

## **FALL 2013 NEWSLETTER**

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

**By John F. Roehm III**

#### **FIFTH CIRCUIT COURT OF APPEALS**

***1. Stewart v. City of New Orleans, 2013 U.S. App. Lexis 16027 (August 2, 2013)***

*A takings claim is not ripe for adjudication where the party has not sought compensation through the appropriate state procedures.*

The City demolished Stewart's home without giving her notice of the demolition nor was she given notice that the building was in imminent danger of collapse or that an emergency situation otherwise existed which would have permitted demolition in the absence of her consent. Stewart sued the City for various constitutional violations, including a takings claim. The City filed a Rule 12(c) motion to dismiss or, alternatively, a motion for summary judgment. Stewart failed to comply with the local rules by filing a motion in opposition at least eight days before the hearing, and the court deemed the City's motion unopposed and dismissed the case. Stewart filed a motion for reconsideration which was denied by the district court. Stewart appealed.

Stewart argued on appeal that the City's destruction of her home was a taking without just compensation. Although Stewart acknowledged that she had not sought and been denied just compensation through the appropriate state procedures before filing suit, she argued that her claims fall under an exception to the rule that a takings claim is generally not ripe for review until the claimant has sought and been denied just compensation through the appropriate state procedure. Stewart asserted that she was not required to go through condemnation proceedings if such action would be futile or inadequate. In support of her contentions, Stewart argued that a judgment rendered against the City in state court would be unenforceable and uncollectible unless and until the City decides to appropriate funds to pay for the judgment.

The Fifth Circuit found that Stewart did not deny that the State of Louisiana provided a cause of action for inverse condemnation, nor did she provide any details as to whether the City would refuse payment in her case should she establish an entitlement to it. The Court found that Stewart was unable to show that it is "certain that the state *would* deny [her] compensation were [s]he to undertake the obviously futile act of seeking it" and thus, her takings claim was unripe for adjudication.

#### **Texas Court of Appeals**

***1. Walton v. City of Midland, 2013 Tex. App. Lexis 11246 (Tex. App. – Eastland, August 30, 2013).***

*The granting of an oil and gas drilling permit to the owner of an oil and gas lease did not constitute a physical invasion of the surface owner's estate and thus, no regulatory taking or inverse condemnation.*

Walton, the owner of a surface estate, sued the City for granting a permit to drill an oil and gas well to Endeavor, owner of an oil and gas lease that included Walton's tract. Walton alleged that the granting of the permit constituted a regulatory taking under the Texas Constitution. Walton claimed that the granting of the permit constituted a physical invasion of his surface estate, and the provision in the permit requiring the drilling of a water well for maintaining trees constituted an invasion of his groundwater. The City filed a plea to the jurisdiction which was granted by the trial court. Walton appealed.

Walton, on appeal, focused on the permit provision requiring the drilling of a water well for landscaping purposes. Walton argued that the water well requirement constituted a taking because it required him to suffer a permanent invasion of his property.

The Court of Appeals found that the water well provision did not require Endeavor to drill the water well on Walton's property. The requirement only provided that the water well was to be located no closer than 500 feet to the permitted oil and gas well and thus, could have been drilled on someone else's property and did not require Walton to suffer a permanent physical invasion of his property. The Court found that the drilling permit did not compel Walton to suffer a physical invasion of his property because a permit to drill an oil and gas well is "purely a negative pronouncement" that "grants no affirmative rights to the permittee to occupy the property." The Court further found "[a] permit granted by an agency does not act to minimize the permit holder from civil tort liability from private parties for actions arising out of the use of the permit."

The permit issued by the City did not grant any affirmative rights to Endeavor to occupy or use Walton's property. The permit did not authorize Endeavor to undertake any action that was not otherwise authorized, and did not shield Endeavor from any liability to Walton. Walton did not show the City's act of granting a permit to Endeavor to drill an oil and gas well on his property deprived him of all economically beneficial use of the property. The Court found that "the City simply allowed what the title itself would have allowed" and thus, comports with the parties' already existing property rights. The permit did not confer any rights to Endeavor that it did not otherwise possess and thus, did not rise to the level of a taking. The Court affirmed the trial court's judgment.

**2. City of Grapevine v. CBS Outdoor, Inc., 2013 Tex. App. Lexis 11868 (Tex. App.-Fort Worth, September 19, 2013).**

*A litigant must avail himself of the statutory remedies that may moot a takings claim before a takings claim can be ripe for adjudication.*

CBS, the owner of an off-premise, nonconforming advertising billboard sign, was included as a defendant in a condemnation proceeding filed by the State since its sign aerially encroached over part of the property to be condemned by the State. CBS and the State discussed

ways to remedy the situation by either shifting the face of the sign so that it no longer encroached or reducing the size of the sign face by the amount of the overhang. CBS contacted the City requesting permission to shift the face of the sign to eliminate the aerial encroachment. The City notified CBS that the advertising sign was “currently nonconforming under applicable City codes” and could not “be moved, altered, or adjusted under the current conditions” and denied CBS’s request to shift the face of the sign. The State notified CBS that the aerial encroachment had to be removed and CBS eliminated the overhang by removing the four foot panel on the end of the sign face overhanging the right of way. The City notified CBS that the sign had been illegally modified in violation of the City’s zoning ordinances and ordered the sign removed. CBS appealed the decision and the City’s Board of Adjustment denied the appeal and request for variance.

CBS sued the City and Board for judicial review, injunctive relief, inverse condemnation, and violations of the state and federal constitutions. The City filed a plea to the jurisdiction on all of CBS’s claims which was denied by the trial court and the City appealed.

The City argued on appeal that the trial court lacked jurisdiction over CBS’s inverse condemnation claim because CBS failed to exhaust its administrative remedies. The Court of Appeals found that under *City of Dallas v. Stewart*, the Texas Supreme Court had held that “a litigant must avail itself of statutory remedies *that may moot its takings claim*, rather than directly institute a separate proceeding asserting such a claim.” The Texas Supreme Court further held “if a remedial procedure might have obviated the need for a takings suit, then the property simply had not, prior to the procedure’s use, been taken *without just compensation*.”

The Court found that CBS did not have to appeal the City’s decision that CBS could not move, alter, or adjust the sign before filing an inverse condemnation suit because that remedial procedure could not have possibly mooted CBS’s inverse condemnation claim which was based on the City’s instruction to CBS to remove the sign. The Court found that it could not conclude that an appeal by CBS of the City’s decision that CBS could not move, alter, or adjust the sign might have obviated CBS’s need to file the inverse condemnation claim because that decision of the City did not order CBS to remove the sign and CBS did not base its takings claim on any decision of the City other than its instruction to remove the sign.

The Court of Appeals affirmed the trial court’s order denying the City’s plea to the jurisdiction as to CBS’s inverse condemnation claim.