Opinion issued March 1, 2012

In The

Court of Appeals

For The

First District of Texas

NO. 01-11-00431-CV

CITY OF HOUSTON, Appellant

V.

HS TEJAS, LTD., Appellee

On Appeal from the County Civil Court at Law No. 2
Harris County, Texas
Trial Court Case No. 926,497

MEMORANDUM OPINION

This interlocutory appeal concerns a regulatory takings case that this court previously examined and remanded for further proceedings in *City of Houston v. HS Tejas, Ltd.*, 305 S.W.3d 178 (Tex. App.—Houston [1st Dist.] 2009, no pet.)

(*HS Tejas I*). The issues and applicable law are virtually the same as those in *HS Tejas I*. The City argues that HS Tejas's petition, which was amended after *HS Tejas I*, still demonstrates a lack of ripeness because it fails to allege a concrete injury. Nevertheless, the trial court denied the City's subsequently filed plea to the jurisdiction. The City also argues that the trial court erroneously considered over 1,100 pages of attachments to HS Tejas's petition when it ruled on the City's plea. We affirm.

Background

The background to this case is more fully discussed in *HS Tejas I*, 305 S.W.3d at 181–82. In summary, HS Tejas sued the City, complaining about an ordinance which was amended in 2006 so as to restrict the City Engineer's issuance of building permits in floodways. HS Tejas alleged that this amended ordinance effectively prohibited it from developing or making improvements to four parcels of vacant land that it owned. *Id.* at 182; *see* Houston, Tex., Ordinance 2006-894, § 26 (Aug. 30, 2006). That amended ordinance, effective on October 1, 2006, was again amended, effective on September 1, 2008, such that the City Engineer gained greater discretion in issuing permits for the development of land in floodways. *See HS Tejas I*, 305 S.W.3d at 181–82; Houston, Tex., Ordinance 2008-658, § 10 (July 23, 2008) (codified at HOUSTON, TEX., CODE OF ORDINANCES § 19-43 (2009)), *current version available at* http://library.municode.com/HTML/

10123/level4/COOR_CH19FLPL_ARTIIISTFLHARE_DIV3DEWAFL.html#COOR_CH19FLPL_ARTIIISTFLHARE_DIV3DEWAFL_S19-43FL.

The City filed a plea to the jurisdiction in which it argued that the claim was unripe for adjudication because HS Tejas had not alleged a concrete injury arising from a specific development or sale impacted by the 2006 ordinance. *HS Tejas I*, 305 S.W.3d at 182. The trial court denied the jurisdictional challenge, and the City filed an interlocutory appeal with this court. *Id.*; *see* TEX. CIV. PRAC. & REM. CODE ANN. § 51.014(a)(8) (West 2008) (authorizing interlocutory appeal for denial of plea to the jurisdiction).

In *HS Tejas I*, this court analyzed the ripeness component of subject-matter jurisdiction in takings cases. *See HS Tejas I*, 305 S.W.3d at 184. The takings claim was construed as an as-applied claim, which meant that to establish ripeness, HS Tejas had the burden to allege a concrete injury resulting from a specific plan for improvement or sale that was adversely affected by the 2006 amendment. *Id.* at 184 (citing *Waco Indep. Sch. Dist. v. Gibson*, 22 S.W.3d 849 (Tex. 2000)). HS Tejas had failed to allege a concrete injury sufficient to support its regulatory takings claim, but the case was remanded to allow HS Tejas an opportunity to amend its pleadings. *Id.* at 185–86 (citing *Tex. Dep't of Parks & Wildlife v. Miranda*, 133 S.W.3d 217, 226–27 (Tex. 2004)).

Six months after this court's mandate from *HS Tejas I* was filed in the trial court, the City filed a new plea to the jurisdiction, pointing out that HS Tejas had not yet filed any amended pleadings. In response, HS Tejas filed its First Amended Original Petition, which contained a section titled "Plaintiff's Intended Use of the Property." That section, which is the only part of HS Tejas's petition that reflected substantial changes, included several allegations that were not made in the original petition. The trial court ruled that the amended petition was insufficient to establish jurisdiction, but it allowed HS Tejas an additional opportunity to amend.

HS Tejas subsequently filed its Second Amended Original Petition in which it expanded upon the section titled "Plaintiff's Intended Use of the Property." In this amended petition, HS Tejas alleged that it had acquired the four parcels "for the specific purposes of developing [them] and selling [them] into residential, commercial and/or mixed use occupancy and selling the developed property to third parties." HS Tejas further alleged that it "began the preliminary steps to accomplishing those purposes," including drawing up plans and employing professional services. However, upon the 2006 amendment's passage, negotiations were alleged to have "failed because the prospective permitting offices and accordingly purchasers could erect no improvements upon the property." The petition was expressly limited to challenge the City's permitting ordinance only

during the 2006 to 2008 timeframe. Over 1,100 pages of unauthenticated exhibits were attached to the amended petition, including invoices, contracts, appraisals, maps, e-mail messages, and other documents.

The City supplemented its plea to the jurisdiction, arguing that HS Tejas had still failed to plead a concrete injury arising out the 2006 amendment's impact on a specific development plan. The City also moved to strike the documents attached to HS Tejas's petition.

After holding a hearing on the City's plea and motion to strike, the trial court signed an order denying the plea to the jurisdiction. The trial court did not otherwise act on the City's motion to strike the attachments, although during the hearing, the court stated that the documents were "attached for information purposes" rather than as evidence.

The City filed an interlocutory appeal from the order denying its plea to the jurisdiction, which we now address. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 51.014(a)(8).

Analysis

The City raises two issues on appeal. First, it argues that HS Tejas's Second Amended Original Petition fails to allege a concrete injury sufficient to confer subject-matter jurisdiction. The City asserts that the petition's allegations fall below the standard for ripeness that this court articulated in *HS Tejas I*, and it

points out that HS Tejas did not submit a development plan that was denied by the City. Second, the City argues that the trial court erred by considering the 1,100 pages of unauthenticated documents attached to the second amended petition.

HS Tejas argues that its amended petition sufficiently describes a concrete injury, that it did not have to apply for a permit because such an application would have been futile under the 2006 amendment, and that the trial court properly considered the attachments as part of the allegations.

We analyze the ripeness question under the same standard of review and the same regulatory takings law discussed in this court's prior opinion. *See HS Tejas I*, 305 S.W.3d at 183–85. Whether a trial court has subject-matter jurisdiction is a question of law that we review de novo. *Miranda*, 133 S.W.3d at 226. If the claimant's pleadings allege sufficient facts that affirmatively demonstrate the court's subject-matter jurisdiction, the plea to the jurisdiction should be denied. *Id.* If, however, the claimant's pleadings do not allege sufficient facts, but do not affirmatively demonstrate incurable defends in jurisdiction, the claimant should be afforded the opportunity to amend. *Id.* at 226–27; *see also HS Tejas I*, 305 S.W.3d at 185. If the pleadings affirmatively negate jurisdiction, the plea to the jurisdiction should be granted without allowing the claimant an opportunity to amend. *Miranda*, 133 S.W.3d at 227.

When reviewing pleadings to determine jurisdiction, we construe them liberally in the plaintiff's favor, looking to the pleader's intent. *See City of Waco v. Kirwan*, 298 S.W.3d 618, 621 (Tex. 2009). The purpose of a plea to the jurisdiction, which is a dilatory plea, is not to force the plaintiff to preview its case on the merits, but rather to establish a reason why the merits of the plaintiff's claims should never be reached. *Bland Indep. Sch. Dist. v. Blue*, 34 S.W.3d 547, 554 (Tex. 2000). Thus, we will not inquire so far into the substance of the claims that we effectively demand HS Tejas to put on its case simply to establish jurisdiction. *See id.*

Ripeness is an element of subject-matter jurisdiction and, as such, is subject to de novo review. *Mayhew v. Town of Sunnyvale*, 964 S.W.2d 922, 928 (Tex. 1998). We may generally look to federal cases for guidance in takings cases, including for guidance on determining the ripeness of a takings claim. *See Hallco Tex., Inc. v. McMullen Cnty.*, 221 S.W.3d 50, 56 (Tex. 2007).

Inverse condemnation occurs when property is taken for public use without proper condemnation proceedings and the property owner attempts to recover compensation for that taking. *City of Abilene v. Burk Royalty Co.*, 470 S.W.2d 643, 646 (Tex. 1971). A real property owner may have a takings claim premised on the theory of inverse condemnation when a government regulation has interfered with investment-backed expectations. *See Hallco*, 221 S.W.3d at 56

(citing *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 98 S. Ct. 2646 (1978)). Among other requirements for the ripeness of a regulatory takings claim, the claimant must allege that it planned to use its property in a way that would conflict with the challenged regulation. *See Palazzolo v. Rhode Island*, 533 U.S. 606, 620–21, 121 S. Ct. 2448, 2459 (2005) (observing that ripeness ordinarily requires government's final decision on development plans); *Hallco*, 221 S.W.3d at 60 (finding ripeness when claimant's intended use was totally prohibited by regulation). This ripeness requirement stems from the principle that a case is ripe only if an injury has occurred or is likely to occur. *See Gibson*, 22 S.W.3d at 851–52. A case is not ripe when the determination of whether the plaintiff has an injury depends upon contingent or hypothetical facts, or upon events that have not yet come to pass. *Id.* at 852. Thus, when a landowner alleging a regulatory taking intends no more than to hold real property during the life of the challenged regulation, there is no concrete injury even if the regulation makes the property less marketable. *See HS Tejas I*, 305 S.W.3d at 184–85; *City of Houston v. Student Aid Found. Enters.*, No. 14-09-00236-CV, 2010 WL 2681706, at *2 (Tex. App.—Houston [14th Dist.] July 8, 2010, no pet.) (mem. op. on rehearing).

HS Tejas's amended petition alleges that it "began the preliminary steps" to develop its parcels "into residential, commercial, and/or mixed use occupancy" for eventual resale, but "negotiations failed" because of the 2006 amendment. The

petition further alleges that HS Tejas "continued to attempt to develop for marketing the property" after the amendment's passage. HS Tejas also alleges that it had "employed the services of architects, engineers, landplanners and others required to implement plans for its subdivision and sale," and that "[p]lans were drawn and others were in the process of being drawn" when the amendment's passage was announced.

This amended petition supplies what was lacking in the petition that this court examined in *HS Tejas I*: an alleged intention to use property in a way that the 2006 amendment disallowed. The alleged activities that HS Tejas undertook—such as negotiating and hiring professional services—are of the kind that a party would undertake only if it had some intention to develop or sell real estate. *See City of Houston v. Mack*, 312 S.W.3d 855, 862 (Tex. App.—Houston [1st Dist.] 2009, no pet.) (finding ripe claim when plaintiff alleged entering into brokerage listing agreement to sell property for development); *City of Houston v. Norcini*, 317 S.W.3d 287, 294 (Tex. App.—Houston [1st Dist.] 2009, pet. denied) (finding ripe claim when plaintiff alleged buying properties with intent to sell to developers). Moreover, the allegation that "negotiations failed" upon the amendment's passage, when liberally construed in HS Tejas's favor, could signify that HS Tejas lost an imminent sale or deal. Because HS Tejas now alleges that the 2006 amendment prevented it from proceeding with its intention to develop

and market its property, it has alleged a concrete injury that is not contingent, remote, or dependent upon events that have not yet come to pass. *See Gibson*, 22 S.W.3d at 852.

The City also challenges the claims as unripe because HS Tejas never applied for a development permit. In similar regulatory takings cases, this court addressed the City's argument and found that such an application would have been futile under the 2006 amendment, which allowed for no discretion or variances. *See Mack*, 312 S.W.3d at 863; *Norcini*, 317 S.W.3d at 294–95; *City of Houston v. Noonan*, No. 01-08-01030-CV, 2009 WL 1424608, at *5–6 (Tex. App.—Houston [1st Dist.] May 21, 2009, no pet.) (mem. op.); *City of Houston v. O'Fiel*, No. 01-08-00242-CV, 2009 WL 214350, at *5 (Tex. App.—Houston [1st Dist.] Jan. 29, 2009, pet. denied) (mem. op.). Thus, the failure to apply for a development permit does not bar the ripeness of HS Tejas's claims.

We overrule the City's first issue. Because we hold that HS Tejas has alleged a concrete injury on the face of its petition, we do not reach the City's second issue, that the trial court erred by allegedly considering the documents attached to HS Tejas's petition. *See* TEX. R. APP. P. 47.1.

Conclusion

We affirm the order of the trial court denying the City's plea to the jurisdiction.

Michael Massengale
Justice

Panel consists of Justices Jennings, Massengale, and Huddle.