

Regulatory Takings
And
Inverse Condemnation

Zoning and Land Use in Texas

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REGULATORY TAKINGS
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INVERSE CONDEMNATION

American law is replete with cases that exemplify the friction between government authority and private property rights. The law has always sought to balance the competing rights of property ownership with the public interest. In the zoning context, zoning decisions always involve a balance between the competing rights of a property owner to use his/her property in the manner in which he/she sees fit and the interests of the municipality in protecting the community, preserving land values, and promoting healthy, safe and beneficial development. At the outset, it is important to note that governments have the basic underlying authority to acquire or “take” private property and private ownership rights from individuals for legitimate public purposes. Yet apart from actually taking away one’s property, the operation of government often results in a deprivation of property rights or interests, both directly and indirectly. Government regulation frequently has some effect on the use and/or ownership of property. All property is held subject to the valid exercise of the state’s police power. However, there is a line beyond which the legitimate exercise of this power triggers an obligation of the government to pay compensation. Often this line is neither bright nor clear and can be the subject of some of most complex and confusing litigation.

Although inverse condemnation cases date back for decades, we now have the benefit of relatively recent judicial pronouncements on both the federal and state levels. In Texas, landmark supreme court opinions were rendered in 2004 in *Sheffield Development v. City of Glenn Heights*, 140 S.W.3d 660 (Tex.2004), *Town of Flower Mound v. Stafford Estates Limited Partnership*, 135 S.W.3d 620 (Tex. 2004), *Tarrant Regional Water Dist. v. Gragg*, 151 S.W.3d 546 (Tex.2004), and *City of Dallas v. Jennings*, 142 S.W.3d 310 (Tex.2004). In 2005, the US Supreme Court issued its opinions in *Lingle v. Chevron USA*, 544 US 528 (2005) and *Kelo v. City of New London*, 545 US ____ (2005).

Texas vs. Federal Law

In relevant part, the 5th Amendment to the US Constitution states, “[N]or shall private property be taken for public use, without just compensation.” Article I, Section 17, of the Texas Constitution, found in the Texas Bill of Rights, sets forth the rule in Texas as follows:

“No person's property shall be taken, damaged or destroyed for or applied to public use without adequate compensation being made, unless by the consent of such person. . . .”

Although the two provisions are similar, it has been said that the Texas Constitution provides greater protections to property owners than does the United States Constitution. See, *City of Glenn Heights v. Sheffield Development Company, Inc.*, 61 S.W.3d 634 (Tex.App.--Waco 2001), *rev'd* 140 S.W.3d 660 (Tex.2004), in holding that the Texas Constitution allows a cause of action for property that is “damaged” even if not “taken.” Nevertheless, in large part due to this similarity in wording, Texas courts have drawn heavily from federal takings cases in interpreting Article I, Section 17, of the Texas Constitution. Moreover, a property owner’s or developer’s decision to file a takings claim against a political subdivision in federal court (which would apply federal law) as opposed to a Texas state court (applying Texas law) typically results in filing suit in state court. This is primarily due to a federal ripeness doctrine which mandates that a plaintiff must first seek compensation via state law remedies before being authorized to file suit in federal court.

Federal jurisprudence recognizes four categorical forms of takings: 1) physical invasions, 2) deprivations of economically beneficial use, 3) land-use exactions, and 4) economically severe/unreasonable interferences based on the factors set forth in the *Penn Central* case discussed below. The first two categories are deemed to be takings per se. Texas courts, in applying federal law, also recognize these categorical forms of takings. However, the deprivation-of-economically-beneficial-use standard, which is a per se taking under federal law, is applicable only in the most severe cases; it exists when a regulation completely deprives an owner of all economically beneficial use of property such that the owner is left with nothing but a token interest. Although some Texas cases acknowledge this standard, a regulation that completely deprives an owner of all economically beneficial use will also satisfy the less-strict *Penn Central* test and, thus, Texas courts analyze inverse condemnation cases using the *Penn Central* test.

Nevertheless, distinct from Texas law, federal law recognizes that a regulatory taking does not warrant the government’s payment of compensation unless the regulation is so severe that it is functionally comparable to a direct government appropriation or physical invasion. The use of this specific language has been avoided by Texas courts, instead focusing on the economic severity of the regulation and the unreasonableness of the interference with property rights in determining whether a regulation has “gone too far.” The federal law standards for regulatory takings are aimed at approximating an appropriation or physical invasion and this analysis necessarily focuses on the magnitude of the severity of the regulation. Texas courts do so as well.

Physical Takings

A physical taking may occur when the government physically appropriates or invades private property. *Westgate, Ltd. v. State*, 843 S.W.2d 448, 452 (Tex.1992). Physical takings occur when the governmental authority authorizes an unwarranted physical occupation of property. *Yee v. City of Escondido*, 503 U.S. 519 (1992). In essence, a physical taking will be actionable, and damages may be awarded, when an intentional physical invasion onto private property renders the property unusable for its intended purpose. A physical invasion or physical

occupation of private property can take a number of different forms. A few leading Texas cases illustrate this.

In *City of Austin v. Travis County Landfill Company, L.L.C.*, 73 S.W.3d 234 (Tex.2002), the Texas Supreme Court decided whether airplane overflights could constitute a physical invasion sufficient to warrant a takings claim. This case involved the construction of Austin-Bergstrom International Airport and the ensuing civilian air traffic over a landfill site. The plaintiff owned a 133-acre landfill site located about one-half mile south of the airport's main runway. Because of the proximity of civilian flights from Bergstrom, the landfill owner asserted a takings claim based on its inability to vertically expand the landfill and the additional risks associated with operating a landfill in close proximity to a municipal airport. In acknowledging the existence of physical invasions as a category of takings, the Supreme Court limited its applicability by stating, "To establish a taking of private property by aircraft overflights in this case the landowner had to show that the overflight effects directly, immediately, and substantially impacted the land so that the property was unusable for its intended purpose."

A common type of taking-by-physical-invasion claim involves the flooding of private property through governmental action. The Texas Supreme Court has recently discussed this. In *Tarrant Regional Water Dist. v. Gragg*, 151 S.W.3d 546 (Tex.2004), the owner of over 12,000 acres of land¹ used for cattle grazing sued the Tarrant Regional Water District over water released from the Richland-Chambers Reservoir dam. In the spring of 1990, extremely heavy rains caused extensive flooding throughout the Trinity Basin, and the District released water through the reservoir's floodgates for the first time since the creation of the reservoir in 1987. For the first time in its history, the property, situated approximately 8 miles downstream, suffered extensive flood damage that breached levee roads and gouged large sections of land out of the property's bottomlands. The Texas Supreme Court held that the evidence was legally sufficient to support a determination that the construction and operation of the reservoir necessarily caused recurrent destructive changes in flood characteristics on the property that rendered the property "unusable for its intended purpose" and resulted in a taking.

On the same day as the *Gragg* case was decided, the Supreme Court also handed down its ruling in *City of Dallas v. Jennings*, 142 S.W.3d 310 (Tex.2004). In *Jennings*, city workers dislodged a clog in a city sewer main that caused another sewer backup which, in turn, flooded the Jennings' home with raw sewage. The Court specifically held that a government entity may be liable under the Texas Constitution's takings clause if the entity 1) knows that a specific act is causing identifiable harm, or 2) knows that the specific property damage is substantially certain to result from an authorized government action - that is, that the damage is necessarily an incident to, or necessarily a consequential result of, the government's action. In other words, the physical invasion must result from an intentional act on the government's part, the requisite intent is present when a governmental entity knows that a specific act is causing identifiable harm or knows that the harm is substantially certain to result. In the *Jennings* case, there was nothing in the evidence that demonstrated either that the City knew the home would be damaged or that the damage was substantially certain to result and, thus, the City was not liable.

¹ The Gragg Ranch is one of the largest in East Texas. The property's open terrain, contiguity, and exceptional fertility made it uniquely suited for a specific type of cattle "pre-conditioning" program.

Thus, taking these cases together, it is clear that a physical invasion must be intentional. In fact, the Texas Supreme Court has held that in order to bring a cause of action under inverse condemnation, “the damage must not result from negligence.” *Steele v. City of Houston*, 603 S.W.2d 786, 790 (Tex. 1980). In order for a governmental entity to be liable, the government’s actions must be taken with knowledge that the act is causing identifiable harm or that the harm is substantially certain to result, and the actions must directly, immediately, and substantially impact the property, rendering it unusable for its intended purpose.

Governmental Exactions

Apart from physical invasions, exactions and regulatory takings present significantly more complex questions. Where a physical invasion is tangible and observable, the effect that a regulation may have on property may often be less identifiable or more debatable. Regulatory takings fall outside the per se takings outlined by the federal courts and thus, an examination of the magnitude and character of the burden caused by the regulation is necessitated. Standards such as diminution in fair market value, deprivation of economic viability, or unreasonable interference are imprecise and invariably involve the use of experts and the subjectivity inherent in alleging intangible damages. A governmental restriction in the permissible uses of property or a diminution in value resulting from regulatory action within the government’s police power may or may not be a compensable taking. Similarly, most forms of government approval come with some form of exaction. Building and development permit fees are a common and obvious example. At a minimum level, an ordinance must not be arbitrary and capricious but this standard is applied to test the validity of the ordinance itself, and does not examine the level of exaction required.

A takings-by-exaction claim results when a government entity withholds approval of some form of activity in exchange for some concession or exaction from an applicant. The leading case in Texas is a recent one. In *Town of Flower Mound v. Stafford Estates Limited Partnership*, 135 S.W.3d 620 (Tex. 2004), the Town of Flower Mound required a developer to pay for paving improvements to a roadway adjacent to its development. As a condition of the Town’s approval of a developer’s residential subdivision, the town required the developer to rebuild a nearly new asphalt roadway to a concrete roadway.

Traditionally, Texas courts have looked with disfavor on municipal actions and regulations that require developers to pay for off-site improvements. This aversion is reflected in the complex and expensive legislative requirements imposed on cities in assessing impact fees. See, Chapter 395, Texas Local Government Code. Municipal regulatory actions that impose an exaction on a developer as a condition of development are not impermissible but must be done in a manner that is roughly proportional to the direct impact that the development will have on the city. In the *Stafford* case, the court relied on federal law in setting forth the rule that a taking will not occur if the condition imposed by the government 1) bears an essential nexus to the substantial advancement of some legitimate governmental interest, and 2) is roughly proportional to the projected impact of the proposed development.

The first requirement (the “essential nexus” requirement) involves an evaluation of the connection between the condition or restriction imposed by the governmental entity and the interests to be served. The second requirement (the “rough proportionality” requirement) requires an individualized determination that the cost-participation requirement is related in nature and extent to the impact of the proposed development. Although no precise mathematical calculation is required, there must be some assessment of the impact that will be caused by the project and the cost that will be needed to accommodate that impact. Those two costs must be roughly proportional.

This rule is derived from two landmark US Supreme Court cases, *Nollan v. California Coastal Commission*, 483 U.S. 825, 107 S.Ct. 3141, 97 L.Ed.2d 677 (1987) and *Dolan v. City of Tigard*, 512 U.S. 374, 114 S.Ct. 2309, 129 L.Ed.2d 304 (1994), and is frequently referred to as the “Nollan/Dolan” test. In these two cases, the government required property owners to dedicate easements allowing public access to their property as a condition of development approval. *Nollan* involved a required dedication of a public easement across the property owners’ beachfront property in exchange for a permit to allow the owners to build a larger home on their lot. The court determined that there was no adequate relationship (no essential nexus) between the required easement and the building permit, referring to the commission’s explanation as “gimmickry.” *Dolan* upheld a city’s requirement that a commercial property owner dedicate land for use as a greenbelt and bike/pedestrian path in order to expand a store and parking lot.

In *Stafford*, the asphalt roadway adjacent to and off-site of the development could have accommodated some but not all of the increased traffic that would be generated by the proposed development. The Town’s position was to require the developer to pay the costs of rebuilding a portion the asphalt roadway to a concrete street in accordance with the Town’s thoroughfare plan. The lack of rough proportionality was the basis for the Court’s determination that a taking by exaction had occurred.

Regulatory Takings

Inverse condemnation cases are among the most complex, most litigated, and most perplexing in current law. The complexity of the law has been described as a “sophistic Miltonian Serbonian bog,” “where armies whole have sunk.” See, *City of Austin v. Teague*, 570 S.W.2d 389, 391 (Tex. 1978). Nevertheless, the Texas Supreme Court has recognized that there are “small islands in this bog.” *Sheffield Development Company, Inc. v. City of Glenn Heights*, 140 S.W.3d 660, 671 (Tex. 2004).

The difficulty in evaluating cases involving compensable takings was discussed in the *Sheffield* case. It goes without saying that many forms of government regulation will in some way impair the value of property or negatively affect the value of property. All property is held subject to the valid exercise of the government’s police power and thus not every regulation is a compensable taking, although some are. There is no one test and no single sentence rule. The

need to adjust the conflicts between private ownership of property and the public's interests is a very old one which has produced no single solution.

In quoting from *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 413, 43 S.Ct. 158, 67 L.Ed. 322 (1922), the Texas Supreme Court wrote that government hardly could go on if to some extent values incident to property could not be diminished by government regulation without paying for every such change in the general law. Yet a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change. The general rule is that while property may be regulated to a certain extent, if regulation "goes too far" it will be recognized as a taking. This is a question of degree and therefore cannot be disposed of by general propositions. The ultimate question is upon whom the loss of the changes desired should fall. Thus, in *Sheffield*, the Texas Supreme Court said that determining how far is too far has proved to be a problem of considerable difficulty.

Regulatory takings can assume different forms. One is derived from the federal standard where the regulation denies all economically beneficial or productive use of land. To deprive an owner of all economically beneficial use of land is tantamount to depriving him of the land itself. As noted, this constitutes a per se taking in federal case law. But this is limited to the extraordinary circumstance when no productive or economically beneficial use of land is permitted and the landowner is left with only a token interest.

However, the most common allegation found in regulatory takings cases involves the three-part test grounded on *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104, 124, 98 S.Ct. 2646, 57 L.Ed.2d 631 (1978). Although not intended to be a mathematically precise or formulaic test, an evaluation of whether a regulation "goes too far" is based on three considerations: 1) the character of the governmental action; 2) the economic impact of the regulation on the claimant; and, 3) the extent to which the regulation has interfered with distinct investment-backed expectations. The analysis necessarily requires a weighing of private and public interests and a careful examination of all the relevant circumstances in applying a fact-sensitive test of reasonableness.

A few Texas Supreme Court cases illustrate the application of this test. In *Mayhew v. Town of Sunnyvale*, 964 S.W.2d 922 (Tex.1998), the Town of Sunnyvale refused to grant an application to a developer to rezone a tract of land from one-acre minimum lots to a more dense residential development. The plaintiffs contended that it would not be economically feasible to develop their property under the existing one-acre lot zoning. The trial court's findings included determinations that the zoning application satisfied all of the Town's requirements, that existing development in the Town was suburban and urban, that the Town acted pursuant to an official policy not to allow development with a density of greater than one dwelling per acre, that the Town deprived the Plaintiffs of all economically viable use of the property, and that the reduction in fair market value caused by the Town's actions was over \$12 million. Nevertheless, the Supreme Court rendered judgment that the Mayhews take nothing.

The *Mayhew* case enunciates the standard that the application of a general zoning law to a particular property constitutes a regulatory taking if the ordinance "does not substantially

advance legitimate state interests” or it denies an owner all “economically viable use” of his land and unreasonably interferes with a landowner’s rights to use and enjoy his/her property.

The “substantial advancement” element examines the nexus between the effect of the ordinance and the legitimate state interest it is intended to advance. In relying on a number of US Supreme Court opinions that have now been overruled by *Lingle v. Chevron USA*, the *Mayhew* court indicated that the “substantial advancement” element is satisfied if the zoning decision meets any of a broad range of legitimate governmental purposes including protecting residents from the ill effects of urbanization; reduction of traffic, population and noise; avoiding greater numbers of school children; enhancing the quality of life; precluding the conversion of open space land to urban uses; preserving desirable aesthetic features; and controlling the rate and character of community growth.

However, the recent US Supreme Court’s opinion in *Lingle v. Chevron USA*, 544 US 528, 125 S.Ct. 2074, 2085, 161 L.Ed.2d 876 (2005), discussed at length below, soundly rejects the “substantial advancement” test on a number of grounds, saying that this test has no proper place in takings jurisprudence. Given the extent to which Texas courts rely on federal cases, the applicability of the substantial advancement component in inverse condemnation cases is highly questionable.

The economic viability and unreasonable interference elements of the takings analysis involve a determination of whether the ordinance denies a landowner all economically viable use and whether the ordinance is an unreasonable interference with the owner’s use and enjoyment of the property. The economic viability issue entails a simple analysis as to whether the property retains value after the government action. If there is any value remaining in the property, if all of the value of the property is not totally destroyed, then no taking has occurred. Determining whether the government has unreasonably interfered with a landowner’s right to use and enjoy property requires a consideration of two factors: 1) the economic impact of the regulation, and 2) the extent to which the regulation interferes with distinct investment-backed expectations. The first factor, the economic impact of the regulation, merely compares the value that has been taken from the property with the value that remains in the property. *Keystone Bituminous Coal Association v. DeBenedictis*, 480 U.S. 470, 497 (1987). The loss of anticipated gains or potential future profits is not usually considered in analyzing this factor. However, the Supreme Court in the *Sheffield* case stated:

“ . . . lost profits are clearly one relevant factor to consider in assessing the value of property and the severity of the economic impact of rezoning on a landowner. It must be kept in mind, however, that ‘[t]he takings clause . . . does not charge the government with guaranteeing the profitability of every piece of land subject to its authority. Purchasing and developing real estate carries with it certain financial risks, and it is not the government’s duty to underwrite this risk as an extension of obligations under the takings clause.’” Citing *Taub v. City of Deer Park*, 882 S.W.2d 824, 826 (Tex.1994).

The economic impact of the regulation compares the value taken from the property with the property’s remaining value. The existing and permitted uses of the property constitute the “primary expectation” of the landowner and knowledge of existing zoning is to be considered in

determining whether a regulation interferes with investment-backed expectations. In *Mayhew*, the Supreme Court determined that the plaintiffs had no reasonable investment-backed expectation in up-zoning their property and, as such, the Town did not unreasonably interfere with their right to use and enjoy the property by denying the planned development proposal.

The second factor, the “investment-backed expectations” of the landowner, is based on a series of considerations. The existing and permitted uses of the property constitute the “primary expectation” of the landowner. The zoning in effect at the time of the owner’s purchase of the property is to be considered. Knowledge of existing zoning is also to be considered in determining whether the regulation interferes with investment-backed expectations. Historical uses of the subject property are critically important.

The *Mayhew* opinion can be reduced to a core principle: a developer cannot compel a city to rezone property so that the proposed development will be economically viable. The more recent *Sheffield Development v. City of Glenn Heights* case demonstrates an extension of this principle. In *Sheffield*, the facts were more extreme than in *Mayhew*. Rather than simply refusing to grant an up-zoning application, the City of Glenn Heights imposed a year-long moratorium, after which it proactively down-zoned the developer’s property. The down-zoning of approximately 194 acres resulted in a diminution in market value of 50% and lost profits of more than \$8 million.

In *Sheffield*, the Court relied on *Penn Central Transp. Co. v. New York City*, 438 U.S. 104, 129, 98 S.Ct. 2646, 2661-62, 57 L.Ed.2d 631 (1978), in stating that several criteria are to be used in evaluating whether an unconstitutional taking has occurred. The Court looked to the three factors cited in *Penn Central*: 1) the severity of economic impact, 2) the extent of the interference with the owner’s reasonable investment-backed expectations, and 3) the nature and character of the government’s actions (whether the regulation was general in character and not directed exclusively at the property owner).

There was no question that the City of Glenn Heights had interfered with the property owner’s investment-backed expectations. Notwithstanding the developer’s \$8 million in lost profits and a diminution in value of 50%, these facts did not rise to the level of a compensable taking. “But while the economic impact of rezoning . . . was unquestionably severe, it did not approach a taking.” The *Sheffield* court stated that Glenn Heights’ zoning decisions “were not materially different from zoning decisions made by cities every day.” The takings clause of the Texas Constitution does not charge the government with guaranteeing the profitability of every piece of land subject to its authority.

The import of *Mayhew* and *Sheffield* is that although the determination of whether a compensable taking has occurred involves a complex review, the level of economic severity must be drastic. It is improper to employ a simple cost-benefit analysis suggesting that the cost of developing land according to a particular zoning regulation may exceed the income derived from that development. Even if a city has deprived a developer of reasonable investment-backed expectations, the level of economic severity must be so dramatic as to approximate a physical appropriation. A city’s refusal to rezone property, even when the existing zoning renders

property development economically unviable, is not sufficient. A reduction in property value of as much as 50% as a result of proactive zoning is not enough.

As noted earlier, federal cases evaluate regulatory takings cases in the context of functional equivalency to direct appropriations and physical invasions. Texas courts may not go so far, however, it is clear that both federal and Texas courts center their analyses on the severity of the regulation and its proximity to appropriations and physical invasions.

Lingle v. Chevron USA and
Kelo v. City of New London

In 2005, the US Supreme Court rendered its ruling in two significant cases, *Kelo v. City of New London*, 545 US ____, 162 L.Ed.2d 439 (2005) and *Lingle v. Chevron USA*, 544 US 528 (2005). The *Lingle* case refines the standards under which regulatory takings in inverse condemnations are viewed. *Kelo* defines certain limits to a government's ability to exercise the right of eminent domain when the public purpose for the taking is for economic development.

Lingle v. Chevron USA,

In the 25 years since *Agins v. City of Tiburon*, 447 U.S. 255 (1980), the Supreme Court has stated that government regulation of private property will effect a taking if the regulation fails to substantially advance legitimate state interests. In *Lingle v. Chevron USA*, 544 US 528 (2005), the Supreme Court soundly rejected the "substantial advancement" requirement as a stand-alone requirement to determine whether a regulation constitutes a taking. Its holding is that the failure of a regulation to substantially advance a legitimate state interest does not establish that there has been a taking; the essential inquiry is the magnitude and character of the burden on private property rights.

In *Lingle*, the State of Hawaii imposed a rent cap on the amount of rent that oil companies were allowed to charge for the rental of oil-company owned service stations. Due to its small size and geographic isolation, the wholesale market for oil products in Hawaii is highly concentrated; only six companies sell gasoline on a wholesale basis. There are approximately 300 gas stations in the state. Of these, only about 75 service stations (25%) are owned by oil companies who lease them to independent lessee-dealers. Chevron owned and leased 64 stations. The lease required the dealers to purchase gasoline from Chevron. Chevron's practice, as was the practice with other oil companies, was to base its monthly rentals on a percentage of gross profits.

In response to concerns over the price of gas due to market concentration, to protect the lessee dealers, and to reduce the price of gas to consumers, the Hawaii legislature adopted a statute that limited rent to 15% of gross profits. Chevron sued and, in the trial court, stipulated that the statute's 15% rent cap would result in increased profits of \$1.1 million annually. Finding in Chevron's favor, the trial court reasoned that the rent cap would not protect lessee dealers nor

would it result in lower gas prices for consumers. Chevron would simply increase the wholesale gas price to offset the rent reduction, thereby causing an increase in retail gas prices. The rent cap would not protect the dealers because when they sold their leases to new dealers, the rent cap savings would result in a higher sale price. The trial court also found that the rent cap would discourage oil companies from building new stations because it would limit anticipated profits. Thus, for these reasons, the trial court determined that the statute did not substantially advance a legitimate state interest and, therefore, constituted a taking.

The US Supreme Court disagreed. Federal jurisprudence has always considered the severity of the regulation in order to determine whether the regulation constituted a taking for which the government should be compelled to pay just compensation. Apart from per se takings, the nonformulaic *Penn Central* factors by which regulations are evaluated have traditionally considered whether the regulation was functionally comparable to an appropriation or physical invasion. Whether or not a regulation is effective to promote a state interest has nothing to do with whether the state has taken someone's property. Thus, the *Lingle* case expressly holds that the "substantial advancement" test has no place in takings cases.

Kelo v. City of New London

The principle issue in the *Kelo* case is the extent of the government's authority to use its eminent domain power to condemn private property for the sole purpose of handing it over to private interests or businesses for a different private use. Surprisingly, the *Kelo* case did not expand the authority of governments to take private property. If anything, it limited that authority, yet it was viewed by the public and the media as holding just the opposite. Its essential holding - that cities have the authority to exercise eminent domain and confiscate private property where the public purpose is economic development - did not reverse existing law. Economic development has served as a legitimate public purpose to support condemnation for many years, even where the condemnation involves a governmental taking from one private person to transfer the property to another private person.

It should be noted that "access to recreation to its residents in the form of spectator sports" has been deemed to be an appropriate function of city government. This was sufficient justification in the California Supreme Court to allow the City of Oakland to condemn the ownership rights of the Oakland Raiders to prevent the team from moving to Los Angeles. In doing so, the California Supreme Court relied partly on an earlier opinion in *City of Anaheim v. Michel*, 259 Cal.App.2d 835 (1968) that allowed the City of Anaheim to condemn land for parking facilities at Anaheim Stadium. In *City of Arlington v. Golddust Twins Realty*, 41 F.3d 960, 966 (5th Cir. 1994), the Fifth Circuit Court of Appeals upheld, on economic development grounds, the authority of the City of Arlington to condemn private property on the northeast side of the old Texas Rangers Stadium to be transferred to the Texas Rangers baseball team to be used temporarily as a parking lot, and later as a site for the construction of an office complex.

The *Kelo* opinion must be looked at in its historical context. One of the earliest cases is *Berman v. Parker*, 348 US 26 (1954), where the District of Columbia condemned an area that was clearly identified as a slum area. More than half of the dwellings had no toilets or baths and

were beyond repair. However, the plaintiff's property, a department store, was not in a blighted condition. Nevertheless, the overall redevelopment plan of land assembly and demolition, coupled with a subsequent transfer to private interests, was upheld as a legitimate exercise of eminent domain.

Slum clearance has not always formed the underlying economic development justification. Perhaps one of the most notorious examples is in *Poletown Neighborhood Council v. City of Detroit*, 304 N.W.2d 455 (Mich. 1981). Intimidated by General Motors' threat to leave Detroit and faced with the possibility of losing one of "Motor City's" signature industrial sites, the City spent some \$200 million to acquire and assemble a 465-acre site and to demolish the preexisting structures. Approximately 1,200 households, 16 churches, over 100 businesses, a post office, and a 278-bed hospital were torn down. The land was sold to General Motors for \$6.5 million. And although General Motors promised 6,000 new jobs, less than half of that number actually materialized. The Michigan Supreme Court regarded this as a legitimate exercise of eminent domain.

The facts in the *Kelo* case were no more dramatic than many others. In an effort to revitalize its ailing economy and its downtown and waterfront districts, the city of New London, Connecticut, adopted an integrated development plan that would create a waterfront conference hotel, walkable urban villages, a riverwalk, a museum, and areas reserved for office, retail and commercial use. In order to do so, the city created an economic development corporation to acquire and assemble the land needed to accomplish the project. Where owners refused to voluntarily sell their property, the city would initiate condemnation proceedings through its economic development corporation. The plaintiff, Susette Kelo, owned a home on the waterfront and refused to sell. She and a group of eight other property owners contested the city's ability to condemn their property. The essential holding of the Court was that economic development, in the context of an integrated redevelopment plan, is a legitimate public purpose for eminent domain, even where the condemnation involves a transfer of the property to other private persons.

The *Kelo* opinion is not limited to integrated redevelopment plans, in other words, it does not stand for the proposition that when economic development forms the public purpose of condemnation, it can only be in the context of an integrated redevelopment plan. Yet its language does place a new check on the broad scope of eminent domain.

In view of its publicity, the *Kelo* case prompted many state legislatures to examine and revise their eminent domain statutes. In Texas, in the second called session following the regular session, the Legislature adopted Senate Bill 7 with the express purpose of limiting the authority of state political subdivisions to condemn private property for economic development. Senate Bill 7, amending the Texas Government Code to create Chapter 2206, prohibits government entities from taking private property through eminent domain if the taking is for economic development purposes, unless economic development is secondary to urban renewal activities designed to eliminate slum or blighted areas. The legislation also prohibits takings if the taking confers a private benefit on a particular private party through the use of the property or is merely a pretext to do so.

The statute also establishes a series of exceptions that continue to allow takings by eminent domain if the taking is for transportation projects; water, wastewater, flood control and drainage projects; public buildings, hospitals, and parks; utility services; sports and community venue projects if approved at an election held prior to December 1, 2005 (the “Dallas Cowboys” exception); and, libraries, museums, and related facilities and infrastructure.
