Zoning and Land Use

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During the survey period, Texas courts had occasion to rule on the procedural prerequisites to bring land-use suits against governmental entities. Unless a valid claim is brought and a final determination has been reached by the governmental entity, an inverse condemnation suit will be dismissed for lack of jurisdiction.

I. INVERSE CONDEMNATION

Sovereign immunity issues are often subject to pleas to the jurisdiction. The Texas Supreme Court has held numerous times over the years that sovereign immunity has been waived for inverse condemnation causes of action. In 1941, the Texas Supreme Court first stated that sovereign immunity is waived in inverse condemnation causes of action under the Texas Constitution.¹

A. INVERSE CONDEMNATION CLAIM WAIVES IMMUNITY

While governmental entities generally are entitled to immunity from suit and/or damages, they are not immune from damage claims brought under article I, section 17 of the Texas Constitution.² However, these inverse condemnation claims must be valid.

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¹ State v. Hale, 146 S.W.2d 731, 735-36 (Tex. 1941).
² See id. at 736.
In *City of Argyle v. Pierce*, the court considered governmental immunity in relation to the pleading of a valid inverse condemnation claim. In this case, Pierce, a property owner near the City of Argyle, and Clear Channel Outdoor, Inc. entered into a lease allowing Clear Channel to build an off-premise outdoor advertising sign on Pierce's property. The City, believing that the sign was located within its extraterritorial jurisdiction (ETJ) and was therefore in violation of a city ordinance prohibiting “[s]igns advertising off-premise businesses, products or services.” The city stopped construction of the sign and filed complaints against Pierce and the president of the Dallas Division of Clear Channel. Pierce and Clear Channel then filed a lawsuit in state court, claiming that the sign, the permit for the sign, Pierce's fee interest in the land, and Clear Channel's leasehold interest were subject to inverse condemnation. The City responded by filing a plea to the jurisdiction which the trial court denied without specifying reasons for the denial.

The Fort Worth Court of Appeals addressed the trial court's denial. The City claimed that the trial court erred in denying its plea to the jurisdiction because Pierce and Clear Channel did not "show that the City's sovereign immunity [had] been waived." Governmental immunity affords a city protection from suit when the city engages in the exercise of a governmental function unless that immunity is clearly waived; however, article I, section 17 of the Texas Constitution waives governmental immunity for valid inverse condemnation claims. The court's decision, therefore, turned on whether Pierce and Clear Channel had stated a valid inverse condemnation claim. "A compensable regulatory taking occurs when a governmental agency imposes restrictions that either deny a property owner all economically viable use of his property or unreasonably interfere with the owner's right to use and to enjoy the property.”

The court noted that the Texas Administrative Code states that "issuance of a permit shall not be deemed to create a property right in the permittee," and, as such, the permit was not "a property interest compensable as a result of inverse condemnation." Likewise, the court held that Pierce and Clear Channel failed to provide evidence to support the contention that the billboard was a fixture, thus giving rise to a property right that should be compensated when the property is taken. The court went on to point out that neither Pierce's interest in the land nor Clear Channel's interest in the lease supported an inverse condemnation.
claim. As stated by the court, "there is no constitutional property right to use realty in any certain way without restriction." Because Pierce and Clear Channel could still use the property and the leased portion of the property for a multitude of purposes other than an outdoor advertising sign, the court held that they had not alleged facts sufficient to support a claim of inverse condemnation. The court ultimately held that because Pierce and Clear Channel failed to state any valid inverse condemnation claim, "governmental immunity applies, and the trial court should have granted the City's plea to the jurisdiction."

In *City of Dallas v. Zetterlund*, the Dallas Court of Appeals held that the landowner had pled sufficient facts showing that the City had used his property as a staging site for construction of a new water pipeline so as to survive a plea to the jurisdiction by the City. Zetterlund owned an undeveloped tract on Harry Hines Boulevard. City contractors used his land as a staging area without Zetterlund's consent, and he filed suit.

The trial court denied the City's plea to the jurisdiction that alleged that there was no intentional act of taking private property because its contractors acted negligently. Zetterlund produced evidence that, after discovering the nonconsensual staging operation, he notified City employees who acknowledged the illegal use. While the City employees disputed this evidence, the court of appeals held that the evidence was sufficient to raise a fact issue as to the City's knowledge after Zetterlund discovered the land invasion.

In addition, the City argued that Zetterlund's claim failed because the land invasion was not for a "public use." Because the use of the property furthered the construction of a municipal pipeline, the court held that it constituted public use. Further, the contractors selected this tract because it was a more advantageous location for the staging area. As a result, the court of appeals upheld the trial court's denial of the City's plea to the jurisdiction.

With limited exceptions, governmental entities are also immune from tort liability. Immunity was an issue in a case involving a torts and inverse condemnation suit brought by an owner of an apartment complex against the City and Councilmember Haskin in *Texas Bay Cherry Hill, LP v. City of Fort Worth*. Due to a high concentration of low-income

13. *Id.*
14. *Id.*
15. *Id.* at 685.
16. *Id.* at 685-86.
17. 261 S.W.3d 824, 831, 834 (Tex. App.—Dallas 2008, no pet.).
18. *Id.* at 826.
19. *Id.* at 827.
20. *Id.* at 829.
21. *Id.* at 831.
22. *Id.* at 832.
23. *Id.* at 833.
24. *Id.* at 833-34.
25. *Id.* at 834.
apartments in the Woodhaven neighborhood, the City hired a consultant to create a Woodhaven master development plan (the Plan). The consultant proposed the redevelopment of Cherry Hill's apartments for mixed use. While the Plan stated that the Fort Worth City Council would not use its power of eminent domain to accomplish this goal, "the City sued Cherry Hill to abate common and public nuisances under chapter 125 of the Civil Practice and Remedies Code."  

The parties agreed "to abate the lawsuit and cooperate . . . to reduce criminal activity" at the project. Cherry Hill then filed suit against the City, Councilmember Haskin, and Woodhaven Community Development, Inc., alleging they conspired to diminish the apartment complex's value for future acquisition. "After a hearing, the trial court granted the City's plea to the jurisdiction" and dismissed Haskin.

The City's plea to the jurisdiction claimed that the trial court lacked jurisdiction because (1) the City was immune from the "business defamation, tortious interference, and conspiracy claims," and (2) Cherry Hill's declaratory judgment and injunctive relief causes of action were not ripe. Immunity from suit defeats a trial court's jurisdiction. "A municipality is liable for torts arising from the exercise of its proprietary functions, but it is generally immune from suit and liability for torts arising from . . . its governmental functions."

The threshold question was whether the City's adoption of the Plan was a governmental or proprietary function. There are thirty-six governmental functions enumerated in the Texas Torts Claim Act. The City claimed that the "adoption of the Plan was an exercise of its planning function under section 101.0215(a)(29)." Because the Plan "laid out a program for the future redevelopment of the Woodhaven area for the common interest," the court agreed that "the adoption of the Plan was a governmental function."

Furthermore, the Plan was a community development plan under section 101.0215(a)(34). Therefore, Cherry Hill's tort causes of action were dismissed.

Cherry Hill's amended petition sought six declarations. All of the declarations were "relate[d] to the alleged illegality and unconstitutionality of the City's exercise of its eminent domain powers in connection with

27. Id. at 386.
28. Id.
29. Id. at 387.
30. Id.
31. Id.
32. Id. at 388.
33. Id. at 389.
34. Id.
37. Id. at 389-90.
38. Id. at 390.
39. Id. at 393.
40. Id.
the Plan." The Fort Worth Court of Appeals noted that the City had expressly stated that it would not exercise its eminent domain powers in furtherance of the Plan and had in fact not done so. The trial court's refusal to review the declaratory judgment action did not present a hardship to Cherry Hill, which could assert its claim if and when the City decided to exercise its eminent domain authority. For these reasons, Cherry Hill's declaratory judgment and injunction causes of action were not ripe for adjudication.

With respect to Cherry Hill's pleadings that the "City [had] acted in bad faith to damage Plaintiff's business and diminish the value of Plaintiff's property," the parties agreed that "governmental [entities have] no immunity from an inverse condemnation claims [sic]." A regulation is a taking if (1) it compels the owner to suffer a physical invasion of the owner's property, (2) it deprives the owner of all economically beneficial use of the property, or (3) it imposes restrictions that unreasonably interfere with the owner's right to use and to enjoy the property. Cherry Hill did not allege facts that would meet the first two tests.

The factors to be considered under the third test are "(1) the economic impact of the regulation and (2) the extent to which the regulation interferes with reasonable investment-backed expectations." As of the trial date, the Plan had not been implemented. As a result, the Plan "had no economic impact on Cherry Hill's apartments." While the Texas Constitution waives immunity with respect to inverse condemnation lawsuits, there is no statutory or constitutional waiver as to conspiracy claims to create an inverse condemnation. Because the Plan existed only on paper, there could be no taking and a dismissal for want of jurisdiction was deemed appropriate.

B. FAILURE TO FILE A PERMIT APPLICATION MAKES SUIT UNRIPE

Ripeness refers to the readiness of a case for litigation; a "claim is not ripe for adjudication if it rests upon 'contingent future events that may not occur as anticipated, or indeed may not occur at all.' " Ripeness is a necessary component of subject matter jurisdiction. The requirement

41. Id.
42. Id. at 394.
43. Id.
44. Id.
45. Id. at 394-95.
46. Id. at 395 (citations omitted).
47. Id. at 396.
48. Id.
49. Id.
50. Id.
52. Atmos Energy Corp. v. Abbott, 127 S.W.3d 852, 857 (Tex. App.—Austin 2004, no pet.); see also Aguilar v. Weber, 72 S.W.3d 729, 731 (Tex. App.—Waco 2002, no pet.) (stating that subject matter jurisdiction may be addressed for first time on appeal, and a court may make this inquiry on its own accord).
that a claim be ripe for review is based on the prohibition against courts’ issuing of advisory opinions. A claim is ripe if the facts involved demonstrate that “an injury has occurred or is likely to occur.” In other words, there must be a concrete injury for the claim to be ripe. A claim is not ripe if it is based on hypothetical or contingent facts that may not occur as anticipated or may not occur at all.

After the City of Dallas filed a complaint against a property owner for demolishing a historical structure, the owner filed an inverse condemnation case that was found to be unripe. TCI owned a former railroad depot building in the historic West End. The City revoked a demolition permit it had issued and ordered a halt to the demolition process. Despite the revocation, TCI demolished the building anyway.

The City filed suit to have the building reconstructed and asked for damages. TCI filed its inverse condemnation claim against the City and the Texas Historical Commission (the Commission), which then filed pleas to the jurisdiction. The trial court granted both pleas, holding that (1) it did not have jurisdiction, (2) TCI’s inverse condemnation claim was not ripe, and (3) the conspiracy claims against the City and the Commission were barred by governmental immunity.

The Commission as a state agency possesses immunity from suit and liability unless the immunity is waived. TCI stated in its pleadings that the Commission had waived any immunity rights by intervening to seek damages for destruction of a historical structure under section 315.006 of the Texas Local Government Code. The Dallas Court of Appeals held that the mere intervention by the Commission did not cause TCI to suffer a physical invasion of its property, destroy all economically viable use of the property, or otherwise result in a regulatory taking. Because TCI could not show a valid waiver of immunity under article I, section 17 of the Texas Constitution, the trial courts granting the Commissioner’s plea to the jurisdiction was upheld.

With respect to the City’s ripeness claim, TCI agreed that there must be a final determination of the application of the regulations to the property. TCI argued that its takings claim had “already occurred because it [had] lost total productive use of the area where the building once stood, and it suffered a diminution in value when it was forced to sell an option

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53. Patterson v. Planned Parenthood, 971 S.W.2d 439, 442 (Tex. 1998); see Tex. Const. art. II, § 1 (separation of powers); Brooks v. Northglen Ass’n, 141 S.W.3d 158, 164 (Tex. 2004) (noting that the separation of powers provision bars issuance of advisory opinions).
54. Patterson, 971 S.W.2d at 442.
55. See Atmos Energy Corp., 127 S.W.3d at 858.
57. TCI W. End, Inc. v. City of Dallas, 274 S.W.3d 913, 915-17 (Tex. App.—Dallas 2009, no pet.).
58. Id. at 915.
59. Id.
60. Id. at 916.
61. Id. at 917-19.
62. Id. at 919.
at half the alleged market value."\textsuperscript{63} Thus, TCI argued, any future actions would be futile.\textsuperscript{64}

The court found that the City's filing of the lawsuit to remedy TCI's misconduct for violating a historical district ordinance and lacking a demolition permit did not constitute a taking. While the filing of the lawsuit by the governmental entity may eventually result in a taking, the act itself does not cause property to be "taken, damaged or destroyed for a public use."\textsuperscript{65} Further, on the prospect that the creation of a constructive trust by the Commission might raise a fact-in-issue as to a taking, the court held that it was "not in a position to review or rule on such hypothetical relief."\textsuperscript{66}

With respect to TCI's regulatory taking claim that the City prevented it from removing debris, the court found that TCI did not appeal the demolition permit revocation to the City's appeals board.\textsuperscript{67} Because the City never had the "opportunity to exercise its full discretion in considering the plans for the building before TCI demolished it," there was no final determination and the inverse condemnation claim was not ripe for adjudication.\textsuperscript{68}

The El Paso Court of Appeals made a similar ruling when it held for the governmental entity and dismissed the landowner's ruling claim based on ripeness grounds in \textit{City of El Paso v. Maddox}.\textsuperscript{69} The owner of a landlocked tract anticipated that his property would obtain public-street access through an adjoining mall site. His belief was based on a "1974 Subdivision Ordinance and City policy which required a subdivider to provide access to adjoining unplatted areas."\textsuperscript{70}

"In 1992, the Appellees asked the City to enforce the 1974 ordinance against [the adjoining mall site], and the City Council instructed the City attorney to do so."\textsuperscript{71} However, the City then "rescinded its prior order and amended the 1974 ordinance to eliminate the requirement for public streets in a shopping center with internal lots."\textsuperscript{72} The plaintiff's petition alleged that the "amendment to the 1974 Subdivision Ordinance and its retroactive application" rendered the property unusable and of no value.\textsuperscript{73}

"[T]he City filed a plea to the jurisdiction alleging that the trial court lacked jurisdiction because [the] claim of a regulatory taking [was] un-

\begin{flushright}
63. \textit{Id.} at 920.
64. \textit{Id.}
65. \textit{Id.}
66. \textit{Id.}
67. \textit{Id.} at 921.
68. \textit{Id.}
70. \textit{Id.} at 68-69.
71. \textit{Id.} at 69.
72. \textit{Id.}
73. \textit{Id.}
\end{flushright}
ripe."

At the hearing on the plea, the parties relied on written evidence attached to their pleadings. The City's primary argument was that, after the ordinance was amended, the landowner plaintiffs had not submitted a development application. As a result, there had been no final decision regarding access to the tract, particularly in light of the fact that the City owned land adjacent to and in the vicinity of the tract which might have allowed public-street access of some land. "Following the hearing, the court denied the plea to the jurisdiction and the City filed notice of accelerated appeal."

Appellees claimed that submitting a permit application would have been futile. Further, they argued that the City staff did not want the application to be approved. The court of appeals rejected this argument because the landowner had abandoned his original development plans and had not submitted a new plan since the ordinance was amended. Because the City did not have the opportunity to make a final determination as to a development plan or variance, the court reversed and dismissed the takings claim without prejudice.

The issue of ripeness in an exactions context was addressed in City of Dallas v. Chicory Court Simpson Stuart, L.P. Chicory owned a tract on which it desired to build a single-family subdivision. Representatives of Chicory and the City met to discuss the drainage construction improvements that would be required for the project. The City took the position that Chicory would need to build a large enough drainage system to accommodate its subdivision and the potential development of an adjoining tract.

Chicory's engineers met with staff and orally proposed to divert the flow of water but to keep the entire water course above ground. Staff responded that Chicory's proposed drainage system would have to be constructed below-grade. The evidence established that Chicory never submitted a written plan to the City showing the above-grade option.

Subsequently, Chicory submitted a written plan showing a combination of below- and above-grade drainage improvements. This plan would have been less expensive than solely installing pipes underground. Chicory's engineers brought up the option of constructing a detention pond, but the City's staff warned that it would take a significant amount of time to review such plans. Due to time-related funding constraints, it was infeasible for Chicory to prepare plans for a potentially lengthy city

74. Id.
75. Id.
76. Id. at 69-70.
77. Id. at 70.
78. Id.
79. Id. at 72.
80. Id. at 75.
82. Id. at 415.
83. Id. at 418-19.
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The last conference between the parties’ engineers occurred in March 2005. Chicory’s engineers testified that they orally revived their request for an exception to the City’s drainage ordinance requirements, which was apparently denied orally by the City’s representatives. The parties then exchanged e-mails, and “Chicory built the underground [system] at a cost of $372,440.52 and dedicated it to the City.” Chicory’s last e-mail stated it would build the underground system but was not waiving its legal right to seek “reimbursement from the City as permitted by applicable law.”

After the trial court denied its plea to the jurisdiction, the City filed an interlocutory appeal. The Dallas Court of Appeals held that Chicory’s exactions case was not ripe and reversed the trial court. While there are occasions when an oral, as opposed to a written, denial can constitute a final determination, in this case, Chicory was given the opportunity to submit a written plan but failed to do so.

The Austin Court of Appeals found that a city employee’s letter stating that the developer’s plans did not comply with relevant zoning restrictions was not a final determination in Buffalo Equities, Ltd. v. City of Austin. Buffalo Equities, Ltd. (BEL) wanted to develop its property for mixed use and submitted a rezoning application. In addition to showing its own property in the application, BEL included an easement it owned on an adjacent tract, which was to be used as a driveway providing access to the tract being recorded. A city employee wrote a letter to BEL stating that the easement could not be included in the rezoning application.

After receiving the letter, BEL asked the City’s Planning and Zoning Commission to initiate a rezoning request on the easement tract for commercial purposes to accommodate BEL’s rezoning application. In 2004, BEL filed suit against the City seeking declarations that “the City’s rules and regulations [did] not prohibit the use of the driveway as part of [BEL’s mixed-use] development” and that “the owner of an easement may file an application to rezone the easement.” In addition, “BEL brought a regulatory takings claim against the City.”

The City filed a plea to the jurisdiction based on the grounds that the letter constituted a “use determination” that should have been appealed.

84. Id. at 419-20.
85. Id. at 421.
86. Id. at 420.
87. Id.
88. Id. at 415.
89. Id. at 424.
90. Id. at 421-22.
92. Id. at *1.
93. Id.
94. Id. at *2.
95. Id.
to the City's Board of Adjustment. BEL argued that it was unnecessary to exhaust administrative remedies because the City was obligated to accept the rezoning application for the easement tract. Because the declarations allegedly involved simply questions of law, there was no need to exhaust remedies.

The court disagreed and found that issues on appeal would not be resolved by consideration of mere questions of law and "would involve consideration of significant factual matters." Further, the court of appeals found it significant that "BEL did not file an actual site-plan application." Therefore, the City had "taken no position on whether it would approve an application." Because BEL did not appeal the city employee's letter or file a site-plan application, its cause of action was not ripe.

C. City Council Denial of a Permit Application Makes Case Ripe

The Dallas Court of Appeals ruled that development regulations can be so onerous as to render a tract of land valueless in City of Sherman v. Wayne. Wayne purchased an old Texas National Guard army and vehicle storage building in Sherman. At the time of purchase, the property was zoned residential, but Wayne believed the property was "grandfathered" as a nonconforming use. After Wayne became aware that the City intended to enforce the residential zoning, which would prevent his proposed trucking use, he filed an application to rezone the tract to industrial commercial. The Sherman City Council (the Council) denied the application, and Wayne filed suit.

According to the City, Wayne's claim was not ripe because the denial of only one zoning application was insufficient in light of the many available uses between the existing and requested zoning. During the rezoning process, the City's Planning and Zoning Board (the Board) asked Wayne to agree to numerous operational restrictions on the truck use. The court found the applicant's willingness to comply with the numerous requested applications to be significant. Although the Board recommended approval, the Council unanimously denied the request with three councilmembers commenting that the tract should have a residential use.

The court concluded that the evidence was sufficient to allow the City to reach a final decision regarding the use of the property. Wayne did

96. Id. at *2, *4.
97. Id. at *5; see Henry v. Kaufmann County Dev. Dist. No. 1, 150 S.W.3d 498, 503 (Tex. App.—Austin 2004, pet. granted, remanded); Jan. 28, 2005.
99. Id.
100. Id.
101. Id.
103. Id. at 40.
104. Id. at 41-42.
105. Id. at 42.
not deem any of the alternative uses suggested by the City as economically viable. "Wayne was not required to re-apply numerous times . . . [for rezoning] because the City's first refusal was clear and such additional efforts would have been futile."106

Wayne's appraisal experts testified that the costs to develop a residential subdivision would far exceed the lot revenues. There also was no demand for residential lots in the area. Wayne testified that the property with residential zoning had a negative value due to maintenance costs, taxes, and insurance.107

While the City introduced two appraisal reports into evidence to show that the tract had some value, neither assumed the property could be used solely for residential purposes.108 The reports assumed that the existing buildings could be reused and did not need to be demolished. Wayne's burden was not "to prove beyond all possible doubt" that the value of the property exceeded zero.109 The court of appeals upheld the trial court.110

D. If an Ordinance Does Not Allow Variances, a Case Is Ripe Without a Permit Application

Whether a Federal Emergency Management Association (FEMA) map revision, standing alone, resulted in a taking was addressed in City of Houston v. O'Fiel.111 The O'Fiels filed suit against the City after FEMA approved new maps that placed their property in the floodway. They argued that the City's floodplain regulations prohibited development of their property that resulted in a takings.112

The City filed a plea to the jurisdiction stating that the O'Fiels had never submitted a permit for a development and that the case was therefore not ripe for adjudication. In response, the O'Fiels pointed to the City's ordinance which stated that residential development of their property was expressly forbidden and no variances or exceptions were available.113 The trial court denied the City's plea to the jurisdiction.114

In this case, the Houston Code specifically prohibited development within the floodway on the O'Fiels' tract. The court pointed out the similarities to Suitum v. Tahoe Regional Planning Agency.115

In Suitum, the planning agency adopted rules that did not permit any development of the land at issue. The U.S. Supreme Court ruled that the

106. Id.
107. Id. at 44-45.
108. Id. at 46.
109. Id. at 46-47.
110. Id. at 51.
112. Id. at *1.
113. Id. at *2.
114. Id. at *6.
agency's lack of discretion to allow any development of Suitum's property made the case ripe. 116 In O'Fiel, the City of Houston did not raise a fact issue suggesting any variances to the regulations might be granted. As a result, the Houston Court of Appeals held that the issue of whether the Houston Code constituted an unconstitutional regulatory taking of the O'Fiel's property was ripe for adjudication. 117

The court of appeals pointed out that a challenge to a land-use regulation can be on its face or as applied to a particular development. 118 O'Fiel's claim was based on the theory that, regardless of how it was applied, the City's Code amounted to an unconstitutional taking. 119 Citing the Texas Supreme Court opinion in Mayhew v. City of Sunnyvale, 120 the court pointed out that the variance requirement is applied flexibly to allow the governmental entity to come to a final decision. 121 Thus, the court of appeals held that, where an ordinance prohibits exceptions, it would be futile to file such an application. 122

II. DECLARATORY JUDGMENT ACT

A community organization brought a Texas Open Meetings Act violation in City of Austin v. Savetownlake.org. 123 Savetownlake.org brought suit against the City seeking a declaratory judgment that the 1999 recodification of the Land Development Code was void because the City violated the Act as well as state and federal due process rights. The organization claimed that the Austin City Council agenda listed the item as nonsubstantive changes when the City actually made substantive changes to the ordinance. 124

The City filed a plea to the jurisdiction arguing, among other things, that Savetownlake.org lacked direct or associated standing, its claims were not ripe, sovereign immunity barred the claims, and Savetownlake.org's petition contained false statements in an effort to confer jurisdiction. Following a hearing, the trial court denied the plea to the jurisdiction. 125 The City's interlocutory appeal followed. 126

Savetownlake.org was interested in two particular site plans. The City argued that it revised the ordinance regarding appeal rights in 2007 and that Savetownlake.org's claims were now moot. However, the City was

116. Id. at 744.
118. Id. at *3 (citing Keystone Bituminous Coal Ass'n v. DeBenedectis, 480 U.S. 470, 494 (1987)).
119. Id.
120. 964 S.W.2d 922, 930 (Tex. 1998).
122. Id. at *3 (citing Halico Tex. Inc. v. McMullen County, 221 S.W.3d 50, 60 (Tex. 2006)).
124. Id. at *1.
125. Id.
126. Id. at *2.
prohibited from changing its regulations after the site plan was filed. Thus, the 2007 changes to the City's ordinance did not render Savetownlake.org's complaints moot. 127

The trial court found that the City's arguments were actually focused on the merits of Savetownlake.org's claims. 128 Based on the record, the trial court properly exercised its discretion to require a "fuller development of the case." 129

III. ANNEXATION

The right of landowners to mount a private challenge of an annexation ordinance was addressed in Town of Fairview v. Lawler. 130 The Town of Fairview sought to annex a portion of Lawler's property by ordinance in 2004. 131 The same property was previously subject to annexation by the Town in 1999; however, Lawler successfully challenged the annexation under section 43.033(b) of the Texas Local Government Code. As a result, the Town was forced to disannex the property by ordinance in 2000.

Challenging the 2004 annexation of his property, Lawler filed suit alleging the 2004 annexation was unlawful because the Town was precluded from annexing Lawler's land under section 43.141 of the Texas Local Government Code. Section 43.141, entitled "Disannexation for Failure to Provide Services," provides that if an "area is disannexed under this section, it may not be annexed again within ten years after the date of the disannexation." 132 Alternatively, Lawler alleged that the annexation was unlawful because "the Town's notice of the meeting to annex his property 'did not meet the notice requirements mandated by the Texas Open Meetings Act.'" 133

While the trial court agreed with Lawler, the Dallas Court of Appeals did not. 134 Relying on the clear language of section 43.141, the court found that section 43.141 was applicable only to "areas disannexed under section 43.141." 135 Lawler had challenged the 1999 annexation of his property, and the property was in fact disannexed, under section 43.033, not under section 43.141. Thus, the court held that Lawler's challenge failed because "the ten-year limitation set forth in section 43.141(c) does not preclude the Town's 2007 attempted annexation of Lawler's property." 136

The court also rejected Lawler's procedural challenge to the annexation of his property. Lawler's suit amounted to a private challenge of an

127. Id. at *6.
128. Id. at *4.
129. Id.
130. 252 S.W.3d 853 (Tex. App.—Dallas 2008, no pet.).
131. Id. at 855.
132. TEX. LOC. GOV'T CODE ANN. § 43.141(c) (Vernon 2008).
133. Town of Fairview, 252 S.W.3d at 857.
134. Id.
135. Id. at 856-57.
136. Id. at 857.
annexation ordinance and such a challenge is permitted in only limited circumstances.\textsuperscript{137} The court affirmed that a \textit{quo warranto} action brought by the State is the only proper method for attacking the validity of a city's annexation of property.\textsuperscript{138} "In contrast, a private challenge of an annexation ordinance is proper only when the ordinance is void or the Legislature expressly grants a private right to challenge the annexation in some manner."\textsuperscript{139} Thus, "[t]he only proper method for challenging 'procedural irregularities such as lack of notice, adequacy of the service plan, lack of quorum for hearing, and other defects in the process of adopting an annexation ordinance' is a \textit{quo warranto} suit by the State."\textsuperscript{140}

In this case, Lawler did not contend that the Legislature expressly granted him a private right to challenge the annexation nor did he raise an issue whether the proposed annexation by the Town would be void. Thus, the court held that the Lawler's challenge to the Town's authority to annex his property based on the Texas Open Meetings Act violations failed for lack of standing.\textsuperscript{141}

**IV. VESTED RIGHTS**

The San Antonio Court of Appeals considered the application of the Vested Rights Statute to a developer seeking to avoid enforcement of a tree preservation ordinance in \textit{Continental Homes of Texas, L.P. v. City of San Antonio}.\textsuperscript{142} Continental Homes of Texas (Continental) was the developer of a tract of land located in the extraterritorial jurisdiction (ETJ) of the city of San Antonio.\textsuperscript{143} Prior to Continental purchasing the land and beginning development activities, the previous owners applied for a vested rights permit from the City.\textsuperscript{144} The vested rights permit was granted in March 2002 and stated that it was effective as of August 29, 1991.\textsuperscript{145} In February 2005, engineers, acting on behalf of the previous owners of the property submitted a Master Development Plan (MDP) to the City as well as a Master Tree Stand Delineation.\textsuperscript{146} The City subsequently approved the MDP, but rejected the Master Tree Stand Delineation stating that "this project will be subject to the . . . 2003 Tree Preservation ordinance . . . . No Tree Preservation plan is approved for this MDP."\textsuperscript{147}

Continental acquired the land and began development in 2006.\textsuperscript{148}

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\textsuperscript{137} Id. at 856-57.
\textsuperscript{138} Id. at 857.
\textsuperscript{139} Id. at 856.
\textsuperscript{140} Id. at 854.
\textsuperscript{141} Id.
\textsuperscript{142} 275 S.W.3d 9 (Tex. App.—San Antonio 2008, pet. filed).
\textsuperscript{143} Id. at 12.
\textsuperscript{144} Id.
\textsuperscript{145} Id.
\textsuperscript{146} Id.
\textsuperscript{147} Id.
\textsuperscript{148} Id.
Without applying for a tree permit, Continental began removing trees. The City issued a stop work order, obtained a temporary restraining order, and subsequently filed a petition seeking a permanent injunction to prevent the removal of trees. Continental reviewed the previous owner's files and became aware of the vested rights permit only after the issuance of the temporary restraining order. In 2006, "a jury trial was held on the City's request for a permanent injunction, civil penalties and mitigation damages." Continental "pled vested rights as an affirmative defense, asserting that it was entitled to develop the property under the ordinances in effect on the date of vesting, i.e., August 29, 1991," and filed a counterclaim for declaratory relief as to its vested rights, asking the court to affirm its right to develop the property under the ordinances in effect as of 1991. Since no tree ordinance was in effect in 1991, Continental asserted that it was exempt from the tree ordinance. The City argued that any vested rights had expired or become dormant and, alternatively, that even if the vested rights were valid, that Continental had to comply with the procedural requirements of the tree permit ordinance by applying for a tree permit.

The trial court granted a permanent injunction enjoining Continental from removing any trees from the property in question, ordering Continental to replant trees in mitigation of trees already removed, and denied Continental's request for declaratory judgment. Continental appealed. On appeal, Continental challenged the trial court's judgment in favor of the City, which was based on the affirmative defense of waiver, arguing that waiver was neither pled by the City nor tried by consent. The trial court, in Conclusion of Law No. 2, found that Continental's predecessor had administrative remedies available to it when the City approved the MDP without a tree preservation plan. Because Continental's predecessor did not exhaust those administrative remedies, the trial court held that any vested rights had been waived as a matter of law. The court of appeals disagreed and held that, "[b]ecause the record clearly shows that the City never pled waiver . . . and the waiver issue was not tried by consent, the trial court's judgment, which is based on waiver of Continental's vested rights, cannot stand."

Having found that Continental's vested rights were not waived, the Court then addressed whether Continental was, nevertheless, required to
comply with the tree permit ordinance. Citing its recent decision in *City of San Antonio v. En Seguido, Ltd.*, the court stated that "rights vest in a particular project, not the land, and are not affected by a subsequent conveyance of the property."162 The court also cited section 245.002 of the Texas Local Government Code, which prohibits a city from enforcing ordinances that are enacted after rights have vested.163 Because the tree permit ordinance, by its own terms, regulated only those activities conducted on property "to which the division applies," and because the ordinance was not applicable to Continental's property due to the vested rights permit, the court found that Continental was not required to comply with the tree permit ordinance.164 Finally, the court rendered a declaratory judgment that Continental had "the vested right to develop the [property] under the ordinances in effect as of August 29, 1991, and award[ed] Continental its attorney's fees in the amounts found by the jury" in the trial court.165

The San Antonio Court of Appeals, in *Hardee v. City of San Antonio*, also addressed the question of when a claim of vested rights is ripe.166 In this case, the developers of several tracts of land filed a petition seeking an injunction to prevent the City of San Antonio from enforcing any development ordinances against several projects and a declaration that "any Development Ordinances . . . passed or otherwise made effective after April 13, 1978, and/or November 9, 1983 . . . may not be applied to or enforced against the development of the Property."167 The City, in a plea to the jurisdiction, asserted that the developers' claims were not ripe because the City had never made a final decision regarding the application of the ordinances to the property.168 The trial court granted the plea to the jurisdiction and the developers appealed.169

The Court, citing *Save Our Springs Alliance v. City of Austin*, noted that before a claim of vested rights is ripe for judicial determination pursuant to chapter 245, "[a] regulatory agency ought to have the opportunity to make a final determination as to which set of land-use regulations apply to a specific plat."170 In the case at hand, the developers merely sent a letter to the City seeking verification that a particular ordinance did not apply to four projects.171 The developers' letter was not an application for a permit, and the City was not required to determine which

162. *Id.* (citing *City of San Antonio v. En Seguido, Ltd.*, 227 S.W.3d 237, 242-43 (Tex. App.—San Antonio 2007, no pet.)).
163. *Id.* at 19 (citing TEX. LOC. GOV'T CODE ANN. § 245.002 (Vernon 2008)).
164. *Id.*
165. *Id.* at 22.
167. *Id.* at *1.
168. *Id.*
169. *Id.*
170. *Id.* at *2* (quoting *Save Our Springs Alliance v. City of Austin*, 149 S.W.3d 674, 683 (Tex. App.—Austin 2004, no pet.)).
171. *Id.*
ordinances applied.\textsuperscript{172} The City responded by notifying the developers that they were required to apply for a vested rights permit so that the City could determine which ordinances were applicable to the projects, but the developers took no further action.\textsuperscript{173} Finding that "[a]t the time the Developers filed the underlying lawsuit, the City had not been given the opportunity 'to make a final determination as to which set of land-use regulations appl[ied]' to the project," the court held that "no claim for declaratory or injunctive relief seeking to enforce [vested rights] was ripe for judicial consideration."\textsuperscript{174}

V. BOARD OF ADJUSTMENT

A city's refusal to allow nonconforming signs to be reconstructed was addressed in \textit{Lamar Corp. v. City of Longview}.\textsuperscript{175} Lamar owned and operated three billboards within 1,500 feet of a public park. Longview enacted an ordinance banning billboards within 1,500 feet of a public park.\textsuperscript{176}

Without a permit, Lamar dismantled and then attempted to reconstruct the billboard structures. The City sent a notice of violation insisting that permits were needed. After receiving the permits, the City denied them on the grounds that Lamar was not performing maintenance but was reconstructing the signs. The Board of Adjustment denied the sign company's appeal of the staff's interpretation of the sign ordinance.\textsuperscript{177}

Thereafter, Lamar filed a petition for declaratory relief in Gregg County District Court to declare: 1) the work done on Lamar's billboards was normal maintenance, which did not require a permit; 2) Lamar's signs did not lose their nonconforming status; and 3) Lamar was not required to remove the signs. . . . In an amended petition, Lamar also asked the trial court to declare [the ordinance] unconstitutional as a taking of private property without just compensation if the court determined the ordinance prevented 'maintenance operations to the support structures.'\textsuperscript{178}

Because Lamar did not file a writ of certiorari as required by section 211.011 of the Texas Local Government Code, the Texarkana Court of Appeals dismissed based on lack of standing except as to the unconstitutional takings issue.\textsuperscript{179} Because the City's billboard ordinance was intended to keep unmaintained signs from injuring motor vehicles and pedestrians and preserve the beautification of the City, the court of appeals held that the sign ordinance was "substantially related to the public

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\textsuperscript{172} \textit{Id.} at *3.
\textsuperscript{173} \textit{Id.}
\textsuperscript{174} \textit{Id.}
\textsuperscript{175} 270 S.W.3d 609 (Tex. App.—Texarkana 2008, no pet.).
\textsuperscript{176} \textit{Id.} at 611-12.
\textsuperscript{177} \textit{Id.} at 612.
\textsuperscript{178} \textit{Id.}
\textsuperscript{179} \textit{Id.} at 614.
\end{flushright}
health, safety and welfare of the City's citizens."\textsuperscript{180} Because property owners do not acquire a protected property interest in a use such as a billboard, the court of appeals held that the City's sign ordinance did not constitute a taking.\textsuperscript{181}

\textsuperscript{180} Id. at 616.
\textsuperscript{181} Id. at 617.