



FOLEY & LARDNER LLP

RECENT DEVELOPMENTS: CURRENT EMINENT DOMAIN ISSUES

IRWA 2021 Eminent Domain Virtual Seminar

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PROCEDURAL MATTERS

Challenging Prior Service by Publication

Mitchell v. Map Res., Inc., 615 S.W.3d 212 (Tex.App.-El Paso 2020, pet. filed)

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.

Court of Appeals 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. Due process under the Fourteenth Amendment of the U.S. Constitution requires that a property owner must be given notice and an opportunity to be heard before being divested of their interest in property. *See Mullane v. Cent. Hanover Bank & Tr. Co.*, 339 U.S. 306, 313 (1950). *Mullane* noted that while personal service is the classic form of notice, personal service is not always necessary. 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. The 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.

No Written Offer to Easement Holder

In re State, --- S.W.3d ----; 2020 WL 7050377 (Tex. App. – Austin, Dec. 2, 2020, no pet.)

Facts: The State sought to acquire property in Bastrop County to make improvements to SH 71. The State could not reach an agreement with the fee owners to acquire the property and filed a petition for condemnation. After appointment of the special commissioners, but prior to the special commissioners' hearing, Mr. Patterson, an easement holder on the property and a named party to the condemnation, filed a plea in abatement. In the abatement plea, Mr. Patterson argued that the State failed to make a bona fide offer in accordance with Tex. Prop. Code §21.0113 because the State did not provide a written offer to him, but only provided it to the fee owners. The trial court granted the plea and abated the case until the State complied with §21.0113. The State filed a petition for writ of mandamus seeking the court to overturn the trial court's abatement order so that the administrative phase of the case could resume.

Court of Appeals Holding: The court granted a writ of mandamus and directed the court to vacate the abatement order and allow the administrative phase of the condemnation action to resume.

Court of Appeals Rationale: The court reasoned that §21.0113's reference to property owner refers to the fee owner and not easement holders. The court supported this decision by pointing out that an easement interest is a non-possessory interest. It also pointed to the fact that §21.0112 requires that the landowner bill of rights be sent to the property owner at the last known address of the person in whose name the property is listed on the most recent tax rolls, as support that §21.0113 reference to property owner is intended to mean the fee owner of the property.

Governmental Immunity applied in Condemnation Case

Hidalgo County Water Improvement District No. 3 v. Hidalgo County Water Irrigation District No. 1, 2021 WL 2149828 (Tex. App. – Corpus Christi-Edinburg May 27, 2021, no pet. (extension filed))

Facts: In connection with the expansion of Bicentennial Boulevard in McAllen, Hidalgo County Water Improvement District No. 3 ("Improvement District") sought to extend one of its water lines into the new public right of way. It was able to reach agreements with the city and another irrigation district but was unable to reach agreement with Hidalgo County Water Irrigation District No. 1 ("Irrigation District"). As a result, it filed a condemnation action against the Irrigation District to condemn a permanent subterranean easement to install its water line. A commissioners' hearing was held, and an award rendered. On appeal at the trial level, the Irrigation District challenged the taking under the paramount purpose doctrine, alleging the acquisition would interfere with its existing public use by damaging its water lines and adversely impacted the structural integrity of its canal. It also contended the Improvement District could not show its use was of paramount public purpose. The Irrigation District later filed a plea to the jurisdiction asserting governmental immunity. The trial court granted the plea and dismissed the case.

Court of Appeals Holding: Affirmed.

Court of Appeals Rationale: The plaintiff has the burden to prove the court has subject matter jurisdiction, a question of law reviewed de novo. The power of eminent domain is inherent in sovereignty, only limited by the constitutional constraints of adequate compensation and public use. Immunity is a creature of common law and deprives a court of subject matter jurisdiction. The purpose of immunity is to protect public funds from being diverted to litigation costs to the detriment of the provisions of public services. In analyzing an immunity claim, the court first determines if immunity exists and defines its boundaries. It then looks to the legislature to decide the extent, if any, to which immunity has been waived. Political subdivisions are protected from suits for monetary damages by governmental immunity. Both entities here are political subdivisions of the State performing governmental functions. Thus, they each have governmental immunity from suit. The Improvement District argues there is no threat to the Irrigation District of a judgment for money damages and

thus immunity does not apply. In fact, the constitution guarantees payment to the Irrigation District for the taking. It also argued immunity did not apply due to the in-rem nature of the proceeding, but if it did, it had been waived. The court of appeals disagreed, stating that even without a threat of a money judgment, immunity helped preserve the separation of powers. A condemnation case involves the forced transfer of property. It effectively deprives the landowner governmental entity of the right not to engage in the transaction. It also requires, at a minimum, that the governmental entity expend public funds defending the suit. Applying immunity in condemnation actions preserves the separation of powers by precluding the judiciary from interfering with the policy decisions of co-equal branches of government. Further, governmental entities enjoy immunity from suits for land. And finally, although the condemning statute at issue authorizes condemnation of “any land”, that, without more, was not sufficient to waive immunity. A separate, independent waiver would be required, which did not exist in this case.

Failure to Provide other Appraisals not Jurisdictional

State v. Mesquite Creek Development, Inc., 618 S.W.3d 383 (Tex.App.—Dallas, Dec. 31, 2020, no pet.)

Facts: TxDOT’s ROW consultant received an appraisal for <\$2M for a C-store acquisition owned by Mesquite on IH-35E. During appraisal review, the ROW consultant decided to shelve the appraisal and hired another appraiser that came in >\$1M. The second appraisal was provided to the landowner with the offer; the first was not. The Special Commissioners’ Award was for the amount of the provided appraisal. Mesquite filed objections and the award was withdrawn from the court. Only later, during discovery, did the ROW consultant inform TxDOT that it had the first appraisal. TxDOT promptly provided it to Mesquite. Mesquite moved for dismissal of the action due to failure to provide the appraisal and thus, TxDOT failing to follow Section 21.0111 of the Texas Property Code, requiring the turnover of all appraisals within ten years. The trial court dismissed the case upon Mesquite’s motion for lack of jurisdiction and awarded \$2,288,476 to Mesquite for fees, costs and damages.

Court of Appeals Holding: Reversed and remanded.

Court of Appeals Rationale: Despite the fact that TxDOT should have given the report during the administrative phase, and cannot use its consultants for purposes of non-compliance with the property code, this failure did not void the court of jurisdiction. First, while pre-litigation requirements are mandatory, they are not jurisdictional and can be waived by withdrawal of the award, which Mesquite did do. Further, there are adequate remedies of De Novo Trial, as Mesquite did timely file objections. Another option would have been to file a Plea in Abatement if the case was in the administrative phase. Finally, failure to comply with Section 21.0111 does not raise a jurisdictional issue because: (1) lack of legislative intent to do so; (2) there are no consequences for non-compliance; (3) the requirement is deliver all appraisals to prevent “appraisal shopping”, but does not require an offer off the highest appraisal; (4) finding a jurisdictional issue leaves the State without the property with a project built and requiring more litigation; (5) and, a landowner could always fail to give a report to the State timely then claim a jurisdictional issue to have the case dismissed.

Jurisdiction of Counterclaims to Condemnation

In re H&S Hoke Ranch, LLC, 625 S.W.3d 220 (2021) (Tex. App.—Waco May 28, 2021, appl. for mandamus filed June 25, 2021)

Facts: A pipeline company, Breviloba, LLC, filed a condemnation action in the county court at law seeking to acquire an easement to build a pipeline across Hoke Ranch’s property. After the Special Commissioners’ hearing, Hoke Ranch filed objections to the award. Hoke Ranch also filed counterclaims, including trespass, for over \$13 million in damages. Hoke Ranch also filed a plea to the jurisdiction and motion to transfer, which was based on Section 21.002 of the Texas Property Code arguing 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 also 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.

Enforcement of a Contract for Sale

Saum v. City of College Station, No. 10-17-00408-CV, 2020 WL 7688033 (Tex. App.--Waco December 22, 2020, pet. denied) (mem.op.)

Facts: City of College Station contracted with Saum to purchase two tracts of property. The contract provided for specific performance as the only remedy for breach. Saum later tried to revoke her acceptance of the contract and sell the tracts to a third party for a higher price. Saum’s attempted revocation occurred after the contract was approved by the city council but prior to the mayor signing the contract. Saum argued the contract was not “executed” by the city prior to the mayor’s signature. She also contended delivery of the contract to her was required. The city filed suit and sought to temporarily enjoin Saum from conveying the tracts. The trial court granted the temporary injunction and Saum appealed. Saum challenges the trial court’s finding that the city established its probable right to relief.

Court of Appeals Holding: Affirmed.

Court of Appeals Rationale: Issuance of a temporary injunction requires proof the applicant has a cause of action against the defendant; that it has a probable right to the relief requested; and that a probable, irreparable, and imminent injury will occur without the grant. Proof the applicant will prevail at trial is not required. That a bona fide issue exists as to its right to ultimate relief is all an applicant must show. The granting of a temporary injunction is reviewed for an abuse of discretion. In construing a contract, the court’s primary concern is to determine the intent of the parties. When governmental entities are involved, the court must also look to any governing statutory requirements, applicable city charter provisions, resolutions, bylaws, ordinances, and the common law. Cities can generally only bind themselves at a duly convened meeting by majority vote. In this case there was nothing requiring the mayor’s signature on a contract to make it effective. The court found execution of the contract on the city’s behalf occurred when it was approved by the city council. It also found the trial court did not abuse its discretion by finding delivery of the contract was not required. Having overruled Saum’s claims, the court of appeals affirmed the trial court’s issuance of the temporary injunction.

Essential Terms to a Real Estate Sales Contract

Naumann v. Johnson, 2021 WL 2212725 (Tex.App.--Austin June 1, 2021, no pet.)

Facts: Damon Naumann passed away and his estate was probated. Dian, Damon’s sister, was the independent executor of his Estate. Dian and Dewayne Naumann, Damon’s son, entered into a contract for sale of property from the estate to Dewayne’s company. The contract included a set sales price, which was amended several

times, but also included another provision that stated, “Sales price shall be adjusted based on the appraisal of the property.” Rebecca Stacks, Damon’s daughter, offered to purchase the property for \$25,000 above the appraised value but Dian refused because of the sales contract. In probate court, Rebecca argued that because the sales contract provided the sales price could be adjusted, it was vague and uncertain and therefore, the document was void. She also alleged that even if the contract were amended to reflect the full appraised value, the beneficiaries would be harmed because of a higher offer. The probate court expressly found that neither Rebecca nor Dewayne and the Company have an enforceable contract to purchase the Property, and ordered that the property be listed with a real estate broker for the best offer. The court held that because a written agreement for the purchase of real estate must contain the essential terms, and the contract for sale did not include the final purchase price, it was vague and indefinite and not an enforceable contract.

Court of Appeals Holding: Affirmed.

Court of Appeals Rationale: A contract for the sale of real estate must comply with the statute of frauds, in that there must be a written agreement that contains the essential terms. *See* Tex. Bus. & Com. Code § 26.01(a), (b)(4) The appellate court noted that “[i]n the sale of real property the essential elements required, in writing, are the price, the property description, and the seller’s signature.” The evidence showed there were several amendments to the contract for sale, but the provision stating that it “shall be adjusted based on the appraisal of the property” was not amended. It allowed for an adjustment based on an appraisal after the contract, sometime in the future, and also didn’t clarify that a price adjustment would be based on the appraised value. The contract did not furnish the data to identify the sales price with “a reasonable degree of certainty and definiteness,” effectively open for future negotiation. Therefore, the Court of Appeals agreed with the probate court, holding it was not an enforceable contract because the essential element of price could not be determined from the written agreement.

Technical Difficulties in Filing Objections

NA Land Company v. State, 624 S.W.3d 671 (Tex.App.—Houston [14th Dist.] April 29, 2021)

Facts: State condemned land owned by NA Land. After the award was entered, NA Land attempted to file objections on the Monday following 20 days after the award of the Special Commissioners. However, it kept getting an e-file message of “Error” message: “Unable to contact payment provider at this time. Please try again in a few minutes. If this error persists, please contact support.” This lasted until the next day when the objections were filed. The State requested a Judgment Absence Objection and the court granted it. NA Land filed a motion for a new trial attaching the error message. The State responded stating that attempting to file the objection but not processed is insufficient under the plain language of the statute. The trial court denied the motion and granted the State’s plea to the jurisdiction.

Court of Appeals Holding: Reversed and Remanded.

Court of Appeals Rationale: The court stated that the statutory deadline for filing objections in a condemnation proceeding is not as inflexible as the State suggests. The condemnation statute should be “liberally construed for the benefit of the landowner.” When electronic filing is involved, courts have interpreted rules liberally and acted with leniency. The rules should be “liberally construed so as to avoid undue prejudice to any person on account of using the electronic filing system.” A document is filed when it is submitted to an electronic filing service provider, not when it is received by the clerk. NA Land informed the trial court at the hearing, without objection, that counsel put the objection to the condemnation award in the system for electronic filing and there was a technical problem with the payment system. The e-Filing for Texas “envelope summary” that attached to its motion is timely dated and includes an “Error” message. Considering this undisputed and unobjected-to evidence, NA Land has shown that its objection to the condemnation award was timely transmitted to the electronic filing service provider.

VALUATION MATTERS

Successful Challenge to Significant Adjustments in Appraisal

AEP Texas Inc. v. World Business Lenders, LLC, et al, 2021 WL 768247 (Tex. App–Corpus Christi - Edinburg, Feb. 26, 2021, no pet.) (mem. op.)

Facts: AEP is an electric utility company with condemnation authority. It filed an eminent domain action against World Business Lenders (“World”) to acquire 12.292 acres to expand its supply capability. Prior to trial, AEP moved to exclude World’s expert, claiming his report and opinions were unreliable based on problems with the three comparable sales he used. AEP challenged these sales on three grounds: that they were in the flood plain, when the subject was not; that their highest and best use was agricultural, when the subject’s was commercial or industrial; and that the adjustments made for “site” and “site improvement” for differences in flood plain, topography, and elevation were not supported by the data. According to AEP, these defects made the sales not comparable, making his report and opinions unreliable. After a hearing, the trial court denied the motion and World’s expert was allowed to testify. At trial, AEP offered value testimony of \$193,288. World offered value testimony of \$868,940. The jury rendered a verdict of \$493,499. AEP appeals the verdict alleging trial court error in failing to exclude the expert’s report and testimony.

Court of Appeals Holding: Reversed and Remanded.

Court of Appeals Rationale: Appraisers in condemnation cases are governed by the same rules as to relevance and reliability as other experts. Reliability is a predicate to admissibility; not a “weight” issue. As the gatekeeper, the trial court must determine whether the expert’s opinion meets the relevance and reliability standards. An expert must show how his data supports his opinion. Failure to provide suitable supporting data renders the opinion unreliable. Similarly, an opinion is unreliable if there is too great an analytical gap between the data offered and the opinion rendered. An expert must connect the data to the opinion it supports to show it has sufficient basis. Once challenged, it is up to offering party to show the validity of the expert’s opinion. A decision to admit or exclude evidence is reviewed on an abuse of discretion standard. An abuse of discretion occurs when the trial court rules contrary to guiding principles or acts unreasonably or arbitrarily.

In its review, the court of appeals focused on World’s expert’s “site improvement” adjustment. This expert made a blanket adjustment of 3.293 million dollars to each comparable to account for the difference in topography and elevation between the subject and the sales. It apparently was meant to represent the cost of ten feet of fill over the entire property. On a percentage basis, this equated to adjustments of 3,136%, 1,756%, and 882%, respectively. Neither his report, nor his testimony at the motion to exclude hearing, provided any basis for that number. World’s appraiser testified he had done a summary appraisal report and the calculations were in his work file, but the work file was never produced in discovery. This lack of data provided no means for the trial court to independently analyze the validity of the adjustment. The court of appeals found the lack of data made the report unreliable. The court then performed a harmful error analysis. Finding that the verdict was halfway between the two value opinions, the court concluded the admission of the unreliable report and attendant testimony probably caused the rendition of an improper judgment. It reversed and remanded the case.

Data from Properties with Different Highest and Best Uses was Unreliable

Bank of Texas NA. v. Collin Central Appraisal District, 2021 WL 2548711 (Tex. App. – Dallas June 22, 2021, no pet.) (mem. op.)

Facts: This case involves an appeal of a tax suit challenging the tax valuations of two branch banks for the years 2016 and 2017. The appraisal district moved to strike the landowner’s experts’ opinions based on their failure to apply appropriate methodology in their analysis. The trial court granted the motion and struck the landowner’s appraisal testimony before trial. The landowner then offered no evidence at trial, and a judgment was rendered for the appraisal district. The landowner appealed.

Court of Appeals Holding: Affirmed.

Court of Appeals Rationale: The trial court must act as a gatekeeper regarding expert testimony and must make an independent analysis to determine if the data relied upon supports the opinions presented. In this case the

parties agreed the highest and best use of the properties involved was for use as branch banks. In performing their analysis, the landowner's appraisers only used the income approach. For their gross rent calculation, they used rents from office buildings and retail properties which had a different highest and best use. They provided no data explaining how these rents could be applied to an analysis of branch banks. As a result, the court was left with the mere "ipse dixit" from the experts that their methodology was correct. This alone is insufficient. The rent comparables relied upon were not, in fact, comparable to the branch banks being valued. Thus, there was too great an analytical gap between the data being relied on and the opinion being given. The landowner also contended it should have been able to present its offer of proof in question-and-answer form. The court agreed but stated the failure to allow that was harmless.

Delays and Late Designation Lead to Summary Judgment

Barron as Trustee of 3001 Decatur Trust v. Fort Worth Transportation Authority, 2021 WL 1323415 (Tex.App.-- Fort Worth, April 8, 2021, pet. denied)

Facts: Fort Worth Transportation Authority ("Authority") filed to condemn property from Barron. After the hearing, Barron filed objections. After numerous attempts at delay by Barron (motions to recuse the judge, motions for interpreters, replacement of counsel, removal to federal court and bankruptcy filings), the Authority finally set its motion for summary judgment, seeking a judgment for the value of \$432,000, which was the value put forth by Barron's witness. Authority's appraisal was \$225,000, which was the amount of the Award. Barron, in the Summary Judgment Response, relied on a new opinion of \$742,000, this opinion being produced 251 days late. The Authority objected and sought to exclude the new opinion. The court struck the new opinion from the record, granted Summary Judgment and found the property value to be \$432,000. Barron appealed the value and the exclusion of the new opinion.

Court of Appeals Holding: Affirmed.

Court of Appeals Rationale: Regarding the late opinion, it was not timely. Also, Barron did not respond to the Authority's objection. Barron did not request leave to serve late discovery responses that the trial court denied and made no showing of lack of prejudice or unfair surprise. Therefore, the court of appeals held that the trial court did not abuse its discretion by excluding the late opinion. As to the value, it was the value sought by Barron of their timely disclosed expert, there is no fact issue regarding the Award (can't be considered by trier of fact anyway) because there is no harm to Barron being the only valuation before the court is that of Barron's (late opinion being excluded) and no other proper value opinion was before the trial on summary judgment. Therefore, summary judgment was proper.

INVERSE CONDEMNATION

Takings Impact Assessment to Stop Highway Project

Lamar Advantage Outdoor Company, L.P. v. Texas Department of Transportation, --- S.W.3d ---; 2020 WL 5666554 (Tex.App.--Fort Worth, Sept. 24, 2020, no pet.)

Facts: Lamar Advantage Outdoor Company, L.P. (Lamar) holds a lease to operate a billboard located along the north side of Interstate 30 just west of SH 360 in Arlington, Texas. TxDOT undertook the re-design and reconstruction of the SH 360/I-30 interchange. The redesigned interchange did not require the acquisition of the property underlying the Lamar billboard, but the visibility of the billboard was blocked by the highway structure. The loss of visibility resulted in Lamar's cancellation of advertising contracts on the billboard.

Lamar filed suit seeking a declaratory judgment against TxDOT to void the highway project due to TxDOT's failure to prepare a Takings Impact Assessment (TIA) pursuant to the Private Real Property Rights Preservation Act. TxDOT filed a general denial and a plea to the jurisdiction. The plea contended that the trial court lacked jurisdiction because TxDOT's actions were exempt under the Act, Lamar had not pled and could not prove a compensable damage under the Act, and Lamar lacked standing under the Act. The trial court granted the plea and dismissed the case for lack of jurisdiction.

Court of Appeals Holding: Affirmed.

Court of Appeals Rationale: The court reasoned that §2007.004 of the Act requires the claimant to be a property owner, and Lamar’s leasehold interest does not provide it standing to bring a claim under the Act. The court further pointed out that even if Lamar had a sufficient property interest, its claim of decreased visibility is not a compensable loss and would not have met the Act’s threshold of 25% reduction in the market value of the property.

Change in Status of Billboards since *Clear Channel*?

John Gannon, Inc. v. Texas Department of Transportation, --- S.W.3d ----, 2020 WL 6018646 (Tex. App. – Austin, Oct. 9, 2020, pet. filed)

Facts: In 2015, the Texas Supreme Court issued its decision in *State v. Clear Channel Outdoor, Inc.*, in which it found that the billboard in question was a fixture and part of the real property to be acquired in a condemnation action. The Court noted, however, that not all sign structures were necessarily fixtures. In 2016 in response to the Court’s decision, TxDOT issued a memo titled “Guidance for Impacted Off-Premise Billboards as Part of Highway Transportation Projects” (the Memo). The Memo, which was amended a few months after it was originally published, stated that TxDOT would treat all billboards as realty and that for the sign structure owner to be eligible for a relocation permit, the owner would need to retain the structure for its salvage value. The Memo also provided that the billboard structure owner would not be provided reimbursement of expenses to relocate the billboard a structure as the billboard structure cannot be the subject of duplicate payments as both an item of real estate and for relocation. In 2017, TxDOT also repealed and amended its regulations regarding billboards to address various issues, with the relevant issue being addressed in the revision of 43 TAC. §21.192 and repeal of §21.196. Section 21.192 was amended to require that a sign must be timely removed from the construction site to be eligible for the relocation provisions. The repeal of Section 21.196 was explained by stating that relocation benefits are an aspect of the purchase of right of way and not related to the sign permitting process.

In 2018, John Gannon, Inc. (JGI), an owner and operator of billboards, sued TxDOT seeking declaratory relief under the Administrative Procedures Act (APA) and the Uniform Declaratory Judgment Act (UDJA), claiming that TxDOT’s Memo eliminated certain rights under state and federal authorities in violation of the APA and that by issuing the Memo, TxDOT Officials acted beyond their statutory authority. In response, TxDOT filed a plea to the jurisdiction making three primary arguments. First, due to the *Clear Channel* decision, the State can no longer consider billboards to be personal property, but is required to acquire and compensate for billboard structures and that the Memo did not constitute a rule subject to rule-making procedures because billboard owners do not have a right to the issuance of an outdoor sign permit. Second, TxDOT argued that the claims are moot because TxDOT had adopted new rules that address both the relocation assistance benefits and the commercial sign permitting process. Third, TxDOT argued that JGI’s UDJA claim was redundant to the relief sought under their APA claim. The trial court granted TxDOT’s plea to the jurisdiction stating that the Memo was not a rule under the APA and dismissed the UDJA Claim because JGI had failed to demonstrate a live case or controversy. JGI appealed the trial court’s dismissal.

Court of Appeals Holding: Affirmed as to the trial court’s order dismissing the UDJA claim, but reversed and remanded the trial court’s dismissal of the APA claim.

Court of Appeals Rationale: The court found that because the Memo made the determination that all billboards constitute fixtures despite the limitation in *Clear Channel* that there may be instances where a billboard was not a fixture, the Memo was not a mere restatement of the law and had a legal effect or significance beyond what was stated in *Clear Channel*. Accordingly, the Memo constituted a rule under the APA and was improperly adopted. Further, the court reasoned that because TxDOT was continuing to rely upon the Memo, which could possibly exceed the language in the revised rules, there was a question as to the impact on JGI that should be determined on the merits and not at the plea to the jurisdiction stage. Finally, the court agreed with the trial court that the relief sought in JGI’s UDJA claim were the same as the relief sought in its APA claim and thus barred by the redundant remedies doctrine.

Immunity not waived for Claims against City for Breach of Airport Lease

City of Cleburne v. RT Gen., LLC, 2020 WL 7394519 (Tex.App.--Waco Dec. 16, 2020, no pet.)

Facts: In 2014, RT General occupied an aircraft hangar at the City's Municipal Airport, using it as a facility for providing aircraft storage, maintenance, and painting services to the public. Without a written agreement with the City, RT General made over \$300,000 in repairs, alterations, and improvements to the hangar. In 2016, RT General and the City entered into a lease for the hangar for a term of 15 years, which provided no rent for the first 10 years because of the improvements made by RT General. In 2018, the City sent a letter notifying RT General that it was in violation of the terms of the lease because it needed to mow the grass, clean up the facility, and provide the City with proof of insurance and proper permits. RT General quickly cured the violations, but the City sent an eviction letter, the City. RT General filed suit alleging breach of contract, fraud, a declaratory-judgment action, and an inverse condemnation claim, as well as request for injunctive relief. The City field a plea to the jurisdiction arguing governmental immunity, but the trial court denied the City's plea to the jurisdiction and granted RT General's request for a temporary injunction.

Court of Appeals Holding: Affirmed.

Court of Appeals Rationale: The Court of Appeals went through a good rendition of governmental immunity, specifically the difference between whether the City was acting in a proprietary or governmental capacity. RT General contended the City was acting in its proprietary capacity, and, thus, is not immune from suit. Citing *Wasson Interests, Ltd. v. City of Jacksonville*, 559 S.W.3d 142, 146 (Tex. 2018), the court noted the difference "is based on the reality that sovereign immunity is inherent in the State's sovereignty, and municipalities share that protection when they act as a branch of the State but not when they act in a proprietary, non-governmental capacity." In the performance of a proprietary function, a municipality is subject "to the same duties and liabilities as those incurred by private persons and corporations." *Id.* Both the Texas Tort Claims Act (§101.0215(a)(10)) and the Texas Transportation Code (§22.002(a)(2)) expressly list airports as a governmental function. Therefore, because the lease here involved the operation, construction, and maintenance of a hangar at the City's municipal airport, the court held the City was performing a governmental function when it entered into the lease with RT General. However, turning to Section 271.152 of the Texas Local Government Code, immunity to suit is waived for contracts entered into by the local governmental entity. For the purpose of waiving immunity under Chapter 271 of the Texas Local Government Code, a contract must be written and must state "the essential terms of the agreement for providing goods or services to the local governmental entity that is properly executed on behalf of the local governmental entity." The City argued that the lease lacked essential terms, but the court disagreed. The Texas Supreme Court has held "essential terms" to include "the time of performance, the price to be paid, ... [and] the service to be rendered." *City of Houston v. Williams*, 353 S.W.3d 128, 138-39 (Tex. 2011). The court held that the lease provided the essential terms, and that RT General plead sufficient facts to establish a waiver of the City's immunity to suit under Section 271.152 of the Texas Local Government Code.

Hurricane Harvey cases:

San Jacinto River Authority v. Medina, --- S.W.3d ----2021 WL 143222764 (Tex. 2021)

Facts: SJRA released water from Lake Conroe into the San Jacinto River during Harvey. Contending this caused flooding downstream, homeowners filed suits in district court raising inverse condemnation claims under Article 1, Section 17 of the Texas Constitution and statutory takings claims under the Private Real Property Rights Preservation Act ("Act"). SJRA filed a motion to dismiss on grounds of governmental immunity. The trial court denied the motion. SJRA appealed and added that District Court in Harris County has no jurisdiction for condemnation claims. The Court of Appeals dismissed the condemnation claims without prejudice as jurisdiction in Harris County is with the County Courts at Law and affirmed the lower court regarding the Act as claims thereunder must be filed in District Court and the Act allows for physical not just regulatory takings. There is also a fact question as to SJRA's actions when looking at the Medina's pleadings. SJRA appealed.

Supreme Court Holding: Affirmed.

Supreme Court Rationale: While the Act excludes formal condemnation claims, the Act creates liability and waives governmental immunity for two causes of action in this case: (1) a statutory takings claim under Subchapter B and (2) a suit to rescind proposed governmental action under Subchapter C. Further, the statutory takings claim may include a physical taking, such as the flooding alleged by the property owners, and is not limited solely to regulatory takings. Further, there are exceptions to liability under the Act, (1) an action taken out of a reasonable good faith belief that the action is necessary to prevent a grave and immediate threat to life or property; (2) an action that: (A) is taken in response to a real and substantial threat to public health and safety; (B) is designed to significantly advance the health and safety purpose; and (C) does not impose a greater burden than is necessary to achieve the health and safety purpose, but these exceptions are not established by the property owner’s pleadings and open to a question of fact. The court of appeals therefore did not err in affirming the trial courts’ orders, which denied SJRA’s motions to dismiss.

Dissent: The Court’s decision authorizes a statutory takings claim under the Act even though a favorable judgment on that claim would do nothing to redress the plaintiffs’ alleged injury. The alleged injury is the flooding of the plaintiffs’ homes as a result of SJRA’s decision to release water from Lake Conroe. Years after the fact, that injury can only be redressed by monetary damages, and the plaintiffs have a claim pending in another lawsuit seeking takings damages through the normal channels. The Act, however, creates a unique statutory cause of action under which the courts have no authority to award damages. Instead, the Act requires the courts, if the plaintiff prevails, to issue a judgment “rescinding” the taking. The flooding of homes several years ago cannot be undone, so judicial “rescission” of the taking is a meaningless. The most the plaintiffs could hope to achieve is a “finding” that the flooding of their homes was a taking by the SJRA resulting in damages. They cannot actually obligate the SJRA pay that amount, which would be the only way to redress their injuries. Indeed, the judgment the plaintiffs seek would not require the SJRA to do or refrain from doing anything.

San Jacinto River Authority v. Ray, 2021 WL 2154081 (Tex.App.--Houston [14th Dist.] May 27, 2021, no pet.)

Facts: SJRA released water from Lake Conroe into the San Jacinto River during Harvey. Ray brings suit in district court of Harris County for inverse condemnation under Article I, Section 17 of the Texas Constitution. There is a dispute if this also included a statutory claim under the Act (as above). SJRA filed a plea to the jurisdiction because the district court does not have subject matter due to only County Courts at Law have subject matter in Harris and no waiver of immunity. The trial court denied SJRA’s claims.

Court of Appeals Holding: Reversed and Judgment Rendered.

Court of Appeals Rationale: A county civil court at law has exclusive jurisdiction in Harris County of inverse condemnation proceedings. Because the district court lacked subject matter jurisdiction over Ray’s inverse condemnation claims, the trial court erred by denying SJRA’s plea to the jurisdiction. Regarding Ray’s pleading under the Act, the court found that while the Act does not obligate a governmental entity to pay damages, property owners may sue to adjudicate whether governmental actions result in a taking under the chapter; if successful, they are entitled to invalidation of the governmental action resulting in the taking, a judgment including a fact finding determining the monetary damages suffered as a result of the taking, and an award of attorney’s fees and costs. However, Ray did not plea under the Act, and pleadings must give a reasonable notice of claims asserted. Ray asserted a single cause of action and other causes cannot be inferred. Ray only suggested the Act in the appeal process. Ray could have amended its petition at any time to correct this and did not. Thus, the only choice was to reverse the trial court’s order denying SJRA’s plea to the jurisdiction and render judgment dismissing Ray’s claims for lack of subject matter jurisdiction.

San Jacinto River Authority v. Guajardo, 2021 WL 1878377 (Tex.App.—Houston [1st Dist.] May 11, 2021, no pet.)

Facts: SJRA released water from Lake Conroe into the San Jacinto River during Harvey. Guajardo is a part of a group that filed suit (joined) in the County Court of Law Harris County. However, Guajardo’s property was not in Harris County, but in Montgomery County. SJRA filed a motion to dismiss or transfer venue. Guajardo

objected citing that the motion to transfer was untimely as other pleadings had been filed and that SJRA had “judicially admitted” a limited exception to the rule that EACH party must prove venue. The court denied SJRA’s motions and this appeal followed.

Court of Appeals Holding: Reversed and Remanded.

Court of Appeals Rationale: In a suit in which there is more than one plaintiff, each plaintiff must, independently of every other plaintiff, establish proper venue. If a plaintiff cannot independently establish proper venue, that plaintiff’s part of the suit, must be transferred to a county of proper venue or dismissed, unless that plaintiff, independently of every other plaintiff, establishes that: (1) joinder of that plaintiff or intervention in the suit by that plaintiff is proper under the Texas Rules of Civil Procedure; (2) maintaining venue as to that plaintiff in the county of suit does not unfairly prejudice another party to the suit; (3) there is an essential need to have that plaintiff’s claim tried in the county in which the suit is pending; and (4) the county in which the suit is pending is a fair and convenient venue for that plaintiff and all persons against whom the suit is brought. All four parts must be met for limited jurisdiction. Damage claims to real property run with the land, thus Montgomery County is proper venue, Guajardo could not establish (3) as Harris County was not indispensably necessary. Further, SJRA did not waive venue by filing other pleadings because an order transferring venue of certain claims based upon a finding of improper joinder is still a joinder decision, even though the remedy for misjoinder may be transfer rather than outright dismissal.

Mere Operation of a Sewer Line not enough for a Taking

Carrasco v. City of El Paso, et al., 625 S.W.3d 189 (Tex. App. – El Paso 2021, no pet)

Facts: Carrasco bought a lot on a cul-de-sac and built a house. When he connected to the public sewer line, his grinder pump burned out in 72 hours. He discovered the sewer line gravity flowed towards his house, not away from it. This resulted in sewage from the subdivision accumulating on Carrasco’s property. The sewer line had been designed and installed by the prior developer, not the city. Carrasco sued the city for damages alleging liability under the Texas Tort Claims Act and for inverse condemnation. The city filed a plea to the jurisdiction alleging governmental immunity which was granted by the trial court.

Court of Appeals Holding: Affirmed.

Court of Appeals Rationale: A waiver of immunity for a property damage claim under the Tort Claims Act requires a showing the property damage resulted from an employee’s omission or negligence in the use of motor driven equipment during the performance of a governmental function. Carrasco could not make that showing here. There is no waiver of immunity for a governmental unit’s failure to perform a discretionary act. The city retained its governmental immunity in this case. To prove liability for inverse condemnation, a person must show an intentional act by the government resulting in the taking or damaging of property for public use. Intent can be shown upon proof the government know a specific act is causing identifiable harm or that it knows harm is substantially certain to result. Merely showing an intentional act is not enough. The related harm must be anticipated to a substantial certainty. Mere negligence is not enough. Nor is there liability for failure to act. A takings claim must be based on some affirmative act. Here the city did not exercise control or ownership over the sewer lines within each lot because that was assumed by the lot owner. Moreover, takings liability cannot be imposed merely for the operation of a sewer line. Nuisance liability can be imposed when the nuisance rises to the level of a taking and thus results in a waiver of immunity. Appellee’s nuisance claim fails for the same reason its taking claim fails. Municipalities generally have immunity for negligent conduct regarding their performance of governmental functions, and operation of a sanitary sewer system is a governmental function.

Challenge to Statutes granting Eminent Domain Authority

Sansom v. Texas Railroad Commission, 2021 WL 2006312 (Tex. App. – Austin, May 20, 2021, no pet.) (mem.op.)

Facts: Appellants, Sansom and several private landowners, Hays County, and the City of Kyle (collectively “Sansom”), sued the Railroad Commission, several of its commissioners and employees, Permian Highway

Pipeline, and Kinder Morgan to enjoin the construction and operation of the PHP natural gas pipeline based on the issuance of a T-4 permit. Sansom allege the T-4 permit process is unconstitutional in various respects. Sansom also asserted certain statutes were unconstitutional to the extent they grant pipeline companies the power to determine the route of the pipeline. They sought a declaratory judgment that statutes granting eminent domain authority to pipeline companies pursuant to a T-4 permit are an unconstitutional delegation of legislative authority, an uncontrolled grant of a special privilege, and violates their right to due course of law by not allowing them input as to the route as stakeholders. The trial court granted the Railroad Commission's plea to the jurisdiction and the pipeline entities' motion for summary judgment. Sansom appealed.

Court of Appeals Holding: Affirmed.

Court of Appeals Rationale: The Administrative Procedures Act waives sovereign immunity to the extent a claim challenges the validity of a rule. Here, Sansom is not challenging the validity of a rule but rather the absence of a rule. They challenge the Commission's failure to enact rules regarding selection of the pipeline route. The APA does not waive immunity to challenge the absence of rules. The trial court's granting of the plea to the jurisdiction as this argument was proper. Sansom's request for a declaratory judgment is likewise improper because the pleading fails to assert which statutory provisions are at issue and unconstitutional. The court of appeals found Sansom's pleading affirmatively negated jurisdiction and thus there was no need to allow them to replead. The district court's grant of the plea was proper.

Regarding the pipeline entities, the court found Sansom's argument of denial of due course of law failed as a matter of law due to the existence of Property Code Chapter 21's statutory scheme allowing challenges to takings and the fact those potential challenges had not yet been asserted. Their claim regarding the grant of special privilege was also meritless because the legislature could withdraw utility companies' eminent domain authority at any time. Finally, in addressing the improper delegation of legislative authority argument, the court analyzed the pipeline project under the eight-factor *Boll Weevil* test enunciated by the Texas Supreme Court. It determined Sansom failed to show the delegation improper pursuant to that test. Thus, granting of the pipeline entities' motion for summary judgment was proper.

Evidence of Prior Flooding was Sufficient to Show Intent

City of El Paso v. Ramirez, 2021 WL 3827441 (Tex.App.—El Paso Aug. 27, 2021)

Facts: The City owns and operates the Clint Landfill, a solid waste disposal site located within a mile of Ramirez's property. After a series of rainstorms, the City and surrounding areas experienced extensive flooding. Retention ponds at the Clint Landfill overflowed and caused significant damage to Ramirez's property, so he sued the City alleging numerous claims including inverse condemnation. After an initial plea to the jurisdiction followed by an interlocutory appeal and remand, the City filed a second plea to the jurisdiction regarding the inverse claim. The second plea to the jurisdiction was denied and the City appealed. It was affirmed on appeal and remanded to the trial court back in 2014. Following a bifurcated bench trial on the issue of liability, the trial court found the City knew, after 2002, that property damage was substantially certain to result from its continued operation and maintenance of the landfill because of its history of wash out, runoff and drainage problems, and the City appealed.

Court of Appeals Holding: Affirmed.

Court of Appeals Rationale: On appeal, the City claims Ramirez did not prove the City knew its continued operation and maintenance of the Landfill was substantially certain to flood the properties and that Ramirez failed to establish the City's operation and maintenance of the Landfill proximately caused damage to Appellees' properties. Essentially, the City argued that no evidence supports the trial court's findings as to the required elements of proximate cause and intent. In determining whether a finding is supported by legally sufficient evidence, the appellate court must consider the evidence in the most favorable light. Plaintiffs must prove there was an affirmative act intentionally committed by the entity that causes identifiable harm, or that the government knows that specific harm is substantially certain to occur to specific property and the taking, damage, or destruction was for public use. This affirmative conduct encompasses the element of causation because, without causation, there can be no takings claim. As to proximate causation, the City argued that

Ramirez's expert was unreliable and failed to prove causation. For a case involving floodwater, the cause in fact prong can be established by evidence that a governmental entity's affirmative act changed the character of the floodwater. The City argued Dr. Walton conceded the properties were already subject to flooding due to their location, and he performed no quantitative analysis to determine how much water from the Landfill reached the properties. However, Dr. Walton testified the Landfill had no flood control structure and he identified the trash as originating from the landfill. He also testified the continued operation of the landfill increased damage to the properties than without the landfill, and the "the presence" of the landfill was the primary causative factor in the erosion, sediment transport, and deposition of waste onto their properties. Also, the property owners presented evidence that no waste infused floods occurred for 20 years prior to when the landfill remained under capacity, but once it reached capacity, there were three damaging floods within four years. Therefore, Ramirez presented some evidence that the discharge from the landfill changed the characteristics of the water, and such changes caused damages to Appellees' properties.

As to intent, City argued it did not intend to cause runoff onto the properties, and the trial court erred in finding the City operated and maintained the landfill with substantial certainty that flooding would occur. The requisite intent to establish a taking is proof that "a governmental entity knows that a specific act is causing identifiable harm or knows that the harm is substantially certain to result." A takings claim must be based on some affirmative "act" or "action" of the government and it must be that specific act that causes identifiable harm, not mere negligent conduct by the government. Ramirez asserted that the affirmative conduct was the City's continuous operation of the landfill as it reached capacity, causing escalated damage following three floods. The court held that Ramirez presented ample evidence at trial to establish the City continued to pile trash on the Landfill with the knowledge runoff containing Landfill trash, polluted water, and sediment would leave the Landfill to the Appellees' properties during a flood. Additionally, Dr. Walton testified that the City built ponds were not within proper standards. The City presented evidence that it took remedial measures, including constructing berms and drainage pipes, adding capacity, repairing erosion, and adding chemicals to stabilize waste. However, the City's remedial measures do not negate the finding of substantial certainty when the City continued to pile mounds of waste and refuse on the landfill, which caused property damage. Based on the evidence, the appellate court held that the trial court could reasonably infer the City continued operating the Landfill having substantial certainty that exacerbated flooding would occur during a rainfall event, and that the damages were as a result of the City's continued operation and maintenance of the landfill.

Limited Rights for Production of Water

Canadian River Municipal Water Authority v. Hayhook, Ltd., --- S.W.3d ----, 2021 WL 1202346 (Tex.App. – Amarillo, March 30, 2021, no pet.)

Facts: Canadian River Municipal Water Authority (Water Authority) owned the water rights underlying Hayhook, Ltd.'s (Hayhook) property. The Water Authority and Hayhook had previously disagreed regarding the amount of infrastructure that could be placed on the surface of the Hayhook property to produce the water. The parties resolved the disagreement with a settlement agreement specifically addressing the amount of infrastructure allowed on the property to facilitate the production of water from under the property. The settlement agreement also pointed out that it did not resolve the disagreement between the parties regarding the placement of infrastructure related to the production of water from other properties. The Water Authority subsequently constructed a 54" pipeline across the Hayhook property to transport water produced from other properties. Hayhook sued the Water Authority for multiple causes of action including an inverse taking. The Water Authority argued, among other things, governmental immunity shielded it from the claim as their actions were done under a color of title and there was no intentional act to take the Hayhook property. The trial court found that the Water Authority's action was an intentional physical taking of Hayhook's property without compensation and awarded Hayhook damages in excess of \$500,000. The Water Authority appealed the trial court's ruling.

Amarillo Court of Appeals Holding: The court affirmed the trial court's order finding of a taking in violation of the Texas Constitution and affirmed the trial court's award.

Court of Appeals Rationale: The court reasoned that the Water Authority’s construction of the pipeline was for the uncontested transport of water produced off the Hayhook property, and thus unrelated to the Water Authority’s production of its water rights on the Hayhook Property. The court further pointed out that the previous settlement agreement between the parties regarding the placement of certain infrastructure on the Hayhook property specifically excluded any infrastructure related to the production of water off the Hayhook property. Accordingly, the court determined that the Water Authority’s action was not done under the color of title from the previous settlement agreement and thus constituted an intentional physical taking of the Hayhook property in violation of Article 1 §17 of the Texas Constitution.

Sufficient Facts to Support Inverse Claim

Mims v. City of Seguin, 2021 WL 3057506 (Tex.App.--San Antonio July 21, 2021, no pet.)

Facts: City, as a part of a sewer project, flooded Mims by tapping into springs and draining across Mims’ property, causing loss of habitability to Mims’ home. Five years prior to the project, the City had knowledge with numerous warnings from the City’s engineers and confirmed by City’s engineers when the project started. Even so, the City passed resolutions to open trench across Mims’ property to drain the same, but blocking access. Mims filed an inverse condemnation case. City filed a plea to the jurisdiction arguing facts did not support waiver of immunity, and facts, if true, did not support an inverse or nuisance claim. The trial court granted the City’s plea and dismissed with prejudice. Mims appealed.

Court of Appeals Holding: Reversed and Remanded.

Court of Appeals Rationale: When taken as true and liberally construed, the facts alleged establish the trial court’s jurisdiction. City did not oppose Mims’ allegations of facts, just said the facts if true did not rise to a taking. The trial court’s grant of the plea was only proper if the pleadings “affirmatively demonstrate[d] an incurable defect” that established the City’s conduct did not amount to a taking under the Texas Constitution. Property damage pleadings must plead the elements, damage to private property for public benefit and the government knew that a specific act caused identifiable harm or knew damage is substantially certain. City’s argument that hitting the springs for the sewer project was not a public use, just the line itself, did not have merit. The City knew of the springs and was told of the potential and actual flooding. Because the springs were hit during the project it was public use. The court held that Mims’ pleadings did not affirmatively and incurably negate the trial court’s subject matter jurisdiction. The City argued Mims’ should have amended and cured the alleged defects, but the City failed to show that there were any incurable defects in Mims’ pleadings. The court found that there is no duty to cure until after a plea is granted.

New Improvements negate a Grand-Fathered Use

City of Dickinson v. Stefan, 611 S.W.3d 654 (Tex. App.—Houston [14th Dist] Oct. 27, 2020, no pet.)

Facts: In December, 1999, Stefan purchased a home on 6.75 acres in Dickinson, Texas. Under a zoning ordinance passed by the City in 2001, the owner of a lot with a nonconforming use must register with the City within one year after the ordinance. If an owner does not register a nonconforming use, the City can require proof by the owner that the use lawfully existed in 2001. Even if an owner established a pre-existing nonconforming use, the owner could not expand the nonconforming use by building structures or other improvements after the effective date of the ordinance. Stefan registered his property as a nonconforming use, stating that the property was used as “business & multi-family,” but Stefan did not specify the type of business. He worked out of his home, but later stated he also used his property for events. In February 2017, the City received a complaint from another resident about a pavilion under construction in Stefan’s front yard. Upon investigation, the City determined that Stefan had not obtained a building permit for the pavilion, but Stefan stated that he had approval to host weddings under the prior registration. Even with the registration, the City considered the pavilion to be an expansion of that use, which was not allowed without a specific use permit. Stefan submitted a request for the specific use permit, and stated that he had been operating as an event center as of 2000, prior to the ordinance, which was denied by the Planning and Zoning Commission and then the Board of Adjustment (“BOA”). Stefan filed suit, seeking a declaratory judgment to declare the property grand-

fathered under the zoning law and asserting an inverse condemnation claim. Stefan also sought a temporary injunction and permanent injunction. The City filed a plea to the jurisdiction, arguing Stefan failed to exhaust his administrative remedies by not appealing the BOA's decision, but the trial court denied the City's plea to the jurisdiction.

Court of Appeals Holding: Reversed and rendered.

Court of Appeals Rationale: Local Government Code section 211.011 allows judicial review of a BOA decision by appealing to a district court, county court, or county court at law. The only issue for a court to determine would be the legality of the BOA's decision, and Stefan would have the burden of making a "very clear showing" that the BOA abused its discretion. However, Stefan didn't challenge the BOA's decision under the abuse of discretion standard, but sought declaratory relief that his use was grand-fathered. The court held that Stefan did not seek judicial review of the BOA's decision and because he failed to exhaust his administrative remedies, the court did not have subject matter jurisdiction over his declaratory judgment claim. Stefan also argued the declaratory judgment claim was brought under Chapter 245 of the Local Government Code, which must assert a vested right in the permit and provides a remedy of mandamus or injunction. Even construed broadly, the court held Stefan did not plead a claim under Chapter 245. As to the takings claim, if a party asserting a takings claim failed to take advantage of a statutory remedy, the party's takings claim is barred. The court held that Stefan's takings claim is barred and should be dismissed because he failed to avail himself of the statutory remedies under Local Government Code section 211.011.

Start of Statute of Limitations for Inverse Claim

Walton v. Neskowin Reg. Sanitary Auth., No. A168358 (Or. App. Sept. 1, 2021)

Facts: The Sanitary Authority installed a main sewer line on Walton's property in 1995. When the home's septic system failed in 2014, the Authority required them to connect to the sewer system. Walton asserted that they were entitled to a "no fee" connection, in accordance with an agreement with the Authority to allow the 1995 installation in exchange for a no fee connection. The Authority denied the existence of any agreement. In 2017, Walton sued for inverse condemnation. The Authority argued the statute of limitations on such a claim had expired because it starting running when the physical invasion occurred, not when the Authority denied compensation, as Walton had argued. The trial court agreed with the Authority.

Court of Appeals Opinion: The court concluded that the statute of limitations of six years for trespass applied to an inverse condemnation claim, and the statute of limitations began running when the invasion took place, and not when the Authority denied compensation.

Copyright Infringement not a Taking

Jim Olive Photography v. University of Houston System, 624 S.W.3d 764, (Tex. 2021)

Facts: A professional photographer, Jim Olive, took a series of aerial photographs of the City of Houston in 2005. Olive published the photographs on his website for purchase. Prior to publishing the photos, Olive registered the photographs with the United States Copyright Office. Olive's website also described applicable copyright protections and stated that unauthorized use was prohibited. Olive alleges that sometime in 2012 the University of Houston (UH), without permission from Olive, downloaded a copy of one of the aerial photographs and began displaying the photograph on several webpages promoting the school. Olive did not discover UH's use of the photographs until years later. Upon the discovery, Olive demanded that UH cease and desist the unauthorized use of the photograph. UH immediately removed the photograph from its websites, but did not pay Olive for its use of the photograph. Olive sued UH alleging that UH's use of the photograph was an unlawful taking under Article 1, Section 17 of the Texas Constitution and the Fifth Amendment to the United States Constitution. UH answered by filing a plea to the jurisdiction arguing that a copyright is not property under the federal and state takings clauses and that Olive's allegations of infringement do not state a cognizable taking. Olive countered by arguing that the takings clauses protect all types of property and that UH's use of the photograph was a per se taking that should not be analyzed under the multi-factor test for a regulatory taking. The trial court denied UH's plea to the jurisdiction and UH filed an interlocutory appeal.

Houston Court of Appeals Holding: The appellate court found that a government's copyright infringement is not a taking and vacated trial court's denial of UH's plea to the jurisdiction and dismissed the case.

Texas Supreme Court Holding: In a plurality opinion, the Supreme Court held that UH's alleged copyright infringement was not a per se taking and affirmed the appellate court's order dismissing the case for lack of jurisdiction.

Supreme Court Rationale: The court determined that while a copyright is property protected under the Fifth Amendment of the US Constitution, UH's use of the photograph did not deprive Olive of all rights related to the copyright and thus did not rise to the level of a per-se taking. The court equated the infringement of the copyright to a trespass of the owner's right, and that the copyright remains valuable so long as the government's infringement does not completely frustrate the owner's reasonable investment-backed expectations. The court determined that Olive's allegations of copyright infringement asserted a violation of the owner's copyright, but not a confiscation of the copyright and that UH retained its sovereign immunity in the absence of a properly pled takings claim.

It should be noted that several justices in their concurring opinion stated that the Texas Constitution provided broader protections than the Fifth Amendment of the US Constitution, however Olive did not establish a per se taking and did not argue for a different result under the Takings Clause of the Texas Constitution and thus waived such arguments.

MISCELLANEOUS CASES

“Accommodation Doctrine” before any Interference

Lyle v. Midway Solar, LLC, 2020 WL 7769632 (Tex.App.- Dec. 30, 2020, pet. filed)

Facts: The Lyles own a portion of an undeveloped mineral estate on a 315-acre tract of land in Pecos County derived from a 1948 Deed. The owners at the time transferred surface ownership to a third party, Gary Drgac. In October 2015, Drgac entered into leases with Midway Solar, LLC allowing it to build a solar energy facility, which were constructed on 215 acres. The leases also gave Midway the right to place transmission lines, electrical lines, and cable lines anywhere on the property, subject to the Drgac's consent. The leases also recognized that Drgac did not own the mineral interests, and Drgac agreed to assist in obtaining consent from the mineral estate owners and designated certain drill sites on the property that were exempt from solar construction. The Lyles had no input on the designated location for the drill sites. After the solar facility was constructed, the Lyles filed a lawsuit against Midway, Drgac, and other mineral interest owners who signed surface waivers alleging that: (1) they were entitled to a declaration quieting title in their mineral estate because the surface waiver agreements created a cloud on their title; (2) Drgac and Midway had breached the terms of the 1948 Deed by denying them reasonable access to their minerals; and (3) Drgac and Midway, with the participation of the surface waiver defendants, were trespassing on the Lyles' mineral estate. The Lyles sought damages alleging the solar facility “destroyed and/or greatly diminished the value” of their mineral estate and wanted the solar panels and transmission lines removed. Both sides filed motions for summary judgment, with Midway arguing that it owed no duty to the Lyles to accommodate their right to use the surface they had not developed their mineral estate and had no current plans to do so. The trial court granted Midway's motion, holding the accommodation doctrine applies to the interpretation of the 1948 Deed in Midway's favor, but denied the Lyles' motion.

Court of Appeals Holding: Affirmed in part, reversed in part.

Court of Appeals Rationale: The “accommodation doctrine” requires surface owners and mineral owners to reasonably accommodate each other in utilizing the surface for their competing estates. The central issue in this case is the conflict between the operation of a large-scale solar facility on the surface and the owners of the mineral interests; however, the mineral owners are not actively attempting to develop those minerals. Midway asserted that if the mineral owners do seek to extract oil or gas, it can accommodate that development. The trial court determined that under the accommodation doctrine, the Lyles' claim for damages should be dismissed until they actively seek to develop their minerals. When the owner of a fee simple estate severs the

mineral estate by a conveyance, the mineral estate is typically referred to as the “dominant” estate in that the mineral owner generally has the right to use the surface to extract minerals, as well as those incidental rights reasonably necessary for the extraction. The surface estate is referred to as the “servient” estate, because the mineral estate “receives the benefit of the implied right of use of the surface estate” to explore and develop its mineral interests. However, the dominance of the mineral estate has been limited by the accommodation doctrine, because the “mineral and surface estates must exercise their respective rights with due regard for the other’s.” If the surface owner can establish that the mineral owner has an available alternative that would allow it to reasonably access its minerals without disturbing the surface owner’s existing use, the accommodation doctrine may require the adoption of an alternative method. Here, the 1948 deed gives the grantors the right to “use” the surface in the “usual” manner in the “use and enjoyment” of the reserved mineral estate. Therefore, the court determined there is room for substantial disagreement as to what the grantors meant because it could now know what the grantors meant when they used the term “usual” in the deed. The deed could have specified a particular drilling method, or say the mineral estate is entitled to drill a vertical well wherever it chooses. The deed does not address the surface owner’s rights to use the surface, nor does it restrict or limit their rights in any way, so the court concluded that the 1948 deed did not preclude the application of the accommodation doctrine. Midway claimed its solar field might only potentially interfere with the Lyles’ mineral interest at some point in the future, but until it actually does so, the Lyles’ cannot have the unilateral right to dictate the use of the surface. The court agreed, holding that the accommodation doctrine could apply here, but it was premature until the mineral owners actually sought to develop their minerals.

The Lyles also raised a trespass claim, but because both parties have rights to the surface, Midway had not encroached on the Lyles’ surface rights until Lyles actually sought to exercise their rights. Finally, the court held that the court erred in denying Lyles’ summary judgment as to the quiet title claim because the waiver agreements signed by other mineral owners on adjacent tracts created a cloud on the Lyles’ title.

U.S. SUPREME COURT

Cedar Point Nursery v. Hassid, 549 U.S. ____ (2021) (issued June 23, 2021)

Facts: California enacted the Agricultural Labor Relations Act (“ALRA”) in 1975, creating the Agricultural Labor Relations Board (“Board”). Shortly after, the Board enacted a regulation allowing union organizers access to agricultural employees at employer worksites under specific circumstances. Cedar Point Nursery operates a nursery in Dorris, California and employs approximately 100 full-time workers and more than 400 seasonal workers. In 2015, organizers from the United Farm Workers union (“UFW”) entered the nursery, without no notice of intent to take access as required by the regulation. The UFW allegedly disrupted the workers, and some workers left their work stations to join the protest. Cedar Point filed a charge against the UFW with the Board, alleging that the UFW had violated the access regulation by failing to provide the required written notice before taking access. The UFW also filed a countercharge, alleging that Cedar Point had committed an unfair labor practices. Cedar Point then sued the Board in federal district court alleging that the access regulation, as applied to them, amounted to a taking without compensation, in violation of the Fifth Amendment, and an illegal seizure, in violation of the Fourth Amendment. The district court granted the Board’s motion to dismiss for failure to state a claim, and Cedar Point appealed. The U.S. Court of Appeals for the Ninth Circuit affirmed.

U.S. Supreme Court Opinion: In a 6-3 decision, the Court held that the California regulation granting labor organizations a “right to take access” to an agricultural employer’s property to solicit support for unionization is a per se physical taking under the Fifth Amendment. The opinion is touted as a “big win for property rights,” as it is seen as a protection of private property rights. There are two types of takings: physical appropriations of land and imposition of regulations that restrict the landowner’s ability to use the land. Physical takings must be compensated, but use restrictions are evaluated using a flexible test developed in *Penn Central Transportation Co. v. New York City*, 438 U.S. 104 (1978), which balances factors such as the “economic impact of the regulation, its interference with reasonable investment-backed expectations, and the character of

the government action.” The regulation granting labor organizations a “right to take access” an agricultural employer’s property is a physical taking. It does not restrict the growers’ use of their own property, but instead appropriates the owners’ right to exclude third parties from their land, “one of the most treasured rights” of property ownership. By granting access to third-party union members, even for a limited time, the regulation confers a right to physically invade the growers’ property and thus constitutes a physical taking.

PennEast Pipeline Co., LLC v. New Jersey, et al. 594 U.S. ____ (issued June 29, 2021)

Facts: PennEast intended to construct a 116-mile natural gas pipeline that would ship Marcellus Shale gas from Northeast Pennsylvania across the Delaware River to New Jersey. The Natural Gas Act, passed in the 1930s, authorizes the federal government, through the Federal Energy Regulatory Commission (“FERC”), to grant private companies building gas pipelines the power of eminent domain. FERC first approved the PennEast project in 2015. PennEast sought to condemn property in which either New Jersey or the New Jersey Conservation Foundation had a property interest. New Jersey moved to dismiss on sovereign immunity grounds, arguing the 11th Amendment, which grants states immunity from private lawsuits, prevented PennEast from condemning property of the state. The District Court denied the motion, and it granted PennEast’s requests for a condemnation order and preliminary injunctive relief. The Third Circuit vacated the District Court’s order, and held that because the Natural Gas Act did not clearly delegate to certificate holders the Federal Government’s ability to sue nonconsenting States, PennEast was not authorized to condemn New Jersey’s property.

U.S. Supreme Court: In a 5-4 decision, the Court upheld PennEast’s right to condemn the property. It held that Congress, through the Natural Gas Act, allows the condemnation by private companies in the interest of building a nationwide system of pipelines, as well as other infrastructure. Chief Justice Roberts wrote, “[w]hen the Framers met in Philadelphia in the summer of 1787, they sought to create a cohesive national sovereign in response to the failings of the Articles of Confederation. Over the course of the Nation’s history, the Federal Government and its delegates have exercised the eminent domain power to give effect to that vision, connecting our country through turnpikes, bridges, and railroads—and more recently pipelines, telecommunications infrastructure, and electric transmission facilities. And we have repeatedly upheld these exercises of the federal eminent domain power — whether by the Government or a private corporation, whether through an upfront taking or a direct condemnation proceeding, and whether against private property or state-owned land.” Accordingly, the Court held that the Natural Gas Act authorized FERC to delegate to PennEast the power to condemn all necessary rights-of-way, whether owned by private parties or states.

Dissent: “If private parties cannot sue nonconsenting States, the Court says, delegates would have no practical means of taking state property,” Justice Barrett wrote. “And that is inconsistent with the Constitution, the Court tells us, because ‘[a]n eminent domain power that is incapable of being exercised amounts to no eminent domain power at all.’ ... The flaw in this logic is glaring: The eminent domain power belongs to the United States, not to PennEast, and the United States is free to take New Jersey’s property through a condemnation suit or some other mechanism.”

Note:

The U.S. Supreme Court denied a request to hear an appeal of a Chicago landowner whose property was condemned by the City to allow the expansion of the Bloomer Chocolate Company on June 25, 2021.

The landowner said the city violated the Constitution by invoking its eminent domain powers without a finding that the change was necessary to remedy urban blight, which would have been a public benefit. Instead, he argued the city said it was acting to avoid possible future blight. The case was thought to be a good chance to revisit the *Kelo* case. In the dissent, Justices Thomas and Gorsuch said the case would have provided “the opportunity to correct the mistake we made in *Kelo*.”

Case to Watch:

Lech v. City of Greenwood Village, Co.

In 2015, an armed shoplifter fleeing the police broke into a Greenwood Village, Colorado, home and refused to come out. During a 19-hour standoff, police officers used explosives, high-caliber ammunition and a battering ram against the house. The shoplifter was apprehended, but the home was totaled, and the homeowners were never compensated. In October, 2019, the 10th U.S. Circuit Court of Appeals held that as long as the government uses its “police power” to destroy property, it cannot be required to provide compensation for that property under the U.S. Constitution’s Takings Clause. The homeowners have filed a Petition for Writ of Certiorari to the U.S. Supreme Court, asking the Court to consider their case.

Update: Takings in the Era of COVID-19

As the pandemic proceeds and government shutdowns or restrictions continue, scholars across the country have weighed in on whether these shutdowns and restrictions constitute compensable takings. A shortlist of some scholarly works, presentations, or discussions is below.

1. For a detailed and ongoing chronology of Covid-19 Takings challenges, please refer to the website of Professor Robert Thomas: inversecondemnation.com. Professor Thomas’s website is a thorough gathering of materials and cases discussing whether pandemic orders constitute compensable takings.
2. On August 26, 2021, the U.S. Supreme Court issued a Per Curiam opinion, holding that the CDC Eviction Moratorium Order could not stay in effect while challenges and appeals worked their way through the court system. This effectively ended the CDC Moratorium, which was set to expire on October 3, 2021. *Alabama Association of Realtors, et al. v. Department of Health and Human Services, et al.*, 594 U.S. __ (2021)