Reversed and Dismissed and Memorandum Opinion filed May 4, 2010.

In The

Fourteenth Court of Appeals

NO. 14-09-00236-CV

THE CITY OF HOUSTON, Appellant

V.

STUDENT AID FOUNDATION ENTERPRISES, Appellee

On Appeal from the County Civil Court at Law No. 1
Harris County, Texas
Trial Court Cause No. 926496

MEMORANDUM OPINION

The City of Houston appeals the trial court's order denying its plea to the jurisdiction. Because we conclude that the claim of appellee Student Aid Foundation Enterprises ("SAFE") is not ripe, we reverse the trial court's order and dismiss this cause for lack of subject matter jurisdiction.

BACKGROUND

The City regulates development of property in flood-prone areas. In October 2006, the City amended chapter 19 of the City of Houston's Code of Ordinances to impose new, more stringent restrictions on development in areas designated as a

"floodway." *See* Houston, Tex., Ordinance 2006-894 (Aug. 30, 2006). The amended ordinance provided that "[n]o permit shall hereinafter be issued for a development to be located in any floodway if that development provides for . . . [n]ew construction, additions to existing structures, or substantial improvement of any structure within the floodway." The ordinance as amended expressly prohibited any variances except for certain instances involving bridges and facilities necessary to protect the health, safety, and welfare of the general public. The 2006 amendment also adopted new maps redefining the floodway under chapter 19.

SAFE is a non-profit corporation that provides academic scholarships to students at Rice University in Houston. SAFE owns vacant property that it purchased as an investment, and it periodically sells or leases portions of the property and uses the money for its philanthropic purpose. The 2006 amendment to the ordinance placed SAFE's property in the floodway for the first time.[1] In 2008, the City again amended chapter 19 and significantly relaxed the restrictions on development in a floodway. *See* HOUSTON, TEX., CODE ch. 19 (2008). SAFE filed this suit shortly after the 2008 amendment, claiming a regulatory taking of its property based on the 2006 amendment. SAFE alleged that the 2006 amendment constituted a taking of its property because the strict development restrictions meant it could neither construct improvements on the property not sell it to anyone who wished to do so.

The City filed a plea to the jurisdiction, arguing in part that SAFE's claim is not ripe. The trial court denied the City's plea, and this appeal followed.

ANALYSIS

Ripeness is a threshold issue that implicates the court's subject matter jurisdiction. *See Waco Indep. Sch. Dist. v. Gibson*, 22 S.W.3d 849, 851 (Tex. 2000). The lack of

[1] The City does not deny that SAFE's property is in the floodway, though the City states that it has not had the opportunity to confirm this fact. For purposes of a plea to the jurisdiction, we take the pleadings as true in the absence of any evidence to the contrary from the City. *See Bland Indep. Sch. Dist. v. Blue*, 34 S.W.3d 547, 554 (Tex. 2000).

subject matter jurisdiction properly may be raised by a plea to the jurisdiction. *See Tex. Dep't Parks & Wildlife v. Miranda*, 133 S.W.3d 217, 225–26 (Tex. 2004). We focus on whether facts have been alleged that affirmatively demonstrate the trial court's jurisdiction. *See City of Waco v. Lopez*, 259 S.W.3d 147, 150 (Tex. 2008); *Kessling v. Friendswood Indep. Sch. Dist.*, 302 S.W.3d 373, 385 (Tex. App.—Houston [14th Dist.] 2009, pet. filed). We review a trial court's ruling on a plea to the jurisdiction de novo. *See Lopez*, 259 S.W.3d at 150; *Kessling*, 302 S.W.3d at 385.

Both the United States and Texas Constitutions prohibit the government from taking private property for public use without just compensation. *See* U.S. CONST. amend. V; TEX. CONST. art. I, § 17; *see also Hallco Tex., Inc. v. McMullen County*, 221 S.W.3d 50, 56 (Tex. 2006) (recognizing similarity between Texas and federal constitutional provisions regarding taking of property and noting it is appropriate to look to federal law for guidance). Although governments can regulate property under a valid exercise of police power, a regulatory action can constitute a taking requiring compensation under some circumstances. *See Palazzolo v. Rhode Island*, 533 U.S. 606, 617 (2001); *Hallco*, 221 S.W.3d at 56. SAFE argues that the 2006 amendment made its property unmarketable and therefore constituted a regulatory taking.[2] The City argues that SAFE's claim is not ripe because SAFE (1) never submitted a permit application or variance request to the City and (2) had no plans for the property in 2006 and thus did not suffer a concrete injury arising from the 2006 amendment.

Ripeness concerns the timing of a lawsuit. *See Gibson*, 22 S.W.3d at 851. A lawsuit is ripe if the facts are sufficiently developed so that a concrete injury has occurred

[2] SAFE also asserted at oral argument that it is automatically entitled to compensation because the amendment deprived it of its right to build on its property and thereby took one of the "sticks in its bundle of property rights." We disagree. Even if a regulation interferes with a property-owner's use of property and thus intrudes upon property rights, a regulation constitutes a taking only when the regulation deprives the owner of all economically beneficial or productive use of the property. *See Palazzolo*, 533 U.S. at 617; *Hallco*, 221 S.W.3d at 56.

or is likely to occur, rather than being contingent or remote. *See id.* at 851–52. A case is not ripe when determining whether there is a concrete injury depends on contingent or hypothetical facts or events that have not yet come to pass. *Id.*

SAFE cannot demonstrate ripeness on this record. At the time of the 2006 amendment, SAFE had owned the relevant property for years and undertook revenue-generating action, such as leasing or selling a parcel, only when it needed money. The record contains neither a pleaded allegation nor any evidence that SAFE intended to do anything with the property while the 2006 amendment was in effect. If SAFE intended to do no more than hold the property during that time, the amendment did not injure SAFE even if it made the property less marketable.

SAFE stated in its petition that the amendment prevented it from selling or building on the property, but this allegation does not show an intent to take such action. SAFE admitted at oral argument that it had no such plans in 2006. Absent evidence or allegations of an intent to sell the property or build on it in 2006, SAFE cannot establish that the amended ordinance prevented it from undertaking a profitable venture and any claimed injury is hypothetical. *See City of Houston v. HS Tejas, Ltd.*, No. 01-09-00393-CV, __ S.W.3d __, 2009 WL 3401066, at *4–5 (Tex. App.—Houston [1st Dist.] Oct. 22, 2009, no pet.) (takings claim involving 2006 amendment to Houston City Ordinance was not ripe because plaintiff "has not alleged any specific improvement or sale that was impacted or impeded by the 2006 amendment"); *Gibson*, 22 S.W.3d at 852–53 (claims challenging student promotion policies were not ripe because no students had been prevented from advancing); *Harris County Mun. Util. Dist. No. 156 v. United Somerset Corp.*, 274 S.W.3d 133, 138–39 (Tex. App.—Houston [1st Dist.] 2008, no pet.) (breach of contract and quantum meruit claims based on inadequate reimbursement were not ripe because utility district had not yet decided how bond reimbursement proceeds would be

distributed).[3] Thus, SAFE's claim is not ripe and the trial court lacked subject matter jurisdiction to address that claim. *See Gibson*, 22 S.W.3d at 851.

CONCLUSION

Because SAFE's claim is not ripe, the trial court lacked subject matter jurisdiction over the action. We reverse the trial court's order and dismiss this cause for lack of jurisdiction. *See Miranda*, 133 S.W.3d at 234.[4]

/s/ William J. Boyce
Justice

Panel consists of Justices Yates, Seymore, and Boyce.

[3] The present case and *Tejas* are both distinguishable from other cases finding that takings claims regarding the 2006 amendment were ripe because those plaintiffs alleged a specific plan for improvement or sale that was thwarted by the 2006 amendment. *See City of Houston v. Mack*, No. 01-09-00427-CV, __ S.W.3d __, 2009 WL 5064710, at *5–6 (Tex. App.—Houston [1st Dist.] Dec. 22, 2009, no pet. h.) (plaintiffs alleged they intended to sell property for development and had entered into listing agreement); *City of Houston v. Norcini*, No. 01-09-00426-CV, __ S.W.3d __, 2009 WL 3931681, at *4–5 (Tex. App.—Houston [1st Dist.] Nov. 19, 2009, pet. denied) (plaintiff intended to sell lots to a builder); *City of Houston v. Noonan*, No. 01-08-01030-CV, 2009 WL 1424608, at *1 (Tex. App.—Houston [1st Dist.] May 21, 2009, no pet.) (mem. op.) (plaintiff intended to build a residence); *City of Houston v. O'Fiel*, No. 01-08-00242-CV, 2009 WL 214350, at *2 (Tex. App.—Houston [1st Dist.] Jan. 29, 2009, pet. denied) (mem. op.) (plaintiff's intended use was residential construction).

[4] Because we determine that SAFE cannot establish ripeness in the absence of a concrete injury, we do not address the City's argument that SAFE's claim also is not ripe because SAFE did not submit a permit application or variance request.