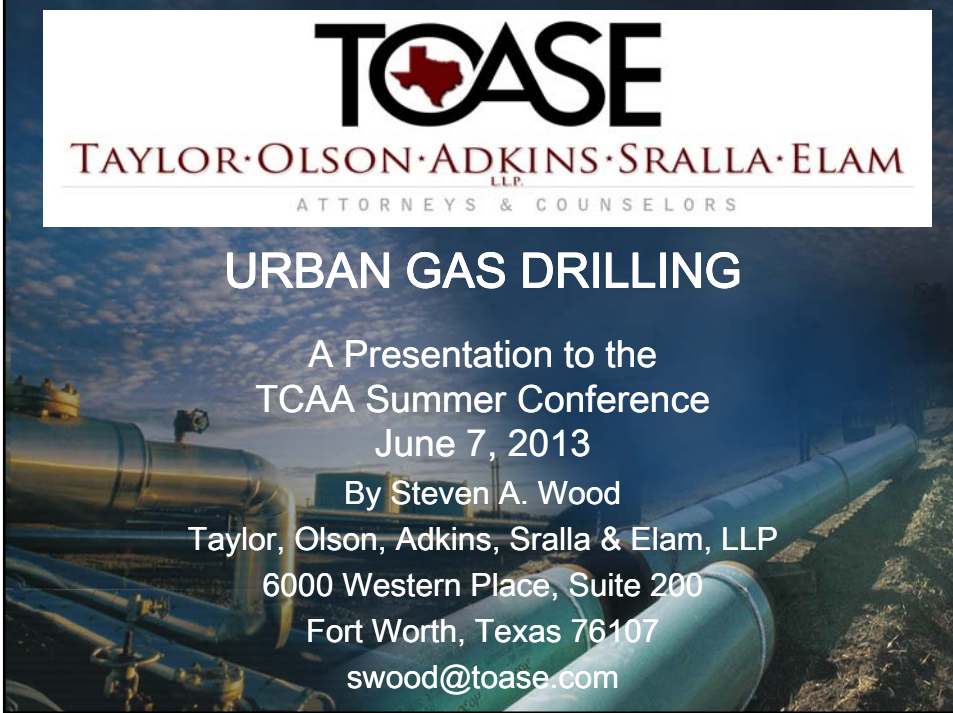


Taylor·Olson·Adkins·Sralla·Elam
LLP
ATTORNEYS & COUNSELORS

URBAN GAS DRILLING

A Presentation to the
TCAA Summer Conference
June 7, 2013
By Steven A. Wood
Taylor, Olson, Adkins, Sralla & Elam, LLP
6000 Western Place, Suite 200
Fort Worth, Texas 76107
swood@toase.com



URBAN GAS DRILLING

- Terminology and Basics of Gas Drilling
 - *Gas utility*—a person, firm, corporation or municipality engaged in the business of transporting or distributing gas for public consumption. (Sec. 181.021 Utilities Code)
 - *Gas facility*—a pipe, main, conductor, or other facility used to carry gas. (Sec. 181.021 Utilities Code)

URBAN GAS DRILLING

- Terminology and Basics of Gas Drilling
 - A gas utility has the right to lay and maintain a gas facility through, under, along or over a public highway, a public road, a public street or alley or public water. (Sec. 181.022 Utilities Code)
 - A gas utility may exercise authority under Section 181.022 in a municipality with the consent of and subject to the direction of the governing body of the municipality. (Sec. 181.023 Utilities Code)

URBAN GAS DRILLING

- Terminology and Basics of Gas Drilling
 - *Gas corporation*—not specifically defined in the Utilities Code (but may include a gas utility).
 - A gas corporation has the right and power to enter on, condemn, and appropriate the land, right-of-way, easement or other property of any person or corporation. (Sec. 181.004 Utilities Code)
 - A gas corporation has the authority to lay and maintain a pipeline over, along, across and under a public road or municipal street or ally—except that its authority to lay and maintain a pipeline over, across or under a “municipal street or alley” is subject to the consent and direction of the governing body of the municipality. (Secs. 181.005 & 181.006 Utilities Code)

URBAN GAS DRILLING

- Terminology and Basics of Gas Drilling
 - *Common Carrier*—a person who owns, operates, or manages, wholly or partially, pipelines for the transportation of carbon dioxide or hydrogen in whatever form to or for the public for hire but only if such person files with the commission a written acceptance of the provisions of Chapter 111 of the Natural Resources Code, expressly agreeing that in consideration of the rights acquired, it becomes a common carrier subject to the duties and obligations imposed by such chapter. (Sec. 111.002(6) Natural Resources Code)
 - A common carrier has the right to enter on and condemn the land, rights-of-way, easements and property of any person or corporation necessary for the construction, maintenance or operation of the common carrier pipeline. (Sec. 111.019 Natural Resources Code)

URBAN GAS DRILLING

- Terminology and Basics of Gas Drilling
 - A common carrier may not use a public street or alley in an incorporated or unincorporated city or town without the express permission of the governing body of the city or town or to lay its pipes along or under a street or alley in an incorporated city or town except with the consent of and under the direction of the governing body of the city or town. (Sec. 111.022 Natural Resource Code)



Natural Gas Compressor Station



03/27/2010

CAUSE NO. 10-78669-2

ENTERPRISE TEXAS PIPELINE LLC,
Plaintiff

VS.

CITY OF HALTOM CITY, TEXAS
Defendant

IN THE COUNTY COURT

AT LAW NO. 2

TARRANT COUNTY, TEXAS

FILED
TARRANT COUNTY TEXAS
2010 JAN -9 PM 2:15
SARAH HENDERSON
COUNTY CLERK

PLAINTIFF'S ORIGINAL PETITION IN CONDEMNATION

TO THE HONORABLE JUDGE OF SAID COURT:

~~COMES NOW ENTERPRISE TEXAS PIPELINE LLC,~~ hereinafter referred to as "Plaintiff," complaining of CITY OF HALTOM CITY, TEXAS, hereinafter referred to as "Haltom City" or "Defendant," files this Original Petition in Condemnation pursuant to Chapter 21 of the Texas Property Code and would respectfully show as follows:

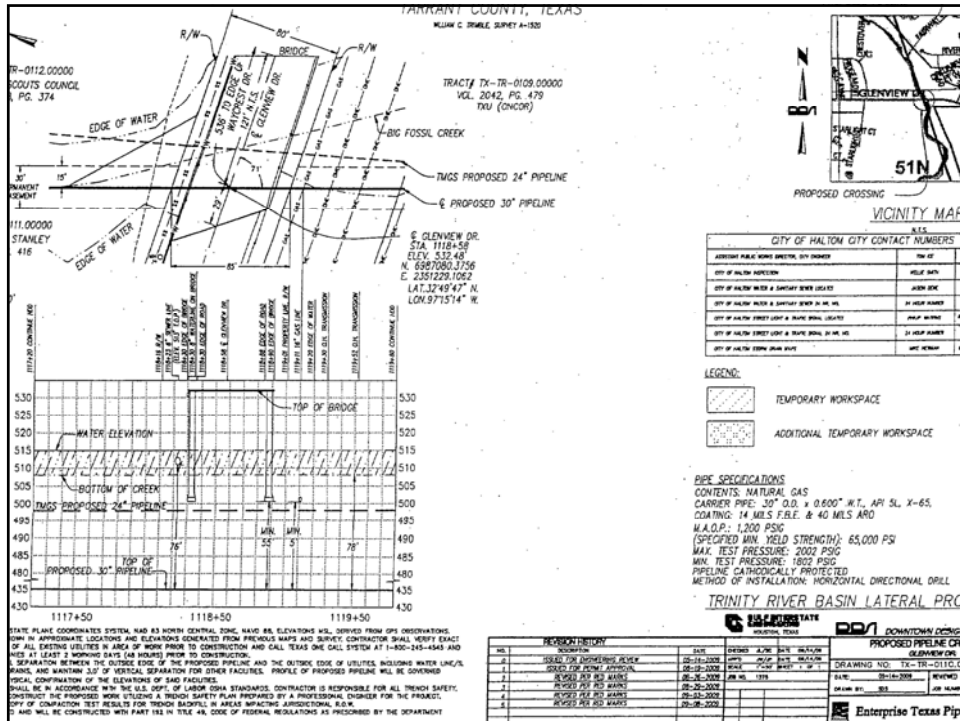
I.

1. Pursuant to Rule 190.1 and 190.3 of the Texas Rules of Civil Procedure, discovery is intended to be conducted under a Level 2 discovery plan.

II.

2. Plaintiff ENTERPRISE TEXAS PIPELINE LLC is a Texas limited liability company authorized to conduct business in Texas.

3. Defendant CITY OF HALTOM CITY, TEXAS is a home rule municipal government that is the owner and/or holder of property interests of certain land situated in Tarrant County, Texas which comprises a public road that is described in more particularity in *Exhibit A to Exhibit 1* attached hereto ("the Subject Property"). Defendant may be served with



URBAN GAS DRILLING

- *Tex. Midstream Gas Services, L.L.C. v. City of Grand Prairie* (5th Cir. 2010)
- **Facts:**
- In 2007, TMGS announced that it was going to construct a natural gas compressor station in Grand Prairie.
- In 2008, the city amended its code to require that TMGS obtain an SUP from the city to operate the station, that the station comply with certain setback requirements, that it be surrounded by an 8 foot security fence and be enclosed by a building designed to maintain pre-development sound levels.

URBAN GAS DRILLING

- *Tex. Midstream Gas Services, L.L.C. v. City of Grand Prairie* (5th Cir. 2010)
- Facts:
- Any violation of the ordinance could be punished by a civil penalty of up to \$2,000 per day.
- TMGS filed suit arguing that the city's regulations were preempted by the Pipeline Safety Act and impinged upon TMGS's statutory eminent domain powers.
- Trial court only enjoined the security fence requirement.

URBAN GAS DRILLING

- *Tex. Midstream Gas Services, L.L.C. v. City of Grand Prairie* (5th Cir. 2010)
- Held:
- TMGS's eminent domain power does not supersede generally applicable zoning regulations that are not arbitrary or unreasonable.
- TMGS failed to show that the city's regulations were arbitrary or unreasonable.

URBAN GAS DRILLING

- *Tex. Midstream Gas Services, L.L.C. v. City of Grand Prairie* (5th Cir. 2010)
- Held:
- The Pipeline Safety Act only preempts safety standards.
- None of the city's regulations, except for the security fence requirement, involved safety.
- The trial court did not abuse its discretion when it only enjoined the security fence portion of the city's regulations.

URBAN GAS DRILLING

- *Oncor Elec. Delivery Co., L.L.C. v. Dallas Area Rapid Transit* (Tex. 2012)
- Facts:
- Oncor, an electric utility, sued DART and the Fort Worth Transportation Authority (both governmental entities) to condemn an easement for use in constructing an electric transmission line.
- Oncor based its authority to condemn public property on section 181.004 of the Utilities Code, which gives the power of eminent domain to a "gas or electric corporation" to condemn the property of a "person" or "corporation."

URBAN GAS DRILLING

- *Oncor Elec. Delivery Co., L.L.C. v. Dallas Area Rapid Transit* (Tex. 2012)
- Facts:
- The governmental entities argued that section 181.004 did not “clearly and unambiguously” waive governmental immunity.
- Oncor argued that governmental immunity is not applicable to a condemnation suit because it was not a suit for money damages.

URBAN GAS DRILLING

- *Oncor Elec. Delivery Co., L.L.C. v. Dallas Area Rapid Transit* (Tex. 2012)
- Held:
- The court assumed without deciding that governmental entities are immune from condemnation suits.
- The court declined to address whether the governmental entities immunity was waived by Section 181.004 because, during the pendency of the appeal, the legislature enacted HB 971 which added Section 37.053(d) to the Utilities Code.

URBAN GAS DRILLING

- *Oncor Elec. Delivery Co., L.L.C. v. Dallas Area Rapid Transit* (Tex. 2012)

- Held:

- Section 37.053(d) extended an electric corporation's power of eminent domain to include the acquisition of "all public land, except land owned by the state, on which the [PUC] has approved the construction of a [transmission] line."

Section 37.053(d) waives governmental immunity for condemnation suits by electric corporations, not gas corporation.

URBAN GAS DRILLING

- *City of Houston v. Trail Enterprises, Inc.* (Tex. App.—Houston [14th Dist.] 2012, pet. filed)

- Facts:

- In 1967, the City of Houston enacted an ordinance that prohibited the drilling of a new oil or gas well in the "control area" near Lake Houston—a source of public drinking water.
- Trail Enterprises owned several oil wells on property near Lake Houston that existed prior to the adoption of the ordinance in 1967.

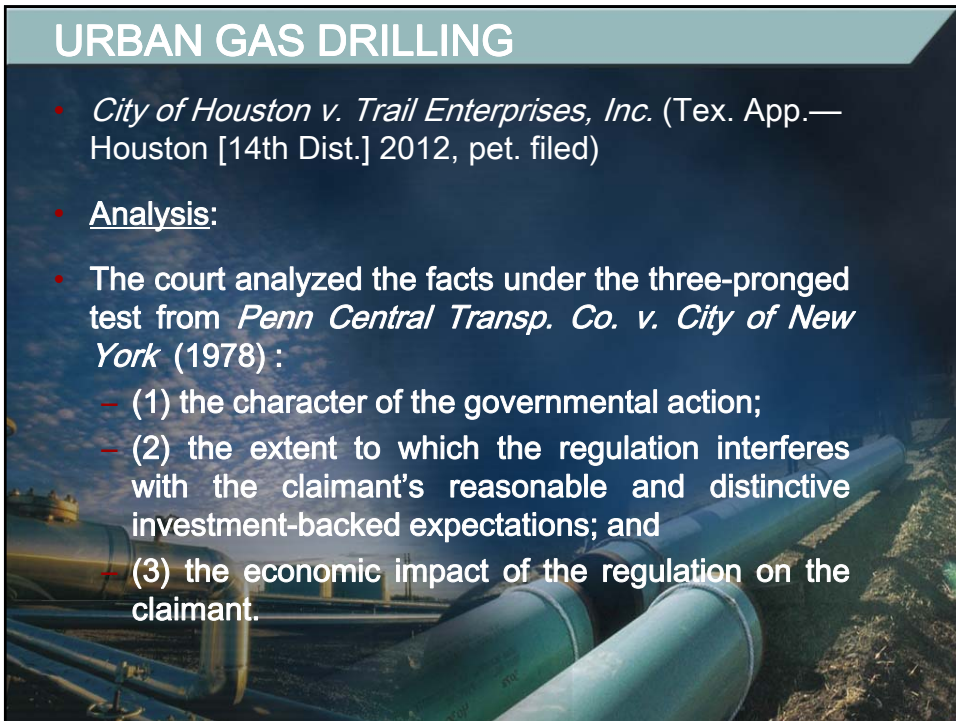
URBAN GAS DRILLING

- *City of Houston v. Trail Enterprises, Inc.* (Tex. App.—Houston [14th Dist.] 2012, pet. filed)
- Facts:
 - In 2003, Trail Enterprises sued the city alleging that the city's prohibition on well drilling constituted an unconstitutional regulatory taking of property.
 - The trial court awarded damages to Trail Enterprises approaching \$17 million.



URBAN GAS DRILLING

- *City of Houston v. Trail Enterprises, Inc.* (Tex. App.—Houston [14th Dist.] 2012, pet. filed)
- Analysis:
 - The court analyzed the facts under the three-pronged test from *Penn Central Transp. Co. v. City of New York* (1978) :
 - (1) the character of the governmental action;
 - (2) the extent to which the regulation interferes with the claimant's reasonable and distinctive investment-backed expectations; and
 - (3) the economic impact of the regulation on the claimant.



URBAN GAS DRILLING

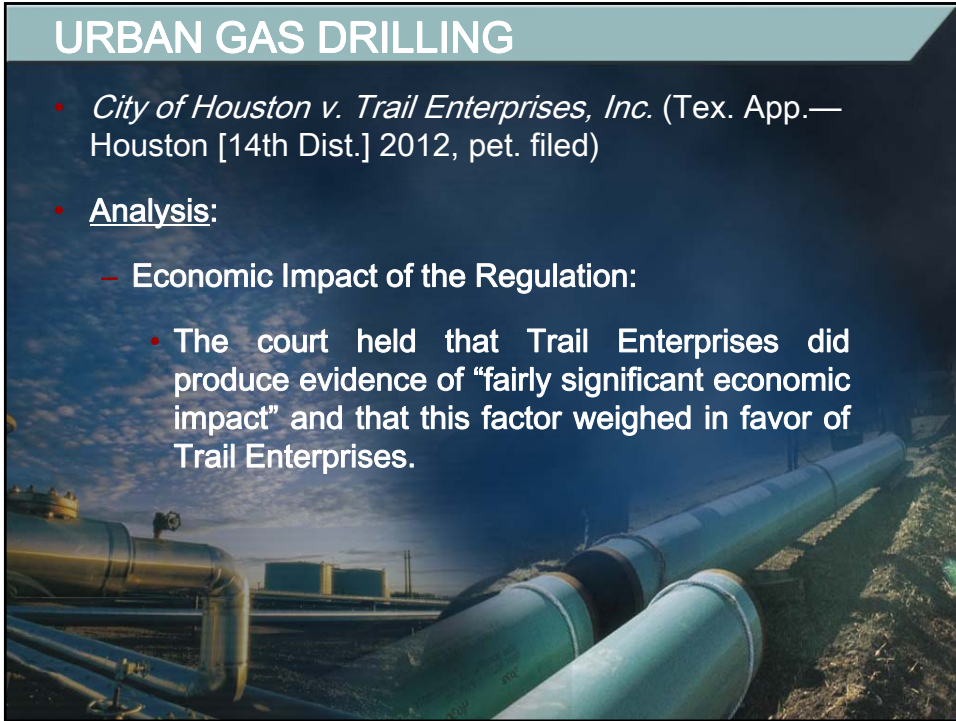
- *City of Houston v. Trail Enterprises, Inc.* (Tex. App.—Houston [14th Dist.] 2012, pet. filed)
- Analysis:
 - Character of the governmental action:
 - The court held that this factor weighed heavily in favor of the city because the purpose of the regulation was to protect the public water supply from possible contamination that might occur from the drilling of new wells within a close proximity to Lake Houston.

URBAN GAS DRILLING

- *City of Houston v. Trail Enterprises, Inc.* (Tex. App.—Houston [14th Dist.] 2012, pet. filed)
- Analysis:
 - Reasonable, Investment-Backed Expectations:
 - The court held that this factor also weighed heavily in favor of the city because at the time Trail Enterprises acquired an interest in the property, the drilling of new wells was prohibited by the city's ordinance; therefore, it was not reasonable for Trail Enterprises to expect to generate revenue from the drilling of new wells.

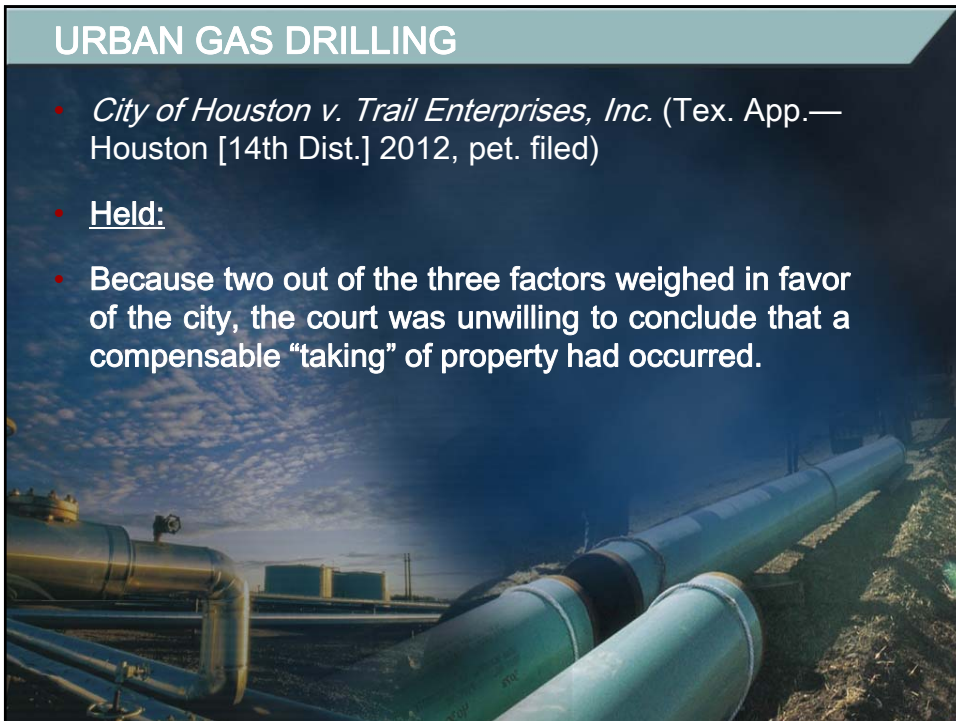
URBAN GAS DRILLING

- *City of Houston v. Trail Enterprises, Inc.* (Tex. App.—Houston [14th Dist.] 2012, pet. filed)
- Analysis:
 - Economic Impact of the Regulation:
 - The court held that Trail Enterprises did produce evidence of “fairly significant economic impact” and that this factor weighed in favor of Trail Enterprises.



URBAN GAS DRILLING

- *City of Houston v. Trail Enterprises, Inc.* (Tex. App.—Houston [14th Dist.] 2012, pet. filed)
- Held:
 - Because two out of the three factors weighed in favor of the city, the court was unwilling to conclude that a compensable “taking” of property had occurred.





URBAN GAS DRILLING

- *City of Houston v. Maguire Oil Co.* (Tex. App.—[14th Dist.] Houston 2011, pet denied)
- **Facts:**
- Maguire Oil Co. applied for a permit to drill a gas well 300 feet west of Lake Houston.
- The city initially granted the permit, and Maguire spent over \$250,000 building roads and preparing to drill the well site.
- The city subsequently revoked the permit citing a provision of the city code that prohibited drilling within the “control area,” defined as an area in the ETJ that was within 1,000 feet of Lake Houston.

URBAN GAS DRILLING

- *City of Houston v. Maguire Oil Co.* (Tex. App.—[14th Dist.] Houston 2011, pet denied)
- Facts:
- In 1993, Maguire sued the city for inverse condemnation, due process violations, negligent misrepresentation, estoppel and promissory estoppel.
- The case was litigated over the next 14 years in state and federal court!
- In March 2009, the case went to trial.

URBAN GAS DRILLING

- *City of Houston v. Maguire Oil Co.* (Tex. App.—[14th Dist.] Houston 2011, pet denied)
- Facts:
- The trial court ruled that Maguire's permit was wrongfully revoked by the city because the drill site was not within the "control area" (i.e., the ETJ), it was within the city limits.

The jury returned a \$2 million verdict in favor of Maguire.

URBAN GAS DRILLING

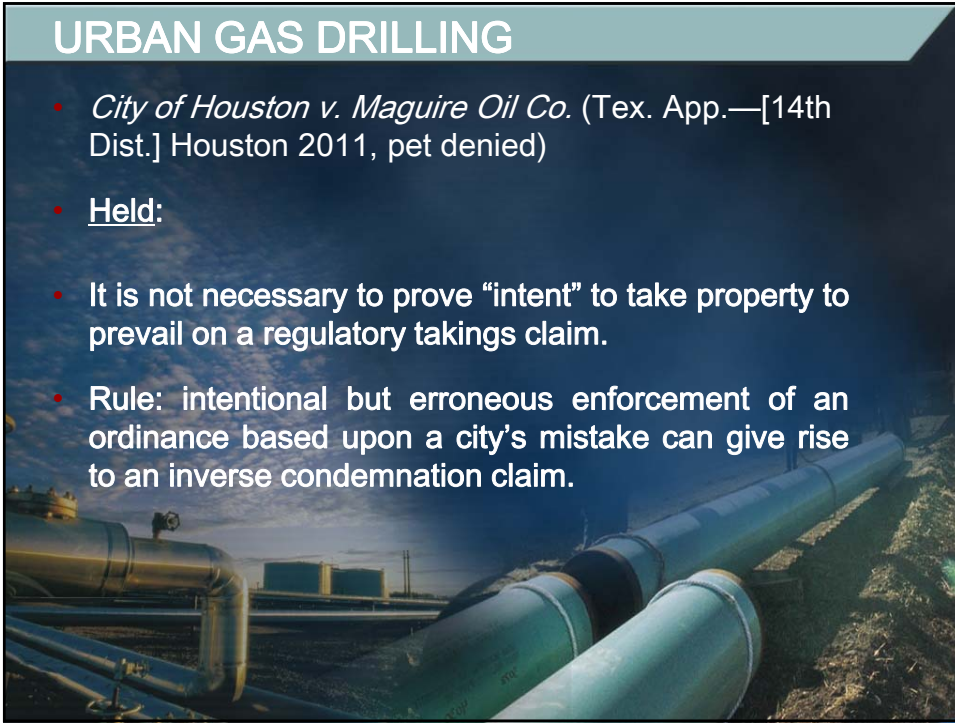
- *City of Houston v. Maguire Oil Co.* (Tex. App.—[14th Dist.] Houston 2011, pet denied)
- Facts:
- Maguire argued on appeal that the city's enforcement of an inapplicable ordinance unreasonably interfered with its right to use and enjoy its mineral estate (i.e., was a regulatory taking).
- The city argued in response that the unauthorized actions of an individual employee in enforcing an inapplicable ordinance cannot serve as the basis for intent by the city to appropriate Maguire's mineral interest rights.

URBAN GAS DRILLING

- *City of Houston v. Maguire Oil Co.* (Tex. App.—[14th Dist.] Houston 2011, pet denied)
- Held:
- The court rejected the city's argument: the actions of an individual employee who is a "final decision maker" in enforcing an inapplicable ordinance or arbitrarily revoking a permit without a legitimate basis may result in a regulatory taking of property.

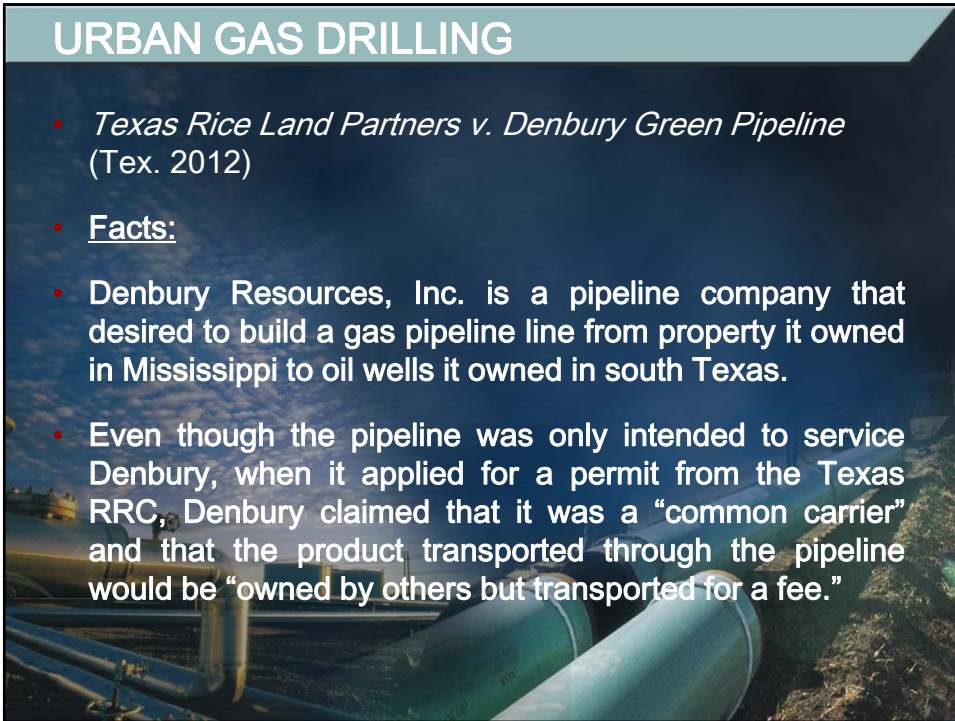
URBAN GAS DRILLING

- *City of Houston v. Maguire Oil Co.* (Tex. App.—[14th Dist.] Houston 2011, pet denied)
- Held:
 - It is not necessary to prove “intent” to take property to prevail on a regulatory takings claim.
 - Rule: intentional but erroneous enforcement of an ordinance based upon a city’s mistake can give rise to an inverse condemnation claim.



URBAN GAS DRILLING

- *Texas Rice Land Partners v. Denbury Green Pipeline* (Tex. 2012)
- Facts:
 - Denbury Resources, Inc. is a pipeline company that desired to build a gas pipeline line from property it owned in Mississippi to oil wells it owned in south Texas.
 - Even though the pipeline was only intended to service Denbury, when it applied for a permit from the Texas RRC, Denbury claimed that it was a “common carrier” and that the product transported through the pipeline would be “owned by others but transported for a fee.”



URBAN GAS DRILLING

- *Texas Rice Land Partners v. Denbury Green Pipeline* (Tex. 2012)
 - Facts:
 - The Texas RRC granted Denbury a permit to construct the pipeline.
 - Texas Rice Land Partners refused Denbury entry onto TRLP's property.
- Denbury sued TRLP seeking a court order to gain entry onto and survey the property.

URBAN GAS DRILLING

- *Texas Rice Land Partners v. Denbury Green Pipeline* (Tex. 2012)
- Held:
- To qualify as a common carrier with the power of eminent domain, the pipeline must serve the public; it cannot be built only for the builder's exclusive use.
- Any exercise of eminent domain authority for purely private use is *per se* unconstitutional.
- The mere fact that the Texas RRC grants a permit to a person/entity does not conclusively establish that the person/entity is a common carrier.

URBAN GAS DRILLING

- *Texas Rice Land Partners v. Denbury Green Pipeline* (Tex. 2012)
- Held:
- Denbury's pipeline was intended to transport gas belonging to Denbury from one Denbury site to another.
- Testimony from Denbury that there was a "possibility of transporting other people's gas in the future" was insufficient to establish common carrier status.
- "Private enterprise cannot acquire unchallenged condemnation power ... merely by checking boxes on a one-page form and self-declaring common carrier status."

URBAN GAS DRILLING

- *Southern Crushed Concrete, LLC v. City of Houston* (Tex. 2013)
- Facts:
- Southern Crushed Concrete applied to the RRC for an air quality permit to move to a new facility located in Houston.
- The city passed an ordinance prohibiting concrete crushing facilities from locating within 1,500 feet of a school facility and other uses.
- The Texas Clean Air Act permits concrete crushing facilities to be located within 1,350 feet of a school.

URBAN GAS DRILLING

- *Southern Crushed Concrete, LLC v. City of Houston* (Tex. 2013)
- Facts:
- The city denied SCC an SUP to locate to the new facility based on the more restrictive set back requirement.
- SCC sued the city alleging that the city's set back requirement was preempted by the TCAA.


URBAN GAS DRILLING

- *Southern Crushed Concrete, LLC v. City of Houston* (Tex. 2013)
- Held:
- The purpose of the TCAA is "to safeguard the state's air resources from pollution by controlling or abating air pollution and emissions of air contaminants."
- The TCAA contains a provision that prohibits a municipality from adopting any regulations that conflict with the TCAA or any rule of the Commission.
- The city's ordinance is preempted by the TCAA because the ordinance makes unlawful an act approved or authorized under the TCAA or the Commission's rules.

URBAN GAS DRILLING

- *Southern Crushed Concrete, LLC v. City of Houston* (Tex. 2013)
- Notes:
 - The court refused to address the question of whether a city can enact more restrictive rules than those set forth in the TCAA or adopted by the Commission.
 - Can a pipeline company now argue that a city's set back requirements contained in its drilling ordinance are in conflict with and preempted by the TCAA?





TOASE
TAYLOR·OLSON·ADKINS·SRALLA·ELAM
LLP
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QUESTIONS?

Steven A. Wood
Taylor, Olson, Adkins, Sralla & Elam, LLP
6000 Western Place, Suite 200
Fort Worth, Texas 76107
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