

## **SPRING 2018 NEWSLETTER**

### **LAND USE, ZONING, AND TAKINGS**

**By John F. Roehm III**

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

***Schmitz, et al v. Denton County Cowboy Church and the Town of Ponder, Texas, 2017 WL 3821886 (Tex. App. – Ft. Worth 2017)***

In February 2015, the Church began construction of a rodeo arena on its property. Approximately four months after the Church began construction, it filed an application with the Town for a commercial building permit. The Town issued a permit for construction of an open arena. In July, 2015, property owners located near the Church brought action against the Church and Town seeking a temporary restraining order and temporary and permanent injunctions prohibiting the Church from continuing construction and requiring the Town to suspend issued building permits and any future building permits.

In late August, 2015, the Town Council, acting as the Town's Planning & Zoning Commission, conducted a hearing to consider a change in the zoning designation of the Church's property and the issuance of a special use permit to allow the Church to build a "Multi-Use Event Center" on its property. The Town Council, acting as the Planning & Zoning Commission voted not to recommend a change to the property's zoning classification. However, after convening as the Town Council, the Town Council approved the proposed zoning classification change and voted to issue the requested special use permit. The Church submitted a new building permit application for its property and the Town issued a new building permit. The property owners filed a protest with the Town contending that the building permit had been wrongfully issued in violation of the Town's ordinance and should be revoked.

The property owners amended their petition multiple times adding claims against the Church and claims against the Town for impermissible spot zoning. The property owners sought numerous declarations, including a declaration that the Town's spot zoning violated its zoning ordinance and the Town acted outside its authority and the law by not following the zoning ordinance – including in its issuance of the building permit and special use permit and by granting the zoning change to the Church. In addition, the the property owners alleged that the Town violated their civil rights by effecting an uncompensated taking of their property as prohibited by the Fifth and Fourteenth Amendments and Article 1, section 17 of the Texas Constitution and engaging in impermissible spot zoning.

The Town filed a plea to the jurisdiction. The Town argued that the property owners failed to plead a valid waiver of governmental immunity-i.e., the Town is immune from claims for declaratory relief, injunctive relief, and nuisance relief and the property owners requested relief required the Town to violate the Religious Land Use and Institutionalized Persons Act.

The court granted the Town's plea to the jurisdiction and the property owners appealed.

The court of appeals found that a property owner can assert a takings claim under the U.S. Constitution and the Texas Constitution. However, for section 1983 claim based on a Fifth or Fourteenth Amendment taking to be ripe, the property owner must first show that it has unsuccessfully sought compensation for the taking under Article I, section 17 of the Texas Constitution. Until that occurs, the federal claim remains unripe. Federal courts construing the Fifth Amendment Takings Clause have held that the government must act affirmatively to warrant the application of that Clause. There must be an affirmative action on the part of the government to form the basis of the alleged taking so claims based on a government entity's refusal or failure to act to enforce its own regulations do not allege a takings claim under the Fifth Amendment.

Since the jurisdictional facts show that the only government action at issue here was void and that consistent with federal takings law there must first be government action before a taking can be effected, the court concluded and held that the trial court did not err by determining that the property owners failed to allege a viable Article I, section 17 takings claim upon which their Section 1983 claim could be based. The court additionally found that the Town's zoning ordinance is not a clear and unambiguous waiver of immunity and thus, the Town is immune from a suit seeking to force it to enforce the zoning ordinance.

#### **UNITED STATES DISTRICT COURT**

***Residents Against Flooding, et al v. Reinvestment Zone Number 17, City of Houston, Texas, et al, 260 F. Supp. 3d 738 (S.D. Tex. 2017)***

Property owners filed suit in federal court asserting claims under Section 1983 against the City of Houston, a Reinvestment Zone, and Redevelopment Authority alleging that Defendants prioritization of commercial development and reinvestment zone caused drainage problems to migrate to residential areas and caused flooding in violation of the United States and Texas Constitutions. The property owners alleged that the flooding in effect effectually seized their real property. The property owners complained that the City and the Authority have engaged in a pattern of: (1) implementing drainage and mobility infrastructure projects in and around the Reinvestment Zone that efficiently convey storm water out of the Reinvestment Zone commercial areas into the surrounding residential neighborhoods or into their over-strained storm systems; (2) approving private commercial development within the Reinvestment Zone that elevated the commercial properties, without any, or without sufficient, storm water mitigation, causing more storm water to enter the residential neighborhoods; and (3) postponing infrastructure projects to help the residential neighborhoods, often in favor of nonessential projects to benefit private commercial interests, causing repeated and terrible flooding in the residential areas in violation of the United States and Texas Constitutions.

The property owners contended that Defendants had actual notice of the drastic need to improve the drainage conditions of the Reinvestment Zone from repeated destructive floods, from numerous complaints from property owners to the City, to its Planning and Zoning Commission, to its Flood and Drainage Committee, and to its City Council.

The City filed a motion to dismiss. The City contended that the property owners brought takings claims under Section 1983 but failed to plead a takings claim under the Fifth Amendment. The property owners did not assert a direct, physical appropriation of property and thus, their takings claim must be a regulatory taking. The court found that the Fifth Circuit has held that a takings claim under the Fifth Amendment is not ripe for adjudication until it is ripe – i.e., (1) until the relevant governmental unit has reached a final decision as to how the regulation will be applied to the landowner; and (2) the Plaintiff has sought compensation for the alleged taking through whatever adequate procedure the state provides. The property owners failed to allege that they met either prong and thus, any potential takings claim under the Fifth Amendment must be dismissed for lack of jurisdiction or failure to state a claim.

The court held that under both federal and Texas law, regulatory takings must be ripe for a trial court to have subject matter jurisdiction over the claim. Under both federal and state law, there must be a final decision regarding the applications of the regulations to the property at issue before a taking of a property issue is ripe. Just as a federal takings claim is not ripe until just compensation is denied, Texas follows federal jurisprudence, which requires a final decision regarding the application of the regulations to the property at issue. A final decision usually demands both a rejected development plan and the denial of a variance from the controlling regulations. The court found that the property owners failed to allege that their claims are ripe under Article I, section 19 of the Texas Constitution-i.e., that they received a final decision about their flooding complaints to the relevant City entity and that they were denied just compensation or a variance from the restrictive regulations and as a result, their taking claims under the Texas Constitution, like those under the federal Constitution, must be dismissed for lack of jurisdiction and failure to state a claim.