COURT OF APPEALS
SECOND DISTRICT OF TEXAS
FORT WORTH

NO. 02-16-00114-CV

PETER SCHMITZ, SEAN POLLOCK, LARRY LADUKE, AND BECKY LADUKE — APPELLANTS

V.

DENTON COUNTY COWBOY CHURCH AND THE TOWN OF PONDER, TEXAS — APPELLEES

FROM THE 431ST DISTRICT COURT OF DENTON COUNTY
TRIAL COURT NO. 15-06454-431

OPINION

When a municipality allegedly refuses to enforce its zoning regulations against a property owner subject to those regulations and takes void actions attempting to change the zoning designation of that owner's property, what recourse, if any, does a neighboring property owner have against either the

municipality or the purportedly nonconforming property owner? In addressing this question, the trial court dismissed all of the claims brought by four homeowners—appellants Peter Schmitz, Sean Pollock, and Larry and Becky LaDuke—against appellees the Town of Ponder and Denton County Cowboy Church on a pretrial plea to the jurisdiction. The trial court's findings and conclusions show that it decided these claims not only on traditional subject matter jurisdiction grounds—i.e., standing and ripeness—but also on grounds related to the ultimate merits of the relief appellants requested in their live pleading. Having determined that appellants failed to plead and bring forward jurisdictional facts showing a waiver of Ponder's immunity for failure to enforce its zoning ordinance against the Church's property and for actions taken in an August 24, 2015 Town Council meeting—and that appellants cannot replead to establish a waiver of immunity for those claims—we affirm the trial court's dismissal of appellants' claims against Ponder. We also affirm the dismissal of Pollock's and the LaDukes' claims against the Church. But because we conclude that the trial court erred by dismissing Schmitz's claims against the Church, we reverse the dismissal of those claims and remand that part of the case to the trial court.

Background

In 2008 the Church bought an approximately seven-acre tract in Ponder, Texas zoned Single Family-2 Residential (the Old Property) under Ponder's zoning ordinance. The Church built a church building on the Old Property and an

outdoor rodeo arena (Old Arena) that at the time of the hearing on the plea to the jurisdiction hosted weekly rodeo events. In 2014, the Church purchased a roughly twelve-acre tract adjoining the Old Property to the west (the New Property) that at the time was also zoned Single Family-2 Residential (SF-2). The New Property is located "directly north of and adjacent to" appellants' homes, which are zoned Single Family-1 Residential. According to Ponder's comprehensive plan, appellants' properties are designated for future low-density residential zoning.

In February 2015, the Church began construction of a 350-foot by 175-foot rodeo arena on the New Property with over 61,000 square feet of building space planned (the New Arena). Around four months after the Church began construction of the New Arena, it filed an application with Ponder for a commercial building permit. Ponder issued a permit on July 13, 2015 for construction of an "open arena on 3 sides [with] [f]ull concession-rest room area." Appellants' attorney then sent Ponder a letter demanding that it revoke the building permit and requesting that it instruct the Church to cease all construction on the New Arena.

On July 30, 2015, appellants sued the Church and Ponder, seeking a temporary restraining order and temporary and permanent injunctions prohibiting the Church from continuing construction of the New Arena and requiring Ponder to suspend the issued building permit and any future building permits "until they are able to show that the [New] Property is zoned for the use as a rodeo arena or

until such time as the Court orders otherwise." Appellants also sought numerous declaratory judgments against both Ponder and the Church related to their contention that the construction of the New Arena violated Ponder's zoning ordinance and was not permitted under the New Property's zoning classification.

On August 10, 2015, the Town Council—acting as Ponder's Planning and Zoning Commission[1]—notified appellants and other property owners within 200 feet of the New Property that a hearing was scheduled for August 24, 2015 to (1) consider a change in the zoning designation of the New Property from SF-2 to Agricultural (AG) and (2) consider issuing a specific use permit (SUP) to the Church to build a "Multi-Use Event Center" on the New Property. At the August 24, 2015 meeting, the Town Council acting as the Planning and Zoning Commission—with one member abstaining—voted not to recommend a change to the New Property's zoning classification. But after convening as the Town Council, recessing into a closed executive session, and then reconvening in a public hearing, the Town Council—with all members voting—approved the proposed zoning classification change. The Town Council also voted to issue the requested SUP.

In September 2015, appellants' counsel filed a protest with Ponder, contending that the building permit had been wrongfully issued in violation of

[1]*See* Tex. Loc. Gov't Code Ann. § 211.007(a), (e) (West 2016) (providing that general law municipality may, but is not required to, appoint zoning commission and that if one is not appointed, statutes referencing zoning commission apply to municipality's governing body).

Ponder's ordinances and should be revoked. That same month, Ponder filed a plea to the jurisdiction in this suit, claiming that appellants had not adequately pled facts in their original petition that would waive its immunity from suit and challenging the existence of jurisdictional facts. In addition, Ponder argued that appellants' request for declaratory relief did not plead an actual controversy.

On October 5, 2015, the Church submitted a new building permit application for the New Arena. Ponder issued a new building permit the same day.

Appellants amended their petition four times between September and December 2015, adding claims against the Church alleging nuisance injuries and claims against Ponder for impermissible spot zoning. The Church filed its own plea to the jurisdiction, in which it claimed that appellants lack standing to sue to enforce Ponder's zoning ordinances, that no live controversy exists between appellants and the Church, that the claim for nuisance injuries arising from the New Arena is unripe and moot, and that the applicable statute of limitations had run on any claims for nuisance injuries related to the operation of the Old Arena.

Although appellants sought emergency relief, they were not able to obtain a hearing until December 30, 2015. After the hearing, the trial court denied appellants' request for a temporary injunction and granted both pleas to the jurisdiction. The trial court issued the following findings of fact and conclusions of law explaining its ruling:

FINDINGS OF FACT

1. The Court adopts and incorporates by reference herein the *Agreed Stipulation of Facts Between Plaintiffs and Defendant the Town of Ponder, Texas*, filed on December 29, 2015.

2. The Plaintiff, Peter Schmitz ("Schmitz"), is an individual residing at 418 Madison Place, Ponder, Denton County, Texas 76259.

3. The Town of Ponder ("Ponder") is a general law municipality.

4. The Denton County Cowboy Church ("Church") is non-profit Texas Corporation.

5. The Church owns two parcels of real estate in Ponder, Texas. A parcel (the "Old Property") at 400 Robinson Road that hosts the Church's Sanctuary and an outdoor arena (the "Old Arena"). A second parcel (the "New Property") immediately to the Old Property's West hosts an outdoor arena (the "New Arena") currently under construction.

6. Mr. Schmitz's residence is directly adjacent to the New Property.

7. The Church is in the process of constructing the New Arena upon the New Property.

8. The Church has yet to hold an arena ministry event in the New Arena.

9. The Church has yet to install any lighting system upon the New Arena.

10. The Church has yet to install any sound system upon the New Arena.

11. The Plaintiff Sean Pollock ("Pollock") presented no evidence of ownership of any real property interest.

12. The Plaintiff Larry Laduke ("L. Laduke") presented no evidence of ownership of any real property interest.

13. The Plaintiff Becky Laduke ("B. Laduke") presented no evidence of ownership of any real property interest.

14. Pollock failed to prove by a preponderance of the evidence any interference with the use and enjoyment of his real property interest.

15. Schmitz presented no evidence of interference with the use and enjoyment of any real property interest.

16[.] L. Laduke presented no evidence of interference with the use and enjoyment of any real property interest.

17. B. Laduke presented no evidence of interference with the use and enjoyment of any real property interest.

18. Pollock presented no evidence of interference with the use and enjoyment of any real property interest.

. . . .

CONCLUSIONS OF LAW

19. This Court has personal jurisdiction over all of the parties.

20. Plaintiffs do not have standing to bring a zoning enforcement action.

21. The only proper party to enforce a zoning ordinance is a municipality.

22. Ponder cannot delegate or assign its zoning enforcement authority.

23. Pollock's alleged injury is not traceable to the actions of the Church.

24. The Church's arena ministries constitute a religious exercise under the Religious Land Use and Institutionalized Persons Act ("RLUIPA").

25. The Church intends to use both the Old Property and the New Property for the purpose of religious exercise.

26. A decision in favor of Plaintiffs would constitute a substantial burden upon the religious exercise of the Church and its members under RLUIPA.

27. Plaintiffs' alleged nuisance damages are speculative, and thus their nuisance claims are unripe.

Standard of Review

We review the trial court's ruling on a plea to the jurisdiction under a de novo standard of review. *Tex. Dep't of Parks & Wildlife v. Miranda*, 133 S.W.3d 217, 226 (Tex. 2004); *City of Wichita Falls v. Jenkins*, 307 S.W.3d 854, 857 (Tex. App.—Fort Worth 2010, pet. denied). The plaintiff has the burden of alleging facts that affirmatively establish the trial court's subject matter jurisdiction. *Tex. Ass'n of Bus. v. Tex. Air Control Bd.*, 852 S.W.2d 440, 446 (Tex. 1993); *Eden Cooper, LP v. City of Arlington*, No. 02-11-00439-CV, 2012 WL 2428481, at *3 (Tex. App.—Fort Worth June 28, 2012, no pet.) (mem. op.). We construe the pleadings liberally in favor of the plaintiff and look to the pleader's intent. *Miranda*, 133 S.W.3d at 226. Whether undisputed evidence of jurisdictional facts establishes a trial court's jurisdiction is a question of law. *Id.*; *Jenkins*, 307 S.W.3d at 857.

If a plea to the jurisdiction challenges the existence of jurisdictional facts, we consider relevant evidence submitted by the parties when necessary to resolve the jurisdictional issues raised, as the trial court is required to do. *Miranda*, 133 S.W.3d at 227; *Jenkins*, 307 S.W.3d at 857. If the evidence

creates a fact question regarding the jurisdictional issue, then the trial court cannot grant the plea to the jurisdiction, and the fact issue will be resolved by the factfinder. *Miranda*, 133 S.W.3d at 227–28; *Jenkins*, 307 S.W.3d at 857. But if the relevant evidence is undisputed or fails to raise a fact question on the jurisdictional issue, the trial court rules on the plea to the jurisdiction as a matter of law. *Miranda*, 133 S.W.3d at 228; *Jenkins*, 307 S.W.3d at 857. This standard generally mirrors that of a traditional summary judgment. *Miranda*, 133 S.W.3d at 228; *Jenkins*, 307 S.W.3d at 857; *see* Tex. R. Civ. P. 166a(c).

Allegations in Fourth Amended Petition

In appellants' Fourth Amended Petition, the live pleading at the time the trial court granted the plea to the jurisdiction, appellants requested numerous declarations that the Church

- violated sections 154.36 and 154.57 of Ponder's zoning ordinance by beginning construction of improvements and clearing the New Property without a valid permit and continuing construction of the New Arena without a valid permit;
- violated section 154.20(A) of Ponder's zoning ordinance by beginning construction of the New Arena without proper zoning in place and without first seeking a change of the improper zoning;
- violated sections 153.009(B) and 154.57(A) of Ponder's zoning ordinance by failing to properly plat the New Property in accordance with the

zoning ordinance and failing to submit a conforming plat with the application for a building permit;

- violated sections 154.36(A)(3) and (B)(7), 154.37, and 154.20 of Ponder's zoning ordinance by failing to submit a conforming site plan with the SUP application, failing to apply for an SUP that would allow a permitted use under the zoning ordinance, and failing to submit a site plan with all of the information required by the zoning ordinance; and
- violated section 154.21 and Table 2 of Appendix B of Ponder's zoning ordinance because the New Arena violates the height, area, and setback regulations.

They also sought declarations that

- Ponder spot zoned the New Property in violation of its zoning ordinance and comprehensive plan; thus, the zoning change is unenforceable;
- Ponder acted outside its authority and the law by not following its zoning ordinance—including in its issuance of the building permit and SUP—and by granting the zoning change to the Church;
- Ponder failed to follow its zoning ordinance and the requirements of the local government code for sending meeting notices;
- the SUP is unreasonably broad and does not allow a permitted use described in the zoning ordinance;
- the New Arena violates the height, area, and setback requirements in the zoning ordinance;

- the SUP application alleges a legally insufficient basis on which to grant the SUP; thus, granting the SUP was arbitrary and unreasonable;
- the New Property was zoned SF-2 on the date the commercial building permit was issued;
- the zoning change and SUP were procured in whole or in part through violations of the Texas Open Meetings Act (TOMA);
- the SUP does not reflect the actions of the Town Planning and Zoning Committee and Town Council;
- Ponder's actions violated appellants' property rights as guaranteed in the state and federal constitutions;
- Ponder's actions create a condition or use so onerous that it amounts to a direct appropriation of appellants' property rights;
- the Church began construction of improvements without Ponder's authority and without proper zoning or a proper building permit; and
- a zoning change from SF-2 to AG is arbitrary, unreasonable, and invalid.

In addition to the numerous declaratory judgment requests, the petition also alleges that Ponder violated appellants' civil rights under 42 U.S.C.A. § 1983 (West 2012), by (1) violating their substantive and procedural due process rights, (2) effecting an uncompensated taking of their property as prohibited by the Fifth and Fourteenth Amendments and Article I, section 17 of the Texas Constitution, and (3) engaging in impermissible spot zoning by conferring a direct benefit on

the Church to appellants' detriment by ignoring the Town's comprehensive plan. Finally, appellants alleged claims against the Church for temporary and permanent nuisance injuries arising from construction of the New Arena so close to their properties. Appellants sought damages, temporary and permanent injunctive relief, and attorney's fees.

Grounds of Pleas to the Jurisdiction

Ponder raised the following grounds in its plea to the jurisdiction:

- Appellants failed to plead a valid waiver of governmental immunity for each of their claims;
- Ponder is immune from appellants' claims for declaratory relief, injunctive relief, and nuisance injuries;
- Appellants failed to allege valid claims for declaratory relief, violation of section 1983, or injunctive relief; and
- Appellants' requested relief would require Ponder to violate RLUIPA, 42 U.S.C.A. § 2000cc(a)(1) (West 2012).

The Church claimed in its plea to the jurisdiction that appellants lack standing to enforce Ponder's zoning ordinances and that no live controversy exists between appellants and the Church regarding the zoning-related claims. Additionally, the Church argued that the nuisance-injury claims are unripe and moot because the alleged injuries related to the construction and operation of the New Arena are speculative and because the applicable statute of limitations has run on any nuisance-injuries claim regarding operation of the Old Arena.

Trial Court Did Not Err By Granting Ponder's Plea

The trial court's findings of fact and conclusions of law appear to apply only to the Church's plea to the jurisdiction, except for the general conclusions that appellants do not have standing to bring a zoning enforcement claim and that the municipality is the only proper party to enforce a zoning ordinance. None of the conclusions of law specifically address whether Ponder is immune from any of appellants' claims, which is the crux of its plea to the jurisdiction. Thus, we will review the trial court's implied findings as to Ponder. *See, e.g.*, *Felix-Forbes v. Forbes*, No. 02-15-00121-CV, 2016 WL 3021829, at *5 n.4 (Tex. App.—Fort Worth May 26, 2016, no pet.) (mem. op.). Additionally, we will address appellants' issues out of the order in which they are presented in their brief to more clearly address them separately as to Ponder and the Church.

Declaratory Relief

In their first issue, appellants argue in part that the trial court erred by dismissing their claims for declaratory relief against Ponder for impermissible spot zoning. According to appellants, Ponder's immunity for those declaratory judgment claims is waived under section 37.004 of the Uniform Declaratory Judgments Act (UDJA) and section 154.99 of Ponder's zoning ordinance.

The UDJA gives Texas courts the power to "declare rights, status, and other legal relations whether or not further relief is or could be claimed." Tex. Civ. Prac. & Rem. Code Ann. § 37.003(a) (West 2015). But the UDJA does not create or augment a trial court's subject matter jurisdiction—it is "merely a

procedural device for deciding cases already within a court's jurisdiction." *Tex. Dep't of Transp. v. Sefzik*, 355 S.W.3d 618, 621–22 (Tex. 2011). Thus, the UDJA "is not a general waiver of sovereign immunity" and only waives "immunity for certain claims." *Tex. Parks & Wildlife Dep't v. Sawyer Trust*, 354 S.W.3d 384, 388 (Tex. 2011). The UDJA does not waive immunity against claims seeking a declaration of the claimant's statutory rights, *Sefzik*, 355 S.W.3d at 621, nor does it waive a governmental entity's immunity against a claim that government actors have acted outside the law, *City of El Paso v. Heinrich*, 284 S.W.3d 366, 372–73 (Tex. 2009). *City of New Braunfels v. Carowest Land, Ltd.*, No. 03-16-00249-CV, 2017 WL 2857142, at *4 (Tex. App.—June 29, 2017, no pet. h.); *Cty. of El Paso v. Navar*, 511 S.W.3d 624, 634 (Tex. App.—El Paso 2015, no pet.). The proper defendant in an ultra vires action is the official who allegedly acted without authority, not the governmental entity itself. *Sefzik*, 355 S.W.3d at 621; *Heinrich*, 284 S.W.3d at 372–73.

The UDJA provides only a limited waiver of governmental immunity: "A person . . . whose rights, status, or other legal relations are affected by a . . . municipal ordinance . . . may have determined any question of construction or validity arising under the . . . ordinance . . . and obtain a declaration of rights, status, or other legal relations thereunder." Tex. Civ. Prac. & Rem. Code Ann. § 37.004(a) (West 2015); *see Ex parte Springsteen*, 506 S.W.3d 789, 798–99 (Tex. App.—Austin 2016, pet. denied) ("[T]he UDJA's sole feature that can impact trial-court jurisdiction to entertain a substantive claim is the statute's

implied limited waiver of sovereign or governmental immunity that permits claims challenging the validity of ordinances or statutes."). Thus, the UDJA waives governmental immunity against claims that an ordinance, or an amendment to an ordinance, is invalid. *Heinrich*, 284 S.W.3d at 373 n.6; *FLCT, Ltd. v. City of Frisco*, 493 S.W.3d 238, 269 (Tex. App.—Fort Worth 2016, pet. denied).

Appellants appear to challenge the dismissal of only those requests for declaratory relief seeking to have the zoning ordinance amendments declared invalid for spot zoning and lack of proper notice. But to the extent appellants' pleadings can be read to fairly include complaints about the remainder of their requests for declaratory relief, we will address them out of an abundance of caution. *See* Tex. R. App. P. 38.1(f); *First United Pentecostal Church of Beaumont v. Parker*, 514 S.W.3d 214, 221–22 (Tex. 2017) ("We generally hesitate to turn away claims based on waiver or failure to preserve the issue.").

Ultra Vires and Private Rights UDJA Claims

Because the following UDJA claims seek only a declaration of rights or allege an ultra vires claim without naming any individual actors—and do not attack the validity of the amendments voted on by the Town Council—the trial court properly dismissed them:

- Ponder acted outside its authority and the law by not following its zoning ordinance—including in its issuance of the building permit and SUP—and by granting the zoning change to the Church;

- the SUP is unreasonably broad and does not allow a permitted use described in the zoning ordinance;
- the New Arena violates the height, area, and setback requirements in the zoning ordinance;
- the New Property was zoned SF-2 on the date the commercial building permit was issued;
- the SUP does not reflect the actions of the Town Planning and Zoning Committee and Town Council;
- Ponder's actions violated appellants' property rights as guaranteed in the state and federal constitutions;
- Ponder's actions create a condition or use so onerous that it amounts to a direct appropriation of appellants' property rights; and
- the Church began construction of improvements without Ponder's authority and without proper zoning or a proper building permit.

See Sefzik, 355 S.W.3d at 621; *Heinrich*, 284 S.W.3d at 372–73.

UDJA Claims Attacking Validity of Town Council's August 24, 2015 Votes

Because appellants' remaining UDJA claims challenge the validity of the zoning change from SF-2 to AG and the issuance of the SUP, either because they were arbitrary and unreasonable or because the required statutory and zoning ordinance notices were not sent, appellants contend that the trial court has jurisdiction to consider them under section 37.004(a) because Ponder's immunity is waived for challenges to the validity of an amendment to an

ordinance. But a municipality may not amend an ordinance by resolution or motion; it must pass an amendatory ordinance. *See Hutchins v. Prasifka*, 450 S.W.2d 829, 832 (Tex. 1970). The evidence here showed that Ponder did not pass an amendatory ordinance; instead, the Town Council merely voted on motions to change the zoning classification of the New Property and to issue the SUP. Therefore, Ponder's actions in granting the zoning change and issuing the SUP are not an "ordinance" within the meaning of section 37.004(a) for which Ponder's immunity is waived. And because the alleged TOMA and notice violations were aimed at voiding the same votes, we conclude and hold that the trial court did not err by dismissing those claims for declaratory relief and claims for injunctive relief based on a violation of TOMA—as raised in appellants' fourth issue—as well. We conclude and hold that the trial court did not err by dismissing the remainder of appellants' UDJA claims. *See City of Dallas v. Turley*, 316 S.W.3d 762, 768–69 (Tex. App.—Dallas 2010, pet. denied).

Attorney's Fees

Because appellants' attorney's fees claim was based on their UDJA claims, none of which survive, we further hold that the trial court did not err by dismissing their claim for attorney's fees. *See Boll v. Cameron Appraisal Dist.*, 445 S.W.3d 397, 400 (Tex. App.—Corpus Christi 2013, no pet.) (op. on reh'g); *City of Corinth v. NuRock Dev., Inc.*, 293 S.W.3d 360, 370 (Tex. App.—Fort Worth 2009, no pet.).

Section 154.99 of Zoning Ordinance Does Not Waive Ponder's Immunity

Appellants contend that even if they did not plead or prove a statutory waiver of immunity, Ponder's immunity from suit is waived under section 154.99 of the zoning ordinance, which provides,

> Any person or corporation violating any of the provisions of this chapter shall upon conviction be fined a sum not to exceed $2,000 per day[,] and every day that the provisions of this chapter are violated shall constitute a separate and distinct offense. In addition to the penalty provided for, the right is hereby conferred and extended upon any property owner owning property in any district where the [p]roperty owner may be affected or invaded by violations of the terms of this chapter to bring suit in the courts having jurisdiction thereof and obtain any remedies as may be available at law and equity in the protection of the rights of the property owners.

A waiver of immunity must be clear and unambiguous. *In re Nestle USA, Inc.*, 359 S.W.3d 207, 212 & n.43 (Tex. 2012) (orig. proceeding). Assuming that Ponder is authorized by law to waive its own immunity in zoning disputes, we conclude and hold that the language in section 154.99 does not clearly and unambiguously do so. *See Tooke v. City of Mexia*, 197 S.W.3d 325, 344 (Tex. 2006). Taken in context, this section purports to confer the right upon private citizens whose property rights are affected by a violation of Ponder's zoning ordinance to file suit *against the offending property owner* to obtain any remedy otherwise available by law—not to waive Ponder's immunity from a suit seeking to force Ponder to enforce the zoning ordinance. We therefore overrule appellants' first and fourth issues to the extent they challenge the dismissal of their declaratory judgment and injunctive relief claims against Ponder.

Section 1983

Appellants' second issue has three subissues. They first argue that they adequately pled facts supporting their section 1983 claim by alleging a valid regulatory takings claim under the United States Constitution.[2] Although appellants did not raise a separate takings claim under Article I, section 17 of the Texas Constitution in their live pleading, they did allege such a taking within the paragraph of that pleading addressing their section 1983 claim.

For a section 1983 claim based on a Fifth and Fourteenth Amendment taking to be ripe, the property owner must first show that it has unsuccessfully sought compensation for the taking under Article I, section 17. *See Town of Flower Mound v. Stafford Estates Ltd. P'ship*, 71 S.W.3d 18, 48–49 (Tex. App.—Fort Worth 2002), *aff'd*, 135 S.W.3d 620 (Tex. 2004). Until that occurs, the federal claim remains unripe. *See id.* at 49. But the two claims may be brought simultaneously. *See id.*

To the extent, then, that a liberal construction of appellants' live pleading shows the intent to raise an Article I, section 17 takings claim, we will review whether appellants presented jurisdictional facts sufficient to show that such a claim is viable. *See Hearts Bluff Game Ranch, Inc. v. State*, 381 S.W.3d 468, 491 (Tex. 2012), *cert. denied*, 133 S. Ct. 1999 (2013); *FLCT, Ltd.*, 493 S.W.3d at 271. Under the *Penn Central* test, a regulatory taking can occur when

[2]*See* U.S. Const. amends. V, XIV; *Palazzolo v. Rhode Island*, 533 U.S. 606, 617, 121 S. Ct. 2448, 2457 (2001).

government action unreasonably interferes with a landowner's use and enjoyment of the property. *Sheffield Dev. Co. v. City of Glenn Heights*, 140 S.W.3d 660, 671–72 (Tex. 2004); *FLCT, Ltd.*, 493 S.W.3d at 272. Federal courts construing the Fifth Amendment Takings Clause have held that the government must act affirmatively to warrant the application of that Clause. *See Alves v. United States*, 133 F.3d 1454, 1458 (Fed. Cir. 1998); *Boston Taxi Owners Ass'n v. City of Boston*, 84 F. Supp. 3d 72, 80 (D. Mass. 2015); *Valles v. Pima Cty.*, 776 F. Supp. 2d 995, 1003 (D. Ariz. 2011) ("Analysis of Plaintiffs' claims under *Penn Central* is first stymied by the fact that there is no government regulation at issue in this case."), *aff'd*, 502 F. App'x 651 (9th Cir. 2012), *cert. denied*, 134 S. Ct. 289 (2013); *Nicholson v. United States*, 77 Fed. Cl. 605, 620 (Fed. Cl. 2007) ("The Court [of Federal Claims] has consistently required that an affirmative action on the part of the [g]overnment form the basis of the alleged taking."); *see also Hearts Bluff Game Ranch*, 381 S.W.3d at 477 ("Our case law on takings under the Texas Constitution is consistent with federal jurisprudence."). Therefore, claims based upon a government entity's refusal or failure to enforce its own regulations do not allege a takings claim under the Fifth Amendment. *See Alves*, 133 F.3d at 1458 ("The government is not an insurer that private citizens will act lawfully with respect to property subject to governmental regulation merely because the government has chosen to regulate . . . ."). *But cf. Litz v. Md. Dep't of Env't*, 131 A.3d 923, 931 (Md. 2016) ("Therefore, we hold, as a matter of Maryland law, that an inverse condemnation claim is pleaded

adequately where a plaintiff alleges a taking caused by a governmental entity's or entities' failure to act, in the face of an affirmative duty to act.").

Because the jurisdictional facts show that the only government action at issue here was void and that consistent with federal takings law there must first be government action before a taking can be effected, we conclude and hold that the trial court did not err by determining appellants failed to allege a viable Article I, section 17 takings claim upon which their section 1983 claim could be based.[3] Therefore, we overrule the first subissue in their second issue. For the same reason, and also because we held that section 154.99 of Ponder's zoning ordinance is not a clear and unambiguous waiver of immunity, we overrule the second subissue in issue two.

Repleading Would Not Cure Defects

Although appellants' general statement of their second issue appears to challenge only the dismissal of their section 1983 claim, in the third subissue they contend that the trial court erred by not giving them an opportunity to amend their pleadings as to "all" of their claims against Ponder. *See* Tex. R. App. 38.1(f); *Parker*, 514 S.W.3d at 222.

The only remaining declaratory judgment claims for which immunity could be waived relate to appellants' contention that Ponder acted outside its authority

[3]To the extent that appellants' issues can be read to include a challenge to the trial court's dismissal of their section 1983 claim alleging that Ponder engaged in impermissible spot zoning, it fails for the same reasons.

in issuing the building permits and approving the zoning change and issuance of an SUP by vote of the Town Council. But because appellants sued only Ponder and did not name any town officials as defendants, the trial court did not err by dismissing those claims without allowing appellants to file amended pleadings. *See Tex. Dep't of Ins. v. Reconveyance Servs., Inc.*, 306 S.W.3d 256, 258–59 (Tex. 2010); *Scott-Nixon v. Tex. Higher Educ. Coordinating Bd.*, No. 03-10-00377-CV, 2012 WL 1582270, at *4 (Tex. App.—Austin May 4, 2012, no pet.) (mem. op.). We express no opinion, however, on the viability of any future suit against Ponder based on events occurring after the dismissal of these claims.

We overrule the third subissue in appellant's second issue.

Trial Court Erred By Granting Church's Plea as to Schmitz

In part of their first issue, appellants contend that the trial court had jurisdiction to determine declaratory judgment claims against the Church because they alleged sufficient jurisdictional facts to show that the Church sought impermissible spot zoning from Ponder. They also generally allege that they have standing to sue the Church under section 154.99 of Ponder's zoning ordinance. In their third issue and part of their fourth issue, they contend that they alleged sufficient jurisdictional facts to show that their claims for nuisance injuries[4] and request for injunctive relief against the Church are ripe. In part of their fifth issue, appellants challenge the trial court's conclusion that "[a] decision

[4]Appellants have not challenged the dismissal of their claims alleging nuisance injuries arising from operation of the Old Arena.

in [their] favor . . . would constitute a substantial burden upon the religious exercise of the Church and its members under RLUIPA." Although appellants do not devote argument to the standing issue, they do state in their first issue that they have standing to sue the Church under section 154.99 of Ponder's zoning ordinance, and we must address issues of standing sua sponte. *Fin. Comm'n of Tex. v. Norwood*, 418 S.W.3d 566, 591 (Tex. 2013). Therefore, we will review the trial court's ruling on standing.

Schmitz Has Standing

The Church contends that, as private citizens, appellants cannot seek declaratory or injunctive relief "enforcing" Ponder's zoning ordinances. According to the Church, section 211.012(c) of the local government code is the exclusive method by which zoning ordinances can be enforced, and that statute specifically allows only a governmental unit to do so.

Section 211.012(c) Not Exclusive Remedy

Section 211.012(c) of the local government code provides,

> If a building or other structure is erected, constructed, reconstructed, altered, repaired, converted, or maintained or if a building, other structure, or land is used in violation of this subchapter or an ordinance or regulation adopted under this subchapter, the appropriate municipal authority, *in addition to other remedies*, may institute appropriate action to:
>
> (1) prevent the unlawful erection, construction, reconstruction, alteration, repair, conversion, maintenance, or use;
>
> (2) restrain, correct, or abate the violation;
>
> (3) prevent the occupancy of the building, structure, or land; or

(4) prevent any illegal act, conduct, business, or use on or about the premises.

Tex. Loc. Gov't Code Ann. § 211.012(c) (West 2016) (emphasis added). In determining whether a legislative scheme provides an exclusive remedy, the supreme court has considered "the purposes, policies, procedural requirements, and remedies of [those acts] to determine whether the Legislature intended to effectively provide two different remedies." *Tex. Mut. Ins. Co. v. Ruttiger*, 381 S.W.3d 430, 441 (Tex. 2012) (op. on reh'g); *FLCT, Ltd.*, 493 S.W.3d at 256. Briefly, the various sections of Subchapter A of chapter 211, in which section 211.012 is located, provide as follows:

- Section 211.001 of the local government code states that "[t]he powers granted under this subchapter [Subchapter A: General Zoning Regulations] are for the purpose of promoting the public health, safety, morals, or general welfare and protecting and preserving places and areas of historical, cultural, or architectural importance and significance."

- Section 211.003 describes the types of regulations a municipality can enact.

- Section 211.004 provides that zoning regulations must be in accordance with a comprehensive plan.

- Section 211.005 allows a municipality to divide into districts and provides for uniformity within the districts.

- Section 211.006 sets forth procedures that a municipality must employ in making zoning regulations.
- Section 211.007 allows for the establishment of a zoning commission to exercise the powers set forth in the subchapter.
- Section 211.0075 provides that TOMA applies to board, commission, or subcommittee meetings.
- Section 211.008 allows for a municipality to appoint a Board of Adjustment that is allowed to make variances to the zoning regulations.
- Section 211.009 describes the scope of a Board of Adjustment's authority.
- Section 211.010 provides an appeal process to the Board of Adjustment for an administrative official's determination.
- Section 211.011 provides for an appeal of a Board of Adjustment's decision by petition for writ of certiorari to a district court, county court, or county court at law.
- Section 211.013 provides that when a zoning regulation adopted under Subchapter A conflicts with a more restrictive one adopted under "another statute or local ordinance or regulation" the more restrictive controls, and it also provides that Subchapter A does not apply to "a building, other structure, or land under the control, administration, or jurisdiction of a state or federal agency."
- Sections 211.014 and .015 apply solely to home-rule municipalities.

- Section 211.016 addresses zoning regulations of the exterior appearance of buildings.
- And section 211.017 provides for the continuation of land use in newly incorporated municipalities.

Tex. Loc. Gov't Code Ann. §§ 211.003–.011, 211.013–.017 (West 2016). The current version of Subchapter A (and the remedy set forth in 211.012(c)) have not changed substantively since originally enacted in 1927. *See* Zoning Enabling Act, 40th Leg., R.S., ch. 283, 1927 Tex. Gen. Laws 424, 424–29 (repealed and replaced by Act of May 1, 1987, 70th Leg., R.S., ch. 149, 1987 Tex. Gen. Laws 707, 710, 963–68, 1306–08).

This main focus of this statutory scheme is to confer zoning authority on municipalities and to define the scope of their powers in furtherance of that authority, including the ability to enforce properly enacted regulations. Nothing in the scheme of this Subchapter purports to preclude or limit any common law or other right of a landowner directly affected by a neighbor's use of property from seeking redress in the courts if another law provides a remedy.

The Church cites *GTE Mobilnet of South Texas Ltd. Partnership v. Pascouet*, 61 S.W.3d 599 (Tex. App.—Houston [14th Dist.] 2001, pet. denied), for the proposition that section 211.012 precludes private citizens from maintaining an action complaining about the application or nonapplication of zoning regulations to property they do not own. That case involved a suit for nuisance and invasion of privacy brought by neighbors of property owned by the

City of Bunker Hill, which leased part of the property to GTE to erect a 126 foot cellular tower. *Id.* at 605–06. The Pascouets sought declaratory and injunctive relief, ultimately seeking to permanently enjoin GTE from keeping the tower in its original location and to enjoin all future violations by GTE of the Bunker Hill zoning ordinance. *Id.* at 620–21. The court of appeals affirmed the trial court's denial of a permanent injunction seeking removal of the tower to a new location because there was "substantial evidence from the Pascouets themselves to the effect that GTE had abated the nuisance." *Id.* at 620. With respect to the request to enjoin future violations of the ordinance, the Pascouets argued only that they were entitled to an injunction under section 211.012 of the local government code. They did not allege that they had standing under any other law. The court held that "[u]nder the unambiguous language of *this statute*, only Bunker Hill may enforce its zoning ordinances." *Id.* at 621 (emphasis added). Later, the court stated that "[u]nder the applicable statutes, only Bunker Hill may enforce its zoning ordinances," and "only municipalities can enforce violations of their zoning ordinances under TEX. LOCAL GOV'T CODE [sic] § 211.012(c)." *Id.* at 622. Thus, although *Pascouet* answers whether section 211.012(c) provides authority for appellants to maintain their suit for declaratory and injunctive relief against the Church—it does not—*Pascouet* never addressed whether the plaintiffs had standing under any other law. *Cf. Reynolds v. Haws*, 741 S.W.2d 582, 587 (Tex. App.—Fort Worth 1987, writ denied) (broadly describing—in context of determining whether former version of local government code section

211.011(a) allowed suit by petition for writ of certiorari against private citizen without joinder of municipality's board of adjustment—holding of *Sams v. Dema*, 316 S.W.2d 165 (Tex. Civ. App.—Houston 1958, writ ref'd n.r.e.), as "one private party may not sue another private party to restrain the second party from violating a zoning ordinance," when narrow issue addressed in *Sams* was whether plaintiffs had exhausted their statutory remedies).

We therefore conclude and hold that section 211.012(c), while providing a municipality with authority to enforce its own zoning regulations, does not purport to exclude any other remedies available to private citizens. We will therefore review whether appellants have shown standing under any other law.

Schmitz Showed Particularized Injury Conferring Standing

The Church contends that even if local government code section 211.012(c) does not preclude appellants from bringing their claims for declaratory and injunctive relief, appellants have not shown any statutory or other authority giving them standing to maintain those causes of action against the Church. The general test for standing requires the existence of a real controversy between the parties that will be determined by the judicial declaration sought. *Tex. Ass'n of Bus.*, 852 S.W.2d at 446. A plaintiff does not have standing unless the subject matter of the litigation affects the plaintiff differently from other members of the general public. *Hunt v. Bass*, 664 S.W.2d 323, 324 (Tex. 1984). Although, generally, a property owner has no vested right to use its property in a certain way without restriction, *FLCT, Ltd.*, 493 S.W.3d at 271—and has no vested

property right in a municipality's enforcement of a neighbor's zoning classification[5]—a property owner does have a right to use and enjoy that property free from substantial interference that causes unreasonable discomfort or annoyance, *Crosstex N. Tex. Pipeline, Inc. v. Gardiner*, 505 S.W.3d 580, 594–95 (Tex. 2016). And even if Ponder's attempt to change the zoning classification and allowed use of the New Property had not been invalid, the law grants a person aggrieved by governmental action, such as by allowing an objectionable permitted use on a neighbor's property, standing if the person can show that he or she has suffered particular or pecuniary damage. *See Scott v. Bd. of Adjustment*, 405 S.W.2d 55, 56 (Tex. 1966); *Bolton v. Sparks*, 362 S.W.2d 946, 951 (Tex. 1962); *Persons v. City of Fort Worth*, 790 S.W.2d 865, 868 (Tex. App.––Fort Worth 1990, no writ); *Lozano v. The Patrician Movement*, 483 S.W.2d 369, 371–72 (Tex. Civ. App.—San Antonio 1972, writ ref'd n.r.e.).

This long-standing rule in Texas is supported generally. As one commentator has observed,

> The extent to which private parties are granted standing to enforce zoning restrictions represents a compromise between opposing public interests. On the one hand, since zoning restrictions are intended to further the welfare of the community generally, the entire community has some interest in their proper

[5]*See Sumner v. Bd. of Adjustments of the City of Spring Valley Village*, No. 01-14-00888-CV, 2015 WL 6163066, at *10–11 (Tex. App.—Houston [1st Dist.] Oct. 20, 2015, pet. denied) (mem. op.) (holding, in context of suit involving city's failure to enforce private deed restrictions when allowing zoning change, that neighboring property owner had no *constitutionally protected* property interest in the continued use of his property for a particular purpose).

> application. This interest is served by a grant of standing sufficiently broad to permit zoning disputes to be resolved on their own merits rather than by application of some overly preclusive rule of standing. On the other hand, it is not in the public interest to grant everyone in the community standing to challenge every zoning decision and every perceived zoning violation since this would make the land use approval process unduly time-consuming and cumbersome and might encourage obstructive or vexatious litigation. This conflict generally is resolved by limiting standing to private persons who can show that they have been directly injured in some special and individualized way by a zoning violation, or in some cases, by giving standing only to persons within a certain stated proximity to the alleged violation. In addition, other interested persons are often permitted to seek administrative review of zoning decisions and, in appropriate cases, administrative enforcement, and may ultimately resort to the courts in furtherance of these remedies.

Eric M. Larsson, *Cause of Action by Private Party to Enjoin Zoning Violation*, 44 Causes of Action 2d 619 (2010) (citations omitted).

Here, whether appellants have shown they have suffered a particularized injury involves the same inquiry as that raised in their third issue—whether their nuisance-injury claims are ripe—because the underlying inquiry as to both is the extent to which they have pled and proved[6] the effect on their adjoining properties of the construction and imminent operation of the New Arena. Therefore, we will address these issues together.

A hypothetical injury is not sufficient to confer standing. *Canty v. City of Nacogdoches*, No. 12-08-00001-CV, 2009 WL 3288299, at *4 (Tex. App.—Tyler Oct. 14, 2009, pet. denied) (mem. op.). In evaluating ripeness, we consider

[6]The Church's ripeness argument challenged both the pleadings and the existence of jurisdictional facts.

"whether, *at the time a lawsuit is filed,* the facts are sufficiently developed 'so that an injury has occurred or is likely to occur, rather than being contingent or remote.'" *Robinson v. Parker*, 353 S.W.3d 753, 755 (Tex. 2011) (quoting *Waco ISD v. Gibson*, 22 S.W.3d 849, 851–52 (Tex. 2000)). Although a claim is not required to be ripe at the time of filing, if a party cannot demonstrate a reasonable likelihood that the claim will soon ripen, the case must be dismissed. *See id.*; *Perry v. Del Rio*, 66 S.W.3d 239, 251 (Tex. 2001).

Only Schmitz testified at the hearing on the plea to the jurisdiction, and he was the only plaintiff who presented evidence relative to whether he had suffered a particularized injury.[7] Therefore, the LaDukes and Pollock failed to show that they had suffered a particularized injury that conferred standing, and we will consider only whether Schmitz's pleadings and evidence met the standard.

Schmitz's Allegations in Live Pleading

In the over-thirty-page Fourth Amended Petition, Schmitz alleged that he "currently owns real property that is directly affected by the actions of" the Church and Ponder, and listed his address and property description. The petition alleged that appellants had "on multiple occasions notified . . . Ponder that the [New] [A]rena construction project was producing excessive noise and light in violation

[7]Although the trial court found that the other appellants presented no evidence of property ownership, the parties had already agreed to stipulate that "the New Property is located directly north of and adjacent to the homes *owned by* [appellants] located on Madison Place, Ponder, Denton County, Texas." [Emphasis added.]

of [Ponder's] ordinances and was being started daily prior to 7:00 a.m. and continuing past 10:00 p.m., also in violation of [Ponder's] ordinances." The petition further alleged,

> The nature and degree of the adverse impacts to [Schmitz's] land is substantial and consists of injuries to the real property itself, [Schmitz's] person[] and [Schmitz's] use and enjoyment of [his] land and to other[s] situated in [the] neighborhood. The [New] Property was properly suited for use as a single family residential district considering the existing and emerging residential neighborhoods that border the [New] Property. . . . [T]he uses allowed in an AG zoning district, particularly construction and operation of a rodeo arena, negatively impact [Schmitz's] health and safety by producing additional traffic, pollution, noise and noxious odors and devalue [Schmitz's] property amounting to a complete taking of their property.

Later in the petition Schmitz alleged that the "Church intended to operate a rodeo arena within 100 feet of [his] propert[y]" and specifically connected that proximity to a diminution in value and use and enjoyment of his property. In the injunction section, Schmitz pled,

> If an injunction is not issued, [the] Church will continue the rodeo arena construction project, causing imminent harm to [Schmitz] and [his] propert[y] in the form of offensive odors, noise from rodeo arena events and patrons, and lights from rodeo arena events and patrons and complete loss of the use and enjoyment, and market value of [his] home[]. Without an injunction prohibiting the construction of the rodeo arena project, [Schmitz] will suffer irreparable harm, injury and damages from biological hazards from animal waste, loss of sleep from light and noise thereby disrupting [his] job performance, intrusion from dirt and dust from rodeo events and gravel roads, and intrusions on [his] seclusion.

Schmitz also alleged as to the New Property that

> [t]he [N]ew [A]rena will create a nuisance to [Schmitz] and others that are similarly located. In this regard, the [Old] [P]roperty is not

> located in a zoning district that is conducive to activities that are routinely found in a commercially operated rodeo arena; the [Old] [A]rena creates an extreme annoyance, sometimes preventing [Schmitz] from spending time in [his] backyard[]; the bright stadium lights that can be seen from [Schmitz's] home[]; the [Old] [A]rena operates well into the night past reasonable hours; following the completion of rodeo events, large trucks make noise and haul the animals off; the announcement system creates undue noise to [Schmitz] and those similarly situated; and the rodeo events held by [the] Church create substantial interference with [Schmitz's] use and enjoyment of [his] property.

Schmitz also specifically alleged that Ponder's attempts to change the New Property's zoning classification were inconsistent with Ponder's future development plan and that the New Arena itself—without the addition of the animals and people involved in its use—violated Ponder's zoning regulations. He further contended that the use of the New Arena in violation of the zoning regulations and future plan adversely impacted the use of his property for low-density residential purposes.

Schmitz's pleadings thus alleged that even though construction of the New Arena had not yet been completed, and the Church was not yet holding rodeo events there, the New Arena was going to be operated in the same manner as the Old Arena—which was close by but not directly behind his home—and that the operation of the Old Arena had substantially interfered with the use and enjoyment of his property due to excessive noise, light, and odor, which sometimes prohibited him from using his backyard. Schmitz also alleged that the same type of injuries would occur temporarily due to the construction activities. We therefore conclude and hold that his pleadings sufficiently alleged at least a

reasonable likelihood that his claim would soon ripen and were thus sufficient to plead a particularized injury.

Schmitz's Testimony

Schmitz testified at the evidentiary hearing that when he bought his home in 2001, there was nothing behind his lot. He expected that the land behind his lot would be zoned in keeping with his being able to have outdoor living in his backyard. The Old Arena was constructed after the church building was built. Construction on the New Arena began in February 2015. The footprint of the New Arena structure is 61,000 square feet.

Schmitz admitted that at the time of the hearing, the New Arena had not yet been completed, no event had yet been held there, and there were no lights, speakers, or animals where the New Arena was being constructed. But he said the lights from the Old Arena shone into his backyard. He complained that the edge of the New Arena structure was located only forty steps from his backyard and that its size dominated the view from his backyard. He agreed that his nuisance allegations as to the New Arena are based on what was currently occurring at the Old Arena and that he was alleging that the same activities would continue at the New Arena. Schmitz testified about the extent of the effect of the Old Arena:

> When they're having events, we can't really use the backyard. The PA system is loud. The noise from the crowds, the cheering, the -- you know, everything that's associated with a rodeo is loud and noisy and prevents us from using our backyard. We can't even

> open our windows at night when it's a nice night because of the noise.

According to Schmitz,

> To us, it's a devastating loss. We won't be able to enjoy our outdoor living area during times of operation. The entire northern skyline is consumed by this huge, monstrous structure. Whenever there's going to be events, they have a gravel road that's 20-foot from our fence. They're going to be bringing in livestock, trucks, tractors, going to have odors, animal waste, crowds, PA systems, music, bells and buzzers, everything that's associated with a rodeo. To me it's a complete loss on the property. I don't know anybody that's going to want to go buy that now.

A church elder testified that the Church held both day and night events at the Old Arena and that those events are conducted mostly in the same manner as they were when the Old Arena was first constructed except that the amount of contestants had increased. The Church planned to take down the Old Arena once the New Arena was operational. Although the Church had initially planned for the south side doors of the New Arena to be open during events, it decided to keep them closed to help shield neighbors from light and sound. The pastor of the Church testified that at the time of the hearing, the Church used the Old Arena mostly every day during the spring and summer months and that the Church intended to use the New Arena with the same frequency.

Nuisance-Injury and UDJA Claims are Ripe

Schmitz challenges the trial court's finding that he presented "no evidence of interference with the use and enjoyment of any real property interest." Schmitz's testimony established the effects of the Old Arena on his use and

enjoyment of his property, and Schmitz's and the Church's testimony established that the Church was planning on using the New Arena for the same purpose and with the same frequency. No evidence supported a finding that construction and use of the New Arena was anything other than imminent. Therefore, we conclude and hold that Schmitz only[8] pled and presented sufficient facts showing a ripe, particularized injury for purposes of establishing standing and ripeness.[9] *See City of Canyon v. McBroom*, 121 S.W.3d 410, 415 (Tex. App.—Amarillo 2003, no pet.); *Freedman v. Briarcroft Prop. Owners, Inc.*, 776 S.W.2d 212, 216 (Tex. App.—Houston [14th Dist.] 1989, writ denied) ("[T]he parking lot did not have to be in existence to bring this claim. Appellants' intent to create the parking lot was imminent.").

Having determined that Schmitz showed standing by pleading a particularized injury and providing evidence of jurisdictional facts, also showing that his claim for nuisance damages is ripe, entitling him to proceeding under common law, we need not address the Church's other argument that Ponder cannot validly delegate the right to private citizens to enforce its zoning

[8]Although Schmitz made numerous references to "we" and "our" in his testimony, it is clear from the context that he was referring only to residents of his property and not the adjoining landowners.

[9]This is not to say that Schmitz will prevail on the merits of his claim. *See Freedman v. Briarcroft Prop. Owners, Inc.*, 776 S.W.2d 212, 216 (Tex. App.—Houston [14th Dist.] 1989, writ denied) (noting that while claim alleging nuisance injuries was ripe, "[w]hether appellants' conduct constituted a threatened nuisance was for the fact-finder").

regulations via section 154.99 of its zoning ordinance. *See* Tex. R. App. P. 47.1. Moreover, section 154.99 cannot confer standing on Pollock and the LaDukes because under the plain language of that section, a property owner must be able to show that he or she is "affected or invaded" by a zoning violation.

As to the declaratory judgment claims, the Church also contended that there was no live controversy between the parties because Schmitz's injuries are not traceable to the Church's conduct that he alleges is in violation of the zoning ordinance; in other words, the Church contends that even if the New Arena does violate the zoning ordinance—in terms of height and setback requirements, nonpermitted construction activities, or noncompliance with Ponder's site plan requirements—Schmitz's damages are not caused by that violation. *See Eden Cooper, LP*, 2012 WL 2428481, at *4 (stating that a requirement of standing is that plaintiff's injury must be fairly traceable to the defendant and it must be likely that the injury will be redressed by a favorable decision). Schmitz's suit necessarily includes the underlying argument that the New Arena would never have been allowed to be constructed in such close proximity to his home if the Church had properly complied with Ponder's zoning ordinance. Thus, he has at least alleged an injury fairly traceable to the Church's actions in building the New Arena. *See Heckman v. Williamson Cty.*, 369 S.W.3d 137, 155, 157 (Tex. 2012); *see also Crosstex*, 505 S.W.3d at 593–97, 600–01 & n.12 (explaining that nuisance injuries arise from a substantial interference with the use and enjoyment of land that causes unreasonable discomfort or annoyance to persons

of ordinary sensibilities and noting that although goal of private nuisance law is to determine when a lawful property use should be prohibited, unlawfulness of property use may nevertheless be relevant to that determination).

RLUIPA

The fifth issue concerns whether dismissal was improper on the basis that appellants' claims are barred by RLUIPA, a federal law protecting religious exercise. The trial court concluded that "a decision in [appellants'] favor . . . would constitute a substantial burden upon the religious exercise of the Church and its members under" RLUIPA.

The part of RLUIPA applicable here provides that

> [n]o government shall impose or implement a land use regulation in a manner that imposes a substantial burden on the religious exercise of a person, including a religious assembly or institution, unless the government demonstrates that imposition of the burden on that person, assembly, or institution . . .
>
> (A) is in furtherance of a compelling governmental interest; and
>
> (B) is the least restrictive means of furthering that compelling governmental interest.

42 U.S.C.A. § 2000cc(a)(1). It further provides that "[a] person may assert a violation . . . as a claim or defense in a judicial proceeding *and obtain appropriate relief against a government.*" *Id.* § 2000cc-2(a) (West 2012) (emphasis added). Thus, it does not apply in an action against a private person. *Id.* The Church alleged that Schmitz may not enforce zoning regulations against it because he is standing in Ponder's shoes, and Ponder is barred from imposing zoning

regulations on the Church's property that violate RLUIPA. But we have already held that Schmitz pled and presented sufficient evidence of a particularized injury that would give him standing to maintain his suit as a private person. As such, his standing is not derivative of Ponder's.

Further, nothing in RLUIPA purports to deprive a trial court of jurisdiction to consider whether a church's use of its property encroaches upon a neighboring property owner's right to use and enjoy that owner's property. *See DaimlerChrysler Corp. v. Inman*, 252 S.W.3d 299, 305 (Tex. 2008) ("A plaintiff does not lack standing simply because he cannot prevail on the merits of his claim . . . ."). The Church cited no authority in the trial court or in this court holding that a trial court is deprived of *subject matter jurisdiction* over a suit when the relief sought would allegedly cause a governmental entity to violate RLUIPA. *See Bland ISD v. Blue*, 34 S.W.3d 547, 554 (Tex. 2000) ("The purpose of a dilatory plea is not to force the plaintiffs to preview their case on the merits but to establish a reason why the merits of the plaintiffs' claims should never be reached. . . . [T]he proper function of a dilatory plea does not authorize an inquiry so far into the substance of the claims presented that plaintiffs are required to put on their case simply to establish jurisdiction."); *UL, Inc. v. Pruneda*, No. 01-09-00169-CV, 2010 WL 5060638, at *6 (Tex. App.—Houston [1st Dist.] Dec. 9, 2010, no pet.) (mem. op.) (discussing difference between pleas in bar, entitling defendant to take-nothing judgment, and jurisdictional pleas challenging a court's power to hear a suit). Accordingly, we sustain the fifth issue

in part as to Schmitz's claims against the Church.[10] Because we have already held that the trial court did not err by dismissing all of appellants' claims against Ponder, we need not address the issue as to Ponder. *See* Tex. R. App. P. 47.1.

Having determined that only Schmitz showed a particularized injury sufficient to give him standing to bring declaratory judgment claims against the Church, that only Schmitz presented jurisdictional facts showing that his claim for nuisance injuries is ripe, and that RLUIPA is not a jurisdictional bar to his claims against the Church, we conclude and hold that the trial court erred by granting the Church's plea to the jurisdiction as to Schmitz only. As to Schmitz only, we sustain appellants' third issue and the part of their fourth issue that relates to the claims against the Church. But we overrule the third issue, and the remainder of the fourth and fifth issues, as to Pollock and the LaDukes.

[10]In so holding, we make no inquiry into the applicability of RLUIPA as between Ponder and the Church, nor do we express any opinion on whether a RLUIPA-type inquiry would be relevant at a stage of the proceedings appropriate for a disposition on the merits of Schmitz's nuisance claim, such as summary judgment. *See Crosstex N. Tex. Pipeline, Inc. v. Gardiner*, 505 S.W.3d 580, 600–01 (Tex. 2016) (providing nonexclusive list of factors that may be considered in determining whether circumstances show a nuisance injury).

Conclusion

We affirm the trial court's dismissal of Pollock's and the LaDukes' claims against the Church and Ponder. We also affirm the trial court's dismissal of Schmitz's claims against Ponder. But we reverse the dismissal of Schmitz's claims against the Church and remand that part of the case to the trial court.

/s/ Terrie Livingston

TERRIE LIVINGSTON
CHIEF JUSTICE

PANEL: LIVINGSTON, C.J.; GABRIEL and PITTMAN, JJ.

GABRIEL, J., concurs without opinion.

DELIVERED: August 31, 2017