

SUMMER 2014 NEWSLETTER

LAND USE, ZONING and REGULATORY TAKING

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TEXAS COURT OF APPEALS

***City of Austin v. Liberty Mutual Insurance*, 2014 Tex. App. Lexis 5306 (Tex. App. – Austin, May 16, 2014).**

The sufficiency of the pleadings to assert a valid takings claim.

Appellees sustained property damage from a wildfire which they contend was caused by the City's lack of a maintenance policy. Appellees filed various claims, including inverse condemnation. The City filed a Rule 91a Motion to Dismiss and asserted that the pleadings did not allege facts establishing that the City acted with the intent required for governmental action to constitute a "taking" under the Texas Constitution and did not allege facts establishing that appellees' property was damaged for a "public use". The trial court denied the motion and the City appealed.

The Court of Appeals held that to sufficiently allege the intent element for a takings claim, it is not enough to merely allege that the act causing the damage was intentional. A party must allege that the governmental entity intended the resulting damage, or at least knew that the damage was substantially certain to occur. To have the requisite intent, a governmental entity must have known that the damage complained of was substantially certain to occur as a result of its conduct, meaning that the damage was necessarily an incident to, or necessarily a consequential result of the entity's action.

The Court held "that the series of events that connects the City's maintenance decision to the property damage, while arguably foreseeable, was not an almost-certain result of or necessarily incident to that decision." The Court found that appellees' factual allegations would show that the City's conduct furnished a condition that made property damage a substantial risk but that is far different from being the substantial certainty required for a valid takings claim. The Court found that while appellees did allege that "a wildfire is a substantially certain result" of the City's lack of a maintenance program, this is merely a legal conclusion as opposed to an allegation of fact and as such, is a conclusory pleading which is insufficient to show jurisdictional facts.

The Court further found that for similar reasons appellees' allegations likewise did not support their assertion that the property was damaged for public use under the requirement for a valid inverse condemnation claim. Property is "damaged for public use" when a government entity is aware that its actions will necessarily cause physical damage to private property yet determines that benefit to public outweighs harm. When property damage is an unintended

result of a government's action or policy, it cannot be said that the property was "taken or damaged for public use."

Since appellees' pleadings failed to state a valid takings claim, the City retained its immunity from this claim.

***City of El Paso v. Ramirez*, 2014 Tex. App. Lexis 2928 (Tex. App. – El Paso March 14, 2014).**

The sufficiency of the pleadings to assert a takings/inverse condemnation claim.

This is another case dealing with the sufficiency of pleadings. Appellees sued the City for property damage caused by flooding due to overflow of the City's landfill. Appellees alleged inverse condemnation, nuisance, trespass, and Texas Water Code violations. The City filed a plea to the jurisdiction asserting that appellees' factual allegations merely allege that the City was aware of the potential for overflow from the landfill retention ponds, and the City failed to take preventive measures to prevent such overflow. Appellees failed to allege public use and causation. The City's plea to the jurisdiction challenged both the sufficiency of appellees' pleadings and existence of jurisdictional facts. The trial court denied the plea and the City appealed.

The Court of Appeals found that the appellees alleged that the City continued to operate and maintain this landfill with knowledge that nearby properties experienced floodwater damage at least twice during the preceding three years and that the City knew its construction, operation, and maintenance of the landfill was substantially certain to damage appellees' property as long as the City continued its intentional acts. The question of what constitutes public use is one for the court. Texas courts have narrowed the meaning of a public use to those situations in which damages arise out of or are incident to public works. Property is taken for a public use only when there results to the public some definitive right or use in the undertaking to which the property is devoted.

The Court found that appellees pled facts that could establish that the damage to their property arose out or was incident to a public work – i.e. a landfill, and thus, their pleading sufficiently alleged facts to show public use. As for causation, the Court found that the appellees sufficiently pled causation in that appellees alleged facts demonstrating how the City's continued operation and maintenance of the landfill changed the character of the floodwaters that damaged their property and further alleged that absent the City's intentional acts the damages would not have occurred, and that the damages were foreseeable to the City. Cause in fact and foreseeability are the components of proximate cause.

Court of Appeals affirmed the trial court's denial of the City's plea to the jurisdiction.