

**REGULATORY TAKINGS:
RIPENESS AND EXHAUSTION OF REMEDIES**

A SWORD AND A SHIELD TO LITIGATION

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BACKGROUND, EDUCATION AND PRACTICE

Peter G. Smith was born on September 4, 1952, in Providence, Rhode Island. He pursued his preparatory and legal education at Texas Tech University obtaining his B.A. in 1974 and J.D. in 1976. He is a member of Delta Theta Phi, Pi Sigma Alpha (Political Science Honorary), and the State Bar of Texas, State Bar of Texas Property Tax Committee.

Mr. Smith holds memberships in various professional associations including: Texas Municipal League, Texas City Attorneys Association, Texas Association of Assessing Officers, and Texas Association of Appraisal Districts. He is a member of the Advisory Board of the Institute for Local Government Studies, Center for American and International Law and frequently lectures and authors articles on ad valorem taxation, land use and municipal law.

Mr. Smith is a partner in the law firm of NICHOLS, JACKSON, DILLARD, HAGER & SMITH, L.L.P., Dallas, Texas, with areas of expertise in economic development, ad valorem taxation, and municipal, administrative and zoning law. The law firm of NICHOLS, JACKSON, DILLARD, HAGER & SMITH, L.L.P. is a Dallas-based full-service law firm specializing in municipal law. The firm was initially formed in 1895, making it one of Texas' oldest and most respected law firms. The firm serves as counsel for municipalities, political subdivisions and appraisal districts throughout the State. The firm's primary area of specialization has been the representation of Texas municipalities and political subdivisions in all matters.

For more than twenty-two years, Mr. Smith has represented cities and all other types of political subdivisions in all types of matters. His experience includes trial and appellate litigation with emphasis on municipal law, civil rights, employment discrimination, zoning, land use, eminent domain and public official liability, and is an approved liability defense counsel for the TML Intergovernmental Risk Pool. Currently, Mr. Smith is City Attorney for the Cities of Richardson, Coppel, DeSoto, Allen and Sachse. He is also general counsel for several economic development corporations and for the Dallas, Tarrant and Williamson County Appraisal Districts and the Denton County Transportation Authority.

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BACKGROUND, EDUCATION AND PRACTICE

Amber L. Slayton was born on November 14, 1975, in Houston, Texas. She studied communications and political science at Southwest Baptist University in Bolivar, Missouri, earning her Bachelor of Arts in 1997. Ms. Slayton pursued her legal education at Baylor University School of Law and actively competed nationally in the moot court program, earning membership in the Order of the Barristers. She obtained her Juris Doctorate in February 2000.

Ms. Slayton is an associate in the law firm of NICHOLS, JACKSON, DILLARD, HAGER & SMITH, L.L.P., a Dallas-based full-service law firm specializing in municipal law. The firm was initially formed in 1895, making it one of Texas' oldest and most respected law firms. The firm serves as counsel for municipalities, political subdivisions and appraisal districts throughout the State. The firm's primary area of specialization has been the representation of Texas municipalities and political subdivisions in all matters. In addition to her experience representing municipalities, Ms. Slayton has represented numerous Fortune 100 companies, managing and trying cases in federal and state court.

Ms. Slayton serves as an adjunct instructor for the Political Science Department of Texas A&M University – Commerce, teaching undergraduate law classes. She also sits as a member of the advisory board of the paralegal program at the university and is a member of the Pro Bono College of the State Bar of Texas.

TAKINGS UNDER THE TEXAS AND FEDERAL CONSTITUTIONS

When the government takes private property and fails to justly compensate the property owner, the government has exacted a “taking” in violation of the state and federal constitutions. The United States Constitution prohibits government takings: “nor shall private property be taken for public use without just compensation.” U.S. CONSTITUTION amend. IV. The Texas Constitution similarly provides:

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; and, when taken, except for the use of the State, such compensation shall be first made, or secured by a deposit of money; . . .

TEX. CONST. art. I, § 17. In order for compensation to qualify as “just” or “adequate” under the respective constitutional provision, the compensation must meet the same test:

There is, we believe, no essential difference between “adequate compensation” under our State Constitution and “just compensation” under the Fifth Amendment to the Federal Constitution. To be adequate, the compensation must be “just,” and vice versa. The two expressions, when used in this connection, are synonymous.¹

However, the timing of the required compensation may vary depending on the constitutional provision in question:

...[T]here is no specific inhibition in the United States Constitution against taking private property in any event until *after* compensation is paid; whereas, on the other hand, the State constitution provides that –

“No person’s property shall be taken, damaged or destroyed for, or applied to, public use without adequate compensation being made . . . and when taken, except for the use of the State, such compensation shall be *first* made, or secured by a deposit of money.”

It is to be observed that the express requirement inheres in this provision for compensation to be first made when property is actually taken for a public use and that this requirement does not obtain when the property is damaged or destroyed for a public use.²

¹ *State vs. Hale*, 96 S.W.2d 135, 141 (Tex. Civ. App. – Austin 1936), *rev’d in part and affirmed in part*, 146 S.W.2d 731 (Tex. 1941).

² *Dallas Hunting & Fishing Club v. Dallas County Bois D’Arc Island Levy Dist.*, 235 S.W. 607, 609 (Tex. Civ. App.—Dallas 1921, no writ) (emphasis added).

Takings claims, whether state or federal, fall into three categories: (1) physical occupation; (2) exactions; and (3) regulatory takings.³ Generally, a physical invasion or a regulatory activity that produces a physical invasion will support a takings claim without regard to the public interest advanced by the regulation or the economic impact upon the land owner.⁴ The second category of takings claims is found where an exaction, such as the required dedication of land, is made a condition of development approval.⁵

The third category, regulatory takings, involves the most complex analysis because, unlike the other types of takings, the property owner typically still possesses the property in question, but governmental action has stripped the property of significant value. A regulatory taking occurs when a regulation itself “denies all economically beneficial or productive use of land,” thereby inherently requiring compensation, but leaving the property owner without the benefit of “case-specific inquiry into the public interest advanced in support of the restraint.”⁶ A regulatory taking may result even when the taking does not render the property valueless. Whether such action qualifies as a taking depends on: (1) the character of the governmental action; (2) the economic impact of the regulation upon the property owner; and (3) the extent to which the regulation has interfered with distinct investment-backed expectations.⁷

THE DOCTRINE OF RIPENESS

As in all areas of law, a property owner may not file suit alleging a regulatory taking until the claim is ripe. However, the ripeness of a takings claim presents a complex legal inquiry flush with traps for the unwary litigant. Although the United States and Texas constitutions both confer rights upon property owners, the claims do not ripen simultaneously:

The ripeness of the state claim cannot be measured by the ripeness of a federal claim since a federal claim is not ripe until state court proceedings have been concluded; if federal and state claims ripened at the same time, then neither could ever get started.⁸

³ *Stafford Estates Ltd. P’ship*, 135 S.W.3d 620, 630 (Tex. 2004); *Sheffield Dev. Co., Inc. v. City of Glenn Heights*, 140 S.W.3d 660, 671-72 (Tex. 2004); *Mayhew v. Town of Sunnyvale*, 964 S.W.2d 922, 933 (Tex. 1996).

⁴ *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg’l Planning Agency*, 535 U.S. 302, 330 (2002); *see also Mayhew*, 964 S.W.2d at 933.

⁵ *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687, 704 (1999); *Doland v. City of Tigard*, 512 U.S. 374, 391 (1994).

⁶ *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1015-16 (1992); *Mayhew*, 964 S.W.2d at 935 (a compensable taking occurs when a governmental restriction “denies the landowner all economically viable use of the property or totally destroys the value of the property”).

⁷ *Lucas*, 505 U.S. at 1016-20; *Penn Cen. Transp. Co. v. City of New York*, 438 U.S. 104, 122 (1978).

⁸ *Hallco Tex., Inc. v. McMullen County*, ___ S.W.3d ___, 2006 WL 3825298, at *7 (Tex. December 29, 2006) (No. 02-1176).

The essence of the ripeness doctrine with respect to state claims is that a property owner must obtain a sufficiently final determination as to the permitted use(s) of the land prior to asking a court to decide whether any regulation has gone too far. A federal takings claim is ripe when: (1) the regulatory authority has reached a final decision regarding the allowable development on the plaintiff's property; and (2) the owner has exhausted state compensation remedies before resorting to federal remedies.⁹

PRACTICE TIP

Before filing suit in federal court, ensure that the regulatory authority has issued a final decision regarding the use of the property and that the property owner has exhausted all state compensation remedies.

FINALITY OF THE REGULATORY AUTHORITY'S DECISION

Before a federal takings claim becomes ripe, the regulatory authority must reach a final decision with respect to the uses and development permitted on the property:¹⁰

[T]he rationale behind this finality requirement is that a landowner must utilize the procedures for obtaining compensation prior to bringing any [federal takings] action because the state's action is not complete until the state fails to provide an adequate post-deprivation remedy.¹¹

Enactment of a land use regulation alone generally does not constitute a "final decision." Rather, a land use application forcing the agency to apply the regulation to a particular site is necessary to trigger ripeness. Otherwise, there may be no meaningful final decision.¹² Applications which the governmental agency has no discretion to grant are not necessary to prove that a decision is final:

⁹ *Williamson County Regulatory Planning Comm'n v. Hamilton Bank*, 473 U.S. 172 (1985).

¹⁰ *Id.*

¹¹ *Levatte v. City of Wichita Falls*, 144 S.W.3d 218, 223 (Tex. App.—Fort Worth 2004, no pet.), citing Philip K. Hartmann & Stephen J. Smith, 42 U.S.C. § 1983: *First Stop – State Court (Sometimes)*, 35 URB. LAW 719, 720 (2003).

¹² *Agins v. Tiburon*, 447 U.S. 255, 260 (1980) (rejecting a claim of deprivation based on a zoning law because appellants did not submit a plan for development of the property as the ordinances permit, there was "no concrete controversy regarding the application of the specific zoning provisions"); *MacDonald, Sommer & Frates v. County of Yolo*, 477 U.S. 340, 352 (1986) (rejection of a subdivision proposal did not ripen a claim because the proposal did not elicit a final, definitive decision concerning the extent to which the development would be permitted; the subdivision proposal had been rejected for failure to show adequate provision for streets, water, sewer, and police protection); *Hodel v. Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264 (1981) (claim not ripe because land owner did not pursue variance procedures provided by the challenged regulatory scheme).

While a land owner must give a land-use authority an opportunity to exercise its discretion, once it becomes clear that the agency lacks the discretion to permit any development, or the permissible uses of the property are known to a reasonable degree of certainty a takings claim is likely to have ripened. . . . [I]n assessing the significance of a petitioner's failure to submit applications to develop the upland area, it is important to bear in mind the purpose that the final decision requirement serves. Our ripeness jurisprudence imposes obligations on land owners because "a] court cannot determine whether a regulation goes 'too far' unless it knows how far the regulation goes." The ripeness doctrine does not require a land owner to submit applications for their own sake. Petitioner is required to explore development opportunities on his upland parcel only if there is uncertainty as to the land's permitted use.¹³

A property owner "is of course not required to resort to . . . unfair procedures in order to obtain [a final] determination."¹⁴ Thus, the federal ripeness rules do not require submission of "further and futile" applications.

EXHAUSTION OF STATE REMEDIES

Additionally, a property owner must exhaust all state remedies in order for any federal claims to ripen. If a litigant obtains adequate compensation through state procedures, it has no federal claims to be reached.¹⁵ The exhaustion of state compensation procedures generally has been interpreted to include state court procedures, not just administrative procedures.¹⁶ However, if a state law does not provide a compensation remedy, a litigant need not assert a takings claim in state court prior to bringing one in federal court.¹⁷ Additionally, a facial takings claim alleging that a land use regulation, on its face, fails to advance a legitimate interest is not subject to the requirement of exhaustion of state compensation remedies because it does not assert compensation for the denial.¹⁸

¹³ *Polazzolo v. R.I.*, 533 U.S. 606, 620 (2001).

¹⁴ *County of Yolo*, 477 U.S. 350, n.7.

¹⁵ *Town of Flower Mound v. Stafford Estates Ltd.*, 135 S.W.3d 620, 646 (Tex. 2004).

¹⁶ *Williamson County*, 473 U.S. at 172.

¹⁷ *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687, 710 (1999).

¹⁸ *Sinclair Oil Corp. v. County of Santa Barbara*, 96 F.3d 401 (9th Cir. 1996), *cert. den.*, 523 U.S. 1059 (1998).

In *Williamson County Regional Planning Commission v. Hamilton Bank*, the United States Supreme Court held that a federal takings claim is not ripe until the claimant has unsuccessfully sought compensation from the state.¹⁹

[B]ecause the Fifth Amendment proscribes takings *without just compensation*, no constitutional violation occurs until just compensation has been denied. The nature of the constitutional right therefore requires that a property owner utilize procedures for obtaining compensation before bringing a § 1983 action.²⁰

The Court implicitly qualified its requirement that takings claimants seek compensation in the state system:

[I]f a State provides an *adequate* procedure for seeking just compensation, the property owner cannot claim a violation of the Just Compensation Clause until it has used the procedure and been denied just compensation.²¹

Claimants who fail to seek compensation through available state procedures frequently argue that those procedures are “inadequate” and that resorting thereto would have proven futile. The *Williamson* Court did not distinguish between “adequate” and “inadequate” procedures, but did imply that had the Tennessee state court not allowed recovery through inverse condemnation, the procedures would have been “inadequate.”²² A number of courts have held that the unsettled status of state law does not render the available procedures “inadequate.”²³ These cases indicate that “inadequate” procedures are those that almost certainly will not justly compensate the claimant. The Fifth Circuit has likewise held that Texas law is adequate.²⁴

The federal Takings Clause itself justifies this conclusion. To violate the clause, the state must not only take someone's property but also deny him compensation. Accordingly, before a takings claim is ripe, the claimant must unsuccessfully seek compensation. Short of that, it must be certain that the state would deny that claimant compensation were he to undertake the obviously futile act of seeking it.²⁵

¹⁹ An exception to this requirement exists when the property was taken for private use. See *Samaad v. City of Dallas*, 940 F.2d 925, 936 (5th Cir. 1991).

²⁰ *Williamson County Regional Planning Comm'n v. Hamilton Bank*, 473 U.S. 172, 194 n.13 (1985) (emphasis added).

²¹ *Id.* at 195 (emphasis added).

²² *Id.*

²³ See, e.g., *Southern Pac. Transp. Co. v. City of Los Angeles*, 922 F.2d 498, 505 n.8 (9th Cir. 1990), *cert. den.*, 502 U.S. 943 (1991); *Del Monte Dunes at Monterey, Ltd. v. City of Monterey*, 920 F.2d 1496, 1507 (9th Cir. 1990), *aff'd*, 526 U.S. 687, 715 (1999); *Estate of Himelstein v. City of Fort Wayne*, 898 F.2d 573, 576 (7th Cir. 1990).

²⁴ *Samaad v. City of Dallas*, 940 F.2d 925, 936 (5th Cir. 1991).

²⁵ See *id.*

PROCEDURE FOR RESERVING FEDERAL CLAIMS IN STATE COURT

Federal takings claims may not ripen until state remedies are exhausted, but failing to reserve federal claims in a state court action may result in waiver, while adjudication of federal claims in a state court action will create issues of *res judicata*. Thus, a litigant must carefully craft its state court pleadings to preserve its federal rights.

Federal and state courts clearly enumerate that federal claims must not be plead in a state court case, but must be reserved. The Fifth Circuit generally addressed the point in a racial discrimination case:

[H]ad appellant wished to reserve her constitutional claims for subsequent litigation in federal court, she could have done so by making on the state record a reservation to the disposition of the entire case by the state courts.²⁶

The Eleventh Circuit extended the Fifth Circuit's ruling to a takings context, holding that a "Jennings reservation" can be made only if the would-be federal court litigant is pursuing state-court proceedings "involuntarily": (1) the litigant is a defendant in a non-removable state-court action and wishes to pursue a federal counterclaim, or (2) federal law imposes an exhaustion requirement upon a would-be federal court litigant as a precondition of bringing his federal claim in federal court.²⁷ Federal takings claims satisfy the second prerequisite.²⁸ Thus, if the appropriate reservation is made in state court, would-be federal court litigants who are forced to pursue state court proceedings in order to satisfy exhaustion requirements imposed by federal law incident to a takings clause claim are "involuntarily" in state courts, and therefore qualify for the exception to generally applicable *res judicata* principles.²⁹ Plaintiffs in state-court takings suits may reserve federal takings claims for later adjudication in federal court, so as to avoid *res judicata*'s application to federal takings claim in later federal suit, because takings plaintiffs are only involuntarily in state court in order "to ripen" federal takings claims.³⁰ Thus, *res judicata* may be avoided by: (1) not raising federal takings claims in state court and (2) clearly reserving those claims from the outset of state litigation.³¹

²⁶ *Jennings v. Caddo Parish Sch. Bd.*, 531 F.2d 1331, 1332 (5th Cir. 1976), *cert. den.*, 429 U.S. 897 (1976).

²⁷ *Fields v. Sarasota Manatee Airport Auth.*, 953 F.2d 1299, 1306 (11th Cir. 1992) (construing *Migra v. Warren City School Dist. Bd. of Educ.*, 465 U.S. 75 (1984)).

²⁸ *Williamson County Regional Planning Comm'n v. Hamilton Bank*, 473 U.S. 172 (1985).

²⁹ *Guetersloh v. State*, 930 S.W.2d 284, 290 (Tex. App.—Austin 1996, writ denied), *cert. denied*, 522 U.S. 1110 (1998).

³⁰ *Id.*

³¹ *DLX, Inc. v. Ky.*, 381 F.3d 511 (6th Cir. 2004), *cert. den.*, 544 U.S. 961 (2005); *Santini v. Conn. Hazardous Waste Mgt. Serv.*, 342 F.3d 118 (2d Cir. 2003), *cert. den.*, 543 U.S. 104 (2004); *Saboff v. St. John's River Water Mgmt. Dist.*, 200 F.3d 1356 (11th Cir. 2000), *cert. den.*, 531 U.S. 823 (2000); *Fields*, 953 F.2d at 1299.

PRACTICE TIP

To avoid *res judicata* applying to a federal takings claim in a subsequent federal suit, be sure to craft Plaintiff's Original Petition in state court carefully to enumerate that the plaintiff reserves its federal takings claims for later adjudication in federal court.

Even with a proper reservation, however, issue preclusion and collateral estoppel remain problematic given a split on this issue among the federal circuits. Some hold that a proper reservation in state court will prevent the operation of *res judicata* and issue preclusion after an unsuccessful state litigation, while others have found that similarities between federal and state takings law gives rise to issue preclusion on those similar issues, effectively barring a federal claim despite the existence of federal jurisdiction.³² For example, reservation of federal as-applied takings claims that have issues indistinct from antecedent state issues does not defeat application of collateral estoppel in later federal suit.³³ The United States Supreme Court recently rejected a petitioner's contention that federal courts should review reserved federal claims *de novo*, regardless of what issues the state court may have decided or how it may have decided them:

Although petitioners were certainly entitled to reserve some of their federal claims, as we shall explain, *England* [*v. Louisiana Bd. of Medical Examiners*, 375 U.S. 411 (1964)] does not support their erroneous expectation that their reservation would fully negate the preclusive effect of the state-court judgment with respect to any and all federal issues that might arise in the future federal litigation. Federal courts, moreover, are not free to disregard [the full faith and credit clause of] 28 U.S.C. § 1738 simply to guarantee that all takings plaintiffs can have their day in federal court.³⁴

RECENT TEXAS SUPREME COURT CASES

- ***Hallco Texas, Inc. v. McMullen County*, ___ S.W.3d ___, No. 02-1176, 2006 WL 3825298 (Tex. Dec. 29, 2006).**

In July 1992, the developer filed an application with the Texas Commission on Environmental Quality to develop an industrial-waste landfill less than two miles from Choke Canyon Lake. In June 1993, the County enacted an ordinance prohibiting the disposal of solid waste within three miles of the lake for the public health, safety and welfare. By the time the

³² See e.g., *DLX*, 381 F.3d at 511; *Santini*, 342 F.3d at 118. But see *San Remo Hotel, L.P. v. City & County of San Francisco*, 545 U.S. 323 (2005); *Wilkinson v. Pitkin County Bd. of Comm'rs*, 142 F.3d 1319 (10th Cir. 1998); *Dodd v. Hood River County*, 136 F.3d 1219 (9th Cir. 1998), *cert. den.*, 525 U.S. 923 (1998).

³³ *San Remo Hotel*, 545 U.S. at 323; *Hallco Tex., Inc. v. McMullen County*, No. 02-1176, 2006 WL 3825298, at *9-10 (Tex. Dec. 29, 2006) (applying *San Remo Hotel, L.P.* to principle of *res judicata*).

³⁴ *San Remo Hotel*, 545 U.S. at 338.

ordinance took effect, the developer had invested more than \$800,000 in the site and the state permitting process.

In June 1995, the developer challenged the ordinance by filing suit in federal and state court. The federal court dismissed the developer's takings claims as not being ripe, since the developer had not exhausted state court remedies. The federal court dismissed the remaining claims with prejudice. One week later, the state court granted the County's motion for summary judgment as to all the developer's claims, without enumerating the grounds. The developer's state court petition had not reserved its federal claims for prosecution in federal court. The Texas Court of Appeals affirmed the trial court's judgment, holding that:

Hallco did not have a cognizable property interest of which the government could deprive [it].... A mere expectancy of future services which would render the land more valuable, in the absence of a contract, is not a vested property right for purposes of determining whether a taking has occurred.³⁵

Hallco did not appeal the judgment.

More than two years after the court of appeals' judgment and almost six years after the ordinance went into effect, the developer submitted a request for a variance to the County Commissioners Court, which took no action on the request. Two months later, in 1999, the developer filed this lawsuit, alleging that by denying its variance, the County had taken, damaged or destroyed the developer's property in violation of the Texas Constitution and reserving its federal takings claims for prosecution in federal court. The developer argued that its as-applied challenge was not ripe at the time of *Hallco I* because no particularized application of the ordinance to the developer's property had been made.

The court held that the developer's as-applied challenge was ripe at the time the ordinance was enacted:

In an as-applied challenge, requiring a claimant to pursue a variance or otherwise test the regulation's application in order to ripen the claim allows the factfinder to measure the extent of the regulation's economic impact so that the takings claim may be adequately assessed.... [T]his is not a case in which a general zoning or land-use restriction was subject to discretionary application or variance. In such cases, the impact on a particular property may not be ripe until a variance is finally denied. *See, e.g., Williamson County*, 473 U.S. at 186, 105 S.Ct. 3108; *Mayhew v. Town of Sunnyvale*, 964 S.W.2d 922, 929 (Tex.1998). But this was no zoning ordinance; the ordinance here prohibited precisely the use Hallco intended to make of this property, and nothing in the ordinance suggested any exceptions would be made. Hallco's taking claim was ripe upon enactment because at that moment the "permissible uses of the property [were] known

³⁵ *Hallco Tex., Inc. v. McMullen County*, 1997 WL 184719, at *2-3 (April 16, 1997) (not designated for publication) ("Hallco I").

to a reasonable degree of certainty.” *Palazzolo v. Rhode Island*, 533 U.S. 606, 620, 121 S.Ct. 2448, 150 L.Ed.2d 592 (2001).³⁶

The court further held that the developer’s claims in the instant suit were barred by the doctrine of *res judicata*:

The factors necessary to assess the ordinance's economic impact and the reasonableness of Hallco's investment-backed expectations were fixed in the prior litigation, and Hallco has made no claim that those elements were impacted any differently by its variance request. The facts relevant to Hallco's present takings claim—the County ordinance's wholesale prohibition, the manner in which it would be applied, and the nature of the damage suffered—were all evident in the prior suit, and Hallco's requested variance proposed no new or different application. Although styled a “variance request,” Hallco's request was nothing more than a demand for the County to reconsider what had been its position all along. Under these circumstances, Hallco's facial and as-applied challenges were the same regardless of how Hallco chose to frame its pleadings, and *res judicata* bars another bite at the apple.³⁷

➤ *Town of Flower Mound v. Stafford Estates Ltd.*, 135 S.W.3d 620 (Tex. 2004).

On the other end of the spectrum, the Texas Supreme Court recently addressed whether a developer waited too long before seeking court intervention.³⁸ The Town’s Land Development Code required that the developer rebuild an asphalt public street abutting the subdivision with concrete, even though the asphalt surface was not in disrepair. The Code further required the developer to make the street improvements at its own costs, rather than share a roughly proportional share of the costs. The developer sought an exception to the requirement, which the Town denied, and objected to the requirement at every administrative level in the Town. Because the requirement was a condition on development, the developer rebuilt the road at a cost of \$484,303.79 and filed suit, claiming the imposed condition on the development was an unconstitutional taking.

The Town argued that the developer’s action was barred because the developer did not sue until after it rebuilt the road and obtained final approval of the development plan. The Town contended that public interest dictated that the government “have the opportunity to withdraw a condition of approval that is found to constitute a taking and thereby avoid the expense to taxpayers of money damages.”³⁹ The court found nothing in Texas’ statutory framework “to suggest that the time for bringing an action like this one is constrained by anything other than the

³⁶ *Hallco Tex., Inc. v. McMullen County*, ___ S.W.3d ___, No. 02-1176, 2006 WL 3825298, at *7 (Tex. Dec. 29, 2006).

³⁷ *Id.*

³⁸ *Town of Flower Mound v. Stafford Estates Ltd.*, 135 S.W.3d 620 (Tex. 2004).

³⁹ *Id.* at 628.

applicable statute of limitations, which the Town does not argue would bar the present action.”⁴⁰ The court expressed what it described as an “obvious concern” that “such a standard would pressure landowner’s to accept the government’s conditions rather than suffer the delay in a development plan that litigation would necessitate.”⁴¹ The court concluded that, “[n]o limitation barring suit exists, and we decline the invitation to create one.”⁴²

Subsequent cases have failed to distinguish the *Flower Mound* ruling. In *Sefzik v. City of McKinney*, the Dallas Court of Appeals found the only distinction between the case at bar and *Flower Mound* was that the City imposed a choice – build the road or pay.⁴³ The court concluded that “choosing between alternative exactions does not bar a later challenge to the government’s imposition of either exaction as being a regulatory taking.”⁴⁴

⁴⁰ *Id.* at 628-29.

⁴¹ *Id.* at 628; *see also Sefzik v. City of McKinney*, 198 S.W.3d 884, 893 (Tex. App.—Dallas 2006, no pet.).

⁴² *Town of Flower Mound*, 135 S.W.3d at 630.

⁴³ *Sefzik*, 198 S.W.3d at 894.

⁴⁴ *Id.*