

FALL 2012 NEWSLETTER

LAND USE, ZONING and REGULATORY TAKING

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UNITED STATES SUPREME COURT

Arkansas Game & Fish Commission v. United States, 568 U.S. ____ (Dec. 4, 2012)

Government-induced flooding temporary in duration gains no automatic exception from Takings Claim inspection.

Arkansas Game & Fish Commission owns and manages a wildlife management area. The U.S. Army Corps of Engineers constructed a dam upstream from the management area and had a Water Control Manual which set seasonally varying rates for the release of water from the dam. The Corps, at the request of farmers, authorized temporary deviations from the Manual that extended flooding into the management area's peak timber growing season. The flooding destroyed timber, and land and the Commission sued the United States alleging the temporary deviations constituted a taking of its property.

The Court of Federal Claims ruled in favor of the Commission but the Federal Court of Appeals reversed. The Court of Appeals held that government-induced flooding can give rise to a taking claim only if the flooding is "permanent or inevitably recurring."

The United States argued that there should be a temporary-flooding exception to the Takings Clause. The Supreme Court found that flooding cases should not be treated any differently from other government intrusions on property. The Court held that government-induced flooding can constitute a taking of property, and because a taking need not be permanent to be compensable, government-induced flooding of limited duration may be compensable. The Court found no prior decisions authorizing a blanket temporary-flooding exception to the Takings Clause jurisdiction and declined to create such an exception in this case. The Court held that government-induced flooding temporary in duration may constitute a taking.

FIFTH CIRCUIT COURT OF APPEALS

Opulent Life Church v. City of Holly Springs, Miss., 697 F.3d 279 (5th Cir., September 27, 2012).

For purposes of injunctive relief, an allegation of a RLUIPA violation constitutes irreparable harm/injury. RLUIPA enforces First Amendment freedoms.

City of Holly Springs had a zoning ordinance which singled out churches, and no other religious facilities. Opulent Life Church, looking for a larger facility, found

suitable property in the City's central business district and entered into a lease agreement. The Church applied for a renovation permit and the City's Planning Commission tabled their request on the grounds of the Church's failure to meet the City's zoning ordinance that applied only to churches (Section 10.8). The Church filed suit seeking a declaration that Section 10.8 of the City's Zoning Ordinance violates the Religious Land Use and Institutionalized Persons Act ("RLUIPA"), the First Amendment, the Equal Protection and Due Process Clauses of the Fourteenth Amendment, and the Mississippi Constitution. The Church sought injunctive relief to prevent the City from enforcing Section 10.8 or the remainder of the Zoning Ordinance to impose limitations on churches not applicable to other non-religious entities.

The Church filed a motion for preliminary injunction to enjoin enforcement of Section 10.8 which was denied by the court on the grounds that the Church had not shown a substantial threat of irreparable harm. An interlocutory appeal was taken to the Court of Appeals. On the night before the oral argument, the City amended its Zoning Ordinance repealing Section 10.8 and replacing it with a new provision that categorically banned churches, temples, synagogues, mosques, and other religious facilities from the newly created business courthouse square district.

The Church argued that the City's Zoning Ordinance violated the Equal Terms Clause of RLUIPA which prohibits imposing or implementing a land use regulation so as to treat a religious assembly "on less than equal terms" than a nonreligious assembly. The Court found that an ordinance that expressly differentiates religious land uses from nonreligious land uses establishes a *prima facie* case for a facial Equal Terms Clause claim. The Court found that both the old and new versions of the City's Zoning Ordinance expressly distinguished between religious and nonreligious land uses. The Court held that the less than equal terms must be measured by the ordinance itself and the criteria by which it treats institutions differently. Courts must determine (1) the regulatory purpose or zoning criteria behind the regulation at issue, as stated explicitly in the text of the ordinance or regulation and (2) whether the religious assembly or institution is treated as well as every other nonreligious assembly or institution that is similarly situated with respect to the stated purpose or criteria.

The City conceded, at the oral arguments, that the repealed sections of the Zoning Ordinance violated the Equal Terms Clause but argued ripeness and mootness as a result of changing the Zoning Ordinance. The Court rejected these arguments but found, as to the new Zoning Ordinance, that the City had not yet had an opportunity to present the zoning criteria or regulatory objectives that it believed justified this ban, and thus, the case would be remanded to determine whether the Church was likely to succeed on the merits of its facial claims against the amended ordinance.

The Court found that the district court erred in that the Church had demonstrated that it would suffer irreparable harm absent the injunction it seeks. The Church satisfied the irreparable harm requirement because it has alleged violations of its First Amendment and RLUIPA rights. The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury. This principle applies with equal

force to the violation of RLUIPA rights because RLUIPA enforces First Amendment freedoms, and the statute requires courts to construe it broadly to protect religious exercise. The Church asserts that its exclusion from its leased property signifies significant impairments to its free exercise of religion.

Finally, the Court found that Church had shown that a preliminary injunction will not disserve the public interest because injunctions protecting First Amendment freedoms are always in the public interest. This principle applies equally to injunctions protecting RLUIPA rights because RLUIPA enforces the First Amendment and must be construed broadly.

TEXAS SUPREME COURT

***City of Beaumont v. Como*, 2012 Tex. Lexis 749 (Texas Supreme Court, Aug. 31, 2012)**

A party asserting a taking based on an allegedly improper administrative nuisance determination must appeal that determination and assert takings claims in that proceeding and cannot file a separate suit alleging a takings claim.

The City passed an ordinance declaring Como's building a public nuisance and condemned it. Como did not appeal the decision. Six months later the City demolished the building. Approximately a year later Como sued the City asserting takings claims under both the Texas and U.S. Constitution. The City filed a plea to the jurisdiction based on immunity which was granted by the trial court.

The Court of Appeals initially affirmed the trial court's judgment and then granted rehearing after the Texas Supreme Court's initial opinion in *City of Dallas v. Stewart*. The Court read *Stewart* to hold that a nuisance determination could not be finally determined in an administrative proceeding and thus, the administrative-level decision to demolish Como's building did not preclude Como from seeking a *de novo* review of that decision in a constitutional suit. The Court reversed and remanded, and the City petitioned to the Texas Supreme Court.

The Texas Supreme Court held that a property owner is not entitled to *de novo* review of an administrative nuisance determination in all circumstances. The party asserting a taking based on an allegedly improper administrative nuisance determination must appeal that determination and assert takings claims in that proceeding. The party must also avail himself/herself of statutory remedies that may moot his/her takings claim, rather than directly instituting a separate proceeding asserting such a claim. Como never appealed her nuisance determination and cannot attack collaterally what she chose not to challenge directly. Como's takings claims are barred and the trial court was correct in dismissing them.

TEXAS COURT OF APPEALS

***City of Houston v. Trail Entrs.*, 377 S.W.3d 873 (Tex. App. – Houston [14th Dist.] 2012).**

Regulatory takings claims generally require a fact specific analysis.

In 1967, the City enacted an ordinance restricting the drilling of new oil and gas wells in the “control area” around Lake Houston. The restrictions applied to property both within the City and its extraterritorial jurisdiction. In 1977, the City redefined the “control area” so that the restrictions were no longer applicable to areas within the City but still applied to areas in the extraterritorial jurisdiction. In 1996, Trail’s property was annexed into the City and thus, was no longer subject to the restrictions. In early 1997, the City changed the ordinance so drilling restrictions were imposed on properties around Lake Houston within both the City proper and its extraterritorial jurisdiction.

The property owner brought suit against the City alleging that the drilling restrictions constituted a compensable taking of their property rights. The trial court found there was a taking and awarded damages to the owners. The City appealed.

The Court of Appeals found that regulatory takings claims require a fact specific analysis. Courts must balance the public’s interests against the private landowner’s interests. Texas has adopted the *Penn Central* Fact Specific Analysis set forth in *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104 (1978). The *Penn Central* Fact Specific Analysis is not applicable if a regulation has denied the owner of all economically beneficial use of his property, a regulation does not advance the legitimate state interest or there has been an actual physical invasion of property. In all other situations, the Court will consider the following factors to determine whether a regulation has become like a physical taking: 1) the character of the governmental action; 2) the extent to which the regulation has interfered with reasonable and distinct investment-backed expectations; and 3) the economic impact of the regulation on the property owner.

The Court found that the nature of the governmental action and the investment-backed expectation of the property owner weighed heavily in favor of the City. The third factor concerning economic impact of the regulation on the property owner weighed in favor of the property owner. However, the Court, based on the factors, found that there was no compensable taking in this matter. The Court reversed and rendered judgment that the property owners take nothing.

***City of San Antonio v. Rogers Shavano Ranch, Ltd.*, 2012 Tex. App. Lexis 7237 (Tex. App. – San Antonio, August 29, 2012).**

Vested rights attach to a project, not to any particular property owner or permit holder.

In December, 2005, Rogers Shavano Ranch, Ltd. (“Ranch”) filed an application requesting the City to recognize the Project’s vested rights as of March 12, 1996 based on a sewer contract with the San Antonio Water System. The vested right application was denied by the City’s Director of Planning and Development and the Ranch appealed the decision to the City’s Planning Commission. On the day the Planning Commission was to hear the appeal, the Ranch amended and resubmitted their application claiming that the basis for their claim of vested right was the Water Report/Commitment which had been approved by the San Antonio Water System on August 3, 1993. The Ranch asserted that this agreement for construction was the first permit for the project. The City Planning Commission approved the application for vested rights based on the Water Report/Commitment and found that the Project had vested rights as of August 10, 1993. The City Manager subsequently appealed the decision to the City Council which sustained the City’s appeal and denied the Ranch’s application for vested rights based on the Water Report/Commitment.

The Ranch filed a declaratory judgment action seeking a declaration of their “vested statutory rights” under Chapter 245 TEXAS LOCAL GOVERNMENT CODE as to the Project. The City filed a plea to the jurisdiction based on the Plaintiff’s lack of standing to bring such claims for declaration of vested rights. The City argued the Water Report/Commitment-i.e., permit application, does not name any of the Plaintiff entities as “owners” of the property and “vested rights are tied to the owner of the land because the project follows the land.” The Ranch asserted that because the vested rights are attached to the Project, the vested rights travel with the property when it is sold as long as the Project has not changed or become dormant. The trial court denied the City’s plea to the jurisdiction stating that there were fact questions as to how the Plaintiff entities are related and how that affects their interest with regard to vested rights. The City appealed the order denying the plea to the jurisdiction.

On appeal the City asserted that the 2005 amendment to Section 245.001(1) expanding the definition of “permit” to include a “contract or other agreement for construction related to, or provision of, service from a water or wastewater utility owned, operated, or controlled by a regulatory agency” was a change in the law that is presumed to apply only prospectively unless expressly made retroactive. The Court found that the Chapter 245 applied retroactively and the expanded definition of “permit” was applicable to the situation.

The City argued that only a “permanent applicant” can bring a declaratory judgment under Chapter 245, and since none of the property owners are listed as “applicants” on the Water Report/Commitment and Sewer Report/Contract, they lack standing to sue. The Court found that the statute imposes no requirement that a plaintiff must be designated as a “permit applicant” in order to enforce its statutory rights under Chapter 245.

The Court recognized that rights vest in a particular project, not in the property itself; therefore, subsequent changes in ownership of the property do not affect the vested rights. Since vested rights attach to the project and not to any particular property owner or

permit holder, they follow along with any conveyances or transfers of rights related to the project.

The Court found that the evidence submitted on the jurisdictional facts challenged by the City did not conclusively establish a lack of subject matter jurisdiction; at most, it raises issues of disputed jurisdictional facts and thus, the trial court properly denied the City's plea to the jurisdiction on lack of standing.