UT LAW CLE | THE UNIVERSITY OF TEXAS SCHOOL OF LAW

PRESENTED AT

Land Use Conference

April 25-26, 2019
Austin, Texas

Land Use Case Law Update

James L. Dougherty, Jr.

Author Contact Information:
James L. Dougherty, Jr.
Attorney at Law
Houston, Texas

jim@jldjr.com
713-880-8808

LAND USE CASE LAW UPDATE

James L. Dougherty, Jr.
Attorney at Law
Houston, Texas

Presented to
Land Use Conference
University of Texas CLE
April 2019
Austin, Texas

TABLE OF CONTENTS

I. PERMITS & APPROVALS (Ripeness and Exhaustion)

II. PERMITS & APPROVALS (Challenges by Neighbors)

III. REGULATORY TAKINGS (By Zoning or Platting)

IV. SUBSTANTIVE DUE PROCESS (Protected Property Interest)

V. REGULATORY TAKINGS (Relevant Property or "Denominator")

VI. ENFORCEMENT (Civil Penalties, Administrative Penalties)

VII. DEVELOPMENT AGREEMENTS (Immunity)

VIII. VESTED RIGHTS (And Retroactivity)

IX. CONFLICT & PREEMPTION (State and Federal)

X. OTHER CASES

I. PERMITS & APPROVALS (Ripeness and Exhaustion)

Background. Claims based on excessive land use regulation, often framed as takings claims, must usually be "ripened" before suit. There are at least two "ripeness" doctrines. The first is a requirement that a claimant pursue local approvals (including applications for variances and other discretionary approvals) until he gets a final decision--or can demonstrate that further efforts are futile. Requiring finality helps the courts determine how far the regulation goes: "A court cannot determine whether a regulation has gone 'too far' unless it knows how far the regulation goes." Requiring discretionary applications gives "the

governmental unit an opportunity to 'grant different forms of relief or make policy decisions which might abate the alleged taking.'" *See Mayhew v. Town of Sunnyvale*, 964 S.W.2d 922 (Tex. 1998) and cases there cited; also J. Mixon, J. Dougherty, et al., *Texas Municipal Zoning Law, 3rd Ed.*, §§ 10.202 and 12.200 (Lexis-Nexis 2018, rel. 20).

The second ripeness doctrine applies to claimants suing under 42 U.S.C. § 1983, which is the federal statute creating a cause of action for deprivation of constitutional rights under color of state law. In *Williamson County Regional Planning Commission v. Hamilton Bank*, 473 U.S. 172 (1985), the Court refused to decide whether denying a plat approval was unconstitutional until the applicant applied for a variance under local procedures and sought compensation in a state inverse condemnation action. According to the Fifth Circuit, federal ripeness doctrine is "peculiarly a question of timing." The basic purposes are to avoid "premature adjudication" and keep the courts from "entangling themselves in abstract disagreements." *Opulent Life Church v. City of Holly Springs*, 697 F.3d 279 (5th Cir. 2012).

Similar considerations require claimants to exhaust available administrative remedies (like appealing to the Boards of Adjustment) before suing. *See* J. Mixon, J. Dougherty, et al., *Texas Municipal Zoning Law, 3rd Ed.*, § 12.300 (Lexis-Nexis 2018, rel. 20). Failure to ripen a claim, or failure to exhaust administrative remedies, can deprive a reviewing court of jurisdiction and lead to dismissal. In *Jabary v. City of Allen*, 2014 Tex. App. LEXIS 7259 (Tex. App.—Dallas, July 3, 2014, no pet.), Jabary's failure to appeal a permit revocation to the Zoning Board of Adjustment led to dismissal of his suit for failure to exhaust administrative remedies. On the other hand, *City of Dallas v. Trinity East Energy*, No. 05-16-00349-CV, 2017 Tex. App. LEXIS 1070, 2017 WL 491259 (Tex.App.--Dallas, Feb. 7, 2017, pet. denied)(mem.op.) held Trinity's taking claim against the City to be ripe, after Trinity showed that "additional efforts to apply for permits would have been futile."

Updates. *City of Fort Worth v. Alvarez*, No. 02-17-00091-CV, 2018 Tex. App. LEXIS 3529 (Tex. App.—Fort Worth May 17, 2018, no pet.)(mem.op.) involved a challenge to a City-approved preliminary plat. It showed a street connecting to an adjacent subdivision. Homeowners in the subdivision sued, but the court held their suit not ripe:

> . . . we agree with the City's position that the approval of a *preliminary* plat, which transferred no actual ownership interests from anyone to anyone else and imposed no restrictions on the homeowners, did not constitute a taking. Likewise, until the developer attempts to dedicate anything to the City (assuming, for the sake of argument, that the property in question properly lies within the City's ETJ), the homeowners' requests for declaratory relief *as to the City* with regard to boundary lines, easements, public rights-of-way, title, abandonment, or adverse possession are not ripe because further action—both governmental and nongovernmental, i.e., by the developer—is required.

Apparently, the court believed a separate question (whether the site was located within the City's platting jurisdiction) *was* ripe.

Joe Murphy v. City of Galveston, No. 14-17-00063-CV, 2018 Tex. App. LEXIS 3979 (Tex.App.—Houston [14th Dist.] June 5, 2018) held that a taking claim was barred because the property owners "did not appeal the loss of the property's 'grandfather' status to the ZBA," which was a failure to exhaust administrative remedies. The property owners tried, unsuccessfully, to avoid dismissal by invoking equitable estoppel.

In *City of Crowley v. Ray*, 558 S.W.3d 335 (Tex. App.—Fort Worth 2018, pet. denied), the court ruled that the developer did not need to exhaust administrative remedies before suing on a taking theory. The City argued, unsuccessfully, that the developer should have sought variances, "flood determination appeals," flood map revision letters ("CLOMR's") or "administrative determination appeals" before suing. However, the court found no authorized appeals that should have been taken. The court also ruled that the developer did not have to seek approval of a less-intensive development or alternative designs for the project in order to ripen its claim, "because the nature of the alleged taking [raising the minimum finished floor elevation by more than eight feet] is not one that left open the possibility that the property could be developed some other way."

In *Orr v. City of Red Oak*, No. 07-17-00281-CV, 2018 Tex. App. LEXIS 10336 (Tex. App.—

Amarillo, Dec. 13, 2018)(mem.op.), Orr had applied for a parking lot permit and submitted plans. A city official reviewed the plans for "general compliance [with] the City's Development Ordinance, Storm Drainage Design Manual, and good engineering practice" and made 29 written comments. The court ruled the comments were an "'order, requirement, decision, or determination made by an administrative official in the enforcement of' a local zoning ordinance that requires Orr to appeal that determination to the [Board of Adjustment]." *See* TEX. LOC. GOV'T CODE §§ 211.008, 211.009. Because Orr did not appeal from the administrative official's comments, he failed to exhaust his administrative remedies, so the court dismissed his suit.

Village of Tiki Island v. Premier Tierra Holdings, 555 S.W.3d 738 (Tex. App.--Houston [14th Dist.] 2018, no pet.) describes a long process a landowner followed to ripen its claims based on the Village's disapproval of a plat for a major marina development. The landowner made multiple submissions and got multiple rejections.

EMF Swiss Ave. v. Peak's Addition Home Owner's Ass'n, No. 05-17-01112-CV, 2018 Tex. App. LEXIS 10882 (Tex. App.—Dallas Dec. 28, 2018)(mem.op.) ruled that an apartment developer had standing to appeal from a judgment revoking a key project permit, notwithstanding the City's arguments that: (i) developer was not the "holder" of the permit, (ii) the judgment did not affect title to the property and (iii) the "economic consequences" of revocation were "too uncertain and premature to be ripe."

II. PERMITS & APPROVALS (Challenges By Neighbors)

Background. Traditionally, private individuals cannot enforce penal ordinances through private lawsuit, but a line of cases indicates they can sue to enjoin violations of zoning ordinances if they can show standing to sue--based on special harm, different from the harm to the general community. *See* J. Mixon, J. Dougherty, et al., *Texas Municipal Zoning Law, 3rd Ed.*, § 9.007 (Lexis-Nexis 2018, rel. 20) and cases there citied, including *Porter v. Southwestern Public Service Co.,* 489 S.W.2d 361 (Tex. Civ. App. Amarillo 1972, writ refused n.r.e.). However, *GTE Mobilnet of South Texas v. Pascouet,* 61 S.W.3d 599 (Tex. App.—Houston [14th Dist.] 2001) ruled that *only* the city could enforce its zoning ordinances, and private homeowners seeking an injunction could not "usurp" that authority.

Standing to sue, generally, is different from standing to appeal from a decision by a board of adjustment. The zoning enabling statute gives the right to appeal (by filing a petition for a writ of certiorari) not only to persons aggrieved by a board's decision but also to *any taxpayer. See* TEX. LOC. GOV'T CODE ch. 211 and J. Mixon, J. Dougherty, et al., *Texas Municipal Zoning Law, 3rd Ed.*, §§ 6.009 and 9.007 (Lexis-Nexis 2018, rel. 20) and cases there cited.

***Updates*.** In *Schmitz v. Denton County Cowboy Church,* 550 S.W.3d 342 (Tex.App.—Fort Worth 2018, pet. denied)(mem. op. on rehearing, *withdrawing prior opinion*), neighbors invoked the Town's zoning ordinance to try to get an injunction against a big indoor rodeo arena a church was building nearby. The court ruled that "… to declare and enjoin the Church's alleged violations of the Town's zoning ordinances is exclusively the province of a municipality," and that private-party neighbors could not "usurp" that authority. However, the court also ruled that TEX. LOC. GOV'T CODE § 211.012 did not prevent the neighbors from "seeking redress for their damages occasioned by the Church's activities allegedly resulting in *private-nuisance injuries* (emphasis added)." The court also held that one of the neighbors had proved a "particularized injury" to support his standing to sue the Church on a nuisance theory.

In *City of Wimberley Board of Adjustment v. Creekhaven, LLC,* No. 03-18-00169-CV, 2018 Tex. App. LEXIS 8448 (Tex. App.—Austin Oct. 18, 2018)(mem.op.), neighboring landowners appealed the granting of two setback variances, but the case was later held to be moot.

In *EMF Swiss Ave. v. Peak's Addition Home Owner's Ass'n,* No. 05-17-01112-CV, 2018 Tex. App. LEXIS 10882 (Tex. App.—Dallas Dec. 28, 2018)(mem.op.), a homeowner's association appealed a Board of Adjustment decision on the maximum allowable height for an apartment project in a planned development district. After the trial court reversed the Board's decision—and the City halted construction—the developer scrambled to get approval of an appeal bond so that it could appeal. The

Title search: Land Use Case Law Update

Also available as part of the eCourse
2019 Land Use eConference

First appeared as part of the conference materials for the
23rd Annual Land Use Conference session
"Land Use Case Law Update"