Fourth Court of Appeals
San Antonio, Texas

MEMORANDUM OPINION

No. 04-18-00275-CV

CITY OF MASON, TEXAS,
Appellant

v.

William Robin **LEE**, as Trustee of Lee Descendants Trust; William Harold Zesch and Amy Daviss Zesch; and Dennis Evans and Kay Evans,
Appellees

From the 452nd District Court, Mason County, Texas
Trial Court No. 185789
The Honorable Robert Rey Hofmann, Judge Presiding

Opinion by: Irene Rios, Justice

Sitting: Rebeca C. Martinez, Justice
Luz Elena D. Chapa, Justice
Irene Rios, Justice

Delivered and Filed: November 7, 2018

REVERSED AND RENDERED

The City of Mason, Texas appeals the trial court's order denying its plea to the jurisdiction as to the appellees' regulatory takings claim.[1] The City argues the trial court should have dismissed the regulatory takings claim because: (1) the appellees failed to plead a viable takings claim that would waive sovereign immunity; and (2) the appellees failed to demonstrate they have

[1] The trial court's order partially granted and partially denied a plea to the jurisdiction filed by the City and City officials who also were named as defendants. The order granted the plea to the jurisdiction as to all claims save and except the regulatory takings claim against the City. This opinion will address only the regulatory takings claim.

standing to challenge the City's enforcement of ordinances on another's property. We reverse the trial court's order and dismiss the appellees' regulatory takings claims.

BACKGROUND

In their petition, the appellees alleged they own property adjacent to or downhill from property owned by Cathie Tyler and Jaime Reyes and Mari Heisler-Reyes, and the Reyeses were constructing a single-family residence on land conveyed to them by Tyler after the City approved an improper "minor plat" entitled Plat of Tyler Subdivision.[2] The appellees further alleged the City issued the Reyeses a "void building permit." Finally, the appellees alleged the construction by the Reyeses "has caused an increase in unlawful water run-off on [appellees'] properties resulting in damage to [appellees'] properties. Additionally, the increased traffic flow due to the construction, has caused, and will increasingly cause noise and dust."

With regard to the regulatory takings claim against the City, the appellees alleged the City committed a regulatory taking "by first approving Defendant Tyler's Minor Plat and then refusing to impose the applicable City Regulations and Ordinances to the real property now owned by Defendants Reyes." The appellees further alleged the City's "failure to adhere and impose the applicable regulations and ordinances to the sub-division of the Tyler plat (now the Reyeses' Lots)" damaged the appellees "because of the excessive noise, traffic, dusts, water intrusion, unreasonable risk of fire and other hazards."

The City filed a plea to the jurisdiction asserting the appellee's regulatory takings claim was barred by immunity. Specifically, the City asserted the approval of a neighboring development does not give rise to a viable regulatory takings claim. The City also asserted the

[2] The appellees' lawsuit also alleged claims against Tyler and the Reyeses which are not the subject of this appeal.

appellees did not have standing to challenge the issuance of a building permit on property they do not own.

The City also filed a supplemental plea to the jurisdiction after the appellees settled their claims against the Reyeses. Under the terms of the settlement, the Reyeses conveyed their property to a third person; therefore, the City asserted the settlement "effectively moots all claims relating to the Reyes's plans to build a house on the property and any issues relating to the City's issuance of a building permit."

The appellees filed a response to the City's plea asserting immunity does not bar their regulatory takings claim because the City engaged in an intentional affirmative action by "illicitly approving the plat." The appellees acknowledge they reached a settlement with the Reyeses, stating, "Once this settlement is finalized, the issue over the permit issued to the Reyeses will be moot. However, the unlawfully approved Minor Plat is still at issue" and "[t]he remaining Tyler property is also non-compliant with the Ordinance, as was the initial Minor Plat when it was filed by the City Building Official."

As previously noted, the trial court signed an order partially denying the plea to the jurisdiction as the regulatory takings claim against the City. The City appeals.[3]

JURISDICTION

In its reply brief, the City noted the appellees settled with both Tyler and the Reyeses and, as a result of those settlements, the appellees acquired all of the property included within the "minor plat." The City then asserted, "Lee's takings claims against the City (though never

[3] The appellees also filed a notice of appeal seeking to challenge the portion of the trial court's order granting the plea to the jurisdiction as to their other claims against the City and the City officials. In their brief, however, the appellees state they "have settled their claims with both the Tyler Defendant and the Reyes Defendants" which "makes the Granting of the Appellant's Plea to the Jurisdiction as to Appellees' Count 1 & Count 2 of their Second Amended Petition moot."

legitimate) are now moot under Appellees' pleadings because they own the property in question and any 'excessive noise, traffic, dusts, water intrusion, unreasonable risk of fire and other hazards' come from conditions that Appellees may create, not from anything the City has done or can do." Based on his assertion, this court issued an order questioning whether we had ongoing jurisdiction over the appeal because the appellees had acquired the property for which the City had approved the "minor plat" and on which the Reyeses began constructing the residence. *See State ex rel. Best v. Harper*, No. 16-0647, 2018 WL 3207125, at *2 (Tex. June 29, 2018) ("A case can become moot at any time, including on appeal.").

The appellees responded that they incurred damages based on the actions taken by the City before the appellees were able to acquire the property, so they still have a valid regulatory takings claim to recover those damages. We agree that a justiciable controversy still exists as to whether the appellees were damaged by the actions taken by the City prior to the appellees' acquisition of the property; therefore, we have jurisdiction to address the issues raised on appeal. *See City of Hous. v. Mack*, 312 S.W.3d 855, 864 n.4 (Tex. App.—Houston [1st Dist.] 2009, no pet.) (holding live controversy still existed regarding whether plaintiff suffered a compensable injury under 2006 amendment to ordinance irrespective of 2008 amendment that may have mitigated future damages).

STANDARD OF REVIEW

We review a trial court's ruling on a plea to the jurisdiction de novo. *Sampson v. Univ. of Tex. at Austin*, 500 S.W.3d 380, 384 (Tex. 2016). If the plea to the jurisdiction challenges the 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." *Tex. Dep't of Parks & Wildlife v. Miranda*, 133 S.W.3d 217, 226 (Tex. 2004). If the plea to the jurisdiction challenges the existence of jurisdictional facts, "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*.

DISCUSSION

"Sovereign immunity does not shield a governmental entity from a takings claim." *Meuth v. City of Seguin*, No. 04-16-00183-CV, 2017 WL 603646, at *2 (Tex. App.—San Antonio Feb. 15, 2017, pet. denied) (mem. op.) (citing *Gen. Servs. Comm'n v. Little–Tex Insulation Co.*, 39 S.W.3d 592, 598 (Tex. 2001); *City of Dall. v. VRC LLC*, 260 S.W.3d 60, 64 (Tex. App.—Dallas 2008, no pet.)). "Whether particular facts are enough to constitute a taking is a question of law." *Gen. Servs. Comm'n*, 39 S.W.3d at 598.

To state a valid takings claim, a plaintiff generally must allege: (1) an intentional governmental act; (2) that resulted in his property being taken; (3) for public use. *Gen. Servs. Comm'n*, 39 S.W.3d at 598; *Meuth*, 2017 WL 603646, at *2. "Only affirmative conduct by the government will support a takings claim." *Harris Cty. Flood Control Dist. v. Kerr*, 499 S.W.3d 793, 799 (Tex. 2016). "A government cannot be liable for a taking if it committed no intentional acts." *Id*. at 800 (internal citations omitted). Accordingly, "the law does not recognize takings liability for a failure to" act. *Id*.; *see also Meuth*, 2017 WL 603646, at *2 (same).

In their response to the City's plea to the jurisdiction, the appellees focused on the City's affirmative actions of approving the "minor plat" and the building permit. Although the appellees attempt to phrase their complaint in a manner that would encompass an affirmative act, the crux of their claim is the City's "failure to adhere and impose the applicable regulations and ordinances

to the sub-division of the Tyler plat" and its refusal "to impose the applicable City Regulations and Ordinances to the real property now owned by Defendants Reyes."

As previously noted, both the Texas Supreme Court and this court have recognized "the law does not recognize takings liability for a failure to" act. *Harris Cty. Flood Control Dist.*, 499 S.W.3d at 800; *Meuth*, 2017 WL 603646, at *2. In addition, this court has also recognized a city's failure to enforce applicable zoning ordinances and special permit restrictions does not constitute a regulatory taking.[4] *Grunwald v. City of Castle Hills*, 100 S.W.3d 350, 354 (Tex. App.—San Antonio 2002, no pet.); *Schmitz v. Denton Cty. Cowboy Church*, 550 S.W.3d 342, 356 (Tex. App.—Fort Worth 2018, pet. filed) ("[A] claim based upon a governmental unit's refusal or failure to enforce its own regulations or ordinances is not a viable takings claim."); *cf. Harris Cty. Flood Control Dist.*, 499 S.W.3d at 804, 807 (questioning whether approval of private development met the public use element of a takings claim and holding no taking occurred where county was not substantially certain approval of private development would damage specific property). Finally, we question whether the appellees have a protected property interest in the manner in which the City enforced or failed to enforce its ordinances against the land owned by Tyler and the Reyeses. *See Schmitz*, 550 S.W.3d at 357; *Sumner v. Bd. of Adjustments of the City of Spring Valley Vill., Tex.*, No. 01-14-00888-CV, 2015 WL 6163066, at *10-11 (Tex. App.—Houston [1st Dist.] Oct. 20, 2015, pet. denied) (mem. op.); *see also Harris Cty. Flood Control Dist.*, 499 S.W.3d at 801

[4] The appellees assert whether a regulatory taking occurred should be examined under the factors outlined in *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104 (1978). However, those factors apply "when regulatory action unreasonably interferes with a property owner's right to use and enjoy his property." *City of Hous. v. Maguire Oil Co.*, 342 S.W.3d 726, 735 (Tex. App.—Houston [14th Dist.] 2011, pet. denied). Stated differently, the factors apply to "an ordinary regulatory takings case, one where the plaintiff complains that the government through regulation so burdened his property as to deny him its economic value or unreasonably interfere with its use and enjoyment." *Harris Cty. Flood Control Dist.*, 499 S.W.3d at 800-801. This case is the "antithesis" of such a case because the appellees "are not complaining about regulation of their property but regulation of other private properties." *Id.* at 801. Accordingly, we decline to apply the factors outlined in *Penn Cent. Transp. Co.* to the instant case. *See id*. (not applying factors outlined in *Penn Cent. Transport Co.* to determine whether "antithesis" of ordinary regulatory takings case constituted a taking).

(questioning whether a complaint about regulation of other private property is "the stuff of a constitutional taking" and asking "If a private developer, after routine approval of its plat, uses its property in a manner causing damage to other properties, might the remedy lie against the developer rather than the county? One can certainly argue that if the government's alleged affirmative conduct is nothing beyond allowing private developers to use their property as they wish, the more appropriate remedy is a claim against the private developers rather than a novel takings claim against the government.").

CONCLUSION

Because the appellees failed to allege a valid takings claim under this court's existing precedent, we reverse the portion of the trial court's order denying the City's plea to the jurisdiction as to the appellees' regulatory takings claim and render judgment dismissing that claim.

Irene Rios, Justice