such that compensation would be required.

VII. EXAMPLES OF MUNICIPAL ORDINANCES

A. San Antonio

This presentation does not aim at any kind of comprehensive report of which cities in Texas have groundwater well regulations, but a few ordinances are examined as examples. It appears that the largest major city in Texas with a private groundwater well ordinance is the City of San Antonio. The ordinance requires a permit both in the city and the service area of San Antonio Water System ("SAWS") (with exceptions for certain wells such as monitoring and test wells); however, it also requires that the permit be refused if water service is available from SAWS or another water purveyor. San Antonio, Tex., Code of Ordinances ch. 34, art. VI, §§ 34-567, 34-570 (2011). Specifically with regard to the requirement to obtain a permit the ordinance states that:

> It shall be unlawful for anyone to drill, maintain, or otherwise construct or have constructed, any new water well, or any other artificial excavation to explore for or produce groundwater . . . within the City of San Antonio or SAWS service area, without first applying for and securing a well drilling permit from the SAWS Water Quality Division.

Id. at § 34-567. Permits are generally refused for a variety of reasons including available service which would include most residential lots, as the ordinance states, "[i]t shall be the duty of the SAWS Water Quality Division . . . **to refuse issuance of a permit when:** . . . (b) The proposed well would be located on property to which **water service is currently available** from SAWS or any other recognized water purveyor." *Id.* at § 34-570. This provision also requires refusal of a permit when:

> (c) Water service from existing SAWS water mains or service lines could be established to the property on which the proposed well is located at a cost equal to or less that the cost of drilling the well; or
> (d) The intended use of the water to be produced by the proposed well could be accomplished using reuse water, and reuse water service is available to the property or could be made available at a cost equal to or less than the cost of drilling the proposed well.

Id. The ordinance does provide a process whereby a property owner denied a permit can seek a variance; however, variances have a limited term of three years. *Id.* at § 34-576. When considering the San Antonio ordinance, it should be kept in mind that the aquifer is the primary source of municipal water supply for the City of San Antonio.

B. Victoria and League City

A few other examples of cities with water well ordinances are Victoria and League City. Already discussed above is the provision of Victoria's ordinance which declares

private groundwater wells a nuisance that either pollute or tend to pollute the city's water supply in a manner which cannot be corrected. Victoria, Tex., Code of Ordinances ch. 13, art. II, § 13-74. The Victoria ordinance requires a permit within the city which "shall be granted" to a person who applies, pays the fees and meets all the requirements in that division of Victoria's city code. *Id.* at § 13-60. In addition, the ordinance has provisions relating to the casing of wells, furnishing water samples, repairing defects, and plugging abandoned wells. *Id.* at §§ 13-67-13-73.

League City's ordinance requires initial approval and permitting of a new water well within the city limits by the city council; the permit expires five years after issuance. Renewals can be obtained from the city water department. League City, Tex. Code of Ordinances ch. 11, art. I, § 114-2. League City's ordinance also requires an application and fee. Other requirements include a record of the water level when the permit is issued, an annual test for total coliform bacteria and a prohibition of cross connections. *Id.* The provisions in the Victoria and League City ordinances appear generally aimed at addressing public health and safety concerns which are a key objective of police power actions.

VIII. CONCLUSION

The cases supporting municipal police power regulation of oil and gas drilling provide valuable precedent for analyzing potential claims concerning municipal regulation of groundwater wells. Although in addressing a regulatory takings claim a Texas court would in most instances now apply the *Penn Central/Sheffield* factors, the third of these factors in particular, which examines the character of the government action includes, among other things, a weighing of the public health and safety purpose of a regulation. Public health and safety factored strongly in the courts decisions concerning municipal authority to regulate oil and gas drilling and would similarly be expected to be important to assessment of municipal authority to regulated groundwater.

In assessing a takings claim, a factor courts will likely weigh is whether a municipal regulation constitutes a total prohibition on accessing groundwater or merely restricts access to some degree. The more stringent the regulation, the more a court will be looking for a justifying police power objective supporting the regulation. Circumstances can vary significantly from one locality to another in this regard. Because the determination of a taking is a "fact-sensitive" test, there is not a blanket answer to what may or may not constitute a taking. Regarding the restriction on drilling, courts are apt to consider, in the case of groundwater restrictions, whether the land owner has another reasonable source of water in terms of factors such as affordability, quality, quantity, and convenience.

The more apparent it is that the regulation aims at protecting public health and safety, the more likely a court will find that a municipal exercise of police power does not effect a taking and does not require compensation. As courts have said, police powers are not static. What is considered an invalid exercise of police power today may be considered valid in the future and vice versa. As the takings analysis is fact-driven, the facts can vary greatly from time to time and place to place.

In summary, in light of the *Penn Central/Sheffield* factors for assessing a takings claim, cities regulating or contemplating regulation of groundwater as a practical matter are advised to: (1) consider the extent to which a regulation impacts a property right and property owners' reasonable investment-backed expectations; (2) weigh that against the counter-balancing purposes for the police power regulation causing the impact; and (3) assess whether they believe a court would find that regulation results in a regulatory taking in light of all of the facts.