

SUMMER 2017 NEWSLETTER

LAND USE, ZONING and REGULATORY TAKING

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TEXAS COURT OF APPEALS

***State of Texas v. YS & LS & LS Partnership, Ltd.*, 2016 WL 4040320 (Tex. App. – Corpus Christi/Edinburgh, July 28, 2016)**

There must be a restriction on the use of land for an inverse condemnation claim.

The State filed a petition for condemnation and the property owner, YS, was awarded a sum of money. The State objected to the award and YS filed a counterclaim for inverse condemnation. YS alleged that upon notice of the State's intent to take the property, it was required to disclose the impending condemnation to perspective tenants and therefore was unable to lease the property. YS alleged that the State's act constituted taking his property. State filed a plea to the jurisdiction arguing that its sovereign immunity had not been waived and that YS had not alleged a valid inverse condemnation claim. The court denied the plea and the State appealed.

On appeal, the court relied on the Texas Supreme Court's decision in *Westgate, Ltd. v. State*, 848 S.W.2d 448 (Tex. 1992). In *Westgate*, the court held that there was no taking when a government entity announced plans to condemn a property owner's land which impaired the property owner's ability to lease its land. The court further held that "publicly targeting a property for condemnation, resulting in economic damage to the owner, generally does not rise to an inverse condemnation cause of action unless some direct restriction on use of the property."

In order to raise a valid inverse condemnation claim, there must be a "current, direct restriction" on the use of land, referring to a physical act or legal restriction on the property's use. The court found that YS had not alleged such a restriction on the use on its land and thus, failed to state a valid inverse condemnation claim and the State's sovereign immunity was not waived.

The court reversed the trial court's denial of the State's plea to the jurisdiction.

***City of Laredo v. Northtown Development, Inc.*, 2016 WL 4211825 (Tex. App. – San Antonio, August 10, 2016)**

Northtown Development, Inc. filed suit against the City of Laredo asserting an inverse condemnation claim and declaratory judgment claims. The claims arose out of a possibility of a reverter contained in a deed conveying property from the Development Companies to the City. The City filed a plea to the jurisdiction asserting sovereign immunity which was denied.

On appeal, the City argued that it took no official action to trigger the reverter in the deed and thus, no intentional act; the City was using the Property for the stated public purpose; and the deed did not permit the reverter of only a portion of the Property. The possibility of a reverter is a future interest in real property, and the taking of such a future interest is compensable under the Takings Clause of the Texas Constitution. A possibility of reverter is a term of art for a future interest retained by a grantor that conveys a determinable fee. It is the grantor's right to fee ownership in the real property reverting to him if the condition terminating the determinable fee occurs.

As for the deed, the possibility of reverter addresses the use of the “tract” of land and upon expiration of the use as to the “tract” of land, the determinable fee terminates and “title to the entirety” of the “tract” reverts to the Development Companies. From this language, the possibility of reverter is not triggered as long as any portion of the “tract” of land is used for the specific public purpose and when the reverter is triggered, “title to the entirety” of the “tract” is the interest that would revert.

The court held that the deed only provides for a possibility of reverter of the “entirety” of the property in the event none of the property is used for purposes of operating a wastewater treatment plant. The evidence was undisputed that the City was operating a wastewater treatment plant on a portion of the Property and thus, the possibility of reverter was not triggered and the Development Companies’ takings claim fails as a matter of law.

The court reversed the trial court’s order denying the City’s plea to the jurisdiction.

***Texas Dept. of Transportation v. Hankins*, 2016 WL 4538542 (Tex. App. – Ft. Worth, August 31, 2016)**

The property owner must own the property at the time of the taking to have standing to assert an inverse condemnation claim.

In the early 1930’s, prior to Hankins’ purchase of the property, the owner of the property conveyed a right-of-way easement across the property to the State of Texas. Later, the Texas Highway Department (“TXDOT”) installed an underground drainage pipe in the easement. There was a building on the property and in the early 1990’s the building fell into disrepair. In March, 2009, the City of Bowie sent a letter to Hankins notifying him that the building violated the City Code and Hankins decided to demolish the building. A demolition contractor alerted Hankins to the existence of the drainage pipe.

Hankins sued TXDOT for inverse condemnation alleging that he had no knowledge or notice of the drainage pipe when he purchased the property, that the construction of the pipe was unauthorized and undocumented, that no right-of-way or other conveyance authorizing construction of the pipe was on file in the deed records. Hankins further alleged the pipe had collapsed, causing irreparable damage to the building and that the continued existence of the building rendered his property virtually worthless. The case was tried and a jury found in favor of Hankins on his inverse condemnation claim and TXDOT appealed the jury verdict.

On appeal, Hankins that the intentional governmental act that resulted in the taking, damaging, or destruction of his property for public use was the State's installation of the pipe in 1955. Hankins argued that he had standing to bring an inverse condemnation claim for the taking of and damage to property even though the taking occurred prior to his purchase of the property if the taking was not known to any prior owner in the chain of title and was discovered by the plaintiff subsequent to purchase. Hankins argued because he was the owner of the property at the time of the injury – diminution in market value that resulted from the installation of the pipe – he had standing.

The court found that the prior owner granted the State a right-of-way easement, and there was no pleading or proof that no prior owner in the chain of title knew about the pipe. It was undisputed that the conveyance issued was recorded in the Deed Records which is notice to all persons of the existence of the instrument. The court focused on the fact that the alleged damage occurred when the drainage pipe was constructed in 1955, not when Hankins discovered its existence, and since he did not own the property when the State constructed the pipe, he lacked standing to bring an inverse condemnation claim. The court held that in order to have standing to sue for inverse condemnation, a party must have a vested property interest in the subject property at the time of the alleged taking.

The court reversed the trial court's judgment and rendered judgment dismissing the case for lack of jurisdiction.

City of Floresville v. Starnes Investment Group, LLC, 502 S.W.3d 859 (Tex. App. – San Antonio 2016, no pet.)

To prevail on an inverse condemnation claim, a claimant must show that the City knew that a specific act is causing identifiable harm or that the harm is substantially certain to result.

In early 2012, Starnes met with City Code Compliance and Permit Officers about a tract of land and was told that the City saw no problem with approval of its proposed RV Park as long as it complied with the City's Recreational Vehicle Development Ordinance. Based on this information, Starnes purchased the property and in late March, 2012, filed its zoning application with the City. Several months later, the City Attorney informed Starnes that the property was entirely outside the city limits and thus, the City's zoning requirements were inapplicable. In 2013, the City completed its new map which showed Starnes' property to be partially inside and partially outside the city limits, and on April 12, 2013, the City Attorney notified Starnes that his property was within the city limits and the City's zoning approval was now required. On September 12, 2013, the City approved Starnes' zoning application and the property was then connected to City water and sewage services.

On June 26, 2015, Starnes sued the City asserting multiple claims including a takings claim under the Texas Constitution. Starnes alleged that it was harmed by the City's delay in approving its zoning application and delay in providing water and sewage from March 29, 2012 until September 12, 2013. The City filed a plea to the jurisdiction and special exceptions. The court conducted a hearing and granted the special exceptions and allowed Starnes to replead no

later than December 30, 2015. On December 30, 2015, Starnes filed an amended petition alleging three causes of action, including a taking/inverse condemnation claim. On January 5, 2016, the trial court entered an order denying the City's plea but granting the special exceptions. The City filed an appeal alleging that Starnes' amended petition failed to allege a claim where its governmental immunity has been waived.

In its amended petition, Starnes asserted that a City's wrongful delay in approving its zoning application and delay in providing water and sewage services constituted a taking and deprived it of its reasonable investment back expectations. In a takings case, the requisite intent is present when a governmental entity knows that a specific act is causing identifiable harm or knows that the harm is substantially certain to result. It is not enough that the act causing harm be intentional – there must also be knowledge to a substantial certainty that the harm will occur.

The evidence established that the City began a project in 2010 to update its municipal city limits map; that before the mapping project was completed the City Attorney told Starnes his property was entirely outside the city limits and, therefore, the City's zoning ordinance did not apply; and on June 14, 2012, again before the mapping project was complete, the City told Starnes his property was partially inside and partially outside the city limits. There is no dispute that the information intentionally provided by the City Attorney in March 2012 was incorrect. However, Starnes' amended petition alleges no facts that the information was the result of anything more than either a mistake or negligence on the City Attorney's part. Starnes alleged no facts the City knew to a substantial certainty that harm would occur as a result of the delay in the mapping project or the incorrect information it provided while the mapping project was ongoing. Since Starnes alleged no facts in its amended petition showing an intentionally taking, the trial court erred in denying the City's plea to the jurisdiction.

The court reversed the trial court's denial of the City's plea to the jurisdiction.