# Fourth Court of Appeals
## San Antonio, Texas

## MEMORANDUM OPINION

No. 04-15-00736-CV

**THE CITY OF LAREDO**,
Appellant

v.

**NORTHTOWN DEVELOPMENT, INC.** and Gateway Centennial Development, Co.,
Appellees

From the 111th Judicial District Court, Webb County, Texas
Trial Court No. 2014-CV-7001705-D2
Honorable Monica Z. Notzon, Judge Presiding

Opinion by: Rebeca C. Martinez, Justice

Sitting: Sandee Bryan Marion, Chief Justice
Rebeca C. Martinez, Justice
Jason Pulliam, Justice

Delivered and Filed: August 10, 2016

REVERSED AND RENDERED

Northtown Development, Inc. and Gateway Centennial Development Co. (the "Development Companies") filed the underlying lawsuit against the City of Laredo asserting an inverse condemnation claim and declaratory judgment claims. The claims arose out of a possibility of a reverter contained in a deed conveying property from the Development Companies to the City. The City filed a plea to the jurisdiction asserting sovereign immunity which challenged the Development Companies' pleadings and the jurisdictional facts. The trial court denied the City's plea. On appeal, the City contends: (1) the City is immune from the Development Companies'

declaratory judgment claims because the Development Companies are not challenging the validity of a City ordinance; (2) the substance of the Development Companies' declaratory judgment claims is a trespass to try title claim; (3) the City was using the property for its stated public purpose; (4) no intentional taking occurred because the City never took official action to trigger the reverter, abandon the property, or not use the property; (5) the language of the deed does not allow the reverter of only a portion of the property conveyed; and (6) no taking can occur by contract. We reverse the trial court's order and dismiss the underlying claims against the City for lack of jurisdiction.

## BACKGROUND

In 1976, Trautmann Properties Investment, Ltd. conveyed two tracts of land to Del Mar Conservation District, specifically a 26.12 acre tract and a 0.14 acre tract. The deed provided that the conveyance would be effective as long as the land was used for public purposes. The evidence established the District intended to build a wastewater treatment plant on the larger tract and a water tower on the smaller tract. The deed further provided that upon the expiration of the use of the land for public purposes, the conveyance would terminate with title to the land reverting to Trautmann.

For some reason,[1] the District built the wastewater treatment plant on land owned by Trautmann but not included in the 1976 conveyance. As a result, in 1984, the Development Companies, who were the successors to Trautmann's interest in the previously conveyed tracts, executed a Deed of Exchange, Correction and Substitution agreeing to correct and supplement the prior conveyance. The deed conveyed to the District a 48.8857 acre tract of land identified by a metes and bounds description attached as Exhibit A to the deed (the "Property"), and 1 acre tract

[1] The parties dispute the reason, but the actual reason is not relevant to our analysis.

of land identified by a plat attached as Exhibit B to the deed. The Property encompassed the 26.12 acre tract previously conveyed and the land on which the wastewater treatment plant had been built. The deed further provided:

> The grant of the tract described in Exhibit "A" attached hereto is for the specific purpose of the continued operation of the Zacate Creek Wastewater Treatment Plant and the commitment of [the] District to serve the residents of the District as well as the future development of lands within the existing or expanded boundaries of the District and for no other purpose.
>
> The grant of the one (1) acre site on McPherson Road as identified on attached Exhibit "B" is for the construction of an overhead water storage facility and for no other purpose.
>
> This conveyance to the district, shall extend to the district's successors and to any municipalities which may hereafter legally assume all or any part of the district's governmental or service obligations and shall be effective for and so long as the district, its successors or other municipalities, use said land for the public purpose for which each grant is made and upon expiration of use for such public purpose as to any of said tracts, the grant of the rights and properties herein and heretofore granted to the district to either or both of said tracts and all related easement rights shall thereupon terminate and title to the entirety of either or both of said tracts shall thereupon revert to the parties grantor herein.

The original wastewater treatment plant constructed on the Property only had the capacity to treat 0.9 million gallons of water per day. Sometime after the original plant was constructed, the City became the District's successor. By 2011, the City had constructed a new wastewater treatment plant on the Property with the capacity to treat 3 million gallons of water per day. The original plant was built on the western side of the Property, while the new plant was built on the eastern side.

In 2012, one of the City's councilmembers allegedly offered to sell the western portion of the Property back to the Development Companies because the City no longer needed that land. In October of 2012, the attorney for the Development Companies sent a letter to the City's assistant city manager referencing an earlier meeting regarding the City's interest in having the portion of the Property no longer in use to "go back into private ownership." The letter makes reference to the reverter language in the deed but only as a basis for allowing the Property to be conveyed by a

private sale rather than by public bid. On May 13, 2013, the attorney sent another letter to the City's assistant city manager referencing the October 2012 letter and requesting another meeting to "discuss terms for the acquisition of both of the mentioned tracts." On May 24, 2013, the City responded by letter stating, "Please note that at no time has the city failed to use said land for the public purpose for which it was granted. Therefore, the city takes the position that there has not been a breach of the condition subsequent that would trigger the reversionary clause contained in the 1984 deed."

On August 18, 2014, the Development Companies filed the underlying lawsuit. As previously noted, the City filed a plea to the jurisdiction asserting immunity. A hearing on the plea was held on November 12, 2015. At the hearing, Tomas M. Rodriguez, Jr., the former Utilities Director for the City who retired on July 3, 2015, testified two pipelines used in the operation of the 2011 plant, a forced main and an effluent line, are still located under the western portion of the Property. Rodriguez also referred to the City's Master Plan which projected the need for the plant operating on the Property to have the capacity to treat 7 million gallons of water per day by 2030. Rodriguez testified this capacity would be achieved by constructing an additional wastewater treatment plant on the western side of the Property where the original plant had been built, and this additional plant would supplement the capacity of the 2011 plant. Rodriguez testified designs for the additional plant would be developed when the 2011 plant reached 75% of its capacity and construction would begin when the 2011 plant reached 90% of its capacity. At the conclusion of the hearing, the trial court denied the City's plea. The City appeals.

## STANDARD OF REVIEW

Immunity from suit implicates a court's subject-matter jurisdiction and is properly asserted in a plea to the jurisdiction. *Houston Belt & Terminal Ry. Co. v. City of Houston*, 487 S.W.3d 154, 160 (Tex. 2016). "As subject-matter jurisdiction is a question of law, we review a trial court's

ruling on a plea to the jurisdiction do novo." *Id.* If the plea to the jurisdiction challenges pleadings, we liberally construe the pleadings to determine if the plaintiff has "alleged facts that affirmatively demonstrate the court's jurisdiction to hear the cause." *Id*. (internal citations omitted). If the plea to the jurisdiction challenges the existence of jurisdictional facts which also implicate the merits of the case, "we consider relevant evidence submitted by the parties to determine if a fact issue exists." *Suarez v. City of Tex. City*, 465 S.W.3d 623, 632-33 (Tex. 2015). "We take as true all evidence favorable to the nonmovant, indulge every reasonable inference, and resolve any doubts in the nonmovant's favor." *Id*. at 633. "If the evidence creates a fact question regarding jurisdiction, the plea must be denied pending resolution of the fact issue by the fact finder." *Id*. "If the evidence fails to raise a question of fact, however, the plea to the jurisdiction must be granted as a matter of law." *Id*.

**DECLARATORY JUDGMENT CLAIMS**

In their petition, the Development Companies sought a declaration that the deed reserved a possibility of a reverter. The Development Companies also sought a declaration that the City's "nonuse, inconsistent use or abandonment of the western portion of the Property triggered the possibility of reverter."

Several of the issues in the City's brief challenge the trial court's refusal to grant the City's plea as to the Development Companies' declaratory judgment claims. First, the City contends it is immune from the claims because the Development Companies were not challenging the validity of an ordinance. Second, the City contends the substance of the declaratory judgment claims is a trespass to try title claim, and the City is immune from such a claim. Finally, the City contends it conclusively established continued use of the western portion of the Property.

We first address the City's contention that it is immune from the Development Companies' declaratory judgment claims. The Uniform Declaratory Judgments Act generally permits a person

who is interested under a deed to obtain a declaration of the person's rights thereunder. TEX. CIV. PRAC. & REM. CODE ANN. § 37.004(a) (West 2015). Although the UDJA waives immunity for certain claims, such as challenges to the validity of a municipal ordinance, it is not a general waiver of immunity. *Tex. Parks & Wildlife Dep't v. Sawyer Trust*, 354 S.W.3d 384, 388 (Tex. 2011); TEX. CIV. PRAC. & REM. CODE ANN. § 37.006(b). In other words, there is no general right to sue a state agency for a declaration of rights under a deed. *Sawyer Trust*, 354 S.W.3d at 388. And, immunity will bar an otherwise proper UDJA claim that has the effect of establishing a right to relief against the State for which the Legislature has not waived immunity. *Id.*

In this case, the Development Companies sought a declaration as to whether the possibility of reverter in the deed was triggered based on the City's nonuse of the Property. Whether the possibility of reverter was triggered, however, is an issue that must be addressed in discussing the elements of the Development Companies' takings claim. *See City of Cibolo v. Koehler*, No. 04-11-00209-CV, 2011 WL 5869683, at *4, 6 (Tex. App.—San Antonio Nov. 23, 2011, no pet.) (noting trial court was authorized to determine whether easement granted to the City of Cibolo was void in addressing the elements of the plaintiffs' takings claim) (mem. op.). In the underlying lawsuit, the Development Companies are seeking damages for the City's taking of the portion of the Property the City allegedly is not using based on their contention that ownership of this portion of the Property reverted to them. Their declaratory judgment claim that the City's non-use of this portion of the Property triggered the possibility of reverter has the effect of establishing a right to relief against the City under the Development Companies' takings claim. In essence, the Development Companies are seeking a declaratory judgment on an element of their takings claim in addition to their takings claim outside the declaratory judgment context. *State, Tex. Dep't of Transp. v. Allodial Ltd. P'ship*, 280 S.W.3d 922, 928 (Tex. App.—Dallas 2009, no pet.) (noting distinction between declaratory judgment claim and takings claim outside the declaratory

judgment context); *see also City of Cibolo*, 2011 WL 5869683, at *5-6 (same). The Development Companies are not, however, permitted to recast an element of their takings claim as a declaratory judgment claim. *Village of Tiki Island v. Ronquille*, 463 S.W.3d 562, 583 (Tex. App.—Houston [1st Dist.] 2015, no pet.) (holding "trial court lacks subject-matter jurisdiction over a declaratory-judgment action that mirrors a takings claim"); *Allodial Ltd. P'ship*, 280 S.W.3d at 928 (holding takings claims are not properly characterized as declaratory judgment claims); *see also City of Houston v. Williams*, 216 S.W.3d 827, 829 (Tex. 2007) (noting "in every suit against a governmental entity for money damages, a court must first determine the parties' contract or statutory rights; if the sole purpose of such a declaration is to obtain a money judgment, immunity is not waived). Because the Development Companies' sole purpose for obtaining a declaration that the possibility of reverter in the deed was triggered was to obtain a money judgment, the City's immunity is not waived. *City of Houston*, 216 S.W.2d at 829. Accordingly, the trial court erred in denying the City's plea to the jurisdiction as to the Development Companies' declaratory judgment claims.[2]

**TAKINGS CLAIM**

A takings claim consists of three elements: (1) an intentional act by the government under its lawful authority, (2) resulting in the taking of the plaintiff's property, (3) for public use. *Gen. Servs. Comm'n v. Litle-Tex Insulation Co.*, 39 S.W.3d 591, 598 (Tex. 2001). The City contends the trial court erred in denying its plea to the jurisdiction with regard to the Development Companies' takings claim because: (1) the City never took official action to trigger the reverter in the deed so the Development Companies cannot prove an intentional act; (2) the City conclusively

[2] In holding the City is immune from the Development Companies' declaratory judgment claims, we sustain the City's first issue and need not address the City's other issues relating to the Development Companies' declaratory judgment claims. *See* TEX. R. APP. P. 47.1 (providing opinions must only address issues necessary to final disposition of the appeal).

established it was using the Property for the stated public purpose so no taking occurred; (3) the deed does not permit the reverter of only a portion of the Property so no taking of a portion of the Property could occur; and (4) no taking can occur by contract. We first address the third issue, and because we hold this issue is dispositive of the Development Companies' takings claim, we do not address the remaining issues. *See* TEX. R. APP. P. 47.1.

The possibility of a reverter is a future interest in real property, and the taking of such a future interest is compensable under the Takings Clause of the Texas Constitution. *See El Dorado Land Co., L.P. v. City of McKinney*, 395 S.W.3d 798, 803 (Tex. 2013). "A possibility of reverter is a term of art for a future interest retained by a grantor that conveys a determinable fee." *Id*. at 801 n.6. "[I]t is the grantor's right to fee ownership in the real property reverting to him if the condition terminating the determinable fee occurs." *Luckel v. White*, 819 S.W.2d 459, 464 (Tex. 1991). For example, in *Leeco Gas & Oil Co. v. Nueces County*, "Leeco gift deeded fifty acres of land on Padre Island to Nueces County for use as a park." 736 S.W.2d 629, 630 (Tex. 1987). "Leeco retained a reversionary interest in the deed whereby the County would keep the property 'so long as a public park [was] constructed and actively maintained' by the County on the property." *Id*. If the County used the property for any other use, the County's determinable fee would cease, and the property would revert to Leeco. *See id*. at 631.

It does not appear to be disputed that the deed governs the nature of the reversionary interest retained by the Development Companies. *See Sewell v. Dallas Indep. Sch. Dist.*, 727 S.W.2d 586, 588 (Tex. App.—Dallas 1987, writ ref'd n.r.e.) (noting parties' rights relative to disputed property stem from and are governed by the deed between them). "The construction of an unambiguous deed is a question of law for the court." *Luckel*, 819 S.W.2d at 461. "The primary duty of a court when construing such a deed is to ascertain the intent of the parties from all of the language in the deed by a fundamental rule of construction known as the 'four corners' rule." *Id*. "The parties to

an instrument intend every clause to have some effect and in some measure to evidence their agreement." *Id*. at 462 (internal citations omitted).

In this case, the deed contained the following possibility of reverter:

> This conveyance to the district, shall extend to the district's successors and to any municipalities which may hereafter legally assume all or any part of the district's governmental or service obligations and shall be effective for and so long as the district, its successors or other municipalities, use said land for the public purpose for which each grant is made and upon expiration of use for such public purpose as to any of said tracts, the grant of the rights and properties herein and heretofore granted to the district to either or both of said tracts and all related easement rights shall thereupon terminate and title to the entirety of either or both of said tracts shall thereupon revert to the parties grantor herein.

Reading the plain language of the deed, the possibility of reverter addresses the use of the "tract" of land and upon the expiration of the use as to the "tract" of land, the determinable fee terminates and "title to the entirety" of the "tract" reverts to the Development Companies. Accordingly, the possibility of reverter is not triggered so long as any portion of the "tract" of land is used for the specified public purpose, and when the reverter is triggered, "title to the entirety" of the "tract" is the interest that would revert.

The Development Companies rely on *City of Houston v. Van de Mark* to contend a portion of property can revert. 83 S.W.3d 864 (Tex. App.—Texarkana 2002, pet. denied). In that case, the MacGregor heirs executed a deed conveying 110 acres of land to the City of Houston for use as a public park under the name of MacGregor Park. *City of Houston*, 83 S.W.3d at 865. The deed provided that if the City "abandon[ed] said park and/or cease[d] to use and maintain the same for public park purposes under the name of MacGregor Park" then the grant of the premises under the deed immediately ceases and terminates "and the title to said land hereby conveyed shall revert to" the MacGregor heirs. *Id*. at 866. The State filed a condemnation proceeding to acquire 6.729 acres of the land to construct a highway. *Id*. It is unclear from the opinion how the dispute over the possibility of reverter was brought into the lawsuit. The opinion simply states, "The case then

went to trial on the question of whether the 47.54 acres constituting the eastern portion of the original park land had reverted to the MacGregor heirs because the City had abandoned or ceased to use that portion of the land as a public park." *Id*. The remainder of the opinion focuses on whether the City had ceased to use the 47.54 acres for park purposes. *Id*. at 867-70. The issue of whether the deed allowed for a reverter of only a portion of the land is not discussed in the opinion. Accordingly, although the opinion holds the 47.54 acres reverted to the MacGregor heirs, the opinion does not support the proposition that a portion of land can revert under a deed that contains a possibility of reverter only as to the "entirety" of the tract.

In view of the language of the deed in the instant case, we hold the deed only provides for a possibility of reverter of the "entirety" of the Property in the event none of the Property is used for purposes of operating a wastewater treatment plant.[3] Because the evidence is undisputed that the City is operating a wastewater treatment plant on a portion of the Property, the possibility of reverter was not triggered, and the Development Companies' takings claim fails as a matter of law. Therefore, the trial court erred in denying the City's plea to the jurisdiction as to the Development Companies' takings claim.

## CONCLUSION

The trial court's order denying the City's plea to the jurisdiction is reversed, and the Development Companies' claims against the City are dismissed.

Rebeca C. Martinez, Justice

[3] We note a deed can be written in which the grantor reserves a possibility of reverter as to a portion of the land conveyed. For example, in *Singer v. State*, the deed included the following provision: "In the event the land herein described is not used for public highway purposes, which includes construction contract letting, on S.H. 121 (Lewisville Bypass) on or before January 1, 2000, then all or that portion of the land not so used, as the case may be, will revert to and be revested in the Grantor named herein or their successors in interest[s]." 391 S.W.3d 627, 630 (Tex. App.—El Paso 2012, pet. denied); *see also Howard v. Arhopulos*, No. 01-00-00844-CV, 2001 WL 522528, at *2-3 (Tex. App.—Houston [1st Dist.] May 17, 2001, pet. denied) (noting language in deed provided for a proportional reverter of a portion of the property).