DEFENDING AGAINST THE EXPANSION OF REGULATORY TAKING LAW

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TABLE OF CONTENTS

I. Introduction

Takings law is considered to be a complicated area of legal practice. In Texas, takings jurisprudence has been famously described as a sophistic Miltonian Serbonian bog, "where armies whole have sunk." *Sheffield Dev. Co., Inc. v. City of Glenn Heights*, 140 S.W.3d 660 (Tex. 2004) (citing John Milton, Paradise Lost 49, bk. II, ll. 592–94 (Scott Elledge ed., Norton & Co. 1993) (1674). The United States Supreme Court has said that "cases attempting to decide when a regulation becomes a taking are among the most litigated and perplexing in current law." *Eastern Enters. v. Apfel*, 524 U.S. 498 (1998).

The United States and Texas Constitutions are clear: the government may take private property for a public use but must pay just compensation for it. Additionally, to establish a regulatory taking, one of the requirements is that a property owner must challenge a restriction on property use.

Yet, in an already complicated area of the law, there is a growing trend in which claimants are filing lawsuits, seeking compensation for property damage under regulatory takings theories in disputes that do not involve restrictions on the use of property, and where the "public use" element of a taking is missing. Because cities are protected by governmental immunity against most property damage claims and immunity is waived when a plaintiff alleges a viable taking claim, it isn't surprising to see so many attempts at alleging a taking claim. What's alarming is the number of courts that get it wrong.

II. Limitations on governmental immunity for property damage

Generally, a municipal government enjoys immunity from suit unless its immunity has been waived by the Legislature. *Reata Constr. Corp. v. City of Dallas*, 197 S.W.3d 371, 374 (Tex. 2006). It is well settled that the Texas Constitution waives governmental immunity with respect to takings claims, but such a claim must be predicated upon a viable allegation of a taking. *City of Houston v. Carlson*, 451 S.W.3d 828, 830 (Tex. 2014). Thus, in the absence of a properly pleaded takings claim, a court lacks jurisdiction. *Hearts Bluff Game Ranch, Inc. v. State*, 381 S.W.3d 468, 476 (Tex. 2012).

Additionally, the Texas Tort Claims Act provides a waiver of immunity under limited circumstances if a plaintiff can show that a negligent act occurred while a municipality performed a governmental function.[1] *See* Tex. Civ. Prac. & Rem. Code §§ 101.021, 101.022, 101.025(a). Like a takings claim, the failure to plead a cause of action within the terms of the Act, deprives the trial court of subject matter jurisdiction. *Harris County v. Sykes*, 136 S.W.3d 635, 638 (Tex. 2004).

To establish a waiver of immunity under the Act, the initial determination to be made is whether the municipality's action or omission involves a proprietary function or a governmental function. *Dalon v. City of DeSoto*, 852 S.W.2d 530, 535 (Tex. App.—Dallas 1992, writ denied). Prior to 1987, the Act did not define which acts were proprietary and which were governmental. *Ethio Exp. Shuttle Serv., Inc. v. City of Houston*, 164 S.W.3d 751, 755 (Tex. App.—Houston [14th Dist.] 2005, no pet.). The determination of whether an act was governmental was left to the judiciary. *Id.* However, as part of tort reform, the legislature amended the Act and added definitions of governmental and proprietary functions. *Id.* (citing Tex. Civ. Prac. & Rem. Code § 101.0215(a), (b)).

Governmental functions are "those functions that are enjoined on a municipality by law and are given it by the state as part of the state's sovereignty." Tex. Civ. Prac. & Rem. Code § 101.0215(a). The Act includes a non-exclusive list of governmental functions. *Id.* On the other hand, a proprietary function is one that a municipality may perform in its discretion in the interest of the inhabitants of the municipality. *Id.* at § 101.0215(b).

Once it is determined that the act a plaintiff complains about occurred while a municipality performed a governmental function, a court will consider whether the plaintiff alleged a valid waiver of immunity under the Act.[2] *Ethio Exp. Shuttle Serv., Inc.*, 164 S.W.3d at 757. "Merely engaging in a governmental function does not automatically waive the City's sovereign immunity." *Id.*

"Sovereign immunity is waived under the Texas Tort Claims Act for only two types of claims: (1) those involving property damage, personal injury or death arising from the operation or use of a motor-driven vehicle or motor-driven

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[1] The Act does not waive immunity for intentional torts. *Id.* at § 101.057(2).

[2] While the Texas Tort Claims Act waives immunity in certain circumstances, Subchapter C of the Act describes exceptions and exemptions from the waiver of immunity. *See* Tex. Civ. Prac. & Rem. Code §§ 101.051 – 101.067.

equipment; and (2) those involving personal injury or death caused by a condition or use of tangible personal property or real property." *Id.* (citing Tex. Civ. Prac. & Rem. Code §§ 101.021(1)(A), (2)). Accordingly, Texas courts have consistently held that a municipality does not waive sovereign immunity under the Act as to property damage unless the damage is caused by the negligent act or omission of a municipal employee and arises from the operation of motor driven equipment. *Carrasco v. City of El Paso*, 625 S.W.3d 189, 195 (Tex. App.—El Paso 2021, no pet.).

Notably, money damages are capped at $100,000 for a property damage claim under the Texas Tort Claims Act. *See* Tex. Civ. Prac. & Rem. Code § 101.023. No such cap exists for a plaintiff who is successful on a taking claim.

III. Overview of regulatory takings law

The Fifth Amendment to the United States Constitution requires the payment of compensation when the government takes private property for public use. The purpose of the Fifth Amendment is to prevent the government from forcing some people alone to bear public burdens "which, in all fairness and justice, should be borne by the public as a whole." *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 535 U.S. 302, 304 (2002).

Similar to the U.S. Constitution, the Texas Constitution provides that "no person's property shall be taken, damaged, or destroyed for or applied to public use without adequate compensation being made." Tex. Const. art. I, § 17. To establish a taking claim in Texas, a party must show that (1) the State intentionally performed certain acts in the exercise of its lawful authority, (2) that resulted in a taking of property, (3) for public use. *Berry v. City of Reno*, 107 S.W.3d 128, 133 (Tex. App.—Fort Worth 2003, no pet.) (citing *State v. Hale*, 136 Tex. 29, 146 S.W.2d 731, 736 (1941)).

A. Regulatory takings in general.

Takings are classified as either physical or regulatory, and categorical or non-categorical. When the government physically takes possession of property or occupies property for a public purpose, "it has a categorical duty to compensate" the owner, even if the possession is temporary. *Tahoe-Sierra Pres. Council, Inc.*, 535 U.S. at 322. On the other hand, a restriction on property-use or a diminution in value resulting from regulatory action may or may not require compensation, depending on the circumstances. *Sheffield Dev. Co., Inc. v. City of Glenn Height*s,

140 S.W.3d 660, 669–70 (Tex. 2004). Theoretically, only when the regulation of property reaches a certain extreme should a property owner receive redress via a regulatory taking claim. *Carlson*, 451 S.W.3d at 831.

There are "sharp distinctions between physical takings and regulatory takings." *Lowenberg v. City of Dallas*, 168 S.W.3d 800, 802 (Tex. 2005). Physical takings are "relatively rare, easily identified, and usually represent a greater affront to individual property rights," while regulatory takings "are ubiquitous and most of them impact property values in some tangential way." *Id*. (citing *Tahoe–Sierra Pres. Council, Inc.*, 535 U.S. at 324).

Regulatory takings jurisprudence began with the United States Supreme Court decision in *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922). Prior to *Mahon*, it was generally believed that the protections of the Fifth Amendment applied only to direct physical appropriations of property and that it had no application to government regulations. *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1014 (1992). In *Mahon,* the Court made it clear that government regulations of real property were not immune from takings claims. "The 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." *Mahon*, 260 U.S. at 415. However, "*Mahon* offered little insight into when, and under what circumstances, a given regulation would be seen as going 'too far' for purposes of the Fifth Amendment." *Lucas*, 505 U.S. at 1015.

B. Categories of regulatory takings.

Since *Mahon*, the Supreme Court has recognized four categories of regulatory takings: (a) regulations that require property owners to suffer a physical invasion of their property; (b) regulations that deprive owners of all economically beneficial use of their property; (c) regulations on property use that do not deprive owners of all economically beneficial use but unreasonably interfere after balancing the public's interest against the landowner's private interest; and (d) regulations that require owners to give up their right to just compensation for a taking in exchange for a discretionary benefit conferred by the government. *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 538 (2005).

1. Physical invasion regulatory takings.

In *Loretto v. Teleprompter Manhattan CATV Corp.*, the United States Supreme Court held that a regulation that imposes a permanent physical occupation by a third party is a regulatory taking even if the economic effects on the property are nominal. 458 U.S. 419 (1982). In so finding, the Court struck down New York regulations that required landlords to allow cable television companies to install equipment on their properties. *Id*. at 441-42. In June of this year, the Supreme Court broadened the scope of the physical invasion category of takings claims, holding that a California regulation that required agricultural employers to allow union organizers to access their property for limited periods of time was a per se taking, despite the fact that the access rights were temporary and not permanent. *Cedar Point Nursery v. Hassid*, 141 S. Ct. 2063, 2074 (2021).

2. Exactions.

An exaction occurs when the government requires an owner to give up the right to just compensation for property taken in exchange for a discretionary benefit conferred by the government. *See Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 548 (2005). The seminal United States Supreme Court cases *Nollan v. California Coastal Comm'n*, 483 U.S. 85 (1987) and *Dolan v. City of Tigard*, 512 U.S. 374 (1994) set forth the standard regarding exactions.

Nollan and *Dolan* involved Fifth Amendment takings challenges of land use decisions conditioning approval of property development on the dedication of portions of property to public use. *Nollan*, 483 U.S. 825; *Dolan*, 512 U.S. 374. Specifically, in each case, the government demanded that a property owner dedicate an easement allowing public access to the property as a condition of granting a development permit. *Id*.

In *Nollan*, the California Coastal Commission required that property owners provide public access to a portion of their property between the owner's seawall and the ocean in exchange for a permit to build a larger residence on their beachfront property. 483 U.S. at 828. In *Dolan*, a city required that a commercial property owner dedicate a portion of its property for a greenway with a bike and pedestrian path in exchange for a permit to expand a store and parking lot. 512 U.S. at 380.

The United States Supreme Court began both cases by stating that had the government simply required the property owners to dedicate portions of their properties for public use, rather than conditioning the grant of a permit on such a dedication, a per se physical taking would have occurred. *Dolan*, 512 U.S. at 384; *Nollan*, 483 U.S. at 831; *see also Lingle*, 544 U.S. at 546. "The question was whether the government could, without paying the compensation that would otherwise be required upon effecting such a taking, demand the easement as a condition for granting a development permit the government was entitled to deny." *Lingle*, 544 U.S. at 546–47.

In *Nollan*, the Court held that the government could require the easement without compensation so long as the exaction would substantially advance the same government interest that would furnish a valid ground for denial of the permit. *Lingle*, 544 U.S. at 547 (citing *Nollan*, 483 U.S. at 834–37). "The Court further refined this requirement in *Dolan,* holding that an adjudicative exaction requiring dedication of private property must also be roughly proportional ... both in nature and extent to the impact of the proposed development." *Lingle*, 544 U.S. at 547 (citing *Dolan*, 512 U.S. at 391) (internal quotation marks omitted).

3. Categorical regulatory takings under *Lucas*.

In *Lucas v. South Carolina Coastal Council*, the United States Supreme Court concluded that, if a regulation completely destroys *all* of a property's economic value, it is considered a "per se" or "categorical" taking. *See* 505 U.S. at 1017. The petitioner in *Lucas* bought two residential lots on a South Carolina island, intending to construct single-family homes on the lots. *Id*. at 1006. Two years after he purchased the lots, the state legislature enacted a statute barring the petitioner from building any permanent habitable structures on his lots. *Id*. He sued for a taking, and the Supreme Court held that in "the extraordinary circumstance when *no* productive or economically beneficial use of land is permitted," courts should apply a categorical rule requiring compensation. *Id.* at 1017 (emphasis in original).

Ten years later, the Supreme Court held that "fairness and justice" would not be served by applying a categorical rule to "any deprivation of all economic use, no matter how brief." *Tahoe-Sierra Pres. Council, Inc.*, 535 U.S. at 334. In *Tahoe-Sierra Pres. Council Inc.*, an association of landowners sued a regional planning agency after the planning agency imposed 32-month moratoria on development in the Lake Tahoe Basin, while it formulated a comprehensive land-use plan for the

area. *Id.* at 306. The Supreme Court held that the moratoria were not a per se taking under *Lucas* because development could eventually go forward. *Id.* at 347. "Logically, a fee simple estate cannot be rendered valueless by a temporary prohibition on economic use, because the property will recover value as soon as the prohibition is lifted." *Id.* at 332.

4. Non-categorical *Penn Central* takings.

Even if restrictions on property use don't rise to the level of a *Lucas* categorical taking because they don't destroy all of a property's value, they can still be considered takings under the balancing test established by the United States Supreme Court in *Penn Central Transp. Co. v. New York City*, 438 U.S. 104 (1978). The Supreme Court's "emphasis on the word 'no' in the text" of the *Lucas* opinion, confirms that if a regulation causes a diminution in property value that is less than 100%, then the categorical taking rule does not apply. *Tahoe-Sierra Pres. Council, Inc.*, 535 U.S. at 330.

Challenged regulations that do not deprive a property of all economic value are considered "non-categorical" and evaluated by engaging in a "complex factual assessment of the purposes and economic effects of government actions." *Id.* at 323. This assessment requires balancing the three well-known factors set out in *Penn Central Transp. Co.*: (1) the economic impact of the regulation; (2) the extent of the regulation's interference with a property owner's reasonable investment-backed expectations; and (3) the character of the governmental action. 438 U.S. at 104.

In the context of temporary regulations, in *Tahoe-Sierra Pres. Council, Inc.*, the Supreme Court held that when a temporary moratorium or property closure denies all viable economic use of property, the question of whether compensation is required under the Fifth Amendment is not to be decided by applying a categorical rule. 535 U.S. at 321. Rather, it is to be decided by applying the *Penn Central* factors. *Id.* at 342.

IV. Trends in takings law

Because a property owner can overcome governmental immunity by presenting a viable takings claim, and the waiver of immunity under the Texas Tort Claims Act for property damage claims is severely limited, there has been a growing trend of property owners attempting to mold a variety of tort claims into takings claims despite the absence of any allegation that a "public use" resulted from the

governmental action. Claimants are also bringing challenges to governmental action that does not involve a restriction on property use. Some of these attempts have been successful.

A. *City of Houston v. De Trapani* and *City of Houston v. Maguire Oil Co.*

For example, in *City of Houston v. De Trapani*, 771 S.W.2d 703 (Tex. App.—Houston [14th Dist.] 1989, writ denied), abrogated by *Tex. Educ. Agency v. Leeper*, 893 S.W.2d 432 (Tex. 1994), and *City of Houston v. Maguire Oil Co.*, 342 S.W.3d 726 (Tex. App.—Houston [14th Dist.] 2011, pet. denied), the Fourteenth Court of Appeals held that a viable takings claim could be predicated on a city's "intentional, but erroneous enforcement of an ordinance." *Maguire Oil Co.*, 342 S.W.3d at 743. The court held the City of Houston liable effectively for negligent enforcement of an ordinance and labeled it a taking.

In *De Trapani*, the City of Houston was sued after its building official misinterpreted Houston's sign ordinance and incorrectly told the plaintiff that his portable signs could not be used in the City's extraterritorial jurisdiction and had to be removed. *De Trapani*, 771 S.W.2d at 704. After receiving the erroneous information, the plaintiff allegedly threw away his signs instead of using them in an area where they would have been allowed. *Id.* Regardless of the plaintiff's ability to use the signs elsewhere, the court of appeals upheld the trial court's finding of a taking and the jury's award of $500,000 for lost revenue and the value of the signs. *Id.* at 708.

Had the same type of claim been asserted as a negligence tort, the City would have been immune under the Texas Tort Claims Act because the damage was not caused by a motor driven vehicle. Moreover, even if immunity had been waived under the Tort Claims Act because the building official had driven a truck into the signs and destroyed them, for example, the plaintiff's damages would have been capped at $100,000. *See* Tex. Civ. Prac. & Rem. Code § 101.023.

The decision in *De Trapani* is plainly wrong and inconsistent with the Legislature's intention to limit governmental liability under the Tort Claims Act for property damage caused by negligence.[3] And, fortunately for Texas municipalities,

[3] One of the more bizarre aspects of the *De Trapani* decision was its conclusion that the city's sign administrator was acting as the final policy maker, for section 1983 liability

it is also inconsistent with the Texas Supreme Court's 2014 opinion in *City of Houston v. Carlson*, which is discussed later in this paper.

Further, as pointed out by the Northern District of Texas in *Roan Bros. Tile Company v. City of Garland*, there was no discussion in *De Trapani* about whether the taking was for a public use. *Roan Bros. Tile Co. v. City of Garland*, 3:04-CV-1090-B, 2006 WL 8437017, at *5 (N.D. Tex. Jan. 12, 2006). "A constitutional taking for public use occurs only when there results to the public some definite right or use in the business or undertaking to which the property is devoted." *Berry v. City of Reno*, 107 S.W.3d 128, 133 (Tex. App.—Fort Worth 2003, no pet.).

In *Maguire*, a City of Houston inspector revoked the plaintiff's oil-drilling permit and issued a stop work order, prohibiting the plaintiff from drilling for oil near Lake Houston. *Maguire Oil Co.*, 342 S.W.3d at 730. The stop work order was issued pursuant to the inspector's mistaken belief that an ordinance applied, which prohibited drilling within a certain area in the city limits, around Lake Houston, and that the permit had been issued in error. *Id.* However, it turned out that the city council had amended part of the ordinance, which removed a restriction on drilling that would have prohibited the drilling in the city limits by the plaintiff.[4] *Id.* The ordinance the inspector relied upon did not apply. *Id.*

The trial court in *Maguire* found a regulatory taking based on these facts, and the court of appeals upheld the decision. More specifically, the court of appeals held that a city's intentional but erroneous enforcement of an ordinance against a plaintiff that unreasonably interferes with permissible activity by the plaintiff can establish a viable inverse condemnation claim. *Id.* at 743.

B. *Schrock v. City of Baytown.*

In *Schrock v. City of Baytown*, the court of appeals has twice held that a dispute over a $1,500 utility bill amounted to a taking by the City of Baytown. *See Schrock v. City of Baytown*, 623 S.W.3d 394, 401 (Tex. App.—Houston [1st Dist.] 2019, pet. granted) (reversing directed verdict); *Schrock v. City of Baytown*, 01-13-

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purposes, when he made a mistake in the enforcement of an ordinance that the city council had adopted. *De Trapani*, 771 S.W.2d at 706-08.

[4] The repeal of the regulations restricting drilling within the city limits was almost certainly unintentional and the result of a drafting error in an ordinance that was intended to add the restriction to the City's ETJ. The fact of the repeal was not discovered until several years after the lawsuit began.

00618-CV, 2015 WL 8486504, at *1 (Tex. App.—Houston [1st Dist.] Dec. 10, 2015, pet. denied) (overturning rendition of summary judgment against property owner). More specifically, the First Court of Appeals held that the city's mistakes in collecting delinquent utility bill payments and in applying a state law restricting liens on rental property can amount to a taking. *Id.*

The property owner in *Schrock* owned a mobile home that he began renting to tenants in 1993. *Schrock*, 623 S.W.3d at 401. In 1991, Baytown enacted an ordinance governing utilities that authorized the city to impose a lien on property for unpaid utility services to that property, whether the services were incurred by the property owner or a tenant. *Id.* The ordinance prohibited water, garbage, or sewer service to properties encumbered by utility liens. *Id.* A landlord could have avoided a lien by submitting a declaration that the property was rental property. *Id.*

In 2009, Baytown notified the owner that he owed money for utility bills that ten of his prior tenants failed to pay over a period of sixteen years. *Id.* at 401. After an appeal to the city manager, the city reduced the amount that the owner owed. *Id.* Regardless of the reduction, the property owner failed to pay the outstanding bills, and no declaration was on file, so the city filed a lien on the property pursuant to its ordinance. *Id.*

Even though a lien was placed on the property, the city continued providing utility services, and the owner continued renting the property to tenants. *Id.* However, in 2010, after renting to a new tenant, the city informed the property owner that he would have to pay the outstanding utility bills before acquiring new water service for his tenant. *Id.* The tenant moved out, and instead of protesting and seeking a refund of any amount the property owner believed the city may have improperly charged him, the property owner stopped renting the property altogether. *Id.* at 413.

The property fell into disrepair, and he sued the city for a taking, among other things. *Id.* at 402. The property owner alleged, and attempted to prove at trial, that the city made mistakes in its collection efforts and that the city unlawfully enacted certain provisions of its ordinance, which conflicted with Texas Local Government Code Section 552.0025. *Id.* at 405. The city conceded that it made a mistake with the ordinance, which contradicted state law. *Id.* at n.22.

In reversing the trial court's directed verdict in favor of the city, the court of appeals analyzed the taking claim as a non-categorical *Penn Central* taking. The court held that there were disputed issues of fact that the jury should have answered prior to the trial court's ultimate determination of a taking, regarding the economic impact of the city's regulations on the property owner, the extent to which the city's ordinance interfered with the property owner's investment-backed expectations, and the character of the governmental action. *Id*. at 413-17. The court also held that there were fact issues for the jury regarding the property owner's amount of damages. *Id*. at 419.

The result from this opinion is that a utility bill dispute that does not involve direct restrictions on property-use and arises from a city's mistakes can be escalated to a regulatory taking. The decision is not only alarming, but it clashes with the Texas Supreme Court's 2014 decision in *City of Houston v. Carlson*.[5]

C. *City of Houston v. Carlson* and its progeny.

In *Carlson*, the Texas Supreme Court held that a viable taking claim cannot be predicated on a municipality's misapplication of the law. *See* 451 S.W.3d 828 (Tex. 2014). A number of courts of appeals followed suit. *APTBP, LLC v. City of Baytown*, 14-17-00183-CV, 2018 WL 4427403, at *5 (Tex. App.—Houston [14th Dist.] Sept. 18, 2018, no pet.) (mem. op.) (rejecting taking claim based on misapplication of building codes and apartment regulations); *Nat'l Media Corp. v. City of Austin*, 03-16-00839-CV, 2018 WL 1440454, at *5 (Tex. App.—Austin Mar. 23, 2018, no pet.) (mem. op.) (rejecting taking claim based on misapplication of city sign regulations); *CPM Tr. v. City of Plano*, 461 S.W.3d 661, 673 (Tex. App.—Dallas 2015, no pet.) (rejecting taking claim based on misapplication of sign regulations); *House of Praise Ministries, Inc. v. City of Red Oak*, 10-15-00148-CV, 2017 WL 1750066, at *7 (Tex. App.—Waco May 3, 2017, no pet.) (mem. op.) (rejecting taking claim based on misapplication of city's substandard building regulations).

In *Carlson*, after an investigation revealed various safety violations at a condominium complex, the city of Houston ordered the condominium owners to make repairs and obtain a certificate of occupancy. 451 S.W.3d at 830. When the owners failed to repair the problems or obtain the certificate of occupancy, Houston ordered the property owners to vacate their homes pursuant to a building code regulation, instead of issuing a citation. *Id*.

[5] The Texas Supreme Court has granted the City of Baytown's petition for review in the *Schrock* case and oral argument is scheduled for later this month.

A group of condominium owners filed a lawsuit, complaining that Houston misapplied their safety regulations, and that their property was taken when the city ordered them to vacate. *Id.* The owners sought damages, including damages for years of lost use. *Id.*

The Texas Supreme Court held that the owners had not alleged a viable regulatory taking claim, so the city retained immunity. *Id.* at 831-33. The Court concluded that the owners were not challenging a land-use restriction,[6] and instead, were challenging the procedure used by the City to enforce its standards because their complaints were directed at the penalty imposed, the manner in which the city enforced its standards, and Houston's misapplication of regulations when ordering residents to vacate. *Id.*

The Court acknowledged that the order to vacate interfered with the condominium owners' use of the property, but explained that "every civil-enforcement action results in a property loss of some kind." *Id.* at 832. Where a party objects only to the infirmity of the process, the party fails to allege a viable taking claim. *Id.* at 833. Moreover, the allegations that Houston made mistakes in the application of its regulations would "amount to nothing more than a claim of negligence on the part of [the city], for which [it] is immune under the Texas Tort Claims Act." *Carlson,* 451 S.W.3d at 833.

Similarly, in *APTBP, LLC v. City of Baytown,* an apartment complex owner sued the city of Baytown for a taking, claiming that Baytown's misapplication of its apartment safety ordinances and denial of access to electricity prevented the property owner from renting apartment units, caused loss of rental income, and created economic waste while the units sat empty. 2018 WL 4427403, at *2. The court of appeals applied *Carlson*, and held that APTBP failed to allege a viable taking. *Id.* at *5.

> APTBP does not allege that any particular regulations or standards are unreasonable restrictions on the use of the property at issue. Rather, APTBP complains about the City's misapplication or "wrongful" application of certain regulations and standards and the

[6] "[Since *Mahon*], the Court has applied regulatory takings analysis only to regulation of property. *See, e.g.*, *Penn Central Transp. Co.*, 438 U.S. at 125 (limiting its discussion to "land-use regulations"). To our knowledge, neither the U.S. Supreme Court nor this Court has ever recognized a purely procedural regulatory taking." *Carlson*, at 451 S.W.3d at 832.

> manner in which the City enforced certain standards and regulations in relation to APTBP, LLC's property. Based on *Carlson*, we conclude that APTBP has not alleged a viable regulatory taking.

Id.

V. Conclusion

The liability of Texas municipalities for property damage under the Texas Tort Claims Act is very limited and claimants have a strong incentive to avoid the limitations of the Act by pleading their claims as takings. Additionally, because takings law is complex, there is an increased risk that the courts will "get it wrong" and apply takings law to allow recovery for negligence in the administration of municipal regulations.

The Texas Supreme Court's holding in *Carlson* that mistakes made in the application of the City of Houston's building regulations "amount[ed] to nothing more than a claim for negligence" is an important development in maintaining the distinction between ordinary tort claims and takings, and the liability protections that rely on that distinction. Lawyers who represent municipalities should be vigilant in recognizing and defending against claims that seek to blur that distinction.