ORAL ARGUMENT – 10/30/02
02-0033
SHEFFIELD DEVELOPMENT CO. V. GLEN HEIGHTS

ANDERSON: Mr. Baggett and I represented Sheffield Development Co., Inc. and Gary Sheffield, the owner of the property which was taken by inverse condemnation by the City of Glen Heights.

This case presents this court with the opportunity to apply the regulatory takings standards that it established in Mayhew v. City of Sunnyvale, which was handed down 4 years ago, to a fact situation that involves a down zoning of property as opposed to the denial of an application, which would have upzoned property which was present in the Mayhew case.

The fact situation in this case is the converse of that in Mayhew. And the CA on page 652 of its opinion provides a good discussion with regards to what the differences are from a factual standpoint of the two cases.

According to Mayhew the first test is whether or not the governmental regulations substantially advances a legitimate governmental interest.

HECHT: Do you think the law is any different in Texas than it is under the US Constitution as it affects this case?

ANDERSON: I think the only difference would be that the Texas constitution is broader in terms of stating that property shall not be taken or damaged without payment of just compensation. I believe that this court has basically construed federal law and the federal constitution the same as the case law here and the state constitution.

HECHT: But are we going to look at the US SC's regulatory takings cases for guidance or for pretty much binding authority?

ANDERSON: My assumption is is that they are being viewed far as a guidance. In addition, I don't there are any cases from a federal standpoint that are exactly like this one. And specifically the first and the third test that were established in Mayhew both are ad hoc factual inquiry. And from my review of the literature and the case law, I haven't ever seen a case exactly like this one, which involves the type of facts that are present here in the application of the test.

PHILLIPS: In all candor, if we're looking to these SC cases for guidance, do you believe your interpretations _____ wrong and had settled in federal law or is the best we can say is that the US SC has given aid and comfort to almost any view in this area and we need to pick and sort through what is the most principled position among their recent _____?

ANDERSON: I'm assuming that you are referring to the US SC's opinions in Palazolla and also the Del Monte _____ case...

HECHT: Concrete Pipe and Products.

PHILLIPS: Is there a lot of conflicting language and we just need to sort through it and say this is going to be the law in Texas and be _____.

ANDERSON: I think that the problem is specifically with respect to the first and the third test, I think the second of the three tests which is denial of all economical and beneficial use, even that test is still somewhat confusing under the federal case law, but is not applicable here. Even though there was a significant devaluation of the property between 38% and 94%. We're not claiming that all value was deprived from the property. When you get to the first and the third test the first is substantial advancement of legitimate governmental interest; and the third is, whether or not the regulation unreasonably restricts the use and enjoyment of property. The problem is is that those are ad hoc factual inquiries. And the cases that have gone up to the SC, not surprisingly the ones that have been taken are those that have involved extremely egregious facts somewhat similar in terms of the extent _____ facts that are present in this particular case.

Del Monte _____ is a good example. There the jury held that the denial of several development applications on a tract of land on a beach did not substantially advance a legitimate governmental interest even though the city said there are lots of legitimate governmental interests that are present here. We want to save a habitat. We want to have some views from the roads through the beach. Things like that. But if you took the totality of the circumstances in this case and the fact that in that case there have been numerous development applications that had been denied, the jury in that case held that the city's actions could not substantially advance legitimate governmental interest. What the courts point out is is that is an ad hoc total circumstances factual inquiry. And that's why I think it is difficult to provide precise guidance with regards to the first and the third test, because those cases do depend upon the facts that are present in those tests.

HECHT: And you say we're not bound by what they thought at the time. We have to look at the whole record.

ANDERSON: That's the way I'm interpreting the first test. And there are a couple of things. In comparison to the Mayhew case, this court was very specific in Mayhew and they pointed to Sunnyvale as being a unique rural environment. And it was basically described as being kind of an island in a sea of more traditionally developed suburbs. And the court specifically points out that the people who lived there lived in large houses, they lived on ranches. Basically the entirety of the city had a very rural feel, and the city, therefore, had a governmental interest in trying to prevent the ill effects of urbanization, which I guess is the terminology from encroaching upon a relatively unique rural environment which was present in that case.

Glenn Heights is like those suburbs that surrounded Sunnyvale. The record

indicates that most of the people who live in the city live either in mobile home parks or on small lots that are sized similarly to the zoning that was on the property at the time that Mr. Sheffield purchased it. As a matter of fact, the development of the city of the 200 building permits in the two years before Mr. Sheffield purchased it, I think virtually all of them but one were on lots that were sized less than 12,000 sq. feet.

So from the standpoint of trying to prevent ill effects of urbanization it's a different circumstance with regards to Sunnyvale in its uniquely rural characteristic and comparing that to Glenn Heights and the characteristics that were present from a physical standpoint.

The other issue is, and that goes back to the question regarding the record, the problem in this particular case is compare this to the Mayhew case. This court specifically stated in Mayhew that the planning and zoning commission had a written report that it presented to the city council prior to the vote. And it set forth numerous governmental interests and reasons as to why in denying an application which would basically have tripled the density on the property and actually increased the potential population in the city, how denying that vote would substantially advance the legitimate governmental interest of trying to keep this rural _____ in tact. The opposite situation here is there is no legislative record that supports the vote by the city council. In addition if you look at the documents that the city had approved they are totally in opposite with regards to the down zoning that occurred. One year before Mr. Sheffield purchased this property, the city had passed their comprehensive plan. Now the comprehensive plan basically is a text and it includes a big map of the whole city and it sets forth the vision of how the city decides that it wants to grow.

Now in Sunnyvale basically the development out in the zoning ordinance was for minimal one acre lots. Clearly that would encourage a more rural type of feel and environment. In the City of Glenn Heights the lowest density was to allow up to 5 dwelling units an acre. Which basically is pretty characteristic of the development that had occurred throughout the city. The TC finding of fact was is that the zoning of the property, the planned development district 10, specifically was consistent with the city's vision of how it decided that the city should grow. And that was with smaller lots. At 5 dwelling units per acre. The city also passed an impact fee ordinance under the Texas local government code that established how much money it could receive from developers to fund capital improvements. And that was based upon the comprehensive plan in a very aggressive growth rate. Thus, they could charge a higher impact fee in order to help fund capital improvements.

They submitted the comprehensive plan to help support obtaining a park grant from the State of Texas for $330,000 saying that the parks were needed in order to satisfy this increase in demand. Throughout this whole process the city never made an attempt to amend or change its comprehensive plan. Its vision, that goes back to the third element. Mr. Sheffield's investment-backed expectations when he was considering purchasing the property he asked the city if he could look at all his documents to decide if this zoning is consistent with your comprehensive plan. He was given those. He discussed it with the city manager, the city engineer, the mayor, members of the council. He went out and looked at the property and he saw that the property, 43

acres had already been developed in accordance with the zoning and the PD site plan that the city had approved. There were 165 houses that were being built that were consistent with this zoning. He saw that the utilities in the streets were all sized and stubbed out to continue development throughout the rest of the PD in accordance with the site plan.

Unknown to him at the time that he was meeting with all of the city representatives, and he had also sent a letter saying please, I'm thinking about buying this property. Please tell me if there is any possibility that the city might change their development regulations that will prevent development of the property in accordance with the zoning that's in effect today, because that's what my investment-backed expectation is. That's what the TC found was to develop in accordance with the PD 10 zoning.

And one of the city council members who lives in PD 10, who apparently saw that the vacant property near his was about to be developed began discussing with the city manager and the city attorney and the council members the possibility of initiating a down zoning and a moratorium that will basically change the zoning on the property.

O'NEILL: Presuming that there is a distinct investment-backed expectation proven in this case, you still have to prove that there is a severe enough economic impact. And how are we to define what does that mean? Does it mean - my understanding is there's still going to be a significant profit made even with the downsizing. Do we look at profit made or loss, or do we look at expectation is less than what it would have been? I don't know how to evaluate severe enough economic impact.

ANDERSON: Let's go back to the federal guidelines and one of the problems we have is the case law has kind of accelerated in the last few years on the federal side, and there have been more cases in the last 5 years than there have been the 25-30 years before then. What the trim line seems to be from a federal standpoint and what J. O'Connor has basically written, J. Stevens backed that up in the Lake Tahoe case, was that at least from the US SC standpoint that that third test means that there is no established mathematical formula. In other words there is no specific threshold with regards to the third test as to whether or not that first element, the adverse economic impact has been met or not.

O'NEILL: What test would you draw for us to be able to determine that?

ANDERSON: What I believe that the CA was saying is that the undisputed evidence in the record is is that there was a 38% diminution in the market value. And the test is the difference in market value before and after the taking.

SCHNEIDER: Isn't it true that there was a 46% diminution in value of the US SC concrete pipe case?

ANDERSON: I think that's correct.

SCHNEIDER: And yet they didn't go either way in that case.

ANDERSON: I think the courts view these land use cases differently. In that the facts in this case, again it's not a threshold with regards to the first element. The courts have basically said you need to consider the combination of the elements and decide. As a matter of fact, I think that the most important consideration is actually the second part of the test, which is, whether or not the regulation deprived Mr. Sheffield of his distinct investment-backed expectations.

O'NEILL: But it is an additional element and requirement.

ANDERSON: It is an and...

O'NEILL: So if that's missing, we don't really get to the other. To me, I don't know how to determine what's severe enough.

ANDERSON: I don't believe that the and means that there's a threshold level on the first test. That there is not a case at least that I'm aware of that applies the third regulatory takings prong.

O'NEILL: What I'm saying is, there can be distinct investment-backed expectations, and we can find that and say clearly there were. But you still have to prove that it's a severe enough economic impact.

ANDERSON: I personally agree with the CA, that the 38% diminution in and of itself meets the test. I have not seen any cases where a specific governmental regulation has ____ the market value of property to _____ extent. I think the other point to be made is is that the evidence in the record shows that there was also evidence of a 90% and a 94% diminution in value. And what I think the CA was saying was, we recognize that there's undisputed 38%. There's evidence in the record to support an adverse economic impact because it went up to 94%. Probably it's somewhere in the range.

ENOCH: What he had was you could put 5 houses there, but now you can only put 4 there. But tomorrow even the 4 houses are going to be worth more than 4 houses, but not as much as 5 houses would be. Is there a reason why the SC seems to wrestle with this economic harm by zoning that it requires almost kind of a substantial _____? Wouldn't it really be short of creating a zone where it can only be done as a public park or something where you really couldn't do anything with the land, isn't there a reason why the courts kind of say if you're talking about a zoning that's depriving you of interest it really has to be a pretty significant zoning that eliminates virtually all investment opportunity as opposed to just kind of harming for the immediate future the value of the property.

ANDERSON: The record indicates and the CA points this out that there was no market to develop 12,000 square foot lots in the city. That's what the CA noted. And the reason for that was is that there had been no building permits issued for any houses that were greater than 12,000 sq. ft.

I think it's also important to point out in the Palazolla case, J. O'Connor pointed out that there was some value left in that particular tract of land. Because one of the issues was did it deprive the property of all economically beneficial use? The SC said no because it was more than nominal value. Basically it was $200,000 in that particular case. And they remanded it back and specifically said that even if there is value that remains with respect to the property, that there are these other elements that have to be considered in determining whether or not the third prong has been met.

I don't think there is a specific diminution amount. Again, there are three witnesses who testified that the diminution in value was more than 90% in this particular case.

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RESPONDENT

BROWN: I would like to start with addressing the question that you asked J. Phillips, and that is, whether this court in essence is going to have to pick and choose the standards that will be utilized in Texas to determine what is a regulatory taking based upon the various and sometimes conflicting statements and views that have come from the US SC. And to answer that question, I think obviously is yes.

What we're asking today is for this court to determine a principled and workable means of determining what is a taking. But in doing so, the court certainly has significant guidance from the US SC as to what types of regulations are so severe that they constitute a compensable taking.

J. O'Neill you asked what is severe? How do I determine what is severe? And you in part were correct that in Mayhew this court determined that there was a 2-prong test. It's a conjunctive test. In order to establish a taking a applicant must show that the regulation has a severe economic impact, and there has to be some unreasonable denial of distinct investment-backed expectations.

The US SC has stated that only severe economic impact rise to that level. And while they have not come out with a quantifiable per se mathematical number, if you look at the cases it's pretty clear that that diminution in value has to be if not zero very significantly close to zero. There are cases back from the 20's, the Euclid case, where there was a 75% diminution going up all the way to Palazolla and Tahoe-Sierra where even today the US SC quotes these older cases with approval of severe economic impact practically making the property valueless.

In the Lucas case, the statement was made that a 95% diminution in value might be the type of diminution that would be getting the court into the ballpark to determine whether there had been a partial taking under the Penn Central factors, which this court adopted at least 2 of them in the Mayhew case.

The Polstar(?) however remains physical appropriation. That's really what

the takings clause has always been about. Historically the takings clause was "I take your property. I physically take it." In 1922 the US SC in the seminal case Pennsylvania Coal v. Mayhahn(?) expanded that and said there may be instances where the government has not physically appropriated your land, but the impact on the landowner is so severe that it is tantamount to a physical appropriation. The Williamson County case in 1985, the US SC reiterated this and said that the court's task is to distinguish the point at which regulation becomes so onerous that it has the same effect as the appropriation of property.

PHILLIPS: What's the principal difference to me if I'm the speculator between you condemning 38% of the property for a _____ verses you making regulations with the _____ I can't sell my property for this much. The amount left in my pocket is going to be the same. So what's the constitutional vision to make those different?

BROWN: The constitutional vision is quite frankly that they are viewed as one in the same in the sense that if government appropriates your land clearly you have no use of it. And what the court is saying if by regulation they don't take your land but they reduce it so significantly that it's akin to an appropriation then the government should pay for it.

HECHT: But the CJ is asking if they only want half of it and they physically take half of it what's the difference between taking half of it and taking half of your profit?

BROWN: Well the difference is that the US SC has always zealously guarded physical property and the right to exclude people from property. There's a per se line of takings cases that says anytime the government physically takes your land regardless of the public purpose and regardless of the economic impact there's always a taking. The same thing consistent with our Texas jurisprudence when governmental agencies go out and condemn property. In doing so you just look at what is taken. You don't look at the remainder of the land.

HECHT: But the question is, if I own 40 acres and they come and take one, it's gone. I only have 39 left. I only own 39/40 of what I owned before. If they just make it impossible to use the acre, then I still have 39/40 left, what's the difference?

BROWN: I think the difference is under the US SC doctrine of partial as a whole rule, when you're talking about regulations that don't physically occupy the property, you look at all of the property interest involved. And it's kind of the bundle of sticks property theory that we've all heard about at different times. When you physically take land one noted commentator has said you don't just take a bundle or some of the sticks from the bundle, you in essence have cut through and sliced through the entire bundle. But if you're just regulating the uses of the land unless you take enough sticks from the bundle so that you're left with absolutely nothing, that's when we're going to find that there is compensation due. Because in that sense it is the same as if we actually physically took the property.

ENOCH: I understand that it's important to Glenn Heights to assert that you are left with

absolutely nothing before they violated the takings without paying. It seems to me that even if I'm left with raw land that is in the middle of a downtown area, there is some real value to me of that raw land. And so it's not a complete lack of taking. But the fact that it cannot be developed, I could not make money by creating 12,000 foot size lots in the middle of a community that's all half that size, and attempt to be able to sell that. So it's not something I would do as a reasonable prudent business person. And so the city basically gets a part without ever having taken the part and hopes to hang onto it for at least the foreseeable future until the value of the land gets to such that we can put small lots there and sell them and the developer could make some money. So it's one thing to zone it and say this is going to be a park that will never be developed, which gives you a threshold of final use. It's another thing where Glenn Heights says gee gosh whiz, we might be able to keep this as a park for 5 or 10 years, and put the economic burden on the guy who owns the land, and not have to pay for it. Just simply by having zoning in such a way that there is still a development right, he's kept 60% of his value there, but because it's only 60% we really won't develop it, and we can use the park for 5 to 10 years without buying it, shouldn't the takings issues be interested in that kind of scenario?

BROWN: No. For a number of reasons. One, that's not factually what we have here. Two, as you pointedly said in your questions to Mr. Anderson, when we look at the value of land we don't just look at it at a particular point in time. Once you have the land that had been taken from you it can increase in value. It can decrease in value. Political winds in a community can blow one way one election, another way in another election. So zoning comes and goes. This court in the Tobb(?) case said that buying real estate carried it with certain financial risks and the takings clause is not designed to undermine or to guarantee some form of profitability. And in this case as long as the property owner has the land and there is some economically viable use for the land, the evidence in this case I believe is undisputed that the reduction in value was only 38%. That is not to say that this land was valueless. Quite frankly it's undisputed that the land was worth more even after the rezoning than 4 times what the landowner actually paid for it. So in that sense the Polstar(?) still must remain physical appropriation. Otherwise, quite frankly you open up a kind of a pandora's box that could subject every level of governmental decision making to some kind of review and scrutiny that looks at whether or not the impact reaches this 38% level which is just so far to the extreme that it's just simply not supportable by any case anywhere, state or federal that any party's been able to find or cite.

PHILLIPS: I'm worried about government fairness. I assume that if there were ten parcels that were identical and the city put owner's restrictions one of them only, and it was pretty clear it was because of the politics of the developer, we would have serious due process problem.

BROWN: Correct. It is a due process problem.

PHILLIPS: Here the due process claim will be quite a bit harder to make. But there is still a fairness issue here. Either we put that into our takings _____ as this court has seem to indicate it's willing to do, or we leave it to what has to be a relatively high standard of due process, or else the prisoner cases start overwhelming.

BROWN: I won't deny there are a number of cases that talk about part of the purpose of the takings clause is to promulgate a certain fairness. The question is whether or not a particular individual has been singled out to bear the burdens of a regulation that might serve a governmental purpose, but the impact is so severe that that person alone has to bear that burden. In this instance, it's undisputed the City of Glenn Heights went through a comprehensive rezoning of property. Mr. Sheffield's land was not singled out. This began back in 1985 when the city adopted a new conference of land use plan and then it adopted a zoning ordinance which rezoned 80% of the land in the city to these new zoning standards. The only thing that was not rezoned at that time were the 14 planned developments based on the advice of the city's planner to take those on a case-by-case basis.

HECHT: But you do kind of get the feeling reading the record that they didn't want this to balance. What number can we pick that will - I mean that just seems to be an under current of the record.

BROWN: I don't think it's a fair reading of the record to say that they didn't want it developed. They did not want it developed at the high density 5,500 sq. foot lots that the planned development zoning had put on it in the mid 80's during the real estate boom, but which it set vacant for 10 years after the real estate bust.

HECHT: But there's no question in the record that it can't be developed at 12,000 sq. ft at the time the record was made subject.

BROWN: There was substantial evidence that it could be developed at 12,000 sq ft. Their argument is that there was no 12,000 sq foot product in Glenn Heights. That's kind of the chicken or the egg. The fact that nobody had built any is because there was no zoning at that time that allowed it. What the community was trying to do was to take this high density zoning that was left over in the planned development, many of them which were very stale and no longer relevant to current economic contemporary conditions and to bring those in line with the current standard, which was larger houses.

O'NEILL: As far as the record goes, the $485,000 finding was 38%. Is that correct?

BROWN: No. The $485,000 finding was by the jury. That was actually a 50% diminution. The case was bifurcated. There was a liability case at which there was evidence and the TC judge found there was a taking. Quite frankly articulating only the investment-backed expectations theory. Very little discussion. The TC made no findings on the degree of diminution in value.

O'NEILL: Where did the 38% come from?

BROWN: It came from the evidence that the city put forth at the liability trial was that the diminution was 38%. The landowner put additional evidence.

O'NEILL: But the jury apparently found it was 50%.

BROWN: The jury found it was 50% on basically the same record, but that was a jury proceeding.

O'NEILL: The TC made no finding on it. So we're just throwing out 38% as what your argument was. Really the only true finding was 50%.

BROWN: That was the jury's finding.

O'NEILL: But that's a factual matter and it's within their...

BROWN: Correct. And I would submit that at 50% they lose. They lose at 38% and they lose at 50% because none of those diminutions in value.

O'NEILL: I want to make sure we're focusing on the right number. And it strikes be that what we should be focusing on is the 50%.

BROWN: Well the CA said that since the trial court judge who determined liability didn't come up with a number, they didn't come up with 50% number, that they weren't going to look at what the jury decided. I have said that the only evidence in the record of actual quantifiable diminution in value was from the jury, and the CA said well that's the damages phase. We're not going to look at that. I think what the CA did is quite frankly rather than address the factual and legal sufficiency points that had been raised in terms of where the evidence was in terms of diminution in value, they either did that analysis sub silentio and said we go with the city's evidence. It's more credible. It's 38%. Or they simply chose not to determine that particular issue which the TC also had not determined and simply looked at the evidence that was not in dispute, which is 38% and said at 38% there's still a taking, which is the record this court has.

The undisputed fact is 38%. That is the issue before this court.

O'NEILL: I'm totally confused by that. The TC never found 38%. There was evidence before the TC of 38 and 96. How can the CA say it was 38%?

BROWN: Quite frankly I think verses weighing and judging the evidence to determine what the act of diminution was for remanding it to the TC to make that finding. The CA simply said we're going to look at the city's evidence, and because in our view 38% is enough to be a taking they went no further in the analysis. That's a troubling part of the CA's opinion, but there are a number of troubling parts of the CA's opinion such as the investment-backed expectation.

O'NEILL: If we were to say that 38% is not enough, is that the end of the inquiry? It doesn't strike me that it wold be. It seems like you would have to look at - if the CA adopted that as a threshold that they thought was enough, we don't need to take that as all that there was. I mean

there was also evidence before the TC of 96% that the TC could have found. Correct? I mean would that be a remand point on the taking issue?

BROWN: I suppose that if that has been argued below, but I don't believe that any argument has been made by any party that the court should do anything other than address the issue, which is 38%. That is the legal issue. That is the issue that is causing concern around the state for which there is so many amicus briefs being submitted. The problem is there were findings - the city submitted detailed findings and fact and conclusions of law to the TC that had value numbers before and after. The plaintiffs submitted findings of fact that contained no findings on value before or after. The TC simply took the plaintiff's findings and facts and struck out the word "proposed". So we're left with the record from the TC as prepared and submitted from the prevailing plaintiffs. Quite frankly if they had wanted a finding in the record to support a takings verdict, I suspect and I submit, that it would have been incumbent upon them to have submitted a finding that said this was the value of my land before, this is the value of my land after, this is the diminution in value, that diminution is significant enough to be a taking. That was not the case. That factual record was simply not - there may have been facts in the record but there were no finding for questions by the plaintiff on it, therefore, there were no findings made by the TC. And I submit in this case both this court and the CA in essence is - you're limited by the record. And it was a record that was prepared. Plaintiffs certainly had some control over that. They didn't ask for that finding.

O'NEILL: So we have no findings as to diminution in value?

BROWN: There are no findings. There was a statement that there was severe economic impact made by the TC as a conclusion of law without any findings to support that. And what that is, we don't know whether the TC quite frankly thought that there was a 50% diminution...

O'NEILL: So if there was any evidence of a 96% diminution in value we have to presume that that was the basis for the TC's legal conclusion correct?

BROWN: No, you do not. The problem is there are legal and factual sufficiency points that the TC - we don't know where the TC came down. Obviously the CA thought 38% was severe. It's a little bit akin to if a TC made a finding that something was in the best interest of a child without getting any factual support for it, I would submit that you would not just look to the record and then presume that facts in the record would support that finding.

O'NEILL: That's exactly what we did. If there's a finding of law we look to the record and presume all facts in favor of that finding.

BROWN: But this is a constitutional issue. And there are a number of cases that say when you review constitutional issues in essence you review them almost de novo. And as this court said in Mayhew, while the trier of fact has to determine factual disputes it's incumbent upon this court to look at that factual record to see if that factual record in fact supports the finding of unconstitutionality. And we believe that the evidence of diminution in value greater than 38% was

legally and factually insufficient. We raised those issues. Quite frankly the CA just chose not to address them, but instead opted to go with the uncontroverted evidence of 38% diminution in value and said there's still a taking.

O'NEILL: If we find that 38% is not a taking, I don't see how we get to a rendition because there are factual sufficiency issues below.

BROWN: Because the CA resolved those issues apparently...

O'NEILL: But you said they didn't address them.

BROWN: They assumed 38%. Their discussion is imprecise as are many things in this particular opinion from the Waco CA. My reading of the case is quite frankly that the CA said there was evidence of 38%. There was evidence above that. And that the evidence that they felt was credible enough for them to make a rendition of a taking was the 38%. Perhaps they should have addressed the other evidence but they didn't do that. But I will submit that that's not been a point of error raised in the petition of the petitioner. The petitioner has certainly not complained as a point of error that the CA should have reviewed this error.

OWEN: But they won. Why would they have to?

BROWN: In order to be able to make that argument handily before this court, I would submit that if they felt that the 38% in diminution was not the correct factual finding upon which this taking should be judged, then I would submit that they would have needed to _____ point that would have expressly put this court on notice that they felt there was sufficient evidence below that to support a finding on a greater term. But quite frankly even under their evidence I'm not sure that their evidence gets you far enough to be a taking under our Texas jurisprudence particularly combined with the investment-backed expectations theory, which this court has pointed out there must be a finding of both in order to _____ Texas undertaking.

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REBUTTAL

ANDERSON: J. Phillips with respect to your question regarding fairness, I think it's important to clarify at least one of the comments that Mr. Brown made. The city had changed and had adopted a new comprehensive plan one year before Mr. Sheffield looked at the property to consider purchasing it. The PD 10 zoning that was in effect was consistent with the comprehensive plan. The city at the time that Mr. Sheffield was reviewing the property and doing his due diligence was not going through a process of reviewing tracts that were zoned planned development district to consider whether or not they should be rezoned or not. The evidence in the record is is that one of the city council members who lived in PD 10 after he learned that Mr. Sheffield was considering developing the property...

O'NEILL: But again, that goes to investment-backed expectations.

ANDERSON: That is correct. But it also goes to the questions that have been asked regarding justice and fairness. And what I think is important here is, the comprehensive plan under the local gov't code, it's not the bible, but it is the guide for not both the city but also for developers and landowners. And they can go review that document and decide if the city - what their vision is. If the city's comprehensive plan had been changed or was in the process of being changed, Mr. Sheffield's investment-backed expectations are clearly different than when he went and asked all of the city representatives to look at their documents and had discussions regarding them...

O'NEILL: Even if it's not fair(?) _____ you still have to meet the other _____ _____ impact prong right?

ANDERSON: That is correct. And again, I think we're getting hung up and I don't know if I'm going to do a much better job than Mr. Brown did. But I will tell you what I think the CA was saying was, that they believe as a panel that the 38% was sufficient to meet the test in this particular case, because the courts have said there is no clear line as to what that diminution in value must be with regard to the third test, not the second test.

O'NEILL: If the expectations are high and firm, the percent can be lower.

ANDERSON: Right.

O'NEILL: If we were to say the 38% is not enough, do we render?

ANDERSON: Yes. I think you uphold the TC's findings because there's evidence in the record to support that there was a significant and severe adverse economic impact.

O'NEILL: If we say the 38% is not sufficient enough economic impact, do we render against you?

ANDERSON: No. Because there is evidence in the record of three witnesses that the devaluation was more than 90%.

O'NEILL: And so we have to presume that the TC found those facts to support its legal conclusion?

ANDERSON: Yes. There are facts in the record that support, and I don't know whether there's a finding of fact or conclusion of law, but he specifically stated there was a severe economic impact that resulted _____...

O'NEILL: So what we would have to say is 38% is not enough, but there was evidence in the record that could support the legal conclusion the TC made; therefore, we remand to the CA

to consider the evidence on that point?

ANDERSON: I don't think there is any need to remand. The TC found that there was a significant economic impact and there is evidence in the record to support that.

OWEN: We are required to review that finding and if we don't know what it is how do we review it? Do we have to presume what the factual underpinnings of that finding are? How do we know what - we've got to review the factual underpinnings of that finding. What do you contend those are?

ANDERSON: There was evidence by the appraiser that testified on behalf of Mr. Sheffield. There was a developer of properties in that area that was...

OWEN: What percentage do you say...

ANDERSON: It was 90%.

OWEN: And you say we as a matter of law have to accept that?

ANDERSON: I think 90% is ...

O'NEILL: If we have to accept that presuming in favor of the TC's legal finding, what about the factual and legal sufficiency challenge to that presumption?

ANDERSON: The evidence was admitted and I don't think that there was a point of error in issue that has been presented that the evidence was improperly admitted.

The recent Lake Tahoe case by the US SC was a prima facie challenge as to whether any moratorium at anytime for any reason constituted a taking because it deprived property of all economically beneficial use.