

SPRING 2015 NEWSLETTER

LAND USE, ZONING and REGULATORY TAKING

By John F. Roehm III

TEXAS SUPREME COURT

State of Texas v. Clear Channel Outdoor, Inc., 2015 WL 1870306, ___ S.W. 3d. ___ (Tex. 2015) (April 24, 2015).

Compensation for the taking, damaging or destroying of billboard structures is the cost of the structures themselves, not the revenue generated from the structures

The State of Texas condemned land which contained billboards. The State contended that the condemnation of the realty did not include the billboards themselves because they were removable personal property for which no compensation was due. The Special Commissioners' award did not include compensation for the billboard structures. The landowners and lessee, Clear Channel, objected to the award and Clear Channel counterclaimed for inverse condemnation of the sign structures. The State moved to dismiss the counterclaim on the grounds that Clear Channel's right under its lease to remove the structure established that they were not fixtures but personalty. The trial court denied the State's request and the State appealed. The court of appeals affirmed.

The State settled with the landowners and Clear Channel for the compensation for their fee and leasehold interests. However, the parties disagreed on whether Clear Channel was entitled to separate compensation for the billboard structures. The State argued that if Clear Channel was entitled to any compensation, the compensation should be limited to the cost to build them. Clear Channel argued that it was entitled to be compensation for the value of the billboards based on the business revenue they generated and that this amount was not included in the settlement. At trial the jury entered an award based on Clear Channel's theory of compensation for the billboards. The State appealed and the court of appeals affirmed.

The State argued that it did not take the billboards themselves because they were not fixtures but personalty which could have been removed under the lease. However, the U.S. Supreme Court has held that a tenant's right to remove improvements when the lease ends cannot be invoked by the condemnor to limit compensation for a taking. The court has found that an improvement can be a fixture even if removal is physically possible. The State argued that it could not have taken the billboard structures because it never took physical possession of them. However, the State required the billboards to be destroyed and under the Texas Constitution, its guarantees compensation if private property is "taken, damaged, or destroyed for or applied to public use without adequate compensation."

As for the compensation for the billboard structures, the Court, in a previous decision in *State v. Cent. Expressway Sign Assocs.*, 302 S.W.3d 866 (Tex. 2009), found that Texas law provides that "income from a business operated on the property is not recoverable and should not

be included in a condemnation award,” even when there is evidence that the business’s location is crucial to its success.

The State did not take Clear Channel’s business but rather took only the land and the billboard structures. Clear Channel can continue the business elsewhere, subject to the restrictions imposed on the new site. The compensation the State owed for the land taken, given that its highest and best use was for outdoor advertising, should have taken into account the facts that the necessary permits were in place and that the site was especially suited to that use. Valuation should have taken into account the rents the owner could command from so desirable a location. The court presumed that the parties considered all these factors in arriving at an agreement on the compensation due and if they did not, their settlement forecloses all these issues. Since the cost of the billboard structures themselves were excluded from the settlement and the compensation due for them can be based only on their cost, the judgment of the court of appeals is reversed and the case is remanded to the trial court for determination of the cost of the billboard structures.

TEXAS COURT OF APPEALS

***The Village of Tiki Island v. Premier Tierra Holdings, Inc.* 2015 WL 1393278, ___S.W.3d.___ (Tex. Ct. App. – Houston [14th Dist.], March 24, 2015)**

No justiciable controversy exists on a declaration of vested rights when the reason for the denial of the plat application is not disclosed.

Premier Tierra Holdings, Inc. (“Premier”) owned land located in the Village of Tiki Island (“Village”) and began negotiating with the Village about a planned development. The Village was contemplating the adoption of a zoning ordinance which would prohibit aspects of Premier’s proposed project. Premier attempted to negotiate with the Village regarding the terms of the proposed ordinance but was unsuccessful. On April 22, 2010, Premier filed a plat application with the Village describing the project. On April 27, 2010, the Village conducted a public zoning hearing concerning the proposed ordinance. At this hearing, Premier presented proposed changes to ordinance to facilitate its project. The Village rejected the proposed changes and approved the zoning ordinance. As a result of the new zoning ordinance, the Village rejected Premier’s filed plat application.

Premier, without waiving its vested rights, sought approval of its project under the new zoning ordinance. At the request of Premier, the Village revised the ordinance to provide for approval of a “Planned Unit District” (PUD) to accommodate certain aspects of the project. Premier negotiated with the Village regarding the terms of a proposed PUD to allow a reduced scale version of the project. A public hearing was held to review the plan and gain public input. Premier received “negative feedback” on the plan but nonetheless Premier, reserving its vested rights, filed an application for the PUD. A second hearing was conducted and again Premier received negative feedback on the plan. Premier continued to pursue a reduced scale version of the project but when it became clear that it would not be approved and the Village would not acknowledge its vested rights, Premier filed suit seeking declarations that its rights in the project vested on April 22, 2010. The Village answered and filed a plea to the jurisdiction asserting no

subject matter jurisdiction and no justiciable controversy. The trial court denied the Village's plea to the jurisdiction.

On appeal the Village did not dispute that Premier's 2010 plat application triggered chapter 245 of the Texas Local Government Code but at the time of the plat application, the Village was governed by chapter 212 of the Local Government Code, which established the standards for approval of a proposed subdivision plat, and Premier's plat application was denied on the basis of the land use regulations in effect at the time, including those of chapter 212. The Village contends that after Premier's plat application was denied, Premier never exercised its statutory right to request that the Village provide the reasons for the denial. Premier never appealed the denial of its plat application and did not challenge the Village's denial in the lawsuit. Since the project cannot go forward, any request for declaratory relief is moot. The Village further contends that to the extent Premier seeks a declaration of what rights would be if it were to submit a new plat or permit application in the future, any claims based on that hypothetical scenario are not ripe for judicial review.

Premier argued that its request for declaratory relief is not moot because its allegations and evidence affirmatively demonstrate that the Village will not consider any further plans or permits unless they are in the form of a PUD, a process that did not exist until after Premier's rights in the project vested. Premier argued that the Village's denial of its plat application is irrelevant to the dispute because the project described by its plat conformed to the Village's regulatory scheme as of April 22, 2010, and Premier's rights in the project vested when the plat application was filed. Premier further argued that because Chapter 245 applies broadly to projects, rather than to individual plats or permits, the denial of its 2010 plat application in no way precluded Premier from filing additional plats or requests for permits based on the project described in that plat.

The Village was not required to approve Premier's plat application merely because it was filed; rather, it was entitled to approve, disapprove, or conditionally approve the application so long as the Village did so "solely on the basis of any orders, regulations, ordinances, rules, expiration dates, or other properly adopted requirements in effect at the time the plat application was filed." Since Premier's plat application was denied, the project described in the 2010 plat, and any subsequently filed permits based on that plat, cannot be initiated, continued, or completed until a determination is made concerning whether the Village denied the 2010 plat application based on the subsequently enacted zoning ordinance in violation of chapter 245, or whether the Village denied the plat application based on one or more legitimate reasons.

The court found that Premier failed to present a justiciable controversy because the record does not disclose the reasons why the Village denied the 2010 plat application; Premier has never requested that the Village certify the reasons for the denial; no plat or permit applications have since been denied for any specified reasons; and Premier has not challenged the Village's denial of its plat application in this or any other proceeding. An injury Premier has allegedly suffered, or may suffer in the future, as a result of the City's refusal to approve its project is not ripe because Premier has failed to allege or demonstrate that any official action by the City has caused its alleged injuries.

The court found that due to the unique posture of the case, the trial court could do no more than confirm that Premier's 2010 plat application invoked chapter 245 for the purpose of providing fair notice of its project to the Village before it was denied and Premier may have vested rights in the project, but there is no context within which to declare what they are. Any such declaration would be a prohibited advisory opinion that would not resolve the parties' dispute.

The City's plea is sustained and Premier's case is dismissed without prejudice.