

## WINTER 2013 NEWSLETTER

### LAND USE, ZONING and REGULATORY TAKING

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#### FIFTH CIRCUIT COURT OF APPEALS

1. *Dennis Melancon, Inc. v. City of New Orleans*, 2012 U.S. App. LEXIS 25763 (December 18, 2012).

**Property interests/rights which are subject to protection under the Fifth Amendment can be created not only by state law, but by policies, customs and practices.**

Plaintiffs sued the City and officials challenging ordinances regulating the taxicab industry. The City required taxicab operators to obtain a certificate of public necessity and convenience (“CPNC”) prior to operating a vehicle as a taxicab. In April 2012, the City enacted various ordinances amending and adding to the regulatory framework governing the taxicab industry. The City ordinances declared CPNCs to be privileges and not rights. Plaintiffs alleged that the ordinances made CPNC transfers discretionary and effected a regulatory taking under the Fifth Amendment. The district court enjoined the enforcement of the City ordinances based on the takings claim.

The Court of Appeals found that to prevail on a takings claim, a plaintiff must demonstrate that he has a protectable property interest. Courts must resort to existing rules or understandings that stem from an independent source such as state law to define the range of interest that qualify for protections as property under the Fifth and Fourteenth Amendment. Unwritten common law or policies and practices also can rise to the level of creating “property interests”. The Fifth Amendment protects expectations arising not just from legislation or judicial precedent, but also those “springing from customs and practices.”

The Court found that the existing rules or understandings that define the dimensions of the interest associated with a CPNC, evidence that the City has historically viewed and treated a CPNC as a privilege rather than a form of constitutionally protected property. The court concluded that whatever interest Plaintiffs hold in their CPNCs is the product of a regulatory scheme that also vests the City with broad discretion to alter or extinguish that interest. The City’s ordinances merely codify pre-existing law which defined CPNCs as privileges subject to extensive regulation. Plaintiffs had no protectable property interest and thus, no taking by the City.

**2. *Abdelhak v. City of San Antonio*, 2013 U.S. App. LEXIS 1914 (January 28, 2013) (unpublished opinion)**

**A takings claim based on a denial of permit requires a “final decision” from the governmental entity. A final decision requires both a rejected development plan and the denial of a variance from the controlling regulations.**

Plaintiff operates a mobile home trailer park and part of his property is located within the Federal Emergency Management Administration 100 year floodplain, which imposes restrictions on development in flood-risk areas. In 1999, Plaintiff’s property flooded and the City ordered Plaintiff to close the park pending compliance with specific public safety requirements. Plaintiff sued the City and the parties reached a settlement agreement wherein Plaintiff could obtain any mobile home permits on the property to which he was legally entitled. In 2007, Plaintiff’s property flooded and the City stopped issuing new permits for electrical hookups to future tenants. The City maintains that Plaintiff must comply with health and safety ordinances relating to floodplain before allowing new tenants onto the property, which would require raising building levels by as much as eleven feet. Plaintiff sued the City for various claims, including a taking under the U.S. Constitution. Plaintiff argued that the settlement agreement effectively exempted his property from the City’s floodplain regulations. The district court ruled that Plaintiff’s constitutional claims be dismissed as unripe.

The Court of Appeals found that the settlement agreement did not suggest that Plaintiff’s property is in any way exempt from complying with the City’s floodplain regulations. Since the agreement did not entitle Plaintiff to contractual relief, Plaintiff had to demonstrate that there was a “final decision” in order to bring a takings claim. A final decision requires both a rejected development plan and the denial of a variance from the controlling regulations. Futile variance requests or re-applications are not required to reach a final decision. Plaintiff did not apply for a variance after the City’s Public Works Department denied permits for the mobile homes. The fact that the City’s Public Works Department staff stated that they would not support a variance from the floodplain regulations does not establish that a variance request was futile because variances are reviewed and granted by the Planning Commission. The City’s Public Works Department did not render a final decision regarding the application of the floodplain ordinances to the property by denying permits for new mobile homes. Since there was no “final decision”, Plaintiff’s takings claim is unripe.

**TEXAS COURT OF APPEALS**

**1. *Fisher v. Church & Akin, LLC*, 2012 Tex. App. LEXIS 8726 (Court of Appeals of Texas, Seventh District, Amarillo) (October 16, 2012)**

**A governmental entity’s withholding of personal property under colorable contract rights does not constitute a takings violation under the Texas Constitution.**

The parties entered into a commercial lease agreement governing the use and operation of a marina. After the initial lease terms expired, the parties renewed their lease. Subsequently, the Plaintiffs became dissatisfied with the Defendant's operation of the marina and gave written notice to terminate the lease and notification to vacate the premises. Defendant was locked out of the premises and filed suit alleging breach of contract, wrongful eviction and tortious interference with business relationships. Plaintiffs filed a plea to the jurisdiction alleging that Defendant's claims were barred by governmental immunity. Defendant amended its pleadings and asserted a new claim, a takings claim under the Texas Constitution. Defendant alleges that personal property owned by the Defendant was being withheld by the Plaintiffs. The trial court denied the Plaintiffs' plea to the jurisdiction.

The Court held that the power to take property for public use extends to every species of property, including personal property. The Court found that when a governmental entity withholds property from an entity in a contract dispute, the governmental entity does not have the requisite intent under constitutional takings jurisdiction. The governmental entity is acting within a color of right under the contract and not under its eminent domain powers. In acting within a color of right to take or withhold property in a contractual situation, the governmental entity is acting akin to a private citizen and not under any sovereign powers. It does not have the intent to take under its eminent domain powers. Its intent is to act within the scope of the contract.

The Court found that the Plaintiffs are withholding Defendant's personal property pursuant to their colorable contract rights under the lease and have no intent to take the property under eminent domain powers. Thus, the Defendant's takings claim fails and the trial court erred in denying Plaintiffs' plea to the jurisdiction on that claim.