

## **WINTER 2012 NEWSLETTER**

### **LAND USE, ZONING and REGULATORY TAKING**

**By John F. Roehm III**

#### **TEXAS COURT OF APPEALS**

***City of Beaumont v. Starvin Marvin's Bar & Grill, LLC*, 2011 Tex. App. Lexis 10042 (Tex. App.-Beaumont, Dec. 22, 2011)**

**Property owners do not acquire a constitutionally protected vested right in property uses once commenced or in zoning classifications once made.**

The Lessee operated a restaurant with an outside patio where customers could enjoy live music. The Lessee was operating the restaurant in compliance with the City's zoning ordinance when the City amended its noise ordinance as a result of a lawsuit settlement. The amended noise ordinance established allowable decibel levels. As a result of the amended ordinance, the use of Lessee's patio, with or without music, would be a prima facie violation of the ordinance.

Lessee filed suit seeking a declaratory judgment and injunctive relief to enjoin the City from enforcing its noise ordinance based on the doctrine of estoppel and inverse condemnation. City filed a plea to the jurisdiction. The trial court denied the City's plea and granted Lessee a temporary injunction enjoining the City from enforcing the ordinance against Lessee based on equitable estoppel.

The Court of Appeals found that a court of equity will not enjoin the enforcement of criminal laws. However, if the law is unconstitutional or void and its enforcement threatens irreparable injury to vested property rights, equity may intervene to protect those property rights. Property owners do not acquire a constitutionally protected vested right in property uses once commenced or in zoning classifications once made. The Lessee's use of the leased property as a restaurant with live outdoor music is not a constitutionally protected vested right. Lessee has not shown that enforcement of the ordinance will cause an irreparable injury to a vested property right and thus, the court does not have jurisdiction to hear a cause of action for declaratory relief or a cause for relief based on equitable estoppel.

The Court vacated the trial court's temporary injunction.

***Town of Flower Mound v. Rembert Enterprises*, 2011 Tex. App. Lexis 9691 (Tex. App. – Ft. Worth, Dec. 8, 2011)**

**A compensable regulatory taking can occur when a governmental entity imposes restrictions that either deny a property owner all economically viable use of**

**his property or unreasonably interferes with the owner's right to use and enjoy the property.**

Rembert applied for approval of its development permits. Flower Mound required Rembert to construct a roadway on its land and land to be acquired by Rembert as a condition of approval. Rembert and Flower Mound entered into several development agreements and Rembert constructed the roadway. Flower Mound reimbursed Rembert fifty percent of the construction costs. Rembert claimed that Flower Mound agreed to reimburse for the full construction costs. Rembert sued Flower Mound for breach of contract and inverse condemnation. Flower Mound filed a plea to the jurisdiction which was granted on the taking issue but denied on the other claims.

The Court of Appeals found that the denial of the City's plea on the breach of contract claim was proper because there was no immunity. The agreement between Rembert and Flower Mound involved services to Flower Mound and thus, falls within the waiver provisions of Chapter 271 of the TEXAS LOCAL GOVERNMENT CODE and fact issues were raised about the contract.

The Court found that a compensable regulatory taking can occur when a governmental entity imposes restrictions that either deny a property owner all economically viable use of his property or unreasonably interfere with the owner's right to use and enjoy the property. A distinct category of regulatory taking occurs when the government conditions the approval of a permit or some other type of governmental approval on an exaction for the approval-seeking landowner. An exaction occurs if the governmental entity requires an action by a landowner as a condition to obtaining governmental approval of a requested land development. The Court found that there was conflicting evidence relating to the alternative nature of Rembert's inverse condemnation claim and thus, the trial court erred by granting Flower Mound's plea to the jurisdiction on the inverse condemnation claim.

***City of Paris v. Abbott*, 2011 Tex. App. Lexis 8440 (Tex.App. – Texarkana, October 21, 2011)**

**Breach of contract claim is barred by failure to exhaust administrative remedies. Takings claim is not ripe.**

Abbott purchased property within the City which was being used as a mobile home park. Abbott purchased the property based upon a representation of the City Manager that the entire property was approved for non-conforming use, as long as it continued to be used as a mobile home park. Abbott wanted to expand the mobile home park and submitted a preliminary plat. The City's Planning and Zoning Department informed Abbott that he would have to get the property rezoned from a commercial category to single family dwelling.

Abbott sued the City and City Manager for breach for contract, inverse condemnation, and denial of due process and equal protection. After filing suit, Abbott

submitted an application to the City for a building permit which was denied by the Planning and Zoning Department. The City filed a plea to the jurisdiction which was granted in part and denied in part.

The Court of Appeals found that the trial court did not have jurisdiction over Abbott's breach of contract claim because he failed to exhaust all administrative remedies -- i.e. appeal the denial to the Board of Adjustment, and the City Manager's letter was not a contract for goods and services and thus, immunity had not been waived under Chapter 271 of the TEXAS LOCAL GOVERNMENT CODE.

The Court found that Abbott's taking claim was not ripe until the State proceeding was complete. The same "final decision" requirement applies to determine the ripeness of as-applied due process and equal protection challenges to land use decision. Although the City ordinance provided procedures for appeal and an opportunity to be heard on the matter, Abbott did not avail himself of these procedures, and thus, he cannot now assert a procedural due process taking claim. As for Abbott's equal protection claim, Abbott failed to allege facts that he was similarly situated with others and was treated differently and thus, did not assert a viable claim.

The trial court lacked subject matter jurisdiction over Abbott's claims and the Court reverses the trial court's denial of the City's plea to the jurisdiction.

***City of El Paso v. Guadalupe Ramirez*, 349 S.W.3d 181 (Tex. App. – El Paso, August 24, 2011)**

**An inverse condemnation claim requires intentional action by the governmental entity for public use. Negligence will not support a takings claim.**

City operated a landfill and after heavy rain storms, the landfill's retention ponds overflowed causing water, silt, trash, and waste to flow onto the property owners' property destroying structures and ruining crops. Property owners filed suit against the City for inverse condemnation, nuisance, trespass, and violations of the Texas Water Code. Property owners alleged that the City failed to take measures to prevent such overflow. The City filed a plea to the jurisdiction which was granted on the Texas Water Code claim but denied on the other claims.

The Court of Appeals held that inverse condemnation requires an intentional action by the governmental entity for public use. A governmental entity's alleged failure to act cannot rise to a level of a taking. A governmental entity's failure to act, even in the face of evidence that curative measures are necessary to prevent future damage, rises only to the level of a negligence claim, and acts of mere negligence will not support a taking claim. Besides not having a viable taking claim, the property owners' other claims were asserted pursuant to Article 1, Section 17 of the Texas Constitution and thus, are barred by sovereign immunity because the acts complained of were not intentional acts by the City.

The Court reversed and remanded to allow the property owners the opportunity to amend their pleadings.