THE QUICK OF THE MATTER: THE PROPOSITION OF TAKINGS LITIGATION UNDER THE SAVE OUR SPRINGS ORDINANCE

Water is an essential commodity which all of nature requires for survival. Our food supply is derived through water which combines with nutrients and minerals to form the fruits and vegetables which become part of our daily diet. The plants of the soil, nurtured by water and consumed by animals, provide our main staple of meat. Like the plants and animals, we too must be nurtured by water.[1]

INTRODUCTION

The City of Austin, Texas, lies atop the Barton Springs Edwards Aquifer, an underground watershed that surfaces through Barton Springs, a natural spring system, feeding Barton Creek. The city obtains a "significant amount" of its water supply from this watershed.[2] In 1992, the citizens of Austin passed an ordinance to protect these water resources.[3] The ordinance, commonly known as the Save Our Springs Ordinance (S.O.S.), proposed to "preserve a clean and safe drinking water supply," and to "prevent further degradation of the water quality" in the springs, creek, and aquifer.[4] In implementing these goals, the ordinance requires building restrictions and prevents pollution by property owners holding land within the Barton Springs watershed.[5] Predictably, property owners soon attacked the ordinance.

Jerry J. Quick and other landowners in Hays County, part of the extraterritorial jurisdiction of the Austin City Council, alleged they were adversely affected by the ordinance. They brought suit in Texas district court, seeking declaratory judgment that the S.O.S. was void.[6] The crux of the charges revolved around whether the ordinance was "unreasonable, arbitrary, and inefficient pursuant to section 26.277(d) of the Texas Water Code."[7] The presiding district judge submitted special issues to the jury, and based on the answers received, found the ordinance null and void.[8] The City appealed, and

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1. Mayor of Clifton v. Passaic Valley Water Comm'n, 529 A.2d 760, 765 (N.J. Super. Ct. 1987).
2. Quick v. City of Austin, 7 S.W.3d 109, 113 n.1 (Tex. 1999).
3. *Id.* at 112.
4. David S. Caudill et al., *The Politics of Legal Doctrine: A Case Study of Texas Land-Use Planning Under the Shadow of* Lucas, 5 HOFSTRA PROP. L.J. 11, 61 (1992).
5. *Id.*
6. City of Austin v. Quick, 930 S.W.2d 678, 682 (Tex. Ct. App. 1996).
7. *Id.* at 683. The relevant portion of the code provides: Any person affected by any . . . ordinance relating to water pollution control and abatement outside the corporate city limits of such city adopted pursuant to this section or any other statutory authorization may appeal such action to the [Texas Natural Resource Conservation Commission] or district Court. TEX. WATER CODE ANN. § 26.177(d) (West Supp. 1996).
8. *City of Austin*, 930 S.W.2d at 682.

the court of appeals affirmed in part and reversed in part, ultimately upholding the ordinance.[9] The court of appeals stated that "measures taken to reduce the amount of runoff rainwater contaminants filtering into the aquifer are rationally related to the goal of protecting the watershed from pollution."[10]

Quick and the other claimants appealed to the Texas Supreme Court, which subsequently affirmed the bulk of the court of appeals' decision, thus declaring the S.O.S. constitutional under the Texas Constitution.[11] Yet, the constitutionality of the ordinance was only the initial skirmish. As the court noted in its decision to uphold the ordinance, the battle over the implications of the ordinance on property rights remains:

> A governmental regulation can restrict, or even take, property for . . . a public benefit; however, if the regulation of property rights goes too far, compensation must be provided. To the extent that the City's limitations on development deny all economically viable use of the property or unreasonably interfere with the right to use and enjoy property, affected property owners may have a remedy in takings law. Such a challenge is not part of this lawsuit.[12]

Determining whether the ordinance's impact on affected property owners constitutes a taking is undoubtedly in the Texas judicial system's near future. While not applicable to the current controversy, the passage of the Texas Private Real Property Rights Preservation Act (TPRPRPA) increases the number of potential litigants with standing to assert a governmental takings claim in Texas.[13] Thus, any decision proposing to resolve the questions must weigh the interests of those who passed the property rights act, private property advocates and environmentalists who initiated and voted to implement the S.O.S.. Such a task will prove difficult. Surely, environmentalists and property advocates alike will have plenty to litigate.

This Note focuses on the potential for takings litigation under the S.O.S. and attempts to predict the outcome when such cases arise. Following a background discussion of federal and Texas takings law, Part I conducts an overview of the creation and substance of the ordinance. Part II applies the ordinance and its alleged impacts on property owners to the current state of takings law. Part III analyzes the applicability of the public trust doctrine in the government's implementation of the ordinance. Finally, this Note

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9. *Id.*
10. *Id.* at 692.
11. *Quick*, 7 S.W.3d at 119-20.
12. *Id.* at 120 (citations omitted).
13. TEX. WATER CODE ANN. § 2007 (Vernon special pamphlet 1996). *See also infra* Part II.B.

concludes that landowners' takings claims under the S.O.S. will fail due to the current status of takings law and in light of the public trust doctrine.

BACKGROUND

A. Federal Takings Law

The Fifth Amendment to the U.S. Constitution provides that private property shall not "be taken for public use, without just compensation" by the government.[14] This limitation on a governmental entity's eminent domain powers also applies to state governments through the Fourteenth Amendment.[15] The U.S. Supreme Court held in *Hawaii Housing Authority v. Midkiff*, that "where the exercise of the eminent domain power is rationally related to a conceivable public purpose, the Court has never held a compensated taking to be proscribed" by the Fifth Amendment.[16] This "exercise," more commonly known as the police power, is "essentially the product of legislative determinations addressed to the purposes of government, purposes neither abstractly nor historically capable of complete definition."[17] Due to the somewhat local and debatable nature of police power, a court confronted with a takings case must approach each case on an *ad hoc* basis and balance public and private interests.[18]

Courts hearing takings litigation face considerable uncertainty. The judicial system must decide whether a governmental body, created to serve its constituency, may abridge the constitutionally-guarded rights to property ownership without compensating property owners for their loss. In so doing, they attempt to carve out rules applicable to these intense disagreements. Unfortunately, because of the changing nature of the government/citizenry relationship and the revolving compositions of the judiciary, predictability in such cases remains absent. The development of takings jurisprudence must be considered as a whole in order to properly evaluate how to decide each issue.

Many believe that the United States Supreme Court decision in *Pennsylvania Coal Co. v. Mahon* provided the seminal statement underlying the principle of takings law.[19] Justice Holmes stated that the "general rule . . . is that while property may be regulated to a certain extent, if regulation goes

14. U.S. CONST. amend. V.
15. Chicago, Burlington & Quincy R.R. v. Chicago, 166 U.S. 226, 235 (1897).
16. Haw. Hous. Auth. v. Midkiff, 467 U.S. 229, 241 (1984).
17. Berman v. Parker, 348 U.S. 26, 32 (1954).
18. Agins v. City of Tiburon, 447 U.S. 255, 260-61 (1980).
19. Pa. Coal Co. v. Mahon, 260 U.S. 393 (1922).

too far it will be recognized as a taking."[20] Undoubtedly, the determination of what satisfied the "too far" limitation and what did not needed more direction. The Court gave this direction in *Penn Central Transportation Co. v. New York City*.[21] There the Supreme Court upheld a landmark preservation law prohibiting the expansion (upward) of Penn Central Station, stating that the preservation law's limiting effect on the proposed construction (and its builders) did not constitute a taking.[22] In so holding, the Court provided a balancing test to use in takings claims that weighs the purpose and effect of the governmental regulation against the remaining uses of, and impact upon, the landowner's property.[23] The Court stated that in implementing the balancing test, a tribunal should consider three factors to aid the analysis: "The economic impact of the regulation on the claimant[,] . . . the extent to which the regulation has interfered with distinct investment-backed expectations[, and] . . . the character of the governmental action."[24] The factor addressing the economic impact on the claimant relates to the extent to which the subject property has been affected—for instance, if the regulation's demands have rendered the claimant's property valueless. The second factor, interference with investment-backed expectations, refers to "interests . . . sufficiently bound up with the reasonable expectations of the claimant to constitute 'property' for Fifth Amendment purposes."[25] Put simply, the factor considers whether the interests affected by the regulation constitute recognized property rights, or "sticks in the bundle." The final factor to consider revolves around the character of the regulation—whether it constitutes a physical invasion or "some public program adjusting the benefits and burdens of economic life to promote the common good."[26] *Agins v. City of Tiburon* further expanded takings jurisprudence by stating that if the governmental regulation either denied a property owner all economically viable use of land or failed to "substantially advance legitimate state interests," such action constituted a regulatory taking.[27]

In accordance with these landmark cases, a court involved in takings litigation must, focusing on the particular facts surrounding the case, weigh the interests of the affected landowner against the interests of the governing body. To aid in defining the landowner's interests, a court should address the *Penn Central Transportation Co.* factors relating to the impact on the owner

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20. *Id.* at 415.
21. Penn Cent. Transp. Co. v. New York City, 438 U.S. 104 (1978).
22. *Id.* at 138.
23. Caudill et al., *supra* note 4, at 21.
24. *Penn Cent. Transp. Co.*, 438 U.S. at 124.
25. *Id.* at 125.
26. *Id.* at 124.
27. *Agins*, 447 U.S. at 260.

and interference with the subject property. Additionally, a court should look to the purpose of the regulation and whether it advances legitimate state interests. These two sides are then balanced, with the weightier interest prevailing. This was not, however, the final procedure handed down by the Court.

The view of takings law changed in the 1980s as the face of the Court changed. President Reagan's appointees, along with the dissenters in *Penn Central Transportation Co.* and *Agins,* comprised a majority on the Court, resulting in decisions favoring private property interests.[28] One such case was *First English Evangelical Lutheran Church v. County of Los Angeles*, which held that a government entity was responsible for compensating a private property owner even though the taking was temporary in nature.[29]

The Court's next decision went even further. In *Nollan v. California Coastal Commission*, the Nollans challenged a state-imposed permit condition on new home construction that required them to grant a public easement to the water that bordered their beachfront property.[30] In a five-to-four ruling, the Court held that the requirement was a violation of the Takings Clause.[31] The Court also stated that "the right to exclude [others is] 'one of the most essential sticks in the bundle of rights that are commonly characterized as property.'"[32] Perhaps the most important result of the decision, however, was the requirement of a nexus between the governmentally-imposed condition on the property and the regulation's purpose.[33] This noticeable and sharp shift favoring property owners' interests was not, however, the Court's last statement.

In 1992, the Court decided *Lucas v. South Carolina Coastal Council*[34] David Lucas owned two residential lots on one of the state's coastal islands.[35] Two years after he purchased the lots, the South Carolina Legislature passed the Beachfront Management Act,[36] effectively barring Lucas from building

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28. George E. Grimes, Jr., Comment, *Texas Private Real Property Rights Preservation Act: A Political Solution to the Regulatory Takings Problem*, 27 ST. MARY'S L.J. 557, 580-83 (1996).

29. First English Evangelical Lutheran Church v. County of Los Angeles, 482 U.S. 304, 319 (1987).

30. Nollan v. Cal. Coastal Comm'n, 483 U.S. 825, 827-28 (1987).

31. *Id.* at 841-42.

32. *Id.* at 831 (quoting Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 433 (1982)).

33. *Id.* at 836-37. In *Nollan*, the Court held that the permit requirements of the regulation did not further the pronounced public purposes (protecting the ability of the public to see the beach, preventing beach crowding, and destroying "psychological" barriers). *Id.* Thus, the "nexus" between the purpose and condition, which would qualify the action as a taking, proved insufficient.

34. Lucas v. S.C. Coastal Council, 505 U.S. 1003 (1992).

35. *Id.* at 1006-07.

36. *Id.* at 1007 (citing S.C. CODE ANN. § 48-39-280(A)(2) (Law. Co-op. 1988)).

any permanent structures on the island lots.[37] Lucas brought suit, alleging the regulation constituted a taking.[38] Using the trial court's determination that the statute rendered Lucas' property "valueless," the Supreme Court ruled in his favor, stating that "the *functional* basis for permitting the government, by regulation, to affect property values without compensation . . . does not apply to the relatively rare situations where the government has deprived a landowner of all economically beneficial uses."[39] The Court further stated that where a state "seeks to sustain regulation that deprives land of all economically beneficial use, we think it may resist compensation only if the logically antecedent inquiry into the nature of the owner's estate shows that the proscribed use interests were not part of his title to begin with."[40] Stated differently, regulations depriving a property owner of "all economically beneficial use" of the land are takings, assuming that the activity prohibited by the governmental action was a part of the owner's initial property rights. Contrary to the historical treatment of governmental actions that invoke a strong presumption of validity, *Lucas* also shifted the burden of proof to the government.[41]

In essence, the current federal takings claim procedure consists of (1) analyzing the purpose of the regulation to ensure that its requirements substantially relate to, and have a nexus with, its stated purpose, and (2) balancing the interests of the parties involved (public versus private). This second undertaking takes into account the impact upon the value of the land, the expectations of property owners, and the type of regulation at issue. A court will hold a government action a taking if the land is rendered valueless, or if the land is impacted in tandem with interference to use and enjoyment, so long as the interests affected reside within the landowner's original "bundle of sticks." If the regulation advances legitimate state interests and does not impose unreasonable burdens upon the landowner, it generally resists takings classification. These procedures are fact-based, and a court must weigh each case individually. While recent decisions in federal takings jurisprudence have tipped the balance in favor of private property owners, there are few clear or certain results in takings cases.[42] This lack of clarity, however, is not confined only to federal courts.

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37. *Id.*
38. *Id.*
39. *Id.* at 1018 (emphasis in original).
40. *Id.* at 1027.
41. *Id.* at 1031-32.
42. Caudill et al., *supra* note 4, at 59.

B. Texas Takings Law

Texas takings law follows federal jurisprudence, but takes a different tack to reach a decision. While the federal takings clause applies to the states through the Fourteenth Amendment,[43] the Texas Constitution also has its own takings clause, stating that "[n]o person's property shall be taken, damaged or destroyed for or applied to public use without adequate compensation being made."[44] The Texas Supreme Court has recognized two classifications of takings: physical and regulatory.[45] Physical takings occur when the government conducts an unwarranted physical occupation of property.[46] The second type, regulatory, requires compensation when an individual's property is "damaged or destroyed."[47] Thus, the analyses in regulatory and physical takings differ.

With respect to the S.O.S., the ordinance does not result in a physical occupation of claimants' property by the government. Rather, the regulation requires the landowners to meet certain use requirements.[48] Since the land remains occupied by the owners, potential claims must undergo a regulatory takings analysis.

In *Mayhew v. Town of Sunnyvale*, the Texas Supreme Court held that the Town's denial of a development application did not constitute a regulatory taking and stated that property regulations "must 'substantially advance' a legitimate governmental interest to pass constitutional muster."[49] The court also recognized that the United States Supreme Court had not yet clarified standards for making such a decision but did note that "a broad range of governmental purposes and regulations" would suffice,[50] including protection from the "ill effects"[51] of urbanization and enhancing the quality of life.[52] The Texas court declared that although a court finds the state's interest relates substantially to a legitimate goal, "[a] compensable regulatory taking can also occur where the government imposes restrictions that either (1) deny landowners of all economically viable use of their property, or (2)

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43. Chicago, Burlington & Quincy R.R. v. Chicago, 166 U.S. 226, 234 (1897).
44. TEX. CONST. art. I, § 17.
45. Mayhew v. Town of Sunnyvale, 964 S.W.2d 922, 933 (Tex. 1998).
46. *Id.*
47. DuPuy v. City of Waco, 396 S.W.2d 103, 108 (Tex. 1965).
48. *See infra* Part I.C.
49. *Mayhew*, 964 S.W.2d at 922, 933, citing City of College Station v. Turtle Rock Corp., 680 S.W.2d 802, 805 (Tex. 1984) (a property regulation must be "substantially related" to a legitimate goal).
50. Nollan v. Cal. Coastal Comm'n, 483 U.S. 825, 834-35 (1982).
51. Agins v. City of Tiburon, 447 U.S. 255, 261 (1980).
52. Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 129 (1978).

unreasonably interfere with landowners' rights to use and enjoy their property."[53]

As to the first determination regarding economically viable use, the court made what it deemed a simple inquiry: did value remain in the property after governmental action?[54] To constitute a taking, entire destruction of value of the property is not necessary; severe economic impact will trigger a state's duty to compensate.[55] The second determination, relating to unreasonable interference with the right to enjoy, requires consideration of (1) the economic impact of the regulation and (2) interference with investment-backed expectations.[56] The first factor merely compares the value taken with the value remaining, not including anticipated losses.[57] The second factor analyzes the landowner's "primary expectation[s]" for use of the property, specifically the property's existing and permitted uses.[58] Additionally, the consideration of expectations before the imposition of the regulation takes into account the historical uses of the property.[59] This undertaking, while involved and thorough, creates uncertainty for potential litigants.

In sum, while both the Texas Supreme Court and the United States Supreme Court have created tests to discern when a police power action is considered a compensable taking, the implementation of those tests does not create predictable results.[60] In Texas, in order for an ordinance to constitute a valid police power action, a court requires that: (1) the regulation substantially relate to the health, safety, or general welfare of the people, and (2) the regulation be reasonable.[61] The rest of the *ad hoc*, fact-based examination requires a court's involvement. While some commentators

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53. *Mayhew*, 964 S.W.2d at 935. *See also* City of Austin v. Teague, 570 S.W.2d 389, 393 (Tex. 1978) ("Important in [a regulatory takings] inquiry would be a determination whether the property was rendered 'wholly useless' . . . or whether the governmental burden created a disproportionate diminution in economic value or caused a 'total destruction' of the value."); Taub v. City of Deer Park, 882 S.W.2d 824, 826 (Tex. 1994) ("[I]mportant considerations are whether property has been rendered 'wholly useless,' or whether its value has been totally destroyed.").

54. *Mayhew*, 964 S.W.2d at 935.

55. *Id.* at 937; *see also Taub*, 882 S.W.2d at 826 (landowners must show "a sufficiently severe economic impact.").

56. *Mayhew*, 964 S.W.2d at 935.

57. *Id.* at 936.

58. *Id.*

59. *Id.* at 937.

60. *See* City of College Station v. Turtle Rock Corp., 680 S.W.2d 802, 804 (Tex. 1984) ("[W]e have previously refused to establish a bright line" test in determining compensability of governmental action.).

61. *Id.* at 804-05.

criticize this process as unclear and unpredictable,[62] creation of a test that provides predictable decisions remains unlikely.

I. ANALYSIS OF THE S.O.S. ORDINANCE

> *He who knows the most, he who knows what sweets and virtues are in the ground, the waters, the plants, the heavens, and how to come at these enchantments, is the rich and royal man. Only as far as the masters of the world have called in nature to their aid, can they reach the height of magnificence.*[63]

The Austin citizenry called nature to their aid. The result, the S.O.S., contains direct and comprehensive terms, and remains succinct. The following three sections review, in turn, the creation of the ordinance, its intent, and, finally, its requirements.

A. Conception

Before the creation of the S.O.S., the Comprehensive Watersheds Ordinance (CWO) stood as the controlling law on water quality within Austin's watersheds.[64] The regulation restricted the quantity of buildings within certain watershed areas and created "setback zones," prohibiting development therein.[65] The ordinance proved controversial, and soon gave way to the proposed S.O.S. initiative.[66] From 1990 until the fall of 1991, the City passed ordinances aimed at preventing further degradation of Barton Creek, including moratoriums on construction.[67] A group of concerned Austin citizens, calling themselves the "Save Our Springs Coalition," proposed even tighter amendments to the CWO to the city council.[68] The resulting agreement, the S.O.S., appeared on a citywide ballot and on August 8, 1992, passed, becoming city law.[69]

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62. *See* Caudill et al., *supra* note 4, at 59 (arguing that the failure of the courts to clarify the field of takings doctrine disallowed the "essential" role the doctrine would have played in the S.O.S. proposed land-use regulation).

63. RALPH WALDO EMERSON, *Nature*, in ESSAYS: SECOND SERIES 66, 67 (1844).

64. Caudill et al., *supra* note 4, at 15.

65. *Id.*

66. *Id.* at 16.

67. *Id.*

68. *Id.*

69. *Id.* at 13, 16.

B. Introduction and Declaration of Intent

The introduction and first section of the ordinance contain straightforward language. The introduction states that the ordinance originated in order to "prevent pollution" of the Barton Springs, Barton Creek, and Barton Springs Edwards Aquifer, and declares as its goals restricting impervious cover[70] and reducing "accidental contamination."[71] The specific and direct declaration of intent follows, containing four assertions: "[1] preserve a clean and safe drinking water supply, [2] to prevent further degradation of the water quality in the subject watershed, [3] to provide for fair, consistent, and cost-effective administration" of Austin's watershed protection laws, "and [4] to promote the public health, safety and welfare."[72] The ordinance continues by stating that "[t]he City of Austin recognizes that the Barton Springs Edwards Aquifer is more vulnerable to pollution from urban development than any other major groundwater supply in Texas, and that the measures set out in this ordinance are necessary to protect this irreplaceable natural resource."[73] The remaining parts of the Act lay out some simple requirements proposed to meet the aforementioned goals.

C. Requirements of the Act

Part two of the ordinance sets out two subparts, the first concerning impervious cover limitations and runoff management, and the second defining the "critical water quality zone."[74] Subpart (a) limits development and any extension or revision of existing developments based on their proximity to certain water zones.[75] Within this "recharge zone," the ordinance limits development to a maximum of fifteen percent impervious cover, and development within the "contributory zone" is limited to a maximum of twenty percent.[76] Any other development within the "remainder of the contributing zone" is limited to a maximum of twenty-five percent, with a provision to lower these percentages "if necessary to prevent pollution."[77] Subpart (a) also requires the management of runoff from development into the

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70. Impervious cover is defined as "roads, parking areas, buildings, swimming pools, rooftop landscapes, and other impermeable construction covering the natural landscape." AUSTIN, TEX., CITY CODE, title XXV, § 25-8-1 (1981).

71. Caudill et al., *supra* note 4, at 61.

72. *Id.*

73. *Id.*

74. *Id.*

75. *Id.*

76. *Id.*

77. *Id.*

watershed, through the use of water quality controls, onsite pollution prevention, and "assimilation techniques" to ensure that thirteen identified pollutants do not exceed current average annual levels in the water.[78] These pollutants include "total suspended solids, total phosphorus, total nitrogen, chemical oxygen demand, biochemical oxygen demand, total lead, cadmium, fecal coliform, fecal streptococci, volatile organic compounds, total organic carbon, pesticides, and herbicides."[79] Finally, subsection (a) states that the impervious cover of a project must be reduced "if needed to assure compliance" with the pollutant restrictions.[80]

Subsection (b) amends the relevant portions of the Texas Land Development Code to prohibit construction of any kind within the Barton Springs watersheds.[81] As a result, "in no event shall the boundary of the critical water quality zone be less than 200 feet from the centerline of a major waterway or be less than 400 feet from the centerline of the main channel of Barton Creek."[82] Consequently, the ordinance prevents construction of any residential, commercial, or even pollution control structures within this zone.[83]

Part three forbids exemptions, variances, or waivers, but Part four states that the ordinance does not apply to existing lots if new development on those tracts "involves (a) construction or renovation of one single family or duplex structure, (b) a maximum of 8,000 square feet of impervious cover (impliedly small commercial development), or (c) school construction."[84] Similarly, Part five retroactively conditions prior approvals, stating that "[p]reviously approved subdivision or site plans will expire under the ordinance unless construction commences within 1-3 years, depending on the date of initial approval."[85] Part six of the ordinance asserts that the authors did not intend for the law to conflict with existing state or federal law.[86] In the event that it does, the City Council has the power, after a public hearing and vote, to "adjust the application" of the law "to the minimum extent required" to comply with federal law, while continuing to "provide the maximum protection of water quality."[87]

Part seven states that if the ordinance conflicts with other ordinances "the provision which provides stronger water quality controls on development

78. *Id.*
79. *Id.*
80. *Id.*
81. *Id.*
82. *Id.*
83. *Id.*
84. *Id.* at 19.
85. *Id.*
86. *Id.* at 62.
87. *Id.*

[should] govern."[88] Part eight requires the City of Austin Environmental and Conservation Services Department to complete a study assessing accidental contamination risks,[89] including "citizen input," and an "inventory [of] the current and possible future use and transportation of toxic and hazardous materials in and through Austin and [requires] recommendations for City actions to reduce the risk of accidental contamination of the Barton Springs Edwards Aquifer."[90]

Part nine directs the City, in its efforts to remedy runoff pollution, to ensure that the money spent on such measures "achieve[s] the maximum water quality benefit" and avoids future similar actions "whenever feasible."[91] Part ten contains a severability clause, providing that any provision of the ordinance subsequently found unconstitutional or invalid will not affect the remainder of the law.[92] Significantly, had any part of the ordinance been found unconstitutional by the *Quick* court, the remainder of the ordinance would stand, and accordingly, the City Council would amend the deficient areas of the regulation. Finally, Part eleven asserts that the ordinance should not "preclude the adoption, at any time . . . of stricter water quality requirements upon development in the watersheds contributing to Barton Springs or of further measures to restore and protect water quality."[93] Arguably, this Part evidences the drafters' singular intent to protect the watershed. The cleanliness of the water remains the central goal of this enactment.

Despite its passage, many critics questioned the construction of the ordinance. Some questioned the dual protections of limiting impervious cover and prohibiting increases in pollutants and asserted that the desire to slow growth served as the actual reason for enacting the ordinance.[94] However, a review of the intent of the ordinance indicates that the proponents of the law were concerned with the quality of the city's water. The law passed to prevent further harm to one of the city's most recognized and vital natural resources. The specific requirements and mechanisms implemented to achieve those goals *show* the ordinance concerns the quality of the city's drinking water. Yet, courts adjudicating potential takings claims must apply the law to the facts of each case. The arguments concerning whether the ordinance operates under a pretext are theirs to determine.

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88. *Id.*
89. *Id.* at 63.
90. *Id.*
91. *Id.*
92. *Id.*
93. *Id.*
94. *Id.* at 19.

II. APPLICATION OF THE S.O.S. ORDINANCE TO TAKINGS LAW

Since the Austin city government's action does not take physical possession of any claimant's property, the current controversy centers around a possible regulatory takings claim, resulting from the City's implementation of a watershed-wide ordinance restricting certain types of construction and land use.[95] Texas employs a separate regulatory takings analysis.[96]

A. Substantial Advance of Legitimate Interests

A court must first consider whether the ordinance was "adopted to accomplish a legitimate goal" and whether it substantially relates "to the health, safety, or general welfare of the people."[97] The contents of the ordinance, namely the Statement of Intent, propose to preserve and enhance the quality of water of the Barton Springs Edwards Aquifer and its related water bodies in order to protect Austin's drinking water and environmental conditions.[98] In *City of College Station*, the Texas Supreme Court held a city ordinance, requiring park land dedication as a condition for approval of subdivision plat applications, substantially related to the general welfare of the people.[99] The court also noted the broad concept of public welfare and explained that if reasonable minds could differ as to whether a substantial relationship exists, the ordinance is valid.[100] Throughout the initiative process of the S.O.S., reasonable minds differed regarding whether the law had a substantial relation to the health and general welfare of the citizens.[101]

Some critics assert that the requirements delineated in S.O.S. do not substantially advance its stated purpose.[102] This argument implies that the limit on development of twenty-five percent is arbitrary number pulling, because "it is difficult to imagine how the existence of 26% impervious cover with no increase in pollutant load fails to serve the goal of water quality, while limiting impervious cover to 25% of a tract somehow furthers that goal."[103] Following this reasoning, an assumption surfaces that perhaps the requirements were selected in order to slow growth in the city, which does not conform with the asserted goals of the ordinance. Yet, arguments that the

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95. *See supra* notes 45-48 and accompanying text.
96. *Id.*
97. City of College Station v. Turtle Rock Corp., 680 S.W.2d 802, 805 (Tex. 1984).
98. *See supra* Part I.B.
99. *City of College Station*, 680 S.W.2d at 805.
100. *Id.*
101. Caudill et al., *supra* note 4, at 11-20.
102. *Id.* at 30.
103. *Id.* at 29.

citizens lacked confidence in the City's ability to control water quality or that the ordinance intends to make water quality protection easier prove reasonable as well.[104] This clash of reasonable opinions demonstrates precisely what the Texas Supreme Court referred to in *City of College Station.*[105] The determination of whether the ordinance bears a substantial relationship to its purported goals would prove simple if judges were able to pry into the minds of those enacting legislation. Currently, such powers elude them. In their stead, so long as a law's purpose appears to substantially relate to its requirements, and reasonable opinions on that matter continue to differ, public policy demands a presumption in favor of upholding the ordinance.[106] While the possibility remains that the Austin City Council and the Save Our Springs Coalition intended to use a water quality control measure to slow city expansion, too many legitimate environmental reasons for enacting such an ordinance exist. Good sense and public policy require maintaining the ordinance.

The S.O.S. intends to protect and preserve the water quality in Austin. Implementing impervious cover limitations upon land within a watershed rationally relates to and furthers those intentions. In fact, in the *Quick* decision, the Texas Supreme Court held that the ordinance's restrictions rationally related to its intentions.[107] The court stated that:

> While the Ordinance's impervious cover limitations undoubtedly substantially affect the value of some property parcels, such limitations are a nationally-recognized method of preserving water quality. Further, it is indisputable that limiting pollutants in runoff water will aid in preserving water quality. We therefore conclude that the Ordinance's provisions are rationally related to its goal of protecting water quality.[108]

The inquiry, however, does not end here.

B. Impact on Affected Properties

A more unpredictable aspect revolves around whether the ordinance denies landowners all economic use of their property or unreasonably

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104. *Id.* at 30.

105. *See supra* notes 99-100 and accompanying text.

106. *See City of College Station*, 680 S.W. 2d at 805 ("The presumption favors the reasonableness and validity of the ordinance. An 'extraordinary burden' rests on one attacking a city ordinance." (citations omitted)).

107. Quick v. City of Austin, 7 S.W.3d 109, 119-20 (Tex. 1999).

108. *Id.*

interferes with their rights of use and enjoyment. While the specific damage Austin landowners have sustained has yet to be litigated, the recent *Quick* decision indicates the extent of possible damages sought by affected property owners. In *Quick,* the plaintiffs alleged an overall decrease in property value of at least $225 million, but did not delineate individual property devaluation.[109] They also presented evidence that some parcels of land lost ninety percent of their value, which went unrefuted by the City.[110] Texas takings jurisprudence requires that the restriction render the affected property valueless.[111] While the terms of the ordinance allegedly *affected* the plaintiff's property values, it did not *completely destroy* them, thus dispensing with a claim of loss of all economic use.

A severe economic impact, however, when combined with an interference with distinct investment-backed expectations can trigger a compensable taking under the unreasonable interference theory.[112] As discussed above, whether losing ninety percent of a parcel's value constitutes a sufficiently severe impact remains cloudy. Likewise, whether the claimants had distinct investment-backed expectations was not established; a review of Texas caselaw establishes a high threshold to cross in order to constitute a taking. In *Taub*, the court held that the revaluation of the plaintiff's property from multi-family use down to single family, which substantially affected plaintiff's property value, did not prove severe enough to constitute a taking because "[w]hile the development of property is limited in scope, it is not altogether precluded."[113] The court stated that "[t]he takings clause . . . does not charge the government with guaranteeing the profitability of every piece of land subject to its authority."[114] *Mayhew* provides additional guidance:

> Traditional land-use regulation (short of that which totally destroys the economic value of the property) does not violate [the Takings Clause] because there is a cause-and-effect relationship between the property use restricted by the regulation and the social evil that it seeks to remedy. Since the owner's use of the property is (or, but

109. *Id.*

110. *Id.*

111. Mayhew v. Town of Sunnyvale, 964 S.W.2d 922, 935 (Tex. 1998).

112. *Mayhew*, 964 S.W.2d at 937 (citing Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1019, n.8 (1992); *see also* Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 124 (1978); Taub v. City of Deer Park, 882 S.W.2d 824, 826 (Tex. 1994)).

113. *Taub*, 882 S.W.2d at 826.

114. *Id.*

> for the regulation would be) the source of the social problem, it cannot be said that he has been singled out unfairly.[115]

In *Mayhew*, the Town denied plaintiff's application for a planned development in order to preserve the rate of Sunnyvale's growth, and stated that the expansion of the town and the resulting "ill effects of urbanization" were the social evils it sought to remedy.[116] The same prevention of urbanization's effects occurred in *City of College Station*, in which the town's ordinance requiring park land dedication was upheld.[117] Similarly, the social evil the Austin citizenry intended to rectify in passing the ordinance was pollution of their main source of drinking water and the encompassing environment. Arguably, the prevention of water pollution also falls within the scope of preventing urbanization's ill effects. The central thrust of the ordinance covers the water quality of the city's main drinking water resource. Accordingly, complaining property owners have not been singled out to bear a disproportionate burden, because their use of the surrounding land and the construction of impervious cover contribute to water pollution. The regulation views the surrounding tracts as the source of the problem. Admittedly, if the ordinance, as some believe, actually furthered a "no-growth" sentiment among Austin residents,[118] *Mayhew* and *City of College Station* have both held that remedying a recognized social evil does not constitute a taking.[119]

Likewise, placing impervious cover restrictions on the watershed lands does not unreasonably interfere with the use and enjoyment of the property. Intuitively, restricting what a property owner may construct on his or her land interferes with the use and enjoyment thereon. But these restrictions do not constitute an *unreasonable* interference in light of S.O.S. goals. The ordinance's limitations sustain the entire community's water quality by requiring sensitive development. The balance shifts in favor of protecting the general welfare of the community, even at the expense of otherwise normal development. A decision in the alternative sets the precedent that land development, without the responsibility of protecting vital natural resources, outweighs the overall benefits of clean drinking water. Citizens expect more from their judicial system and legislature.

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115. *Mayhew*, 964 S.W.2d at 936 (quoting Pennell v. City of San Jose, 485 U.S. 1, 20 (1988) (Scalia, J., dissenting)).

116. *Mayhew*, 964 S.W.2d at 935.

117. City of College Station v. Turtle Rock Corp., 680 S.W.2d 802, 803 (Tex. 1984). *See also supra* notes 99-100 and accompanying text.

118. Caudill et al., *supra* note 4, at 15-17.

119. *See supra* notes 116-17 and accompanying text.

Another important consideration the presiding court may implement relates to the general movement towards greater recognition of private property rights. Recently, property rights advocates have begun a backlash against what they see as an unhelpful state of takings law by proposing state laws protecting private property rights.[120] The movement has come from organizations representing small and large landowners as well as trade organizations.[121] Their goals are twofold. First, they desire to reduce regulation interfering with or reducing the value of property.[122] Second, if such regulations exist, they seek to ensure that the responsible governmental body gives proper compensation.[123] By creating more potential instances requiring compensation to landowners, the groups hope to "discourage unneeded regulation."[124]

This movement remains active in many states, seventeen of which have enacted property rights-related legislation.[125] In 1995, Texas joined the ranks with the passage of the TPRPRPA.[126] The Texas version is considered "the strongest state takings law" in the United States.[127] The Act states that a landowner "whose property is diminished in value at least twenty-five percent" by regulation may sue the regulating governmental body.[128] In the event of a successful suit, the entity must either pay the lost value or repeal the regulation.[129] The law also requires a Takings Impact Assessment before enforcing "any regulation that could affect the value of private real property."[130] The assessment must describe alternatives to the governmental action, identify any "burdens" the action "will likely impose" on ownership, and decide if either the regulation or alternatives "will constitute takings."[131]

Had the TPRPRPA been in effect at the adoption of the S.O.S., it would prove significant to the takings analysis. Initially, the City would have been required to make an assessment. Additionally, if the S.O.S. had been subject to the TPRPRPA prior to the original *Quick* litigation, the City would have

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120. Grimes, *supra* note 28, at 558, 583.

121. *Id.* at 583-84.

122. *Id.*

123. *Id.*

124. *Id.*

125. *Id.* at 587.

126. *Id.* at 560, 589. Statute *located at* TEX. GOV'T CODE ANN. § 2007.001-.044 (Vernon special pamphlet 1996).

127. Grimes, *supra* note 28, at 560 (quoting Robert Elder, Jr., *Taking the Property Rights Plunge: Now that Texas Has the Most Powerful Takings Law in the Nation, It Will Take a Tangle of Administrative Hearings and Litigation to Determine Its Value—and Its Potentially Staggering Costs*, TEX. LAW., July 31, 1995, at S4.).

128. Grimes, *supra* note 28, at 560.

129. *Id.*

130. *Id.*

131. *Id.*

had to identify alternatives to the S.O.S. In fact, such a finding may have lead to a total recision of the ordinance.

The TPRPRPA, however, is not primary authority and does not control here. Notwithstanding, the Act could bear persuasively on the determination of takings questions implicated in the S.O.S. As described in the background analysis, the current state of takings law takes into consideration the public's interest. The court could easily look to the TPRPRPA as a sign that the balance should move towards private property interests. While the Act does not bind this case, it remains one of the factors a court could consider.

Lucas, on the other hand, argues that a governmental body imposing a regulation subject to a takings attack may "resist compensation" so long as the right that the ordinance takes away constitutes a right that the landowner had in the first instance.[132] While the ordinance restricts what property owners may construct on their tract, they do not have, within their "bundle of sticks," a right to develop their land in a manner that leads to drinking water pollution.

Here, however, development directly leads to water degradation. Allowing landowners to create impervious cover despite the ordinance's requirements could result in many pollutants entering and contaminating the water.[133] Construction by Austin landowners within the water quality zones established by the S.O.S. could pollute Barton Creek and the Springs. Consequently, the construction restricted in this instance relates to those types that cause water pollution, not rights of construction overall. The *Lucas* decision would allow the regulation, which clearly attempts to solve the pollution problem in Austin (or at least prevent further degradation), and resists compensation because the affected landowners do not have property interests antecedent to the ordinance's goals.

Overall, the balancing a presiding court must perform in a takings claim contains many factors on both the public and private interest sides of the scale. Texas recently passed legislation protecting private property rights, indicating a public outcry against governmental regulations. The affected landowners must, under the terms of the ordinance, subject their private property to restrictions on how they may use their land, which clearly interferes with their rights as property owners. Thus, the private property interests will weigh heavily in the case. Alternatively, the ordinance seeks to preserve and protect the water resources of the entire community. Based upon the evidence of property devaluation, the terms of the regulation neither result in a complete destruction of the economic value of the property nor an unreasonable interference with use and enjoyment. In this instance, a court

132. Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1027 (1992).

133. Caudill et al., *supra* note 4, at 32.

must find against sustaining a takings claim. The public policies protected by the ordinance, while restrictive, reflect a reasonable limitation on construction. Since a general right to pollute does not exist, a right to develop one's land which results in polluting should not either. A decision here would find in favor of the regulation and consider its ramifications on property owners not compensable. The government/public could, however, use a stronger and somewhat easier weapon: the public trust doctrine.

III. PUBLIC TRUST DOCTRINE IMPLICATIONS

The public trust doctrine would aid in defending the S.O.S. against takings claims. The theory has been described as "a collision between two treasured sets of expectancy interests: those of private landowners who expect their titles to land and water to remain secure, and those of the general public, who expects that most of its rivers will remain rivers, its lakes lakes, and its bays bays."[134] After a brief but relevant introduction to the basic systems of water law, this section analyzes the origins of the doctrine, its expansion, and the Texas recognition (or lack thereof) of the trust doctrine. Finally, this section concludes by applying the public trust doctrine to the takings analysis and confirms that the doctrine's use proves priceless in defending the S.O.S. against takings claims.

A. Riparianism Versus Prior Appropriation

The two major types of water rights systems that exist in the United States are riparianism and prior appropriation, each distinct to a particular region of the country.[135] The eastern part of the nation follows riparianism, which states that a landowner whose property abuts a stream has a vested property right to use of the water, but that use cannot act to the detriment of other riparians.[136] Nonuse or misuse does not destroy this right.[137] The doctrine of prior appropriation has been more prevalent in the western United States, where water remains scarce, and follows the idea that "water rights are created by diverting water and putting it to beneficial use."[138] The

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134. Charles F. Wilkinson, *The Headwaters of the Public Trust: Some of the Traditional Doctrine*, 19 ENVTL. L. 425, 426 (1989).

135. Janet M. Drewry, Casenote, *Water Law–Riparian Rights–Neither Conservation Amendment Nor Police Power of State Justifies the Taking of Vested Riparian Rights Without Compensation Under Texas Water Rights Adjudication Act of 1967*, 14 ST. MARY'S L.J. 127 (1982).

136. *Id.* at 128.

137. *Id.*

138. *Id.*

appropriator can lose his rights by nonuse, and disputes concerning priority of water rights are rectified by temporal superiority.[139]

Texas originally adopted the English riparian system, but the arid regions of the state required the more applicable appropriation doctrine to satisfy their water needs.[140] Thus, in 1889 and 1895, statutes were passed authorizing the appropriation system, but all acquired waters remained "subject to existing riparian rights, leaving Texas with a dual system of water law."[141] Finally, in 1913, the legislature passed a law declaring the entire state as subject to the appropriation doctrine.[142] Consequently, Texas continues to use the appropriation doctrine today.

B. The Origins of the Public Trust Doctrine

The basic premise underlying the public trust doctrine asserts that a state has a fiduciary duty to the public which requires it to prohibit the privatization of natural resources.[143] While there is great debate concerning the origins of the doctrine,[144] most agree that the initial decision describing the doctrine was *Illinois Central Railroad Co. v. Illinois*.[145] In that case, the Supreme Court reviewed the Illinois Legislature's decision to convey title of a substantial tract of submerged land on the Lake Michigan waterfront to the railroad, via the Lake Front Act.[146] Four years later, however, the legislature changed its mind concerning this transfer and repealed the Act, asserting that the state once again controlled the land.[147] The railroad argued that their rights in the property were secured, and thus such a decision would violate their constitutional rights.[148] The Supreme Court held that the state's holdings in submerged land were different than those in dry land because such land "is held in trust for the people of the State that they may enjoy the navigation of the waters, carry on commerce over them, and have liberty of fishing therein freed from the obstruction or interference of private parties."[149] Because of

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139. *Id.* at 129.
140. *Id.*
141. *Id.* at 129-30.
142. *Id.* at 130.
143. James R. Rasband, *The Public Trust Doctrine: A Tragedy of the Common Law*, 77 TEX. L. REV. 1335 (1999).
144. *Id.* at 1339-44.
145. Ill. Cent. R.R. Co. v. Illinois, 146 U.S. 387 (1892).
146. Eric Pearson, Illinois Central *and the Public Trust Doctrine in State Law*, 15 VA. ENVTL. L.J. 713, 720 (1996).
147. *Id.*
148. *Id.*
149. *Illinois Central*, 146 U.S. at 452.

the nature of this trust, the state could not transfer it as it ordinarily would.[150] Rather, the trust could not be lost and "would not allow the irrevocable loss of sovereign control over such a valuable resource."[151] Although argument has arisen as to the validity of the decision,[152] the Court has continued to consider public trust doctrine arguments.

A more recent decision concerning the trust was given in *Phillips Petroleum Co. v. Mississippi*.[153] This case, too, involved a controversy over submerged lands off the coast of the state.[154] Justice White began the decision by citing to the progeny of *Illinois Central* to restate the equal footing doctrine.[155] He addressed the doctrine by stating that the Court recognizes "that absolute property in, and dominion and sovereignty over, the soils under the tidewaters in the original States were reserved to the several States," and the newly admitted states "have the same rights, sovereignty and jurisdiction in that behalf as the original States possess within their respective borders."[156] Using this authority, the Court held that the coastal submerged lands at issue passed to Mississippi "upon its entrance into the Union."[157] As a result of this holding, the Court retreated from the broad pronouncement it made in *Illinois Central*, concerning a state's inability to alienate public trust lands, by holding that states may discern which lands to hold in the public trust and which to give private rights "as they see fit."[158] After acknowledging that property matters should be left to the state, the Court held that lands not "navigable-in-fact" were also subject to the public trust doctrine and therefore under control of the state.[159]

Up to this point, the key determination involved in public trust analyses concerned whether the waters at issue were navigable. The trust applied to navigable waters in order to protect navigation, commerce, and fisheries, and had done so "from time immemorial."[160] The case of *National Audubon Society v. Superior Court of Alpine County*, also known as the Mono Lake case, expanded that view.[161] Mono Lake, a saline lake home to certain

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150. Pearson, *supra* note 146, at 727.

151. *Id.*

152. *Id.* (arguing that the decision was flawed due to a misunderstanding of state power, misapplication of authority, lack of a sufficient constitutional analysis, and the public trust portion of the decision as merely dictum).

153. Phillips Petroleum Co. v. Mississippi, 484 U.S. 469 (1988).

154. *Id.* at 472.

155. *Id.* at 474.

156. *Id.* (quoting Knight v. United States Land Ass'n, 142 U.S. 161, 183 (1891)).

157. *Phillips Petroleum Co.*, 484 U.S. at 476.

158. *Id.* at 475.

159. *Id.* at 476.

160. Ralph N. Johnson, *Water Pollution and the Public Trust Doctrine*, 19 ENVTL. L. 485 (1989).

161. Nat'l Audubon Soc'y v. Superior Court of Alpine County, 658 P.2d 709 (Cal. 1983).

wildlife, is fed by five streams.[162] The Department of Water and Power to the City of Los Angeles was granted a permit to fully appropriate four of those five streams by the California Water Resources Board.[163] The lake level subsequently dropped, affecting the ecology of the area.[164] The California Supreme Court did not, in this instance, ultimately decide on the specific validity of the permit, but it did espouse opinions about the breadth and effect of the public trust doctrine. The court stated that "the public trust doctrine and the appropriative water rights system are parts of an integrated system of water law," giving power to the state "which precludes anyone from acquiring a vested right to harm the public trust, and imposes a continuing duty on the state" to account for public trust uses in allocating water.[165] Beyond integrating the two concepts, the court discussed the scope of the trust and concluded "that the public trust doctrine . . . protects navigable waters from harm caused by diversion of nonnavigable tributaries."[166] The decision also cited and affirmed a prior case recognizing that the public trust protects environmental and recreational values.[167]

A few states have followed California's lead and adopted the public trust theory for control of water resources.[168] Montana represents a prime example of state application of the public trust doctrine to non-navigable waters. In *Montana Coalition for Stream Access v. Curran*, the state supreme court held that in light of the doctrine and portions of the state's constitution, all waters capable of recreational use are subject to state trust law.[169] Other states have rendered decisions extending the doctrine to dry sand beaches,[170] state parks,[171] and wildlife.[172] The Idaho Supreme Court has held that "[t]he state holds *all waters* in trust for the benefit of the public," and explained that the public trust extends to "aquatic life . . . , aesthetic beauty and *water quality*."[173] Idaho later codified its holding.[174] Additionally, a New Jersey decision has extended the trust to drinking water.

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162. *Id.* at 711.

163. *Id.*

164. *Id.*

165. *Id.* at 732.

166. *Id.* at 721.

167. *Id.* at 719 (citing Marks v. Whitney, 491 P.2d 374, 383 (Cal. 1971)) (expanding the doctrine "to encompass changing public needs").

168. Ronald A. Kaiser & Shane Binion, *Untying the Gordian Knot: Negotiated Strategies For Protecting Instream Flows In Texas*, 38 NAT. RESOURCES J. 157, 181 (1998).

169. Mont. Coalition for Stream Access, Inc. v. Curran, 682 P.2d 163 (Mont. 1984).

170. Matthews v. Bay Head Improvements Ass'n, 471 A.2d 355 (N.J. 1984).

171. Gould v. Greylock Reservation Comm'n, 215 N.E.2d 114 (Mass. 1966).

172. Wade v. Kramer, 459 N.E.2d 1025, 1027 (Ill. 1984).

173. Shokal v. Dunn, 707 P.2d 441, 447-48, n.2 (Idaho 1985) (quoting Kootenai Envtl. Alliance v. Panhandle Yacht Club, 671 P.2d 1085, 1088 (Idaho 1983)) (emphasis added).

174. IDAHO CODE § 36-1601 (1977).

In *Mayor of Clifton v. Passaic Valley Water Commission,* actions were brought against municipality-owned water commissions challenging the distribution of monetary surplusage among member municipalities by the water commissioner. The surplusage derived from member municipalities operating as suppliers of public drinking water.[175] The court held the distribution of these funds contrary to public policy, including the public trust doctrine.[176] The decision stated that "[w]hile the original purpose of the public trust doctrine was to preserve the use of the public natural water for navigation, commerce and fishing . . . it is clear that since water is essential for human life, the public trust doctrine applies with equal impact upon the control of our drinking water reserves."[177] Utilizing this reasoning, the commission could not distribute the proceeds because the water was public domain and their duty was to provide drinking water "of the highest quality."[178] The decision relates not only the importance of clean drinking water, but recognizes the duty of the state to protect its quality. The S.O.S. implements the duty of the government to protect its drinking water resources in a similar way.

These cases illustrate the growing reach of the public trust doctrine and represent a rather widespread opinion on the subject. The trend to include all water resources as protectable under the public trust doctrine includes the belief that the doctrine historically implied a protection of water quality.[179] The public trust doctrine has always purported to include protection of fishing grounds and fisheries.[180] Intuitively, the quality and quantity of fish within those areas depends on the quality of water in which they subsist. Fish perish in poor water quality areas. Thus, while water quality of these protected areas rarely receives explicit protection, the fundamental importance of water quality remains evident.[181] Protecting fisheries and wildlife implicitly relies on protecting water quality, and this quality, in turn, falls within the protections of the public trust doctrine.

The aforementioned *Mono Lake* case, fundamental in expanding the trust to non-navigable waterways,[182] considered the rising salinity of the lake as a reason for discontinuing the diversion.[183] Increased salinity would destroy the algae in the lake, which would reduce the lake's brine shrimp population and,

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175. Mayor of Clifton v. Passaic Valley Water Comm'n, 529 A.2d 760, 762 (N.J. Super. Ct. 1987).
176. *Id.* at 767.
177. *Id.* at 765.
178. *Id.*
179. Johnson, *supra* note 160, at 491.
180. *Id.*
181. *Id.* at 498.
182. *See supra* notes 162-68 and accompanying text.
183. Nat'l Audubon Soc'y v. Superior Court of Alpine County, 658 P.2d 709, 715 (Cal. 1983).

in turn, its full population of life.[184] The water quality of the lake would effect a substantial portion of the lake's ecology. The court's recognition of the public trust doctrine's use in protecting these waters again reiterates the inclusion of water quality into the doctrine. The S.O.S., by its intent and terms, protects water quality, and does so with the support of the doctrine's requirements on governmental bodies to keep the waters in trust for the public. Texas courts, however, have yet to totally accept the trust doctrine.

C. Texas' Response to the Public Trust Doctrine

In *Natland Corp. v. Baker's Port, Inc.*, a Texas Court of Appeals gave the most recent pronouncement of its view of the effects of the public trust doctrine on Texas water law.[185] The state became involved in a dispute concerning 2,800 acres of undeveloped coastal land, claiming 265 of the acres were subject to public use under the public trust doctrine.[186] The state argued that although it had the ability to sell the land, specific legislative intent to transfer such public trust lands is required and the buyer must use the purchase consistent with the public interest.[187] The court of appeals recognized that while there exists no "universal" doctrine, many states have dealt with these lands "according to [their] own views of justice and policy."[188] The court then stated: "This doctrine . . . has not fared well in Texas jurisprudence."[189] The resulting analysis, however, proceeded to show that the Texas courts had refused to analyze the *Illinois Central* case and its progeny because they found sufficient intent by the Texas Legislature to surrender the lands *without* the public trust attached.[190] This decision did not completely preclude any use of the public trust doctrine, but rather merely stated that when the state intends to convey or sell lands without the trust doctrine's fiduciary duty towards the public attached, the court cannot subject the landowner to the trust doctrine.

The blow sustained by public trust doctrine advocates softens in light of *Barshop v. Medina County Underground Water Conservation District.*[191] Barshop and other landowners challenged the validity of the Edwards Aquifer Act which created the Edwards Aquifer Authority, charged with managing the

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184. *Id.*
185. Natland Corp. v. Baker's Port, Inc., 865 S.W.2d 52 (Tex. App. 1993).
186. *Id.* at 55.
187. *Id.* at 59.
188. *Id.* at 60.
189. *Id.*
190. *Id.*
191. Barshop v. Medina County Underground Water Conservation Dist., 925 S.W.2d 618 (Tex. 1996).

appropriations from the aquifer.[192] In holding the Act facially constitutional, the Texas Supreme Court noted the uniqueness of the aquifer and recognized it as "vital to the general economy and welfare of the State of Texas."[193] The court further stated that the state "has the responsibility under the Texas Constitution to preserve and conserve water resources for the benefit of all Texans."[194] The reference to the state constitution relies on Article 16, § 59, familiarly known as the Conservation Clause, which provides: "The conservation and development of all of the natural resources of this State, . . . and the preservation and conservation of all such natural resources of the State are each and all hereby declared public rights and duties."[195] The court used this clause to bolster its decision and recognized the state's duty in protecting and conserving the waters of the state. The court's recognition that the government must protect the state's waters for the public interest reflects the theory of the public trust doctrine. Likewise, the state has codified its responsibility. The Texas Water Code states that:

> The water of the ordinary flow, underflow, and tides of every flowing river, *natural stream*, and lake, and of every bay or arm of the Gulf of Mexico, and the storm water, flood water, and rainwater of every river, *natural stream*, canyon, ravine, depression, and *watershed* in the state is the property of the state.[196]

In addition, the Code observes that the governmental entities created to regulate the waters have a duty "to assure that the public water of this state, which is held in trust for the use and benefit of the public, will be conserved, developed and utilized in the greatest practicable measure for the public welfare."[197] The Barton Springs Edwards Aquifer, Barton Creek, and Barton Springs constitute state-owned waters under the Texas Water Code. The relevant sections of the Code, in tandem with the Texas Supreme Court's statements regarding the Texas Constitution in its *Barshop* decision, are additional support that the bodies of water involved in the instant dispute require protection by the state's governmental bodies in the name of the public. The basis of the S.O.S., therefore, arguably falls within the parameters of the public trust doctrine, requiring protection by the city.

Recently, the Texas Supreme Court held unconstitutional a portion of the Water Code allowing certain private landowners within a municipality's

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192. *Id.* at 624.
193. *Id.* at 623.
194. *Id.*
195. TEX. CONST. art. XVI, § 59(a).
196. TEX. WATER CODE ANN. § 11.021 (Vernon Supp. 1984) (emphasis added).
197. *Id.* § 16.196.

extraterritorial jurisdiction to designate their property as "water quality protection zones."[198] The Code exempted such landowners from otherwise applicable municipal "ordinances, rules, or requirements which 'are inconsistent with the land use plan and the water quality plan or which in any way limit, modify, or impair the ability to implement and operate'" such a plan.[199] The court invalidated the statute because it delegated legislative power to private landowners.[200] In so holding, the court stated "[w]ater quality regulation is a legislative power."[201] Of particular applicability to the instant case, the court declared "[t]he conservation, preservation, and development of the State's natural resources are public rights and duties, and the Legislature is charged with passing laws to protect these public rights."[202] Arguably, a majority of the court is leaning towards the concepts underlying the public trust doctrine, irrespective of any official adherence to the doctrine.

Clearly, the "scope of the public trust doctrine is poorly defined . . . but there is little doubt that the doctrine does exist" in Texas.[203] Some have argued that the doctrine should extend to the state's estuary and riverine systems,[204] as well as to instream flows.[205] Although not *specifically* addressed by the Texas Supreme Court, the language of state law (constitutional and statutory) and the tone of the prior court decisions show that Barton Springs and its affiliated watershed float within the parameters of the public trust doctrine.

D. Application of the Public Trust Doctrine to an S.O.S. Takings Case

The use of the public trust doctrine to defend litigation against the S.O.S. is of paramount importance. Since government and public interests influence balancing under takings law, utilizing the argument that the state has a fiduciary duty to protect the waters of the state results in bolstering "public welfare" assertions.

For instance, the City of Austin has a fiduciary duty to protect and preserve the waters within its jurisdiction. Barton Creek and Barton Springs are surface waters that flow through the City's jurisdiction and are used for

198. FM Properties Operating Co. v. City of Austin, 22 S.W.3d 868 (Tex. 2000).

199. *Id.* at 875 (quoting Tex. Water Code § 26.179(i) (1995)).

200. *Id.*

201. *Id.*

202. *Id.* at 875-76.

203. Kaiser & Binion, *supra* note 168, at 181.

204. *Id. See also* Michael D. Morrison & M. Keith Dollahite, *The Public Trust Doctrine: Insuring the Needs of Texas Bays and Estuaries*, 37 BAYLOR L. REV. 365, 419 (1985).

205. Kaiser & Binion, *supra* note 168, at 181-82.

consumption as well as aesthetic and recreational activities.[206] Likewise, the Barton Creek Edwards Aquifer, while technically an underground water source, bubbles up into the creek via the springs and eventually empties into the Colorado River, a navigable waterway. These facts, in concert with the applicable sections of the Texas Water Code, lead to the conclusion reached in the *Mono Lake* case, extending the public trust doctrine to nonnavigable tributaries of navigable waterways.[207] Logically, the public trust doctrine requires the City and State to account for the trust waters and the public's interest in them. A regulation *required* by law to preserve and conserve the public's interest in clean drinking water, through use of the public trust doctrine and the Conservation Clause of the Texas Constitution,[208] indicates an overwhelming governmental interest in passing the S.O.S.

Additionally, the public trust doctrine precludes persons from acquiring a vested right to harm the public trust.[209] Since Texas law considers all waters within the state public property,[210] and recognizes, by definition, the Barton Springs Edwards Aquifer, Barton Springs, and Barton Creek as waters owned by the state, it follows that property owners along this watershed cannot possess, and consequently never possessed, a vested right to harm those waters. The S.O.S. prevents harm to waters protected by the public trust doctrine, and conversely, the public trust doctrine protects attacks against the State's implementation of water quality measures. The water quality measure involved here exists within the protection of the State under its public trust doctrine obligations—obligations which clearly outweigh individual private property rights.

Uncertainty remains, however, regarding the status of the trust doctrine in Texas. If the Texas Supreme Court remains unwilling to recognize the public trust doctrine, attempts to implement this strategy will obviously prove unsuccessful. Yet, with a trend towards recognition of the doctrine,[211] and the heat of the issue coupled with the overwhelming evidence that the state remains duty-bound to protect its waters, the court will undoubtedly speak specifically to the problem, and should find the doctrine exists under Texas law.

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206. Quick v. City of Austin, 7 S.W.3d 109, 112 n.1 (Tex. 1999).
207. *See supra* notes 161-68 and accompanying text.
208. *See supra* notes 195-96 and accompanying text.
209. *See supra* note 165 and accompanying text.
210. *See supra* note 197 and accompanying text.
211. *See supra* Parts III.B-III.C.

CONCLUSION

The City of Austin stands at a fork. On the one hand, many members of the public and city government fought for the S.O.S. because they recognized the importance of keeping their environment, particularly the city's drinking water, clean and enjoyable. On the other hand, citizens despise infringement on their property rights, especially by the government. This conflict describes the overriding problem that all regulatory takings claims have to encounter: private versus public interests. While the current takings law often proves unpredictable and ad hoc in nature,[212] the analysis undertaken in this Note argues that the city regulations, for multiple reasons, do not require compensation.

First, the ordinance's terms substantially relate to its purpose, making it a valid police power regulation.[213] The Texas Supreme Court has already held the regulation's purpose of preserving the city's water quality as legitimate and its restrictions related to that goal.[214] Likewise, the prior state supreme court rulings recognizing the broad concept of "public welfare"[215] logically include prevention of contamination of the water supply. The court must recognize that under the Texas Constitution, the City and other governmental bodies have an affirmative duty to undertake actions similar to the enactment of the S.O.S.[216] In addition, the interference with private property rights remains reasonable in light of the purpose of the ordinance and the remaining uses of the affected property.[217]

Recent court decisions in other jurisdictions hold that the government has a fiduciary duty to control and care for the state's waters under the public trust doctrine.[218] While these findings do not represent binding authority, Texas arguably has a duty to ensure that the water under its control is not only *appropriated* in a manner consistent with local water law, but *preserved* in such a manner as well. The waters involved clearly fall within those required for the state to protect.[219] Under the trust doctrine, the Austin city government arguably had an obligation to implement the ordinance. If a court were permitted to saddle a governmental body with compensating citizens affected by an ordinance created in the name of the public they have a duty to serve, the hoards of litigation would never cease. The purpose of the S.O.S. remains

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212. *See supra* notes 41-42 and accompanying text.
213. *See supra* Part II.A.
214. *See supra* notes 107-08 and accompanying text.
215. *See supra* notes 49-52 and accompanying text.
216. *See supra* Part III.D.
217. *See supra* Part II.B.
218. *See supra* notes 161-79 and accompanying text.
219. *See supra* notes 192-98 and accompanying text.

substantially related to the admirable, and arguably mandatory, goal of preserving and protecting the city's water resources.[220]

The court must then look to whether the ordinance has denied the owner all economically viable use of the property.[221] Based on the limited facts given in the prior *Quick* decision, the regulation does not take *all* viable use, and the ordinance does not totally destroy the value of the property.[222] Also, while the ordinance does have an economic impact upon the affected property, it does not sufficiently interfere with the use and enjoyment of the property to constitute a taking.[223] Governmental entities cannot guarantee the profitability of property in its jurisdiction, and the social evil that the ordinance attempts to rectify sweeps across and includes all who attempt to pollute in the watershed; no specific group must bear a disproportionate burden.[224] The Texas courts have recognized prevention of the ill effects of urbanization to carry great weight.[225] More importantly, since a landowner cannot acquire rights to harm public trust waters, any claims made to the extent that the S.O.S. removes sticks from the bundle lack legal support.[226]

A decision finding the City not liable for compensation has two obstacles. The first is the recent adoption of the Texas version of property rights protection laws. This law does not affect the ordinance because the Act was passed later in time, but the growing sentiment and movement towards restricting the government's ability to regulate property, even property adversely affecting the city's natural resources, may influence a decision from the court.[227] The author has faith, however, that the court will recognize the weightier concerns of the public interest, including the State's duty under the public trust doctrine.

The second obstacle concerns the amount of loss suffered by the landowners. Texas takings law does not require complete destruction of private property before awarding compensation.[228] Rather, if the regulation has a "sufficiently severe economic impact" and it "interferes with distinct investment-backed expectations," the court will find for the landowner.[229] With no bright line test or limit delineated by either the United States or Texas Supreme Courts, a court must consider all factors and balance the weight of

220. *See supra* Part II.A.
221. *See supra* Part II.B.
222. *See supra* notes 109-11 and accompanying text.
223. *See supra* notes 112-19 and accompanying text.
224. *Id.*
225. *Id.*
226. *See supra* notes 210-11 and accompanying text.
227. *See supra* notes 120-31 and accompanying text.
228. *See supra* notes 55-56 and accompanying text.
229. *Id.*

both interests.[230] The resulting decision will presume the validity of the legislative enactment and recognize that some economic use remains in the affected properties. An evident nexus between the purpose of the ordinance and the effect it has on the public exists. Furthermore, the landowner has no legitimate rights to use his property in a way that results in pollution or disrupts the aforementioned nexus.[231] Clearly, the benefits reaped by the public outweigh any potential damage the ordinance may cause, and the ordinance does not go "too far." Further, the balance tips in favor of the State as a result of its public trust obligations to accomplish exactly what the ordinance intends: to preserve the state's public resources.[232] Protection of water quality has paramount importance to the public, and a court should recognize that fact. The alternative is not a course the courts will want to take.

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230. *See supra* notes 60-62 and accompanying text.

231. *See supra* Part II.

232. *See supra* notes 207-12 and accompanying text.

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