LOCAL REGULATION OF MINERAL EXPLORATION BY CITIES AND LOCAL POLITICAL BODIES [1]

I. Introduction

The recent run up in energy prices coupled with a growing recognition of the perils of reliance upon international oil and gas resources[2] has fueled a renewed drive for development of domestic reserves. That the United States is a mature province from explorational and developmental perspectives is undeniable. Most major US onshore depositional basins have been identified and, to varying extents, developed.[3] It is similarly recognized that much of the past onshore production activities have bypassed or entirely missed a large proportion of the oil and gas in place in these basins.[4] Consequently an increasing amount of new reserves come from infill wells drilled into existing fields, or from formations that were drilled through, but never produced due to economic or other factors, or from other nonconventional sources.[5] Given that

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[1] This paper is written with a focus on Texas Law with comparisons to law of other jurisdictions where comparisons are particularly noteworthy. This is so largely because of the burgeoning scope of the topic; but also partly because the law of most producing states in this area has developed along parallel tracks, albeit with some local variations. Given that the existence and scope of municipal or local governmental regulation of oil and gas drilling and production activities necessarily depends upon location, it necessarily involves innumerable cities of differing sizes and other local governmental authorities having different areas of concern. Consequently, details of the myriad local controls and the specifics of any given municipality's local regulations and their potential impacts in respect to any given mineral activity are beyond the scope of this article.

[2] The United States is estimated to have 1.7% of the world's proven oil reserves (21,371 million barrels of the estimated worldwide 1,238,808 million barrel proved reserve) and 3.2% of the world's proven natural gas reserves (192,513 Bcf of the estimated 6,040,208 Bcf worldwide proved reserve). Oil and Gas Journal, Volume 102, No. 47, Penwell Publishing Company, (December 20, 2004). United States petroleum consumption in 2004 "averaged approximately 21 million barrels of oil and natural gas liquids and 61 Bcf of natural gas per day." Imported crude oil accounted for approximately 63 % and imported natural gas accounted for approximately 19% of these amounts. U.S. Department of Energy - E.I.A. 2004 Annual Report.

[3] New field discoveries in the lower 48 states have persistently declined over the last 30 years to the point that new field discoveries in 2004 were 86% lower than the post-1976 average – a trend that shows no signs of reversing.

[4] Traditional primary production oilfield techniques often resulted in recovery efficiencies of 10% or less of the oil originally in place in the reservoir. *See generally* Society of Petroleum Engineers, Oil and Gas Basics – Reservoir Engineering: Primary Recovery (2005). A prime example of these practices is what is referred to as the "oil rim" of the Panhandle Field where (due primarily to lack of markets) more than a Tcf of natural gas was vented to the atmosphere in order to produce the associated oil – a fact that both reduced reservoir energy necessary for efficient oil production and wasted an enormous natural gas reserve that would be worth billions of dollars at today's prices.

[5] According to the Department of Energy – Energy Information Administration, U.S. Crude Oil, Natural Gas and Natural Gas Liquids Reserves 2004 Annual Report, the levels of oil and gas reserves since 1977, "have primarily been sustained by proved ultimate recovery appreciation in existing fields rather than by the discovery of new oil fields. Only 12% of reserves additions since 1977 were booked as new field discoveries..." In the natural gas context,

oil and gas production activities have traditionally fueled local population and economic growth, it is not particularly surprising that this confluence of factors has increasingly driven oil and gas operations into more and more populated areas.

Exploring and drilling for oil and gas in cities and populated areas involves a unique set of issues that determine how and even whether operations can occur. Oil and gas operations are often messy or noisy and, thus, may conflict with activities planned for certain areas of the city. Moreover, the closer one approaches the larger population centers around the state the more likely one is to encounter various state and local authorities each of which has its own concerns and jurisdiction. Often those concerns and jurisdiction overlap and, not infrequently, the concerns and jurisdictions are in conflict to some degree. However oil and gas are where you find them and operations are necessarily site specific. Thus, dealing with a continually expanding array of local regulatory authorities with jurisdictions and agenda's that are often overlapping and sometimes conflicting, is inescapably a part of the oil and gas exploration business in the 21st century.

The inherent conflict between surface use for oil and gas activities and use of property for municipal, residential or other business purposes has caused many cities to impose severe restrictions on oil and gas operations. Water quality concerns have only exacerbated the potential. Cities have found it beneficial to reach farther for planning and control purposes as their needs and services have expanded and legislatures have accommodated, increasingly granting cities authority to regulate activities both within and outside their corporate limits. By way of example, the Texas Legislature has decided that water policy in the state is best implemented at a local level – effectively ceding legislative power in this regard to local authorities. As a result more numerous and powerful water control and conservation districts, which have the power to create their own body of rules under the Texas Water Code, have begun

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field "extensions accounted for 52% of all reserves additions since 1977 while net revisions and adjustments accounted for 23%."

to emerge. In view of the recent national trend to push the burdens and costs of regulation to the most local lever, this trend seems likely to be here to stay.

As a consequence of these factors, the decision of whether and how to undertake exploration and production activities in urban areas requires a different analysis than exploration in rural areas. Municipal regulation of oil and gas activities invariably makes mineral exploration and development more difficult and expensive. Additionally, public or municipal use of the surface may practically limit or even preclude desired mineral development. In some cases the drilling regulations, or the city's use of the property, are so incompatible with mineral development that a constitutional "taking" of the underlying minerals occurs. This article discusses the extent of the legal authority of cities to regulate oil and gas activities and to engage in surface activities that are incompatible with mineral development. It also discusses the accommodation doctrine in light of recent cases in the area of regulatory taking and inverse condemnation.

II. REGULATORY AUTHORITY OF CITIES

A. The Type of City Defines the Scope of its Power

In general, cities have broad powers and should be considered the primary regulatory authority for areas within their jurisdiction. There are several types of cities defined by constitutional and statutory law. The type of city, which in some regards is related to its size, has an impact over the extent of the city's ability to regulate activities both within its city limits and in adjacent areas. However, the general legislative grant that empowers all cities is remarkably similar among all types of cities. For example, Texas municipalities, including the three classes of general law municipalities described below, are given the power "to adopt ordinances for good government, peace or order that are necessary or proper for carrying out a power granted by law."[6] The primary differentiation relates to geographic scope and the extent of regulatory authority. For example, unincorporated communities have literally no governmental powers and very limited jurisdictional areas. By contrast, home rule cities have legislative authority functionally equivalent to that of the Texas State Legislature; and some have jurisdictional areas covering entire counties and beyond.

There are two types of incorporated cities - general law cities and home rule cities. Many other producing states have similar municipal legal frameworks.

1. General Law Cities

In Texas, when a community exceeds the population of 200, it may incorporate pursuant to a statutory procedure set out in Local Government Code §7.01. The territorial

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[6]Tex. Loc. Gov't Code Ann. § 51.001 (Vernon 1988). Citations to this code throughout the text are abbreviated as "Local Government Code."

requirements for incorporation of all general law cities are dictated by statute.[7] There are three specific types of general law cities, Type A General Law Cities,[8] Type B General Law Cities,[9] and Type C General Law Cities.[10] All three types of general law cities have the power to pass ordinances for the general welfare of the community. General Law cities, however, do not have the power to adopt a charter or create a body of laws distinct to that city. They may pass ordinances but their powers are limited to the general laws of the State and they only can exercise those powers expressly granted by the Legislature or those powers necessarily implied by the Legislature's express grant of powers.[11] Despite these apparent limitations, general law cities have broad powers within their jurisdictional limits both under the statutory laws of the State and under the police power.

The laws of Louisiana, Oklahoma and Colorado all make similar provision for “general law” cities. Oklahoma divides it municipalities into charter or non-charter municipalities, which are further classified as Towns, Cities, and Charter Municipalities. A city must have a population of 1,000 inhabitants or more and be properly incorporated under Oklahoma statutes, while a town may be smaller than a 1,000 inhabitants.[12] Article XIV, Section 13, of the Colorado Constitution,

[7]Tex. Loc. Gov't Code Ann. § 5.901(1)-(3) (Vernon 1988). Territorial requirements range from no more than two square miles of surface area for communities of fewer than 2,000 inhabitants to no more than nine square miles of surface area for communities having 5,000 to 10,000 inhabitants.

[8]A community that contains 600 or more inhabitants and meets the prescribed territorial requirements in Local Government Code §6.001(1)-(3) may incorporate to become a "Type A" general law city. Local Government Code §51.012 grants to "Type A" municipalities the power to adopt ordinances not inconsistent with state law that are necessary for the government interest, welfare or good order of the city.

[9]A community that contains between 201 and 999 inhabitants may incorporate into a "Type B" general law city provided it meets the prescribed territorial requirements set out in Local Government Code §7.001(1)-(3). Local Government Code §51.032 grants to "Type B" municipalities the power to adopt ordinances not inconsistent with state law that are proper for the government of the city.

[10]A community with between 201 and 4,999 inhabitants which meets the prescribed territorial requirements in Local Government Code §8.001(1)-(3) may incorporate to become a "Type C" general law city. Local Government Code §51.051 grants the "Type C" municipalities the same power as is granted to either a "Type A" or a "Type B" municipality depending upon the population of the "Type C" municipality.

[11] 1 J. Dillon, Commentaries on the Law of Municipal Corporation §237 (5th Ed. 1911).

[12] OKLA. STAT. ANN. tit. 11, § 4-101(3).

leaves classification of municipalities to the state legislature.[13] The Colorado legislature has recognized four different municipality classes: cities, towns, territorial charter cities, and home rule municipalities.[14] Municipalities with populations over 2,000 may be cities,[15] while a town is a "municipal corporation having a population of two thousand or less."[16] Colorado territorial charter cities incorporated prior to July 3, 1877 which have not yet reorganized under the Colorado general statutes retain their territorial charters.[17] Similarly, Louisiana divides municipal corporations into three categories: cities, towns, and villages. In Louisiana, municipalities "having five thousand inhabitants or more are cities; those having less than five thousand but more than one thousand inhabitants are towns; and those having one thousand or fewer inhabitants are villages."[18]

2. Home Rule Cities

The other type of city is a home rule city. Most larger cities are home rule cities. In Texas, a city may become a home rule city when it reaches a population of 5,000. A home rule city may adopt a charter upon a vote of its citizens pursuant to constitutional authority,[19] and this constitutional authority is recognized in statutes in §9.001 et seq. of the Local Government Code. Local Government Code §51.072 grants a home rule city "full power of local self government." Home rule cities may adopt or amend charters and may comprehensively regulate activities within their jurisdiction; however, Article XI, §5 of the Texas Constitution prohibits home rule cities from acting in a manner inconsistent with the Constitution. The home rule city has plenary authority equivalent to a State Legislature's authority except when its enactments conflict with

[13] Colo. Const. art. XIV, § 13.
[14] COLO. REV. STAT. § 31-1-201 (West 2005).
[15] Id. § 31-1-101(2) (stating that a city may have a population of 2,000 or less if it has not reorganized as a town).
[16] Id. § 31-1-101(13) (a town may have a population above 2,000 if it has not reorganized as a city).
[17] Id. § 31-1-202.
[18] LA. REV. STAT. ANN. § 33:341.
[19] Tex. Const. art. XI, §5.

state law.[20] In Colorado, a city or town may become a home rule municipality upon adoption of a home rule charter pursuant to the Colorado Constitution, Article XX.[21] Under which "[s]uch charter and the ordinances made pursuant thereto . . . shall supersede within the territorial limits and other jurisdiction of said city or town any law of the state in conflict therewith."[22] The Colorado Constitution also provides that, in regard to home rule municipalities, "[i]t is the intention of this article to grant and confirm . . . the full right of self-government in both local and municipal matters and . . . shall not be construed to deny . . . any right or power essential or proper to the full exercise of such right."[23] As in Texas, Colorado state statutes do still apply to home rule cities and towns unless superseded by the home rule charters or ordinances.[24] Similarly, Article 18, Section 3(a) of the Oklahoma Constitution provides that "[a]ny city containing a population of more than 2,000 inhabitants may frame a charter for its own government, consistent with and subject to the Constitution and laws of this State"[25] Referred to as "Charter municipalities" Oklahoma home rule cities need only frame their charters consistent with the Oklahoma Constitution and "once a municipal charter has been adopted and approved it . . . prevails over state law on matters relating to purely municipal concerns."[26] In Louisiana, general municipalities are "authorized to exercise any power and perform any function necessary, requisite, or proper for the management of its affairs not denied by law."[27] However, the addition of a properly adopted home rule charter may provide for "the exercise of any power and performance of any function necessary, requisite, or proper for the management of its affairs not

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[20]City of Corpus Christi v. Continental Bus Systems, Inc., 445 S.W.2d 12 (Tex. Civ. App. -- Corpus Christi 1969, writ ref'd. n.r.e.).
[21] Id. § 31-1-201(a)(b).
[22] Colo. Const. art. XX, § 6.
[23] Id. § 6(h)
[24] Id.
[25] Okla. Const. art. 18, § 3(a) and OKLA. STAT. ANN. tit. 11, § 13-101.
[26] OKLA. STAT. ANN. tit. 11, § 1-102(1).
[27] LA. REV. STAT. ANN. § 33:361. The Constitution of Louisiana states that a government subdivision "which has no home rule charter or plan of government may exercise any power and perform any function necessary, requisite, or proper for the management of its affairs, not denied by its charter or by general law, if a majority of the electors voting in an election held for that purpose vote in favor of the proposition that the governing authority may exercise such general powers. Otherwise, the local governmental subdivision shall have the powers authorized by this constitution or by law." La. Const. art. 6 § 7(a).

denied by general law or inconsistent with [the] constitution."[28]

B. Regulatory Tools Available to Cities

As noted above, a home rule city's power derives from its charter, and as a consequence it has broader authority than a general law city.[29] Its powers are, however, limited by its charter and, to some degree, by the general laws of the State.[30] Like a general law city, when a home rule city seeks to engage in activities outside the scope of its charter, it must either conform to legislative authority or otherwise act in a manner which is not in conflict with either the Constitution or the general laws of the State.[31]

Cities have power, and indeed are supposed to engage in activities that serve the general welfare of their inhabitants. This involves both carrying out proprietary functions (such as providing government, policing, fire prevention, sanitation, etc.) and assuring that the various competing interests within the city are accommodated to the extent possible. Cities also are empowered with "police power" to regulate activities that could adversely impact the community.[32] This "police power" may result in restriction of individual rights, including private

[28] La. Const. art 6 § 5(e).
[29] Royal Crest, Inc. v. City of San Antonio, 520 S.W.2d 858 (Tex. Civ. App. -- San Antonio 1975, writ ref'd. n.r.e.). Colo. Const. art. XX, § 6.
[30] Colo. Const. art. XX, § 6; Trinen v. City and County of Denver, 53 P.3d 75 (Colo. Ct. App. 2002) ("if, on a matter of local concern, a home rule city . . . enacts an ordinance that conflicts with a state statute, the ordinance takes precedence over the statute; if instead the matter is one of statewide concern, a home rule city may legislate in that area only if the constitution or a statute authorizes the legislation"); La. Const. art. 6, § 4; New Orleans Campaign For a Living Wage v. City of New Orleans, 825 So.2d 1098, 1103 (La. 2002) ("Although "home rule" does not entail complete autonomy, in affairs of local concern, a home rule charter government possesses powers which within its jurisdiction are as broad as that of the state, except when limited by the constitution, laws permitted by the constitution, or its own home rule charter."); City of Kingfisher v. State, 958 P.2d 170, 173 (Okla. Civ. App. Div. 2 1998) ("test as to whether a home rule municipality's laws control over conflicting state statutes is: "Whether the power being exercised is purely municipal, or whether there is a wider public interest involved.").
[31] Tex. Const. art. XI §5; Leach v. Coleman, 188 S.W.2d 220 (Tex. Civ. App. -- Austin 1945, writ ref'd.). For a thorough treatment of legal authority of various types of cities, see E. Bruchez, Drilling for and Producing Oil and Gas in Urban Areas, 17th Ann. Oil, Gas & Min. Law Inst. (March 22, 1991).
[32] *Ellis v. City of West University Place,* 141 Tex. 608, 175 S.W.2d 396, 397 (Tex. 1943) (police powers afford cities authority to "safeguard the health, comfort and general welfare of their citizens by such reasonable regulations as are necessary for that purpose."); *Crossroads West, Ltd. Liability Co., v. Town of Parker*, 929 P.2d 62, 64 (Colo. Ct. App. 1996) ("municipalities have broad and general police power to institute regulations for public good which

property rights. Often, the city may find oil and gas exploration and production activities so incompatible with the orderly and safe functioning of the city that it elects to effectively prohibit those operations, at least as to certain areas. However, cities are also political and economic entities, and to support their proprietary function or as a consequence of political reality, cities need the economic activity and revenue associated with the oil and gas industry. In addition, cities that are overly aggressive in their approach to regulation run the risk of incurring liability for inverse condemnation damages if their restriction on mineral production activities results in a regulatory or possessory "taking" of the minerals. Cities, therefore, seldom completely prohibit all drilling within the entirety of the city, but instead seek to comprehensively regulate oil and gas activities. The city's power to both enjoy the benefits of mineral wealth within the city limits and to properly regulate related activities for the public good requires a balancing of interests, and is constrained by the laws authorizing formation the city.

A city has many tools that it may use to regulate activities within the area of its jurisdiction. This it can do by ordinance, by zoning, by regulation of nuisances or by regulation for water pollution control and abatement under the Texas Water Code. Many of these different powers are derived from the same Constitutional and statutory bases. In at least some cases, cities also have been expressly delegated the ability to regulate activities outside of the corporate city limits and extending into what is known as the extraterritorial jurisdiction of a city. The extraterritorial jurisdiction of a city is a function of the population of the city and ranges from one-half mile in the case of smaller cities to five miles in the case of major cities.[33]

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encompasses actions to preserve or promote health, safety, comfort, and general welfare of its citizens"); *Brannon v. City of Tulsa,* 932 P.2d 44, 46 (Okla. Civ. App. Div. 3 1996) (finding that police power exists as a result of sovereignty and should be used to "enforce all *reasonable* laws and regulations necessary for advancement and protection of public welfare . . . and to protect and promote public morals, health, safety and prosperity) (emphasis added); *State Civil Serv. Comm'n v. Department of Pub. Safety Dir.*, 873 So.2d 636, 641 (La. 2004) (establishing that the state and constitution vest police powers in municipalities).

[33]The Local Government Code provides that cities have the following areas within their extraterritorial jurisdictions:

1. Cities having a population of 5,000 or less - the extraterritorial jurisdiction extends one-half mile beyond the corporate city limits.
2. Cities having population of 5,000 to 24,999 - the extraterritorial jurisdiction extends one mile beyond the city's corporate limits.

1. Regulation of Mineral Activities by Ordinance

An ordinance is a permanent rule or prohibition and is the municipal law equivalent of a statute. Ordinances have effect only within the corporate limits of the city unless the Legislature expressly has extended their application to extraterritorial areas. Nearly all cities of all types have restrictive drilling ordinances which prohibit drilling or mining operations within the city limits or at least within certain areas of the city. In some urban areas that have experienced extensive mineral development, ordinances have been developed which designate drilling blocks or lots within the city and provide City Council or designated authority the ability to grant or deny drilling permits. Some ordinances have the effect of pooling interests where wells are drilled within the corporate limits of the city.[34] While there is little express statutory authority for regulation of oil and gas drilling, municipalities' authority to regulate oil and gas activities within their corporate limits does not appear to be subject to serious question.[35] The validity of an ordinance is dependent upon three factors. Specifically, the ordinance must be (1) established by the procedurally correct means (i.e., consistent with the home rule city's charter or the Local Government Code); (2) adopted to accomplish some legitimate governmental goal; and, (3) substantially related to the health, safety or general welfare of the people.[36] Finally, the

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3. Cities having populations between 25,000 and 49,999 - the extraterritorial jurisdiction extends two miles beyond the city's corporate limits.
4. Cities having population of 50,000 to 99,999 - the extraterritorial jurisdiction extends three and one-half miles beyond the city's corporate limits.
5. Cities having populations of more than 500,000 - the extraterritorial jurisdiction extends five miles beyond the city's corporate limits.

Tex. Loc. Gov. Code Ann. §§42.021 et seq. (Vernon 1988).

[34]*See Mills v. Brown*, 159 Tex. 110, 316 S.W.2d 720 (Tex. 1958). This drilling block type of ordinance will be discussed further in the section of this paper relating to zoning.

[35]*See Unger v. State*, 629 S.W.2d 211 (Tex. App. -- Fort Worth 1982, writ ref'd.). In the case of home rule cities, specific statutory authorization is not necessary and assuming the drilling regulation is not inconsistent with statutory aims for municipal regulation, the ordinance will be presumed valid. *See City of College Station v. Turtle Rock Corp.,* 680 S.W.2d 802, 807 (Tex. 1984).

[36] *U.S. West Communications, Inc. v. City of Longmount*, 924 P.2d 1071, 1084 (Colo. 1997) (municipal regulations not having fair relation to health, safety, and welfare "are generally unreasonable, but when they fairly tend to promote those objects, they are generally sustained"); *see also Bethlehem Evangelical Lutheran Church v. City of Lakewood,* 626 P.2d 668, 675 (Colo. 1981) (holding construction of a church was subject to "reasonable regulation as [was] necessary to promote public health, safety, or general welfare);

regulation must be reasonable and not arbitrary.[37] An ordinance properly promulgated by a city is presumed to be reasonable and valid, and one attempting to attack an ordinance has an extremely heavy burden.[38]

Given the presumption of validity afforded ordinances, it seems probable that an ordinance limiting or even substantially restricting oil and gas exploration or development within a city's corporate limits, if properly enacted, would be held valid.[39] The full extent of a city's ordinance authority to fully prohibit drilling has never been directly addressed, though the Court's opinion in *Trail Enterprises, Inc. v. City of Houston*[40] provides as unequivocal statement as can be found. In *Trail Enterprises*, the court considered the validity of an ordinance that prohibited drilling of wells within the "control area" of Lake Houston. The "control area" was broadly defined to be "[t]hat land contained in the extraterritorial jurisdiction of the City, which contains waters that flow into or adjacent to the watershed of Lake Houston."[41] Given the topography of the area in question it is hard to conceive of an area within the Houston ETJ that would not be arguably within the Lake Houston control area. The appellant mineral lease owner claiming under leases predating the "control area" ordinance sought a variance to drill on its

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[37]*City of College Station*, 680 S.W. 2d at 805. *Accord Farmer v. City of Sapulpa*, 645 P.2d 518, 520 (Okla. 1982) (ruling that mayor's proclamations, regarding issuance of new water taps, were made under authority vested in him under the charter and were neither arbitrary nor unreasonable under the circumstances); *City of Lake Charles v. Southern Pac. Transp. Co.*, 310 So.2d. 116, 123 (La. 1981) (asserting that municipal ordinance must be reasonably related to health and safety, among other things).

[38]*See id.; Hunt v. City of San Antonio*, 462 S.W.2d 536, 539 (Tex. 1971). *Accord Hopkinns v. Board of County Com'rs of Gilpin County,* 564 P.2d 415, 418 (Colo. 1977) (establishing that "to obtain declaration that statute is unconstitutional in area of zoning and other restrictions on land use, party must show that challenged statute bears no substantial relation to public health, safety, morals or welfare, or that it precludes use of affected property for any reasonable purpose"); *Wilkinsin v. Board of County Commn'rs of Pitkin County*, 872 P.2d 1269, 1277 (Colo. Ct. App. 1993) (stating that "land use regulations and zoning plans are presumed to be constitutional, and it is burden of one challenging such regulation to demonstrate its invalidity beyond reasonable doubt"); *Anderson-Kerr, Inc. v. Van Meter*, 19 P.2d 1068 (Okla. 1933), *overruled on other grounds, Oklahoma City v. Harris,* 126 P.2d 988 (Okla. 1942) (upholding ordinance prohibiting oil drilling within 300 feet of oil and gas drilling zone as proper use of police power).

[39] *See, e.g., Town of Frederick v. North American Resources, Co.,* 60 P.3d 758 (Colo. Ct. App. 2002) (finding municipality could enjoin oil and gas operator for violating ordinance which required special use permit to drill within municipal limits).

[40] 957 S.W.2d 625 (Tex. App. – Houston [14th Dist.] 1997, rev. denied), *cert. denied*, -- U.S. --, 119 S. Ct. 802, 142 L.Ed. 2d 663 (1998).

[41] *Id.* at 628.

leases in the "control area" and the City declined to respond, effectively denying appellant the permit. The appellant sought a judgment that the ordinance was void or (apparently alternatively) that the City had "taken" its minerals. Though the bulk of the opinion relates to issues of limitations and estoppel, the Court easily disposed of the appellants' invalidity argument concluding that the ordinance was "a valid exercise of the city's police power as a matter of law."[42] The Court went on to note that given "the presumption of validity of an ordinance, and (*sic*.) appellant faces an 'extraordinary burden' when asserting an ordinance is unconstitutional."[43] The Court, with equal ease disposed of the appellants' complaints regarding the retroactivity of the ordinance,[44] balancing the constitutional injunction against retroactive laws, against the city's compelling need to protect its water supply from pollution and finding the latter purpose overwhelming.

Another relatively recent case that addressed the issue more obliquely, but to the same effect, is *Shelby Operating Co. v. City of Wascom*[45]. The ordinance in question in the *Shelby Operating* case prohibited the drilling of a well on lands in Wascom's city limits, within five hundred feet of a building without the permission of the surface owner. Shelby Operating had succeeded to leases that had been executed long before the ordinance came into effect that contained a limitation against drilling nearer than two hundred feet to any building. Shelby sought permission from the surface owner (Astec) to drill a well on a corner of the tract, more than 200' but less than' 500' from a building on the premises. The surface owner would not consent and the city declined to issue the permit.[46] The appellate court considered the case based upon a summary judgment in the city's favor in the Court below. The Court noted that a challenger to the validity of an ordinance must to succeed, demonstrate that the ordinance is

[42] *Id.* At 634-35.
[43] *Id. citing Turtle Rock Corp*., *supra* at 805.
[44] *Hud Oil & Refining, Co. v. Oklahoma City*, 30 P.2d 169 (1934) ("ordinance regulating drilling of oil wells within municipality was binding on defendant notwithstanding ordinance was not enacted until after defendant had commenced drilling")
[45] 946 S.W.2d 75 (Tex. App. – Texarkana 1997, rev. denied).
[46] *Id.* at 78.

clearly unreasonable and arbitrary.[47] Without much discussion of its analysis, the Court concluded that Shelby Operating failed to carry its burden and affirmed the trial Court's judgment.[48]

These more recent cases find firm footing in the foundation established in *Helton v. City of Burkburnett*,[49] in which the city had enacted an ordinance which authorized it both to regulate drilling and to completely deny drilling permits. Helton chose to drill a well in an undeveloped portion of the city within the corporate limits, but refused to even seek a permit to do so. The city responded by obtaining a permanent injunction against the drilling of the well. The court held the ordinance to be valid, noting that an ordinance is presumed constitutional unless it clearly appears on its face to be unreasonable and arbitrary. The court also held that if the city's police powers are properly invoked, it could deprive individuals of rights including the right to drill a well.

Similarly, in *Klepak v. Humble Oil & Refg. Co.*[50] another historically significant opinion, a lessee had obtained oil and gas leases on certain city lots in the City of Tomball and had obtained from the Texas Railroad Commission a Rule 37 exception to drill a well. However, the city denied him a drilling permit because he did not have a surface location on a tract designated as a "drilling block" by the city. Klepak argued that the Railroad Commission was the sole source of drilling authority and that the ordinance was an unconstitutional taking of his property. The Court of Appeals held that the Legislature's grant of authority to the Railroad Commission did not invalidate existing law giving the cities the power to regulate drilling when acting in the public interest. Absent a showing of arbitrariness, the ordinance did not constitute a taking and, because the city's exercise of its police power was a purely governmental function, the city could not be held liable for damages.

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[47] *Id*. at 82, *citing Helton v. City of Burkburnette, infra*, and *Zahn v. Board of Public Works*, 274 U.S. 325, 47 S. Ct. 594, 71 L. Ed. 1074 (1927).

[48] *Id.*

[49] 619 S.W.2d. 23 (Tex. Civ. App. -- Ft. Worth 1981 (writ ref'd. n.r.e.).

[50] 177 S.W.2d 215 (Tex. Civ. App. -- Galveston 1944, writ ref'd. w.o.m.).

While none of the above cases involved an ordinance completely prohibiting mineral exploration within the city's boundaries, they all suggest the likely conclusion that an ordinance that did so would not be void as long as it was enacted in the public interest and rationally related to accomplishing its interests. [51] The fact that the ordinance is not void, however, does not prevent a party from seeking compensation if the ordinance is so restrictive as to constitute a compensable regulatory taking or "inverse condemnation" under either the United States or Texas Constitutions.[52] Regulatory takings and inverse condemnation are discussed at greater length in subsequent portions of this article.

2. Regulation of Land Use by Zoning

Cities also have the authority to regulate oil and gas activities within their corporate limits by exercise of their zoning authority. Zoning laws have long been held to be a valid exercise of the sovereign's police power.[53] Despite the fact that zoning ordinances are not facially invalid, in individual cases, a zoning rule as applied may violate Constitutional requirements.[54] Chapter 211 of the Local Government Code grants cities authority to zone within their boundaries and at least most large cities in the state have done so. In general, the city's zoning authority must be exercised in compliance with a "comprehensive plan."[55] Zoning usually is accomplished by ordinance and, like ordinances in general a zoning ordinance must be enacted for the purpose of promoting the health, safety, morals and general welfare of the public in order to be valid.[56] Zoning is afforded a presumption of validity similar to any other type of ordinance.[57] A zoning

[51] *See Ex parte Biggs*, 54 P.2d 404 (Okla. Crim. 1935) (holding that a requiring a permit to drill for oil or gas within municipality is valid and refusing contention that requirement was ex post facto simply because well was created previous to enactment of ordinance); s*ee also Ptak v. Oklahoma City*, 229 P.2d 567 (Okla. 1951) (upholding city ordinance requiring $1000 fee for drilling permit).

[52] *City of Austin v. Teague*, 570 S.W.2d 389, 391 (Tex. 1978).

[53] *See Euclid v. Ambler Realty Co*., 272 U.S. 365 (1926). The Court upheld the power of governments to enact and implement zoning laws largely by analogizing zoning to the historic control of nuisances at common law.

[54] *Loveladies Harbor, Inc. v. U.S.,* 28 F.3d 1171, 1176 (Fed. Cir. 1994) (and authorities cited).

[55] Tex. Loc. Gov't. Code Ann. § 212.004 (Vernon 1988).

[56] *See City of Bellaire v. Lamkin*, 317 S.W.2d 43 (Tex. 1958).

[57] Accord *Wilkinsin,* 872 P.2d at 1277 (finding zoning regulations presumed constitutional, burden of proof against

ordinance will stand as a valid exercise of police power even if reasonable minds could differ as to whether it is substantially related to the public health, safety, morals or general welfare.[58] As in the case of other types of ordinances, the burden is upon the challenger to prove the ordinance is arbitrary or unreasonable because it lacks that substantial relationship.[59] In the case of conflict between a zoning ordinance and any statute, the stricter standard applies.[60]

Many home rule cities have both zoning and oil and gas ordinances. For instance, some cities have ordinances that limit the height of structures which could obscure visibility, including drilling structures, near airports. An ordinance of this type was involved in *City of Abilene v. Burk Royalty Co.*[61] Many cities have comprehensive zoning ordinances that may allow oil and gas activities only in certain zones within a city or if a "conditional use" permit is provided. In many cases, obtaining a permit for a conditional use may require a hearing before a planning and zoning authority and a relatively strict permitting process. In such cases, an operator seeking to drill within the corporate limits of a city may have to navigate a rather complex process to obtain a permit. It seems likely that a zoning ordinance that provides for conditional uses upon hearing would satisfy the requirements of due process and would not be subject to attack on

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regulation is upon challenging party, and burden is beyond reasonable doubt); *Meyers v. City of Baton Rouge*, 185 So.2d 278, 282 (La. App. 1st Cir. 1966) (holding that "zoning ordinances, adopted in accordance with procedure set up in enabling statute, are presumed to have been adopted by municipal authorities for valid purposes, and their discretion will not be interfered with by courts, unless it is clearly shown that ordinance is arbitrary, unreasonable and in violation of enabling statute").

[58] *Mid-Contintental Life Ins. Co. v. City of Oklahoma City*, 701 P.2d 412, 413-14 (Okla. 1985) (providing that "unless zoning decisions of a municipality are found not to have a substantial relation to public health, safety, morals or general welfare or are found to constitute an unreasonable, arbitrary exercise of police power, such judgments will not be overridden by district court" and that "if validity of the challenged zoning ordinance is 'fairly debatable,' legislative judgment of municipality must stand").

[59] *Bell v. City of Waco*, 853 S.W.2d 211 (Tex. App. -- Waco 1992, writ ref'd n.r.e.); a*ccord Hopkins*, 564 P.2d at 418 (establishing that party opposing zoning regulations carries burden to prove zoning regulation "bears no substantial relation to public health, safety, morals or welfare, or that it precludes use of affected property for any reasonable purpose"); *Wilkinsin*, 872 P.2d at 1277 (stating "it is burden of one challenging such [zoning] regulation to demonstrate its invalidity beyond reasonable doubt").

[60] Tex. Loc. Gov't. Code Ann. § 211.013.

[61] 470 S.W.2d 643 (Tex. 1971).

constitutional grounds[62] even if in practice it substantially restricted or even eliminated drilling in the zone in issue.

3. Regulation of Nuisances

Cities have both inherent and statutory power to regulate nuisances.[63] The authority for governmental bodies to regulate nuisances has long been recognized as an inherent power of the State in the exercise of its sovereign power.[64] The State of Texas has statutorily enabled cities to regulate nuisances, essentially delegating its power to the city as to activities within the city's jurisdictional limits. Home rule cities may regulate nuisances within their corporate limits and within 5,000 feet beyond city limits.[65] General law cities likewise are authorized to regulate nuisances, but are restricted to doing so within their city limits.[66] While there are no cases directly in point, it seems likely that oil and gas drilling activities (or at least some activities associated with drilling) could qualify as a nuisance.[67] The general rule is that the activity must,

[62] *See Klepak v. Humble Oil & Refg. Co*., 177 S.W.2d 215 (Tex. Civ. App. -- Galveston 1944 writ ref'd w.o.m.).

[63] COLO. REV. STAT. ANN. § 31-15-401(1)(C) (state that, "in relation to the general police power, the governing bodies of municipalities have the following powers: . . . (c) effective January 1, 2006, [t]o declare what is a nuisance and abate the same and to impose fines upon parties who may create or continue nuisances or suffer nuisances to exist."); OKLA. STAT. ANN. tit. 11, § 22-121(3) ("The municipal governing body may declare what shall constitute a nuisance, and provide for the prevention, removal and abatement of nuisances."); LA. REV. STAT. ANN. § 621 ("The inhabitants of a city . . . may define, regulate, prohibit, abate, suppress, or prevent all things detrimental to the health, morals, comfort, safety, convenience, and welfare of the inhabitants of the city, and all nuisances and causes thereof.").

[64] *See Pennsylvania Coal v. Mahon*, 260 U.S. 393 (1922); *Euclid v. Ambler Realty Co.,* 272 U.S. 365 (1926).

[65] Tex. Loc. Gov't. Code Ann. § 217.042 (Vernon 1988); *See St. Bernard Poultry Farm v. City of Aurora*, 54 P.2d 684, 686 (Colo. 1936) ("municipality may prohibit within its limits and within one mile beyond any offensive or unwholesome business or establishment, but does not have authority to declare what shall constitute a nuisance within a mile beyond its outer boundaries and to abate it."). *But see Pueblo v. Flanders,* 225 P2d 832 (Colo. 1950) ("Unlike power to enforce authority of municipality as against property or people outside its limits, right of municipal officers to volunteer services or act outside municipality where no enforcement of authority is involved is discretionary and dependent on purpose and result.")

[66] Tex. Loc. Gov't. Code Ann. § 217.002 (Vernon 1988) (type A municipality); *Id*. at §217.022 (type B municipality).

[67] Texas Law has followed the common law definition of nuisance described in Blackstone's commentaries as "[a]nything wrongfully done or permitted which injures or annoys another in the enjoyment of his legal rights." Sanders v. Miller, 113 S.W. 996, 998 (Tex.Civ.—App. 1908)." To constitute a nuisance it is not necessary that the annoyance should be of a character to endanger life and health. It is sufficient if it occasions what is offensive to the senses and which renders the enjoyment of life and property uncomfortable. Even that which does but cause a well-founded apprehension of danger may be a nuisance." Burdith v. Swenson, 17 Tex. 489 (1856).

in fact, be a nuisance before it can be controlled by a city. A city cannot declare something to be a nuisance unless it would constitute a nuisance at common law or is a nuisance per se.[68] A nuisance per se is a condition that is a nuisance under all circumstances, while a nuisance "in fact" is situational -- it depends upon the circumstances.[69] If an activity constitutes a hazard to the health, safety and welfare of the public, it can constitute a nuisance in fact.[70] Given these circumstances, a court could find oil and gas drilling activity to constitute either a nuisance per se or at least a nuisance in fact, depending upon its proximity to sensitive human activities (i.e., schools, hospitals, etc.).

Effective regulation of nuisance conditions may require that the activity giving rise to the nuisance be completely prohibited. It is unlikely that regulation of a nuisance condition, even if it resulted in a prohibition, could give rise to a claim for inverse condemnation damages since one is generally not presumed to have the right to maintain a nuisance.[71] Thus, a city seeking to regulate drilling activities on a reasonable basis or to abate or control a nuisance condition would probably face little exposure to damages for either regulatory taking or inverse condemnation even if the regulation rises to the level of a taking.

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[68] *City of Lucas v. North Texas Mun. Water Dist.,* 724 S.W.2d 811, 824 (Tex. App. -- Dallas 1986, writ ref'd. n.r.e.); *City of Shreveport v. Liederkrantz Society,* 58 So. 578 (La. 1912) ("An ordinance, declaring the use of property to be a nuisance does not make it so unless it is in fact so or is embraced within the common law or statutory idea of a nuisance"); *City of Muskogee v. Morton*, 261 P. 183 (Okla. 1927) (statute do not provide municipality with authority to "to declare a thing a nuisance which is clearly not one, it does empower it to declare anything a nuisance which, by reason of its location or use, or local condition and surrounding")

[69] *City of Sundown v. Schewmake,* 691 S.W.2d 57, 59 (Tex. Civ. App. -- Amarillo 1985, no writ). The issue of whether a nuisance exists whether in fact or per se is a matter that must be resolved by the courts. A city cannot "make that a nuisance which is not in fact a nuisance." Id.

[70] *Hart v. City of Dallas,* 565 S.W.2d 373, 379 (Tex. Civ. App. -- Tyler 1978, no writ). Fair and impartial minds would recognize the activity as a nuisance. *Ex parte Taylor,* 249 S.W.2d 607 (Tex. 1950); *State Dept. of Health v. The Mill,* 887 P.2d 993 (Colo. 1994) (stating that a "[p]ublic nuisance is doing or failure to do something that injuriously affects safety, health, or morals of public or works some substantial annoyance, inconvenience, or injury to public"); *Dobbs v. City of Durant*, 206 P.2d 180 (Okla. 1949) (finding that when business interferes with use of others property, or injures property of others, a wrong is done under nuisance law).

[71] *See, e.g., Stein v. Highland Park I.S.D.,* 540 S.W.2d 551, 553 (Tex. Civ. App. -- Texarkana 1976, writ dism'd); *Aztec Minerals Corp. v. Romer*, 940 P.2d 1025, 1032 (Colo. Ct. App. 1996) (finding environmental regulation of mining operation did not rise to level of inverse condemnation or taking because site constituted hazard to surrounding area and was a nuisance); *Bearden v. City of Tulsa*, 821 P.2d 394, 396 (Okla. Civ. App. Div. 2 1991) (ruling that removal of property owner's vehicles from yard was not unconstitutional taking because placement equipment, vehicles and trash constituted public nuisance in violation of city health ans safety standards).

4. Regulation to Protect Public Water Supplies

Any city may, and all cities with populations of over 5,000 are required to, establish a water pollution control and abatement program.[72] Under §26.177 of the Texas Water Code, a city has broad latitude to regulate (in cooperation with TNRCC) for water pollution control and abatement areas "within its extraterritorial jurisdiction which in the judgment of the city should be included to enable the city to achieve [its] objectives for the area within its territorial jurisdiction."[73] The plan must be submitted to the Texas Natural Resources Conservation Commission for review and approval.[74] Given the relationship between oil and gas drilling activities and protection of groundwater, a city's ability to regulate in this area is difficult to deny. Further, a home rule city's authority to control pollution allows it to regulate the location and storage of hazardous materials,[75] which likely would include oil and gas, together with various lubricants and solvents and other substances employed in drilling and completion operations.[76] This power on the part of the home rule city overlaps considerably with the city's authority to control nuisances and likewise is subject to little question.[77] The obvious corollary is that regulation that is narrowly tailored to satisfy the desired end of preserving public water quality is likely to be sustained as valid and non-compensable even if it adversely affects an owner's ability to drill for and extract the mineral resources underlying lands within the regulated area.[78]

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[72]*See* Tex. Water Code Ann. §§ 26.171 et seq. (Vernon 1988); COLO. REV. STAT. § 31-15-710(1)(A) (West 2005) (providing authority to Colorado municipalities to provide for water systems and abate water pollution); LA. REV. STAT. ANN. § 51:1152 (stating that it was the intent of the legislature to authorize municipalities to ("dispose of properties for the abatement, elimination, control, and prevention of air, water, noise, or other pollution or to control or eliminate or dispose of liquid and solid wastes"); OKLA. STAT. ANN. tit. 11, § 37-115 (West 2005) (municipality may enjoin activity polluting water supply).

[73] COLO. REV. STAT. ANN. § 31-15-707(1)(b) (Giving municipalities jurisdiction over "the stream or source" from which the water in their waterworks is taken "for five miles above the point from which it is taken.); *See Town of Carbondale v. GSS Properties, LLC*, NO. 03-CA-2523, 2005 WL 2155508, *5 (Colo.App. Sep 08, 2005)

[74]Tex. Water Code Ann. § 26.177(c).

[75]Op. Tex. Att'y Gen. No. JM-226 (1984).

[76]See Resource Conservation and Recovery Act of 1976, 42 U.S.C. §6901 et seq. (1992).

[77]Op. Tex. Att'y Gen. No. JM-226 (1984).

[78] *See Trail Enterprises, Inc. v. City of Houston, infra*.

An interesting example of this regulatory power, in play, can be observed in the Barnett Shale play in the Fort Worth Basin adjacent to the City of Fort Worth, where there has been an unprecedented increase in produced salt water associated with the prolific drilling and production activities for Barnett Shale Oil. Concerned of the potential impact of salt water disposal activities on area water supplies, the City of Fort Worth placed a proposed ordinance on its October 3, 2006, agenda that would impose a moratorium on salt water dispersal applications pending review of possible impacts to surface and water supplies. [79] Though the moratorium and potential regulation (or prohibition) of new salt water disposal wells does not equate to a prohibition of further drilling activities, its practical end result could be just that. A significant restriction in salt water disposal facilities could certainly affect costs that drive well economics and effectively prevent the drilling of otherwise economic wells.

5. Regulation Under the Statutory Mineral Subdivision Act

Regulation of mineral activities in urban areas may also be effected indirectly, by creation of a statutory mineral subdivision under Chapter 92 of the Texas Natural Resources Code entitled "Mineral Use of Subdivided Land." The Texas Legislature in 1983, recognizing the inherent conflict between land developers and cities seeking to develop urban property in increasingly densely populated areas and of operators pursuing valid mineral activities, enacted the statute to provide a mechanism to allow orderly development of land and minerals in tandem. The statute is not limited in its application to private property owners and, in fact, it may provide a further vehicle for coordination of concurrent surface and mineral rights in cases in which the surface is owned or condemned by a municipality. This chapter provides a statutory procedure for adopting a plat binding on all mineral owners within qualified subdivisions.

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[79] See City of Fort Worth Ordinance No. 17224-10-2006 entitled "Adaptation of Ordinance Establishing a Moratorium until January 16, 2007, or Acceptance of Applications for Salt Water Disposal Wells Within the City Limits.

The statute applies only to counties having populations in excess of 400,000 or in a county having a population in excess of 140,000 that borders on a county having a population in excess of 400,000 persons or that is located on a barrier island.[80] As of the last census, the only counties in Texas which clearly meet these qualifications include Bexar, Dallas, El Paso, Harris, Tarrant, Travis, Brazoria, Denton, Fort Bend, Montgomery, Collin and Galveston Counties. Under the Act, the surface owners of a parcel of land not to exceed 640 acres may create a "qualified subdivision" on the land by securing Railroad Commission approval of a plat of the subdivision and filing this plat with the clerk of the county in which the subdivision is located. If the surface owner complies with Chapter 92, the owner of the possessory mineral interest may explore, develop and produce minerals only from designated operations sites as platted in the qualified subdivision.[81]

To comply with Chapter 92, the surface owner must create a plat consistent with both the Act and the platting authority of the county in which the plat is proposed. The plat must designate separate operation sites of not less than two acres each for each 80 acres of land within the subdivision from which the possessory mineral interest owner may conduct the mineral exploration activities.[82] After notice to the surface owner and all possessory mineral interest owners, the plat must be approved by the Texas Railroad Commission before becoming effective.[83] Upon approval of the plat, the surface owner must commence actual construction of roads and utilities within the subdivision and sell a lot to a third party by the third anniversary date of the order of the Railroad Commission for the subdivision to maintain its status under Chapter 92.[84] After lots have been sold and the plats have been approved, there is no authority to amend, repeal or replat the property without approval of all persons involved, i.e., the city authority, platting authority, Texas Railroad Commission and property owners.

[80]Tex. Nat. Res. Code Ann. § 92.002(3) (Vernon 1988).
[81]Tex. Nat. Res. Code Ann. §§ 92.001 - 92.007 (Vernon 1988).
[82]Tex. Nat. Res. Code Ann. § 92.002(1),(3) (Vernon 1988).
[83]Tex. Nat. Res. Code Ann. § 92.004 (Vernon 1988).
[84]Tex. Nat. Res. Code Ann. § 92.005(c) (Vernon 1988).

Chapter 92, however, does not expressly affect the authority of cities to require approval of subdivision plats or the authority of a home rule city to regulate development activities within its boundaries[85] and in fact, despite the existence of a certified plat a city can, by ordinance or zoning authority, substantially restrict or eliminate drilling rights within the mineral subdivision. Thus, the existence of an operation site logically would not create any property rights in the owner of a possessory mineral interest. That owner would still face the normal difficulties in obtaining consent to drill under any existing city ordinance.[86] However, the Mineral Subdivision Act does provide a viable means of attempting to satisfy both the statutory and regulatory goals of accomplishing reasonable exploitation of mineral resources while allowing city platting authority and mineral owners' latitude to explore.

A mineral subdivision plat which delineates where operation sites are to be located does, of necessity, impose limitations on the mineral owner's operations and may, in some cases, effectively define the alternative means that must be employed by a mineral owner under the accommodation doctrine. Although the surface owners' surface use rights are generally subject to the dominant rights of the mineral owner, once a plat is in place, the plat defines what activities and uses are permitted in different areas of the subdivided tract. The extent to which a subdivision plat under the mineral subdivision could constitute a regulatory taking has not yet been tested. However, given the stated legislative policy that underpins the statute and the established power of the state to impose reasonable regulation on oil and gas activities, if the subdivision is legally platted under the statute, it seems unlikely that it would cause a compensable taking.

6. Regulatory Authority Beyond Corporate City Limits

There are some types of ordinances that may be enforced by cities within their extraterritorial jurisdiction (ETJ) as well as within the city limits. For all types of cities, those

[85]Tex. Nat. Res. Code Ann. § 92.007 (Vernon 1988).
[86]*Phillips Petroleum Co. v. Mecom*, 395 S.W.2d 828 (Tex. Civ. App. -- Houston 1965, writ ref'd. n.r.e.).

include water pollution control and abatement,[87] regulation of hazardous materials location and storage on the city's watershed area within its ETJ,[88] and platting of subdivisions of land within the ETJ.[89] It is not difficult to conceive of restrictions that could be incorporated in a water pollution control and abatement plan created under §26.177 of the Water Code, and which would make drilling considerably more expensive or even prohibit drilling in sensitive areas altogether.[90] Given the Water Code's authority to include in the plan "areas within [the city's] extraterritorial jurisdiction" which the city in its judgment deems appropriate to enable the city "to achieve its objective," the city's latitude is broad and may extend for up to five miles beyond its corporate limits.[91] In addition to those powers, home rule cities also may regulate nuisances within 5,000 feet of the city limits,[92] and may police parks, lakes and contiguous lands and speedways and boulevards owned by, and located outside, city limits.[93]

The general "platting authority" delegated to cities also may provide a significant opportunity for a city to regulate oil and gas activities in its ETJ. Cities have authority (with some exceptions) to extend application of ordinances "prescribing rules governing plats and subdivision of land," which could expose to regulation substantially all subdivisions of real property within the ETJ of a city.[94] The extent to which a city could regulate future drilling in its ETJ by use of the platting authority has not yet been tested. However, the Texas statutory authorization permitting cities to adopt rules governing plats and subdivisions "to promote the health, safety, morals or general welfare of the community" seems sufficient to permit some degree of regulation of drilling through the platting process. Presumably, if there is a clear and

[87]Tex. Water Code §§26.171 et seq. and §26.177 (Vernon 1988 and Supp. 1996).
[88]Op. Tex. Att'y Gen. No. JM-226 (1984).
[89]Tex. Loc. Gov't. Code Ann. § 212.0003 (Vernon 1988).
[90] *See Trail Enterprises, Inc. v. City of Houston, infra*.
[91]Tex. Water Code §26.177(d) provides a process by which a person aggrieved by an act of a city outside its corporate city limits may seek review of the ruling, ordinance or other act. This provision also sets the standard for review of such an ordinance which is probably a slightly lesser standard than for judicial review of ordinances generally. *See* notes 23-27 *supra* and accompanying text.
[92]Tex. Loc. Gov't. Code Ann. § 217.042 (Vernon 1988).
[93]Tex. Loc. Gov't. Code Ann. § 341.903 (Vernon 1988).
[94]Tex. Loc. Gov't. Code Ann. §§ 212.002 and 212.003(a) (Vernon 1988 and Supp. 1996).

direct correlation between the platting authority as implemented and a constitutionally valid governmental activity, the exercise of platting authority would likely be enforceable even if it impacted mineral development within the city's ETJ.

III. **REGULATORY POWERS OF OTHER LOCAL AUTHORITIES**

There are other local governmental authorities that have authority to impact mineral development and the authorities invariably become more numerous in proximity to population centers. For example, counties have authority to impose taxes and to restrict activities within the county. School districts, likewise have limited authority to act within the limits of their jurisdiction. One more recent development that has resulted in a proliferation of local governmental authorities having broad powers are the amendments to the Texas Water Code passed during the 1995 and 1997 Legislative session.[95] The concept behind these amendments was simple – to move implementation of the State's water policy to a very local level.

Even prior to passage of Senate Bill 1, water districts had been authorized under the Water Code. Such Districts included Irrigation Districts under Ch. 59 of the Code, Stormwater Control Districts under Ch. 66 of the Code, Fresh Water Supply Districts under Ch. 53 of the Code, Underground Water Conservation Districts under Ch. 52 of the Code, Water Conservation and Improvement Districts under Ch. 51 of the Code and Municipal Utility Districts under Ch.54 of the Code. However, for the most part, these districts had only very limited ability to impact conservation, protection and use of groundwater. Senate Bill 1 changed that. It also redefined the scope of authority of water districts, expanding their powers significantly.

[95] Acts 1995, 74th Leg. Ch. 933, sec. 2, eff. September 1, 1995, and Acts 1997, 75th Leg., ch. 1010, sec. 4.10, eff. September 1, 1997. The 1997 act known as "Senate Bill 1" effectively restructured much of the Texas Water Code to define and empower local water districts. *See generally*, Hubert, Senate Bill 1, The First Big and Bold Step Toward Meeting Texas' Future Water Needs, 30 T. TECH L. REV. 53 (1999)

The general authority of general law water districts is defined in Chapter 49 of the Water Code. The power of water districts derives from the Texas Constitution. [96] Under this authority, the Legislature created a framework for establishment of water districts, and in particular underground water districts, with very broad regulatory reach. Under Section 49.211 of the Water Code, water districts have the "functions, powers, authority, rights and duties that will permit the accomplishment of the purposes for which it is created *or* the purposes authorized by the Constitution, this Code *or* any other law." Even in light of the specific purposes of water districts, a broader grant of authority is hard to envision. Water Districts are given the power of eminent domain and are authorized to condemn property in compliance with Chapter 21 of the Texas Property Code either "as to fee simple title or a lesser property interest."[97]

Water districts can be formed anywhere they are needed, even within the extraterritorial jurisdictions of cities. [98] Moreover, water districts can also function as or even convert to Municipal Utility Districts having authority roughly equivalent to that of cities.[99] As a consequence, the possibility of encountering water districts and municipal authorities having overlapping areas of authority and jurisdictions is not only possible, but increasingly likely as one approaches population centers.[100] The degree to which the regulatory authority of water districts will be upheld by Courts has not been tested. Given the enabling statutes and their stated underlying purposes, it seems likely that their rules and actions will be afforded the same degree of deference as is afforded city ordinances.

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[96] Tex. Const. Art. III, Section 52 and Art. XVI, Section 59.
[97] Tex. Water Code Ann. Se. 49.222 (Vernon 1999).
[98] *See* Tex. Water Code Ann. Sections 35.007-35.008 and 36.001 (Vernon Supp. 2000)(with consent of the city).
[99] Tex. Water Code Ann. Sections 54.001, 54.021 and 54.030 (Vernon 1999).
[100] Tex. Water Code Ann. Section 49.452 (Vernon Supp. 2000) requires that "[A]ny person who proposes to sell or convey real property located in a district created under this title or by a special Act of the legislature … and which district includes less than all the territory in at least one county and which, if located within the corporate area of a city, includes less than 75 percent of the incorporated area of the city or which is locate outside the corporate area of a city in whole or in substantial part, must first give to the purchaser the written notice provided in this Section." A purchaser who is not given the statutory notice required by the foregoing section may recover all costs associated with the purchase and seek recission of the sale or recover statutory damages not to exceed $5000.00 and attorneys fees. Though the statute does not expressly relate to mineral leases or sales, the language of the statute is sufficiently broad to extend to such a sale.

Water districts have potential to impact mineral development in number of ways. Water wells to produce water for drilling may require permits from the water district. Even changing the configuration or pump horsepower in an existing water supply well may require a permit from an underground water conservation district.[101] Moreover, district rules intended to address aquifer watershed and recharge feature protection considerations might preclude drilling in sensitive areas. An underground water conservation district rule limiting or even prohibiting drilling in environmentally sensitive areas, in or around recharge features or in the contributory watershed to a recharge features is not hard to envision and invites an easy comparison to surface water protection cases.[102] Again, given the scope of the water districts' power to accomplish its purposes, and the public interest involved, it may be anticipated that a districts rules will be accorded great deference when challenged. Finally, given districts' eminent domain authority, condemnation of property, the ultimate form of regulation is a distinct possibility.

IV. **CONDEMNATION OF PROPERTY**

Cities sometimes acquire land for municipal uses by directly purchasing it. In appropriate circumstances, cities and other governmental or public service agencies can acquire land by direct condemnation. Water districts have been authorized by statute to condemn property in essentially the same way as cities in the exercise of their statutory purposes.[103] Moreover, often a land use regulation or law that indirectly imposes limitations on the use of property that rises to the level of a taking under federal and state constitutional law.

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[101] Tex. Water Code Ann. Section 36.113 (Vernon 1999).

[102] *Cf. Trail Enterprises Inc. v. City of Houston*, 957 S.W.2d 625 (Tex. App. – Houston [14th Dist.] 1997, rev. denied), *cert. denied*, -- U.S. --, 119 S. Ct. 802, 142 L.Ed. 2d 663 (1998).

[103] Because virtually the entire body of law relating to condemnation and inverse condemnation arises out of actions taken by cities, the body of this section will relate to actions that have or may be taken by cities, though the principles may apply with equal force to water districts or other political bodies.

A. Direct Condemnation

Direct condemnation, in which a city takes property for public use, is a generally well understood concept.[104] Section 251.001 of the Local Government Code authorizes municipalities to "exercise the right of eminent domain for public purpose to acquire public or private property whether located inside or outside the municipality for any of the purposes [designated in the statute]."[105] Thus, a city can condemn and acquire privately-owned property for streets, public works and facilities, but is required to pay just compensation to the dispossessed owner.[106] Direct condemnation is a relatively straightforward matter with most disputes revolving around the extent of the condemnation (i.e. whether of all rights in the affected property or of only some interest or rights in the property) and the market value of the property or rights condemned.

B. Inverse Condemnation

The doctrine of inverse condemnation has evolved as a result of municipal activities that may impair access to privately owned property without resulting in acquisition of that property for public use by eminent domain.[107] The law relating inverse condemnation arises out of the body of federal and state law relating to takings.

1. Physical Takings

An actual physical taking may result in circumstances in which governmental action causes an actual loss of use of property or “authorizes an unwarranted physical occupation of an individual’s property.”[108] The Texas Constitution provision that no “person’s property shall be

[104] The practical and procedural intricacies of the law of an eminent domain are the subject of many treatises and are beyond the scope of this article.
[105] Tex. Loc. Gov. Code Ann. §251.001 et seq. (Vernon 1988).
[106] Tex. Const. art. I § 17.
[107] *See City of Waco v. Texland Corp.*, 446 S.W.2d 1 (Tex. 1969); *City of Austin v. Avenue Corp*., 704 S.W.2d 11 (1986).
[108] *Mayhew v. The Town of Sunnyvale*, 964 S.W.2d 922, 934 (Tex. 1998)(citing *Yee v. City of Escondido*, 503 U.S.

taken, damaged or destroyed for or applied to public use without adequate compensation being made"[109] authorized compensation in circumstances which rise to the level of a physical taking.

2. Regulatory Takings Doctrine

In some instances, regulations imposed by a city or other governmental authority so limit an owner's use and enjoyment of the property that its value is substantially destroyed, giving rise to a "regulatory taking." It is often difficult to discern when the exercise of the police power constitutes a compensable taking and when it does not.[110] The Texas Supreme Court has announced three factors to be considered in determining whether a compensable taking has occurred:

1. Whether the property is rendered wholly useless;

2. Whether the government burden created a disproportionate diminution in economic value or caused a total destruction of the value of the property; and

3. Whether the government's action against an economic interest of an owner was for its own advantage.[111]

In other words, a person aggrieved by the effect of regulation by ordinance has two high hurdles to clear: he or she must first show that the interference resulting from the ordinance or exercise of police power is so great that it rises to the level of a constitutional taking. Only then does the person face the second hurdle -- the question of whether the taking is compensable. For purposes

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519,522, 118 L.Ed. 2d 153, 112 S. Ct. 1522 (1992).

[109] Tex. Const. Art 1 Section 19.

[110] There has been some controversy over whether and to what extent the police power follows or overlaps the power of eminent domain. Despite some conceptual differences, the Texas Supreme Court found the two doctrines to "merge in so many places when applied to specific problems" that the labels are not helpful. The Texas Supreme Court in *City of Austin v. Teague*, 570 S.W.2d 389, 391 (Tex. 1978), noted the slipperiness of distinctions between excessive applications of the police power and the exercise of eminent domain over private property referring to the legal battlefield as a "sophistic Miltonian Serbonian Bog" (citing *Brazos River Authority v. City of Graham*, 163 Tex. 167, 176, 354 S.W.2d 99, 105 (1962) demonstrating "the manifest illusoriness of distinctions." (*citing DuPuy v. City of Waco*, 396 S.W.2d 103.107 (Tex. 1965)). The Supreme Court has largely rejected any dichotomy between valid regulation under the police power which goes too far and a compensable taking holding "that one's property may not be taken without compensation under some circumstance even in the exercise of police power." *Teague* at 891. (citations omitted). *See generally*, Canalis, Inverse Condemnation in Texas – Exploring the Serbonian Bog, 44 Tex.L.Rev. 1584 (1966).

[111] *City of Austin v. Teague*, 570 S.W.2d 389, 391 (Tex. 1978); *see also, City of College Station v. Turtle Rock Corp.,* 680 S.W.2d 802, 804 (Tex. 1984).

of evaluating the extent a regulatory burden on property may rise to the level of a taking. Texas courts have largely followed the lead of federal courts.[112]

Federal courts have been required to deal extensively with the issue of regulatory taking.[113] The issue has recently become prominent in cases where use of property has been limited by environmental regulation. However, the regulatory taking doctrine has its historical roots in private property owners' objections to an increasingly common practice in the 1920s - state regulation of private land use by zoning.[114] The practice of zoning was challenged as taking governmental regulation of private property rights "too far."[115] As discussed earlier, zoning has survived these constitutional challenges under the analysis that zoning is simply an extension of the common law power of governments to control nuisances. But the decisions regarding zoning also recognized that, despite zoning's general facial validity, such laws could go "too far" as applied in certain instances, thereby unduly impairing private property rights and effecting a taking.[116] The issue of regulatory takings thus came to hinge upon the nebulous term "too far."

The regulatory takings doctrine, as announced by the Supreme Court, posed more questions than answers for the first 70 years of its history. The cases provided little guidance for determining either how far is "too far" or what remedies are available for a private property owner impacted by excessive regulation. At least some guidance has been recently provided by the Supreme Court's decision in *Lucas v. South Carolina Coastal Council*.[117] In *Lucas* the purchaser of two ocean front lots was denied the right to build a residence on the lot by legislation aimed at preservation of the beach and dune ecology. The plaintiff had bought the

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[112] *See Mayhew v. The Town of Sunnyvale,* 964 S.W. 2d 922, 935-36 (Tex. 1998); *Taub v. City of Deer Park*, 882 S.W.2d. 824 (1994).

[113] *See Lucas v. South Carolina Coastal Council, 505* U.S. 1003, 112 S. Ct. 2886, 120 L.Ed.2d 798 (1992); *Loveladies Harbor, Inc. v. U.S.,* 28 F.3d 1171 (Fed. Cir. 1994); *Florida Rock Ind., Inc. v. U.S.*, 18 F.3d 1560 (Fed. Cir. 1994).

[114] *See Loveladies Harbor*, 28 F.3d at 1176 (*citing Euclid v. Ambler Realty Co*., 272 U.S. 393 (1926)).

[115] *See Pennsylvania Coal Co. v. Mahon,* 260 U.S. 393 (1922) in which Justice Holmes stated: "[T]he general rule at least is, that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking" Id. at 415.

[116] *See Nectow v. City of Cambridge*, 277 U.S. 183 (1928).

[117] 505 U.S. 1003, 112 S. Ct. 2886, 120 L.Ed.2d 798 (1992).

lots specifically for purposes of residential building, and the legislation was enacted after the lots were purchased. The trial court awarded the plaintiff $1.1 million for the taking, ruling that the economic value of the property had been destroyed by the regulatory imposition. The State Supreme Court reversed, holding that in the balance of a "paramount public policy" of protection of the ecology against private property rights, private property rights must yield. The U.S. Supreme Court accepted certiorari.

The Supreme Court declined to treat the case as one involving environmental policy and instead analyzed the case as a basic property law question. The issue is not one of competing rights in the same property; rather it is about who owns the property right in question. Is the affected right or interest within the "bundle" of rights owned by the individual or is it a right or interest reserved to the State under its common law right to control nuisances? The court held that if the imposed restraint would be justified under the traditional state nuisance law, it is not a taking.[118] The Supreme Court remanded the case to the South Carolina Supreme Court that subsequently determined the state did not have the common law right to restrain the plaintiff's intended use of the land.[119] The federal regulatory taking analysis after *Lucas* has been restated as follows:

> a) A property owner who can establish that a regulatory taking of property has occurred is entitled to a monetary recovery for the value of the interest taken, measured by what is just compensation.
>
> b) With regard to the interest alleged to be taken, there has been a regulatory taking if
>
> > 1) there was a denial of economically viable use of the property as a result of the regulatory imposition;
> >
> > 2) the property owner had distinct investment-backed expectations; and

[118] *Id.* at 112 S. Ct. 2900.
[119] *Lucas v. South Carolina Coastal Council*, 424 S.E.2d 484, 486 (S.C. 1992).

3) it was an interest vested in the owner, as a matter of state property law, and not within the power of the state to regulate under common law nuisance doctrine.[120]

It appears likely that Texas courts will follow substantially the test under the Lucas case in evaluation of regulatory takings under the Texas Constitution.[121]

The *Lucas* opinion discusses as well (without deciding) the issue of what degree of diminution in value is required to rise to the level of a "denial of economically viable use of the property" as a result of regulation. A total loss of use, or "categorical taking" occurs when there has been a total loss of beneficial use as to the entire property, and by definition meets the standard for a compensable taking (assuming the other requirements are met). At the other end of the spectrum of potential takings is a "substantial impairment" -- nothing less than a substantial impairment can constitute a taking; in fact, the *Lucas* opinion suggests (based upon existing caselaw) that a regulatory taking requires that there be a denial of essentially all remaining economic use.[122] The problem of evaluating partial takings involving "linedrawing between noncompensable 'mere diminutions' and compensable" takings has not fully evolved; however, Federal Courts facing the issue have generally tended to find means of restricting the analyses to the diminution in value of the specifically impacted property (and not the remaining property in the larger commonly-owned tract from which it is carved) thereby enabling them to treat the diminution as either categorical or non-categorical.[123] The Texas Supreme Court appears to favor the view that a regulatory taking has not occurred where the property "is not rendered completely useless or deprived of all economically beneficial use" [124] which appears to be in line with the federal cases on this issue

[120]*Loveladies Harbor*, 28 F.3d at 1176.
[121]*See Taub v. City of Deer Park*, 882 S.W.2d 824 (Tex. 1994). In fact, though the test evolved under the *Lucas* decision is somewhat more property law based and extensive, the basic requirements are similar to those previously announced by the Texas Supreme Court in *City of Austin v. Teague*, 570 S.W.2d 389 (Tex. 1978).
[122]*See Lucas*, 112 S. Ct. at 2895.
[123]*See Florida Rock*, 18 F.3d at 1565; *Loveladies Harbor*, 28 F.3d at 1180.
[124]*See Mayhew v. The Town of Sunnyvale*, 964 S.W. 2d 922, 935-36 (Tex. 1998); *Taub*, 882 S.W.2d at 826.

3. Regulatory Takings and Inverse Condemnation of Minerals

Given the potential for conflict between mineral activities and municipal land uses, there are innumerable opportunities for laws, ordinances or activities which do not involve direct acquisition of mineral resources for municipal use, but which result in conditions which either limit or totally preclude mineral exploration. Texas law recognizes that activities which restrict access to minerals may rise to the level of a taking; however, condemnation of the surface does not necessarily inversely condemn underlying minerals. The Texas Supreme Court in *Chambers-Liberty Counties Navigation Dist. v. Banta*[125] held that there is no inverse condemnation of the minerals so long as the mineral owners retained their "common law right to reasonable use of the surface estate."[126] The common law rule of reasonable use of the surface is, in turn, defined by the evolved "due regard doctrine" as modified by the "accommodation doctrine." These concepts are critical to another recent Texas Supreme Court case, *Tarrant Water Control and Improvement Dist. No. 1 v. Haupt, Inc.*,[127] discussed at length *infra*. Thus, the extent to which a restriction of access to minerals constitutes inverse condemnation requires an analysis of the relationship of the respective rights of surface and mineral owner.

a. Historic Relationship Between Surface and Mineral Rights

Under Texas law, when a mineral severance has occurred, the right to minerals carries with it "the right to enter upon and extract them and all such incidents thereto as are necessary to be used for getting and enjoying them."[128] The rationale for the doctrine is "because a grant or reservation of minerals would be wholly worthless if the grantee or reservor could not enter upon the land in order to explore for and extract the minerals granted and reserved."[129] Hence, the mineral estate together with the right to use the surface for developing the minerals is the "dominant estate" meaning that the mineral owner's common law right to use the surface

[125]453 S.W.2d 134 (Tex. 1970).
[126]*Id.* at 137.
[127] 854 S.W.2d 909 (Tex. 1993).
[128]*Cowan v. Hardeman*, 26 Tex. 217, 222 (1862).
[129]*Harris v. Currie*, 142 Tex. 93, 176 S.W.2d 302, 305 (1944).

generally has superiority and priority over any purposes for which the surface owner desires to use the surface even when the surface owner is a public entity needing the property for public use.[130] However, even under the established common law rule, use of the mineral rights must be reasonably exercised with due regard to the rights of the surface interest owners -- the mineral owner should use no more land than is reasonably necessary for development of minerals and should exercise, at least, ordinary care.[131] The due regard doctrine generally has been applied from the perspective of the mineral owner. If the lessees' activities are objectively reasonable within the industry, they will not expose the lessee to liability to the surface owner irrespective of their impact to the surface estate.[132] However, the law, as it evolved, did not recognize the mineral owner's use of the surface as unconstrained. The due regard doctrine does recognize the concurrent rights of the two estates -- the surface owner's right to use and enjoy those parts of the surface not required for mineral activities and the mineral owner's right to use so much of the surface as is reasonably necessary for purposes of exploration and development of minerals.

The "due regard" concept was expanded in *Getty Oil Co. v. Jones*,[133] which established the doctrine of accommodation. This doctrine recognizes that the use of the surface estate must be considered and accommodated by the mineral owners where it is necessary and possible to do so. The doctrine holds that "where there is an existing use by the surface owner which would otherwise be precluded or impaired and where under established practices in the industry there are alternatives available to the mineral lessee whereby minerals can be recovered, the rules of reasonable usage of the surface may require the adoption of an alternative use by the lessee."[134] The accommodation doctrine is applied based upon the facts of each individual case depending upon the reasonable alternatives available to both the surface and mineral owners. If there is only

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[130]*See Chambers Liberty County Navigation Dist. v. Banta*, 453 S.W.2d 134 (Tex. 1970).
[131]*General Crude Oil Co. v. Aiken*, 344 S.W.2d 668 (Tex. 1961); *see also, Brown v. Lundell*, 344 S.W.2d 863, 866 (Tex. 1961) (mineral owner owes duty not to negligently injure surface).
[132]*See generally* Burney, Accommodating and Condemning Surface and Mineral Estates -- The Implications of Tarrant County Water Control and Imp. Dist. No. 1 v. Haupt, Inc., 1994 Adv. Oil, Gas & Min. Law Inst. (Oct. 6-7, 1994).
[133]470 S.W.2d 618 (Tex. 1971).
[134]*Id*. at 622.

one means of surface use that reasonably would allow production of the minerals, then the mineral owner has the right to pursue such use regardless of the surface damage. However, if the mineral owner has reasonable alternatives, the mineral owner must make a reasonable accommodation to permit the use of the surface for other productive purposes even if the mineral owner's production costs are increased. Application of the "accommodation doctrine" was further refined by the Texas Supreme Court in *Sun Oil Company v. Whitaker*[135] in which the Court decided the reasonable alternative had to be one available on the property. Thus, if the alternative can only be exercised by use of land or materials off the lease (i.e., directional drilling from other lands or, as in *Whitaker*, importation of water for secondary recovery operations), the lessee is not required to employ that alternative.

b. Pre-*Haupt* Inverse Condemnation Cases

Once an aggrieved party makes a showing that a mineral activity has been prevented, the city has a burden of proof to show that the prohibited use of the surface by the mineral owner is not reasonably necessary. The city may discharge that burden by showing that non-interfering and reasonable ways and means of producing the minerals are available. The reasonable means of extracting minerals (under the existing caselaw) must be means that are objectively reasonable and recognized as such in the oil industry,[136] and they may not involve lands or means outside the property boundaries.[137]

Texas law also makes clear that, in addition to being substantial and in violation of the mineral owner's common law access rights, the interference must be a present one in order to cause an inverse condemnation.[138] The mere acquisition of surface by a city for public purpose

[135]483 S.W.2d 808, 812 (Tex. 1972).
[136]*See Getty Oil Co. v. Royal*, 422 S.W.2d 591 (Tex. Civ. App. -- Beaumont 1967, writ ref'd n.r.e.); *Reading & Bates Offshore Drilling Co. v. Jorgenson*, 453 S.W.2d 853 (Tex. Civ. App. -- Eastland 1970, writ ref'd n.r.e).
[137]*Sun Oil Co. v. Whitaker*, 483 S.W.2d 808 (Tex. 1972).
[138]This same limitation clearly applies to a regulatory taking as well. See *Town of Sunnyvale v. Mayhew*, 905 S.W.2d 234, 244-45 (Tex. App. -- Dallas 1994, no writ); *see also, Williamson County Regional Planning Comm'n. v. Hamilton Bank*, 473 U.S. 172, 186 (1985).

does not imply restriction of access to the minerals.[139] The courts will not presume that there will be a substantial material impairment of the right of access even when alternative, non-interfering means of access might not be the most effective means of access.[140] In cases where there has been a temporary and partial interruption of access to minerals under circumstances where such access may be later permanently impaired, no inverse condemnation occurs until the time of a permanent restriction of access. The *City of Abilene v. Burk Royalty* case decision is illustrative of this point. In that case, Burk Royalty in 1963 acquired oil and gas leases that later came to comprise the Chapman Waterflood Unit. The City of Abilene in 1968 undertook expansion of its airport in such a way as to adversely impact operations of the waterflood unit. Among the acts complained of by Burk Royalty was that the City of Abilene's expansion of its runways would ultimately cause two of Burk's wells to violate airspace requirements for airport operations. The Court held the temporary transient interference with operations during the construction phase did not rise to the level of a constitutional taking, and that the future potential impact to wells due to airspace requirements was, likewise, not a current taking. On this latter point the Court held:

> The most that can be said is that the utilization of the runway under the restrictions to be later imposed by the required flight easement would at that time lessen the feasibility of the project and impede its development. This future prospect was not a present taking.... There has been an award of damages on the basis of a taking no sooner than at trial but assessed in light of conditions at an earlier time when there had not been a taking. The general rule is that the market value of property which is condemned is determined as of the date of taking of the property (citations omitted). It is thus apparent that the requisite element of an inverse condemnation proceeding, i.e., a constitutional taking or damaging of property entitling the owner to compensation measured by conditions at such time have not been shown.[141]

Thus, the interference must be both present and substantial before a taking results.

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[139]*City of Abilene v. Burk Royalty, 470 S.W.2d 643 (Tex. 1971); Chambers-Liberty Counties Navigation District v. Banta*, 453 S.W.2d 134 (Tex. 1970).
[140]*City of San Augustine v. Johnson*, 349 S.W.2d 653, 655 (Tex. Civ. App. -- Beaumont 1961, writ ref'd, n.r.e.).
[141]*City of Abilene*, 470 S.W.2d at 647.

In the case of use or condemnation of the surface, so long as mineral owners retain their common law right to the reasonable use of the surface estate, they have suffered no damages as a matter of law. While some caselaw implies that a city seeking to condemn property should condemn all interests it intends to take,[142] a city clearly is not required to condemn all interests that may, in the future, be impacted.[143] If the city later determines to take common law access or possessory rights, it then may proceed with condemnation proceedings or, if it so interferes with the mineral owner's common law rights, the interference may constitute a second taking by inverse condemnation. However, until there is a second taking, compensation is unavailable.

Much of the caselaw regarding whether inverse condemnation of minerals has occurred upon a condemnation or inconsistent use of the surface only, arises out of the condemnation of surface only by water districts for use in reservoirs. The water district does not intend to "use" the minerals, and it does not condemn them. However, invariably the ability to access any minerals is impacted or even precluded when the reservoir is impounded and the property is inundated. The issue in these cases is whether and at what point inverse condemnations arose from restrictions upon access to minerals. The results in these cases have varied, but the prevailing trend appears to favor allowing many factors, most significantly, the accommodation doctrine to be considered in reaching a decision.

In *City of San Augustine v. Johnson*[144] the city sought to condemn the surface of only 40 out of a tract of 61 acres of land owned by the defendant. Johnson sought an award of damages for the value of the minerals underlying the tract on the premise that all mineral use of the 40 acres would be permanently precluded.[145] The evidence at trial had established a value of $10.00 per acre for the mineral interests in a 40-acre tract which was being flooded by a reservoir, and the condemnation award in the trial court included damages in that amount. The Court of

[142]*Cf. LaGrange v. Pierott*, 142 Tex. 23, 175 S.W.2d 243 (1943).
[143]*See Banta*, 453 S.W.2d at 137.
[144]349 S.W.2d 653 (Tex. Civ. App. -- Texarkana 1961, writ ref'd n.r.e.).
[145]*Id.* at 655.

Appeals reversed, noting that Johnson retained full mineral and surface rights in an adjacent 21 acres. The Court observed that evidence also had shown that the minerals under the 40 acres could be accessed through directional drilling, although there was no evidence concerning whether directional drilling would be as effective as vertical drilling. The Court of Appeals held that the mineral owner was not entitled to any compensation for the mineral estate in the 40 acres, because he could still access those minerals by using the adjacent 20 acres.[146]

Eight years later, the same Court, on similar facts, reached a different conclusion in *Trinity River Authority v. Chain*[147] which involved the condemnation of the surface only of a 280-acre tract of land for purposes of construction and maintenance of a reservoir. As in the *City of San Augustine* case, the landowners retained full ownership of contiguous lands -- in this case a 70-acre tract. The Court considered its holding in the *City of San Augustine* case but, nonetheless, affirmed a verdict for inverse condemnation damages relating to minerals underlying the 280-acre tract the surface of which was condemned. The apparent reason for the different outcome is that Chain had obtained specific jury findings that the mineral estate in the land that was being flooded would have no remaining value and the River Authority on appeal did not challenge that finding. Because the jury finding established that the lack of direct access had destroyed the value of the minerals in the flooded area, the award of damages for oil and gas was sustained on appeal.[148]

A further refinement of the test results from the decision in *Willcockson v. Colorado River Municipal Water District*[149] which again involved a water district that sought to condemn the surface, but not the mineral estate in a site for a new reservoir. In *Willcockson* there was existing oil and gas production on the site, and the surface owner owned one-fourth of the

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[146]*Id.* at 655.
[147]437 S.W.2d 887 (Tex. Civ. App. -- 1969, writ ref'd n.r.e.)
[148]*Id.* at 890. The Court also incidentally held that the value of sand, gravel, Fullers earth and bentonite were included in the condemnation value given for the surface but since oil and gas were not, a separate award of damages was appropriate. Id.
[149]436 S.W.2d 203 (Tex. Civ. App. - Austin 1968, writ ref'd. n.r.e.).

mineral estate. In its statement for condemnation of the surface estate, the water district expressly excluded all of the oil, gas and minerals, and proposed arrangements to allow the oil operations to continue. The district proposed to install earthen mounds around all existing wells, to connect those wells with the shore by dikes wherever the district engineer decided it would be feasible, to provide a barge to float oil field equipment to sites when needed, and to allow the operators access to the shoreline for conducting mineral activities, including directional drilling. The special commissioners appointed by Coke County had made an award of $764,515 for the value of the surface taken and damages to the remainder of the land, including a one-fourth mineral interest in the land condemned. The district objected to the award and appealed to the County Court. The trial court specifically instructed the jury to consider these proposals as obligations of the district affecting the value of the condemned surface interests. The jury found Willcockson's damages to be approximately $219,000 less than the Commissioners' award.[150] Willcockson appealed. The Court of Appeals reversed, holding that the instructions were improper. The proposals by the district were mere promises of future performance, not binding commitments or limitations or restrictions upon the property that was being condemned. Id. at 206-07. If they had been binding restrictions or limitations upon the condemned property, then the instructions might have been proper. Mere promises could be presented as evidence, but the jury should not have been instructed to consider such promises when determining the property value. The case was remanded for new trial without comment as to the sufficiency of evidence regarding value or impairment of value occasioned by the flooding, with the Court observing that upon the guidance in its opinion "neither the evidence nor the jury findings would likely be the same upon a new trial."[151]

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[150]Evidence of damages to the mineral estate ranged from zero to $375,000 and the jury's award equated to about $45,000. *Id*. at 209.
[151]*Id*. at 210.

c. The *Haupt* Decision

The most recent pronouncements regarding inverse condemnation in these circumstances came in the Texas Supreme Court's decision in *Tarrant County Water Control and Improvement District Number One v. Haupt, Inc.*[152] where the court expressly ruled what other cases had only implied -- that the doctrine of accommodation must be considered in evaluating inverse condemnation cases involving mineral rights. As in *Willcockson,* a tract with existing oil production was being flooded by a new reservoir. The landowner had owned surface and mineral interests in 80 acres including 60 acres that would be flooded by the lake, and 12 acres of the adjoining shoreline. The oil rights were under lease to a third party, and the landowners were receiving royalties. The water district condemned the surface estate and a leasehold interest of the existing oil lessee, but it did not condemn the reversionary mineral and royalty interests of the landowners. The water district plugged two wells that had been operated by the lessee; however, shortly before the wells were plugged, the landowners gave top leases to Bar J.B. Company. When Bar J.B. attempted re-enter the plugged wells the water district obtained an injunction preventing them from doing so or from conducting further drilling on the inundated portion of the 80-acre tract. One of the lessees then drilled a directional well under the lake from the family's onshore acreage, but the well was a dry hole. However, a directional well drilled on an adjoining tract had been successful. The landowners and new lessees sued the water district for inverse condemnation of the mineral interests. The evidence at trial indicated that the right of direct access to the minerals from the surface had been destroyed, and that the mineral interests under the lake had lost between 75% to 100% of their value.

The trial court found that the mineral interests of the two principal landowners had been inversely condemned, but that the interests of another mineral owner (a son) and the corporate lessees had not been inversely condemned. On appeal, the Court of Appeals initially held that all of the mineral and leasehold interests had been inversely condemned when the water district

[152] 870 S.W.2d 350 (Tex. 1993).

prevented the lessees from obtaining direct access to the site being flooded (which occurred after the initial condemnation of the surface and the prior oil lease).[153] The Court of Appeals found that the right of access to the minerals had been impaired as a matter of law through "a permanent restriction of the most reasonable, lowest-risk and most cost-effective means of access: vertical drilling from dry land." That impairment "damaged the mineral estate through a substantial, material, permanent, partial restriction of access" which "constituted an inverse condemnation of the plaintiffs' interests as a matter of law." The trial court's finding that the corporate lessees had some access to the minerals was deemed immaterial.[154]

The Texas Supreme Court reversed, holding that the doctrine of accommodation must be used to determine whether the mineral owners' rights of access were unreasonably restricted. And the Court specifically found the doctrine of accommodation to apply when the surface owner is a governmental entity. The Supreme Court held that the finding that the corporate lessees had some access to the minerals was very "material to the outcome of this case." The Supreme Court further held that there was some evidence to support a finding that the mineral owners and lessees had "reasonable access to their minerals by alternative means" such as directional drilling.[155] The Court, citing *Getty v. Jones*, noted that if the mineral owner has reasonable alternative "uses of the surface one of which permits the surface owner to continue the use of the surface in the manner intended... and one that would preclude that use by the surface owner, the mineral owner must use the alternative that allows continued use of the surface by the surface owner."[156]

The Supreme Court also considered and expressly disapproved the Court of Appeals' reliance upon *City of Waco v. Texland Corp*.[157] and *City of Austin v. Avenue Corp.*[158] (two "street

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[153]*Haupt, Inc. v. Tarrant County Water Improvement Dist. Number One*, 833 S.W.2d 697 (Tex. App. - Waco 1992), rev'd, *Tarrant County Water Improvement Dist. Number One v. Haupt, Inc.,* 854 S.W.2d 909 (Tex. 1993).
[154]*Haupt*, 833 S.W.2d at 700.
[155]*Haupt*, 854 S.W.2d at 913.
[156]*Id.* at 912 (emphasis added).
[157]446 S.W.2d 1, 2 (Tex. 1969).
[158]704 S.W.2d 11, 13 (Tex. 1986).

access" cases) in the analysis of whether access had been impaired to the degree necessary to constitute a taking.[159] These "street access" cases generally stand for the proposition that "property had been damaged for a public use within the meaning of the Constitution when access is materially and substantially impaired even though there has not been a deprivation of all reasonable access...."[160] Under this analysis a compensable impairment may occur whenever access to property is impacted. The Court, observing that because the relationship between the surface use rights of the mineral and surface owner are concurrent and concomitant whereas "street access" cases involved the interests of adjacent property owners, found the "street access" cases to provide an inadequate analogy. The Supreme Court declared erroneous the Court of Appeals' holding that a "taking of the plaintiffs' mineral interests occurred even though all reasonable means of access had not been restricted."[161]

The case was remanded to the Court of Appeals to consider whether that finding could be upheld under the weight and preponderance of the evidence. The Supreme Court instructed that the inverse condemnation could be upheld only if the weight of the evidence proved that "surface drilling is the only manner of use of the surface whereby the minerals can reasonably be produced. In that event, the lessee has the right to pursue this use under the accommodation doctrine."[162] On remand, the Court of Appeals reviewed the facts under the accommodation doctrine.[163] It followed the instructions of the Supreme Court and found that the weight of the evidence established that surface drilling was the only reasonable means of access to the minerals. Thus, it again found that all of the interests had been inversely condemned, even under the accommodation doctrine. It sent the case back to the trial court to determine the amount of damages. On remand the trial court, in a bench trial found that, based upon the opinion of the Court of Appeals, there had been a substantial injury to the value of the mineral interest by virtue

[159] *Haupt*, 854 S.W.2d at 912.
[160] *City of Waco v. Texland Corp.,* at 446 S.W.2d 2.
[161] *Haupt*, 854 S.W.2d at 912.
[162] *Id.* at 913.
[163] *Haupt, Inc. v. Tarrant County Water Control and Improvement Dist. Number One*, 870 S.W.2d 350 (Tex. App. -- Waco 1994) (on remand).

of an inverse condemnation. The issue of damages was tried to a jury and the Court ultimately awarded the Haupt group of Plaintiffs approximately $2,000,000.00 in damages. The appellate court affirmed the judgment and the Supreme Court denied writ of error.[164]

d. Harmonizing the *Haupt* Decision

While the Texas Supreme Court's analysis in the *Haupt* case is indicated to be based upon *Getty v. Jones* (and presumably its progeny), it appears to go somewhat beyond the holdings in prior cases, tilting the balance somewhat in favor of the right to concurrent use by the surface owner.[165] The apparent shift becomes even more pronounced when examined in the light of Texas inverse condemnation cases relating to impairment of access to property. The existing "black letter of the law, prior to *Haupt* has been that when access to property is substantially and materially impaired for a public use, that impairment may constitute a taking. Under the street access cases, a taking could result even if other means of access exist. However, the *Haupt* decision seems to turn the test on its head - a taking will not be found to exist unless all reasonable means of access have been restricted.[166] The analysis under *Getty v. Jones*, at minimum, makes it incumbent upon the surface owner to show that reasonable alternative means exist. Nevertheless, *Haupt* while honoring the evidentiary requirement, appears to then shift the burden to the mineral owner to establish that the additional costs and risks associated with the alternative methods caused the value of the minerals to be so substantially impaired that an inverse condemnation results.

If the Supreme Court considers the street access analysis to be inapplicable to mineral access, much of the basic caselaw applicable to inverse condemnation is not useful. In fact, the

[164] *Tarrant County Water Control and Improvement Dist. Number One v. Fullwood et al*., 963 S.W. 2d 60-62 (Tex. 1998)(Hecht, J. dissenting).

[165] For an article discussing and detailing some of the analytical shortcomings of the Texas Supreme Court's opinion see Laura Burney, Accommodating and Condemning Surface and Mineral Estates -- The Implications of Tarrant County Water Control and Imp. Dist. No. 1 v. Haupt, Inc., 1994 Adv. Oil, Gas & Min. Law Inst. (Oct. 6-7, 1994).

[166] *Haupt*, 854 S.W. 2d at 912.

result in *Haupt* is more consistent with a regulatory takings approach to constitutional taking by public entity than to a traditional inverse condemnation context. Under a regulatory takings perspective, as enunciated in the *Lucas* case, the preliminary analysis would be: has the state acquired for itself a right or interest that is included within the bundle of sticks or property rights belonging to the private property owner? Under this analysis such a right is taken if all economically viable use and enjoyment of the property has been destroyed by the restriction on use. Essentially in a mineral context, the public entity owning the surface has a concurrent right to use of the surface subject to the rights of the mineral owner. It is this concurrent right of the mineral owner (subject to the "due regard" and accommodation doctrine) that is the right damaged or taken by the public entity. All value of the minerals is not destroyed until and unless all reasonable means of access have been prevented. The reasonable means of access, in this analysis, equates to economically viable enjoyment of the minerals. Under the impairment test adopted by the Texas Supreme Court in the *Mayhew v. Town of Sunnyvale* and *City of Deer Park* cases, a mere diminution in value will not be sufficient. There must be either a categorical taking or a near categorical taking before the taking rises to the level of compensability. Essentially this is the result in the *Haupt* case where the Court seemingly said that the accommodation doctrine requires that there be no reasonable alternative means of acquiring the minerals and the Court seemingly ignored the resulting economic impact which follows if the drilling must be directional and thereby more expensive. The Court of Appeals on remand reached its contrary result favoring the mineral owners finding the minerals to be almost entirely devalued.

The accommodation doctrine may only be an issue when the city or public entity is the owner of the surface. In the context of inverse condemnation of minerals due to impaired access, application of the accommodation doctrine will simply make an inverse condemnation claim that much harder to maintain. Given the powers afforded cities, the competing interests, rights and relationship between the public entity and the private property owner and the fact that a very significant diminution in value (or even a categorical taking) is required before there is any right

to compensation arises, the only the more obvious cases will be sustainable. Under a regulatory takings analysis, given the presumption of validity attending ordinances and the multiple hurdles to be cleared before compensation is available, the threshold may simply be too high. In the context of competing governmental uses, there will be few mineral cases in which property rights cannot in some way be accommodated through careful pre-planning.

e. Refinement of Accommodation Doctrine as Relates to Inverse condemnation under *Texas GenCo LP. V. Valence Operating Co*.[167]

The recent decision by the Waco Court of Appeals in the *Texas Genco* decision may begin to shed some light on how the interplay between the rights of the mineral owner to reasonable use of the surface or access to minerals, versus the rights of accommodation due to the surface owner will be resolved. The *Texas Genco* case involved a dispute arising out of Valence Operating Company's intention to drill a well on the surface of property that Texas Genco used for a Class II solid waste landfill regulated by the Texas Commission on Environmental Quality. Texas Genco, which owned the adjacent powerplant, was using the landfill to dispose of coal combustion byproducts and waste. Texas Genco had, in 1985, permitted the landfill in a series of predetermined clay lined cells that were to be filled to a permitted height and grade dependent upon the footprint of the landfill cell. They lands owned and existing oil and gas lease covering the minerals and the Texas Genco landfill and proposed to drill a well within the footprint of one of the predetermined cells that have not yet been filled. According to Texas Genco, it was anticipated that the cell would begin receiving waste in about 10 years. Texas Genco took the position that at the time the lease was entered into, it had a pre-existing use of the surface, by virtue of the landfill plan it had deed recorded in 1985.

Texas Genco requested that Valence directionally drill its proposed well from a location outside the footprint of any of the anticipated clay lined cells. Genco also gratuitously offered Valence $400,000 to compensate valence for the additional cost, that it would reasonably incur in drilling the well as a deviated wellbore rather than a straight hole. Valence declined Genco's offer, and after negotiations broke down and Valence started building a well pad at its proposed location. [168] Genco sought and received a temporary restraining order and temporary injunction and proceeded to trial.

At trial Genco submitted a prima facie case in support of its accommodation doctrine claim-i.e. that it had an existing use, that would be precluded or impaired by Valences proposed drilling activities, that Genco's only reasonable use of the property was as a landfill, and that valence at a reasonable industry accepted alternative method by which to recover its minerals. Much of the published opinion at this point has to do with the manner in which the case was submitted to the jury; however, the Waco Court of Appeals agreed with Genco that the jury's findings had established Genco's accommodation doctrine claim and Valences concomitant duty to accommodate Genco's surface use. The case is, however, currently the subject of a pending petition for review to the Texas Supreme Court, based upon a conflict in the jury verdict under the Court's submission.

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[167] 187 S.W.3d 118 (Tex. App. – Waco 2006, pet. Filed).

[168] TCEQ regulations did not necessarily require either notice of a special permit since the proposed action (i.e. drilling a well in the proposed surface location) would not have eliminated or modified a physical control (the clay landfill cell lining). TCEQ rules require notice and permit only if a "substantial change in circumstances results in an unacceptable risk to human health or the environment: 30 Tex.Admin.Code §350.35 (West 2006). In fact TCEQ has generally taken the position that even drilling through a clay liner is not a "substantial change in circumstances" necessitating agency action. *See* S. Zachas & H. Vandrovec, Environmental Issues Affecting the Oil & Gas Industry, Ch. 10. Adv. Oil, Gas and Energy Resources Law Course (Oct. 2006).

The Waco court of appeals opinion does, however, present a fairly reasoned approach to the accommodation doctrine issue. The Court evaluated evidence of the extent to which the proposed well would interfere with an existing use of the property by the surface owner, Genco. From the premise that the landfill constituted an existing use under accommodation doctrine law, the court concluded that the proposed well, would substantially impair Genco's reasonable use of the property. The court also concluded there was ample evidence to support the jury's finding that directional drilling is a reasonable, industry-accepted alternative under the circumstances. The court went on to evaluate whether the alternative was an economically viable and a reasonable one. In this connection, the court stated as follows:

> "[o]n the issue of the reasonableness of directional drilling as an economically viable alternative, which valence disputed because of the increased cost and alleged decreased yield, Genco presented evidence that valences cost estimates were too high. And that valence could extract all of the gas. Moreover, the evidence (testimony by Valence's, CEO and C00) showed that regardless of the costs and decreased yield, the projected 15 million to $25 million in gas reserves in homes. Number eight weren't valences directional drilling, regardless of the increased costs. In conclusion legally sufficient evidence supports the jury's answers to questions 1 and 1 (a.)."[169]

Significantly, the Waco court, upon determining that an economically viable alternative means existed by which Valence could access and produce its minerals concluded that Valence could be required to rely upon that reasonable alternative means to access its minerals, even if that economically viable means resulted in higher costs or reduced yields to Valence. The consequence of the foregoing is that Valence's access to the minerals was not unreasonably impaired and hence it was not entitled to compensation for the increased cost or reduced yields since the economically viable alternative means existed.

[169] Id. at 124-25.

In the context of inverse condemnation law implications of the *Texas Genco v Valence* case are significant. In the first instance, the Court of Appeals found the future use of a part of the land included within the overall landfill footprint as an existing use since it had been previously platted by recorded document. It is not a stretch to analogize the recorded plat to a recorded city master plan or regional development project. Moreover, the court made clear that the increased costs or diminution in recoveries in and of themselves would not eliminate the obligation to accommodate. In such instance, if the obligation to accommodate exists. There is no damage associated with the accommodation and, presumably in the inverse condemnation context. There would be no obligation to compensate for the fair market value of either the increased cost or reduced recoveries.

f. Damages for Inverse Condemnation

Once inverse condemnation is shown to have occurred, the issue of damages for the condemnation is always very much contested. The traditional rule is that damages in inverse condemnation cases are based upon the market value of the property taken at the time of the condemnation. When access is the issue, damages are often measured by comparing the market value of the affected property prior to condemnation to the market value of the property remaining after condemnation. The extent of the interests to be evaluated pre- and post-condemnation has been the subject of controversy. In the recent case *State v. Heal*,[170] the Texas Supreme Court has reaffirmed that damages for inverse condemnation are limited to the value of the property right damaged or destroyed. In *Heal* the State condemned a part of Heal's property in order to expand Dallas' North Central Expressway. The jury found that Heal was damaged by one amount for the value of the property taken and for a second amount for diminution of the value of the remaining property. The state appealed the diminution in value portion of the

[170] 39 Tex. Sup. Ct. Journal 221 (January 18, 1996).

judgment as being inconsistent with the long-established rule of condemnation damages. The Court held that constitutional "damage" is required for inverse condemnation and Heal must demonstrate that his access rights have been materially and substantially altered. Added inconvenience is not sufficient and extra traffic preventing a left turn unto Heal's property is not a physical obstruction under these facts.[171] Thus, damages for restriction of access to the remaining property were not allowed.

Given the Texas Supreme Court's holding that "street access" cases are inappropriate for use in cases involving mineral versus surface uses, the applicability of the Heal decision is subject to some question and the availability and measure of damages may be subject to further refinement. For instance, as drilling technologies improve (particularly directional drilling technology), use of directional drilling becomes more feasible both mechanically and economically. Directional drilling may, in turn, impact the reasonably anticipated recoveries (both as to rate and cumulative production per well) driving present values for future production up to offset increased drilling costs. The net result may be a substantially higher initial capital cost, but a relatively small impact on present value of future production. Logically, this analysis would go both to whether there has been a sufficiently significant and material impairment to constitute a taking and (assuming a taking did occur) also to the issue of condemnation damages.

The *Texas Genco v. Valence* case provides an opportunity for the Texas Supreme Court to weigh in on the extent to which surface accommodation might give rise to a right of compensation. Whether the court will use that case is an opportunity to enlarge the body of law relating to damages for impairment of mineral access is unclear; however, any ruling that deals with the central issue in the Texas Genco Court of Appeals opinion will at least provide some clarification as to the issues of existing use and alternative means.

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[171]*Id.* at 223; *see also Felts v. Harris County*, 39 Tex. Sup. Ct. Journal 218 (January 18, 1996) (related case similar holding); *but see Stevenson v. United States*, 33 Fed. Cl. 63 (Cl. Ct. 1995). ("Mere threat of flooding of property probably does not constitute taking under Texas law.").

V. **Conclusion**

Cites have broad powers to regulate activities within their jurisdictions, and those jurisdictional limits may extend substantially beyond the corporate limits of the city. Cities also acquire property for municipal uses that may be altogether incompatible with mineral exploration and development. A consequence of these factors is that mineral development in areas surrounding cities may be substantially more difficult and expensive than those same activities in rural areas. In some cases, mineral development is simply precluded which may or may not give rise to a right to compensation either for regulatory taking or inverse condemnation.

Taking under the regulatory takings doctrine has many similarities to inverse condemnation by restriction of access. Both involve a limitation on the private property owner's rights to use and enjoy property by virtue of limitations imposed for the benefit of the public. However, in a mineral law context there is at least one distinct, additional issue. A regulatory taking may or may not dispossess a private property owner; but, it necessarily entails the public entity taking for public use a right or interest exclusively owned by the property owner and not one "reserved" to the state at common law. By contrast, evaluation of inverse condemnation potential due to the restriction on access to property resulting from separate ownership and use of the surface of property by a governmental entity and private mineral ownership, entails balancing of separate concurrent ownership rights in possession of the surface. In such case, while there is little question that the governmental entity has the concurrent right to be in possession of the surface except to the extent the surface is reasonably necessary for use of the mineral estate, the mineral estate is the dominant estate. Likewise, there is little question that the accommodation doctrine requires the mineral owner in using the surface for mineral purposes to adopt reasonably available alternative means to accommodate existing use of the surface even if that means increases the expense of the mineral use. Analyzing the concurrent possessory rights from a regulatory takings perspective, the right or interest which must be taken (and which would not be a right reserved to the state) is the right to possession of so much of the surface as is necessary

for enjoyment of the minerals subject to the limitations imposed under the accommodation doctrine. That is to say, a taking of minerals occurs when that possessory right is so limited that all economically viable use of the minerals has been destroyed.

In this analysis it appears clear that the accommodation doctrine will be an issue only when the governmental authority is the surface owner. In cases of simple regulatory takings, there is no need to balance concurrent rights of possession; rather it is the entire right of enjoyment of minerals that is being impacted. Employing the accommodation doctrine as an overlay to the test under these circumstances creates an extremely high threshold for a taking of minerals. This approach is different in some ways from the traditional "access" analysis of inverse condemnation but appears more consistent with the result obtained in the Texas Supreme Court's conclusion in the *Haupt* decision.

Oil and gas exploration in urban areas requires a greater degree of planning and involves compliance with more levels of regulatory authority than is normally the case. Complications may exist which dramatically alter the economics of a prospect even when it is not within the city's limits. Prudence requires that operators fully familiarize themselves with these complications before engaging in exploration in urban areas. The extent to which regulation or municipal surface se may impact mineral activities without being compensable is not certain. But, what is certain is that the threshold is high, whether viewed as a traditional limited access inverse condemnation perspective or from the perspective of the regulatory taking doctrine.