

SUMMER 2016 NEWSLETTER

LAND USE, ZONING and REGULATORY TAKING

By John F. Roehm III

TEXAS SUPREME COURT

***Harris County Flood Control District v. Kerr*, ___S.W.3d___ (Tex. 2016), 2016 WL 3418246 (June 17, 2016).**

Property owners located in the White Oak Bayou watershed filed suit against Harris County and Harris County Flood Control District for flooding damage to their properties. Property owners allege that a taking occurred as a result of the governmental entities approving private development and engaging in flood control efforts. The County filed a plea to the jurisdiction alleging that there was no taking. The court denied the plea and the County appealed.

The Court must limit its consideration to affirmative conduct the County was substantially certain would cause flooding to the homeowners' properties and that would not have taken place otherwise. The only affirmative conduct on which the homeowners rely is the approval of private development. The homeowners offered no proof that the County was substantially certain that the homeowners' particular properties would flood if the County approved new housing development; rather, they alleged that the County was substantially certain that this action in approving "unmitigated development" would result in flooding "in the vicinity of their properties."

The property owners presented no evidence that the County's actions were the proximate cause of flooding on their property. The homeowners presented no evidence that the County was consciously aware that approval of unmitigated development in one defined area was substantially likely to cause flooding in another specifically defined area of the White Oak Bayou watershed that included the homeowners' properties. The homeowners provided no evidence that the County knew, at the time it allegedly approved of "unmitigated" development, the homeowners' particular property would suffer from recurrent flooding.

The Court found that there was an absence of a conscious decision on the part of the County to damage certain private property for a public use. The homeowners attempted to establish intent on the part of the County due to the recurrence of flooding. However, intent in the taking context is determined as the time the government acted, not with the benefit of hindsight. Property owners must establish a fact issue on all elements of inverse condemnation – intent, causation, and public use. To form the requisite intent, the government ordinarily knows which property it is taking – the government must know that "a specific act is causing identifiable harm" or knew that "specific property damage is substantially certain to result from an authorized government action." Courts have not recognized liability where the government only knows that someday, somewhere, its performance of a general government function, such as granting permits or approving plats, will result in damage to some unspecified parcel of land within its jurisdiction. Inaction cannot give rise to a taking so any alleged failure to take further

steps to control flooding does not rise to an inverse condemnation claim. Further, courts have not held that the public use element is met where the government does nothing more than approve plats or building permits for private development.

The Court overrules the trial court's denial of the County's plea to the jurisdiction on the grounds there was no taking.

TEXAS COURT OF APPEALS

***Bhakta v. Texas Department of Transportation*, ___S.W.3d___ (Tex. App. – San Antonio 2016), 2016 WL 1593163 (May 3, 2016).**

Bhakta owned a hotel near a roadway construction project by Texas Department of Transportation ("TxDOT"). During construction, the area experienced severe storms and runoff from the storms caused flooding to Bhakta's business. Bhakta sued TxDOT and alleged claims of inverse condemnation and nuisance under the Texas Constitution. Bhakta alleged that a lack of connection between the old and new drainage systems during construction considerably increased the storm runoff onto his property and caused three flooding events. TxDOT filed a plea to the jurisdiction which was granted by the trial court. Bhakta appealed.

On appeal, Bhakta argued that he raised a fact issue on whether his property was intentionally taken without compensation because his property flooded several times and based upon the recurrence of flooding events, TxDOT knew its actions caused damage to his property – i.e., they acted intentionally by failing to rectify the cause of flooding. Bhakta alleged that there was an "intent to cause identifiable harm" on the part of TxDOT.

The Court held that it is not enough that the act causing the harm be intentional. There must also be knowledge to a substantial certainty that the harm will occur to the plaintiff's property. The governmental entity must know at the time it takes action damage to the plaintiff's property will occur or is substantially likely to occur. The requisite intent at the time the act or plans are made must presuppose the flooding or the flooding must be a result of the operation as intended.

Bhakta presented evidence that the flooding of his property was caused by insufficient connectivity of the existing and proposed drainage systems, combined with greater than normal rainfall and the duration of the water flow. TxDOT's plans for drainage construction called for a continuous, connected pipe from the old drainage system to the "outfill point." The contractor, on the project, failed to do so which caused runoff to back up and flood Bhakta's property. Bhakta did not present evidence which raised a fact issue on whether TxDOT knew when it drafted the plans for construction of the drainage system that flooding was substantially likely to occur. The evidence did not establish or raise a fact issue whether the flooding was the result of the operation as intended at the time TxDOT drafted the drainage system plans.

TxDOT directed the drainage system to be constructed to direct water into an outfield point; however, diversion from TxDOT's plan by the contractor caused disconnection in the designed pipeline resulting in flooding. TxDOT's knowledge that a failure of the drainage

system caused water for the highway to flow onto Bhakta's property does not raise a fact issue with regard to TxDOT's intent to damage Bhakta's property. No evidence was presented to address TxDOT's knowledge at the time the plans were drafted – i.e., whether they knew damage was substantially likely to occur from their plans, and thus, Bhakta failed to raise a fact issue with regard to TxDOT's intent as a matter of law.

The Court sustained the plea to the jurisdiction.

***City of Justin v. Wesolak*, ___S.W.3d___ (Tex.App. – Fort Worth 2016), 2016 WL 2989568 (May 19, 2016).**

Wesolak owned two adjoining tracts of land and wanted to build a fence across both tracts. The City told Wesolak that he would need to replat his two tracts into a single tract. Wesolak submitted his proposed plan and the City told him that he would need to amend the plat to include language which Wesolak contends prevented a fence from being constructed on his property. Wesolak built the fence and the City issued citations for violating City ordinance. Wesolak filed suit against the City seeking declaratory judgment and asserted a takings claim. The City filed a plea to the jurisdiction. Wesolak contended that the City was acting outside of its lawful authority and the City's taking led to a private easement being imposed on his property. The plea was denied and the City appealed.

The Court found that Wesolak failed to allege a valid takings claim. Wesolak failed to allege that the City intentionally performed certain acts in exercise of lawful authority or that the City's alleged taking was for a public use. Wesolak failed to plead facts supporting the intent and public use elements of a takings claim.

The Court held that the City's plea should have been granted and reversed and rendered judgment granting the City's plea to the jurisdiction.

***FLCT, Ltd. v. City of Frisco*, ___S.W.3d___ (Tex.App. –Fort Worth 2016), 2016 WL 3029514 (May 26, 2016).**

Property owners owned two tracts which were zoned to allow the sale of beer and wine "by right", subject to certain restrictions. Beer and wine package sales were prohibited within three hundred feet of a public school. In 2008, the Property owners submitted a site plan application for the two tracts to the City. The plan proposed a convenience store with gas pumps, restaurant and car wash on the tracts. The plan made no mention that beer and wine sales were contemplated on either tract. After the submission of the site plan, the Frisco ISD began negotiating with the Property Owners to purchase a portion of their land for an elementary school. Property Owners contacted the City about whether they would be able to sell beer and wine on the remaining portion of their property and on January 22, 2009, the City's Development Coordinator sent them a letter stating that since their site plan for a convenience store is the first use for approval, as long as they continue to move forward with site plan approval and construction, they will retain the ability to sell beer and wine at the convenience store. Prior to closing on the sale with the School District, the Property Owners submitted an amended site plan application to the City which deleted the property sold to the School District.

On February 24, 2009, the City approved the amended site plan application and on March 24, 2009, the City approved a conveyance plat for the elementary school.

In late August, 2009, the City amended the zoning ordinance regarding alcohol sales. In the fall of 2009, the City informed the Property Owners that they would not allow the sale of alcoholic beverages on their property due to the close proximity of the elementary school under construction. Over the next several years the Property Owners entered into agreements to have a convenience store construed on their property but when the presented site plans for the development, the City informed them that the sale of alcoholic beverages was not permitted on the property.

The Property Owners submitted a vested rights petition to the City contending that they have the right to sell alcoholic beverages because the original preliminary site plan application was submitted prior to the school construction being approved by the City and the City enacting an ordinance imposing separation criteria applicable to the sale of beer and wine at a convenience store. The City denied the petition and the Property Owners filed suit. The Property Owners amended their petition to assert a regulatory takings claim and declaratory judgment claim. The Property Owners contended that the City's intentional refusal to allow them to use their property in accordance with their investment-backed expectations to sell beer and wine is a temporary or permanent taking. The City filed a plea to the jurisdiction claiming the Property Owners have not alleged a valid takings claim and the Alcoholic Beverage Code pre-empts their case. The court granted the plea and the Property Owners appealed.

On appeal, the City argued that the Property Owners did not have a protected cognizable property interest in selling alcoholic beverages or have a reasonable investment-backed expectation because they have not shown that beer and wine sales were "an existing, established use" on the property. The Property Owners argued that the City unreasonably interfered with their existing property rights by erroneously applying distance requirements to the property in contravention of the property owner's Chapter 245 vested rights. Under the *Penn Central* test, a regulatory taking can occur when government action unreasonably interferes with a landowner's use and enjoyment of its property. It is an *ad hoc*, fact-intensive inquiry rather than a formulaic test. The *Penn Central* test considers the following conditions: economic impact of the regulation; regulation interference with distinct investment-backed expectations; and character of the government action.

The court found that the Alcoholic Beverage Code does not pre-empt a municipality from enacting distance regulations nor does it provide the exclusive remedy for the Property Owners claims based on the City's enforcement of the distance requirements with respect to their property. The court found that fact issues exist as to the extent of the economic impact on the property and whether the City had a first-in-time policy regarding development and thus, the trial court erred by dismissing the Property Owners' inverse condemnation claim for lack of jurisdiction.