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TEXAS STATE SENATOR
DISTRICT 25

RQ-0164-KP

June 8, 2017

The Honorable Ken Paxton
Office of the Attorney General
Attention: Opinion Committee
P.O. Box 12548
Austin, Texas 78711-2548

Re: Request for an Opinion on the Constitutionality of Municipal Tree Preservation Ordinances

Dear General Paxton:

Please accept this letter as a request for an Attorney General Opinion with respect to the following legal question:

> Whether under certain circumstances municipal tree preservation ordinances may violate the Takings Clause of the Texas Constitution.

There is no right more fundamental to a free society than the right to private property. As Texans, we must do everything we can to ensure this constitutional right remains protected for all our citizens.

I submit the attached legal brief for your consideration.

Sincerely,

D Campbell MD

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I. INTRODUCTION

Several municipalities in the State of Texas have enacted ordinances restricting the rights of owners of real property to remove trees from their land. Texans are being deprived of their basic rights to use and dispose of their property in the way that they see fit, thanks to municipal regulations like these restrictive tree preservation ordinances. This regulatory streak, applied in these cases to the very features of the land itself, is inimical to the principles of a free-market economy that have made Texas the most prosperous state in the nation.

Private property owners may not be forced to keep unwanted property, including trees, on their land. If, as the municipalities claim, the public receives benefits from these trees remaining on private land, then the public should pay for this benefit; the property owners should not be drafted into converting their land into a public wilderness preserve.

II. OVERVIEW OF MUNICIPAL TREE PRESERVATION ORDINANCES

Although the municipal tree preservation ordinances around the State of Texas vary in their particulars, they share some basic features. As examples, we will set forth the basic features of two such ordinances.

A. The City of Austin

Austin describes the benefits of trees as "supply[ing] character to a landscape, creat[ing] a sense-of-place, provid[ing] a habitat for plants and animals, promot[ing] interacting within the community, temper[ing] local climate, reduc[ing] storm water runoff/erosion, diminish[ing] building lines, conceal[ing] unsightly views, provid[ing] solitude, assist[ing] in conserving energy, and increas[ing] property values." City of Austin website, Development Services Department Frequently Asked Questions: Tress-General, available at http://austintexas.gov/department/development-services/faq.

Austin requires a permit for removal of trees that are "protected" – nineteen inches or larger in diameter on a single-family property or eight inches or larger on commercial or non-single-family property. (Austin Land Development Code Section 25-8-602(3); Section 25-8-604(B)). A "heritage tree" is a separate classification, of a high-value species specifically listed and of twenty-four inches in diameter or more. (Section 25-8-602(1)). Removal of heritage trees larger than twenty-four inches but smaller than thirty inches in diameter requires an administrative variance from the director of the Planning and Development Department; those larger than thirty inches require a public hearing. (Section 25-8-602(D)).

Austin may approve an application to remove a protected tree only after determining that the tree (1) prevents reasonable access to the property, (2) prevents a reasonable use of the property, (3) is an imminent hazard to life or property, and the hazard cannot reasonably be mitigated without removing the tree, (4) is dead, or (5) is diseased and restoration to sound condition is not practicable, or the disease may be transmitted to other trees and endanger their health. (Section 25-8-624(A)).

An application for site plan approval is required to have extensive detail regarding trees prepared at the property owner's expense. It must include a tree protection plan and demonstrate that the design will preserve the existing natural character of the landscape, including the retention of trees eight inches or larger in diameter to the extent feasible. (Section 25-8-604(A)). If development under a proposed site plan will remove a tree eight inches or larger in diameter, Austin may require mitigation, including the planting of replacement trees, as a condition of site plan approval. The director may not release the site plan until the applicant satisfies the condition or posts fiscal security to ensure performance of the condition. (Section 25-8-604(B)).

For an application for preliminary plan, final plat, building permit, or site plan approval that proposes the removal of a heritage tree, the applicant must file a request for a variance to remove the heritage tree before the application may be approved. (Section 25-8-604(C)).

Austin has a schedule for mitigating loss of trees. The rates vary based on the species and size of the tree permitted to be removed, but the standard formula is one caliper inch of replacement value is equivalent to $200.00 and placed into a reforestation fund. (Austin Environmental Criteria Manual ("ECM") Section 3.5.4). Heritage trees are assessed at three times that amount.

A variance may be granted to remove a heritage tree smaller than thirty inches in diameter only after the Austin Director of Planning and Development has determined that the tree prevents reasonable access to the property, prevents a reasonable use of the property, is an imminent hazard to life or property (where the hazard cannot reasonably be mitigated without removing the tree), or if it is diseased (where restoration to sound condition is not practicable or the disease may be transmitted to other trees and endanger their health. Denial of a variance may be appealed to the Land Use Commission. (Section 25-8-644).

A variance may be granted by the Land Use Commission (in a public hearing) to allow removal of a heritage tree greater than thirty inches in diameter only if it finds the criteria met for the issuance of a variance of a heritage tree under thirty inches as described above. (Section 25-8-643).

B. The City of Colleyville

Colleyville describes the broad objectives of its tree preservation ordinance as "[p]rotect[ing] healthy trees and preserv[ing] the natural ecological environmental and aesthetic qualities of the City [,] [p]rotect[ing] and increas[ing] the value of residential and commercial properties within the City [, and] [p]rohibit[ing] the indiscriminate clear cutting of property." (Colleyville Land Development Code Section 5.1).

The ordinance applies to "[a]ny real property upon which any protected tree is located." (Section 5.6(A)(1)). A protected tree is defined as "[a] self-supporting woody perennial plant which has attained a trunk diameter of six (6) inches or more when measured at a point four and one-half (4½) feet above the surrounding grade and normally having an overall height of at least fifteen (15) feet at maturity, usually with a single elongated main stem with few or no branches on its lower part." (Section 2.5, Definitions: Tree (Protected)). A list of disfavored tree species (mesquite, hackberry, Chinese tallow, cottonwood trees under eighteen inches in diameter, cedar

trees with some exceptions, other non-native tree species as determined by City) are exempted from the tree preservation ordinance. (Section 5.10(C)).

Colleyville further defines another, more protected category, Heritage Trees, which it defines as including "[a]ny existing tree listed as an approved replacement tree in Chapter 5 and whose diameter is at least 50% of the diameter of its representative species on the Big Tree Registry, as published by the Texas Forest Service." (Section 2.5, Definitions: Tree (Heritage)). Heritage Trees "may not be classified as exempted trees, regardless of whether or not they are located in any exempted area." (Section 5.9(D)).

A resident of a single-family home may remove all or a portion of a tree on a lot of a single-family home. However, if such a property is larger than two acres, if more than five protected trees are removed as part of a tree removal permit, the City may require compliance with the mitigation and preservation requirements of the tree preservation ordinance if it determines that the resident is attempting to "clear-cut" all or a portion of the property where no new building or similar structure, is proposed as part of a submitted building permit application. (Section 5.10(A)(1)(b)).

The following are exempt from the requirements of the Ordinance: Removal of a tree that has become severely diseased or damaged to the extent that it is beyond the point of recovery or is in danger of falling, as determined by the City; commercial nurseries; removal of a tree or portion of tree that has disrupted the property owner's public utility service due to adverse weather, but only that portion necessary to restore normal utility service. (Section 5.10(A)).

A tree preservation plan shall be submitted with a tree permit application form including payment of fee. Those permit applications requiring no fee or that require the removal of a minimum amount of trees on existing developed properties or within existing right-of-way may not require a complete tree preservation plan and may only require a description of the tree to be removed showing only a portion of the property. (Section 5.8).

Tree preservation plans must include detailed requirements relating to property, existing trees, proposed replacement trees and must be prepared and sealed by a registered landscape architect (all at the landowner's expense). (Section 5.8).

Any protected tree six inches or greater in diameter that is removed, destroyed or more than 50% damaged and is not exempt from these requirements shall be mitigated by either replacing the protected trees by planting new trees, paying a mitigation fee, or a combination of both. (Section 5.12).

A sufficient number and diameter of replacement trees must be planted to equal the total diameter inches (or fraction thereof) of protected trees slated for removal. All medium, large, and palm replacement trees shall be a minimum of six inches diameter when measured one foot above soil and a minimum of twelve inches in height when panted. All screening and ornamental trees shall be a minimum of three inches diameter when measured one foot above soil and a minimum of eight feet in height when planted. All replacement trees shall be a species listed on the City's replacement tree list and guaranteed for three years from date of final

inspection and acceptance of project. Replacement trees must be planted on site where existing tree are to be removed; where this is not feasible, the applicant may initiate a proposal to plant trees off-site, if within half a mile. Any replacement trees must be planted prior to the issuance of a certificate of occupancy or project release. A minimum of 75% of all replacement trees planted as part of required mitigation for a development shall be classified as medium and large tree a listed on the replacement tree list. (Section 5.12(A)).

In the alternative to planting replacement trees, a monetary fee of $250 per diameter inch of the trees removed or damaged must be paid to the City. (Section 5.12(B)). There is a special rule for heritage trees: the mitigation fee is $500 per diameter inch (rather than $250), and any replacement tree equivalent is twice the diameter of the heritage trees removed. (Section 5.12(C)).

III. IN PARTICULAR CIRCUMSTANCES, THE TREE PRESERVATION ORDINANCES VIOLATE THE TAKINGS CLAUSE OF THE TEXAS CONSTITUTION

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." Texas courts generally rely on federal takings jurisprudence when interpreting the state Takings Clause. *See Sheffield Development Company, Inc. v. City of Glenn Heights*, 140 S.W.3d 660, 669 (Tex.2004). Prior to *Sheffield*, at least one Texas court had interpreted the two takings clauses as having different meanings based on the additional language in the Texas Constitution. *Trinity & S. Ry. Co. v. Meadows*, 11 S.W. 145, 146 (Tex.1889).

First, the municipal tree preservation ordinances do not substantially advance legitimate state interests in some circumstances and thus violate the Takings Clause.

Second, in some instances, tree preservation ordinances constitute a regulatory taking under the ad hoc balancing test of *Penn Central Transp. Co.* v. *New York City*, 438 U.S. 104 (1978), because the character of these regulations is strongly analogous to a physical occupation of property, and in some cases the economic impact on the property owner will be too large to go uncompensated, particularly when the investment-backed expectations relating to a parcel are excessively frustrated.

The Takings Clause is "designed to bar 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." *Armstrong v. United States*, 364 U.S. 40, 49 (1960). The character of the municipal tree preservation ordinances is closely analogous to a conservation (or scenic) easement or servitude on the property subject to it. *Cf. Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1018-19 (1992) ("The many statutes on the books, both state and federal, that provide for the use of eminent domain to impose servitudes on private scenic lands preventing developmental uses, or to acquire such lands altogether, suggest the practical equivalence in this setting of negative regulation and appropriation.").

Relevant to the character prong of the *Penn Central* test, there is legal authority for recognizing some restrictions on development as attempts to impose a de facto scenic easement. *See City of Austin v. Teague*, 570 S.W.2d 389 (Tex.1978). Courts have recognized that a government

preventing a property owner from removing a tree from his property is close to a physical occupation. *See, e.g., Wilmes v. City of St. Paul*, No. A11-589, 2012 WL 171390, *3 (Minn. Ct. App. Jan. 23, 2012) ("assertion [of a physical occupation claim for refusal to permit the removal of a tree on property] might be true if his tree were located outside the city's right-of-way"). Similarly, where a separate timber interest is held on land, the owner of that interest has had the entirety of his property interest seized by the provisions of the municipal tree preservation ordinances, of a character similar to a physical seizure, requiring that the owner be compensated.

A. The tree preservation ordinances do not substantially advance legitimate government interests in some circumstances.

An issue that remains open is whether Texas courts will follow the Supreme Court's recent decision in *Lingle v. Chevron USA, Inc.*, 544 U.S. 528 (2005). *Lingle* overruled *Agins* v. *City of Tiburon*, 447 U.S. 255 (1980), where the Court declared that government regulation of private property "effects a taking if [such regulation] does not substantially advance legitimate state interests . . . ." *Id.* at 260. While the Texas Supreme Court has acknowledged *Lingle* in *Hearts Bluff Game Ranch, Inc. v. State*, 381 S.W.3d 468, 478 n.21 (Tex.2012), it has not specifically addressed the effect of *Lingle* on Texas takings jurisprudence.

Agins had essentially introduced the doctrine of substantive due process into the Takings Clause analysis. *Lingle*, 544 U.S. at 540. The "substantially advances" formula suggests a means-ends test: It asked whether a regulation of private property is *effective* in achieving some legitimate public purpose. An inquiry of this nature has some logic in the context of a due process challenge, for a regulation that fails to serve any legitimate governmental objective may be so arbitrary or irrational that it conflicts with the Due Process Clause. *See, e.g., County of Sacramento* v. *Lewis*, 523 U.S. 833, 846 (1998) (stating that the Due Process Clause is intended, in part, to protect the individual against "the exercise of power without any reasonable justification in the service of a legitimate governmental objective").

However, given heightened substantive scrutiny under the Due Course of Law Clause of the Texas Constitution set forth in *Patel v. Texas Dep't of Licensing and Regulation*, 469 S.W.3d 69 (Tex.2015), the *Agins* test may still exist in the Takings Clause of the Texas Constitution. As a result, because the tree preservation ordinances do not have the required tight fit in their efficacy in accomplishing their asserted goals without oppressively burdening property rights of the owner (*e.g.*, they impose blanket ratios of inches of trees to be replaced in mitigation and their asserted interests are not furthered by favoring particular species of trees), they do not substantially advance legitimate government interests in some circumstances and are invalid when applied to particular development proposals.

B. The tree preservation ordinances are uncompensated regulatory takings under certain circumstances.

"Physical takings require compensation because of the unique burden they impose: A permanent physical invasion, however minimal the economic cost it entails, eviscerates the owner's right to exclude others from entering and using his property – perhaps the most fundamental of all property interests." *Lingle*, 544 U.S. at 539 (citations omitted). Once a physical taking has been established, the government must compensate the property owner "to the extent of the occupation, without regard to whether the action achieves an important public benefit or has only a minimal economic impact on the owner." *Loretto*, 458 U.S. at 434-35.

There are two categories of regulatory action that generally will be deemed per se takings. First, where a government requires an owner to suffer a permanent physical occupation of his property – however minor – it must provide just compensation. *See Loretto* v. *Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982) (state law requiring landlords to permit cable companies to install cable facilities in apartment buildings effected a taking). A second categorical rule applies to regulations that completely deprive an owner of "*all* economically beneficial us[e]" of his property. *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1019 (1992) (emphasis in original). The Court held in *Lucas* that the government must pay just compensation for such "total regulatory takings," except to the extent that "background principles of nuisance and property law" independently restrict the owner's intended use of the property. *Id.* at 1026-1032.

Regarding the tree preservation ordinances, if a city could show that removal of the trees or any other action violating the ordinance would have been a common law nuisance, then no compensation would be required to prohibit it. However, no city can plausibly demonstrate that cutting down trees on one's own property would have been considered a nuisance at common law.

Outside the two relatively narrow per se, regulatory takings challenges are governed by the standards set forth in *Penn Central Transp. Co.* v. *New York City*, 438 U.S. 104 (1978). When assessing whether a regulatory taking has occurred, courts look at the three *Penn Central* factors: (1) the economic impact of the regulation on the claimant, (2) the extent to which the regulation has interfered with investment-backed expectations, and (3) the character of the governmental action. 438 U.S. at 124; *Sheffield Dev. Co. v. City of Glenn Heights,* 140 S.W.3d 660, 672 (Tex.2004).

1. The Economic Impact of the Regulation on the Property Owner

The economic impact of the regulation factor simply compares the value that has been taken from the property with the value that remains in the property. *Mayhew v. Town of Sunnyvale,* 964 S.W.2d 922, 935–36 (Tex.1998) (citing *Keystone Bituminous Coal Ass'n v. DeBenedictis,* 480 U.S. 470, 497 (1987)). "[T]he economic impact of a regulation may indicate a taking even if the landowner has not been deprived of all economically beneficial use of his property." *Village of Tiki Island v. Ronquille*, 463 S.W.3d 562, 575 (Tex.App.-Houston [1st Dist.] 2015) (citing *Sheffield Dev. Co.*, 140 S.W.3d at 672). "[L]ost profits are clearly one relevant factor to consider in assessing the value of property and the severity of the economic impact of rezoning on a landowner." *Sheffield Dev. Co.*, 140 S.W.3d at 677.

With regard to particular properties, reductions in the value approaching 50% is undoubtedly significant under this prong of the *Penn Central* test. *See FLCT Ltd. v. City of Frisco*, 493 S.W.3d 238 (Tex.App.-Fort Worth 2016) (under the economic impact prong, the court found that a diminution of value of 46% due to a restriction on selling alcohol was significant).

2. The Extent to Which the Regulation Interferes with Investment-Backed Expectations

The existing zoning of the property at the time it was acquired is the primary factor in determining whether the regulation interferes with investment-backed expectations. *Mayhew,* 964 S.W.2d at 937-38. In

Palazzolo v. Rhode Island, 533 U.S. 606 (2001), the Court held a takings claim is not barred by the mere fact that a property was transferred after enactment of a regulation but before the takings claims had ripened, though it is a factor to be considered under *Penn Central. Id.* at 627–30. Thus, if an owner had acquired the property before the relevant tree protection ordinance went into effect, with a specific intent to develop the property in a way that required clearing trees, this factor would be in favor of finding a taking.

In *Village of Tiki Island v. Ronquille*, 463 S.W.3d 562 (Tex.App.-Houston [1st Dist.] 2015), the court faced a takings claim challenging regulations on short-term rentals. The court cited the Supreme Court opinion in *Hearts Bluff Game Ranch, Inc. v. State,* 381 S.W.3d 468 (Tex.2012) as explaining that "[t]he existing and permitted uses of the property constitute the 'primary expectation' of the landowner that is affected by regulation." (citing 381 S.W.3d at 491). The court found that the property owner had reasonable investment-backed expectations of being able to use the property for short-term rentals; the fact that the particular property was not actually so used was not dispositive because the record did reflect that: (1) short-term rentals have long been done in Tiki Island (on other properties); (2) the owner was doing short-term rentals for seven years before the ordinance was passed; and (3) had made the decision to purchase the particular house based on representations about her ability to rent it out short term. This was evidence of a reasonable investment-backed expectation of an ability to engage in short-term rentals.

In *FLCT Ltd. v. City of Frisco*, 493 S.W.3d 238 (Tex.App.-Fort Worth 2016), a developer bought a property that was subsequently rezoned to deny ability to sell alcohol. The developer raised a regulatory taking claim that the rezoning violated his investment-backed expectations to sell beer and wine, in violation of Texas Constitution. Using the three-prong *Penn Central* test, the court found that the character of the action was a restriction on ability to use his property. Under the economic impact prong, the court found that a diminution of value of 46% due to the alcohol restriction was significant. *Id.* at 273. Under the investment-backed expectations prong, the court cited *Mayhew v. Town of Sunnydale*, 964 S.W.2d 922 (Tex.1998) for the proposition that "historical uses of the property are critically important when determining the reasonable investment-backed expectation of the landowner." *Id.* at 273 (citing *Mayhew*, 964 S.W.2d at 933). Regulations at the time of purchase should be considered in determining whether the regulation interferes with investment-backed expectations. And knowledge of existing regulations "is to be considered in determining whether the regulation interferes with investment-backed expectations."" *Id.* (citing *Mayhew*, 964 S.W.2d at 936).

In *City of El Paso v. Navar*, 2015 WL 4711191 (Tex.App.-El Paso August 7, 2015), the court found a viable regulatory takings claim under *Penn Central* where the landowner of a mobile home park claimed that the city retroactively changed the rules governing mobile home parks and required him to obtain new certificates regarding compliance with new standards requiring large expenditures to retrofit the property. The court focused primarily on the lost profits due to the loss of rental income, noting that "[t]he existing and permitted uses of the property constitute the 'primary expectation' of the landowner that is affected by the regulation." *Id.* at *4 (citing *Hearts Bluff Game Ranch, Inc. v. State*, 381 S.W.3d 468, 491 (Tex.2012)).

For property owners who acquired property before the tree preservation ordinances were enacted, with an intention of developing the land (or in the case where a separate timber interest was acquired; discussed in more detail in the subsection below), these cases are on point: owners

of those interests had reasonable investment-based expectations of being able to use the land for development (or timber interests) rather than having them retroactively nullified by municipal regulatory action.

3. The Character of the Governmental Action

"[T]he 'character of the government action' – for instance whether it amounts to a physical invasion or instead merely affects property interests through 'some public program adjusting the benefits and burdens of economic life to promote the common good' – may be relevant in discerning whether a taking has occurred." *Lingle v. Chevron USA, Inc.*, 544 U.S. 528, 539 (2005). Thus, where on the spectrum a regulation lies – *i.e.*, is it more like a physical invasion or an authorization of the occupation of property, or more like a use restriction – is analyzed under the character prong. This prong of the *Penn Central* test strongly supports finding the restrictions of the tree preservation ordinances to constitute uncompensated takings.

The tree preservation ordinances effectively impose a conservation easement or servitude on property subject to them. *See City of Austin v. Teague*, 570 S.W.2d 389 (Tex.1978). In *Teague,* local residents appeared before the city council and urged it to stop further development of Teague's land and asked the council to take steps to have the site preserved as a scenic easement bordering the southern approach to downtown. Teague applied to the city for a permit required to proceed with preparation of the land for development. The city denied the application as well as two subsequent applications. Teague sued the city for damages for inverse condemnation of his land. *Teague,* 570 S.W.2d at 390-91.

The Supreme Court of Texas concluded that the landowner demonstrated that the City of Austin, by rejecting the third application for a development permit, sought to impose a servitude upon his property to preserve "the natural and traditional character of the land and waterway – that is, the city wanted to use his land as a scenic easement." *Teague*, 570 S.W.2d at 394. In reaching this conclusion, the Supreme Court reasoned that "the City by indirection acquired the scenic easement at no cost which it had recommended that the State Highway Department acquire by purchase. In doing so it also singled out plaintiffs to bear all of the cost for the community benefit without distributing any cost among the members of the community." *Teague*, 570 S.W.2d at 394.

Other courts have recognized that the character of a government preventing a property owner from removing a tree from his property approaches even a per se taking. In *Wilmes v. City of St. Paul*, 2012 WL 171390 (Minn. Ct. App. Jan. 23, 2012), the Minnesota Court of Appeals was faced with a challenge by a homeowner to the denial of permit to remove a tree on his property. The owner claimed a physical occupation per *Loretto*. The court denied the claim because it was in city's right-of-way; therefore the city had the right to control. The court hinted that the analysis would be different if the tree was on an unencumbered portion of the owner's property. "Although Wilmes' assertion [of physical occupation claim via *Loretto* for refusal to permit the removal of the tree] might be true if his tree were located outside the city's right-of-way, it is not. The fact that the tree is located within the city's right-of-way triggers a different analysis." *Id.* at *3. The Supreme Court in *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992) also likened regulations that require leaving property in its natural state to negative easements or servitudes, possessory interests in land taken by the government. *Id.* at 1018-19.

The character of the provisions of the tree protection ordinance that prevent some homeowner from removing a tree without permission (*i.e.*, those provisions not tied to making tree preservation a condition on a permit for development) is analogous to physical occupations requiring compensation, *see Lingle*, 544 U.S. at 539 (under the character prong, if regulation "amounts to a physical invasion" it favors finding a taking); it is in effect indistinguishable from a scenic (or conservation) easement or servitude acquired by the municipalities, but are an attempt to get around the requirement of just compensation for the public benefit provided by the property owner. This is because,

> [e]ssentially, a conservation servitude is a negative restriction on land prohibiting the landowner from acting in a way that would alter the existing natural, open, scenic, or ecological condition of the land. Typical provisions included in conservation servitudes range from a prohibition against destruction of trees, shrubs, or other greenery to a restriction to residential or existing uses. . . . In short, a conservation servitude seeks to preserve the environmental status quo of the burdened land by shifting some ownership rights from the owner of the servient tract to the servitude holder.

Gerald Korngold, *Privately Held Conservation Servitudes: A Policy Analysis in the Context of in Gross Real Covenants and Easements*, 63 Tex. L. Rev. 433, 435–36 (1984); s*ee generally* Jeffrey Tapick, *Threats to the Continued Existence of Conservation Easements*, 27 Colum. J. Envtl. L. 257, 258–60 (2002); *cf.* Travis County website at https://www.traviscountytx.gov/tnr/cep/faq ("A conservation easement is a restriction landowners voluntarily place on specified uses of their property to protect natural, productive or cultural features. . . . Many rights come with owning property, including the rights to manage resources, change use, subdivide or develop. With a conservation easement, a landowner permanently limits one or more of these rights.").

Texas law permits governments to purchase property interests from private landowners in the form of conservation easements, defining and explaining the purposes of these interests:

> (1) "Conservation easement" means a nonpossessory interest of a holder in real property that imposes limitations or affirmative obligations designed to:
> (A) retain or protect natural, scenic, or open-space values of real property or assure its availability for agricultural, forest, recreational, or open-space use;
> (B) protect natural resources;
> (C) maintain or enhance air or water quality; or
> (D) preserve the historical, architectural, archeological, or cultural aspects of real property.

Tex. Nat. Res. Code Ann. § 183.001 (West)(1)(A-D).

But Texas law explicitly bars governmental taking of a conservation easement by eminent domain, Tex. Nat. Res. Code Ann. § 183.006(b)(1) (West); rather, such a property interest must be acquired by consent and follow particular procedures: "An interest that exists in real property at the time a conservation easement is created is not impaired unless the owner of the interest is a party to the conservation easement or consents to it" and "[a] conservation easement must be

created in writing, acknowledged and recorded in the deed records of the county in which the servient estate is located, and must include a legal description of the real property which constitutes the servient estate." Tex. Nat. Res. Code Ann. § 183.002 (West)(d-e).

Municipal tree ordinances are attempts to acquire the benefits of conservation easements without having to obtain the consent of property owners, or to have the public pay the property owners for bestowing the public benefits from such an easement. *See* Tapick, *Threats to the Continued Existence of Conservation Easements*, 27 Colum. J. Envtl. L. at 264 ("While the creation of a conservation easement arises from a transaction between private parties, the easement itself creates a benefit that is inherently public in nature. The general public stands to gain from the achievement of an easement's conservation purpose, be it the preservation of open space, the protection of natural resources, or the maintenance of healthy air quality. Indeed, each of the statutorily recognized conservation purposes of an easement is considered to be a public benefit."); *cf. Casitas Mun. Water Dist. v. United States*, 543 F.3d 1276, 1292 (Fed. Cir. 2008) ("there is little doubt that the preservation of the habitat of an endangered species [by restricting water rights] is for government and third party use – the public – which serves a public purpose" and is therefore a public use subject to the Takings Clause) (citation omitted).

Private property owners should not be required to provide benefits to the public, in the form of "supply[ing] character to a landscape, creat[ing] a sense-of-place, provid[ing] a habitat for plants and animals, promot[ing] interacting within the community, temper[ing] local climate, reduc[ing] storm water runoff/erosion, diminish[ing] building lines, conceal[ing] unsightly views, provid[ing] solitude, assist[ing] in conserving energy, and increas[ing] property values," City of Austin website, Development Services Department Frequently Asked Questions: Tress-General, available at http://austintexas.gov/department/development-services/faq, or "[p]rotect[ing] healthy trees and preserv[ing] the natural ecological environmental and aesthetic qualities of the City [,] [p]rotect[ing] and increase[ing] the value of residential and commercial properties within the City [, and] [p]rohibit[ing] the indiscriminate clear cutting of property." (Colleyville Land Development Code Section 5.1). The public may obtain these benefits by purchasing conservation easements from landowners, and should not be permitted to dragoon landowners to provide them at their own expense.

The application of the tree preservation ordinances to real property are instances of municipalities imposing de facto easements or servitudes on real property interests and, under the character prong of the *Penn Central* test, militate in favor of finding them to be takings requiring compensation.

As discussed immediately below, where a usufructuary property interest in timber is separately held from the land, the character of the restrictions are even more pronounced due to the nature of the property interest held; the tree preservation ordinances effectively take that interest and must pay compensation.

The Supreme Court of Texas has determined that the taking of separate future or contract-based real property interests require compensation. *El Dorado Land Co., L.P. v. City of McKinney*, 395 S.W.3d 798, 801–04 (Tex.2013). Certain property rights are usufructuary; that is, the entire

value of the property interest is in the ability to use some natural resource. This makes a use restriction indistinguishable from a seizure of the property interest, and requires compensation. Rights to water, and oil and gas, are such usufructuary rights. *See Edwards Aquifer Auth. v. Day*, 369 S.W.3d 814, 829 (Tex.2012) (citation omitted) (a landowner's "right to the oil and gas beneath his land is an exclusive and private property right . . . inhering in virtue of his proprietorship of the land, and of which he may not be deprived without a taking of private property."); *Elliff v. Texon Drilling Co.*, 210 S.W.2d 558, 561 (Tex.1948) ("In our state the landowner is regarded as having absolute title in severalty to the oil and gas beneath his land.") (citation omitted); *Marrs v. R.R. Comm'n*, 177 S.W.2d 941, 948 (Tex.1944) ("Every owner or lessee is entitled to a fair chance to recover the oil or gas in or under his land, or their equivalent in kind, and any denial of such fair chance amounts to confiscation.").

In *Day*, the Texas Supreme Court held that a landowner has absolute title in severalty to the water in place beneath his land. 369 S.W.3d at 831. The only qualification of that rule of ownership is that it must be considered in connection with the law of capture and is subject to police regulations. *Id.* at 832. The water beneath the soil is considered a part of the realty, and each owner of land "owns separately, distinctly, and exclusively all the water under his land." *Id.* "Groundwater rights are property rights subject to constitutional protection, whatever difficulties may lie in determining adequate compensation for a taking." *Id.* at 833; s*ee also Tulare Lake Basin Water Storage Dist. v. United States*, 49 Fed. Cl. 313, 318-20 (2001) ("In the context of water rights, a mere restriction on use – the hallmark of a regulatory action – completely eviscerates the right itself since plaintiffs' sole entitlement is to the use of the water."); *Dugan v. Rank*, 372 U.S. 609, 625 (1963) ("A seizure of water rights need not necessarily be a physical invasion of land," and treating restriction on water use as a "servitude . . . constitut[ing] an appropriation of property for which compensation should be made.") (citations omitted).

Timber interests may be severed from real estate, and are then separate property interests. *See McVey v. United Timber & Kaolin Ass'n*, 270 S.W. 572, 573-74 (Tex. Civ. App. 1925) ("The sale of timber growing on the land is a sale of an interest in the land and has been held to be within the statute of frauds."); *Groce v. W. Lumber Co.*, 165 S.W. 519, 522 (Tex. Civ. App. 1913) ("Our conclusion [is] that standing timber is realty, and that a verbal sale thereof which does not contemplate its immediate removal is in contravention of the statute of frauds").

The "intrinsic value" of trees are capable of being valued separately from the land. *Gilbert Wheeler, Inc. v. Enbridge Pipelines (East Texas), L.P.*, 449 S.W.3d 474, 485 (Tex.2014). Separate timber rights, like water rights, are also usufructuary property rights; a limit on use is no different from seizure of the interest. Such a limit takes the entire property interest, and must be compensated. In the context of a holder of a severed interest in timber, the character of the restrictions imposed by the tree preservation ordinances factor in finding them to be uncompensated takings.

IV. CONCLUSION

For the reasons above, municipal tree preservation ordinances are in some circumstances unconstitutional, violating the Takings Clause of the Texas Constitution.