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Opinion Committee

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July 14, 1995

SJS
FILE # ML-35189-95
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The Honorable Dan Morales
Attorney General of Texas
Supreme Court Building
P. O. Box 12548
Austin, TX 78711

RE: Requesting an Attorney General's Opinion Concerning the Viability of Tex. Loc. Govt. Code sec. 212.015's RESTRAINT ON RIGHTS OF PROPERTY OWNERS

Dear General Morales:

Tex. Loc. Govt. Code sec. 212.015 imposes a severe restriction on a landowner's ability to subdivide land. In addition, the statute bears no reasonable relationship to a legitimate governmental purpose. It also fosters a system in which a planning commission may languish interminably over a replat request, resulting in a property owner's right to use property being indefinitely denied. Finally, the statute fails to provide standards which govern a planning commission's decision-making process with regard to replat requests. Each of these concerns about the statute's viability are addressed below.

Taking

A Texas property owner's right to subdivide his land is governed by Tex. Loc. Govt. Code sec. 212.015. After being rejected by the legislature in 1979, this controversial fourteen year old statute was rewritten in 1987, 1989 and then amended again in 1993. This law formerly gave protesting neighbors the final determination as to whether a replat was to be allowed. Act 1987, 70th Leg., ch. 149 sec. 1. This section was found unconstitutional in Minton v. City of Fort Worth Planning Commission, 786 S.W.2d 563 (Tex. App. - Fort Worth 1990, no writ), as an unlawful delegation of legislative authority to a narrow segment of the population.

Tex. Loc. Govt. Code sec. 212.015 now provides for a different process whereby a landowner's request to replat/subdivide a piece of land may be protested by neighboring landowners. If at least 20% of the owners of land adjoining the land covered by the proposed replat protest the proposal as provided in this section, the replat can only be approved if three-fourths of the Planning Commission members present approve it.

Elliott Naishtat
Vice Chair

Members: Diana Davila, Mary Denny, Jesse Jones,
Mike Krusee, Glen Maxey, Carolyn Park, Arlene Wohlgemuth

While it is recognized that property may be regulated, it is also true that "if regulation goes too far it will be recognized as a taking." Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 414 (1922). The right to have property protected against a government taking derives from the Fifth Amendment to the United States Constitution, which provides that "private property [shall not] be taken for public use, without just compensation." U.S. Const. Amend. 5.

The United States Supreme Court has recently revisited the area of takings law in its decision in Lucas v. South Carolina Coastal Council, 112 S.Ct. 2886 (1992). There the Court recognized that when a landowner has been required by government action to "leave his property economically idle," the landowner has suffered a taking. In Lucas, the landowner was prevented by a beach management act from erecting homes on his two lots. Because the landowner was deprived of all economically beneficial use of his land, the Supreme Court held there would be a taking unless the state could prove the homes would not be allowed to be built under traditional nuisance law restrictions.

In Texas, sec. 212.015 imposes regulations on landowners which severely restrict their property rights. The hurdle that a landowner must overcome in a case where neighbors protest -- the three-fourths planning commission vote approval requirement -- is a high one. This significant restriction on a landowner's economic use of his property results in case after case across the state of Texas in landowners being unable to develop their property. This inability to develop, of course, results annually in millions and millions of dollars worth of property value not being added to the tax base of various taxing authorities. Tax appraisal districts have historically placed a higher value on smaller parcels of land than on one larger piece of property. Since its inception, the law has been responsible for adversely affecting the potential construction of hundreds of millions of dollars of new homes and buildings and the jobs that are created by new construction projects. An undeveloped property has no economic use to a landowner, and is a "total deprivation of beneficial use", and is, "from the landowner's point of view, the equivalent of a physical appropriation." Lucas, 112 S.Ct. at 2894.

The Texas Constitution also prohibits the State from taking property for public use without "adequate compensation." Tex. Const. art. I, sec. 17. A taking can occur when the government physically appropriates land, as for highway construction, or when it unreasonably interferes with the landowner's right to use and enjoy the property, such as by restricting access, or denying a permit for development. See City of Austin v. Teague, 570 S.W.2d 389 (Tex. 1978) (impairment of access to a business, caused by government's building of viaduct, requires compensation); City of Waco v. Texland Corp., 446 S.W.2d 1 concrete culvert for creek if result is inability to use land); DuPuy v. City of Waco, 396 S.W.2d 103 (Tex. 1965) (viaduct-caused impairment of access requires compensation); Hubler v. City of Corpus Christi, 564 S.W.2d 816 (Tex. Civ. App. - Corpus Christi 1978, writ ref'd n.r.e.) (flood damage to private land, caused by government project, is to be compensated for, to the extent it has already occurred).

The three-fourths requirement of sec. 212.015(c) imposes an unreasonable interference

with landowners' rights to use and enjoy their property. This appears impermissible under all "takings" case law.

Legitimate Governmental Purpose

It is beyond question that regulations governing use of land are unconstitutional if they bear no substantial relationship to the public health, safety, morals, or general welfare. Village of Euclid v. Ambler Realty Co., 272 U.S. 365, 395 (1926). In Texas, this doctrine is embodied in Ellis v. City of West University Place, 175 S.W.2d 396 (Tex. 1943). Regulations on the use of land must satisfy two requirements. First, they must be adapted to accomplish a legitimate goal; the regulation must be "substantially related" to the health, safety, or general welfare of the people. City of College Station v. Turtle Rock Corp., 680 S.W.2d 802 (Tex. 1984). Second, the regulation cannot be arbitrary. Id.

It is difficult to see what relationship a three-fourths approval requirement has to the health, safety, or general welfare of the citizens of Texas. The requirement appears to be arbitrarily adopted and a complete violation of the Euclid rule requiring a relationship to the public health, safety, morals, or general welfare.

Delay

It is apparent that some Planning Commission members do not wish to decide difficult issues pitting neighbors against a landowner requesting a replat. The response of these commissioners to their difficulty is refusal to rule. Meetings are postponed because of lack of a quorum, applications are postponed because of a lack of quorum for a specific plat application vote, when, for political reasons, Commission members excuse themselves during deliberation of the application, or staff members instruct applicants to withdraw their applications, based on the fact that the approval process will be so difficult it is not worth the applicant's time or expense to pursue the request. It appears that some planning commissions and their staff take great strides to avoid providing any "final determination" as to the status of a replat application.

In First English Evangelical Lutheran Church v. County of Los Angeles, 482 U.S. 304, 319 (1987), Chief Justice Rehnquist stated that landowners ought not to have to suffer abnormal or unreasonable delay in securing decisions on development requests. Chief Justice Rehnquist conceded that landowners must tolerate normal delay in obtaining approval of their request for development, but it is clear from his opinion that there is some outside limit on how long this process can take. The six years involved in First English exceeds this limit; Chief Justice Rehnquist referred to the six-year period in question as being shorter than many leases that the government is a party to and for which it must pay remuneration. That is, his concern was that the government would have to compensate a person if it rented his property for six years; why, then, should the government be free to impede the use of land for the same period without compensation.

Another ground exists on which unreasonable delay can be argued. Some governing bodies have devised a method of getting around the requirement of Tex. Loc. Govt. Code

212.009 that commissioners rule on a plat within 30 days after the plat is filed. Governing bodies are skirting this requirement by refusing to allow property owners to file the replat. Their internal processes only permit landowners to apply to file by only allowing the use of a "preliminary" plat, while not allowing the applicant to file a "final" plat. This application to file a plat can languish interminably in the bureaucracy of the planning commission, stalled by delays caused by staff members not responding to the application in a timely manner. In some cities, in order to create delays staff members have been known to go out and actively seek neighbor protests to replat applications. Surely the intent of the legislature in passing sec. 212.009 was to require that final decisions be made relatively quickly when a replat request is made by a landowner.

Discretion

The United States Supreme Court has held that citizens have a substantive due process right not to be subjected to arbitrary or irrational zoning decisions. Village of Arlington Heights v. Metropolitan Hous. Dev. Corp., 429 U.S. 252, 263 (1977).

In Texas it has been held, in the building permit context, that there must be definite standards in place to guide an inspector in the exercise of his discretion. For example, if a building inspector may deny a building permit based on his belief that the use would injure property or be hurtful to residents, such a broad authority is invalid. Gulf Refining Co. v. Dallas, 10 S.W.2d 151 (Tex. Civ. App. - 1928, writ dism'd w.o.j.). The discretion to grant or deny a permit must be exercised reasonably and not arbitrarily. University Park v. Hobilzelle, 150 S.W.2d 169 (Tex. Civ. App. - Dallas 1941, writ dism'd w.o.j.), cert. denied, 315 U.S. 781 (1942). That is, building permits are not subject to rejection at the discretion or pleasure of the building inspector. Dallas v. Mitchell, 245 S.W.2d 944 (Tex. Civ. App. - Dallas 1922, writ ref'd).

In the replatting context, specific guidelines rarely exist to govern a planning commission or its individual members in the decision-making process. Without such guidelines, a planning commission might, for example, deny a replat proposal based on the fact that one of the neighboring landowners protesting the replat is a personal or political friend. This reasoning would be an example of impermissible arbitrary exercise of discretion. Arlington Heights, supra.

In light of the foregoing inadequacies of Tex. Loc. Govt. Code sec. 212.015, the following questions are posed:

1. Taking. Does the requirement in Tex. Loc. Govt. Code sec. 212.015(c) that three-fourths of local planning commission members present must approve replat requests protested under this section place an unreasonable restriction on a landowner's right to benefit from the use of privately-owned property?

2. Legitimate Governmental Purpose. Is there a substantial relationship between the three-fourths requirement and the health, safety, or general welfare of the citizens of Texas?

E. Are the permits issued by TxDOT under the new TEX. REV. CIV. STAT. ANN., art. 6675c (see, S.B. 3, 74th Legislature, Regular Session) covered by Ch. 232?

F. Are vehicle title registration (TEX. REV. CIV. STAT. ANN., art. 6687-1) and the license plate requirements (TEX. REV. CIV. STAT. ANN., art. 6675a, et seq) subject to the requirements of Ch. 232? May vehicle titles and vehicle license plates be refused or revoked under the strictures of Ch. 232?

G. It is the responsibility of TxDOT to issue certain permits for the operation of certain "heavy" vehicles on Texas highways. See, TEX. REV. CIV. STAT. ANN., art. 6701a. Are these permits to be denied or revoked under the strictures of Ch. 232?

H. Pursuant to TEX. REV. CIV. STAT. ANN., art. 6669c, TxDOT has "establish(ed) a disadvantaged business program." As part of this program, TxDOT certifies certain businesses as "disadvantaged businesses." Are these certifications subject to the strictures of Ch. 232?

We realize that this is an extensive request. We will of course be happy to furnish you with any additional information or input you feel would be helpful. In this regard, please feel free to call upon our General Counsel, Mr. Robert E. Shaddock, or his Deputy, Mr. Richard D. Monroe. They may be reached at the above address or by telephone at 463-8630. I will be happy to render any assistance I can in this matter. We thank you for your assistance in this matter.

Sincerely,

Wm. G. Burnett, P.E.
Executive Director

Attachments

cc: Texas Transportation Commission