UT LAW CLE | THE UNIVERSITY OF TEXAS SCHOOL OF LAW

PRESENTED AT

Land Use Conference

April 23-24, 2020
Austin, Texas via Live Webinar

New Land-Use Cases

James L. Dougherty, Jr.

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

jim@jldjr.com
713-880-8808

NEW LAND-USE CASES

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

Presented to
Land Use Conference
University of Texas CLE
April 23-24, 2020
Austin, Texas *via* Live Webcast

TABLE OF CONTENTS

I. RIPENESS & EXHAUSTION OF ADMINISTRATIVE REMEDIES

Background. Claims based on excessive land use regulation--often framed as takings or inverse condemnation--must usually be "ripened" before suit. There are at least two "ripeness" doctrines. The first requires a claimant to pursue local approvals (including applications for variances and other discretionary approvals) to get a final decision locally, or else demonstrate that further efforts will be futile. A final decision helps a reviewing court determine how far a 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, B. McDonald, R. Wilson *et al., Texas Municipal Zoning Law, 3rd Ed.*, §§ 10.202 and 12.200 (Lexis-Nexis 2018, rel. 21)("TMZL"). For a classic example or ripening efforts, *see Village of Tiki Island v. Premier Tierra Holdings*, 555 S.W.3d 738 (Tex. App.--Houston [14th Dist.] 2018, no pet.), a case arising from disapproval of a major marina development. The opinion recounts the developer's systematic ripening efforts, including multiple submissions and multiple rejections.

The second ripeness doctrine applies to claims under 42 U.S.C. § 1983, 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 United States Supreme Court refused to rule on the constitutionality of plat approval until: (i) the applicant applied for a variance under local procedures and (ii) sought compensation in a state inverse condemnation action.

A similar doctrine requires claimants to exhaust available administrative remedies--like appealing to Boards of Adjustment--before suing. *See* TMZL, § 12.300. Failure to ripen a claim, or failure to exhaust administrative remedies, can deprive a reviewing court of jurisdiction and lead to dismissal. For example, 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.

Updates. *City of Houston v. Commons at Lake Houston*, 587 S.W.3d 494 (Tex. App.—Houston [14th Dist.] 2019) involved a development (called "The Commons") near Lake Houston. Apparently, developer had secured City approvals, including a general plan, a subdivision plat and facility plans, when the City adopted new floodplain regulations. The developer claimed the new regulations made the development "unfeasible" and sued on an inverse condemnation theory--and also invoked "vested rights" under Chapter 245, TEX. LOC. GOV'T CODE. The City argued there had not been a final decision by the City, so the claims were not ripe.

The court reviewed an email exchange between a developer representative and a City "managing engineer" and ruled that it was not a final decision. The court also pointed out that there was neither a denial of plat approval (or permit) nor a request for a variance. The court explained:

> The purpose of the "final decision" requirement, usually evidenced through the denial of a permit, is to determine the "application of the regulations to the property at issue." . . . The Commons' application must be sufficient for the City to make the determination of whether the regulations will bar residential construction below two feet above the 500-year flood elevation.

The court also noted that the developer "need only follow 'reasonable and necessary' steps to allow the City to exercise its discretion," (citing *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001), and then warned: "If the City were to unreasonably withhold a final decision from The Commons regarding minimum elevation, the claim could ripen because subsequent applications or variance requests might be futile" (citing *Mayhew*, also *Palazzolo:* "Government authorities, of course, may not burden property by imposition of repetitive or unfair land-use procedures in order to avoid a final decision."). The court went on rule that the "futility" exception to the ripening rules did not apply:

> Based on this record, however, the futility exception does not apply. The permissible uses of The Commons' property is not known to a reasonable degree of certainty. The Commons must give the City an opportunity to exercise its discretion.

Turning to the developer's Chapter 245 claim (essentially a claim that the new floodplain regulations should not apply to The Commons), the court focused on the developer's email exchange with the City's

Title search: New Land-Use Cases

Also available as part of the eCourse
2020 Land Use eConference

First appeared as part of the conference materials for the
24th Annual Land Use Conference session
"New Land-Use Cases Part 1"