

FALL 2014 NEWSLETTER

LAND USE, ZONING and REGULATORY TAKING

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TEXAS COURT OF APPEALS

***City of El Paso v. High Ridge Construction, Inc.*, No. 08-13-00187-CV, 2014 Tex. App. LEXIS 8431 (Tex. App. – El Paso, July 31, 2014).**

The City of El Paso entered into a contract with the Texas Department of Housing & Community Affairs to administer funds provided by the federal government for weatherization services in qualified low-income residential properties. The City entered into a contract with High Ridge Construction to deliver weatherization services for eligible residential properties in El Paso. The contract provided that the City would not pay High Ridge more than \$600,000 for services performed under the contract. High Ridge submitted invoices and was paid more than \$600,000 but the City then refused to pay additional monies for materials and services. High Ridge sued the City for breach of contract and an unconstitutional taking of private property.

The City filed a plea to the jurisdiction claiming that it retained its immunity from suit on High Ridge's unconstitutional takings claim because High Ridge failed to allege that the City intended to exercise its eminent domain powers to take High Ridge's private property. High Ridge argued that the City had intentionally taken and obtained the benefit of the materials and work which High Ridge provided to the properties and the property has been taken for a public purpose and the City has refused to pay just compensation for the property. The trial court denied the City's plea to the jurisdiction and the City appealed.

The Court relied on Texas Supreme Court precedent which stated that the State does not have the requisite intent under constitutional-takings jurisprudence when it withholds property or money from an entity in a contract dispute. In that situation, the State is acting within the color of rights under the contract, not under its eminent domain powers. Since the City had withheld payments under a contractual dispute, High Ridge's pleadings affirmatively showed that the City did not have the requisite intent to take High Ridge's property under its own eminent domain powers and as a result, the City retains immunity from suit on the takings claim.

The trial court's order denying the City's plea to the jurisdiction on the takings claim is reversed.

***Appaloosa Development, LP v. City of Lubbock*, No. 07-13-00290-CV, 2014 Tex. App. LEXIS 8780 (Tex. App. – Amarillo, August 11, 2014).**

Appaloosa purchased a tract of land which was designated as "transition district" by the City of Lubbock. Under this designation, the only acceptable use of the property was for single

family residence. Appaloosa determined that the undeveloped property was likely to be zoned as commercial property and, as a result purchased the property. Appaloosa filed an application with the City to have the property zoned as “Interstate Highway Commercial District” which would allow commercial development on the property. The City’s Planning & Zoning Commission approved the application and the application was reviewed by the City Council. The City Council received written objections to the proposed zoning classification from neighborhood residents and as a result, the City Council initially voted to deny the application. Appaloosa brought suit against the City for inverse condemnation.

After a bench trial, the trial court granted a take nothing judgment and Appaloosa appealed. On appeal, Appaloosa alleged that the trial court erred: 1) when it failed to make sufficient findings to support its conclusion that the City did not own unlawfully take or damage the property; (2) when it found and concluded that a regulatory taking cannot occur when the City denies a zoning request; (3) when it failed to conclude that the City’s refusal to approve commercial zoning of previously unzoned property resulted in an unlawful taking of property; and (4) that the evidence was factually insufficient to establish that the denial of Appaloosa’s zoning requests advanced a legitimate government interest.

On appeal, Appaloosa alleged that the City’s denial of its zoning request constituted a regulatory taking pursuant to *Penn. Central Transp. Co. v. New York City* and the City had an improper or self-interested motive in denying the zoning request which made it actionable under *State v. Biggar*.

The Court of Appeals looked at three *Penn Central* factors to determine whether a regulatory taking had occurred: (1) economic impact of the regulation on the claimant; (2) the extent to which the regulation has interfered with investment-backed expectations; and (3) the character of the governmental action. The economic impact of the regulation factor simply compares the value that had been taken from the property with the value that remains in the property. The Court found that the City’s denial of Appaloosa’s request for zoning clarification had no effect on the value of the property since the property could continue to be used for the same purposes after the denial as it could have been used at the time that Appaloosa purchased the property.

As for the investment-back expectations factor, the existing zoning of the property at the time it was acquired is the primary factor in determining whether the regulation interferes with investment-backed expectations. The City’s denial of Appaloosa’s zoning application had no effect on the permitted use of the property and thus, the property lost no value.

Finally, as to the character of the government action factor, the Court found there was significant evidence presented to support the appropriateness of the character of the City’s denial of Appaloosa’s zoning application. Neighbors of the property objected to Appaloosa’s application on the basis of increased noise, traffic, and crime in the neighborhood; decreased property values; and ill effects from increased urbanization. The Court held that such considerations present legitimate reasons for governmental zoning decisions.

As for Appaloosa's theory that the City specifically targeted them by its zoning determination, a cause of action does exist for inverse condemnation where the government acts to gain an unfair advantage against an economic interest of an owner. The Court found the City did not rezone the property or otherwise specifically target the property. Rather, the City simply denied Appaloosa's zoning application when the City received multiple objections from neighboring residents and these objections have been recognized as providing a legitimate basis for governmental zoning decisions. Further, the Court found that Appaloosa failed to point to evidence that would establish sufficient similarities between other properties that had been zoned Interstate Highway Commercial District to lead to an inference that the City's denial of Appaloosa's zoning application was not for a legitimate purpose.

The trial court did not err in entering a take nothing judgment and said judgment is affirmed.

***Jabary v. City of Allen*, No. 05-12-01608-CV, 2014 Tex. App. LEXIS 7259 (Tex. App. – Dallas, July 3, 2014).**

Jabary applied for a commercial certificate of occupancy for a restaurant in the City of Allen. Jabary submitted an application for a building permit and a certificate of occupancy stating that the building would be used for a restaurant and hookah bar. Jabary was issued a certificate of occupancy for the building "for use as a restaurant." Later City officials determined that Jabary's business was primarily a hookah bar and was not capable of being used as a restaurant and was issued a "Notice of Violation" stating he was operating a business in violation of the certificate of occupancy because the establishment does not meet the criteria for restaurant use.

Jabary sued the City in federal and state court. In the state court lawsuit he alleged both private and public takings. The City filed a motion for summary judgment on the grounds that he did not exhaust his administrative remedies and thus, the claim was not ripe. Jabary argued that he was not required to exhaust his remedies because he did not get proper notice and any appeal would be futile. The trial court granted summary judgment in favor of the City and Jabary appealed.

The Court of Appeals found that when the legislature creates a statutory procedure, a party may seek recourse by filing a constitutional suit only where the statutory procedure proves inadequate. In order for a regulatory takings claim to be ripe, there must be a final decision regarding the application of the regulation to the property at issue. When a provisional procedure exists for compensation or recourse, a constitutional claim is necessarily premature. When a party asserts a takings claim based on an allegedly improper administrative determination, the party must first appeal that determination and assert his takings claim in that proceeding. The Court found that Jabary did not file an appeal with the Board of Adjustment and did not offer any evidence to refute what the City offered, nor did he provide evidence or any argument as to why an appeal to the Board of Adjustment would have been futile. The Court found that the City conclusively established Jabary failed to exhaust his administrative remedies and the trial court did not err by granting summary judgment in the City's favor.

The Court further rejected Jabary's argument that the lack of post-deprivation process triggered the exhaustion exception. Jabary claimed that he was not required to file an appeal with the Board of Adjustment because no one told him that he could appeal. The Court found that Jabary had waived this issue because he did not raise it below and furthermore, both the U.S. and Texas Supreme Court have considered and rejected similar arguments. The City gave Jabary notice of the revocation and the City municipal code provided a statutory remedy that was easily discoverable from public sources. The City was under no duty to invite Jabary to appeal to the Board of Adjustment.

The trial court's summary judgment is affirmed.