

# **SPRING 2013 NEWSLETTER**

## **LAND USE, ZONING and REGULATORY TAKING**

**By John F. Roehm III**

### **Texas Supreme Court**

***Kopplow Dev., Inc. v. City of San Antonio*, 2013 Tex. App. Lexis 178 (Tex.Sup.Ct., March 8, 2013).**

An inverse condemnation claim based on an owner's inability to develop its property as the City's previously approved is not rendered premature because there has been no flooding on the property.

Kopplow purchased undeveloped property, obtained permits (vested rights permits) and filled the portion of the property to the 100-year flood level. Later, the City decided to construct a facility partly on the property that would detain storm water in a significant flood, thus causing the property to be below the 100-year flood level and undevelopable without additional fill. The City further changed its regulatory 100-year flood plain to account for future, upstream development. The City requested an easement from Kopplow for the project but Kopplow refused. It was undisputed that the City's planned facility would cause an increase of storm water on Kopplow's property. The City would permit Kopplow to develop the property if it fills the property to the new level of the 100-year flood.

Kopplow sued the City for taking while it was constructing the facility and the City counterclaimed for condemnation of Kopplow's easement. A jury awarded damages to Kopplow for the taking and damages to the remainder of the property. Both parties appealed.

The Court of Appeals held that the remainder damages were unrecoverable under inverse condemnation because the property had not yet flooded and thus the inverse condemnation claim was premature.

The Supreme Court found that the City knew that the project would inundate part of Kopplow's property before it ever began construction, prompting the City to seek a drainage easement from Kopplow – there was little dispute that the City intended to take Kopplow's property for the project. The Court found that Kopplow's claim was about development, not flooding, so the fact that flooding had not occurred did not render the claim premature. Kopplow purchased the property to develop it, obtained development permits and filled the property to the 100-year flood level to develop it before the City constructed the project that rendered the land undevelopable unless filled again.

The Supreme Court found that Kopplow could no longer develop the property as previously proved and a lack of ripeness does not bar Kopplow's inverse condemnation claim. The damage award to the remainder is recoverable under Kopplow's inverse condemnation claim. The Supreme Court reversed and remanded the case back to the Court of Appeals.

### **Texas Court of Appeals**

***Odutayo v. City of Houston*, 2013 Tex. App. Lexis 4734 (Tex.App. – Houston [1st Dist.], April 16, 2013)**

Claims for “impaired access” or “denial of access” are compensable only when the access is materially and substantial impaired.

Plaintiffs purchased undeveloped property and submitted plans for a car dealership. The property was adjacent to Alameda Road which had drainage ditches. Plaintiffs began filling their property and extended a pre-existing driveway along the drainage ditch by about six feet. Plaintiffs received citations from the City. The City removed the portion of the driveway along the drainage ditch. Plaintiffs filed suit against the City for inverse condemnation. The City filed a plea to the jurisdiction and motion for summary judgment and Plaintiffs asserted that they pled a viable denial of access taking claim and that the destruction of the driveway constitutes a physical taking. The trial court granted the City's plea to the jurisdiction and Plaintiffs appealed.

The Court of Appeals held that for a physical taking, a direct invasion of property is not required. “Property” as it applies to takings law, does not only mean the real estate, but every right which accompanies its ownership. One of these rights is the right to an easement for a right of access to public roads. Such claims in an inverse condemnation action are known as “impaired access” or “denial of access” claims. Access is compensable only when access is materially and substantially impaired. Whether the access has been materially and substantially impaired is determined as a matter of law. Impaired access is analyzed in light of the actual or intended uses of remainder property as reflected by existing uses and improvements and applicable zoning. Impairment cannot be established by speculative or hypothetical uses of the property.

The Court found that the portion of the driveway which was removed by the City was along the State's drainage ditch and thus, no physical land had been taken from the Plaintiffs. The easement right of access to public roads still exists at all points along the property boundary with Alameda Road. The only possible grounds for a taking, then, is for diminished access to the property by the act of removing the unpermitted driveway from the time of removal to the time Plaintiffs obtained necessary permits to rebuild the driveway.

The Court found that the Plaintiffs' use of the property, to develop a car dealership, was not impaired by the destruction of the entrance to the driveway since they

were not able to begin construction at that time because they had not completed the process for obtaining permits. Since the Plaintiffs had allowed the subsequently approved permits to rebuild the driveway access to expire, and they acknowledged that nothing could be done with the property until all permits necessary to begin construction had been received, the evidence established as a matter of law that the impairment to their right of access was not material and substantial. The Court affirmed the trial court decision.

***Town of Bartonville Planning & Zoning Board of Adjustments v. Bartonville Water Supply Corporation*, 2013 Tex. App. Lexis 3767 (Tex.App. – San Antonio, March 27, 2013).**

A district court review of a Board of Adjustment order in a petition for writ of certiorari is limited to the legality of the order.

The Water Supply Corporation began construction of a water tower without a permit. The Town sent a letter requesting them to cease construction. The Water Supply Corporation filed a suit for declaratory relief and filed an application for a permit. The Town's Official denied the permit application and this decision was appealed to the Board of Adjustments. The Board upheld the Official's decision and the Water Supply Corporation filed a petition for certiorari arguing the order is illegal because the ordinance does not apply to the Water Supply Corporation and the Board failed to apply the law properly. The trial court found that restrictions in the Town's zoning ordinance were unenforceable against the Water Supply Corporation, reversed the Board's decision, and issued a building permit for the construction of the water tower.

The Board appealed arguing that the trial court exceeded its subject matter jurisdiction by determining that the Texas Water Code trumped the ordinance and the Water Supply Corporation was not subject to the ordinance. The Board further argued that a decision by the Board is subject to limited review by the district court. The Board only has authority to enforce the ordinance and has no authority to make such a determination.

The Court of Appeals held that to establish that an order is illegal, the party attacking the order must present a very clear showing of abuse of discretion. A zoning board abuses its discretion if it acts without reference to any guiding rules or principles or clearly fails to analyze or apply the law correctly. The Board of Adjustment derives its power from both the statute and the city ordinances establishing it and defining its local functions and powers. The Court found that if the Board had determined that the Water Supply Corporation was not subject to the ordinances; its determination would have been "null and void" as it would have been exceeding its authority. Since it is not within the Board's jurisdiction to make such a determination, it was also not within the trial court's jurisdiction in this limited petition for writ of certiorari review.

The Court further found that a district court sits only as a court of review and the only question that may be raised by a petition for certiorari is the legality of the Board's order. The Town's Official and its Board do not have the authority to determine whether the Texas Water Code "trumps" the Town's ordinance and thus, whether the Water Supply Corporation is subject to the ordinance period. The Town's Official and the Board have only been given authority to ensure the ordinances are followed. The Court reversed and remanded the case.

***Harris County Flood Control Dist. v. Kerr, 2013 Tex. App. Lexis 2772 (Tex.App.-Houston [1<sup>st</sup> Dist.], March 7, 2013).***

Property owners filed suit asserting claims for inverse condemnation and nuisance against the Flood District and Harris County for the flooding of their properties. The Flood District and the County filed a combined plea to the jurisdiction and motion for summary judgment on the grounds of sovereign immunity. Property owners asserted that the flooding was caused by unmitigated upstream development, coupled with the Flood District's flood-control measures. The trial court denied the combined plea declaring it had to under the "law of the case" doctrine. Defendants appealed.

Under the doctrine of the "law of the case," a question of law decided on appeal to a court of last resort governs the case throughout its subsequent stages. The Court of Appeals found that the prior court decisions relied upon by the trial court were not binding under the "law of the case" doctrine because the case involved different parties and different facts and one of the opinions had been withdrawn and superseded by another opinion.

Although the Court found that the trial court was mistaken in its belief that it was compelled to deny the combined plea based on the "law of the case" doctrine, the Court found that the property owners presented evidence sufficient to raise a fact issue with respect to the elements of a takings claim-intent, public use and causation. The property owners presented numerous studies and report that demonstrate that the Defendants knew that their approval of upstream development without sufficient mitigation was substantially certain to result in the flooding of the property owners' properties and presented evidence which eliminated other possible causes of the flooding. The trial court did not err in denying the plea to the jurisdiction and its decision is affirmed.

***Foster v. City of El Paso, 2013 Tex. App. Lexis 1657 (Tex.App. – El Paso, February 20, 2013).***

The City, relying upon judicial decisions and municipal studies, adopted a new sexually-oriented business ordinance. Foster filed suit asserting the ordinance violated numerous sections of the Texas Constitution, *i.e.* free speech and expression, equal protection, and adequate procedural safeguards. The City moved for summary judgment

on the grounds that the ordinance was a constitutional regulation of the time, place and manner in which sexually-oriented businesses must operate in the City. The trial court granted the City's motion for summary judgment and Foster appealed.

The Court of Appeals found that the City's ordinance targets the negative secondary effect of sexually-oriented businesses. Since the City's predominant purpose in enacting the ordinance is unrelated to the suppression of First Amendment expression, the ordinance is content-neutral and subject to an intermediate degree of scrutiny. Courts will apply the four-prong *O'Brien* test to determine whether it is a constitutional restriction on symbolic speech under the First Amendment.

The Court found that the ordinance satisfied the four-prong *O'Brien* test. The City had the constitutional authority to adopt an ordinance protecting the health and safety of its citizens, there is a substantial government interest to protect against the negative secondary effects of sexually-oriented businesses and the ordinance furthers that interest, the City's interest is unrelated to the suppression of free expression, and the ordinance's incidental restriction on First Amendment freedoms is no greater than is essential to the furtherance of the important or substantial government interest. The City's ordinance is not a constitutional restriction on symbolic speech under the First Amendment and Court affirmed the trial court decision.