FALL 2011 NEWSLETTER

ZONING, LAND USE AND TAKING UPDATE

by John F. Roehm III

Fifth Circuit Court of Appeals

***Elijah Group v. City of Leon Valley,* 643 F.3d 419 (5th Cir. 2011)**

The City had a zoning code that allowed churches to obtain Special Use Permits (SUPs) to operate in business zones designated "B-2." The City amended its code to create a retail corridor on Bandera Road which reclassified a number of B-2 uses and eliminated the right of churches to obtain SUPs in B-2 zones. The City excluded churches exclusively from B-2 zones but preserved the right of some similarly nonretail but nonreligious institutions to obtain SUPs in B-2 zones. Churches could operate in B-3 zones, which are designated for commercial use with large space requirements. The Elijah Group purchased property in a B-2 zone and requested rezoning to B-3 which was denied.

The Elijah Group sued the City for violations of the Texas Religious Freedom Restoration Act ("TRFRA") and the Federal Religious Land Use and Institutionalized Persons Act ("RLUIPA"). The City filed a motion for summary judgment which was granted by the court. The Elijah Group appealed contending that the City's land use regulation violates RLUIPA's Equal Terms Clause and makes a facial challenge that the ordinance treats churches less favorably than other nonretail, nonreligious institutions.

The Fifth Circuit found that the City's ordinance does not allow churches in B-2 zones but many nonretail, nonreligious entities are allowed to request SUPs and, if granted, to operate in a B-2 zone. RLUIPA's Equal Terms Clause requires more than a showing that a religious use is forbidden and some other nonreligious use is permitted. The "less than equal terms" must be measured by the ordinance itself and the criteria by which it treats institutions differently. The City's amendment to its code is invalid because it treats churches on terms that are less than equal to the terms on which it treats similarly situated nonreligious institutions and thus, violates RLUIPA's Equal Terms Clause.

Texas Supreme Court

***City of Dallas v. Stewart,* 2011 Tex. App. Lexis 517 (Tex. 2011, July 1, 2011)**

The City's Urban Rehabilitation Standards Board ("Board") found that Stewart's house was an urban nuisance and ordered its demolition. Stewart appealed the Board's decision to the district court but the appeal did not stay the demolition order. The City obtained a judicial demolition warrant and demolished the house. Stewart amended her complaint to include constitutional claims of due process and unconstitutional taking. The trial court, on substantial evidence review, affirmed the Board's finding of nuisance. Stewart's constitutional claims were tried to a jury and the jury rejected the City's contention that Stewart's house was a public

nuisance. The Court of Appeals affirmed and the City appealed, arguing that the Board's nuisance finding precluded Stewart's taking claim.

The Texas Supreme Court held that a substantial evidence review of a nuisance determination resulting in a home's demolition does not sufficiently protect a person's rights under Article I, §17 of the Texas Constitution and such a determination is not preclusive. Nuisance determinations must ultimately be made by a court, not an administrative body, because it is judicial in nature and taking suits are fundamentally constitutional suits which must ultimately be decided by a court rather than an agency. An agency's decision regarding constitutional claims is not entitled to preclusive effect.

Texas Court of Appeals

***BMTP Holdings v. City of Lorena,* 2011 Tex. App. Lexis 4207 (Tex. App. – Waco, June 1, 2011)**

The City approved a preliminary plat for development submitted by BMTP. After approval, BMTP began construction of the infrastructure, which included the necessary facilities to service each lot with water, sewer, and other utilities, as well as streets, curbs, and gutters. A final plat for the subdivision was approved by the City Council on January 16, 2006 but the final plat was not delivered to BMTP until June 5, 2006. BMTP was told that the City passed a moratorium on the issuance of sewer taps earlier that day.

BMTP filed a declaratory judgment action seeking a declaration that the City's moratorium did not apply to its' subdivision. BMTP argued that the subdivision had been approved for development prior to the issuance of the moratorium. The parties filed motions for summary judgment and the trial court granted the City's motion for summary judgment.

The Court of Appeals found that a municipality has the power under Chapter 211 of the Texas Local Government Code to institute a moratorium on property development if it demonstrates a need to prevent a shortage of essential public facilities. However, the moratorium is limited to property that has not been approved for development. BMTP argued that the approval of their plats constituted "property development". The City argued that once BMTP completed all property development that it was permitted to complete, which was the subdivision infrastructure only, additional approval was required separate and apart from that to develop the property further, including connection to the sewer system.

The Court found that the definition of "property development" includes the full range of development contemplated by Section 211.131(3) of the Texas Local Government Code which includes the entire process from platting to finishing construction of infrastructure and buildings. The City's moratorium did not apply to BMTP's subdivision and the trial court's judgment was reversed.

***City of Laredo v. Rio Grande H20 Guardian*, 2011 Tex. App. Lexis 5729 (Tex. App. – San Antonio, July 27, 2011)**

The City passed two ordinances amending the City's zoning map by rezoning real property to light manufacturing. Rio Grande filed a declaratory judgment action asserting that these zoning ordinances violate the City's comprehensive plan. The City's comprehensive plan did not permit the real property in question to be rezoned as light manufacturing. After suit was filed, the City modified its comprehensive plan to allow the rezoning of the real property in question. The City filed a motion for summary judgment and plea to the jurisdiction. The court denied the plea and the City appealed.

The Court of Appeals found that Chapter 211 of the Texas Local Government Code provides that zoning regulations must be adopted in accordance with the municipality's comprehensive plan if one exists. The City's attempt to amend its comprehensive plan after the passage of the amended zoning ordinances violates Chapter 211. This statute requires a municipality to adopt zoning ordinances in accordance with a comprehensive plan, not to amend a comprehensive plan to comport with an amended zoning ordinance. The law is well settled that the adopted comprehensive plan must, by statutory mandate, serve as a basis for subsequent zoning amendments. Since the City did not rezone in accordance with its comprehensive plan, the amended zoning ordinances were void and null.

***Como v. City of Beaumont,* 2011 Tex. App. Lexis 7046 (Tex. App. – Beaumont, Aug. 3, 2011)**

The City declared the structure on Como's property to be a nuisance and ordered it demolished. The City notified Como that the structure on her property was vacant, neglected, and deteriorated and if she did not repair, it might be demolished in accordance with the city ordinance. Months later, a hearing was conducted and the City passed an ordinance declaring structures, including Como's, to be public nuisances and condemning them. Como did not challenge this decision or the ordinance and her structure was demolished.

Como sues the City asserting among other things, a state takings claim – i.e. inverse condemnation. The City filed a plea to the jurisdiction arguing that Como failed to exhaust her administrative remedies and she did not seek a substantial evidence review of the ordinance authorizing the demolition of her structure and thus, her takings claim was not ripe. The trial court granted the City's plea to the jurisdiction.

The Court of Appeals, relying on the Texas Supreme Court's decision in the *City of Dallas v. Stewart*, held that the City's administrative decision that Como's property was a nuisance does not prohibit the trial court from determining whether the administrative body correctly decided the nuisance issue. Nuisance determinations must be made by a court and Como is entitled to de novo review of that decision since this is a constitutional suit. The Court further found that whether property constituted a nuisance cannot be resolved through a plea to the jurisdiction.

***Harper Park Two, LP v. City of Austin,* 2011 Tex. App. Lexis 6655 (Tex. App. – Austin, Aug. 18, 2011)**

In 1985, Harper Park submitted a preliminary plan for a mixed-use commercial development. In the application, lots were labeled with the intended use. One of the lots was labeled for "office use." The City approved the preliminary plan and in 2007, Harper Park applied for a final plat on this lot. The application described the use of the property as "commercial-retail." The City rejected the application asserting that the label "office" on this area on the 1985 preliminary plan precluded retail use. Harper Park revised its application to eliminate the reference to "retail" use, instead specifying "commercial-office."

Harper Park submitted a site plan application to build a hotel on the lot. The City asserted that a hotel was a different project from the one initiated by the 1985 preliminary plan application and that only an office could be developed on the lot under the 1985 regulations. The City informed Harper Park that if they desired to construct a hotel on the lot, the development would have to comply with the City's current land use regulations. Harper Park, sued seeking a declaratory judgment that it could develop the lot as a hotel or any other commercial or office use consistent with the regulations in effect in 1985. The trial court found that the proposed hotel was a change in the project and the developer must comply with the City's current land use regulations.

The Court of Appeals found that Harper Park's preliminary plan application gave notice to the City that the subdivision would be a "mixed-use" commercial development. It is this identification that defines the nature and scope of the "project," not narrower descriptive terms or labels that all parties agree hold no legal effect at the time. Harper Park's proposed hotel development is within the same "project" that was initiated by the 1985 filing of the preliminary plat application – "commercial" development, as defined under the Barton Creek Watershed Ordinances and a hotel was a permitted use under the ordinance and Harper Park could develop a hotel pursuant to the regulations in effect in 1985.

***Robert Nolan Allen d/b/a Fetzer Howard Sign Company v. City of Baytown*, 2011 Tex. App. Lexis 6894 (Tex. App. – Houston [1st Dist.], August 25, 2011)**

Allen owned three off-premises billboard signs which were damaged by Hurricane Ike. The City notified Allen that the signs could not be re-erected or rebuilt pursuant to the City's sign ordinance. Allen filed applications with the City for permits to reconstruct or place new signs which were denied by the City's chief building official. Allen appealed the decision but the City Clerk did not receive Allen's notices of appeal until two weeks after the deadline to file such an appeal. The City's Sign Committee conducted a public hearing to consider Allen's appeal and denied the appeal.

Allen filed suit alleging an unconstitutional taking and sought declaratory relief. The City filed a plea to the jurisdiction arguing that the Court lacked subject matter jurisdiction because Allen failed to exhaust its administrative remedies by filing a timely appeal of the building official's denial of his application. In addition, the City filed a motion for summary

judgment on the grounds that Allen did not timely file suit after the denial of his appeal by the Sign Committee. The court granted the City's motion for summary judgment.

The Court of Appeals found that filing a petition for writ of certiorari is necessary in order to exhaust administrative remedies and avoid having the review be considered a collateral attack on the Board's decision. Allen did not file a petition for writ of certiorari but rather a petition for declaratory relief. The Court held that the trial court did not have subject matter jurisdiction over Allen's request for declaratory relief.

The Court further held that when a constitutional takings claim is brought, it can be considered even though other claims are dismissed for failure to exhaust administrative remedies. The exhaustion of administrative remedies is not necessary for a claim of a violation of a constitutional or federal statutory right. The Court found that the City did not establish, as a matter of law, that no regulatory taking occurred and thus, reversed summary judgment on the unconstitutional takings claim.