

# Exhibit E



Fazzino's Complaint also alleges that the District took his groundwater when it (1) enacted the Rules in 2004, and (2) permitted Bryan's Well 18 in 2007. Since that time, Bryan has been pumping groundwater. The District has taken no action to change that status quo. Because the alleged takings occurred in 2004 and 2007, Fazzino's claim to recovery compensation for the takings is barred by the applicable two-year statute of limitations.

Finally, Defendants moved for judgment on the pleadings as to Fazzino's takings claim against the Individual Directors, Fazzino's claim for injunctive relief on his takings claim, and Fazzino's punitive damages request on his takings claim. Fazzino did not respond to Defendants' Motion on these claims, and they are thus abandoned.

## **II. ABANDONED CLAIMS**

Defendants moved to dismiss (1) Fazzino's takings claim against the Individual Defendants because a takings claim can only be brought against a governmental entity; (2) Fazzino's takings claim for punitive damages against all Defendants as such relief is not available in a takings claim; and (3) Fazzino's takings claim for injunctive relief against all Defendants as such relief is unavailable. (Doc. 45 at 2.) Fazzino did not respond to Defendants' Motion on these issues. (Doc. 50.)

A party's failure to respond to arguments raised in a Rule 12 motion constitutes waiver or abandonment of those issues at the district-court level. *See Black v. Panola Sch. Dist.*, 461 F.3d 584, 588 n.1 (5th Cir. 2006); *Arkansas v. Wilmington Tr. Nat. Ass'n*, No. 3:18-CV-1481-L; 2020 WL 1249570, at \*5 (N.D. Tex. Mar. 16, 2020). Inasmuch as Fazzino has failed to respond to Defendants' Motion on those three

issues, those claims are abandoned. The Court should therefore grant judgment on the pleadings dismissing (1) Fazzino's takings claim against the Individual Defendants; (2) Fazzino's takings claim for punitive damages; and (3) Fazzino's takings claim for injunctive relief.

**III.  
ARGUMENT & AUTHORITIES**

As to Fazzino's remaining claims, they are all time-barred with the exception of his claim that the District's decision in 2017 that his drilling application was administratively incomplete denied him of equal-protection.

**A. Fazzino's takings claim is time-barred because the event of which he complains occurred in 2006.**

Fazzino acknowledges that the statute of limitations for his takings claim is two years. (Doc. 50 at 2.) The actions that Fazzino identifies as having taken his property occurred more than two years before the filing of his lawsuit, and the Response does not argue otherwise.

**1. *The action that Fazzino identifies as a taking occurred in 2007.***

Fazzino's Complaint alleges that "the groundwater belonging to Plaintiff Fazzino is within the 'cone of depression impact' of Well No. 18 and is therefore being impacted by production from that well." (Doc. 1 at ¶ 48.) "The District's conduct in permitting the City of Bryan to produce disproportionate amounts of groundwater from its small tract of land results in depriving Plaintiff of his fair chance to produce a fair share of groundwater." (Doc. 1 at ¶ 52.)

But that “conduct in permitting the City of Bryan” occurred in 2007. (Doc. 1 at ¶ 23.) Since that time, Bryan has been pumping water through its Well 18, which Fazzino alleges “impact[s]” “the groundwater belonging to Plaintiff Fazzino” because his property “is within the cone of depression of Well No. 18.” (Doc. 1 at ¶¶ 23, 24, 48.) In other words, since 2007 the only entity that has taken any action vis-à-vis Fazzino’s property has been Bryan, not the District.

**2. *Fazzino’s takings claim was ripe in 2007 under Township of Scott v. Knick.***

Fazzino’s Response does not dispute the conclusion that the District’s action that caused a taking occurred in 2007. Instead, Fazzino’s Response spends its entire effort complaining that his federal takings claim would not have been considered ripe under *Williamson County Regional Planning Commission v. Hamilton Bank*, 473 U.S. 172, 186, 105 S. Ct. 33108 (1985). (Doc. 50 at 3.) Fazzino argues that “a statute of limitations cannot bar an unripe claim because an unripe claim has not yet accrued.” (Doc. 50 at 3.) But as the Supreme Court held in *Knick v. Township of Scott, Penn.*, 139 S.Ct. 2162, 2170 (2019), and as the Fifth Circuit concluded in this case, *Stratta v. Roe*, 961 F.3d 340, 356 (5th Cir. 2020), Fazzino’s claim was ripe.<sup>1</sup> Fazzino’s observations about a case that has been overruled is therefore of no moment.

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<sup>1</sup> The Supreme Court has held that when applying “a rule of federal law to the parties before it, that rule [becomes] the controlling interpretation of federal law and must be given full retroactive effect in all cases still open on direct review and as to all events, regardless of whether such events predate or postdate [the Supreme Court’s] announcement of the rule.” *Harper v. Va. Dep’t of Taxation*, 509 U.S. 86, 97 (1993). A new rule is retroactive even if it makes a previously timely action untimely. See *Reynoldsville Casket Co. v. Hyde*, 514 U.S. 749 (1995).

That is doubly true because even under the *Williamson County* regime, Fazzino could have sought to recover just compensation for an alleged taking in state court. And, in fact, that's exactly what he originally did before dismissing his state-court claim to seek redress in federal court instead. *See* Pl.'s Orig. Pet., *Fazzino v. Brazos Valley Groundwater Conserv. Dist.*, No. 17-02-20199-CV (82nd Dist. Ct., Robertson Cty., Tex., Feb. 7, 2017). Fazzino therefore had an avenue to recover compensation for the alleged taking that occurred in 2007. He did not pursue it.

**3. *The denial of Fazzino's drilling application is not a taking.***

The only action that the District took vis-à-vis Fazzino within two years of Fazzino's Complaint was its decision to declare his permit application administratively complete. (Doc. 1 at ¶ 27.) Though that action does not take any groundwater, Fazzino alleges that the decision prevents him from "offset[ing] or mitigat[ing] the impact of well No. 18 on the groundwater beneath his property." (Doc. 1 at ¶ 52.)

This case presents facts similar to those addressed by the Fifth Circuit earlier this year in *Degan v. Board of Trustees of the Dallas Police & Fire Pension System*. In that case, retired police officers and firefighters sued the Pension System after it voted to limit their ability to withdraw from their Deferred Retirement Option Plan. 956 F.3d 813, 814 (5th Cir. 2020). Rejecting the plaintiff's regulatory takings claim, the Fifth Circuit observed that "merely limiting an individual's access to a property interest does not constitute a taking." *Id.* at 815 n.1 (citing *Andrus v. Allard*, 444 U.S. 51, 65–66 (1979) (holding that the government's restriction on an individual's

ability to dispose of his property did not constitute a taking because the individual retained other property rights)).

Even assuming that Fazzino has a property interest in groundwater beyond that which the District's Rules permit him to produce, the regulatory limitation on his access to that groundwater therefore does not constitute a taking. *Cf., id.* Because the District's 2017 action does not constitute a taking as a matter of law, Fazzino alleges no possible act that could constitute a taking that is within the statute of limitations. The District is therefore entitled to judgment on the pleadings that Fazzino take nothing by his takings claim.

**B. Fazzino's equal-protection claim is also partially time-barred.**

As with the takings claim, Fazzino acknowledges that his equal-protection claim is subject to a two-year statute of limitations. (Doc. 50 at 2–3.) Thus, any claim accruing before April 13, 2016, is time-barred. (Doc. 1.)

Fazzino argues that his equal-protection cause of action only accrues once the District made a final decision on his well application. (Doc. 50 at 4–5.) Fazzino's Complaint does allege that "Defendants have applied and interpreted the Rules in an inconsistent and contradictory manner, in an effort to protect certain producers from others." (Doc. 1 at ¶42.) The Complaint concludes that "Defendants' conduct is designed to protect the City of Bryan's Well No. 18 from being subject to the production limitations applicable to Plaintiff Fazzino, or to protect Well No. 18 from being offset by production by Fazzino." (Doc. 1 at ¶42.)

The District acknowledges that, to the extent Fazzino complains about the District's application of the Rules to his permit application in 2017, that claim was

brought within the statute of limitations. The allegations in Fazzino's Complaint, however, are not limited to the District's action on Fazzino's well application.

Contradictorily to his allegation that the District has applied "the Rules in an inconsistent and contradictory manner," Fazzino's equal-protection claim also alleges that "[t]he District's Rules attempt to differentiate between types of wells based on the date on which they were drilled or produced, or the use of the water from such wells." (Doc. 1 at ¶46.) The Complaint then argues that the Rules' "disparate treatment of owners of wells based on the use of the water or the date of drilling or production is arbitrary and results in deprivation of Equal Protection." (Doc. 1 at ¶46.) Accordingly, the Complaint asks the Court to "hold that such Rules are void." (Doc. 1 at ¶46.)

The Rules were enacted in 2004. The enactment of the Rules was a matter of public record, and was preceded by months of public meetings and engagement. (Doc. 40-3, 40-4, 40-5 & 40-6.) Fazzino does not claim that he did not have notice of the Rules' enactment. Accordingly, Fazzino's claim that the Rules themselves "result[] in deprivation of Equal Protection," that claim is time-barred. *Cf., Piotrowski v. City of Houston*, 51 F.3d 512, 515 (5th Cir. 1995) ("In Texas, the pertinent limitation period is two years from the day the cause of action accrues.").

#### IV. CONCLUSION

Fazzino's claim that alleges that the enactment of the Rules deprive him of equal protection because the Rules were enacted more than two years before Fazzino filed suit. That claim is thus barred by the applicable statute of limitations.

Likewise, Fazzino's takings claim alleges that the District took his groundwater when it (1) enacted the Rules, and (2) permitted Bryan's Well 18—events that occurred in 2004 and 2007, respectively. Since that time, the District has taken no action vis-à-vis Fazzino. To the extent he has lost any groundwater, it has been taken by Bryan, not the District. Because the alleged takings occurred in 2004 and 2007, Fazzino's claim to recovery compensation for the takings are barred by the applicable two-year statute of limitations.

Accordingly, the Court should grant the District judgment on the pleadings under Federal Rule of Civil Procedure 12(c):

- 1) dismissing Plaintiffs' equal-protection claim against all Defendants arising from the enactment of the District's December 2, 2004 Rules on the basis that it is barred by the applicable statute of limitations;
- 2) dismissing Plaintiffs' equal-protection claim against all Defendants arising from the District's decision to grant a permit to the City of Bryan for its Well 18 on the basis that it is barred by the applicable statute of limitations;
- 3) dismissing Fazzino's takings claim against all Defendants arising from the enactment of the District's December 2, 2004 Rules on the basis that it is barred by the applicable statute of limitations;
- 4) dismissing Fazzino's takings claim against all Defendants arising from the District's decision to grant a permit to the City of Bryan for its Well 18 on the basis that it is barred by the applicable statute of limitations;
- 5) dismissing Fazzino's takings claim against the Individual Defendants because a takings claim can only be brought against a governmental entity;
- 6) dismissing Fazzino's takings claim for punitive damages against all Defendants because such damages are unavailable in a takings claim; and
- 7) dismissing Fazzino's takings claim for injunctive relief against all Defendants as such relief is unavailable in a takings claim.

Respectfully submitted,

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