

Regulatory Takings: Downzoning
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A regulatory taking may occur when a regulation, such as a zoning, subdivision, or nuisance ordinance, causes private property to lose all monetary value. Article I, Section 17, of the Texas Constitution provides that, “[n]o person’s property shall be taken, damaged or destroyed for or applied to public use without adequate compensation being made” The United States Constitution contains a similar provision, and when Texas courts analyze whether an ordinance or other regulation constitutes a takings, they often turn to federal law to make that determination. Downzoning (rezoning land to a more restrictive use) may be called into question as a regulatory taking.

The main Texas case on regulatory takings in Texas is *Sheffield v. City of Glenn Heights*, which was a zoning case decided by the Supreme Court of Texas in 2004. *Sheffield v. City of Glenn Heights*, 140 S.W.3d 660 (Tex. 2004). In the case, the developer sued the city when the city put a moratorium on plats and later increased the residential lot size and square footage requirements for the developer’s land before lifting the moratorium. The Supreme Court held that regulatory takings cases must be taken on a case-by-case basis and should be determined by balancing the public’s interest and the private landowner’s interest. A mathematical approach to determining how much value is lost was disapproved. The Court looked at whether the “regulation substantially advances legitimate state interests,” but held that the city’s desire to curb growth in the city was a sufficient reason for the regulation. The Court also focused on the fact that, while the rezoning lowered the value of the property, it was still worth four times the purchase price. In addition, because the developer had not gotten very far in developing the property, his investment backed expectations were speculative, and the downzoning was not just focused on him as an individual developer. The Court held that neither the rezoning nor the moratorium were takings, but noted that the city had perhaps not dealt fairly with the developer.

Since the *Sheffield* case, two other Supreme Court of Texas cases have cited the case for its regulatory takings analysis. See *Hallco Tex., Inc. v. McMullen County*, 221 S.W.3d 50 (Tex. 2006); *Seagull Energy E & P, Inc. v. R.R. Comm’n*, 226 S.W.3d 383 (Tex. 2007). Also, in a recent San Antonio Court of Appeals case, the court used *Sheffield* to determine whether the city’s rezoning of a business was a taking. *The City of San Antonio v. El Dorado Amusement Co.*, 195 S.W.3d 238 (Tex. App.—San Antonio 2006). To determine a taking the court reviewed whether: “the city imposed restrictions that either: (1) denied El Dorado all economically viable use of its property, or (2) unreasonably interfered with El Dorado’s right to sue and enjoy its property.” *Id.* at 245. The court held that the value of El Dorado’s property was not totally destroyed by the city’s regulation, but that the regulation unreasonably interfered with El Dorado’s business and had a severe economic impact on the business. *Id.* at 247. The Supreme Court of Texas denied the city’s petition for review. The difference between the *El Dorado* case and *Sheffield* was that *El Dorado* dealt with an existing business that had made profits based on its original zoning in the past. If zoning, or another regulation, negatively affects an existing business, it appears that a successful taking challenge is

more likely, as opposed to when only the future development of the property is harmed or stopped by a city regulation.

Another case that used the *Sheffield* analysis recently came out of the Dallas Court of Appeals. *Rowlett/2000 Ltd., v. City of Rowlett*, 2007 WL 2355733 (Tex. App.—Dallas 2007). In *Rowlett/2000, Ltd v. City of Rowlett*, the developer argued that the city's denial of its rezoning applications caused an unconstitutional regulatory taking of property that it originally acquired as pasture land. The developer argued that all value of his land had been destroyed when the city refused to "upzone" the property. The court of appeals held that refusal to rezone was not a taking since the land could still be used as a camp site or park and the owner still had ownership rights to the property. The court also noted that the question of whether the regulation substantially advances a legitimate government purpose is no longer one of the determining factors in whether the regulation was a taking under the recent United States Supreme Court case *Lingle v. Chevron*, 544 U.S. 528 (2005). In *Lingle*, the Supreme Court holds that the "substantially advances" test is an inappropriate test for a constitutional takings analysis. *Id.* at 532. However, it still might be an appropriate test for a due process claim if a city is adopting regulations that have no legitimate public purpose.

When determining whether a downzoning or other city regulation constitutes a regulatory taking, a city should look at: (1) whether it diminishes all economic value of the land or lowers the value of the land to more than the owner paid for it; (2) whether any lost profits caused by the regulation are speculative or not; (3) whether the business involved is pre-existing or development of the land has already occurred; and (4) whether the regulation is purposely focused on one landowner. Cities should be especially careful of regulations that would close down an existing business if the business is not a public nuisance.

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