Opinion issued August 25, 2011

In The

Court of Appeals

For The

First District of Texas

NO. 01-09-00914-CV

ROBERT NOLAN ALLEN D/B/A FETZER HOWARD SIGN COMPANY, Appellant

V.

CITY OF BAYTOWN, DEBBIE SHERMAN AND KEVIN BYAL, Appellees

On Appeal from the County Civil Court at Law No. 4
Harris County, Texas
Trial Court Case No. 943,676

MEMORANDUM OPINION

Appellant, Robert Nolan Allen, doing business as "Fetzer Howard Sign Company," challenges the trial court's rendition of summary judgment against him

in his lawsuit against appellee, the City of Baytown ("the City").[1] In two issues, Allen contends that the trial court erred in granting summary judgment in favor of the City on the grounds of lack of subject matter jurisdiction, due to Allen's failure to exhaust administrative remedies against the City, and that Allen did not assert a valid regulatory-takings claim[2] against the City.

We affirm in part and reverse and remand in part.

Background

In his original petition, Allen alleges that he owned and maintained three off-premises billboard signs in the City and, in September 2008, Hurricane Ike damaged the creosote poles upon which the signs were placed. Allen removed the signs from the broken poles, removed the broken poles, and placed "new poles in the ground with the intention of putting up the signs again." However, before he could replace the signs, Debbie Sherman, the City's sign inspector, notified Allen that the poles had to be removed and the signs could not be re-erected or rebuilt pursuant to the City's sign ordinance.[3] Allen, on October 8, 2008, filed "applications with the City for permits to 'reconstruct' or place three new signs" at

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1 Allen appeals only the judgment of the trial court in regard to the City and not any other defendant that he sued below.

2 *See* TEX. CONST. art. I, § 17.

3 *See* Baytown, Tex., Code of Ordinances, ch. 118, art. III, Div. 4, subd. 4, § 118-131(c).

the locations of the three damaged signs. However, on October 23, 2008, the City's Chief Building Official denied Allen's permit applications "because the City's regulations prohibit the reconstruction or replacement of off-premises billboards that have been destroyed, damaged, or taken down."

Pursuant to the City's ordinance, Allen filed an appeal from the denial of his permit applications, but the City Clerk did not receive Allen's notices of appeal until November 20, 2008, two weeks after the deadline to file such an appeal.[4] On January 7, 2009, the City's Sign Committee conducted a public hearing to consider Allen's appeal. The City argued that the committee lacked jurisdiction to consider the appeal because it was untimely filed, and the committee then denied Allen's appeal because a majority of the members present did not vote to proceed.

After initially filing suit against the City in district court on February 5, 2009, Allen, on July 13, 2009, nonsuited the case. The next day, Allen filed against the City in the Harris County Court at Law the instant suit, alleging an unconstitutional taking of his property and seeking a declaratory judgment. He alleges that he has lost the signs and the resulting business income. Allen further alleges that the lands upon which his three signs were erected are burdened with perpetual easements that cannot be rescinded, and, thus, the lands are now damaged and essentially worthless in value. He asserts that a regulatory taking of

[4] *See id.* § 118-64.

his property has occurred in that the regulations imposed by the City have denied him the economically viable use of his property and unreasonably interfered with his right to use and enjoy his property.

In its answer, the City generally denied Allen's claim. It then filed a plea to the jurisdiction, arguing that the trial court lacked subject matter jurisdiction over the suit because Allen "failed to exhaust his administrative remedies by filing a timely appeal of the City building official's denial of his applications for permits to reconstruct the three signs that were destroyed by Hurricane Ike." The City subsequently filed a summary-judgment motion, arguing for "a dismissal of Allen's suit for want of jurisdiction" because he had not timely filed suit in a district court within twenty days after the City's Sign Committee had denied his appeal of the denial of his permit applications.[5] And the City otherwise asserted that Allen had failed to exhaust his administrative remedies. In a footnote, the City alternatively argued that it had taken nothing from Allen because "his property was taken by Hurricane Ike" and the "application" of its "sign regulations do not constitute a taking of Allen's personal property." In regard to Allen's declaratory judgment action, the City specifically asserted that he could not rely upon it to avoid the need to exhaust administrative and statutory remedies.

[5] *See* TEX. LOCAL GOV'T CODE ANN. § 216.014 (Vernon 2009).

In his response to the City's summary-judgment motion, Allen asserted that his claim for an unconstitutional taking of his property arises from "the leasehold interest [he] maintains for the maintenance and operation of billboards." He argued that the taking of his property is in violation of article I, section 17 of the Texas Constitution because it is "not possible for a city ordinance to regulate or create any statute or administrative remedy which would deny a party their constitutional claim." Allen asserted that "a party does not have to exhaust administrative or statutory remedies when the claim involves one of a constitutional issue or right" and there is "nothing about the City municipal code that bars [his] right to bring a regulatory takings claim." Allen further asserted that the City's "vague argument (in a footnote) that the takings claim must fail as a matter of law" could not be considered as a properly pleaded ground for summary judgment.[6]

The trial court granted the City's summary-judgment motion, ordering that Allen "take nothing" against the City and that his "remaining claims" against the City be "dismissed for want of subject matter jurisdiction."

Standard of Review

To prevail on a summary-judgment motion, a movant has the burden of proving that he is entitled to judgment as a matter of law and there is no genuine

[6] *See* TEX. R. CIV. P. 166a(c).

issue of material fact. TEX. R. CIV. P. 166a(c); *Cathey v. Booth*, 900 S.W.3d 339, 341 (Tex. 1995). When a defendant moves for summary judgment, it must either (1) disprove at least one element of the plaintiff's cause of action or (2) plead and conclusively establish each essential element of its affirmative defense, thereby defeating the plaintiff's cause of action. *Cathey*, 900 S.W.2d at 341. We may affirm a summary judgment only when the record shows that a movant has disproved at least one element of each of the plaintiff's claims or has established all of the elements of an affirmative defense as to each claim. *Am. Tobacco Co. v. Grinnell*, 951 S.W.2d 420, 425 (Tex. 1997); *Farah*, 927 S.W.2d at 670. In deciding whether there is a disputed material fact issue precluding summary judgment, proof favorable to the non-movant is taken as true, and the court must indulge every reasonable inference and resolve any doubts in favor of the non-movant. *Randall's Food Mkts., Inc. v. Johnson*, 891 S.W.2d 640, 644 (Tex. 1995); *Lawson v. B Four Corp.*, 888 S.W.2d 31, 34 (Tex. App.—Houston [1st Dist.] 1994, writ denied). When a summary judgment does not specify the grounds on which the trial court granted it, the reviewing court will affirm the judgment if any theory included in the motion is meritorious. *Harwell v. State Farm Mut. Auto. Ins. Co.*, 896 S.W.2d 170, 173 (Tex. 1995); *Summers v. Fort Crockett Hotel, Ltd.*, 902 S.W.2d 20, 25 (Tex. App.—Houston [1st Dist.] 1995, writ denied).

The absence of subject matter jurisdiction may be raised by a plea to the jurisdiction, as well as by other procedural vehicles, such as a motion for summary judgment. *Tex. Dep't of Parks & Wildlife v. Miranda*, 133 S.W.3d 217, 225–26 (Tex. 2004); *Bland Indep. Sch. Dist. v. Blue*, 34 S.W.3d 547, 554 (Tex. 2000). In reviewing a challenge to a court's subject matter jurisdiction, the court may review the pleadings and any other evidence relevant to the issue. *Id.* at 554–55. Because subject matter jurisdiction presents a question of law, we review the trial court's decision de novo. *Mayhew v. Town of Sunnyvale*, 964 S.W.2d 922, 928 (Tex. 1998); *Kalyanaram v. Univ. of Tex. Sys.*, 230 S.W.3d 921, 927 (Tex. 2007).

Subject Matter Jurisdiction

In his first issue, Allen argues that the trial court erred in granting the City's summary-judgment motion on the ground that he had not exhausted administrative remedies because he was "not required to exhaust administrative remedies." Allen (1) has asserted a claim against the City for an unconstitutional taking of his property and (2) he seeks a declaration that section 118-131(c) of the City's ordinance "means" that he "has the right to re-erect his signs if the cost of repair of the signs is less than sixty (60%) percent of the cost of erecting a new sign" and "he is in compliance with the ordinance and that the City of Baytown must issue a permit to allow [him] to re-erect the signs." As noted by the City, Allen did not

timely file a petition for review in a district court to challenge the Sign Committee's denial of his appeal.

The City responds that his failure to timely appeal the Sign Committee's decision by filing a petition for writ of certiorari constitutes a failure to exhaust administrative remedies and therefore bars his claims.

Declaratory Judgment

Under the City's ordinances regulating billboard signs, the owner of a sign must obtain an operating permit for each sign and the construction or placement of any new off-premise billboard within the City is prohibited. Baytown, Tex., Code of Ordinances, ch. 118, art. III, Div. 4, subd. 4, § 118-358. Central to this dispute in this case is the following ordinance:

> When any sign or a substantial part of a sign is destroyed, damaged, or taken down or removed for any purpose other than maintenance operations or for changing the letters, symbols, or other matter on such sign, it shall not be re-erected, reconstructed or rebuilt, except in full conformance with this chapter. A sign or substantial part of it is considered to have been destroyed only if the cost of repairing the sign is more than 60 percent of the cost of erecting a new sign of the same type at the same location.

Id. § 118-131(c). It is also "unlawful for a person to intentionally or knowingly erect, construct, build, reconstruct or alter a sign without a prior written building permit." *Id.* § 118-127.

The City's ordinance provides that the decisions of the City's sign administrator may be appealed to the City's Sign Committee, "provided the

appealing party shall give notice of appeal in writing to the city clerk no less than ten days following the decision appealed from." *Id.* § 118-64. Moreover, a sign owner may appeal the decisions of a municipal sign board to a state district court by filing a verified petition for writ of certiorari within twenty days after the date the decision is rendered by the board. TEX. LOCAL GOV'T CODE ANN. § 216.014 (Vernon 2009).

Here, the City argues that the trial court did not err in granting its summary-judgment motion "and dismissing Allen's claims for lack of jurisdiction" because he failed to file a timely petition for review" in a district court of the Sign Committee's denial of his appeal of the City's denial of his permit applications to reconstruct his signs. *See id*. The City asserts that Allen's "attempt to mask his error by mischaracterizing his claim as a regulatory taking claim that falls outside the legislative remedy of Chapter 216 [of the Local Government Code] is without merit."

The procedure for reviewing the legality of a municipal sign board's decision pursuant to section 216.014 is in all material respects identical to the procedure for reviewing the decision of a zoning board of adjustment. *See and compare* TEX. LOCAL GOV'T CODE ANN. § 211.011 (Vernon 2000); *J.B. Adver., Inc. v. Sign Bd. of Appeals of City of Carrollton*, 883 S.W.2d 443, 446 (Tex.

App.—Eastland 1994, pet. denied). Thus, zoning board case law is instructive in reviewing the decision of a sign board. *J.B. Adver., Inc.*, 883 S.W.2d at 446.

The requirement that one timely file a petition for writ of certiorari to challenge a zoning board decision is part of an administrative remedy,[7] which is provided by the Texas Local Government Code and must be exhausted before board decisions may be challenged in court. *See City of San Antonio v. El Dorado Amusement Co.*, 195 S.W.3d 238, 250 (Tex. App.—San Antonio 2006, pet. denied). Thus, a suit not brought in compliance with such a pertinent statutory provision constitutes an impermissible collateral attack on the board's decision. *Id.* (dismissing appeal not brought by writ of certiorari for lack of subject matter jurisdiction). When properly brought, the only question which may be raised by a petition for writ of certiorari is the legality of the Board's order. *See* TEX. LOC. GOV'T CODE ANN. § 216.014; *City of San Angelo v. Boehme Bakery*, 144 Tex. 281,

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[7] "Certiorari is a procedural mechanism by which a reviewing court can 'demand of an inferior court or body that it send up the record of the proceedings in the matter under review in order that the legality thereof might be tested to determine whether the lower court or body had acted within its proper jurisdiction.'" *Teague v. City of Jacksboro*, 190 S.W.3d 813, 818 (Tex. App.—Fort Worth 2006, pet. denied) (quoting *City of San Angelo v. Boehme Bakery*, 144 Tex. 281, 190 S.W.2d 67, 69 (1945)). "The writ of certiorari is the method by which the court conducts its review; its purpose is to require [the city] to forward to the court the record of the particular . . . decision being challenged." *Id*. (quoting *Davis v. Zoning Bd. of Adjustment of La Porte*, 865 S.W.2d 941, 942 (Tex. 1993)).

190 S.W.2d 67, 69 (1945) (construing prior statute); *El Dorado Amusement Co.*, 195 S.W.3d at 250; *Bd. of Adjustment of City of Piney Point Village v. Amelang*, 737 S.W.2d 405, 406 (Tex. App.—Houston [14th Dist.] 1987, writ denied). A petition for writ of certiorari must be filed within ten days of the Board's order. *El Dorado*, 195 S.W.3d at 250.

As noted by the City, it is true that Allen did not timely file a petition in a district court to challenge the Sign Committee's denial of his appeal. And he now seeks a declaration that "he [was] in compliance with the [City's] ordinance and . . . [it] must issue [him] a permit to allow [him] to re-erect the signs." In *Lamar Corporation v. City of Longview*, the Texarkana Court of Appeals held that a sign owner's petition for declaratory relief, rather than a petition for a writ of certiorari, was "insufficient to confer jurisdiction on the district court." 270 S.W.3d 609, 614 (Tex. App.—Texarkana 2008, pet. denied) The court emphasized that "filing a petition for writ of certiorari is necessary in order to exhaust administrative remedies and avoid the review from being considered a collateral attack on the Board's decision." *Id.* Thus, the court concluded that the district court did not have subject matter jurisdiction over the sign owner's request for declaratory relief. *Id.*

Accordingly, we hold that the trial court did not have subject matter jurisdiction over Allen's declaratory judgment action, and we overrule this portion of his first issue.

Regulatory-Takings Claim

In regard to Allen's regulatory-takings claims, we note that several appellate courts have expressly rejected the City's argument and held that a constitutional takings issue may be considered even though other claims are dismissed for failure to exhaust administrative remedies. *See Hitchcock v. Board of Trustees*, 232 S.W.3d 208, 219 (Tex. App.—Houston [1st Dist.] 2007, no pet.); *Lamar Corp.*, 270 S.W.3d at 614; *Centeno v. City of Alamo Heights*, No. 04-00-00546-CV, 2001 WL 518911, at *3 (Tex. App.—San Antonio May 16, 2001, no pet.).

In *Lamar*, the court concluded that the district court did not have jurisdiction to consider the sign owner's declaratory judgment request, but it did have jurisdiction to consider the owner's unconstitutional takings claim because one may obtain judicial review of an administrative action if the decision adversely affects a vested property right or otherwise violates a constitutional right. *Id.*; *see also Tex. Dep't of Protective & Regulatory Servs. v. Mega Child Care, Inc.*, 145 S.W.3d 170, 172 (Tex. 2004); *Cont'l Cas. Ins. Co. v. Functional Restoration Assocs.*, 19 S.W.3d 393, 404 (Tex. 2000); *City of Amarillo v. Hancock*, 150 Tex. 231, 239 S.W.2d 788, 790–91 (1951). When a constitutional takings claim is

brought, it can be considered even though other claims are dismissed for the failure to exhaust administrative remedies. *Centeno*, 2001 WL 518911, at *3; *see also Hitchcock*, 232 S.W.3d at 219. The exhaustion of administrative remedies is not necessary for a claim for the violation of a constitutional or federal statutory right. *Dotson v. Grand Prairie Indep. Sch. Dist.*, 161 S.W.3d 289, 291-92 (Tex. App.—Dallas 2005, no pet.).

In support of its contention that Allen failed to exhaust his administrative remedies, the City relies on *TCI West End, Inc. v. City of Dallas*, 274 S.W.3d 913 (Tex. App.—Dallas 2009, no pet.). In that case, however, the court addressed whether a takings claim was "ripe," not whether the landowner had failed to exhaust his administrative remedies. Although questions of ripeness and exhaustion of administrative remedies often overlap, they involve "distinct and separate inquiries."[8] *Garrett Operators, Inc. v. City of Houston*, No. 01-09-00946-CV, 2011 WL 1833558, at *3 (Tex. App.—Houston [1st Dist.] May 12, 2011, no

[8] "The requirement of a final decision, in context of an inverse condemnation case, concerns whether the governmental entity charged with implementing the regulation that allegedly caused the taking has fixed some legal relationship between the parties. In contrast, exhaustion of administrative remedies concerns whether an agency has exclusive jurisdiction in making an initial determination on the matter in question and whether the plaintiff has exhausted all required administrative remedies before filing a claim in the trial court." *Garrett Operators, Inc. v. City of Houston*, 01-09-00946-CV, 2011 WL 1833558, at *3 (Tex. App.—Houston [1st Dist.] May 12, 2011, no pet.) (internal citations omitted).

pet.); *Williamson Cnty. Regional Planning Comm'n v. Hamilton Bank of Johnson City*, 473 U.S. 172, 192, 105 S. Ct. 3108, 3119 (1985) (explaining that although policies behind the two concepts often overlap, they are conceptually distinctive).

Accordingly, we hold that the trial court could not have properly granted the City's plea to the jurisdiction in regard to Allen's regulatory-takings claim on the ground that he had failed to exhaust his administrative remedies.

In its supplemental briefing, which it filed after oral argument, the City contends that Allen's claim for an unconstitutional regulatory taking was not ripe. Although the City did not present this separate ground to the trial court, we must address its contention because a defect in subject matter jurisdiction may be raised at any time by a party or by a reviewing court. *Tex. Ass'n of Bus. v. Tex. Air Control Bd.*, 852 S.W.2d 440, 445 (Tex. 1993). Ripeness is a component of subject matter jurisdiction and cannot be waived. *Mayhew v. Town of Sunnyvale*, 964 S.W.2d 922, 928 (Tex. 1998).

Both parties agree that in takings cases the issue of ripeness is governed by *Mayhew*, in which the Texas Supreme Court, noting that we should look at federal authority to guide our review, held that a takings claim is not ripe until the relevant governmental unit has reached a final decision regarding the application of the regulation to the landowner. *Id*. (citing *Suitum v. Tahoe Reg'l Planning Comm'n Agency*, 520 U.S. 725, 734, 117 S. Ct. 1659, 1665 (1997); *Hamilton Bank*, 473

U.S. at 186, 194, 105 S. Ct. at 3120–21; *see also Garrett Operators*, 2011 WL 1833558, at *3; *Maguire Oil Co. v. City of Houston*, 243 S.W.3d 714, 718 (Tex. App.—Houston [14th Dist.] 2007, pet. denied). For example, even if a property owner's plan is initially disapproved by a governmental entity, the final decision requirement mandates that the property owner seek variances or waivers, when potentially available, unless it would be futile to do so. *Williamson Cnty.*, 105 S. Ct. at 3117; *Maguire Oil*, 243 S.W.3d at 718.

Allen first argues that his claim is ripe despite his untimely appeal because he suffered a concrete injury when his permit request was denied. In support of his argument, Allen relies upon *City of Houston v. Mack*, 312 S.W.3d 855 (Tex. App.—Houston [1st Dist.] 2009, no pet.). However, *Mack* is not applicable because there the plaintiff-landowner's claim fell within the futility exception to the rule requiring an application for a variance. *See id.* at 864. Nevertheless, Allen asserts that a timely appeal in the City's administrative process was not necessary to make the City's determination final. He notes that no case law supports such a suggestion. The City argues that there is no final decision from the City in this case because the merits of Allen's request for a permit were never considered by the Sign Committee, as he had not timely appealed the denial of his permit request and the Sign Committee refused to hear his appeal. Allen responds that the Sign

Committee made a final decision when it refused to grant his request for relief, "the regulation was imposed," and his property "was rendered valueless."

As we noted in *Garrett*, although "there is no single rule that controls all questions of finality, at the very least, a decision by an agency is final if it is (1) definitive; (2) promulgated in a formal manner; and (3) one with which the agency expects compliance." *Id.* at *3. Otherwise, "[a]dministrative orders are generally final and appealable if 'they impose an obligation, deny a right or fix some legal relationship as a consummation of the administrative process." *Id*. Here, Allen's application for a permit was, in fact, denied, and because his appeal to the Sign Committee was refused as untimely, the City's action is for all practicable purposes definitive and final. Obviously, the City expects Allen to comply with its decision and not replace his signs.

Accordingly, we hold that the trial court had subject matter jurisdiction over Allen's regulatory takings claim against the City, and we sustain this portion of his first issue.

Regulatory-Takings Claim

In his second issue, Allen argues that the trial court erred in granting the City's summary-judgment motion on the ground that he had not asserted a valid regulatory takings claim because the City "provided no evidence to support its

footnote summary judgment argument that Allen could not prove a takings claim" and the regulations enforced "rendered the value of his property worthless."

Allen first emphasizes that the "only summary-judgment argument made with respect to the underlying merits of the regulatory takings claim appeared in a footnote" of the City's summary-judgment motion. He argues that the City's argument should not have been considered by the trial court "because it d[id] not allege with any specificity the ground for which the summary judgment [was] being argued." A summary-judgment motion must "state the specific grounds therefor." TEX. R. CIV. P. 166a (c). The motion must itself expressly present the grounds upon which it is made. *McConnell v. Southside Indep. Sch. Dist.*, 858 S.W.2d 337, 341 (Tex. 1993); *see also Roberts v. Southwest Tex. Medical Hosp.*, 811 S.W.2d 141, 146 (Tex. App.—San Antonio 1991, writ denied) ("Grounds may be stated concisely, without detail and argument. But they must at least be listed in the motion."). Here, the City included in a footnote in its summary-judgment motion, the following argument:

> Alternatively, even if Allen's complaint of an unconstitutional taking is not barred by his failure to exhaust statutory remedies, it is barred as a matter of law. Defendants have taken nothing from Allen; his property was taken by Hurricane Ike. Moreover, application of the City's sign regulations do not constitute a taking of Allen's personal property.

Albeit very weakly presented, the City did argue, concisely, that, in the alternative, Allen's regulatory takings claim was barred as a matter of law because Hurricane

Ike took his property, not the City. It thus presented to the trial court this ground for summary judgment.

In regard to the merits of the City's argument, Allen responds that the City "essentially. . . argued a plea to the jurisdiction because it simply argued . . . that his pleadings failed to state a jurisdictional claim," but he, in fact, alleges "a constitutional violation, which confer[ed] subject matter jurisdiction on the trial court." He further asserts that the City presented "no evidence to support a summary judgment" in its favor on Allen's regulatory takings claim.

The Texas Constitution expressly prohibits the State from taking one's property under its sovereign powers without consent or adequate compensation. TEX. CONST. art. I, § 17. A property interest must find its origin in some aspect of state law. *Spring Branch I.S.D. v. Stamos*, 695 S.W.2d 556, 561 (Tex. 1985); *see also Bishop v. Wood*, 426 U.S. 341, 344-46, 96 S. Ct. 2074, 2077–78 (1976) (holding that state law determines which state-created interests constitute property). To raise a valid regulatory takings claim, a plaintiff must establish that a regulation has either (1) destroyed all economically viable use of his property or (2) unreasonably interfered with the use and enjoyment of his property. *Sheffield Dev. Co. v. City of Glenn Heights*, 140 S.W.3d 660, 671 (Tex. 2004); *Taub v. City of Deer Park*, 882 S.W.2d 824, 826 (Tex. 1994); *TCI W. End, Inc. v. City of Dallas*, 274 S.W.3d 913, 917 (Tex. App.—Dallas 2008, pet. denied). A plaintiff

must also establish that he has an ownership interest in the property. *See Sheffield*, 140 S.W.3d at 671.

As the party moving for summary judgment, the City had to establish its right to judgment as a matter of law, and, only after having done so would the burden shift to Allen, as the non-movant, to raise a material fact issue sufficient to defeat summary judgment. *Castillo v. Westwood Furniture, Inc.*, 25 S.W.3d 858, 860 (Tex. App.—Houston [14th Dist.] 2000, pet. denied).

In its summary-judgment motion, the City made two assertions: (1) it did not take Allen's property, rather Hurricane Ike took his property, and (2) the application of the City's regulations did not constitute a taking of Allen's property. Whether the facts presented constitute a taking is a question of law, but the extent of intrusion by a government entity may be a question for the trier of fact. *See Sheffield Dev. Co.*, 140 S.W.3d at 673; *Mayhew*, 964 S.W.2d at 932–33. In support of its argument that the application of its regulations did not constitute a taking of Allen's property, the City attached to its motion, as evidence, a copy of the City's regulations, affidavits from Sherman and Kevin Byal, the City's chief building official, copies of the denied permit applications, and photographs of the damaged signs.

In their affidavits, Sherman and Byal asserted that Hurricane Ike destroyed Allen's signs and his permit applications were denied because the City's

regulations prohibit the issuance of permits for the construction of new signs. Thus, the only pertinent evidence presented by the City in support of its summary-judgment motion failed to establish as a matter of law that the application of the regulations did not constitute a taking of Allen's property. It is true that the City's actions did not cause the physical damage to Allen's signs; however, the City's regulations did prohibit Allen from repairing or re-erecting the signs, regardless of how they were damaged. The City cited no legal authority and made no argument at the summary judgment stage to show that a regulatory taking did not occur. Although the City vaguely asserted that the application of its regulations did not constitute a taking of Allen's property, such legal conclusions, unsupported by facts, will not support a summary judgment. *Anderson v. Snider*, 909 S.W.2d 54, 55 (Tex. 1991); *McIntyre v. Ramirez*, 109 S.W.3d 741, 749–50 (Tex. 2003) (conclusory statements not supported by facts are not proper summary judgment proof). Accordingly, we hold that the City failed to establish as a matter of law that no regulatory taking of Allen's property occurred.

We sustain Allen's second issue.

Conclusion

We affirm the portion of the trial court's judgment dismissing Allen's declaratory judgment action. We reverse the portion of the trial court's judgment

concerning Allen's claim for an unconstitutional taking of his property, and we remand this claim to the trial court for further proceedings.

Terry Jennings
Justice

Panel consists of Justices Jennings, Higley, and Brown.