WINTER 2015 NEWSLETTER

LAND USE, ZONING and REGULATORY TAKING

By John F. Roehm III

TEXAS SUPREME COURT

***City of Houston v. Carlson,* 2014 Tex. App. LEXIS 1209 (Tex. Sup. Ct., December 19, 2014).**

A challenge to a procedural regulation does not necessarily equate to a taking.

The City investigated safety concerns at a condominium complex and declared the condominiums uninhabitable and posted notice that a certificate of occupancy must be obtained. The condominium owners did not apply for an occupancy certificate and the City, rather than issue a citation, ordered all residents to vacate the complex. The City conducted an administrative hearing and upheld the order to vacate. The condominium owners sued and obtained a permanent injunction that they were not afforded due process of law. The trial court reversed the order to vacate and the Court of Appeals affirmed. The parties did not appeal to the Supreme Court and the homeowners association sold the complex for redevelopment.

A group of owners filed suit against the City for inverse condemnation – i.e., alleging that their property was taken when residents were forced to vacate. The trial court granted the City's plea to the jurisdiction concluding that the property owners did not allege a taking. The Court of Appeals reversed. The City filed a petition for review with the Texas Supreme Court.

The Supreme Court found that the owners' allegations did not support a regulatory takings claim. A regulatory taking is a condition of use "so onerous that its effect is tantamount to a direct appropriation or ouster." The owners did not contest any of the City's property-use restrictions, did not argue it was unreasonable to require multi-family residential facilities to obtain occupancy certificates and did not challenge the City's various codes. Rather, the owners objected to the penalty imposed and the manner in which the City enforced its standards. The owners were challenging the procedure utilized by the City – not a land use restriction. The Court acknowledged that it has never recognized a purely procedural regulatory taking.

The Court found that the property was not "taken for public use" within the meaning of the Constitution. Where a party objects only to the "infirmity of the process," no taking has been alleged. The owners have not alleged a viable inverse condemnation case and the Court reversed the Court of Appeals' decision.

TEXAS COURT OF APPEALS

***City of Galveston v. Murphy,* 2015 Tex. App. LEXIS 220 (Tex. Ct. App. – Houston [14th Dist.], January 13, 2015.**

The denial of a grandfathered non-confirming status is a taking.

In September 2008, a property owner sustained flood damage. In January 2009, the City advised the property owner that the property was "unfit" for human habitation, and had been "condemned." The tenants evacuated the building and the property owner began making repairs. In January 2010, the City indicated that the condemnation would be lifted if various code items were completed and a letter from a certified engineer attesting to the property's safety was provided to the City. In May 2010, the City informed the property owner that because the property had been unoccupied for over six months, it had lost its "grandfathered" non-conforming status and would require a Specific Use Permit (SUP) to be occupied as multi-family dwellings. The property owner submitted a SUP application to the City and to the Landmark and Planning Commissions for review and recommendation. Both the Landmark and Planning Commissions recommended denial of the SUP application but the City staff recommended approval subject to certain conditions. The City Council denied the request. The property owner sued the City alleging that the denial of the SUP and revocation of its grandfather status constituted a regulatory taking under the Texas and Federal Constitution. The City filed a motion to dismiss for lack of subject matter jurisdiction arguing that the property owner's claims were not ripe because there was no final or definitive decision regarding use of the property as multi-family dwellings. The trial court denied the motion and the City filed an interlocutory appeal.

As for the property owner's regulatory takings claim with regard to the denial of the SUP application, the Court found that at the time of the denial, the property was not code-compliant and the City had not received the engineer's letter. The property owner acknowledged that the City Council told him he could bring it up to code and reapply. The property owner did not resubmit the SUP application that would have reflected completion of repairs and/or an engineer's letter certifying the safety of the property. The Court found no evidence of futility which would have excused the property owner from resubmitting the application. The Court found that the property owner's regulatory takings claims with regard to the City's denial of the SUP application are not ripe and the trial court erred in denying the City's plea on that basis.

In its supplemental briefing, the City argued that the property owner waived their right to raise a takings claim based on the City's revocation of the property's grandfathered non-conforming status by filing the SUP application and failing to pursue an appeal with the Zoning Board of Adjustment. The Court found that the City's waiver argument is really a jurisdictional argument – by failing to request reconsideration or a variance from the Zoning Board as to the property's revoked non-conforming status, such claim is not ripe. The Court rejected the property owner's argument that the City waived this ripeness issue but found that the City had not elicited evidence from the property owner or anyone from the Zoning Board that the property owner had the ability to appeal the City's decision. The evidence in the record as to ripeness was focused on the property owner's lack of the SUP application, not any alleged failure to obtain a final decision as to the City's removal of the property's grandfathered non-conforming status. The Court found that the City did not meet its burden to establish that its revocation decision was not final and thus, the trial court did not err in denying the City's plea with regard to an alleged taking based on the City's revocation of the property's non-conforming status.