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Zoning and Land Use

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I. CONDEMNATION

A. *KELO V. CITY OF NEW LONDON*

ON June 23, 2005, the U.S. Supreme Court announced its decision in *Kelo v. City New London.*[1] In a five to four decision, the U.S. Supreme Court affirmed a divided Connecticut Supreme Court decision upholding the right of a local government to use its eminent-domain powers to acquire private property for economic-development purposes and to transfer it to a private entity.

The city of New London, Connecticut, ran into economic difficulties after some military bases closed and the population fell. The city formed the New London Development Corporation, a nonprofit organization, to help the city implement a plan to redevelop a ninety-acre site near a proposed Pfizer Corporation pharmaceuticals plant. The development corporation acquired most of the property through negotiation, but Susette Kelo and other property owners filed suit, challenging the city's right to condemn their properties.[2]

The issue in the case was whether the taking of property through eminent domain as part of an economic-development project is a "public use."[3] Both the U.S. and Texas Constitutions allow the taking of prop-

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1. 125 S. Ct. 2655 (2005).

2. U.S. CONST. amend. V ("[N]or shall private property be taken for public use without just compensation."). TEX. CONST. art. I, § 17 ("No person's property shall be taken, damaged or destroyed for or applied to public use without adequate compensation being made . . . .").

3. *Kelo*, 125 S. Ct. at 2659-60.

erty for public use. Justice Stephens, speaking for the majority, found that the case turned on the question of whether the city's development plan serves a "public purpose." The Court found that case authority defined that concept broadly, reflecting the Court's long-standing policy of deference to legislative judgment.[4] Therefore, the Court concluded that the state's purpose of eliminating the social and economic evils of a land oligopoly qualified as a valid public use.[5] Further, the Court refused to find that the state's act of transferring the properties to private individuals upon condemnation diminished the public character of the taking.[6]

In contrast, Justice O'Connor's dissenting opinion said "To reason, as the Court does, that the incidental public benefits resulting from the subsequent ordinary use of private property render economic development takings 'for public use' is to wash out any distinction between private and public use of property —and thereby effectively to delete the words 'for public use' from the Takings Clause of the Fifth Amendment."[7] The Fifth Amendment's language imposes two distinct conditions on the exercise of eminent domain: "The taking must be for a 'public use' and 'just compensation' must be paid to the owner."[8]

The dissent also stated that turning the responsibility over to the states to choose to impose additional limitations on economic development takings is an abdication of the Court's responsibility to enforce the United States Constitution.[9] The dissent warned that "[t]he beneficiaries are likely to be those citizens with the disproportionate influence and power in the political process, including large corporations and development firms. As for the victims, the government now has a license to transfer property from those with fewer resources to those with more."[10]

B. Senate Bill 7: The Texas Legislative Response

In the majority opinion, Justice Stephens concluded by emphasizing that nothing in the *Kelo* opinion precludes individual states from placing further restrictions on the exercise of the taking power.[11] The Texas Legislature followed Justice Stephens' suggestion to place legislative restrictions on the exercise of the takings power.

On August 31, 2005, Governor Rick Perry signed Senate Bill 7, which amends various statutory provisions to limit the use of the power of eminent domain in the State of Texas.[12] First, the bill added Chapter 2206

4. *Id.* at 2663.
5. *Id.* at 2664.
6. *Id.*
7. *Id.* at 2671 (O'Connor, J., dissenting).
8. *Id.* at 2672 (citing Brown v. Legal Found. of Wash., 538 U.S. 216, 231-32 (2003)).
9. *Id.* at 2677.
10. *Id.*
11. *Id.* at 2668.
12. Press Release, Texas Governor Rick Perry, Governor Perry Signs New Loan Protecting Property Rights (Aug. 31, 2005), *available at* http://www.governor.state.tx.us/divsions/press/pressreleases/PressRelease.2005-08-31.3313; *see also* Tex. S.B. 7, 79th Leg., 2d R.S. (Tex. 2005) (Senate Bill 7 does not apply to condemnation proceedings that are insti-

"Limitations On Use of Eminent Domain" to the Texas Government Code, which applies to any governmental or private entity.[13]

Under this new provision, a governmental or private entity may not take private property through eminent domain to confer a private benefit or for economic development purposes unless the economic development is a secondary purpose resulting from community development or urban renewal activities to eliminate a slum or blighted area.[14] A condemnor's determination that a taking does not confer a private benefit and complies with section 2206.001(b) does not create a presumption of validity.[15]

There are express exceptions in the bill from the limitation on the use of eminent domain. The new regulations do not affect transportation projects: ports; water, wastewater, flood, and drainage projects; public buildings, hospitals, and parks; utilities; a sport- and community-venue project approved at an election on or before December 1, 2005; the operation of a common carrier or energy transporter; public utilities under Chapter 181 of the Utilities Code; underground-storage operations; a waste-disposal project; or a library, museum, or related facility or infrastructure.[16] A governmental entity may condemn a leasehold estate on property owned by the governmental entity.[17]

Senate Bill 7 also amends the Education Code to prevent a university from using eminent domain to acquire land for a lodging facility or parking for such a facility.[18] Senate Bill 7 also requires notice to certain property owners by a charitable corporation that seeks to acquire real property by condemnation or seeks to purchase property that the corporation intends to use in a manner that would not comply with deed restrictions.[19]

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tuted or a deed that is filed of record before the effective date of Senate Bill 7, which is November 18, 2005. A taking for which condemnation proceedings were instituted before the effective date of Senate Bill 7 is governed by the law in effect immediately before that date).

13. TEX. GOV'T CODE ANN. § 2206.001(a) (Vernon 2005).

14. *Id.* § 2206.001(b).

15. *Id.* § 2206.001(e) states: "(e) The determination by the governmental or private entity proposing to take the property that the taking does not involve an act or circumstances prohibited by Subsection (b) does not create a presumption with respect to whether the taking involves that act or circumstance."

16. *Id.* § 2206.001(c).

17. *Id.* § 2206.001(d) ("This section does not affect the authority of a governmental entity to condemn a leasehold estate on property owned by the governmental entity.").

18. TEX. EDUC. CODE ANN. § 51.9045 (Vernon 2005). According to newspaper accounts, a state representative allegedly added this amendment to prohibit the University of Texas at Austin from condemning a popular hamburger restaurant, owned by his cousin, to build a parking garage and hotel. Polly Ross Hughes, *House Gives Approval to Property Rights Bill/Measure Would Curb Government Power of Seizure*, HOUSTON CHRONICLE, Aug. 10, 2005, at B6, *available at*, http://www.chron.com/CDA/archives/archive.mpl?id=2005_3893926.

19. TEX. REV. CIV. STAT. ANN. art. 3183b-1, § 6 (Vernon 2005).

C. TEXAS CASE

In *Whittington v. City of Austin*, the Austin Court of Appeals held that the City of Austin did not meet its summary-judgment burden regarding its authority to condemn eight downtown lots for an unspecified "public use."[20] The court pointed out that there are two components of "public use" under the Texas Constitution. First, the condemnor must intend the use to be "public" under Texas law. Second, the condemnation must actually be necessary to advance the ostensible use.[21] Whether or not a use is a "public use" is a matter of law and requires more than a simple legislative declaration.[22]

In this case, the city did not specify what the intended public use was in its resolution authorizing the condemnation.[23] Furthermore, the city failed to meet its burden of showing there was a "necessity" for the condemnation. Because the city's resolutions failed to address either the "public use" or "necessity" criteria, the court of appeals reversed the summary judgment in favor of the city and remanded the case to the trial court for further proceedings.[24]

II. INVERSE CONDEMNATION

The Texas Supreme Court in *City of Keller v. Wilson*[25] provided clarification regarding the relationship between municipal plat approval, the requirements of the Texas Local Government Code, and inverse condemnation under Article I, section 17 of the Texas Constitution. The Fort Worth Court of Appeals ruled that the City of Keller, by approving a residential subdivision that allegedly flooded downstream property, was liable for inverse condemnation.[26] Following an appeal by Keller, the Texas Supreme Court, on June 10, 2005, reversed the Fort Worth Court of Appeals and rendered judgment on behalf of the City.[27]

The City required a developer of a new subdivision to submit plans for removal of run-off water that did not increase the flow or the velocity of water to downstream property in conjunction with plat submittal. After review and satisfaction that the developer's drainage plans met Keller's criteria and requirements, Keller approved the plans and final plat and authorized construction of infrastructure improvements.

As part of the process for plat approval and, ultimately, the building of the subdivisions, Keller required the developer to provide for the removal of run-off water resulting from a 100-year rain event. Keller also required that the developer's drainage plan could not increase either the

20. 174 S.W.3d 889, 900 (Tex. App.—Austin, pet. denied).
21. *Id.* at 896-97.
22. *Id.* at 897.
23. *Id.* at 900.
24. *Id.* at 900, 906.
25. 168 S.W.3d 802 (Tex. 2005).
26. City of Keller v. Wilson, 86 S.W.3d 693, 706 (Tex. App.—Fort Worth 2002, pet. granted).
27. 168 S.W.3d at 830.

flow or velocity of the water reaching downhill properties. These requirements were part of Keller's Master Drainage Plan.[28]

The engineer that designed the permanent drainage easement and channel for the developers testified that the permanent drainage easement and channel were designed to comply with Keller's drainage requirement that neither the flow nor velocity of water reaching downstream properties would increase.[29] To insure that the developer's design of the permanent drainage easement would not increase the flow or velocity of water on downstream properties, Keller instituted several reviews of the design. First, Keller's engineering department reviewed the design and found that it complied with Keller's Master Drainage Plan. The Director of Public Works for Keller, a professional engineer, testified that the developer's design placed the permanent drainage easement in the area where water already flowed so as to follow the water's natural flow. He also testified that, based on his training and experience, the developer's design did not increase the flow or velocity of water on downstream properties.[30]

Second, Keller inspectors inspected the construction of the drainage improvements to assure that the construction complied with the developer's design. Third, Keller made a final inspection after the permanent drainage easement and drainage improvements were completed, finding that they complied with the developer's design.

Fourth, Keller commissioned an independent engineering firm to review the developer's design to insure that the design conformed to Keller's Master Drainage Plan and other regulations.[31] An engineer with the independent engineering firm commissioned by Keller testified that he reviewed the developer's design for the permanent drainage easement and concluded that the design was adequate to carry stormwater flow resulting from a 10- to 100-year rain event. Keller's independent engineer also concluded that the developer's design conformed to standard and accepted engineering practices and procedures and that it would not increase the floodwater run-off to downstream properties. Thereafter, Keller approved the final plat and the developer's drainage plans, and this suit followed.

First, the court considered whether the Fort Worth Court of Appeals erred by failing to consider the evidence contrary to the jury's finding that Keller acted intentionally to cause flooding on private property. In this case, the Wilsons sued over flooding that resulted, in part, from Keller's approval of a development plat upstream from the Wilsons' property. Under Keller's Master Drainage Plan (the "1990 Plan"), a possible drainage channel would have been cut across the Wilsons' property for runoff from the upstream development. Keller approved the developer's

28. *Id.* at 808.
29. 86 S.W.3d at 706.
30. *Id.*
31. *Id.* at 701, 706.

plan and plat without the channel, which engineers for the developer and Keller and those who designed Keller's Master Drainage Plan believed satisfied Keller regulations and the 1990 Plan. The court of appeals excluded the engineering evidence supporting the development and plat approval, holding that the jury could find that Keller acted with substantial certainty that flooding would result.[32] The court also rejected Keller's contention that all engineering testimony should be included in the review, holding that it must consider only the evidence and inferences that tended to support the findings of the trial court and disregard all evidence and inferences to the contrary.[33] The Texas Supreme Court rejected the court of appeals' scope of review by holding that a reviewing court must consider "all of the evidence" in the light favorable to the verdict (the "inclusive standard").[34]

The court next considered the City of Keller's state of mind. The Wilsons had to prove Keller *knew* (not should have known) that flooding was substantially certain to result from approval of the plans. The court held that the reviewing court could not evaluate what Keller knew by disregarding most of what the court was told by three sets of reviewing engineers. Moreover, when a case involves scientific or technical issues requiring expert advice (as this one did), the jurors would not disregard a party's reliance on experts hired for that very purpose without a reasonable basis for doing so.[35] In *Keller*, three sets of engineers certified that the development plans and plat met Keller's codes and regulations and thus would not increase downstream flooding.[36] None of the evidence cited by the court of appeals showed that Keller knew more than it was told by the engineers.[37] As the court explained, "The Wilsons' expert testified that flooding was (in his opinion) inevitable, but not that the City *knew* it was inevitable."[38] Keller witnesses admitted knowing that development would "increase runoff at the head of this drainage system, but not flooding at its foot."[39] The omission of a drainage channel across the Wilsons' property obviously raised concerns as to whether Keller properly investigated, but was not evidence that Keller knew that the advice that it received in response was wrong.[40]

More importantly, the supreme court noted that the appellate court's decision "ignores what the Wilsons had to prove—not that [Keller] *might* have disbelieved the engineers' reports, but that it *did*."[41] The court

32. 168 S.W.3d at 808.
33. *Id.*
34. *Id.* at 807, 809.
35. *Id.* at 829 (citing Provident Am. Ins. Co. v. Castaneda, 988 S.W.2d 189, 194-95 (Tex. 1998)).
36. *Id.*
37. *Id.*
38. *Id.*
39. *Id.*
40. *Id.* (*Cf.* Nissan Motor Co. Ltd. v. Armstrong, 145 S.W.3d 131, 140 (Tex. 2004) (holding that complaint letters may require a manufacturer to investigate, but are not evidence that complaints are true)).
41. *Id.* at 830.

noted that "[t]his requires evidence of 'objective indicia of intent' showing [Keller] knew identifiable harm was occurring or substantially certain to result."[42] Accordingly, Keller's approval of the development plan and plat was not an intentional taking under Article I, section 17 of the Texas Constitution.[43]

III. HISTORIC PRESERVATION

In *2128 Bryan Street, Ltd. v. City of Dallas*,[44] the Dallas Court of Appeals held that the purchaser of property in downtown Dallas was not entitled to a permit to demolish an old high school on the property that was included in an historic overlay district, which was designated as such only after the permit application was submitted. In this case, before the appellant owner purchased the property, the city landmark commission instituted proceedings to consider whether the property should be designated a historic district. Under the Dallas City Code, the institution of such proceedings triggered a moratorium on the acceptance of any applications for permits to alter or demolish structures on the property. The moratorium was in effect when the appellant submitted its first application for a demolition permit. At the time, the code provided that the moratorium would end on the 180th day after the filing of a written request for hardship relief. The appellant filed the request, which was not granted.[45]

Before the 180-day period expired, the city adopted a new ordinance amending its historic regulations to delete the 180-day provision and add new standards for demolition permits. The landowner demanded a demolition permit, which was refused. The city contended that the application was incomplete under the new regulations. Soon thereafter, the city adopted an ordinance designating a portion of the appellant's property, including the school, as an historic overlay district.[46]

The landowner then sued for a writ of mandamus ordering the city building official to issue a demolition permit and for damages from alleged regulatory-taking and due-process violations. The trial court granted the city's motion for summary judgment on the permit issue. After a bench trial, the court also ruled for the city on the regulatory-taking and due-process claims.[47]

On appeal, the appellant argued that Chapter 245 of the Texas Local Government Code required the city to issue the demolition permit, despite the adoption of the later ordinances for historic districts. The landowner contended that either its initial application or its hardship request

42. *Id.* (citing Tarrant Reg'l Water Dist. v. Gragg, 151 S.W.3d 546, 555 (Tex. 2004) (emphasis added)).
43. *Id.*
44. 175 S.W.3d 58 (Tex. App.—Dallas 2005, pet. denied).
45. *Id.* at 62.
46. *Id.*
47. *Id.*

triggered the protection of Chapter 245.[48] However, the court of appeals agreed with the city that Chapter 245 did not apply because no permit application could be filed during the moratorium. The court also agreed that, because new demolition standards were adopted for properties under consideration for historic designation before the end of the moratorium, those standards properly applied to any subsequent permit application.[49]

In addition, the court upheld the trial court's denial of the owner's due-process and regulatory-taking claims, finding that the opinions and conclusions of the owner's appraiser on the impact of the permit denial on the property's value were not credible.[50]

In *Wyly v. Preservation Dallas*, a nonprofit organization and the Historical District Association were held to have standing to prevent homeowners from destroying a home in the Swiss Avenue Historic District.[51] The Dallas City Planning Commission ("CPC") authorized the demolition and Preservation Dallas obtained a temporary restraining order to prevent imminent destruction of the house. The historic district joined the suit, claiming that proper notice was not posted before the CPC hearing.

Applying the three-prong test for associational standing, the Dallas Court of Appeals initially held that both Preservation Dallas and the Historical District Association had members who owned homes in the district. Those members had standing to sue in their own right.[52] Second, the purpose of both organizations was to preserve historical buildings, which was germane to the issue in the suit. Third, the claim in the lawsuit did not require that individual members participate in the lawsuit.[53]

Because the trial court granted the temporary injunction without holding an evidentiary hearing, the court of appeals vacated the trial court's order enjoining the Wylys from destroying the property.[54] Further, the court of appeals found that it did not have interlocutory appellate jurisdiction over the trial court's granting of mandamus relief ordering the CPC to rehear the appeal of the Landmark Commission's decision, so the appellate court took no action on the order.[55]

In re Gruebel addressed the issue of whether a certificate of appropriateness from the Nacogdoches Historic Landmark Preservation Committee was required before demolition of a building located within the Historic Overlay of the city.[56] Dr. Gruebel sought a writ of injunction to prevent the city from issuing a permit to demolish a building owned by Commercial Bank.

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48. *Id.* at 62-63.
49. *Id.* at 63.
50. *Id.* at 66.
51. 165 S.W.3d 460, 462 (Tex. App.—Dallas 2005, no pet. h.).
52. *Id.* at 464.
53. *Id.* at 464-65.
54. *Id.* at 465.
55. *Id.* at 466.
56. 153 S.W.3d 686, 688 (Tex. App.—Tyler 2005, no pet. h.).

During the pendency of the litigation, the city amended its comprehensive zoning ordinance to delete the requirement that a landowner obtain a certificate of appropriateness before demolishing a designated historic landmark. While it is well settled that laws may not operate retroactively, Dr. Gruebel, as a resident of the city, did not have a vested substantive right in preventing the structure's demolition. As a result, the controversy became moot.[57]

IV. ANNEXATION

In *Smith v. City of Brownwood*,[58] the requirements for disannexing thirteen acres of a 153-acre annexation were addressed. Section 43.141(a) of the Texas Local Government Code states that "a majority of the qualified voters of *an annexed area* may petition the governing body of the municipality to disannex the area if the municipality fails or refuses to provide services [within the timeframe established in the statute]."[59] The trial court held that Smith, an owner of less than ten percent of the annexed land, did not have standing to trigger the disannexation process.

The Eastland Court of Appeals agreed with the trial court and held that Smith did not have standing. The court reasoned that extending water and sewer lines should be done in an orderly manner, and if an individual owner could file suit for disannexation, this would potentially subject the municipality to numerous suits.[60] While not particularly helpful for Smith, the Texas Legislature now allows an individual owner to file a writ of mandamus to enforce the service plan for his or her tract.[61] The city then has the choice of complying with the service plan or disannexing the smaller area.

In *City of Alton v. City of Mission*,[62] the Corpus Christi Court of Appeals held that a city cannot unilaterally repeal an agreement defining the extraterritorial jurisdiction ("ETJ") boundaries between the city and annex the land in question. In 1991, the cities of Mission and Alton signed identical ordinances agreeing to limitations on both cities' right to ETJ beyond set limits. In 2001, Alton passed an ordinance repealing its 1991 ordinance and annexed outside of the ETJ described in the 1991 ordinances. Mission sought a declaratory judgment that Alton breached their agreement. Alton counterclaimed that the 1991 agreements only covered subdivision regulations and did not give up Alton's power to annex property within its ETJ. The trial court found that Alton's action of repealing the ordinance was a breach of contract and granted Mission's summary judgment. Alton appealed.[63]

57. *Id.* at 689.
58. 161 S.W.3d 675 (Tex. App.—Eastland 2005, no pet. h.).
59. TEX. LOC. GOV'T CODE ANN. § 43.141(a) (Vernon 2005) (emphasis added).
60. *Smith*, 161 S.W.3d at 679.
61. *Id.* at 680.
62. 164 S.W.3d 861 (Tex. App.—Corpus Christi 2005, pet. filed).
63. *Id.* at 865.

While the court ruled that Alton could reduce its future ETJ, the court also found that Mission did not automatically receive the reduced or released area. Specifically, the court of appeals held that the city ordinances were unambiguous in defining extraterritorial jurisdiction for all purposes and that the legislative purpose could not have been to allow the expansion of one city's ETJ through the receipt of another city's future ETJ.[64] Legislation also provided that such ordinances were not just for subdivision regulation. The court further held that ordinances were contractual in nature; therefore, the city could not repeal an ordinance on the basis of public good.[65] Rather, a city's ETJ boundaries can only grow by annexation, population growth, or request.[66]

In *Hughes v. City of Rockwall*, the Dallas Court of Appeals held that private landowners had standing to seek arbitration under the Municipal Annexation Act.[67] Hughes was the executor of the Estate of W.W. Caruth, Jr., which owned land in Rockwall's ETJ. The Estate demanded arbitration, but Rockwall refused, contending that the Estate had no standing to demand arbitration unless compelled by a ruling in a *quo warranto* suit brought by the State.[68] Sparsely populated land is not required to be included in a municipality's three-year annexation plan. When a landowner is notified of a pending annexation, section 43.052(i) of the Texas Local Government Code allows the landowner to include the land in the three-year annexation plan.[69] If the city refuses, the landowner can request arbitration to have an arbitrator determine if "no reason exists under generally accepted municipal planning principles and practices for separately annexing the area."[70]

In this case, the court of appeals ruled that the legislature specifically authorized a private person to seek arbitration in passing section 43.052(i). As a result, the court reversed the trial court's order of dismissal and directed the trial court to compel arbitration and to prohibit annexation during the pendency of the annexation.[71]

In *City of San Antonio v. Summerglen Property Owners Ass'n*, a homeowners association and individual property owners were held not to have standing to challenge the city's proposed annexation of the property.[72] Following notice of the annexation, a series of negotiations regarding the service plan were held between the city and area representatives. The Summerglen representatives submitted an arbitration request, which was denied on the grounds that it was premature in light of the pending negotiations. Following the denial, suit was filed. The trial court denied the city's plea to the jurisdiction and granted a temporary injunction.

64. *Id.* at 869.
65. *Id.* at 870.
66. *Id.*
67. 153 S.W.3d 709, 710 (Tex. App.—Dallas 2005, pet. granted).
68. *Id.* at 712.
69. *Id.* at 711.
70. *Id.* at 711-12.
71. *Id.* at 714.
72. 185 S.W.3d 74 (Tex. App.—San Antonio 2005, pet. filed).

The San Antonio Court of Appeals reversed. With respect to the arbitration issue, the court discussed in detail the *Hughes* opinion. The city argued that *Hughes* was distinguishable because it had not refused to arbitrate and that the statutory right to arbitration could not prohibit an annexation.[73] The court of appeals agreed with the city, stating that the city was only manually postponing arbitration until after negotiations were concluded.[74] Furthermore, the court held that the arbitration should have been limited solely to the service plan under section 43.0564(a) of the Texas Local Government Code.[75] Finally, the court of appeals held that House Bill 585, which prohibited the annexation, was an unconstitutional local law.[76]

In *Freeman v. Town of Flower Mound*,[77] the Fort Worth Court of Appeals interpreted the disannexation provisions of section 43.141(a) of the Texas Local Government Code. The Town annexed approximately 5,000 acres in 1999, and the Freemans filed a petition to disannex 1,200 acres. The Town took no action on the petition, and the Freemans filed suit.

The question before the court of appeals was whether or not a majority of the qualified voters within the 1,200-acre tract or the 5,000-acre tract were necessary to trigger the disannexation process. The court held that, because the service plan was prepared for the entire 5,044-acre tract, the Freemans alone could not trigger the petition process.[78] Therefore, the trial court's granting of the Town's plea to the jurisdiction was deemed proper.

V. ZONING

In *Baird v. City of Melissa*,[79] a recreational vehicle park owner challenged the city's termination of the park as a nonconforming use. In 1991, the city amended its comprehensive zoning ordinance to delete RV parks as a permitted use. In 2003, the city included a provision in its comprehensive zoning ordinance to provide an "amortizing" mechanism for nonconforming uses.[80]

The court held a hearing and gave Baird two and a half weeks to remove all RVs from the property. Following filing of the suit, the trial court granted the city's motion for summary judgment. Addressing Baird's claim of equitable estoppel, the Dallas Court of Appeals noted that Baird increased the number of RVs from five to eighteen without receiving permission from the city. As a result, this was not an "exceptional case" warranting equitable estoppel to prevent "manifest injustice."[81]

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73. *Id.* at 85.
74. *Id.*
75. *Id.*
76. *Id.* at 86-87.
77. 173 S.W.3d 839 (Tex. App.—Fort Worth 2005, no pet. h.).
78. *Id.* at 841.
79. 170 S.W.3d 921 (Tex. App.—Dallas 2005, pet. denied).
80. *Id.* at 924.
81. *Id.* at 928 (citing Hutchins v. Prasifka, 450 S.W.2d 829, 836 (Tex. 1970)).

Essay


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