



RECENT DEVELOPMENTS: CURRENT EMINENT DOMAIN ISSUES

IRWA 2022 Eminent Domain Virtual Seminar

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PROCEDURAL MATTERS

Filing Objections Early

Town of Westlake v. City of Southlake, 2021 WL 6069104 (Tex.App.—Ft. Worth Dec. 23, 2021, pet. filed)

Facts: A proposed residential development in Southlake abuts the right of way of FM 1938 owned by the town Westlake, with the roadway of FM 1938 owned by the State of Texas. The only existing access to the proposed residential development is one road on the southern boundary, but the developer wanted access to FM 1938 through Westlake's right of way. Westlake denied that access. Southlake sought to condemn the access to FM 1938 through Westlake's right of way and filed a petition for condemnation. After the Special Commissioners' Hearing and with its objections, Westlake filed a motion to dismiss arguing the condemnation is an attempt by Southlake to use its powers of condemnation to gain access to FM 1938 that the developer has not been able to negotiate. It also argued that Southlake was trying to control the streets and highways outside its town limits, and the doctrine of paramount importance prevented the taking because "condemnation is not authorized to take property that has already been dedicated to a public use when such condemnation would practically destroy the use to which it has been devoted." The trial court denied Westlake's motion to dismiss. Westlake then filed a plea to the jurisdiction, arguing Westlake was protected by governmental immunity from such an action and Southlake was attempting to "usurp a power that the legislature had given to Westlake to control the streets and highways within its town limits." The trial court denied the plea to the jurisdiction, but viewed it as a motion for summary judgment in its order. Westlake filed an interlocutory appeal, but Southlake filed a motion to dismiss the appeal, arguing it could not be appealed through an interlocutory appeal.

Court of Appeals Holding: Affirmed.

Court of Appeals Rationale: The appellate court denied Southlake's motion to dismiss and overruled the two issues raised by Westlake. First, the court denied Westlake's argument that the statute that Southlake relied on for its power to condemn, Section 251.001 of the Local Government Code that permits a municipality to sue another municipality to condemn public land, lacked a clear and unambiguous waiver of Westlake's governmental immunity. However, the court noted that Section 251.001 expressly authorizes eminent domain to acquire property whether public or private and regardless of "whether [the property is] located inside or outside the municipality." Westlake next argued that Southlake cannot establish that it is taking property for a public use and it is an attempt to usurp Westlake's authority to control the highways and streets within its town limits. However, the court determined it could not address those issues because Westlake did not conclusively establish those issues and will need to be determined in the trial court.

The court also denied Southlake's motion to dismiss the appeal. First, Southlake argued the objections prior to the filing of the Special Commissioners' Award, but Property Code Section 21.018(a), setting the deadline for filing objections, does not address the consequences of filing an objection too early. The court noted that Westlake likely filed before the Award to prevent Southlake from taking possession of the property. Southlake

also argued that Westlake's plea was a second bite at the motion to dismiss, but the court determined Westlake had the right to raise the jurisdictional argument and had a right to an interlocutory appeal.

Waiver of Immunity after Agreement

Harris County Freshwater Supply District No. 61 v. Magellan Pipeline Company, 2022 WL 1144636 (Tex.App.—Houston [1st Dist.] April 19, 2022, no pet.)

Facts: Magellan Pipeline Company LP and V-Tex Logistics LLC (the “pipeline”) sought to condemn a pipeline easement under the property of Harris County Fresh Water Supply District No. 61. After preliminary negotiations, the parties entered into a right of entry agreement. The agreement provided for the payment of a certain sum to the District, which included the ability to seek additional sums if the route or design was modified, as the total sum the District could seek in compensation, and it provided a certain allowance for engineering and legal fees. The agreement further recited the District would not contest the pipeline's authority to condemn the easements or whether a bona fide offer had been made. It was understood that a condemnation proceeding would be filed to determine the additional amounts due, if any, if the parties could not reach agreement. To that end, a petition was filed. The Special Commissioners awarded an additional \$160,000. The District then filed a Plea to the Jurisdiction alleging a paramount-public-purpose defense, and objections alleging the awarded compensation was inadequate. The issue of immunity was not raised. At trial, the District sought \$34,316,165 in damages for the pipeline's breach of the right of entry agreement and for additional compensation. The pipeline asked for an award of an additional \$160,000. The trial court awarded the pipeline's number of \$160,000, finding the District's claims were not permitted under the right of entry agreement or not proven by a preponderance of the evidence. The District appealed, raising for the first time the issue of governmental immunity and that the pipeline lacked condemning authority.

Court of Appeals Holding: Affirmed.

Court of Appeals Rationale: The doctrine of sovereign immunity has two components: immunity from suit and immunity from liability. Immunity from suit deprives the trial court of subject matter jurisdiction without legislative consent or waiver. Governmental immunity may be raised for the first time on appeal. Here, the District's immunity from suit was waived by virtue of its participation in the suit. Although it did not file the case or intervene, it procured it agreed to the right of entry agreement and later filed objections, converting the case into a civil cause. It also made an affirmative claim for damages at trial. For these reasons, the court found the District's immunity was waived and did not prevent the pipeline's suit. The District also argued the pipeline did not have common carrier status and that the District had a paramount public purpose to its use in the land. Citing *Denbury*, and consistent with *Hubenak*, the court of appeals stated that, once challenged, common carrier status had to be proven, but it was not jurisdictional. The issue of paramount-public-purpose is a defense to condemnation, not a jurisdictional prerequisite. Because these issues are not jurisdictional, they may be waived. The right of entry agreement limited the condemnation action to the issue of additional compensation. Thus, the District waived its right to complain about the pipeline's lack of common carrier status or its own paramount public purpose. Even so, there was sufficient evidence to show the pipeline was a common carrier. Also, the court declined to modify the paramount public purpose test to put the initial burden on the condemnor to show the existing use would not be materially impaired or practically destroyed.

No Fees if Not Property Owner

State v. SignAd Ltd., 2022 WL 2976230 (Tex.App.—Houston [1st Dist.] July 28, 2022)

Facts: The State sought to acquire property in Austin County to make improvements to Interstate 10. The property included a billboard owned by SignAd. In May, 2017, the State made an offer to SignAd for the billboard, and SignAd did not accept the offer. In October 2018, the State filed its petition for condemnation seeking to acquire SignAd's billboard. In August 2017, prior to the State filing its petition for condemnation, SignAd relocated the billboard so that it was no longer located within the property necessary for the highway project. The State was unaware of the relocation of the sign and proceeded to a special commissioners' hearing

in December of 2018. The special commissioners issued an award for the acquisition of the billboard of \$118,000. In January 2019, SignAd applied for a temporary injunction to bar the State from removing the billboard prior to the condemnation trial. At the injunction hearing, SignAd disclosed that it had relocated its billboard so that it was at least five feet outside the State's proposed right-of-way line. State's counsel agreed that if the billboard was not within the proposed right of way, the State did not have the authority to condemn the billboard. The trial court, with the State's agreement, enjoined the State's removal of the billboard. The State also agreed to commission a new survey to confirm the location of the relocated billboard. The State never took possession of or removed SignAd's billboard. In December 2019, the State dismissed its condemnation suit with prejudice pursuant to Texas Property Code Section 21.0195, which provides for the allowance of reasonable and necessary attorney fees incurred by the property owner. The trial court held a bench trial to determine whether SignAd was entitled to attorney fees and expenses due to the State's voluntary dismissal of the condemnation action. The trial court awarded SignAd \$48,304 in expenses and \$171,509 in reasonable and necessary attorney fees. The State appealed.

Court of Appeals Holding: Reversed and rendered that SignAd take nothing by way of its claims for attorney fees and other expenses.

Court of Appeals Rationale: The State appealed the trial court's award of expenses and fees on multiple grounds. The State argued that SignAd was not a property owner, because the billboard was not within the State's highway improvement area and that the fees and expenses were not reasonable or necessary because SignAd relocated its billboard without informing the State that this had been done prior to the State filing its condemnation petition. The court determined that for purposes of Property Code Section 21.0195, SignAd did qualify as a property owner that may seek recovery of reasonable and necessary attorney fees. However, the court found that in this instance SignAd caused its own fees by failing to promptly disclose its case-dispositive information to the State prior to its filing of the condemnation action or shortly thereafter, which would have made the suit and SignAd's expenses unnecessary. Thus, SignAd's fees and expenses were unreasonable and did not qualify for reimbursement.

Texas Central Rail is a "Railroad"

Miles v. Texas Central Railroad & Infrastructure, Inc., 647 S.W.3d 613 (Tex. June 24, 2022)

Facts: The owner of real property located along the proposed high-speed railway route sued seeking a declaratory judgment that the Texas Central Entities lacked eminent-domain authority. The trial court held that the entities do not qualify as either railroad companies or interurban electric railway companies and granted summary judgment to the landowner. The court of appeals reversed, holding that the entities qualify as both in doing so (1) reversed the trial court's judgment, (2) rendered judgment granting the Texas Central Entities' motion for partial summary judgment and denying Miles's summary-judgment motion.

Supreme Court Holding: Affirmed, agreeing as to "interurban rail" and declined to address as to "railway company."

Supreme Court Rationale: The power of eminent domain must be conferred by the Legislature, either expressly or by necessary implication, with the authority subject to the constitutional prohibition against the taking of property for private use. TCE relies on the Texas Transportation Code's grant of eminent domain authority to "legal entit[ies] operating a railroad" and to "corporation[s] chartered under the laws of this state to conduct and operate an electric railway between two municipalities in this state" (interurban electric railway companies) for that authority. Tex. Transp. Code §§ 81.002(2), 112.002(5), 131.011-.012. A "railroad company" is defined to include: "Any other legal entity operating a railroad, including an entity organized under the Texas Business Corporation Act or the Texas Corporation Law provisions of the Business Organizations Code." Tex. Transp. Code 81.002(a). A "railroad company" can "exercise the power of eminent domain and enter a person's land for the purpose of making an examination and survey for the company's proposed railway ... as necessary to select the most advantageous route." Tex. Transp. Code §§ 112.002(b)(5), 112.051(a). Eminent domain authority is granted to a corporation chartered for the purpose of constructing,

acquiring, maintaining, or operating lines of electric railway between municipalities in this state for the transportation of freight, passengers, or both, or designated as an “interurban electric railway company.” Tex. Transp. Code §131.012. Despite the statute for “interurban electric railway” not specifying “high speed rail,” the Court found the meaning of operating an electric railway between municipalities to have common meaning. The courts have long interpreted statutes, including eminent-domain statutes, to embrace later-developed technologies when the statutory text allows, and it does here. Furthermore, while it takes more than checking a box for eminent-domain authority (pipelines), there is no dispute that TCE (1) were actually chartered for a statutorily authorized purpose and (2) are engaged in activities in furtherance of that purpose, which is a public use. Also, there is no reasonable-probability-of-completion test so required on such projects. Finally, there was no expiration of eminent-domain authority by TCE not claiming to be an “interurban electric railway” before actually amending their charters to do so. TCE timely filed for eminent-domain authority when they amended their charter to be “interurban electric railway” under Transportation Code Chapter 131. It would have been improper to do so until it was chartered as the statute requires a corporation to be chartered for the specific purpose “to conduct and operate an electric railway between two municipalities in this state.”

Eminent Domain Jurisdiction in the County Court at Law

State of Texas by and through the Texas Transportation Commission v. Suleiman, 2022 WL 2350048 (Tex. App.--Houston [14th Dist.] June 30, 2022, no pet.)

Facts: In 2005, Suleiman filed an inverse case against the State over an issue with a fence. The State counterclaimed in eminent domain for a tract known as Parcel 908. The parties later executed an interim settlement agreement providing that the State would pay an initial \$80,000 in damages, to be credited against any later final damage award; construction could proceed as the case progressed; and that ingress and egress through the existing entrances and exits would not be impacted by the road construction or improvements. The case went to trial and on appeal and is final. Years later, the State decided to condemn additional land (Parcel 400) located near Suleiman’s property. This tract was owned by Columbia Stop, LLC, developed with a convenience store and gas station. Suleiman was Columbia Stop’s registered agent. Columbia Stop filed a counterclaim in the county court at law asking that the State be enjoined from condemning Parcel 400. It alleged the acquisition would violate the previous settlement agreement regarding Parcel 908 in that Columbia Stop’s entrances and exits would be affected by the acquisition. This counterclaim was later dismissed. After Columbia Stop filed objections in the condemnation case, it along with Suleiman sought injunctive relief in district court and a declaration that the previous settlement prevented the State’s current acquisition. The State moved to dismiss the district court case for want of jurisdiction, arguing immunity or, alternatively, an abatement of the district court proceeding. The district court denied both motions. The State then filed an interlocutory appeal as to the denial of its motion to dismiss, contending that Suleiman lacked standing, the trial court lacked jurisdiction, and sovereign immunity barred Suleiman’s claims. It also filed a petition for writ of mandamus, claiming the district court abused its discretion by not abating the proceedings. These two proceedings were consolidated by the court of appeals.

Court of Appeals Holding: Reversed and rendered as to the State’s motion to dismiss.

Court of Appeals Rationale: District courts and county courts at law generally have concurrent jurisdiction in eminent domain matters. A county court at law’s jurisdiction includes the right to decide all matters which fairly arise from, or in connection to, a condemnation action, other than those concerning title questions. Section 25.0222 of the Government Code provides that the statutory county courts of Brazoria County are primarily responsible for eminent domain cases and proceedings. Once objections are filed in an eminent domain case, the county court acquires subject matter jurisdiction over the matter and has exclusive jurisdiction over the proceedings to the exclusion of all other courts. Suleiman’s claim that the State was precluded from the instant acquisition by virtue of the previous settlement was a matter properly decided by the county court and within its exclusive jurisdiction. Therefore, the district lacked subject matter jurisdiction to consider Suleiman’s claims.

Jurisdiction of Counterclaims

In Re Breviloba, LLC, 2022 WL 2282598 (Tex. June 24, 2022), reversing *In re H&S Hoke Ranch, LLC*, 625 S.W.3d 220 (2021) (Tex. App.—Waco May 28, 2021)

Facts: A pipeline company, Breviloba, LLC, filed a condemnation action seeking to acquire an easement for a pipeline across Hoke Ranch's property. After the Special Commissioners' hearing, Hoke Ranch filed objections to the award and filed counterclaims, including trespass, for over \$13 million in damages. Hoke Ranch also filed a plea to the jurisdiction and motion to transfer based on Section 21.002 of the Texas Property Code. It argued the amount in controversy for the counterclaims exceeded the county court at law's jurisdictional limit, therefore, the case should be transferred to the district court. Breviloba contended the county court at law had jurisdiction over the counterclaims because they were raised in response to the condemnation proceeding. The trial court denied the plea to the jurisdiction and motion to transfer. Hoke Ranch filed a mandamus action in the appellate court.

Court of Appeals Holding: Mandamus conditionally granted.

Court of Appeals Rationale: Mandamus is an extraordinary remedy that will only be granted if the trial court clearly abused its discretion and Hoke Ranch has no other adequate remedy. Section 21.002 of the Property Code states, "[i]f an eminent domain case is pending in a county court at law and the court determines that the case involves an issue of title or any other matter that cannot be fully adjudicated in that court, the judge shall transfer the case to a district court." Hoke Ranch argued that because its counterclaims implicate ownership and exceed the court's jurisdictional limits, the counterclaims are a "matter that cannot be fully adjudicated in that court." Breviloba did not dispute that the amount of the counterclaims exceeded the jurisdiction of the county court at law but contended that mandamus was not the appropriate appellate mechanism. The Court of Appeals stated that a trial court does not lose jurisdiction over a plaintiff's claim within its jurisdictional limits simply because a defendant files a counterclaim that exceeds the court's jurisdictional limits. Where counterclaims cannot be fully adjudicated by the county court at law, which does not have jurisdiction over the counterclaims, the Property Code requires transfer to the district court, which has concurrent jurisdiction of condemnation case with the county court at law and has jurisdiction of counterclaims over which the county court at law does not. Therefore, the county court at law did not have subject matter jurisdiction over Hoke Ranch's counterclaims, and the Court of Appeals conditionally granted mandamus relief and directed the trial court to grant the plea to the jurisdiction and motion to transfer the case to the district court.

Supreme Court of Texas Holding: Petition for Writ of Mandamus conditionally granted in favor of Breviloba.

Supreme Court of Texas Rationale: Breviloba appealed the Court of Appeals ruling in favor of Hoke Ranch. The Court noted that Pursuant to Section 21.001, Texas Property Code, district courts have concurrent jurisdiction with county courts at law in cases involving eminent domain. In counties with a county court at law, eminent domain cases should be filed in that court. Although some county courts at law have concurrent jurisdiction in civil cases up to a certain dollar amount in controversy, these statutory, additional grants of jurisdiction do not impede Section 21.001's general grant of authority in eminent domain cases. The challenge to Breviloba's power to condemn in this case is part of the eminent domain case, and it is not affected by the amount in controversy and is properly within the county court at law's eminent domain jurisdiction. The petition for writ of mandamus is conditionally granted and the court of appeals is ordered to vacate its writ in favor of Hoke Ranch.

Right to Repurchase?

Ball v. City of Pearland, 2021 WL 4202179 (Tex.App. – Houston [1st Dist.] Sept. 16, 2021 (no pet.)

Facts: The City of Pearland condemned an approximate 5.5 acre tract from the Balls for the construction and connection of public safety facilities and other related uses. In October 2002, the parties entered an agreed judgment awarding the Balls \$625,000 for the property, and the City acquired fee simple title to the 5.5 acre tract excluding the mineral interest. In 2019, the Balls filed suit seeking a declaratory judgment that the public

use for which the property had been condemned had been canceled and that they were entitled to repurchase the property under the provisions of Chapter 21, subchapter E of the property code, which should retroactively apply to their property. The City filed a motion to dismiss the case under Texas Rules of Civil Procedure 91a arguing that there was no basis in fact or law to support the Ball's claim of a right of repurchase. The City argued that the right of repurchase in Chapter 21, Subchapter E, the basis of the Ball's claim, did not apply retroactively and the Legislature unambiguously made subchapter E effective on January 1, 2004, and prospective in application. The trial court granted the City's motion and dismissed the case. The Balls appealed, arguing that the agreed judgment included a condition precedent that the property must be utilized for a public purpose.

Court of Appeals Holding: Affirmed.

Court of Appeals Rationale: The Court reviewed the agreed judgment and found that the description of the basis for the City's condemnation, the construction and connection of public safety facilities and other related uses, was a recital and not a condition precedent. The granting language within the Agreed Judgment was the transfer of a fee simple interest in the property excluding the mineral interest. The Court also pointed out that the right of repurchase contained in Chapter 21, Subchapter E of the property code unambiguously applied to properties condemned after January 1, 2004.

Proper Claim for Right to Repurchase

State v. LBJ/Brookhaven Investors, L.P., 2022 WL 3053893 (Tex.App.—Dallas Aug. 2, 2022)

Facts: In 2008, TxDOT acquired 3 acres off the front of a commercial property located on LBJ Freeway in Dallas. After the Special Commissioners' Hearing, the owner filed objections. During litigation, TxDOT discovered that Atmos had a large gas pipeline on the property that would need to be re-routed. TxDOT then proceeded to acquire the remaining 22.7 acres but did not disclose it was for staging or construction. The parties entered into an Agreed Judgment for \$42.5 million owed to the owner for the 3 acres plead for in the petition, and the owner filed a warranty deed conveying the remaining 22.7 acres to the State. TxDOT constructed the highway improvements, relocating the frontage road onto the 3 acres originally sought and using the remaining 22.7 acres for staging and manufacturing construction materials. Once the project was complete, the State listed the 22.7 acres for sale as surplus property. The former owners learned of the listing and sued the State, as well as TxDOT and individuals with TxDOT, alleging it had the right to repurchase the property pursuant to Sections 21.101-21.103 of the Property Code and for an injunction to stop the listing and any sale. The State filed a plea to the jurisdiction, and after a hearing, the trial court denied the plea. The State appealed.

Court of Appeals Holding: Affirmed.

Court of Appeals Rationale: The repurchase statute is limited to property acquired through eminent domain. Relying on language in the deed, the State argued that it negotiated the voluntary sale of the 22.7 acres and closed the transaction by deed so the trial court lacked jurisdiction over property not considered by the special commissioners during the administrative phase. Although the petition was not amended to include the 22.7 acres, the Court stated that the Agreed Judgment did include the acreage and specifically stated the State was "condemning and acquiring" the property and "should have and recover" the property. The issues were tried by consent and formal amendment of the pleadings was not necessary. Because the trial court was not limited to the property considered by the special commissioners and was not deprived of jurisdiction to render the Agreed Judgment, the Court determined that the State acquired the 22.7 acres by eminent domain for purposes of the right of repurchase statute. The Court also disagreed with the State's argument that no particular provision of Chapter 21 expressly waives immunity from suit. The court concluded that Section 21.003 contemplates suits against the State, allowing "claims for property or for damages to property occupied by the party under the party's eminent domain authority." The court noted that "[i]t would make little sense to give landowners the right to repurchase property previously taken by eminent domain yet deny them the ability to exercise the right." The court then determined that it did not matter which version of 21.101 applied (2004 or

2011) as neither affects the ability to bring suit against the State. Therefore, the court concluded sovereign immunity did not bar the owner's claims under the Property Code.

Abatement and Discovery during Administrative Phase

In re ETC Texas Pipeline, Ltd., 2022 WL 3048238 (Tex.App.—Austin Aug. 3, 2022)

Facts: ETC filed a condemnation to acquire an easement on property in Fayette County owned by Teresa Garlin. The property is already subject to an oil-and-gas lease with a drilling company that holds a permit for drilling a horizontal well across multiple production units, but the company does not have power of eminent domain or the right to install a meter station on Garlin's property. ETC is constructing a new pipeline, valve station, and related facilities to its existing system to include an easement for a meter station on Garlin's property. After special commissioners were appointed but before the hearing, Garlin filed a plea in abatement and motion to abate so that the parties could engage in discovery. As to whether ETC has eminent domain authority for the taking of her property and whether the proposed taking was for a "public use." The trial court granted the motion and ETC sought mandamus relief, contending that the trial court abused its discretion by abating the condemnation proceeding and authorizing discovery during the administrative phase. Court of Appeals Holding: Mandamus relief conditionally granted.

Court of Appeals Rationale: This mandamus proceeding concerns the scope of the trial court's authority to order discovery during the initial administrative phase of a condemnation proceeding. As held in *In re State*, 629 S.W.3d 462, 467 (Tex. App.—Austin 2020, orig. proceeding), a relator lacks an adequate remedy when the trial court abuses its discretion by improperly interfering with the administrative phase of a condemnation proceeding. Any delay "would vitiate and render illusory the right to a rapid, inexpensive alternative to traditional litigation" the legislature intended for such proceedings. *Id.* The court determined that ETC had no adequate remedy by appeal if the trial court abused its discretion. Garlin argued that Section 21.025 of the Texas Property Code granted the trial court authority to enforce and compel discovery, but the court disagreed because, although the statute did require a condemning party to produce information when requested by the person who owns the property, it did not allow the trial court to suspend the administrative phase for the parties to participate in discovery. Garlin also argued that the two discovery issues, eminent domain authority and "public use," are jurisdictional that can be properly considered by the trial court during the administrative phase. The court made a distinction between subject matter jurisdiction and the jurisdiction based on statutory elements of a condemnation. A trial court retains jurisdiction "to determine [its] own jurisdiction" during the administrative phase. *See In re Lazy W*, 493 S.W.3d at 543–44 (quoting *Houston Mun. Emp. Pension Sys. v. Ferrell*, 248 S.W.3d 151, 158 (Tex. 2007)). But *In re Lazy W* concerned the court's subject matter jurisdiction in determining whether sovereign immunity applied. Here, the issues involved the statutory elements that are commonly decided by trial court during the judicial phase. Therefore, the court determined the trial court abused its discretion when it exceeded its jurisdiction by abating the proceeding and allowing this discovery during the administrative phase.

Discovery on Common Carrier in Litigation

In re DeRuiter Ranch, LLC, 2021 WL 4445356 (Tex.App.—Corpus Christi-Edinburg Sept. 28, 2021, no pet.)

Facts: Permian Highway Pipeline (PHP) sought to condemn property for its pipeline project from DeRuiter Ranch, LLC. DeRuiter challenged the right to take based on lack of public use. In discovery, DeRuiter made numerous requests for production regarding PHP's future use of the pipeline that were objected to by PHP. DeRuiter filed its motion to compel with PHP stating it should not have to provide such information as it was already granted "common carrier" status. The trial court sustained PHP's objections. DeRuiter filed a petition for writ of mandamus.

Court of Appeals Holding: Mandamus granted, reversing court's order.

Court of Appeals Rationale: Mandamus is proper when there is an abuse of discretion by the court and there would be an inadequate remedy on appeal. Procedural rules allow the broad discovery of unprivileged

information that is “relevant to the subject matter of the pending action.” DeRuiter contends that the requested discovery is necessary to determine (1) whether Permian’s board of directors abused its discretion in determining that the pipeline would serve a public use and (2) whether the pipeline will in fact serve a public use. According to DeRuiter, “[a] property owner’s ability to challenge the public use or necessity of a private, for-profit corporation’s exercise of the public power of eminent domain depends on adequate discovery of these issues.” PHP argued discovery was irrelevant because it is a utility and has the power to condemn. DeRuiter pled affirmative defenses as to whether or not PHP has a “public use” for the condemnation and whether the use is fraudulent, in bad faith, or arbitrary and capricious. Therefore, the requested discovery, pertaining to ownership of the pipeline and the transportation, processing, and sale of any products through the pipeline, is pertinent to DeRuiter’s affirmative defenses to the condemnation and is relevant. Therefore, the trial court abused its discretion by sustaining PHP’s objections and DeRuiter has no adequate remedy by appeal to cure the abuse.

VALUATION MATTERS

Common Carrier and Pipeline Corridors

Hlavinka v. HSC Pipeline Partnership, LLC, 2022 WL 1696443 (Tex. May 27, 2022)

Facts: Hlavinka challenged HSC’s eminent-domain authority regarding “public use” of the pipeline contending that transporting polymer-grade propylene does not grant HSC common-carrier status and said transport to an unaffiliated customer is insufficient to demonstrate public use. Hlavinka also wishes to testify to certain arms-length sales of pipeline easements as evidence of value for an easement across its property. Trial court agreed with HSC that it had authority to condemn and the project was for public use, and that Hlavinka was blocked from testifying about other pipeline sales and was limited to ag. value. Court of Appeals agreed that transport of propylene counted as a common carrier for eminent domain authority, but that “public purpose” was a fact question for the jury and Hlavinka should have been able to testify about easement sales.

Supreme Court Holding: Affirmed as to common carrier, reversed as to “public purpose,” remanded for trial on value.

Supreme Court Rationale: Texas Business Organizations Code Section 2.105 grants eminent domain authority to common carriers for the construction and use of a polymer-grade propylene pipeline as a crude petroleum product. Section 2.105 directly incorporates the right of eminent domain found in Texas Natural Resources Code Section 111.019(a), and polymer-grade propylene qualifies as an “oil product” derived from the refinement of either oil or natural gas liquids, both of which are components of crude petroleum. Thus, HSC has eminent domain authority. Whether the project was for a “Public Purpose” is a question of law, and the test for determining public use in this context is whether it is reasonably probable that, in the future, the pipeline will “serve even one customer unaffiliated with the pipeline owner.” HSC had a contract already in place with an unaffiliated user, so there was no question that the test is met. Regarding Hlavinka’s testimony, a property owner may testify about the market value of the property taken, but it must be based on facts that demonstrate the property’s market value “rather than intrinsic or some other speculative value of the property.” Arms’ length transactions are appropriate evidence of market value, provided the sales are voluntary, contemporary, local, and involve land with similar characteristics. Sales of 25 easements on this property to other pipeline companies, combined with the existence of pipelines running parallel and adjacent to HSC’s pipeline, provide some evidence that a factfinder could reasonably conclude that the Hlavinkas could have sold the easement that they instead were compelled to sell to HSC. This is not to say that land that a pipeline traverses becomes a “pipeline corridor” will always have a corresponding rise in market value. A landowner must show a “reasonable probability” that the land would likely sell to another interested market participant in the near future. A single or ancient pipeline may not be sufficient to show market value because, standing alone, it may not indicate that a current market for the easement exists absent the taking. The evidence in this case, in contrast, of frequent, recent, comparable sales, should have been admitted to show a “reasonable probability”

that the easement condemned by HSC would likely have been sold to another pipeline in the near future. Evidence of recent fair market sales to secure easements running across the property that precede the taking are admissible to establish the property's highest and best use, and its market value, at the time of the taking.

Violation of the "Unit Rule"

United States v. 4.620 Acres of Land, more or less, in Hidalgo County, Texas, 576 F.Supp.3d 467 (Southern Dist. Texas, McAllen Div., Dec. 20, 2021)

Facts: The United States brought an eminent domain action to take 4.620 acres tract of land in fee simple with certain reservations. As part of the pre-trial proceedings, the district court issued orders addressing the U.S. Attorney's motion to exclude expert appraisal testimony presented by the landowner and the landowner's motion for partial summary judgment seeking a ruling regarding the compensability to the landowner of fencing improperly placed on the landowner's property by the U.S. Government. In its motion to exclude the expert testimony of the landowner's appraiser, the U.S. Attorney argued that the landowner's appraisals: 1) did not use a "before and after analysis" as required by the Fifth Circuit Court of Appeals, 2) did not meet Uniform Standards of Professional Appraisal Practice (USPAP) and the Uniform Appraisal Standards for Federal Land Acquisitions, 3) uses the wrong date of take, 4) failed to recognize that the subject property was impacted by both a FEMA floodplain and IBWC floodway, 5) violated the "unit rule" as established by the Fifth Circuit Court of Appeals, and 6) the testimony failed to substantiate the 40% diminution in value to the remainder property, and 7) the rebuttal reports prepared by the landowner's appraiser should be excluded as untimely produced. The court rejected all but one of the government's arguments except that the landowner's appraisal report violated the "unit rule" in its valuation of the property before the acquisition. The landowner filed a motion for summary judgment seeking a ruling that a bollard fence previously installed by the U.S. Government on defendant's property prior to the taking and without permission was the landowner's property that should be included in the compensation to be paid to the landowner. The court denied this motion.

District Court's Holding: The court granted in part the government's motion to exclude expert testimony of the landowner appraisal to the extent the appraiser violated the "unit rule" test and denied the remainder of the government's motion to exclude. The court also denied the landowner's motion for summary judgement on the compensability of the bollard fence placed on the landowner's property by the government before the taking.

District Court's Rationale: As to the government's motion to exclude, the court found that the appraiser's use of two separate economic units to determine the value of the whole property violated the "unit rule" as established by the Fifth Circuit. The property was bisected by a levee easement and the appraiser valued the northern half of the property as one economic unit and the southern half of the property as a second economic unit. The northern unit was valued at a higher per acre value due to its access to a county road and the southern unit at a lower value per acre due to its reduced access. The appraiser then added the two units together to determine the whole property value. The court held that this addition of two separate economic units to determine the whole property value violated the "unit rule" since it did not properly account for the value of the property if it were to be sold as one entire property.

On the landowner's motion for summary judgement on the compensability of a bollard fence placed on the property by the government prior to the taking, the court ruled that the fence was not compensable. The court followed the Fifth Circuit's prior ruling that items affixed to the land by an entity with eminent domain authority did not become the property of the landowner to be included in a later condemnation action because such entity could condemn the property and only pay for the value of the property without the inclusion of the entity's improvements.

No Objections to Testimony

Castellanos v. Harris County, 2021 WL 4597109 (Tex.App.–Houston [1st Dist.] Oct. 7, 2021, pet. denied)

Facts: Harris County condemned a permanent highway easement, a water-line easement, and a temporary construction easement from the Castellanos. At trial the Castellanos presented testimony of compensation of approximately \$237,000 and the County presented compensation testimony of approximately \$111,000. The Castellanos did not file any objections to the testimony presented by the County. The jury awarded the Castellanos \$113,165.

Court of Appeals Holding: Affirmed.

Court of Appeals Rationale: On appeal, the Castellanos argued that the evidence presented at trial did not support the jury's finding of \$113,165 for total compensation and that the trial court erred by refusing their requested jury instruction regarding damage to the remainder. The court pointed out that it was the landowner's burden to prove that the jury's award was not supported by the evidence presented. The court noted that the Castellanos did not file any objections to the expert testimony presented by the County and instead chose to address any deficiencies in the County's testimony through cross examination. The court found that the jury's determination of compensation fell within the testimony presented and that the Castellanos had not proved that the award was not supported by the evidence. As to the Castellanos claim that the trial court erred in refusing their requested jury instruction, the court determined that this issue was waived because the Castellanos had failed to object to the trial court's ruling during the jury charge conference.

Schmidt/Campbell Claim for Damages

Fort Bend County v. Williams, 2022 WL 481782 (Tex. App. – Houston [14th Dist.] Feb. 17, 2022, no pet.)

Facts: Fort Bend County condemned a total of 12,525 square feet in two tracts from the Williams, one tract in fee for road purposes and another for a storm sewer easement. The road runs along the eastern part of the remainder, partly on the land acquired from the Williams. There is a ramp leading to an overpass adjacent to the Williams' property which elevates the road several feet, built higher than the Williams's remainder by about four feet. The Williams argued at trial that, prior to the taking, the property had open pasture views. They offered expert testimony that, after the taking, the new road would fundamentally change the aesthetics of the property and would alter its quality, safety, and privacy. The expert opined a barrier wall was needed to mitigate the damages and to make the remainder safer, but the remainder suffered damage due to the proximity of the road and the overpass that were unique to the subject property. Mr. Williams testified to his concern cars would run off the roadway into his yard, threatening his children and grandchildren who play there. He complained of the car lights, noise, and trash coming from the road. He testified the ramp for the overpass bridge was built on the property acquired and the damages were special to his property. The court gave various instructions to the jury, including that it should consider the effects of the taking in determining the market value of the remainder after. It instructed the jury against awarding community damages, gave a "*Schmidt-Campbell* exception" instruction, and advised that mitigation costs could be considered a component of damages. After deliberation, the jury awarded \$180,000 in damages. Fort Bend County appealed to contest the damage award as barred by the *Campbell* Rule and that the Williams's failed to prove their damages fell within the *Schmidt* exception.

Court of Appeals Holding: Affirmed.

Court of Appeals Rationale: Section 21.042 of the Property Code only allows for damages from the effects on the remainder value from the condemnor's use of the land condemned. The *Campbell* Rule holds that damages resulting from use of adjoining land acquired for the project are not compensable. Generally, damages caused by the condemnor's use of existing right of way or land taken from adjoining properties are not compensable. In *Schmidt*, the court held the *Campbell* Rule applies unless: 1) the land taken from the condemnee is indispensable to the project; 2) the land taken is a substantial (not inconsequential) part of the project; and 3) the damages caused to the land not taken from use of the land taken are inseparable from the damages caused by the condemnor's use of adjoining property. Remainder damages are also limited in that the injury suffered

must be peculiar to the landowner of the part taken and not suffered in common by the general community. However, costs of curing an unsafe condition caused by the acquisition may be compensable. In this case, Williams made damage claims based both on Fort Bend County's use of the part taken and under the *Schmidt-Campbell* exception. Due to the broad form submission of the damage issue to the jury, and the county's inadequate briefing as to why damages for its use of the part taken were improper, the appellate court found it failed to challenge the Williams' damage claim for use of the part taken. Therefore, the trial court did not commit error by rendering judgment based on the damages awarded by the jury.

Property Owner Testimony for Entity

The State of Texas v. Audie Gray Family L.P., 2022 WL 965250 (Tex. App. –Houston [14th Dist.] March 31, 2022, no pet.)

Facts: In July 2015, Audie Gray Family, L.P. bought 20.15 acres of land along State Highway 36 in an unincorporated area of Fort Bend County. One of the partners, Carlson, testified the partnership planned to develop a boat and RV storage facility on part of the site. At the time this case commenced, an entity named TFG Associates LLC was operating a boat and RV storage business as "Texas 36 Storage" on the remainder. Audie was also renting a half-acre of the tract to a farmer for agricultural use. The State of Texas filed a petition to acquire 1.89 acres from the subject tract, leaving a remainder of 18.26 acres. After objections to the special commissioners' award were filed by both sides, the case went to trial. Audie offered Carlson as its value witness pursuant to the Property Owner Rule. Prior to trial, the State moved to strike Carlson's testimony, which was denied. The State offered compensation testimony of \$61,748, while Carlson testified to compensation of \$406,800 under the income approach and \$371,708 under the sales comparison approach. Audie did not claim damages to the remainder. The jury awarded \$236,700. The State appealed, alleging, among other things, that the evidence in support of the verdict was factually and legally insufficient.

Court of Appeals Holding: Reversed and Remanded.

Court of Appeals Rationale: Pursuant to the Property Owner Rule, a landowner is qualified to testify to the value of his property, but this testimony is held to the same standards as other opinion evidence. A property owner's testimony must be based on market value, not the value to the landowner, its intrinsic value, or some other speculative value of the property. Texas Rules of Evidence Rule 701 allows for lay opinion testimony if it is rationally based on perceptions by the witness and is helpful to understand his testimony or to determine a relevant fact at issue. The Property Owner Rule is premised on the assumption the owner is familiar with the property and its value and fulfills the role of expert testimony. This testimony must be based on a factual basis using the market value standard, not based on the value to the landowner or conclusory or speculative testimony. Corporate entities are treated as natural persons regarding the Property Owner Rule. To be properly qualified to testify, the witness must be a corporate officer or manager who has duties related to the property, or employees with substantially similar duties, and must also be personally familiar with the subject property and its market value. The State challenged Carlson's income approach testimony on the ground it improperly considered business income, and that the income proffered was not from the property by the storage of vehicles. Carlson took the net rental income obtained by TFG and spread that over a 42,000-sf area he claimed Audie could have used for parking spaces. He then capitalized this amount at 7%. The court of appeals held that use of TFG's business income was not permitted to value the subject property. Regarding Carlson's sales comparison approach, the State claimed Carlson employed a "value to me" standard in making his adjustments, not the willing buyer/willing seller standard required by Texas law. The court of appeals held the Property Owner Rule does not allow testimony under a "value to me" approach and ruled the trial court erred by not striking this testimony. Due to the verdict being substantially higher than the State's testimony, the court found the improperly admitted testimony probably caused the rendition of an improper judgment.

Damages for Denial of Permit to Drill under City Lease

City of Dallas v. Trinity East Energy, LLC, 2017 WL 491259 (Tex.App.--Dallas Feb. 7, 2017, pet. for review filed May 11, 2017)

Facts: The City of Dallas issued a request for proposal to lease several thousand acres owned by the City for gas exploration and drilling. Trinity East Energy already had drill sites in the area and submitted the winning proposal to design and implement a continuous drilling program. Trinity found 2 additional properties owned by the City that indicated good production and they were included in the final lease signed in 2008. Under the lease, Trinity paid \$19M up front plus a percentage of production. At the time, the current drilling ordinance required obtaining a Special Use Permit. The lease stated that the City would not unreasonably oppose Trinity's request for a variance or waiver if needed for its drilling operations on the leased sites. In 2011, Trinity was ready to submit applications for drilling permits but, in the meantime, the City had appointed a gas drilling task force, which delayed consideration of the SUP applications and required extension of the lease agreement. In December 2012, the City Planning Commission considered Trinity's SUP applications and denied them, which was later confirmed by City Council. In 2013, the City then amended its drilling ordinance and imposed stricter setbacks and other restrictions which essentially precluded drilling on the lease property or within City limits. Trinity sued the City for breach of contract, tort, declaratory judgment, and inverse condemnation. The City filed a plea to the jurisdiction arguing governmental immunity. The trial court granted the City's plea to the jurisdiction. Trinity appealed, and it was reversed on appeal. On remand, the case went to trial. Trinity presented evidence that the fair market value of the drill sites was \$26m - \$40m, but worth nothing after the denial of the SUP. The jury did not find that the City breached the lease, but found the City committed statutory fraud and negligent misrepresentation. The jury found the fair market value of Trinity's property before the denial of the SUP was \$33,639,000 and zero after the denial. The trial court determined that the City committed a regulatory taking by failing to approve the SUP and awarded Trinity compensation in the amount of \$33,639,000.

Court of Appeals Holding: Affirmed.

Supreme Court Rationale: The City contends that the evidence is legally and factually insufficient to support the trial court's finding of a regulatory taking. Texas law recognizes several theories under which a claimant may allege a regulatory taking: (1) a *Lucas* claim, in which a property owner alleges that a property regulation denied the owner of all economically beneficial or productive use of the property, *see Lucas v. S. Cent. Coastal Council*, 505 U.S. 1003, 1015–19 (1992); and (2) a *Penn Central* claim, in which a property owner alleges that, while a regulation did not deprive the owner of all economically viable use, the governmental action unreasonably interfered with the owner's use and enjoyment of his property, *see Penn Cent. Transp. Co. v. N.Y.C.*, 438 U.S. 104, 124 (1978)). Because the trial court's findings of fact and conclusions of law supported either theory, the court concluded the evidence supported the trial court's findings and conclusions on the *Lucas* theory. The City argued that denial of the SUP did not deprive Trinity of all beneficial use of its property because Trinity had other drill sites from which it could have accessed at least some of the acreage under the lease. However, the City did not identify any evidence that Trinity would have been able to obtain a SUP for other sites. The court held that there was evidence the factfinder could reasonably believe that none of the alternative drill sites were viable or feasible for economically developing Trinity's mineral property, so the denial of the SUP resulted in a regulatory taking of Trinity's property.

The City also challenged the expert testimony presented by Trinity as unreliable and insufficient to support the jury's findings. Strickland, a petroleum engineer specializing in reservoir engineering, provided testimony on market value. He prepared a fair market value opinion on the acreage that could have been developed from the three drill sites on which Trinity requested SUPs from the City. He valued two separate development plans to drill those sites using the comparable sales method and the discounted cash-flow method. His valuation only included the fair market value of the acreage Trinity had under lease at the time of the taking. The City argued Strickland used producing properties, while there was no production on Trinity's leases and distance of the sales. Strickland used six sales from Barnett Shale transactions from 2010 to 2013, and all of the sales he

examined included both developed and undeveloped acreage. He determined a value per acre for the undeveloped acres and made downward adjustments, excluded two sales as outliers, and then averaged the remaining four sales and applied a ten percent discount to account for the uncertainty in the City acreage. He used information from other sales as the allocation between the developed and undeveloped acreage and subtracted expenses and costs. As for distance of the sales, Strickland testified the Barnett Shale covered a wide area, and he considered sales with similar shale thickness as the City property. As these issues were considerations for the jury, the trial court did not abuse its discretion in admitting the testimony. Lastly, the City argued Strickland's cash flow analysis was "not reasonably certain." When comparable sales are not available or inadequate as a measure of market value, other methods may be used to estimate fair market value. *City of Harlingen v. Estate of Sharboneau*, 48 S.W.3d 177, 183 (Tex. 2001). Strickland explained that the discounted cash-flow method (or income approach) uses the estimated future production, estimated future prices, and estimated costs of production to calculate the net income for the property, discounted to present value. He subtracted the cost data to determine the net cash flow and calculated the present value of that cash flow using discount rates. The City thoroughly cross-examined Strickland and Trinity's other witness. Even though the jury was presented with conflicting evidence on whether Trinity's lease would be productive, the jury determined that the value would have been \$33,639,000 had Trinity been permitted to drill. The jury is the sole judge of the weight and credibility of the evidence and has discretion to award damages within the range of evidence, and the court did not want to disturb the jury's verdict. Therefore, the court ruled the evidence was legally and factual sufficient to support the trial court's award of damages for inverse condemnation to Trinity. Lastly, the City argued the trial court should have bifurcated the trial and conducted a bench trial on the taking question before trying the issue of damages to the jury. However, the case involved multiple causes of action with different damage theories, multiple witnesses, and several days of evidence. The City did not show it was prejudiced by submission of the value question to the jury before the court determined there had been a taking. Therefore, the court concluded the trial court was within its discretion to not bifurcate the taking issue from the damages issue.

INVERSE CONDEMNATION

No Recourse for Revocation of Sign Permits

Lamar Advantage Outdoor Company, L.P. v. Texas Department of Transportation, 2022 WL 1498213 (Tex. App.–Houston [1st Dist.] May 12, 2022, no pet.).

Facts: Texas Department of Transportation (TxDOT) revoked three billboard permits held by Lamar Advantage Outdoor Company, L.P. (Lamar) for failure to timely renew a non-conforming billboard permit. Lamar filed suit against TxDOT and TxDOT officials alleging *ultra vires* actions, TxDOT's rules were invalid, and alternatively, inverse condemnation for its loss of the permits. Lamar alleged that the revoking of Lamar's billboard permits by the TxDOT executive director, violated Lamar's procedural due process rights by sending the Orders without first giving Lamar the required notice of renewal and opportunity to bring the permits current before ordering removal of the signs. TxDOT filed a motion to dismiss for want of jurisdiction and motion for summary judgment. The trial court granted TxDOT's motion to dismiss for want of jurisdiction.

Houston Court of Appeals Holding: Affirmed.

Court of Appeals Rationale: The court determined that the trial court's dismissal for lack of jurisdiction was a question of law to be reviewed de novo. The court first determined that the actions by the TxDOT officers, while may have mistakenly not followed TxDOT's regulations, were not actions wholly outside the officer's authority and would thus be viewed as an action by the agency and under the sovereign immunity protections afforded TxDOT. The court addressed Lamar's claim that the rules were not valid and were incorrectly applied in the revocation of its permits. The court considered Lamar's argument that the rules dictating that a non-conforming sign would only be renewed if other requirements were met was unconstitutionally vague. The court determined that TxDOT's use of "Notwithstanding" unambiguously meant that despite a party's

satisfaction of the other renewal provisions of the rules, the department will still not renew a permit for a nonconforming sign unless the sign structure ... also satisfies (a)(1) and (2), and thus was not so vague as to render the rule invalid. The court then addressed Lamar's argument that TxDOT inappropriately applied its rules by revoking the permits without first providing the required renewal notices. The court determined that Lamar's claim that Gov't Code §2001.038 waived TxDOT's sovereign immunity was misplaced. The court explained that Gov't Code §2001.038 waives sovereign immunity to allow for a challenge to determine whether a rule is relevant to or applies to a set of facts and does not waive sovereign immunity to determine whether an agency has complied with a rule or how a rule should be applied. As to Lamar's final claim of an inverse taking, the court determined that the billboard permit was not a property interest and thus a proper taking claim was not made and the trial court was correct in dismissing the case for a lack of jurisdiction.

No Act that Caused Sewer Flooding

Webb v. City of Fort Worth, 2022 WL 123219 (Tex.App.–Ft. Worth Jan. 13, 2022, no pet.)

Facts: The Webbs sued the City of Fort Worth after a blocked sewer line resulted in flooding of their home. The Webbs made various claims including a constitutional taking or damaging of their property resulting from the flooding. The Webbs claimed that the City's failure to properly maintain the sewer system constituted an intent by the City to damage the homeowners' property because the failure to clean out the system would result in flooding. The City filed a plea to the jurisdiction and claimed that there was no constitutional taking of the property because the City had not taken any actions that it knew would damage the property. The City provided evidence that the sewer lines were cleaned out on a 10-year schedule and the subject sewer line was not due for cleaning for another four years. The trial court granted the City's plea to the jurisdiction and dismissed the case. The Webbs appealed claiming that the trial court abused its discretion by failing to hold an evidentiary hearing and issue findings of facts and conclusions of law.

Court of Appeals Holding: Affirmed.

Court of Appeals Rationale: The court determined that nothing in the record reflected that the City knew that a specific act would cause the sewer to flood Webb's house, or that such flooding was substantially certain to result, when nothing beyond Webb's speculative and conclusory statements about sewer maintenance contradicted the City's statements that the City tried to clean the sewer lines once every 10 years. Accordingly, the court determined that there was no intent by the City to take or damage Webb's property and thus no constitutional taking of their property. The court further stated that no evidentiary hearing is required for a plea to the jurisdiction and thus the trial court did not abuse its discretion in failing to hold an evidentiary hearing or issue findings of facts and conclusions.

No Evidence to Counter Plea to the Jurisdiction

City of Robinson v. Leuschner, 636 S.W.3d 48 (Tex.App. –Waco 2022, pet. filed)

Facts: The Leuschners own a home in Robinson, Texas. In January 2000 the city constructed a sewer lift station near their property. Once the lift station became operational, the Leuschners noticed a foul smell in an around their house. Their complaints to the city went unresolved so they sued the city for inverse condemnation, nuisance, fraudulent and/or gross negligence, negligence, and estoppel. They stated they were not bringing claims under the Texas Tort Claims Act, but only raise the fraud, negligence and estoppel claims for purposes of tolling the statute of limitations. The city filed a plea to the jurisdiction on the Leuschner's nuisance, inverse, and tort claims, claiming its acts were not intentional and that it had immunity from Leuschners' claims. The trial court denied the plea, and the city brought this interlocutory appeal.

Court of Appeals Holding: Reversed on the plea to the jurisdiction; nuisance and inverse claims dismissed with prejudice.

Court of Appeals Rationale: Immunity is waived for takings claims if the taking results from an intentional act by the government. For purposes of an inverse claim under Article 1, Section 17, a governmental entity acts intentionally if it either knows a specific act will cause identifiable harm, or that specific damage is

substantially certain to result from the government's act. Knowledge is determined at the time of the act, not in hindsight. Also, mere negligence does not rise to a "taking" level. On appeal, the city has the burden to show the court lacks jurisdiction. It claimed and offered evidence that it did not know the lift station would cause an offensive odor and it did not intend to cause the odor. Having met its burden of proof by its evidence, the Leuschners had to raise a fact issue as to the court's jurisdiction, but they did not. Therefore, the court did not have jurisdiction as to their nuisance and inverse claims. As a result, the denial of the city's plea to the jurisdiction was reversed and the Leuschner's nuisance and inverse claims are dismissed with prejudice.

Attempt to Reverse Conveyance to City

Hunnicut v. City of Webster, 641 S.W.3d 584 (Tex.App.--Houston [14th Dist.] Feb. 17, 2022, no pet.)

Facts: Hunnicutt owns an undivided interest with her brother, Jackson, in property in Webster, Texas. A City employee presented Hunnicutt with a deed to convey 4.111 acres to the City to be used for an entrance to a large new development, which she signed. Hunnicutt filed suit, pleading that the city was acting in a proprietary function rather than governmental function thus immunity was not proper and raising an *ultra vires* claim against the city employee for making false representations in order to induce Hunnicutt to execute the deed. The City filed a plea to the jurisdiction on all claims, claiming Webster was acting in a government function and had immunity, and the employee had authority to act on behalf of the city. Trial court granted the plea and dismissed all claims.

Court of Appeals Holding: Affirmed.

Court of Appeals Rationale: There is a two-step inquiry to determine whether a municipality has immunity from suit. If the function is governmental, immunity is waived. The City maintained it was acting in governmental function because its actions were to develop streets, defined by the legislature as governmental functions in the Texas Tort Claims Act. Here, street construction and design are specifically identified as governmental functions in the Texas Tort Claims Act. The fact that the City could have used a different property to build the roads or even designed the roads differently does not convert the city's governmental function of designing and building roads into a proprietary function. As to claim against the city employee, *ultra vires* claim, the plaintiff must allege and prove that the named official or governmental employee acted without legal authority or failed to perform a ministerial act. The standard for an *ultra vires* act is whether it was done without legal authority, not whether it was correct. Hunnicutt failed to claim lack of authority, instead pled tortious conduct, so she did not raise a valid *ultra vires* claim on the basis of tortious conduct alone. What matters is whether the facts alleged constitute actions beyond the governmental actor's statutory authority. Because Hunnicutt did not assert that the employee's actions were outside the authority, Hunnicutt failed to assert a proper claim denying court jurisdiction.

City of Webster v. Hunnicutt, 2022 WL 1111872 (Tex.App.--Houston [14th Dist.] April 14, 2022, no pet.)

Facts: After the county court action, Hunnicutt and Jackson filed suit asserting: (1) an inverse condemnation claim against the City and (2) an action for "recission" of the deed. She alleged that she was induced into signing the deed and that the city employee said if Jackson did not agree to the conveyance, which he did not, then the deed would be voided. The City filed a plea to the jurisdiction as to Hunnicutt's claims against the City and the employee, which was denied.

Court of Appeals Holding: Reversed.

Court of Appeals Rationale: The City does not dispute that Jackson's undivided one-third interest in the 4.111 acres was taken when the City built the road and admits that Jackson is owed compensation, but it is only Hunnicutt's claims against the City that were the subject of the appeal. The City argued that Hunnicutt did not plead a viable inverse-condemnation claim. If a plaintiff "cannot establish a viable takings claim" against a governmental entity, the claim would potentially be barred by immunity. See *Texas Dep't of Transp. v. A.P.I. Pipe & Supply, LLC*, 397 S.W.3d 162, 166 (Tex. 2013). The City argued that the pleadings negate her inverse condemnation claim, because she alleged a tort claim related to the actions of the city employee. Unintentional

acts of negligence or intentional acts that are outside the authority of the state may be torts, but they are not takings. The court looked at other opinions that had found a fraudulent taking of a person's property by a governmental entity can constitute inverse condemnation. However, the court disagreed in the case where an inverse condemnation claim is based on tortious conduct. Because Hunnicutt's taking claim was based on the premise that she was fraudulently induced to sign the deed based on various "unfulfilled" promises, the court determined that she did not plead a viable inverse condemnation claim. Hunnicutt also argued that the city made a judicial admission through a statement by an attorney for the City during the hearing on the City's plea to the jurisdiction in another case. A "true" judicial admission is a formal waiver of proof usually found in pleadings or the stipulations of the parties and are statements of fact, not through testimony, particularly on a question of law and not a material fact in the case. As to the rescission claim, because Hunnicutt did not establish a substantive right to relief against the City under the inverse claim, she had no claim for rescission.

Hurricane Harvey cases:

San Jacinto River Authority v. Dennis, 2021 WL 4270030 (Tex.App.-- Houston [14th Dist.] Sept. 21, 2021, no pet.)

Facts: This case is one of a series of lawsuits brought in Harris County **district courts** against the San Jacinto River Authority (SJRA) by various homeowners whose properties allegedly flooded when water was released from the Lake Conroe Dam in the aftermath of Hurricane Harvey. In the present lawsuit, the homeowners asserted only inverse condemnation claims under the Texas Constitution. SJRA filed a motion to dismiss under TRCP 91a contending the homeowners' claims have no basis in law or fact and SJRA's immunity from suit as a governmental entity is not waived. The trial court denied SJRA's motion, and SJRA brought this interlocutory appeal. On appeal, SJRA raised the fact that Tex. Govt. Code Section 25.1032(C) gives Harris County Courts at Law exclusive jurisdiction.

Court of Appeals Holding: Reversed and rendered, dismissing suit without prejudice.

Court of Appeals Rationale: Subject matter jurisdiction is essential to the authority of a court to decide a case; it therefore cannot be waived and can be raised for the first time on appeal, even *sua sponte*. Tex. Govt. Code Section 25.1032(c) states that a "county civil court at law has exclusive jurisdiction in Harris County of eminent domain proceedings, both statutory and inverse" This is an inverse proceeding, thus the civil county court at law retains sole jurisdiction. Accordingly, the district court lacked subject matter jurisdiction over the homeowners' constitutional inverse condemnation claims. The homeowners' live pleading affirmatively negates the district court's jurisdiction because the district court lacks subject matter jurisdiction over all pleaded claims. Therefore, the homeowners are not entitled to a remand to plead new claims over which the district court may possess subject matter jurisdiction. The proper remedy is to reverse the order denying SJRA's motion to dismiss and render judgment dismissing the homeowners' claims for lack of subject matter jurisdiction.

San Jacinto River Authority v. Brocker, 2021 WL 5117889 (Tex.App.--Houston [14th Dist.] Nov. 4, 2021, no pet.)

Facts: Property owners whose properties allegedly flooded when water was released from the Lake Conroe Dam in the aftermath of Hurricane Harvey sued the San Jacinto River Authority (SJRA) in a Harris County district court. The property owners asserted inverse condemnation claims under the Texas Constitution as well as statutory takings claims under Texas Government Code chapter 2007. SJRA filed a motion to dismiss under Texas Rule of Civil Procedure 91a, contending the property owners' claims have no basis in law or fact and SJRA's immunity from suit as a governmental entity is not waived under the circumstances. The trial court denied SJRA's motion, and SJRA brought this interlocutory appeal.

Court of Appeals Holding: Affirmed in part, as to statutory claims, reversed and rendered on inverse claims.

Court of Appeals Rationale: Court used the same reasoning as above in *Dennis* for the inverse claim. SJRA DID NOT CLAIM its defense in the inverse claim with regards to the statutory claim relying on TRCP 91a.

SJRA argued that the property owners have not pleaded and cannot plead sufficient facts to show SJRA intentionally flooded their properties. The requisite intent for a constitutional taking exists when a governmental entity knows that a specific act is causing identifiable harm or knows that the harm is substantially certain to result. If the government knows that specific damage is substantially certain to result from its conduct, then takings liability may arise even when the government did not particularly desire the property to be damaged. The owners point to admissions by SJRA's executive director that the result of the post-Harvey release would be "devastating flooding downstream" with "catastrophic consequences." Liberally construing the property owners' pleadings, these facts were sufficient to allege SJRA's release of water from Lake Conroe was intended to, or was known to be substantially certain to, result in flooding. Second, SJRA argued that it did not take or cause damage to their properties. The owners' pleadings regarding a taking and causation are clear and detailed. They alleged that in the aftermath of Hurricane Harvey, SJRA released water from Lake Conroe, causing the foreseeable flooding or exacerbation of flooding of their properties downstream, and such flooding caused significant damages. The owners also asserted that their properties would not have flooded but for the water released by SJRA and would not have flooded under natural conditions. The court determined that the owners' pleadings sufficiently alleged a taking and causation. SJRA also argued the action was for a public purpose. The owners specifically alleged SJRA chose to sacrifice the property owners' properties in order to protect the stability and integrity of the dam, its earthen embankment, and related infrastructure. This is a public purpose and so properly pled. Therefore, the owners sufficiently pleaded a statutory takings claim under Government Code section 2007.002(5) and have shown a waiver of governmental immunity.

What Claim as Recourse for Cutting Trees?

Texas Department of Transportation v. Self, 2022 WL 1259094 (Tex.App.–Fort Worth June 9, 2022, pet. filed)

Facts: The Selfs own 170 acres in Montague County that adjoins a farm to market road. The State has an existing right of way easement a certain distance from the center of the road. The Selfs originally placed a fence at the boundary line of the easement and their remaining property. When the Selfs replaced the fence, they built it 2-3 feet inside the area abutting the easement to allow for the growth of trees which had grown next to the original fence. As part of its right of way maintenance, TxDOT hired TFR Enterprises to remove trees and brush from the right of way. TFR cleared the trees up to the new fence line, which included trees located on the Self's unencumbered land in the 2-3 feet area between the easement and the new fence. The Selfs filed suit against TxDOT and TFR and asserted a claim under the Texas Tort Claims Act against TxDOT arguing immunity had been waived by virtue of operating or using motor driven equipment and that TFR was an employee for purposes of the TTCA. They also asserted a claim for inverse condemnation. TxDOT filed a plea to the jurisdiction, asserting no TxDOT employee had ever operated the motor driven equipment. They also asserted TFR was an independent contractor, and as such, is not an "employee" under the TTCA. TxDOT also claimed that its actions were not intentional or that the trees were taken for a public use. The court denied TxDOT's plea.

Court of Appeals Holding: Reversed and dismissed as to the Self's negligence and inverse claims. Affirmed as to the denial of the plea on the independent contractor issue.

Court of Appeals Rationale: Whether sovereign immunity exists and thus deprives a court of subject matter jurisdiction is a question of law. If the existence of jurisdictional facts is at issue, the party claiming immunity must first offer evidence to a summary judgment burden of proof standard that no jurisdictional facts exist. If that burden is carried, the other party must prove the existence of a disputed material fact relevant to the jurisdictional issue. If a fact issue exists, the trial court should deny the plea. Here, no evidence was presented sufficient to raise a fact issue as to TxDOT's use or operation of the motor driven equipment. The general instructions given by TxDOT to TFR do not rise to the level of control needed to evidence use or operation of motor driven equipment sufficient to waive the State's immunity under the TTCA. The issue of whether the TFR workers were "employees" of TxDOT turns on who had the right to control the progress, manner, and

methods of the work, which would be resolved by contractual provisions or evidence of actual control over the way the work was performed. TxDOT's act of telling TFR which land to clear was a sufficient act of control to justify the trial court finding there was fact issue as to TFR's employee status. To prove a valid inverse claim sufficient to waive immunity requires proof of an intentional act. Here, the removal of the Self's trees was the result of the negligent act of failing to properly identify the area of State right of way. Such an act is insufficient proof of the intent necessary to support a waiver of immunity for an inverse claim.

Immunity for Takings Claim under Contract

Preston Hollow Capital, L.L.C. v. Cottonwood Development Corporation, 23 F.4th 550 (5th Cir. Jan. 14, 2022)

Facts: City of Hutto announced it would be the location of a new HQ for Perfect Game Incorporated and unveiled plans for a mixed use development. Cottonwood was tasked with the project. Preston agreed to finance the project and executed loan agreements, promissory notes and deeds of trust distributing the first round of funding of \$15M to Cottonwood in 2 parts in escrow. Although Cottonwood demanded the funds form escrow, Preston considered Cottonwood and vis-a-vis Hutto in default, moved to foreclose and requested its funds back from escrow. Cottonwood and Hutto considered the transaction voidable, terminated the contract and declined to return the funds that were disbursed. Preston filed an action against Cottonwood and Hutto claiming a taking under 42 USC §1983. The district court declined supplemental jurisdiction on Cottonwood's state law counterclaims and dismissed Preston's claim under FRCP 12(b) (6) failure to state a claim.

Court of Appeals Holding: Affirmed.

Court of Appeals Rationale: The Fifth Amendment, as incorporated against state and local governments under the Fourteenth Amendment, forbids the taking of private property for public use without just compensation. However, taking claims rarely arise under government contracts because the government acts in its commercial or proprietary capacity in entering contracts, rather than in its sovereign capacity. The two characters which the government possesses as a contractor and as a sovereign cannot be ... fused; nor can the government while sued in the one character be made liable in damages for acts done in the other. While Preston may have had a "pre-existing title" to its funds, it was exchanged for rights in the loan documents and is governed by the terms of the contract. The government must be acting as a sovereign to affect a taking, here it was not. Thus, Preston should have asserted a breach of contract claim, it did not. Preston pled a takings claim that "sounds in contract" thus dismissal is proper.

MISCELLANEOUS CASES

Challenge to Sign Ordinance on Digital Billboards

City of Austin, Texas v. Reagan National Advertising of Austin, LLC, 142 S.Ct. 1464 (2022)

Facts: Owners of billboards advertising off-premises products or services, i.e., off-premises signs, filed a state court lawsuit for declaratory judgment that City of Austin's sign ordinance, which distinguished between on-premises and off-premises signs, violated their First Amendment free speech rights, after the City denied their applications for permits to digitize grandfathered off-premises signs. After removal to Federal Court and a bench trial, the United States District Court for the Western District of Texas, determined that the City's sign ordinances were content neutral and the ordinance met the required intermediate scrutiny and entered judgment for City. Reagan appealed. The United States Court of Appeals for the Fifth Circuit, reversed the District Court's ruling. The Fifth Circuit opined that because the City's on-/off-premises distinction required a reader to inquire "who is the speaker and what is the speaker saying," "both hallmarks of a content-based inquiry,"

the distinction was content based which dictates a strict scrutiny review. The City appealed to the U.S. Supreme Court and certiorari was granted.

Supreme Court Holding: The Supreme Court reversed and remanded the Appellate Court's decision.

Supreme Court Rationale: The Supreme Court determined that the City's code, which only distinguished between on-premise signs and off-premise signs, did not single out any topic or subject matter for differential treatment and was thus content neutral on its face which triggers an intermediate scrutiny of the code. The Supreme Court likened the City's on-/off-premises distinction to that of ordinary time, place, or manner restrictions, which do not require the application of strict scrutiny. The Supreme Court pointed out that its determination that the City's on-/off-premises distinction was facially content neutral did not end the First Amendment inquiry. The Supreme Court explained that if evidence of an impermissible purpose or justification underpins a facially content-neutral restriction, the restriction may nevertheless be content based. The Supreme Court also noted that to survive intermediate scrutiny, a restriction on speech or expression must be "narrowly tailored to serve a significant governmental interest." Because the Court of Appeals did not address these issues, the Supreme Court remanded them back to the appellate court for review.

Challenging Prior Service by Publication

Mitchell v. Map Res., Inc., 2022 WL 1509745 (Tex. May 13, 2020)

Facts: Map Resources, Inc. ("Map"), acquired mineral interests previously owned by Elizabeth S. Mitchell as a result of a tax sale conducted pursuant to a 1999 Tax Judgment rendered in a tax deficiency suit. In that suit, Elizabeth A. Mitchell was listed among the named defendants in the tax suit, and the attorney for the taxing authorities filed an affidavit that tracked the requirements for obtaining court approval for citation by posting, in that either they were "nonresident(s) of the State of Texas, absent from the state, or are transient" under Rule 117a of the Texas Rules of Civil Procedure. Additionally, the attorney stated that the owners were unknown "after diligent inquiry." The trial court concluded that diligent inquiry had been made and recited in the Tax Judgment that the defendants "were duly served as required by law by means of citation by posting." The Tax Judgment ordered the properties be sold. In 2015, heirs of Mitchell filed a collateral attack on the Tax Judgment, seeking to declare the Tax Judgment and the deeds issued to Map after the subsequent tax sale are void. After cross-motions for summary judgment, the trial court entered judgment (1) denying the heirs' motion for summary judgment, (2) granting Map's motion for summary judgment, and (3) ordering a take-nothing judgment on the heirs' claims for declaratory judgment.

Court of Appeals Holding: Affirmed. The appellate court held that the summary judgment evidence did not conclusively prove that citation on Mitchell by posting violated either Rule 117a or Mitchell's due process rights so the court had jurisdiction to enter the Tax Judgment. The court relied on *Mullane v. Cent. Hanover Bank & Tr. Co.*, 339 U.S. 306, 313 (1950), in finding that although personal service is the classic form of notice, personal service is not always necessary, and for missing or unknown persons, *Mullane* acknowledged that service by an indirect method raises no due process concerns. *Id.* at 317. Under Rule 117a, where the defendant is a Texas resident whose name and residence are known, citation shall be by personal service, unless the defendant is subject to service by publication under subsection three. The Tax Judgment recited that the defendants "were duly served as required by law by means of citation by posting[.]" and nothing in the record established a jurisdictional defect to overcome the presumption of validity.

Supreme Court Holding: Reversed, rendered as to partial motion for summary judgment.

Supreme Court Rationale: The heirs alleged that the 1999 Tax Judgment was void as to Mitchell because "there was a complete failure of service of citation on her and she was thereby denied due process guaranteed her under the Fourteenth Amendment to the U.S. Constitution and under Article I, Sections 13 and 19 of the Texas Constitution." They alleged that the attorney falsely testified that Mitchell's address was unknown because her address was public record at the time of the tax suit in several deeds on file with the property records, and therefore, the attorney must not have made a diligent search of the public records or he would have discovered this address and personally served Elizabeth Mitchell. In response to Map's limitations arguments, the heirs

argued that statutory limitations and procedures do not apply if a party has been denied due process, and they argued the court should look beyond the face of the Tax Judgment to determine whether the court had jurisdiction. The Supreme Court held that the posting of the citation of the tax foreclosure on the courthouse door was insufficient to give the trial court personal jurisdiction over Mitchell. It also held that information available in public records can be considered in a collateral attack on the judgment that alleges constitutional due process violations, and if those records were properly considered here, Mitchell's due process rights were violated. When public property or tax records include contact information for a defendant that was served by publication, the Supreme Court held that a court hearing a collateral attack on a judgment on due process grounds may consider those records. Because the deed records here featured Mitchell's mailing address, service by citation (posting here) did not comply with procedural due process.

Short term rental cases

Hignell-Stark v. City of New Orleans, 2022 WL 3584037 (5th Cir. Aug. 22, 2022)

Facts: The City of New Orleans has changed course on whether short term rentals, renting for less than thirty days, was allowed. Prior to 2016, STRs were prohibited, but in 2016, the City allowed licenses. The City undertook a study that determined that STRs were nuisances STRs in residential neighborhoods lowered residents' quality of life. Because of the study, the City substantially revised the ability to obtain a STR license in 2019 by requiring the owner to reside on the property as the owner's primary residence proven with a homestead exemption on the property. Homeowners filed suit alleging that the City's failure to renew STR licenses violated the Takings Clause because they had a property interest in the renewal of their licenses, that the STR Ordinance violated the dormant Commerce Clause, and they also asserted a §1983 action (not addressed on appeal.) The City filed a motion for summary judgment on all claims, and the district court granted the city summary judgment as to the Takings and Commerce Clause claims.

Fifth Circuit Holding: Affirmed in part, reversed in part.

Fifth Circuit Rationale: The court determined the owners had no protected property interest in renewal of their short term rental licenses, as required to support a Takings Clause claim for failure to renew their STR licenses. The Fifth Circuit pointed to another holding that a business license is property for purposes of procedural due process, providing procedural protections, but not for purposes of possessing a private property interest. *See Bowlby v. City of Aberdeen*, 681 F.3d 215 (5th Cir. 2012.) The Court stated that "the Fifth Amendment protects expectations arising not just from legislation or judicial precedent, but also those springing from custom and practice," in that the expectation has to be "so deeply rooted in custom" that compensation is owed for appropriating it. Because the Court concluded that STR licenses are privileges, not rights, it basically held that STR licenses have were not "so deeply rooted in custom" to constitute a property right in the granting or renewal of the STR licenses. However, the Court determined that the residency requirement of the STR ordinance did violate the dormant Commerce Clause, as it discriminates on its face against out-of-state property owners. The City had reasonable nondiscriminatory alternatives to achieve its policy goals, such as imposing a cap on the number of units that could be used as STRs.

Note that the City Council has since raised the likelihood of the creation of an interim zoning district to prohibit new STRs until it could pass new permanent rules and prohibited the processing of new residential STR applications, with existing permits valid through March, 2023.

See also Nekrilov v. City of Jersey City, 2022 WL 3366430 (3d Cir. Aug. 16, 2022)

The Third Circuit concluded that the city's ordinance restricting short-term rentals (less than thirty days) was not a taking. The City, at one time, passed an ordinance allowing STRs in residential zones without requiring a permit unless the owner had more than five STRs. However, due to some local politics, the city changed course and adopted a new ordinance imposing new restrictions, in that it limited non-owner-occupied STRs to sixty nights per year but "only those who owned properties could rent on a short-term basis in Jersey City." However, the plaintiffs had invested in properties for STRs and the new ordinance resulted in a significant loss

of rental income for these owners. The Third Circuit affirmed the trial court's granting of a motion to dismiss for failure to state a claim (not a summary judgment.) It first concluded that the claims did not constitute a legally cognizable property interest for the purposes of a takings claim. Also, it was not a "total taking" because the properties could still generate income and "they have not been rendered economically idle." Similar to *Hignell-Stark v. City of New Orleans*, it held that even though a municipality legalized a business activity, the owner did not automatically have a cognizable property right. The court also concluded that plaintiffs failed to prove that Jersey City violated the Contract Clause, limiting the power of the state to interfere with an obligation of contracts, because it "does not disrupt a state's ability to exercise its police powers in service of the public interest, even if it affects existing contracts."

City of Grapevine v. Muns, 2021 WL 6068952 (Tex.App.—Ft. Worth Dec. 23, 2021, pet. filed)

Facts: Homeowners own residential properties in Grapevine that they lease to others as short-term rentals ("STR"). For several years prior to the City passing the STR Ordinance in 2018 passage, the owners had rented out their properties on a short-term basis without interference from the City. The City employees had even stated that there were no restrictions, regulations, or permit requirements for STRs. In 2018, the City passed an ordinance expressly prohibiting STRs in the City, which was defined as a home lease for less than 30 days. According to the City, the STR Ordinance did not really amend the existing Zoning Ordinance but just clarified that the Zoning Ordinance did not allow STRs. As a result, the owners sued the City for declarations that the STR Ordinance violated their substantive due-course-of-law rights, is preempted by Chapter 156 of the Texas Tax Code, is unconstitutionally retroactive, depriving them of their vested rights to STRs, and asserting a regulatory takings claim. The City moved for summary judgment and filed a plea to the jurisdiction arguing that the trial court lacks subject-matter jurisdiction on several grounds, which were denied by the trial court. The owners also sought temporary injunctive relief, which was granted by the trial court but was not an issue on appeal.

Court of Appeals Holding: Affirmed on all claims except reversed and rendered as to preemption claim.

Court of Appeals Rationale: First, the court addressed the City's claim that the owners were required to exhaust all administrative remedies before they filed suit. Generally, a party must exhaust the administrative remedies available under Chapter 211 of the Local Government Code before filing suit. However, the court determined that any decision by the City through an administrative appeal would not have avoided filing of the lawsuit. The Court then determined that STRs were allowed prior to the 2018 Ordinance in the existing Zoning Ordinances, which allowed consideration of the owners' other claims, retroactivity, due-course-of-law, and takings claims. Turning to the elements of a regulatory takings claim, the City argued the owners did not have a vested right to use their properties in a certain way without restriction. The court disagreed, finding the owners had a vested property interest in the properties themselves and claim that the City has unreasonably interfered with their rights to use and enjoy their properties by passing the STR Ordinance. It also determined that the passage of the STR Ordinance was the cause in fact of the alleged taking. Even though the City alleged the value of the owners' properties had increased to negate a takings claim, the court noted that lost profits are a relevant factor to consider in assessing the severity of the economic impact on a property owner. The court found the owners had presented sufficient evidence that the ordinance did have an economic impact on the value of their property in that they could "generate higher average rent than long-term leases, even after expenses." Therefore, the Court of Appeals held that the trial court correctly denied the City's plea to the jurisdiction, allowing the regulatory takings claim to proceed. As for the declaratory judgment claims, preemption, retroactivity, and due-course-of-law, under the Declaratory Judgments Act, a person whose "rights, status, or other legal relations are affected by a ... municipal ordinance" is entitled to "have determined any question of construction or validity arising under the ... ordinance" and to "obtain a declaration of rights, status, or other legal relations thereunder." Tex. Civ. Prac. & Rem. Code Ann. § 37.004(a), thus providing a limited waiver of governmental immunity for declaratory judgment claims against municipalities challenging an ordinance's validity. Looking at each claim, the court determined the owners did not plead viable

preemption or substantive-due-course-of-law rights claims. “[P]roperty owners do not acquire a constitutionally protected vested right in property uses once commenced or in zoning classifications once made.” *City of Univ. Park v. Benners*, 485 S.W.2d 773, 778 (Tex. 1972). A vested right is “something more than a mere expectancy based upon an anticipated continuance of an existing law.” As for the retroactivity claim under Article I, Section 16 of the Texas Constitution, the owners facially plead that the STR Ordinance takes away their “fundamental and settled” vested property rights under both the Zoning Ordinance and Texas common law to lease their property on a short-term basis. Although the owners do not have a vested right arising under the existing Zoning Ordinance to use their properties as STRs, the court held that a property owner has a vested right to lease his property.