

2014 YEAR IN REVIEW

SIGNIFICANT DECISIONS IN 2014: **LAND USE, ZONING and REGULATORY TAKING**

By John F. Roehm

***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 takings 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.

***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. High Ridge Construction, Inc.*, No. 08-13-00187-CV, 2014 Tex. App. LEXIS 8431 (Tex. App. – El Paso, July 31, 2014).**

A contractual dispute does not rise to the level of a constitutional taking.

The City of El Paso entered into a contract with the Texas Department of Housing & Community Affairs to administer funds provided by the federal government for weatherization services in qualified low-income residential properties. The City entered into a contract with High Ridge Construction to deliver weatherization services for eligible residential properties in El Paso. The contract provided that the City would not pay High Ridge more than \$600,000 for services performed under the contract. High Ridge submitted invoices and was paid more than \$600,000 but the City then refused to pay additional monies for materials and services. High Ridge sued the City for breach of contract and an unconstitutional taking of private property.

The City filed a plea to the jurisdiction claiming that it retained its immunity from suit on High Ridge's unconstitutional takings claim because High Ridge failed to allege that the City intended to exercise its eminent domain powers to take High Ridge's private property. High Ridge argued that the City had intentionally taken and obtained the benefit of the materials and work which High Ridge provided to the properties and the property has been taken for a public purpose and the City has refused to pay just compensation for the property. The trial court denied the City's plea to the jurisdiction and the City appealed.

The Court relied on Texas Supreme Court precedent which stated that the State does not have the requisite intent under constitutional-takings jurisprudence when it withholds property or money from an entity in a contract dispute. In that situation, the State is acting within the color of rights under the contract, not under its eminent domain powers. Since the City had withheld payments under a contractual dispute, High Ridge's pleadings affirmatively showed that the City

did not have the requisite intent to take High Ridge's property under its own eminent domain powers and as a result, the City retains immunity from suit on the takings claim.

The trial court's order denying the City's plea to the jurisdiction on the takings claim is reversed.