NEW LAND-USE CASES

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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; according to one opinion: "A court cannot determine whether a regulation has gone 'too far' unless it knows how far the regulation goes." Also, requiring discretionary applications (like variances) 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 of ripening, *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 the Village's disapproval of a major marina development. The court's opinion recounts the developer's systematic ripening campaign, including multiple submissions and multiple rejections. *See also City of Houston v. Commons at Lake Houston*, 587 S.W.3d 494 (Tex. App.—Houston [14th Dist.] 2019), where the court held that a vested-rights claim (targeting an intervening change in floodplain regulations) was not ripe. According to the court, an email exchange between the developer's representative and a City engineer did not constitute a final decision, and there was neither a denial of plat approval (or permit) nor a request for a variance. In contrast, *Zaatari v. City of Austin*, No. 03-17-00812-CV, 2019 Tex. App. LEXIS 10290 (Tex. App.—Austin Nov. 27, 2019, pet. filed) held that a challenge to the text of Austin's short-term rental ordinance (a so-called "facial" challenge) did not require additional ripening steps.

A doctrine similar to ripeness 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. *Tejas Motel, L.L.C. v. City of Mesquite,* No. 05-19-00667-CV, 2020 Tex. App. LEXIS 4225 (Tex. App.—Dallas June 4, 2020) (mem.op.) involved a 2018 ordinance that established a two-step amortization procedure for non-conforming uses. At the first step, the Board of Adjustment would determine whether continued operation of a nonconforming use "will have an adverse effect on nearby properties." If so, the Board would then proceed to the second step and establish a compliance date (defining, in effect, an amortization period). Shortly after adopting the amortization ordinance, the City Council adopted a resolution asking the Board of Adjustment to consider establishing a compliance date for five non-conforming properties, including the Tejas Motel. At the Board's first-step hearing regarding the Motel, the parties reached an agreement calling for the motel to cease operating eight months later (unless brought into compliance). They signed a written "Order and Decision." The City sent a copy of the order to the owner's attorney, by email. The order included this paragraph:

> Any interested person wishing to appeal this decision is required to file a petition for Writ of Certiorari in a district court, county court at law within ten (10) days of the date this decision is filed in the Board's office in accordance with section 211.011 of the Texas local Government Code. The decision was filed in the Board's office on July 31, 2018.

There was no appeal within the 10-day period. More than three months later, the owner filed a petition seeking a writ of certiorari under § 211.011, TEX. LOC. GOV'T CODE. The owner also asserted an Open Meetings Act claim, a state takings claim, a declaratory judgment claim and federal constitutional claims. The court ruled that, because the appeal was not filed within the 10-day period specified by § 211.011, the owner had failed to exhaust its administrative remedies. The court therefore dismissed the appeal and all the other state-law claims, for lack of jurisdiction. (The court also dismissed the federal constitutional claims because the motel owner had "no vested property interest in maintaining a nonconforming use" and "no reasonable investment-backed expectations in continuing that use.")

City of Dickinson v. Stefan, 611 S.W.3d 654 (Tex. App.—Houston [14th Dist.] reached a result similar to the result in the *Tejas Motel* case. In 1999, Stefan had bought 6.75 acres in a residential area. He operated a computer business from home, and, in 2000, he allowed a church group to hold a Christmas party at the home. The City adopted its zoning ordinance in 2001. Stefan registered his property as a nonconforming use in 2002, claiming it had a "business & multi-family" use. However, he apparently did not get a "Certificate of Occupancy Nonconforming," which the ordinance required to be issued when a nonconforming use was registered.

Fifteen years later, in 2017, Stefan started construction on a large pavilion, apparently intending to use it as a wedding venue. There was a complaint, and the building official investigated. Stefan said he had approval for a business on the property and showed the registration form he had filed in 2002. The building official could not find a record of the approval and refused to certify Stefan's claimed nonconforming use. Stefan appealed to the Board of Adjustment, which issued an "Order Denying Appeal." Stefan sued two days later, claiming to be "grand-fathered" (but without mentioning the vested rights statute, ch. 245 TEX. LOC. GOV'T CODE). He pled a taking theory and asked for declaratory judgment, injunctions and attorneys fees. Crucially, he did not request review by writ of certiorari under § 211.011, TEX. LOC. GOV'T CODE.

The City filed a motion to dismiss, and Stefan apparently stood on his pleadings. When the trial court refused to dismiss, the City appealed. The Court of Appeals ruled that: (i) Stefan did not plead for declaratory judgment under ch. 245 TEX. LOC. GOV'T CODE; and (ii) by failing to pursue review by writ of certiorari, Stefan had "*failed to exhaust his administrative remedies* (emphasis added)." The court dismissed all claims--and ruled that Stefan was "not entitled to a remand to plead new claims."

Selinger v. City of McKinney, 2020 Tex. App. LEXIS 4894 (Tex. App.—Dallas July 1, 2020) (mem. op.) was a 2020 plat case (discussed further under "REGULATORY TAKINGS," below). A developer claimed that the City denied a plat approval because the developer had refused to commit to pay $482,000 in impact fees at an indefinite date in the future, *i.e.,* "if the City ever extended its water and sewer lines to the subdivision." (There were potentially other reasons for denying the approval.) One of the issues in the case was whether the developer had exhausted his administrative remedies under TEX. LOC. GOV'T CODE § 212.904, which calls for an initial decision on the proportionality of infrastructure costs by an engineer, with an appeal to the governing body (City Council, in this case). The court decided that the City Council's decision to deny the developer's plat "was the Council's determination of [developer's] appeal." The court explained: "Section 212.904 does not require any particular procedure for an appeal to the municipality's governing body, nor does it prescribe a specific form for that body's appealable determination."

In a case involving a County's creation of a reinvestment zone for tax abatements, *Ellis v. Wildcat Creek Wind Farm LLC*, No. 02-20-00050-CV, 2021 Tex. App. LEXIS 2312 (Tex. App.—Fort Worth Mar. 25, 2021) (mem.op.), the court ruled that property owners had not shown that they had standing or that their claims were ripe. They were complaining about possible harm from a possible future wind farm, but, according to the court, "that harm appears to have little to do with Appellees' challenged actions (a prelude to the creation of tax incentives) and more to do with contingent future events that may never come to pass (the eventual construction of a wind farm)."

Murphy v. City of Galveston, No. 3:12-CV-00167, 2021 U.S. Dist. LEXIS 62210 (S.D. Tex. 2021) came as the latest decision in a long-running dispute involving restoration of property in Galveston's East End Historical District. The property was damaged by Hurricane Ike in 2008. After it sat vacant for more than six months, a City Code Enforcement Officer notified the plaintiffs that the property had lost nonconforming ("grandfather") status. They could have appealed that decision to the Board of Adjustment, but they did not. Instead, they applied for a Special Use Permit (SUP), which the City Council denied. Reportedly, however, various City officials encouraged them to make changes reapply for an SUP, but they did not. Instead, they sued on a federal taking theory. The federal magistrate judge ruled their claim not ripe, because they never got a final decision from the City. They had never asked for a ruling from the Board of Adjustment, and they declined to reapply for a SUP. According to the judge:

> Although the City initially rejected Plaintiffs' request for an SUP, there was a real possibility that a subsequent SUP application would have been successful if Ben-Amram had applied for a variance with the Board concerning the parking issue, repaired the Property so that it satisfied the code requirements, and provided an engineer's letter. Plaintiffs *failed to actively seek a final decision from the City, and that dooms their claim.* (emphasis added)

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