

## **WINTER 2019 NEWSLETTER**

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

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

##### **City of Crowley v. Ray, 558 S.W.2d 355 (Tex. App. – Fort Worth 2018)**

A developer sued the City alleging that its regulation relating to minimum finished floor elevation in a floodplain made it economically infeasible to develop its property. The City filed a plea to the jurisdiction which was denied by the district court and affirmed by the Court of Appeals. The developer amended its petition and added an inverse condemnation claim against the City. The City filed a plea alleging that the developer's inverse condemnation claim was unripe and its governmental immunity had not been waived. The district court denied the plea and the City appealed.

The developer's inverse condemnation claim was premised upon a regulatory taking. A regulatory takings claim ordinarily is not ripe until the government entity charged with implementing the regulations have reached a final decision regarding the application of the regulations to the property at issue. What this requires is a final and authoritative determination of the type and intensity of development legally permitted on the subject property. The City argued that there was no final decision because the developer had simply requested to develop the property to the fullest extent possible-i.e., forcing as many lots, residential units, and buildings on the property as legally and practically possible, and denial of such a request did not mean that some development would not be permitted by the City.

The Court found that even if the developer proposed a less intense development, the City would still insist on the same minimum finished floor elevation requirement. The nature of the alleged takings is not one that left open the possibility the property could be developed some other way, thereby precluding a final decision in the type and intensity of the development.

The City argued that the developer's regulatory takings claim is unripe because the developer did not seek a variance or appeal the administrative decision. The Court found that the City had taken a definitive position of what would be the minimum finished floor elevation in a floodplain for the developer's property and the developer's pursuit of a variance or other administrative procedure at this point would be futile. The futility of complying with applicable administrative procedures had been recognized as an exception to the ripeness doctrine in takings cases.

The City argued that its governmental immunity had not been waived for the developer's inverse condemnation claim. The Court found that the developer had, in fact, alleged direct governmental action by the City and thus, a valid inverse condemnation claim had been alleged against the City.

The City argued that the developer had developed a portion of its property and thus, cannot argue any economic value deficiency on his current development request. The developer purchased the property-Phase 1 and Phase 2, at the same time and decided to develop the property in phases.

The developer developed and sold property in Phase I but was prohibited by the City from developing property in Phase II. The City argued that Phase 1 and Phase 2 should be treated as one property for purposes of a value determination.

Courts are to utilize a factors analysis to determine whether a regulatory taking has occurred—i.e., treatment of the land under state and local law; physical characteristics of the land; and prospective value of the regulated land. This endeavor should determine whether reasonable expectations about the property ownership would lead a landowner to anticipate that his holdings would be treated as one parcel or instead, as separate tracts. The Court found that the developer developed Phase 1 under a flood elevation standard which the City no longer utilized or applied to its Phase 2 development and thus, the two properties would not be treated as one property for purposes of a value determination.

The Court found that developer's regulatory takings claim was a valid claim and affirmed the denial of the City's jurisdictional plea.

**Village of Tiki Island v. Premier Tierra Holdings, Inc., 555 S.W.3d 738 (Tex. App. – Houston [14th Dist.] 2018)**

A property owner sued the City seeking a declaration of its vested rights to have a marina project evaluated under the zoning rules in effect when it filed a plat application describing the project, including declarations that various provisions of city ordinance enacted after the application was filed did not apply to the project. The property owner sought to build residences and elevated dry boat storage. At the time of the plat application submission, the City had no meaningful land use regulations, no subdivision platting or zoning ordinances, or any general or comprehensive plan that would prohibit the project. Days after filing the plat application, the City approved a new zoning ordinance that prohibited dry boat storage and apartment property classifications anywhere on the property.

The City filed a plea to jurisdiction which was denied by the district court. The City appealed and the Court of Appeals found that the property owner may have vested rights in the project but there is no context within which to declare what they are. Any such declaration would be a prohibited advisory opinion that would not resolve the parties' dispute. The Court sustained the City's plea and dismissed the property owner's case without prejudice.

The property owner submitted a rezoning application for a planned unit district which was denied by the City. The property owner requested the City to issue certified reasons for denial and the City asserted that the 2010 plat application did not conform to the general plan of the City and its current and future streets, alleys, parks, playgrounds, and public utility facilities. The property owner submitted several revised plat applications which were all denied by the City.

The property owner filed a second amended petition and application for writ of mandamus. The property owner requested a declaratory judgment concerning its rights in the project and a takings claim. The City filed an amended plea to the jurisdiction arguing that the project was denied based on existing regulations rather than the subsequently enacted ordinance, and therefore, no justiciable controversy existed concerning the application of Chapter 245. The City

also argued that the property owner failed to state a viable takings claim. The district court denied the City's plea to jurisdiction and the City appealed.

Chapter 245 of the Texas Local Government Code creates a system by which property developers can rely on a municipality's land use regulations in effect at the time the original application for a permit is filed. Chapter 245 expressly authorizes enforcement of its provisions through a request for declaratory relief. In addition, a municipality's immunity from suit is expressly waived in regard to an action under Chapter 245. The Court found that the City did not identify any general plan or existing regulations that were ostensibly applied to the project and likewise made no attempt to explain their vague references to a denial based on a general plan that is "reflected in its existing streets and bridges."

The Court found that although the City maintains that they rejected the plat application on the basis of "existing regulations" and not the subsequently enacted ordinance, the City had presented no argument or evidence to support their allegation. The City relied on an alleged general plan to deny approval of the plat applications, which just happens to reach the same results as would applying the ordinance. The City did not allege or present evidence that the other reasons for denying the plat applications were either in effect before the property owner submitted its original plat or are applicable.

The Court found that a dispute exists concerning the primary jurisdictional fact on which the City relies: whether the City has properly denied the plat applications based on regulations that preexisted the property owner's initial plat application or whether the City has improperly refused to recognize the property owner's vested rights in the project by denying its plat applications based on subsequently enacted ordinances, rules or regulations, or other reasons that are inapplicable or irrelevant. The Court rejected the City's argument that the property owner had not pled a claim to which Chapter 245 applies.

The City contends that the property owner's claims for enforcement of Chapter 245 are not justiciable because they are not ripe. Specifically, the City maintains that because they have yet applied the ordinance to the project, no justiciable controversy has yet arisen. However, the property owner seeks a declaratory judgment to confirm the existence and extent of its vested rights to develop the project and to determine what aspect of the City's regulatory scheme applied to the project. The property owner's claim to declaratory relief is not based solely on the ordinance; instead the property owner asks for specific declarations that its vested rights permit it to develop the project as a multi-use facility that includes, among other things, dry boat storage and apartments. The Court found that the property owner had demonstrated that a justiciable controversy exists that requires judicial resolution and Chapter 245 specifically authorizes a declaratory judgment action for this purpose. The property owner's request for declaratory judgment is ripe and the district court did not err in denying the City's plea.

As for the City's argument that the property owner did not plead a viable regulatory takings claim, the Court found that the property owner had alleged facts supported by evidence that raise a fact issue concerning whether the City's repeated rejection of the property owner's plats are based on legitimate reasons or the City's refusal to recognize the property owner's vested rights. The property owner pointed out that before it purchased the property the previous owner was in the process of constructing a marina with dry boat storage and the existence of a similar marina development in the area before the property owner acquired the property supports the property

owner's assertion that the City had no existing regulations prohibiting such development at the time the property owner purchased the property.

The City argues that the property owner failed to allege facts to support its claims that any interference by them was unreasonable and that any investment-backed expectation exists and thus, the property owner has not asserted a valid regulatory takings claim. The City argues that its denial of the property owner's plat application does not establish a taking because the property owner has never pursued any alternative developments. The Court found that the City cited no authority for the proposition that a property owner is obligated to propose or undertake some other, unspecified type of development that differs from the property owner's investment-backed expectations before a property owner may allege a viable takings claim. The existing permitted uses of the property constitutes the primary expectation of the land owner that is affected by the regulation. The property owner claims that it had a vested property interest in the use and enjoyment of its property as dry boat storage when it filed its plat application and that dry boat storage buildings were permitted when the property owner's rights vested. The property owner alleged that the City has created a direct restriction on its use of the property, and has unreasonably interfered with its use and enjoyment of its property.

The City denies that they have applied the ordinance and otherwise assert only that the City rejected the property owner's plat application primarily based on existing regulations. However, City presented no evidence of these "existing regulations" or any of the other asserted grounds for repeatedly denying the property owner's plat applications. The Court found that the property owner's petition adequately alleged that a taking occurred through regulatory action that unreasonably interfered with the property owner's right to use and enjoy its property.

As for the City's investment-backed expectation argument, the Court found that a property owner has adequately pled a viable takings claim by alleging that at the time it acquired the property, it had a reasonable investment-backed expectation to develop or market the property as a marina with elevated dry boat storage and that the City has interfered with the property owner's investment-backed expectations by repeatedly denying its vested rights to its property based upon items irrelevant to plat applications or ordinances adopted after the property owner's rights vested.

The Court affirmed the denial of the City's amended plea to the jurisdiction.