

SUMMER 2012 NEWSLETTER

LAND USE, ZONING and REGULATORY TAKINGS

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TEXAS SUPREME COURT

City of Dallas v. Stewart, 361 S.W.3d 562 (Tex. 2012)

Independent court review of an administrative nuisance determination is a constitutional necessity.

The City's Urban Rehabilitation Standards Board ("Board") found that Stewart's house was an urban nuisance and ordered demolition. Stewart appealed the Board's decision to the district court but the house was demolished. Stewart amended her complaint to include constitutional claims of due process and constitutional taking. The district court, on substantial evidentiary review, affirmed the Board's determination that the house was a nuisance. Stewart's constitutional claims were tried to a jury and the jury rejected the City's contention that the house was a public nuisance. The Court of Appeals affirmed and the City appealed arguing that the Board's nuisance finding precluded Stewart's taking claim.

The Texas Supreme Court found that a substantial evidence review of a nuisance determination resulting in a home's demolition does not sufficiently protect a person's rights under Article I, §17 of the Texas Constitution and such an administrative determination is not preclusive. Nuisance determinations must ultimately be made by a Court, not an administrative body, because it is judicial in nature and taking suits are fundamentally constitutional suits which must ultimately be decided by a court rather than an agency. Agencies lack the ultimate power of constitutional construction and their determinations are not entitled to preclusive effect.

Patel v. City of Everman, 261 S.W. 3d, 600 (Tex. 2012)

A takings claim, based on an administrative nuisance determination, must be asserted on appeal of the nuisance determination or else it is barred.

The City notified Patel that it intended to demolish his substandard buildings. Patel sued to enjoin the demolition and the trial court ordered Patel to bring the buildings into compliance with the City's code. Patel failed to do so and was notified by the City that the buildings were substandard. Patel sued again to stop the demolition and alleged a taking. Patel nonsuited the case and several buildings were demolished.

Patel sued the City in federal court and the court granted the City's motion for summary judgment. Patel then filed suit in state court alleging an unconstitutional

taking. The City filed a motion for summary judgment which was granted. The Court of Appeals affirmed and found that Patel's taking claim is barred.

The Texas Supreme Court, in *City of Dallas v. Stewart*, held that a party alleging a taking based on an administrative nuisance determination must appeal that determination and assert his takings claim in that proceeding. Although agencies have no power to preempt a court's constitutional construction, a party asserting a taking must first exhaust its administrative remedies and comply with the jurisdictional prerequisites for suit. Patel cannot attack collaterally what he declined to challenge directly. By nonsuiting his case, Patel had not asserted a takings claim.

TEXAS COURT OF APPEALS

***Wild Rose Rescue Ranch v. City of Whitehouse*, 2012 Tex. App. Lexis 5494 (Tex. App. – Tyler, July 11, 2012)**

A property owner does not have a constitutionally protected vested right in property uses.

Wild Rose Rescue Ranch is a nonprofit organization that rescues animals, provides them with foster homes and adopts them out to members of the public. Wild Rose had been operating in this capacity for approximately seven years when the City enacted an animal control ordinance to protect the health, safety and welfare of the citizens. The ordinance prohibited property owners from keeping more than four dogs, four rabbits, and other enumerated collection of animals and violation of the ordinance will result in fines. Wild Rose filed suit challenging the constitutionality of the ordinance. The City filed a plea to the jurisdiction contending the ordinance was a penal ordinance that must be construed by a court exercising criminal jurisdiction. The trial court granted the City's plea to the jurisdiction and Wild Rose appealed.

Wild Rose appealed on several grounds, including that it had a vested property right in animals that are kept at its animal shelter. The Court of Appeals found that the ordinance is best characterized as a land-use regulation and property owners do not acquire a constitutionally protected vested right in property uses once commenced or in zoning classifications once made. Therefore, even though Wild Rose had used the property as an animal rescue shelter since 2004, it did not have a constitutionally protected vested right in this property use. The City may lawfully exercise its police power to control an owner's use of its property to protect the health, safety and welfare of citizens within its jurisdiction. Wild Rose had shown no vested property right that would be implicated because it has no absolute right to use this property for a particular purpose, such as keeping animals in an animal shelter. Wild Rose had failed to show the vested property right necessary to establish jurisdiction in the trial court to enjoin enforcement of the penal ordinance.

FIFTH CIRCUIT COURT OF APPEALS

***Bowlby v. City of Aberdeen*, 2012 U.S. App. Lexis 9717 (5th Cir. May 14, 2012)**

A permit is a property interest entitled to due process protection.

Bowlby appeared before the City's Planning and Zoning Board ("Board") seeking permission to operate a "sno cone" hut at a particular location. The Board granted Bowlby's request for permits and told her to proceed with her business plan. Several months later, the Board again discussed the location of Bowlby's business and decided to revoke the permit they had given her to operate the business at that location. Bowlby was not invited to the meeting nor informed that the Board was reviewing the issue. Bowlby received a letter from the Board notifying her of its decision and the reasons. The City's Ordinance requires that all appeals of Board decisions be made to the Mayor and Board of Alderman and then the courts. Bowlby did not follow this procedure and filed suit against the City and the Board in the federal district court. Bowlby claimed that her business was taken without just compensation in violation of the Fifth Amendment takings clause and that her business was closed without notice or hearing in violation of the Fourteenth Amendment due process clause.

The district court held that Bowlby's takings claim was not ripe because she did not first seek just compensation in the state court for the taking of her business and her equal protection claim would not exist but for the taking and thus, it was unripe. The court also found that the Board had not violated Bowlby's due process rights because there had not yet been a final deprivation by the state, since she had not appealed the decision to revoke permission to operate her business.

The Fifth Circuit found that Bowlby had a property interest in her business permit and thus, she was entitled to due process protection before the permit could be revoked. While the Court found that the Zoning Board has discretion to determine the locations for certain type of business within the City, once the Board issued permits to Bowlby to operate her business at a designated intersection, Bowlby had property interest in those permits and by extension in operating at the location it identified. Permits and licenses relate to the maintenance of a person's livelihood and the suspension of an issued license involves state action that adjudicates important interest of the licensees. Therefore, once issued, a license or permit cannot be taken away by the state without due process.