

2018 YEAR IN REVIEW

SIGNIFICANT DECISIONS IN 2018

LAND USE, ZONING and REGULATORY TAKING

By John F. Roehm III

TEXAS COURT OF APPEALS

Electro Sales and Services, Inc. v. City of Terrell Hills, __S.W.3d __, 2018 WL 1309709 (Tex. App.-San Antonio, March 14, 2018)

In determining whether a regulation interferes with a property owner's investment-backed expectations, the existing and permitted use of the property at the time the owner acquires the property constitutes the primary expectation of the property owner.

Electro purchased a building with three suites. At the time of the purchase, two of the suites were non-conforming commercial uses and the third suite was vacant. The property was currently zoned semi-commercial. Electro requested the City to rezone the property from semi-commercial to commercial. The City Council denied the rezoning request. About a year later, Electro again requested to rezone the property to commercial. The City Council did not rule on the request but rather amended the City's ordinance to provide for special use permits in semi-commercial zoning districts. Electro submitted an application for a barber shop and beauty salon. City Council signed an ordinance approving the special use permit for a hair and nail salon. About a month later, Electro filed suit against the City alleging a regulatory taking. Specifically, Electro alleged that the City denied it all economically viable use of the middle suite and unreasonably interfered with its right to use and enjoy the property. About a year later, Electro requested a special use permit to open a barber shop. The City signed an ordinance approving a special use permit a hair and nail salon.

The City moved for summary judgment challenging jurisdiction to consider a regulatory taking claim. Specially, the City asserted that its immunity had not been waived because Electro had not alleged a viable regulatory taking claim; that Electro lacked standing in that the semi-commercial zoning classification was in place before Electro purchased the property and the middle suite non-conforming use had expired prior to their purchase of the property and thus, the City had not taken any action to restrain its use of the property; and that Electro's claims were not ripe in that Electro never requested the City to reinstate the previous nonconforming use exception. The trial court granted the City's motion for summary judgment and Electro appealed.

The Court of Appeals held that the trial court had jurisdiction to consider the regulatory takings claim based on the City's denial of Electro's request to rezone the property. A restriction denies the landowner all economically viable use of the property or totally destroys the value of

the property if the restriction renders the property valueless. Electro continued to receive income from the rental of the other suites so the property was not rendered valueless by the City's denial of its rezoning request.

When determining whether a regulation has gone too far and becomes much like a physical taking, the court must conduct an analysis of how the regulation affects the balance between the public's interest and that of the private landowners. The court will look to (1) the economic impact of the regulation; (2) the extent to which the regulation has interfered with the distinct investment-backed expectations; and (3) the character of the governmental action.

The Court of Appeals found that Electro failed to show an adverse economic impact from the regulation. Although Electro stated that it was unable to lease the suite, it presented no evidence that the suite could not be leased for semi-commercial use. The court held that loss of potential profit is not to be considered. As for investment-backed expectations, the existing and permitted use of the property constitutes the primary expectation of the landowner that is affected by the regulation. Knowledge of existing zoning is to be considered in determining whether the regulation interferes with investment-backed expectations. A regulatory regime in place at the time the claimant acquires the property helps to shape the reasonableness of a claimant's investment-backed expectation. The semi-commercial zoning was already in place and the suite had already lost its non-conforming use when Electro purchased the property and thus, the zoning could not interfere with its investment-backed expectation. Finally, as to the character of the governmental action, while the City denied the request for rezoning, the City amended its ordinance to provide a procedure for Electro to obtain special use permits and granted Electro's applications for special use permits. Electro failed to produce more than a scintilla of evidence to show that the City's denial of its rezoning requests went too far and became much like a physical taking.

The Court of Appeals affirmed the City's summary judgment.

***Schmitz v. Denton County Cowboy Church*, ___S.W. 3d___, 2018 WL 2144141 (Tex. App.-Fort Worth, May 10, 2018)**

A viable takings claim must allege that the governmental entity affirmatively acted; a claim based upon a governmental entity's refusal or failure to enforce its own regulations or ordinances is not a viable takings claim.

The Church requested a zoning change from SF-2 to AG on its property and a special use permit to build a multi-use event center on its property. The Town approved the zoning change and granted the special use permit. Neighboring landowners filed a protest with the Town arguing the special use permit was issued in violation of the Town's ordinances and should be revoked. The Church sought a new commercial building permit for the proposed arena. The neighboring landowners filed suit against Church and Town. The landowners requested declarations under the Uniform Declaratory Judgment Act that the Church's construction violated the Town's ordinances and that the Town violated its ordinances and the Texas Open Meeting Act by allowing the construction. The landowners asserted a §1983 claim against the

Town for due process, taking of property without just compensation and impermissible spot zoning by changing the zoning from SF-2 to AG. The landowners further asserted a claim for private-nuisance injuries against the Church and Town.

The Town filed a plea to the jurisdiction that the court did not have subject matter jurisdiction over the landowner's claims because it was entitled to governmental immunity, that the landowners lacked standing to seek enforcement of the Town's ordinances, and that the landowner's nuisance injuries were not ripe. The trial court granted the Town's plea to the jurisdiction and the landowners appealed.

The Court of Appeals held that while governmental immunity can be waived for a claim asserting a taking of property by a governmental unit without just compensation, the landowners have the burden to present jurisdictional facts sufficient to establish that their takings claim was viable. In the absence of a properly pled takings claim, a government's immunity is retained. A regulatory taking can occur when governmental action unreasonably interferes with a landowners use and enjoyment of his property. However, a viable takings claim must allege that the governmental unit affirmatively acted; a claim based upon a governmental unit's refusal or failure to enforce its own regulations or ordinances is not a viable takings claim. The landowners challenged the manner in which the Town enforced its ordinances, changed the zoning, and issued the permits to the Church and thus, failed to allege a viable takings claim that would waive the Town's governmental immunity. The Court found that the landowner's had no protected property interest in the manner in which the Town enforced or failed to enforce its ordinances against the Church, rendering its claim under §1983 not viable and subject to the Town's plea to the jurisdiction.

The Court of Appeals affirmed the Town's plea to the jurisdiction.

City of Ft. Worth v. Alvarez, 2018 WL 2248481 (Tex. App.-Ft. Worth, May 18, 2018)

A regulatory takings claim is not ripe until the governmental entity reaches a final decision which restricts the property owner's use of the property.

The approval of a preliminary plat Homeowners filed suit against the City for adopting a preliminary plat which the homeowners claim was erroneous for various reasons. The homeowners alleged that the City's adoption of the plat is an unlawful attempt to take their private property and they seek a declaratory judgment and a voiding of the planning commission's approval of the preliminary plat.

The City filed a partial plea to the jurisdiction that some of the homeowners' claims were not ripe because there was no final plat. The homeowners responded that the adoption of the preliminary plat was a final determination by the planning commission, that they had exhausted their administrative remedies, and that a determination of the City's jurisdiction over the tracts was ripe for the court to decide. The homeowners alleged that the tracts were not in the City's extraterritorial jurisdiction. The trial court denied the City's plea and the City appealed.

On the issue of ripeness, a case is not ripe when its resolution depends upon contingent or hypothetical facts or upon events that have not yet come to pass. In the context of land use regulations, a court cannot determine whether a regulation has gone too far until it knows how far the regulation goes. A regulatory takings claim is not ripe until the government entity charged with implementing a regulation reaches a final decision regarding the application of the regulation to the property.

The Court of Appeals found that there was a lack of any direct governmental restriction on the homeowners' use of their land. The City's approval of the preliminary plat transferred no actual ownership interests from anyone to anyone else and imposed no restriction on the homeowners and thus, did not constitute a taking. Additionally, until the developer attempts to dedicate anything to the City, the homeowners' requests for declaratory relief with regard to boundary lines, easements, public rights-of-ways, title, abandonment, or adverse possession are not ripe because further action is required by the City and developer.

The Court of Appeals reversed the trial court's denial of the City's plea that the takings claim was not ripe.