EMINENT DOMAIN UPDATE

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LEGISLATIVE UPDATE

In reviewing the activities of the Texas Legislature with regard to eminent domain, what failed to pass is almost as significant as what did. A brief review of both the failed measures and those going forward is provided below.

1. "WE'RE JUST LIVIN' IN THE FUTURE AND NONE OF THIS HAS HAPPENED YET" – WHAT DIDN'T PASS

First, H.B. 1432 would have allowed a right of repurchase for property acquired by eminent domain if the project for which the property was acquired is canceled, there is no actual progress made toward the public use for which the property was acquired within five (5) years it its acquisition, or if the property would become unnecessary for the public use for which it was acquired. The proposed legislation would have required the condemnor to send notice of any of the events triggering the right to repurchase.

Second, a proposed amendment to the Texas Constitution was left pending in committee. This amendment would have asked the voters to add language to Article I, Section 17 of the Constitution requiring payment of relocation expenses in the acquisition of a homestead or farm such that the property owner would not only be fully compensated for the relocation but would also ensure that there is no impact to "property owner's standard of living immediately before the taking."

The mention of these two pieces of legislation is merely a side note, since neither made it to final adoption. That these two bills were introduced in the first place, however, may be significant. Time will tell if these concepts get any play in the next legislative session.

2. "I HAD SOME VICTORY THAT WAS JUST FAILURE IN DECEIT" – THE PROPOSED CONSTITUTIONAL AMENDMENT

The voters will be asked to decide next month a proposed amendment to Article I, Section 17 of the Texas Constitution. The proposed amendment would constitutionally limit the taking, damage or destruction of private property for public use if the taking, damage, or destruction is for the "ownership, use, and enjoyment" by a governmental body or entity with the power of eminent domain or for elimination of urban blight. Moreover, the proposed amendment specifically prohibits the taking of property for "transfer to a private entity for the primary purpose of economic development or enhancement of tax revenues." Finally, the amendment would require that the Legislature could only approve a grant of eminent domain power by two-thirds vote of each house. The full text of the proposed amendment is attached to this paper for your review.

CASES

1. "THERE'S TREASURE FOR THE TAKING, FOR ANY HARD WORKING MAN" -- TAKINGS FOR ECONOMIC DEVELOPMENT

In one of the more celebrated cases of the past few months, the Fort Worth Court of Appeals decided a case in favor of opulence and football, all in the name of economic development. In ***Cascott, L.L.C. v. City of Arlington*, 278 S.W.3d 523, (Tex. App. – Fort Worth 2009, pet. denied)**, the City of Arlington brought condemnation actions against a number of adjoining landowners to acquire land on which it would construct the new Dallas Cowboys' Stadium. The arrangement between the Dallas Cowboys and the City called for the City to own the stadium and lease it on a long term basis to the Dallas Cowboys. The landowners objected, arguing that the City's acquisition of the property by eminent domain violated Article 1, Section 17 of the Texas Constitution.

The Fort Worth Court of Appeals rejected their argument. The Court recognized the presumptive effect given to legislative declarations that a statutorily authorized use of property is for a public purpose. "[T]he [legislative] determination of public necessity is presumptively correct, absent proof by the landowner of the [condemning authority's] fraud or proof that the condemning authority acted arbitrarily or capriciously." *Id.* at 528, quoting *FKM Partnership, Ltd. v. Board of Regents of University of Houston System*, 255 S.W.3d 619, 629 (Tex. 2008). The Court recognized the indisputable fact that the Dallas Cowboys "stand to reap substantial benefits from the project. . . ." *Id.* at 529. Determining that the private benefit in this case was not the primary use, the Court stated: "[t]he mere fact that a private actor will benefit from a taking of property for public use, however, does not transform the purpose of the taking of the property, or the means used to implement that purpose, from a public to a private use." *Id.* at 529.

2. "THE PRICE YOU PAY" -- DISMISSAL OF A CONDEMNATION CASE.

Section 21.019 of the Texas Property Code provides that in eminent domain cases where a condemnor dismisses a condemnation proceeding, the property owner may recover reasonable and necessary expenses incurred, including attorneys fees. Several cases decided recently provide further interpretation of what constitutes a dismissal and what fees and expenses are recoverable after a dismissal.

In 2008, the Supreme Court frequently considered the issue of whether amendment of a condemnor's highway plan constitutes a dismissal of a case such that fees and expenses are owed the landowner under the Property Code. First, in ***PR Investments and Specialty Retailers, Inc. v. State*, 251 S.W.3d 472 (Tex. 2008)**, the State sought to condemn a .3407-acre strip from a property owned by PR Investments ("PRI"). The property in question was improved with an office complex and distribution facility and leased to Special Retailers, Inc. ("SRI"). The State's initial design plans for the project, the expansion of South Main Street (US 90A) in Harris County, called for the narrowing of the frontage road to a single lane at the entrance to the PRI remainder property. Following PRI and SRI's complaints about safety risks resulting from this plan, TxDOT devised a new plan calling for new signage and striping and the provision of a dedicated

deceleration lane and acceleration lane for vehicles entering and exiting the property. *PR Investments,* 251 S.W.3d at 474.

SRI, satisfied with the new plan did not attend the hearing, while PRI asked for additional damages based on the second plan. After the award, both PRI and the State filed objections to the commissioners' award. *Id*. Shortly before trial, TxDOT abandoned the second plan and returned to the initial plan without the acceleration or deceleration lanes. Both SRI and PRI argued that this reversion materially altered the compensation issues before the trial court and rendered the special commissioners' proceeding a worthless exercise. *Id*. The trial court ultimately dismissed the case without prejudice, holding that it lacked jurisdiction to proceed under the initial plan because it "deprived the Property Owners of greater rights and impost greater burdens on the remainder property than did the [second plan]". *Id.,* at 475. The trial court went on to award SRI and PRI all of their expert-witness and attorneys' fees and expenses for failing "to bring the proceeding properly," as a sanction for filing a frivolous claim under Texas Rule of Civil Procedure 13, and as discovery sanctions under Texas Rule of Civil Procedure 215. The Court of Appeals affirmed. *State v. PR Investments,* 132 S.W.3d 55 (Tex.App.--Houston [14th. Dist.] 2004, pet. granted). Sitting en banc, the Court of Appeals reversed the trial court's judgment and remanded the case for further proceedings, holding that while the State may have engaged in conduct warranting discovery sanctions, fees and expenses for dismissal under the Property Code were not properly awarded. *State v. PR Investments,* 180 S.W.3d 654, 663-64, 676 (Tex.App.--Houston [I4« Dist.] 2005, pet. granted).

The Supreme Court affirmed the ruling of the en banc Court of Appeals, holding in part that there is no requirement that all material facts relevant to damages remain static after the special commissioners have ruled for the trial court to retain jurisdiction over a condemnation case. *PR Investments and Specialty Retailers, Inc. v. State,* 251 S.W.3d at 476. *Citing* TEX. PROP. CODE ANN. § 21.012 (b) (2) (Vernon's 2008). The Court further noted that there is no statutory requirement that the condemnor even mention its plans for the condemned property beyond stating "the purpose for which the entity intends to use the property." *PR Investments* at 477. The remainder of the Court's opinion confirmed that the award of dismissal and fees and expenses was too severe for discovery sanctions and, recognizing that discovery sanctions may be warranted in this case, remanded the case for further analysis of that issue. *Id.* at 479.

In ***FKM Partnership, Ltd. v. Board of Regents of the University of Houston System, 255 S.W.3d* 619 (Tex. 2008)**, the Supreme Court considered an amendment of the actual amount of property being acquired by the condemnor, and the extent to which this causes an effective dismissal of a condemnation proceeding. In this case, PKM owned a tract of land adjacent to the University of Houston campus, which the University acquired for expansion purposes. The Special Commissioners awarded damages to FKM and FKM objected to the Commissioners' award. Thereafter, the University reduced the size of its proposed acquisition by amendment of its pleadings, ultimately reducing the proposed acquisition to 1,260 square feet (a reduction of about ninety-seven percent). *FKM Partnership,* 255 S.W.3d at 624-625. FKM filed a motion to dismiss the condemnation action. At the hearing, FKM argued that the case should be dismissed because there was no Board of Regents resolution to acquire the smaller tract (and thus no right to take) and because the University had divested trial court of jurisdiction by belatedly seeking to amend its taking, and doing so after the Special Commissioners had

considered the value of the larger tract. *Id.* at 625. The trial court granted FKM's motion to dismiss and awarded fees and expenses as well as damages for temporary possession of FKM's property under §§ 21.019(e) and 21.044 of the Texas Property Code. The Court of Appeals reversed, holding that the trial court retained jurisdiction as to the smaller tract but remanded for a determination of fees and expenses incurred in relation to the ninety-seven percent of the larger tract no longer sought to be condemned. *Board of Regents of the University of Houston System v. FKM Partnership, Ltd.*, 178 S.W.3d 1, 9 (Tex. App.-Houston [14th. Dist.] 2005, pet. granted).

The Supreme Court, relying on the recently-decided *PR Investments* case, held again that the trial court's de novo proceeding is not limited to the exact compensation facts and issues presented to the commissioners. *FKM Partnership*, 255 S.W.3d at 625, citing *PR Investments*, 251 S.W.3d at 475. FKM argued that *State v. Nelson*, 160 Tex. 515, 334 S.W.2d 788 (1960) and *Texas Power & Light Co. v. Cole*, 158 Tex. 495, 313 S .W.2d 524 (1958), stand for the proposition that an amendment to the taking by the condemnor will only be allowed where it does not prejudice the landowner. Noting that it does not consider a situation where the condemnor amends its petition to increase the size of the taking, the Court acknowledged the language in *Cole* and *Nelson*, but dismissed the argument by reasoning that a landowner would not ordinarily be harmed when a condemnor decides to take less, because the landowner gets to keep the land it did not want to sell in the first place. *FKM* at 626-627. The Court notes later that where the condemnor physically alters the land or permanently injures or changes it during possession, that the landowner might be prejudiced upon subsequent amendment of the taking. But here, the Court concludes that the amended taking does not prejudice FKM. *Id.* at 628. Finally, the Court echoes its holding in *PR Investments* that where there is a change in compensation issues that does not require dismissal, the Court has no discretion (that would be observed upon appeal) to dismiss. *Id.*

Seeking to avoid a situation where "a condemning authority could artfully amend its petition to condemn only an extremely small fraction of the original area sought and avoid liability for fees and expenses under § 21.019 of the Texas Property Code," the Court went on to affirm the Court of Appeals' award of fees and expenses as to the "dismissal" of the ninety seven percent of the property amended out of the taking. *Id.* at 636. The Court proposes a "common-sense" approach whereby an award of fees and expenses for this kind of partial dismissal does not turn on the wording of a pleading or whether a hearing is held, but instead, on case-specific factors such as whether the planned use of the smaller tract significantly differs from the original tract sought, whether there are different uses of the tract, as well as the size of the tracts. *Id.* at 634, 637. Rather than impose a "bright line," the Court holds that on these facts, the University effectively abandoned its original claim, leaving FKM entitled to fees and expenses under the Property Code for those fees and expenses it would not have incurred had the smaller tract been sought originally instead of the larger tract. *Id.* at 637.

In ***State v. Brown*, 262 S.W.3d 365 (Tex. 2008),** the Supreme Court considered whether an amendment to the State's petition in condemnation eleven days before trial (and well after the special commissioners' hearing) that did not change the actual land taken but

significantly altered the access allowed to the remainder of the subject property after the take constituted an effective dismissal under Sections 21.019 and 21.0195 of the Property Code. The basic question the Court faced was: is this case closer to *PR Investments* (no dismissal) or *FKM Partnership* (dismissal of most of the original proceeding)? *Brown,* 262 S.W.3d at 370.

In *Brown,* there was no change in the amount of land acquired, but the property's access (and only access) to the IH-35E frontage road was reduced from two and a half driveways to one driveway. The trial court allowed the amendment eleven days before trial and the jury rendered its verdict. The Fort Worth Court of Appeals, relying in part on *State v. Nelson,* 334 S.W.2d at 790, held that the significant change in access so late prejudiced Brown's ability to effectively use his experts. Accordingly, the Fort Worth Court reversed and remanded the case to the trial court. *Brown v. State,* 984 S.W.2d 348, 350-351 (Tex. App. - Fort Worth 1999, pet. denied). On remand, the case was retried to a jury given the changed access, and the Court awarded fees and expenses to Brown for the functional dismissal of the first case, which the State appealed. Relying heavily on the Houston Court of Appeals decision in *PR Investments,* the Fort Worth Court of Appeals affirmed the trial court's award of fees and expenses. *State v. Brown,* 158 S.W.3d 68, 72-73 (Tex. App..-Forth Worth 2005, pet. granted). The Fort Worth Court noted that the effective result of the State's late amendment was the reversal and remand of the case which created the policy situation that the legislation was designed to minimize, the necessity to try two very expensive cases because of an error in the bringing of the case by the condemnor. *Id.* at 70-72.

The Supreme Court, hearing this dismissal case on the heels of *PR Investments,* reached the predictable conclusion that the "operative facts in this case are strikingly similar to those in *PRI* but not *FKM." Brown,* 262 S.W.3d at 370. The Court, relying on the fact that the State amended its pleadings to seek the same land it sought to condemn in its presentation to the special commissioners with just a different configuration, reversed and rendered the trial court's award of fees and expenses due to a functional dismissal of the case. *Id.* The Court also again affirmed that even though the amendment occurred eleven days prior to trial, it was only a procedural trial error, and not a jurisdictional error under Sections 21.019 and 21.0195 of the Texas Property Code. *Id.* at 369-370.

Texas Courts of Appeals have considered two other important cases focusing on the dismissal of a condemnation proceeding. In ***Harris County Hospital District v. Textac Partners I,* 257 S.W.3d 303 (Tex. App. - Houston [14th. Dist] 2008, no pet.),** the Court of Appeals reversed a trial court's order of dismissal based on the Hospital District's right to take. The order was rendered after a two day hearing in which attorneys for both parties presented legal arguments as to the legal effect of the evidence submitted by both parties in support of and in opposition to Textac's Motion to Dismiss. *Id.* at 313. The evidence presented addressed whether the Hospital District had the right to take because it acted fraudulently, in bad faith, or arbitrarily and capriciously. *Id.* at 316-317. Textac argued that its motion to dismiss did not raise a jurisdictional challenge, but instead sought to dismiss the case on the merits for failure to prove the right to condemn. Further, it asserted that findings of fact necessary to support the conclusion reached by the trial court should

be implied on appeal (as the Hospital District did not request findings of fact), such that the findings of fact and legal conclusions reached by the trial court should be reviewed for legal and factual sufficiency. *Id.*, at 311, citing *Brocail v. Anderson,* 132 S.W.3d 552, 556 (Tex. App. - Houston[14th. Dist.] 2008, pet. denied).

The14th Court of Appeals rejected Textac's argument, ruling that Textac's motion to dismiss was functionally equivalent to a motion for summary judgment and the dismissal hearing was effectively a summary judgment hearing. Thus the Court reasoned that the review of the trial court's decision should be de novo, with summary judgment appropriate where there is no genuine issue as to any material fact such that judgment should be granted to movant as a matter of law. *Textac Partners,* 257 S.W.3d at 315, citing *Natividad v. Alexsis, Inc.*, 875 S.W.2d 695, 699 (Tex. 1994). Ultimately, the Court held that Textac failed to demonstrate as a matter of law that the Hospital District's condemnation action was founded in fraud or was arbitrary and capricious, and reversed the order of dismissal and remanded for trial of the condemnation case. *Textac Partners,* 257 S.W.3d at 320.

3. "THIS HARD LAND" -- DEFINING COMPENSABLE PROPERTY INTERESTS

Texas Courts are often evaluating and re-evaluating what property rights are compensable in the context of an eminent domain proceeding. These cases help to determine when a property right is compensable.

***AVM-HOU, Ltd. v. Capital Metropolitan Transportation Authority,* 262 S.W.3d 574 (Tex. App, Austin 2008, no pet.)**, involved the whole taking of a property leased by AVM-HOU for the operation of an adult video store. AVM-HOU, seeking to relocate its business, discovered that due to the zoning required to operate an adult-oriented business, it would not be allowed to relocate. It brought an inverse condemnation claim (separate from the statutory claim brought by Capital Metro), seeking compensation for the taking of its business (the value of the business, its good will, and lost profits). The Court noted that a landowner or lessee may recover lost profits in a case involving a partial taking, where the government's additional act (usually restriction of access) related to the taking impairs the business as it attempts to operate on the remainder property. *AVM-HOU*, 262 S.W.3d at 578-579, citing *City of Austin v. Avenue Corp.*, 704 S.W.2d 11, 13 (Tex. 1986). The Austin Court approached a whole taking differently, and instead held, as a matter of law, that there is no cause of action in Texas for inverse condemnation to recover for the loss of a business in the case of a total taking. *AVM-HOU*, 262 S.W.3d at 586. Summarizing the issues faced by the Courts in determining which property rights are compensable, the Court quotes *Reeves v. City of Dallas,* 195 S.W.2d 575 (Tex. Civ. App. -- Dallas 1946, writ ref d n.r.e.): "business rights and all other consequential rights incident to possession of physical properties ... must be subservient to the public's right of eminent domain." *Id*. at 584.

In ***Canyon Regional Water Authority v. Guadelupe-Blanco River Authority,* 258 S.W.2d 613 (Tex. 2008)**, the Supreme Court addressed again the "paramount public interest test" employed when a condemnor seeks to condemn property already dedicated to another public use. Here, the Water Authority sought to condemn an easement on Lake Dunlap to expand its existing water intake facilities. The River Authority, who

maintained Lake Dunlap for the public's recreational use, argued that such an easement would practically destroy the existing public use of the lake. *Id.* at 617. When a public entity seeks to condemn property already dedicated to another public use, the condemnee with authority over the property to be condemned, to prevent the condemnation, must show that the new condemnation would practically destroy the public use to which it has been devoted. *Sabine E. & T Railway Company v.* Gulf *& I Railway Company of Texas,* 92 Tex. 162, 46 S.W. 784 (1898). If the condemnee can show that the condemnation would practically destroy the exiting public use, then to succeed with the condemnation, the condemnor must show that its public necessity is so great as to make the new enterprise of paramount importance to the public, which cannot be accomplished in any other way. *Id.* at 786-787. The Court of Appeals found that the Water Authority's proposed new intake structure will result in practical destruction of part of the lake's existing public use. *Guadelupe-Blanco River Authority v. Canyon Regional Water Authority,* 211 S.W.3d 351, 357-358 (Tex. App. -- San Antonio 2006, pet. granted).

The Supreme Court, noting that newly created easement would only restrict access to less than one half of one percent of Lake Dunlap's total surface area, due to an existing intake easement that could be overlapped, found that there would be no practical destruction of the existing recreational use and reversed and remanded the case to the trial court to consider condemnation damages. *Canyon Regional Water Authority,* 258 S.W.3d at 619. Though the Supreme Court did not reach the issue of paramount public use, it was clearly influenced by the hierarchy of public uses listed in Texas Water Code § 11.024. Domestic or municipal uses, including public water, were listed in the Water Code as uses to be given the greatest preference while recreational uses were to be given lesser preference. *Canyon Regional Water Authority,* 258 S.W.3d at 619.

Two other Court of Appeals cases speak to the compensability of certain property rights "taken" for a public use. In ***Brownlow v. State,* 251 S.W.3d 756 (Tex. App. - Houston [14th. Dist.] 2008, pet. granted)**, the Houston Court of Appeals ruled that a landowner has a right to excavated soil within an easement acquired by a condemning authority. In this case, the property owner signed an agreed judgment granting the State a permanent easement for the purpose of constructing a detention pond. The judgment and easement were silent as to the excavated soil. When the State excavated the pond, and hauled off the excavated soil, the property owner complained that the excavated soil was not part of the permanent easement, and filed a claim for inverse condemnation for the value of the soil. The trial court granted the State's plea to the jurisdiction, and this appeal followed. The Court of Appeals reversed the trial court's grant of the State's plea, finding that the property owners had a property interest in the soil that was not extinguished by either the State's petition for condemnation of the easement or agreed judgment signed by the parties. *Id.* at 762.

The Austin Court of Appeals faced a similar argument, albeit with a twist, in ***Block House Municipal Utility District v. City of Leander,* 291 S.W.3d 537 (Tex. App. – Austin 2009, no pet.)**. The City of Leander sought to acquire a wastewater easement across parkland dedicated by the Block House Municipal Utility District. In attempt to prevent the City's acquisition of the wastewater line, the MUD argued not only the paramount public purpose, but also asserted that Section 26.001 of the Texas Parks and Wildlife Code required the City to make

a specific finding that no feasible and prudent alternative to the taking existed. Without specifically addressing whether a "feasible and prudent alternative" existed, the Court indicated that such a determination was subject to judicial review only upon a showing of fraud, bad faith, or arbitrary and capricious action on the part of the City. The Court analogized the determination to the determination required of every municipal action in eminent domain by Section 251.001 of the Texas Local Government Code that the City "considers it necessary." Once the city meets that burden, a presumption of necessity arises and the fact of necessity can only be challenged by a showing of fraud, bad faith, or arbitrariness. *Id.* at 540, citing *Whittington v. City of Austin*, 174 S.W.3d 889, 898 (Tex. App. – Austin 2005, pet. denied).

Conversely in ***Hollywood Park Humane Society v. Town of Hollywood Park*, 261 S.W.3d 135 (Tex. App. - San Antonio 2008, no pet.)**, the San Antonio Court of Appeals held that a property owner, as a matter of law, did not have a property right in wild deer that were kept as pets and fed using an outdoor feeder. In this case, the town of Hollywood Park instituted a deer maintenance policy that resulted in the elimination of overpopulated deer. As part of a lawsuit by the local humane society, Scott, a local property owner, filed an inverse condemnation suit, claiming a vested property right in the deer. Generally, no vested property interest exists in wild animals. *State v. Bartee*, 894 S.W.2d 34, 41 (Tex. App. - San Antonio 1994, no pet.). However, property rights in wild animals can arise when an animal is legally removed from its "natural" liberty and subjected to "man's dominion." *Nicholson v. Smith*, 986 S.W.2d 54, 60 (Tex. App. -- San Antonio 1999, no pet.). Whether this has occurred is determined by whether the animal has been reduced to a possession, by placing it under man's dominion and control. *Bartee*, 894 S.W.2d at 41-42. The Court relied upon a Texas Parks and Wildlife statute precluding an individual from capturing, transporting, or transplanting any game animal from the wild without a permit. TEX. PARKS AND WILDLIFE CODE ANN. § 43.061(a) (Vernon 2002). Accordingly, the Court ruled that the evidence was sufficient as a matter of law to support the trial court's finding that Scott never obtained a property interest in the deer through capture, and that he never obtained a permit that would have allowed him to confine the deer. The trial court's grant of the Town's plea to the jurisdiction was affirmed. *Hollywood Park Humane Society*, 261 S.W.3d at 141.

***Edwards Aquifer Authority v. Day*, 274 S.W.3d 742 (Tex. App. -- San Antonio (2008) pet. filed),** reversed a trial court's grant of summary judgment of an inverse condemnation claim for compensation for the Edwards Aquifer Authority's appropriation of groundwater belonging to Day. In this case, the Court affirmed that Day had some ownership right in the groundwater beneath his property. *Day*, 274 S.W.3d at 756, citing *City of Del Rio v. Clayton Sam Colt Hamilton Trust*, 2008 WI., 508682, *4 (Tex. App. - San Antonio Feb.27 2008, no pet.); and *Houston T. & C. Railway Company v. East*, 98 Tex. 146, 81 S.W.279, 281 (1904). Because, Day had some ownership right in the groundwater he was entitled to constitutional protection. *Day*, at 756, citing *Subaru of America, Inc. v. David McDavtd Nissan, Inc.*, 84 S.W.3d 212, 219 (Tex. 2002).

Finally, in ***Southwestern Bell Telephone, L.P. v. Harris County Toll Road Authority*, 282 S.W.3d 59 (Tex. 2009)**, the Texas Supreme Court denied the telephone company's claim for expenses related to the relocation of its facilities to allow the construction of a toll road project. The Texas Supreme Court indicated the long established rule that a utility company forced to

relocate from a public right-of-way must bear the cost of such relocation. *Norfolk Redevelopment and Housing Authority v. Chesapeake & Potomac Telephone Company,* 464 U.S. 30, 34, 104 S. Ct. 304, (1983). Moreover, unless the state specifically assumes part of the expense, utility companies can clearly be "required to remove at their own expense any installations owned by them and located in public rights of way whenever such relocation is made necessary by highway improvements." *Southwestern Bell* at 62, quoting *State v. City of Austin*, 160 Tex. 348, 331 S.W.2d 737, 741 (1960). While Southwestern Bell argued that telephone utilities should be treated differently, the Supreme Court noted that Southwestern Bell was a respondent in the *City of Austin* case, supra.. *Id.* at 63.

4. "PAY ME MY MONEY DOWN" -- COMPENSABLE INTERESTS IN BILLBOARDS.

Billboard decisions continue to be a hot topic in eminent domain law. The following is a summary of recent cases involving billboard takings.

Three Houston cases involving Clear Channel each center around the condemnor's assertions that billboards are personal property as a matter of law, and that therefore, trial courts lack jurisdiction to hear takings claims for compensation. All three cases involve the taking of a leasehold interest owned by Clear Channel. In all three cases, the condemnor offered compensation for Clear Channel's leasehold interest, and Clear Channel sought additional compensation for its interest in the billboard as a realty interest. The courts considered the compensation available to a billboard company suffering a taking of its billboard. First, in ***Harris County Flood Control District* v. *Roberts*, 252 S.W3d 667 (Tex. App. - *Houston* [14th. Dist.] 2008, no pet.),** the Court rejected the District's claim that Clear Channel's billboard was personal property as a matter of law, and affirmed the trial court's award of compensation for the billboard sign structure. In this case, the Court reached its determination about the characterization of the sign structure through an analysis of the intent of the property interest owner made apparent by objective manifestations. *Logan v. Mullis,* 686 S.W.2d 605, 607-608 (Tex. l985). The Court of Appeals, reviewing the trial court's decision for legal and factual sufficiency, looked at evidence of Clear Channel's intent regarding the billboard structure. Ultimately, the Court held that the evidence could support a finding that the billboard was a fixture, the taking of which should be compensated in an eminent domain case. *Roberts*, 252 S.W.3d at 672, citing *Brazos River Conservation and Reclamation District v. Adkisson,* 173 S.W.2d 294, 297-301 (Tex. Civ. App. -- Eastland 1943, writ ref'd).

In ***Harris County v. Clear Channel Outdoor, Inc.*, 2008 WL 1892744 (Tex.App. — Houston [1st. Dist.] Apr. 29, 2008, no pet.)**, the Court also affirmed the trial court's judgment awarding Clear Channel damages for loss of its leasehold interest as well as its billboard sign structure. In this case, however, the Court decided the case based on the Fifth Amendment to the United States Constitution. Citing *Almota Farmers Elevator and Warehouse Company v. United States,* 409 U.S. 470, 473-477, 93 S.Ct. 791, 794-798, 351-Ed. 1 (1973), the Court noted that the government cannot refuse to provide fair compensation for business improvements that are taken and dismiss the improvements as worth no more than scrap value with no intention of using them. *Clear Channel* at *4, citing *Almota*, 409

U.S. at 475, n. 2 93 S.Ct. at 795 n.2. Further, the Court noted that the condmenor cannot take advantage of an agreement between a lessor and a lessee designating an improvement made by the lessee as personal property. *Id.* at 477, n. 5. In this case, the 1st Court of Appeals held that the *Logan* test cited in *Roberts* does not apply to condemnation proceedings, noting that no case employing the *Logan* test involved a condemnation proceeding. *Clear Channel* at *4, n. 3.

Finally, in ***State v. Clear Channel, Inc.*, 274 S.W.3d 162 (Tex. App. - Houston [1st. Dist.] 2008, no pet.)**, the trial court again held that the condemnor could not prove, as a matter of law, that Clear Channel's billboard was personal property, and denied the State's plea to the jurisdiction. In affirming, the First Court of Appeals again relied on *Almota* and *Adkisson,* and rejected the *Logan* test as being inapplicable to condemnation claims. *Clear Channel, Inc.*, at 165, citing *Harris County v. Clear Channel Outdoor, Inc.*, 2008 WL 1892744 at *4 n. 3 (Tex.App. Houston [14th. Dist.] 2008, no pet.).

Conversely, the Fort Worth Court of Appeals in ***City of Argyle v. Pierce*, 258 S.W.3d 674 (Tex. App. - Fort Worth 2008, pet. filed)**, held that whether a billboard is a fixture is a question of fact to be determined under the *Logan* test. *Pierce*, 258 S.W.3d at 683. In reversing the trial court's denial of the City's plea to the jurisdiction, the Court held that the billboard company failed to provide evidence that the sign was a fixture. With no evidence to guide it, the Court reversed the ruling of the trial court and granted the City's plea to the jurisdiction, holding that the billboard sign was non-compensable personal property. *Id*. at 683.

In ***Dallas County Community College District v. Clear Channel Outdoor, Inc.*, 2008 WL 3307085 (Tex. App. Dallas 2008, pet. granted)**, the Dallas Court of Appeals considered an inverse condemnation case involving a sign company's compensable property interest in a leasehold and billboards under a lease with both a termination clause and a condemnation clause. The evidence in the case was that the sign company had a billboard lease with the property owner. The lease provided that a bona fide purchaser could terminate the lease upon notice to the sign company, but it also provided that a condemnation award for a leasehold interest and for the structures would accrue to the sign company. The landowner was approached by the District, and asked if he would be inclined to voluntarily sell the property, but also warned that without agreement, it would "begin moving to acquire [the] land through eminent domain." *Clear Channel Outdoor*, 2008 WL 3307085 at *1-2. The District ultimately purchased the property through a voluntary sale and invoked the termination clause against the sign company. The sign company sued for inverse condemnation, and the trial court denied the District's motion for summary judgment and awarded damages to the sign company pursuant to the lease condemnation clause. *Id.* at *2. The Dallas Court of Appeals reversed and rendered, ruling that because the District did not compel the transfer of the property, it was within its rights as a bona fide purchaser to terminate Clear Channel's lease.

The Supreme Court faced a unique argument for compensation from the taking of a billboard in ***State v. Central Expressway Sign Associates*, 2009 WL 1817305 (Tex.), 52 Tex. Sup. Ct. J. 978**. In response to a condemnation action to acquire a billboard easement, the

sign company argued that billboard advertising revenues should be included in the analysis of fair market value of the billboard easement being acquired. The Supreme Court rejected the sign company's argument pointing out that Texas law only allows the income approach to be considered when the taking causes a material and substantial interference with access to the property or when only a part of the land is being taken, so that lost profits may demonstrate the effect on the market value of the remaining property. The Court reasoned that the application of this rule is supported for "two reasons: first, because profits from a business are speculative and often depend more upon the capital invested, general market conditions, and the business skill of the person conducting it that it does on the business's location; and second, because only the real estate and not the business has been taken and the owner can presumably continue to operate the business at another location." *Id.* at 3.

5. "HIDING ON THE BACKSTREETS" – LOST AND DIMINISHED ACCESS

In ***State v. Dawmar Partners, Ltd.*, 267 S.W.3d 875 (Tex. 2008),** the Supreme Court held that a taking which eliminated access to a public highway but retained or created access to arterial roads caused no material and substantial denial of access. The property involved in *Dawmar* was a large vacant tract with access to FM 1695, a major thoroughfare in Hewitt, Texas. After the taking, the property lost its direct access to FM 1695, because the plans called for the roadway to be elevated. The remainder of the property retained 2,165 feet of access to Old Ritchie Road and acquired 1,827 feet of access to New Ritchie Road. Both thoroughfares carry far less traffic than FM 1695, but both roadways intersect FM 1695 at or near the point where the remainder fronted the highway. The landowner's appraiser testified at trial that a 30-acre economic unit fronting on FM 1695 had a highest and best use of commercial before the taking (with the rest of the whole property being residential). After the taking, all but three acres of the commercial unit, due to the loss of direct access to FM 1695, change to a highest and best use for residential development, resulting in damages based on the difference between the before and after valuations of the economic unit for different highest and best uses.

In its analysis, the Waco Court of Appeals focused on the evidence presented by the landowner regarding the change in highest and best use of the property, of which the denial of access is only one factor. The Waco court noted that in *Interstate Northborough Partnership v. State*, 66 S.W.3d 213, 223-224 (Tex. 2001), the Supreme Court allowed an award of damages based on the landowner's evidence of unsafe access, in a case where the impairment of access may not have been material and substantial. Accordingly, the Waco court upheld the trial court's award of damages for loss of access.

The Supreme Court rejected this approach in its opinion, couching the landowner's argument as a claim that access is materially and substantially impaired, as a matter of law, when loss of access changes the highest and best use of the property. "If we were to accept this position," the Court stated, "it would be a rare case in which a reduction of access would not have some impact on the value of property, and the 'material and substantial' limitation would be effectively eliminated in the vast majority of cases, contrary to our body of impaired access law." *Dawmar,* 267 S. W. 3d at 878 *citing State v. Schmidt*, 867 S.W.2d 769, 774 (Tex.1993); *Archehold Auto Supply Company. v. City of Waco*, 396 S.W.2d

111, 114 (Tex.1965); *Texland Corporation v. City of Waco,* 446 S.W.2d 1 (Tex. 1969). The Supreme Court's approach does not examine whether there was ample evidence to support the landowner's opinion of damages (i.e. whether there was sufficient evidence that the highest and best use of a large portion of the property changed from commercial to residential). The Supreme Court held, therefore, that because the remainder tract retained access to some Old Ritchie and New Ritchie Road, there was no material and substantial impairment of access, and remands the damages issue in light of its opinion.

The Supreme Court does not base its opinion on *Interstate Northborough,* on which the Court of Appeals seems to rely, but rather focuses on *County of Bexar v. Santikos,* 144 S.W.3d 455, 459 (Tex. 2004) and *State v. Delany,* 197 S.W.3d *297,* 300 (Tex. 2006), two other recent Supreme Court cases. Like the properties in *Santikos* and *Delany,* the Dawmar property was vacant, and the Court emphasizes its vacant condition and current zoning for residential use. *Citing Delany, Santikos* and *Schmidt,* the Court emphasizes that in those cases, like this one, any development plans of these vacant tracts are "hypothetical,...remote, speculative and conjectural." *Dawmar,* 267 S.W.3d at 879.

The Texas Supreme Court followed its own lead in *Dawmar* in its opinion in ***State v. Bristol Hotel Asset Company,* 2009 WL 1383717 (Tex.), 52 Tex. Sup. Ct. J. 751**. In Bristol, the State condemned 0.107 acres of a 5 acre hotel property for roadway purposes. The taking and subsequent road project effectively left the hotel with only one of its original three entrances. Testimony at the trial of the case also indicated that the hotel lost approximately 80 of its 380 parking spaces. The hotel sought temporary damages for loss of use of some parking spaces and permanent damages for the reduced access by way of lost driveways.

The Supreme Court rejected both arguments. Standing on its reasoning in *Dawmar*, the Court held that a "partial and temporary disruption of access is not sufficiently 'material and substantial' to constitute a compensable taking." *Id.* at 2, *citing City of Austin v. The Avenue Corporation,* 704 S.W.2d 11, 13 (Tex. 1986). Furthermore, any disruption in the use of the property during the construction of the property is not compensable. Finally, the Court answered the hotel's argument for loss of parking spaces by stating that "the partial, temporary loss of some parking spaces on Bristol's remainder property was not sufficiently material and substantial to qualify as compensable condemnation damages." *Id.* at 2.

In ***Burris v. Metropolitan Transit Authority of Harris County.*, 266 S.W.3d 16 (Tex. App.-Houston [1st. Dist.] 2008, no pet),** the 1st Court of Appeals upheld the trial court's grant of Metro's motion for summary judgment because the changes to the property's access as a result of a Houston light rail project did not amount to a material and substantial impairment of access. The subject property in this case was a commercial property with a building used in Burris' business, the sale of wheelchairs and motorized scooters to disabled persons. Before the taking, the property had two-way access to San Jacinto Street (a major downtown thoroughfare) and two-way access to Wichita Street (a much-less traveled smaller roadway). The light rail taking converted the access to egress only on San Jacinto, with the same two-way access to Wichita Street. Despite evidence that Wichita (the only thoroughfare from which the property could be accessed after the taking) carries *97.5%* less traffic than San

Jacinto and that access to the property from traffic coming off San Jacinto onto Wichita would be impossible if more than one car is waiting at the light at Wichita, the Court affirmed the trial court's grant of Metro's summary judgment motion. Because the property retained *some* access - from San Jacinto via Wichita - the Court found, as a matter of law that the impairment here did not rise to the level of material and substantial. *Id.*

In ***City of Dallas v. Zetterlund,* 261 S.W.3d 824 (Tex. App.-Dallas 2008, pet. granted),** the property owner had an undeveloped tract on Harry Hines Boulevard in Dallas. The City of Dallas used Zetterlund's tract as a staging area without compensation. The claim for an inverse taking of the staging area survived the City's plea to the jurisdiction. After Zetterlund complained of dumping on his tract, the City constructed a berm eliminating the access used by Zetterlund and limiting the overall access to the property. The Court, in affirming the trial court's grant of the City's plea to the jurisdiction as to the access damages, noted that after the constriction of the berm, the property still had 500 feet of frontage on which Zetterlund could construct a driveway. Citing *Santikos*, 144 S.W.3d at 460, the Court opined that "impairment of access is difficult to prove when the property in question has no businesses, no homes, driveways or improvements of any kind." *Zetterlund*, 261 S.W.3d at 834.

Compare, however, some of these more recent cases. In ***State v. Harrell Ranch, Ltd.*, 268 S.W.3d 247 (Tex. App.---Austin, no pet.)**, part of the Harrell Ranch cattle-ranching facility no longer abutted the public roadway (FM 969) following acquisition of property by eminent domain. After the taking, Harrell Ranch used driveways to access FM 969 over state property, and evidence showed that it was physically possible to access the public roadway using those driveways after the taking. The Austin Court found that a material and substantial denial of access existed because the relevant portions of the Harrell Ranch property had *no right of* access regardless of whether existing driveways made it physically possible. Citing *Creighton v. State, 366* S.W.2d 840, 843 (Tex. Civ. App.-Eastland 1963, writ ref d n.r.e.), the Court noted the presumption is that the State will exercise its rights and use and enjoy the property taken to the full legal extent. In *Harrell Ranch,* the Court also held that where a total temporary denial of access occurs, lost profits of the business are recoverable, and that lost profits are still recoverable even when the business is winding down or ceasing to operate, as long as the business would have continued during the period for which lost profits are sought, but for the impairment of access. *Harrell Ranch* 254, *citing Huckabee v. State*, 431 S.W.2d 927, 930 (Tex.Civ.App.-Beaumont 1968, writ ref d n.r.e.). *Harrell Ranch* also contains some important findings on damages: that lost profits and diminution of value of the remainder may both be recoverable in the same case, *Harrell Ranch* at 259, and that a jury can combine damage allocation methods and values of experts to create a range of reasonable jury verdicts. *Id.*

6. "DO WHAT YOU LIKE, BUT DON'T DO IT HERE" – REGULATORY TAKINGS.

A compensable regulatory taking occurs when a governmental agency imposes restrictions that either deny a property owner all economically viable use of his property or unreasonably interfere with the owners right to use and enjoy the property. *City of Dallas v. Blanton,* 200 S.W.3d 266, 271 (Tex.App.-Dallas 2006, no pet.), citing *Mayhew v. Town*

of Sunnyvale, 964 S.W.2d 922, 928 (Tex.1998). The first set of cases reviewed here consider the threshold issue of ripeness: what is necessary for a plaintiff to state an inverse condemnation claim based on a regulatory taking. The second set of cases presents different scenarios, with the courts determining if the facts amount to a regulatory taking by a governmental entity.

For a regulatory takings claim to be ripe, there must be a final decision regarding the application of the regulation to the property at issue. *Mayhew,* 964 S.W.2d at 929, citing *Williamson County Regional Planning Commission v. Hamilton Bank*, 473 D.B. 172, 186, 105 S.Ct. 3108, 3116, 87 L.Ed.2d 126 (1985). A final decision usually requires both a rejected development plan and the denial of a variance from the controlling regulation. *Id.* In ***City of El Paso v. Maddox*, 276 S.W.3d 66, (Tex. App. - El Paso 2008, no pet.)**, landowners filed an inverse condemnation claim after a planned medical office development became impossible due to changes an amended zoning ordinance. The court of appeals reversed the trial court's ruling on the City's plea to the jurisdiction finding that the landowners' case was not ripe because, according to undisputed evidence the City had not rejected a development plan for the property. The evidence was that although the landowners had a development plan at one time, it was abandoned before the zoning ordinance was amended. *Maddox* at 71-72. The landowners argued that their claim was ripe because submission of a development plan and efforts to seek a variance would have been futile. *Id.,* citing *Mayhew,* 964 S.W.2d at 925*; Mallco Texas Inc. v. McMullen County,* 221 S.W.3d 50 (Tex. 2006). The *Maddox* court found these cases distinguishable. In *Mayhew,* the town of Sunnyvale actually rejected the initial and modified proposal submitted by the landowners. The Court also noted that the landowners spent over $500,000 and over a year in negotiations, in ruling that further pursuit of the development plan or a variance would be futile. *Maddox* at 71, citing *Mayhew,* 964 S.W.2d at 927.

Conversely, in ***City of Sherman v. Wayne*, 266 S.W.3d 34 (Tex. App. -- Dallas 2008, no pet.)**, the court upheld the trial court's ruling that Wayne's claim was ripe when he sought a zoning change and a special use permit to allow him to use the former national guard property he purchased (which had been re-zoned residential) for a truck driving school. The court also found that evidence that it would cost more money per lot to develop the property for residential use than could be recovered by sale of the lots was sufficient to support the jury's finding that the property had no value after the application of the zoning ordinance and that therefore a regulatory taking occurred.

In ***Texas Bay Cherry Hill, L.P. v. City of Fort Worth*, 257 S.W.3d 379 (Tex. App. - - Fort Worth 2008, no pet.)**, the court considered an inverse condemnation claim for regulatory taking. In this case, the owner of an apartment complex targeted for redevelopment under a city master development plan, alleged that the City's efforts at targeting the complex for redevelopment discouraged tenants from leasing space in the complex, amounting to a taking. The property owner could not show a physical invasion nor a deprivation of all economically beneficial use of the property. Thus, the Court was left to consider whether the City's proposed plan caused an unreasonable interference with the landowner's right to use and enjoy the property. *Texas Bay Cherry Hill,* 257 S.W.3d at 396. The Court, in affirming the trial court's grant of the City's plea to the

jurisdiction, found that the City's plan had no economic impact on the property, or at the least, the impact was impossible to discern at the time of suit. *Texas Bay Cherry Hill,* 257 S.W.3d at 396, citing *Hamilton Bank,* 473 U.S. 172, 181, 105 S.Ct. 2108, 3119. Examining the second prong in the *Penn Central* test, the Court found that the threat of a plan, in and of itself, could not interfere with a reasonable investment-backed expectation on the part of the complex. On those grounds, the City's plea to the jurisdiction was affirmed.

***City of Dallas v. VRC LLC,* 260 S.W.3d 60 (Tex. App. – Dallas 2008, reh'g denied)**, involved a similar analysis. In *VRC*, a towing company argued that the City of Dallas' imposition of regulation setting the maximum price for nonconsent tows was a regulatory taking because the set price was unreasonable. The Dallas Court of Appeals, affirmed the City's plea to the jurisdiction noting that VRC, an out of state company that moved to Dallas to perform nonconsent tows, did so with the knowledge of the existing price ceiling, and that it thus had no reasonable investment-backed expectation of charging more than the existing ceiling when it began performing tows in Dallas. *VRC LLC,* 260 S.W.3d at 66, citing *Mayhew,* 964 S.W.2d at 937.

The Supreme Court addressed an inverse condemnation claim in ***City of San Antonio v. Pollock*, 284 S.W.3d 809 (Tex. 2009)**. In *Pollock*, homeowners brought a, among other things, a takings claim against the City of San Antonio arguing that the City's negligence related to a municipal landfill allowed benzene to contaminate their property and reduce their property values. In rejecting this claim, the Supreme Court reiterated that mere negligence which eventually leads to the destruction of property is not a taking. To constitute a taking, the government must act intentionally. "This requirement is rooted in the constitutional provision that a compensable taking occurs 'only if property is damaged or appropriated for or applied to a public use.'" *Id.* at 820, quoting *Tarrant Regional Water District v. Gragg*, 151 S.W.3d S.W.3d 546, 554-555 (Tex. 2004).

Similarly, in ***City of Borger v. Garcia*, 290 S.W.3d 325 (Tex. App. -- Amarillo 2009, no pet.)**, homeowners brought a takings action against the City of Borger after their home flooded during a heavy rain. The homeowners' argument was not so much that the City negligently constructed the storm water drainage system serving its neighborhood, but that it deliberately did so using a cheaper design than was necessary to adequately address the drainage. Not surprisingly, the Amarillo Court of Appeals rejected the claim, concluding "That the purported savings of public funds in the design and construction of the drainage system is insufficient to establish that appellees' property was taken for a public use." *Id*. at 331.

7. "THE (W)REST(LER)" -- CASES INCAPABLE OF CLASSIFICATION

The following cases do not fall neatly within any of the other categories discussed above.

***In Re ETC Katy Pipeline, .Ltd,* 2008 WL 44444 (Tex. App. -- Waco 2008, pet. denied)**. In this case, the Court granted ETC's writ of mandamus vacating the trial court's orders dismissing five underlying cases and refusing to appoint commissioners in all five, finding that the trial court was still acting in its ministerial capacity since special commissioners hearings had not yet occurred and, therefore, the trial court was without jurisdiction to dismiss the cases or refuse to appoint commissioners. *See In re State,* 65 S.W.3d 383, 385 (Tex. App. -- Tyler 2002, orig. proceeding).

***In re.Energy Transfer Fuel, L.P.,* 250 S.W.3d 178 (Tex. App. - Tyler 2008, orig. proceeding)**. The trial court rendered a judgment based on the special commissioners' award in a pipeline easement case. The trial court's judgment, however, added provisions to the easement beyond what was awarded and contemplated by the special commissioners. The Tyler Court of Appeals granted the pipeline company's application for writ of mandamus, holding that the trial court was without jurisdiction during the ministerial phase of the condemnation case to enter judgment that contained provisions not contained in the commissioners' award.

***Martin v. City of Rowlett,* 2008 WL 5076629 (Tex. App. – Dallas 2008, no pet.)**. In *Martin*, the City of Rowlett sought to acquire property for street right-of-way purposes. The special commissioners set a day and time for the hearing. Mrs. Martin did not appear at the hearing. On appeal, Mrs. Martin argued that the special commissioners were never vested with jurisdiction of the case because the City failed to show proper notice of the special commissioners hearing. The basis for this argument was not that Mrs. Martin did not receive notice of the hearing or that she wished to attend the hearing – she readily admitted timely receipt of notice and that she made no attempt to attend – but rather that because the hearing was held in a different room in the Courthouse than was listed on the notice, the special commissioners never obtained jurisdiction over the case. The Court relied on the Supreme Court's decision in *State v. Bristol Hotel Asset Company*, 65 S.W.3d 638 (Tex. 2001), and *Hubenak v. San Jacinto Gas Transmission Company*, 141 S.W.3d 172 (Tex. 2004) to hold that the special commissioners did indeed have jurisdiction of the case and overrule Mrs. Martin's plea to the jurisdiction.

***AIC Management v. Crews,* 246 S.W.3d 640 (Tex. 2008)**. Interpreting Texas Government Code § 25.1032, which grants exclusive jurisdiction over Harris County eminent domain cases to the Harris County Courts at Law, the Court held that title disputes intertwined with eminent domain cases in Harris County must be resolved contemporaneously in the Harris County Courts at Law. The Court further held that such title disputes do not need to be transferred to the District Court to determine title issues, though it may be the procedure in other jurisdictions.