COURT OF APPEALS
SECOND DISTRICT OF TEXAS
FORT WORTH

NO. 02-17-00384-CV

CITY OF EL PASO — APPELLANT

V.

MAX GROSSMAN — APPELLEE

FROM THE 384TH DISTRICT COURT OF EL PASO COUNTY
TRIAL COURT NO. 2017-DCV2528

MEMORANDUM OPINION[1]

I. Background

The underlying litigation involves a challenge to Appellant the City of El Paso's $180 million plan to demolish its oldest continuously occupied downtown

[1] *See* Tex. R. App. P. 47.4.

neighborhood, "Duranguito" (Union Plaza), in order to build a taxpayer-funded multipurpose cultural, athletic, and performing arts facility.[2]

Appellee Max Grossman, an assistant professor of Art History at the University of Texas-El Paso who serves on the El Paso County Historical Commission, sought a declaratory judgment that the City be required to (1) properly notify the Texas Historical Commission (THC) "and take any and all other actions in compliance with" natural resources code section 191.0525, (2) refrain from issuing demolition permits in the area, and (3) refrain from entering new contracts related to the project until it complied with "all requirements of the Texas Antiquities Code" and received THC's approval to proceed. Grossman also sought a temporary restraining order under natural resources code section 191.173(a),[3] an injunction to stop the demolition of the historic buildings, and attorney's fees pursuant to his declaratory judgment action.

[2]An interlocutory appeal pertaining to the taxpayer-funded nature of this project is currently pending in the Austin Court of Appeals in cause number 03-17-00566-CV.

[3]Natural resources code section 191.173(a) provides that a Texas citizen may bring an action for restraining orders and injunctive relief "to restrain and enjoin violations or threatened violations of this chapter [Antiquities Code], and for the return of items taken" in violation of the chapter's provisions. Tex. Nat. Res. Code Ann. § 191.173(a) (West 2011). Grossman's TRO application was denied when the parties agreed to the terms of a temporary order to give notice of demolition. The temporary order was to remain in effect until the trial court issued an order on Grossman's application for temporary injunction or until the City provided the fourteen-day notice required in the order.

The City filed a plea to the jurisdiction in which it argued that Grossman had failed to meet his burden of affirmatively pleading waiver of the City's governmental immunity because he made "no effort to plead facts that establish a waiver of the City's governmental immunity under the UDJA" and that the narrow waiver of governmental immunity in section 191.173 did not apply because it was limited to restraining orders and injunctive relief. The City also asserted that it was "nowhere near ready to break ground,"[4] so section 191.0525 had not been violated.

As of the trial court's September 11, 2017 hearing on the plea to the jurisdiction, the City had not sent notice to THC. The trial court denied the City's plea based on natural resources code section 191.173,[5] and the City immediately filed its notice of appeal. *See* Tex. Civ. Prac. & Rem. Code Ann. § 51.014(a)(8) (West Supp. 2017) (providing for interlocutory appeal of an order granting or denying a plea to the jurisdiction by a governmental unit).

After conflict ensued over the City's issuance of demolition permits to private property owners under contract with the City, the El Paso Court of Appeals granted emergency relief pursuant to Grossman's petition for writ of injunction in that court.

---

[4]At the time that it filed its plea, the City stated that while the project's footprint contained 22 parcels of land, the City had only acquired 10 parcels, while the remaining 12 were still privately owned.

[5]The trial court stated, "my specific ruling today is I want specific notice sent to the Texas Historic Commission telling them what's going to happen. And within 30 days, they have to take -- tell us whether they're going to do anything within 30 days. If they're not going to do anything, then this Court believes that the issue is moot."

The supreme court subsequently ordered both the original proceeding and interlocutory appeal transferred to this court. *See* Misc. Docket No. 17-9147 (Tex. Oct. 31, 2017, order) (transferring cause numbers 08-17-00199-CV and 08-17-00200-CV). We granted Grossman's petition for writ of injunction to preserve our jurisdiction over the subject matter of the pending interlocutory appeal. *In re Grossman*, No. 02-17-00383-CV, 2017 WL 6047681, at *1 (Tex. App.—Fort Worth Dec. 7, 2017, orig. proceeding) (mem. op.).

II. The City's Motions and Grossman's Responses

On June 25, 2018, the City filed a "Motion to Dismiss Appeal as Moot." In the motion, the City contended that it had taken an action that rendered Grossman's "underlying action . . . moot" and consequently sought to dismiss the appeal.

Grossman opposed the motion and requested an extension of time to file a response, which we granted. On July 19, 2018, Grossman filed his response, arguing that his claim for attorney's fees under the Declaratory Judgments Act "breathe[d] life into" the appeal and prevented it from being moot[6] and that the parties' underlying dispute was not moot.

[6]Grossman's attorney's fees claim is not before us in this interlocutory appeal. *Cf.* Tex. Civ. Prac. & Rem. Code Ann. § 51.014(a)(8); *Osborne v. Rowe*, No. 02-15-00277-CV, 2015 WL 6556298, at *1 (Tex. App.—Fort Worth Oct. 29, 2015, no pet.) (mem. op.) ("We must strictly construe section 51.014 as a narrow exception to the general rule that only final judgments or orders are appealable."). Accordingly, it does not provide a basis to retain the interlocutory appeal.

On August 3, 2018, the City notified this court that it was withdrawing its motion to dismiss the appeal but provided this court with no explanation as to its previous assertion of mootness, ignoring this court's obligation to review sua sponte issues affecting jurisdiction. *M.O. Dental Lab v. Rape*, 139 S.W.3d 671, 673 (Tex. 2004).

On August 14, 2018, the City filed a "Motion to Dismiss Appeal under TRAP 42.1." In the instant motion, the City states that its plea to the jurisdiction was based on its contention that there was no waiver of governmental immunity because the real property involved in the underlying suit was not owned by it. Because it has "recently purchased and acquired title to the property that is the subject of Appellee's claims in the underlying suit," the City now asks us to dismiss the appeal "so that this case may proceed in the trial court." Grossman opposed the motion but did not file a response.

III. Interlocutory Appeal

In its brief in this interlocutory appeal, the City argued that the trial court erred by denying its plea to the jurisdiction because (1) there was no waiver of governmental immunity for Grossman's claims and (2) the City did not violate or threaten to violate natural resources code section 191.0525.

Natural resources code section 191.0525(a) requires notice to THC by the person primarily responsible for a project located on state or local public land prior to breaking ground on the project. Tex. Nat. Res. Code Ann. § 191.0525(a) (West 2011). THC then has thirty days to determine whether a historically significant

archeological site is likely to be present at the location, to determine what additional action, if any, is needed to protect the site, and to determine if an archeological survey is needed. *Id.* § 191.0525(a)(1)–(3), (b). If THC determines that an archeological survey is necessary, the project must halt until the survey is completed. *Id.* § 191.0525(b).

In its first, now-defunct, motion to dismiss the appeal as moot, the City claimed that it had mooted Grossman's underlying action by sending notice to THC regarding its plans for the properties at issue, and it attached a copy of its May 23, 2018 notice to its motion as an exhibit.

To his response to the City's motion, Grossman attached as an exhibit THC's June 27, 2018 response to the notice. THC's response to the City required that a Texas Antiquities Permit Application and Research Design be submitted to THC for review and stated that, upon THC's receipt of this information, THC would respond within 30 days with one of the following: the issuance of a permit, a request for revisions or additional information, the issuance of a permit with special conditions, or the denial of issuance of a permit. *See* 13 Tex. Admin. Code § 26.21 (2016) (Tex. Historical Comm'n, Issuance and Restriction of Historic Buildings and Structures Permits).

While we would normally not consider information outside of the appellate record, we may take judicial notice "to determine [our] jurisdiction over an appeal." *See Tex. Windstorm Ins. Ass'n v. Jones*, 512 S.W.3d 545, 552 n.4 (Tex. App.—Houston [1st Dist.] 2016, no pet.) (referencing *City of Glenn Heights v. Sheffield*

Dev. Co., 55 S.W.3d 158, 162–63 (Tex. App.—Houston [1st Dist.] 2001, pet. denied)). Based on the information provided to this court by the parties, as to the City's second issue in this interlocutory appeal, the portion of Grossman's original petition requesting a declaratory judgment that the City be required to properly notify THC is moot because the City has notified THC. And the City's assertion in its current motion to dismiss—that it has finally purchased and acquired title to the property at issue in the underlying lawsuit—moots the City's first issue in this interlocutory appeal.

The remainder of the City's second issue, covering Grossman's declaratory judgment request that the City "take any and all *other* actions in compliance with" section 191.0525, appears merely to be unripe for our review. [Emphasis added.] *See City of Fort Worth v. Alvarez*, No. 02-17-00091-CV, 2018 WL 2248481, at *8 (Tex. App.—Fort Worth May 17, 2018, no pet.) (mem. op.) (discussing ripeness and citing *City of El Paso v. Madero Dev.*, 803 S.W.2d 396, 400 (Tex. App.—El Paso 1991, writ denied), *cert. denied*, 502 U.S. 1073 (1992), and *Tex. Bay Cherry Hill, L.P. v. City of Fort Worth*, 257 S.W.3d 379, 393 (Tex. App.—Fort Worth 2008, no pet.)). But the ripeness of this and any of Grossman's other underlying claims is a determination best suited to the trial court at this point.

IV. Conclusion

Based on the above, we grant in part the City's current motion as to the portions of its interlocutory appeal that have not been completely mooted, and we dismiss the City's interlocutory appeal. *See* Tex. R. App. P. 43.2(f). As the

interlocutory appeal no longer remains pending in this court, we release the temporary injunction. The City shall bear all costs of this appeal. *See* Tex. R. App. P. 42.1(d).

/s/ Bonnie Sudderth

BONNIE SUDDERTH
CHIEF JUSTICE

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

DELIVERED: August 30, 2018