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ADMINISTRATIVE LAW

JUDICIAL REVIEW OF ADMINISTRATIVE ACTIONS UNDER STATUTORY OR CONSTITUTIONAL AUTHORITY

THREE attacks on administrative orders were made in the courts in 1948 under express statutory right of judicial review. In *Hawkins v. Texas Company*[1] an effort was made to cancel a drilling permit of the Railroad Commission, and appeal was taken in accordance with the provision of Texas Civil Statute Article 6049c, Section 8.[2] The special permit, granted to Hawkins as an exception to Rule 37 and "to prevent physical waste," allowed him to drill a tenth well on a 21.6 acre tract of land in the East Texas oil field. The Texas Company, owner of an oil and gas lease of a 30.54 acre tract, lying north of and immediately adjoining the 21.6 acre tract, and on which there are six producing wells, filed suit to test the validity of the permit. The decision of the trial court cancelling the permit was affirmed by the Court of Civil Appeals. Both Hawkins and the Railroad Commission of Texas appealed. The Supreme Court affirmed the lower courts' judgment. The decision involved application of the "substantial evidence" rule and has been discussed previously.[3]

Citizens and tax-payers of a home-rule city attacked the validity of a city ordinance in *Forwood v. City of Taylor*.[4] Suit was instigated in the district court to enjoin collection of taxes under Texas Civil Statute Article 1176b-2,[5] which provides that persons whose rights were adversely affected by ordinances of home-rule cities, enacted in violation of Chapter 13 of Title 28, Texas Civil Statutes, are entitled to injunctive relief in any court of compe-

[1] Hawkins v. Texas Company, 146 Tex. 511, 209 S. W. (2d) 338 (1948).
[2] TEX. REV. CIV. STAT. (Vernon, 1948) art. 6049c, § 8.
[3] Comment, 2 SOUTHWESTERN L. J. 334 (1948).
[4] Forwood v. City of Taylor, ... Tex. ....., 214 S. W. (2d) 282 (1948).
[5] TEX. REV. CIV. STAT. (Vernon, 1948) art. 1176b-2.

tent jurisdiction upon proper application and satisfactory proof. It was alleged that the ordinance in question was void in that it provided for a board of equalization of nine members rather than three members as prescribed by Texas Civil Statutes Article 1048.[6] The Supreme Court affirmed the trial court's action in denying the injunction, pointing out that Article 1048 (contained in Chapter 5, rather than Chapter 13, of Title 28) applies only to cities incorporated under the general laws, that Taylor, Texas, is incorporated under home-rule charter, and that it therefore was subject to statutes relating to home-rule cities. Since the Enabling Act[7] did not limit the number of members of boards of equalization the act of the home-rule city was authorized and the ordinance created a *de jure* board.

In *Canales v. Laughlin*[8] citizens went to a district court to enjoin action under a resolution of a commissioners court. The district courts are given appellate jurisdiction over the commissioners courts under the Constitution.[9] Plaintiffs claimed the resolution was void since it created an office not provided by statute. The resolution called for roads to be built, operated, and maintained as a unit, and in addition provided for a county road unit administration officer with broad powers. Decisions of the lower courts that the resolution was authorized were reversed by the Supreme Court, which rendered judgment for the plaintiffs. Holding that such an office is not expressly provided for by statutes, the Supreme Court reviewed relevant articles, Texas Civil Statute Articles 6716-1 and 6737-61,[10] to see if the appointment could be justified under another name. The court decided that if he were considered a road commissioner or superintendent, the appointee, who was to receive $390 monthly, was paid too much in violation of Article 6737, which limits road commissioners to two dollars

[6] TEX. REV. CIV. STAT. (Vernon, 1948) art. 1048.
[7] TEX. REV. CIV. STAT. (Vernon, 1925) art. 1165 *et seq.*
[8] Canales v. Laughlin, ___ Tex. ___, 214 S. W. (2d) 451 (1948).
[9] TEX. CONST., Art. V, § 8.
[10] TEX. REV. CIV. STAT. (Vernon, 1948) art. 6716-1, art. 6737-61.

a day, and Article 6745, which limits road superintendents to $1200 per annum in counties with over 15,000 inhabitants. In addition, the resolution was passed in a special session instead of a regular session and no term of employment was mentioned as provided by Article 6743. If he were considered a county engineer, the court pointed out that no vote by qualified voters to authorize the appointment by the commissioners court was held as required by Article 6716-1 and no statement was made that he met the qualifications required by Article 6716-1. After discussing these articles, the court held that, since the statutory requirements for appointment had not been observed, the action of the commissioners court, in so far as the appointment was concerned, was void. In answer to the defendant's claim that the resolution was valid under Texas Civil Statute Article 1580,[11] which authorizes appointment of agents by the commissioners courts for certain named purposes "or for any other purpose authorized by law," the Supreme Court said that Article 1580 was intended to cover the employment of agents in situations which are not covered by specific statutes and that the specific statutes discussed are controlling in this case over the general provision of Article 1580.

Necessity of Exhausting Administrative Remedies Before Resort Is Taken to the Courts—Application to Municipalities

The general rule is that persons aggrieved by administrative actions may not have recourse to the courts until they first have exhausted their administrative remedies.[12] A case of first impression on an unique aspect of this principle arose in 1948 in *Rosenthal v. City of Dallas*,[13] where it was successfully contended that the rule applied not only to individuals but might likewise be

[11] Tex. Rev. Civ. Stat. (Vernon, 1948) art. 1580.

[12] 42 Am. Jur. 580 (1942).

[13] Rosenthal v. City of Dallas, 211 S. W. (2d) 279 (Tex. Civ. App. 1948) *writ of error refused.*

extended to municipalities in zoning cases involving the application of Texas Civil Statute Article 1011g,[14] which says in part:

> "Appeals to the board of adjustment may be taken by any person aggrieved or by any officer, department, board, or bureau of the municipality affected by any decision of the administrative officer. Such appeal shall be taken within a reasonable time, as provided by the rule of the board, by filing with the officer from whom the appeal is taken and with the board of adjustment a notice of appeal specifying the grounds thereof."

City of Dallas brought an action, in which twenty-six interested persons intervened, to enjoin alleged violation of a zoning ordinance and maintenance of public and private nuisances by defendant. Operating under a city permit issued by an assistant city building inspector, defendant was engaged in cold storage and meat curing. Alleging the area was zoned for apartments and that a prior non-conforming use of the premises for cold storage had been abandoned at the time the permit was issued, the city claimed that the permit under which the defendant was operating was void *ab initio* and that the action of its agent in issuing it was unauthorized.

The defendant pleaded *res ajudicata* or binding effect of the original permit on all the plaintiffs, that his use of the property was merely the continuation of a valid non-conforming use, that the city was estopped to order revocation because vested rights had accrued to the defendant by valuable improvements he had made and by operation of the plant for eighteen months with knowledge of city officials and the interveners, and that the threatened restriction of his property to an apartment use would constitute a taking without due process of law.

On the first hearing, two of the appellate justices held that, while the prior non-conforming use had not been abandoned at the time the permit was issued, it had been so changed by the defendant in making his dominant enterprise meat processing,

[14] TEX. REV. CIV. STAT. (Vernon, 1948) art. 1011g.

with refrigeration a mere incident, as to be terminated in fact, that the issuance of the permit was unauthorized because violative of a zoning ordinance, that a city is not estopped by the mistake or unauthorized or wrongful act of its officers or agents, that the defendant was creating a nuisance by its operations, and that the trial court's decision in granting a permanent injunction should be affirmed, modified, however, to the extent of releasing the mandatory order for the defendant to tear down or remove his buildings erected in accordance with the permit. In answer to the defendant's plea that the action was a collateral attack, the court held that the municipality was not bound by Article 1011g when an act of its building inspector is challenged as void and violative of the zoning ordinance.

The dissenting justice, Justice Looney, held that the prior nonconforming use had not been abandoned at the time the permit was issued, that the change in use by the defendant was not supported by pleadings of the plaintiff and should not be considered but that even if it were considered the change in use did not fall outside the interpretation of "cold storage" given by city officials, and that testimony of city inspectors indicated that no nuisance existed. Holding that the doctrine of estoppel applies to cities as well as to individuals and corporations, the dissent said that the plaintiffs were estopped to revoke the permit since it had been issued by an authorized agent of the city and no appeal had been taken to the board of adjustment under Article 1011g either by city officials or by interested individuals, or to complain of the failure of the defendant to obtain an additional permit for the extra expenditures or erections and alterations of buildings, since the city, through its various officers and agents, knew such work was progressing but failed to take any official action to stop it for eighteen months. Ruling that the permit was authorized and valid, the dissent held that since no appeal was made by any of the plaintiffs as provided by Article 1011g, the permit cannot now be collaterally attacked.

On rehearing, one of the justices for the majority joined the