

## **SPRING 2014 NEWSLETTER**

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

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#### **TEXAS COURT OF APPEALS**

***Corpus Christi v. Scorpio Dev., LLC*, 2014 Tex. App. Lexis 2780 (Tex. App. – Corpus Christi, March 13, 2014).**

Disputed jurisdictional evidence precludes the granting of a plea to the jurisdiction.

The City approved a subdivision plat which depicted dedication of 50 feet of right-of-way. Subsequently, two of the lots in the plat were sold to Scorpio. The City widened Yorktown Blvd and Scorpio sued the City for taking 30 feet of its property. The City filed a plea to the jurisdiction arguing that its immunity has not been waived because Scorpio, by virtue of the subdivision plat and dedication, has consented to the taking of property within the 50 feet of right-of-way. The trial court denied the plea.

The City submitted evidence that the widening of the road was within the 50 feet of dedicated right-of-way. In the context of a takings claim, the City's plea challenged the existence of a jurisdictional fact. The City disputed that it engaged in an intentional act that resulted in a taking of Scorpio's property. Scorpio submitted evidence that as a result of widening the road, Scorpio's property lost approximately 30 feet in depth.

The Court of Appeals found that the evidence presented raised a fact issue as to whether the City's expansion of the road occurred within the dedicated right-of-way and thus, the trial court's denial of the plea to the jurisdiction was appropriate.

The Court of Appeals affirmed the denial of the plea to the jurisdiction.

***Midtown Edge, L.P. v. City of Houston*, 2014 Tex. App. Lexis 1676 (Tex. App. – Houston [1st Dist.] Feb. 13, 2014).**

A party cannot assert a takings claim if there is consent.

Midtown Edge began construction of a condominium project and applied to the City for use of its wastewater line. The City notified Edge that a new wastewater line would need to be constructed because the existing wastewater line was inadequate to accommodate the project's needs. The City issued a construction permit and Edge constructed a new line at its own expense and dedicated the new line to the City for its ownership and maintenance. Subsequently, an apartment complex connected to the new line and Edge applied to the City for reimbursement in an amount equal to the pro-rata share of Edge's cost to construct the new line. The City refused

reimbursement and the apartment complex disconnected from the new line. Edge sued the City on several grounds, including an unconstitutional taking. Edge argued that it was required to build a new wastewater line which provided a benefit for the City's use and the municipality exacted a benefit from Edge and should be required to compensate Edge for the same. The City filed a plea to the jurisdiction asserting that no unconstitutional taking occurred because Edge consented to the City's ownership of the new wastewater line. The trial court granted the plea.

The Court of Appeals discussed that a distinct category of takings occurs when the government conditions the approval of permits "on an exactions from the approval-seeking landowners." Any requirement that a developer must provide or do something as a condition to receive municipal approval is an exaction.

The Court found that Edge chose to construct the new wastewater line at his own expense and did not object to the City's requirement and thus, consented to those requirements. There can be no taking if there is consent. Edge failed to assert a valid takings claim and thus, the dismissal of the claim for want of jurisdiction was appropriate.

The Court of Appeals affirmed the granting of the plea to the jurisdiction.

***San Antonio Water Sys. v. Overby*, 2014 Tex. App. Lexis 2992 (Tex. App. – San Antonio, March 19, 2014).**

Governmental immunity is not waived in the taking context when there is no intent to damage property.

The Overbys, after years of having their home and yard flooded by rainwater and sewage, sued the San Antonio Water Systems ("SAWS") for a taking. The Overbys alleged that SAWS knew its maintenance of the sewer system, including the alley's surface over the sewer system, caused rainwater to damage their yard and home. The Overbys argued that SAWS maintained the sewer system and the alley for public use and SAWS knew that the manner in which they had graded the alley had and would cause flooding into their yard. SAWS filed a plea to the jurisdiction asserting governmental immunity. The trial court denied the plea.

The Court of Appeals found that even if SAWS knew its decision not to change the grade of the alley could result in flood damage to the Overbys' property in case of a heavy rain, this awareness of the mere possibility of damage is no evidence of intent to damage their property. The flooding of the Overbys' property was not "necessarily an incident to, or necessarily a consequential result of" SAWS maintaining the sewer system in the alley. No evidence was presented that SAWS intended to damage the Overbys' property. Absent such requisite intent, SAWS' immunity was not waived under the takings clause. The Court found that the trial court erred in denying the plea to the jurisdiction.

The Court reversed and rendered judgment that the Overbys' take nothing from SAWS on their takings claim.

***Abbott v. City of Paris*, 2014 Tex. App. Lexis 2651 (Tex. App. – Texarkana, March 7, 2014).**

There must be a final decision in order to assert a (regulatory) takings claim.

Abbott purchased property. Half of the property was being used as a mobile home park and the other half unused. Abbott received a letter from the City Manager informing him that the mobile park was an “approved, non-conforming use” of the property. The property was zoned commercial. Abbott intended to expand the mobile park to encompass all the property and submitted a plat. The City informed Abbott that placement of additional manufactured homes would require a change in zoning from “commercial” to “Single-Family Dwelling No. 3”. Abbott sued the City under breach of contract and various constitutional violations. Abbott did not attempt to have any portion of property rezoned. The City filed a plea to the jurisdiction and the trial court denied the plea. The Court of Appeals reversed and rendered judgment dismissing the suit.

Abbott filed a second suit against the City asserting several claims including a regulatory taking/inverse condemnation claim. The City filed a plea to the jurisdiction asserting no waiver of immunity and Abbott’s failure to exhaust his administrative remedies. The trial court granted the plea.

The Court of Appeals found that Abbott’s federal takings claim was not ripe because the state proceedings had not yet been concluded. The City advised Abbott that the change he was seeking – expansion of the mobile home park use to the entirety of the property, required a zoning change. Abbott filed an appeal with the City’s Board of Adjustments but they did not have authority to change zoning. Abbott did not request any variance from the Board of Adjustments. The Court found that Abbott had not filed for rezoning, had not requested a variance, and had not appealed the denial of the building permit application. The Court found that since Abbott had not obtained a final decision through use of the administrative proceedings, his state takings claim was not ripe for adjudication.

The Court of Appeals affirmed the granting of the plea to the jurisdiction.

### **UNITED STATES DISTRICT COURT**

***Dominican Mgmt., LLC v. City of Arlington*, 2014 U.S. Dist. Lexis 34535 (U.S. District Court for Northern District of Texas, Dallas Division, March 17, 2014).**

A regulatory takings claim is unripe until there is a final decision.

Dominican purchased portions of property to create a Hispanic-oriented shopping center. The property represented a part of, but not the entire, parcel originally platted for Six Flags Mall. Between the closing and May 2013, Dominican claims that the City flagged the property and would not issue any permits. Dominican claims that City officials told him the entire area had to be replatted including its property, stores and other parcels that Dominican did not own. The City claimed that Dominican was told that there was not enough parking for its property, the mall sign had to be removed, and a new landscaping plan had to be submitted, though the area for the landscape plan was located on other owners’ property. Dominican began construction

without the necessary building permits and the City instructed Dominican to stop all construction until they obtained a replat and applied for and received the required permits. The City denies that it ever “flagged” the property. About three weeks prior to filing suit against the City, Dominican submitted a proposed replat to the City. Dominican sued the City alleging that the City interfered with its use and enjoyment of their property by imposing restrictions and impermissibly denying them permit applications regarding the renovation of a shopping mall. Dominican brought suit under the Texas Constitution for an unconstitutional taking as well as federal constitutional claims under Section 1983. The City moved to dismiss Plaintiff’s claims on the grounds that they were not ripe.

The Federal District Court found that at the time the City filed its motion to dismiss the replat application was still under review and no final decisions had been made by the City concerning signage, parking, or landscaping the property. The Court, upon review of the City’s ordinances, found that Dominican was required to replat and, by extension, obtain a final decision before filing suit. Dominican presented no evidence to the Court that futility excused them from obtaining a decision on their initial application. Dominican never waited to receive a first rejection of their plat application so their claim of futility was premature.

As for Dominican’s argument that they have established a temporary taking, the Court rejected the argument. The Court found that cases involving “normal delays in obtaining building permits, changes in zoning ordinances, variances, and the like” do not necessarily rise to the level of takings. The Court found that Dominican’s temporary takings claim was also unripe. The Court held that even if Dominican’s argument that the City required them to include all other owners’ property in the replat and landscaping plan is true, these statements by the City do not amount to a final decision by the City on Dominican’s application materials. Dominican initiated this suit before such a decision could be reached and thus, no regulatory taking had been established because the extent of the restriction on Dominican’s property was not yet known.

The Court found that Dominican’s regulatory takings claim under the Texas Constitution was not ripe and thus, the Court lacked subject matter jurisdiction and Dominican’s claim was dismissed without prejudice.