LAND USE CASE UPDATES

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I. RIPENESS & EXHAUSTION OF ADMINISTRATIVE REMEDIES

Background. Claims of excessive land use regulation--often framed as takings or inverse condemnation--must usually be "ripened" before suit. There are at least two "ripeness" doctrines. The first requires a claimant to pursue local approvals (including applications for variances and other discretionary approvals) to get a final decision locally, or else demonstrate that further efforts will be futile. A final decision helps a reviewing court determine how far a regulation goes; according to one opinion: "A court cannot determine whether a regulation has gone 'too far' unless it knows how far the regulation goes." Also,

requiring discretionary applications (like variances) gives "the governmental unit an opportunity to 'grant different forms of relief or make policy decisions which might abate the alleged taking.'" *See Mayhew v. Town of Sunnyvale*, 964 S.W.2d 922 (Tex. 1998) and cases there cited; also J. Mixon, J. Dougherty, B. McDonald, R. Wilson *et al., Texas Municipal Zoning Law, 3rd Ed.*, §§ 10.202 and 12.200 (Lexis-Nexis 2018, rel. 21)("TMZL").

For a classic example of ripening, *see Village of Tiki Island v. Premier Tierra Holdings*, 555 S.W.3d 738 (Tex. App.--Houston [14th Dist.] 2018, no pet.), a case arising from the Village's disapproval of a major marina development. The court's opinion recounts the developer's systematic ripening campaign, including multiple submissions and multiple rejections. *See also City of Houston v. Commons at Lake Houston*, 587 S.W.3d 494 (Tex. App.—Houston [14th Dist.] 2019), where the court held that a vested-rights claim (targeting an intervening change in floodplain regulations) was not ripe. According to the court, an email exchange between the developer's representative and a City engineer did not constitute a final decision, and there was neither a denial of plat approval (or denial of a permit) nor a request for a variance. In contrast, *Zaatari v. City of Austin*, No. 03-17-00812-CV, 2019 Tex. App. LEXIS 10290 (Tex. App.—Austin Nov. 27, 2019, pet. filed) held that a challenge to the text of Austin's short-term rental ordinance (a so-called "facial" challenge) did not require additional ripening steps.

A doctrine similar to ripeness requires claimants to exhaust available administrative remedies--like appealing to Boards of Adjustment--before suing. *See* TMZL, § 12.300. Failure to ripen a claim, or failure to exhaust administrative remedies, can deprive a reviewing court of jurisdiction and lead to dismissal. For example, in *Jabary v. City of Allen*, 2014 Tex. App. LEXIS 7259 (Tex. App.—Dallas, July 3, 2014, no pet.), Jabary's failure to appeal a permit revocation to the Zoning Board of Adjustment led to dismissal of his suit (filed later), for failure to exhaust administrative remedies.

Murphy v. City of Galveston, No. 3:12-CV-00167, 2021 U.S. Dist. LEXIS 62210 (S.D. Tex. 2021, appeal filed) arose from a long-litigated dispute over restoration of hurricane-damage property in Galveston's East End Historical District. After it sat vacant for more than six months, a City Code Enforcement Officer notified the owners that the property had lost its nonconforming ("grandfather") status. They could have appealed that decision to the Board of Adjustment, but they did not. Instead, they applied for a Special Use Permit (SUP), which the City Council denied. Reportedly, however, various City officials encouraged them to make changes and reapply for an SUP, but they did not. Instead, they sued on a federal taking theory. The federal magistrate judge dismissed their claim, writing that they "failed to actively seek a final decision from the City, and that dooms their claim."

Texas courts ordinarily require that claimants exhaust administrative channels for relief *if the administrative agency (e.g., the board of adjustment) can grant relief*. When the constitutionality of the ordinance itself is at issue, the board may not be able to grant relief. For example, the board cannot allow landowners to use property for purposes (uses) not allowed by the ordinance. *See* TMZL §§ 11.504 and 12.200.

Updates. *City of Grapevine v. Muns,* No. 02-19-00257-CV, 2021 Tex. App. LEXIS 10133 (Tex. App.—Ft. Worth, Dec. 23, 2021, pet. filed) (op. on rehearing en banc), ruled that the City's Board of Adjustment "lacked the power" to declare either a zoning ordinance or a non-zoning ordinance unconstitutional. The court wrote:

> Generally, administrative bodies do not have authority to rule on the constitutionality of statutes and ordinances. *See City of Dallas v. Stewart*, 361 S.W.3d 562, 568 (Tex. 2012) (op. on reh'g) (citing *Cent. Power & Light Co. v. Sharp*, 960 S.W.2d 617, 618 (Tex. 1997)). "The supreme court has held that administrative agencies lack the ultimate power of constitutional construction." *City of Richardson v. Bowman*, 555 S.W.3d 670, 686 (Tex. App.—Dallas 2018, pet. denied) (citing *Stewart*, 361 S.W.3d at 568). "No Texas agency has been granted the power to engage in constitutional

> construction, and any such attempt by the legislature to vest such power would raise serious and grave issues of a separation of powers violation." *Id.* (quoting *Stewart*, 361 S.W.3d at 568).

However, some constitutional claims would be still subject to the exhaustion requirement:

> As the City points out, though, just because a claim is based on the Texas Constitution does not necessarily mean that a plaintiff can proceed directly to filing suit without first exhausting his administrative remedies. *See Garcia v. City of Willis*, 593 S.W.3d 201, 210-12 (Tex. 2019). Claims based on the Texas Constitution are not "globally exempted" from "statutory exhaustion-of-remedies requirements." *Clint ISD v. Marquez*, 487 S.W.3d 538, 552 n.9 (Tex. 2016). *If the administrative proceeding could have obviated the need for a plaintiff to file suit because the proceeding had the potential to moot that claim, then the plaintiff must have pursued his administrative remedies. See, e.g., Garcia*, 593 S.W.3d at 211-12; *Watson v. City of Southlake*, 594 S.W.3d 506, 522 (Tex. App.—Fort Worth 2019, pet. denied). (emphasis added)

In the *City of Grapevine* case, the court ruled that the Board's decision would not have mooted claims that a short-term rental ordinance was unconstitutional because, no matter how Board ruled, the challenged ordinance "would have remained in place."

The court in *Laredo Vapor Land, LLC v. City of Laredo*, No. 5:19-CV-00138, 2022 U.S. Dist. LEXIS 47369 (S.D. Tex. 2022), ruled that a developer had not exhausted administrative remedies available under TEX. LOC. GOV'T CODE § 212.904 (which requires an engineering review of the costs of municipal infrastructure) because the developer had "failed to request such a pre-development review, much less appeal any determination." The court also held that the developer failed to ripen its case by getting a final decision.

In an unusual case decided in 2022, *Board of Adjustments v. Lopez*, No. 13-20-00199-CV, 2022 Tex. App. LEXIS 601 (Tex. App.--Corpus Christi–Edinburg, Jan. 27, 2022) (mem.op.), the owner of a concrete batch plant applied for rezoning while an appeal from an earlier Board of Adjustment decision was pending in court (by writ of certiorari). The Board had denied nonconforming status for the batch plant, and the decision was appealed. The owner then applied for rezoning, and the City issued temporary certificates of occupancy to allow the owner's plant to keep operating during the rezoning process. The process was delayed, and the certificates of occupancy apparently expired. At that point the owner added taking and injunction claims to its pending certiorari appeal. The City argued that the owner had not exhausted its administrative remedies, but the court disagreed:

> We find no authority that would preclude the writ of certiorari when rezoning is sought. Therefore, we cannot conclude that the Lopezes were required to abandon their pursuit of rezoning to exhaust their administrative remedies. Accordingly, we reject appellants' argument that the Lopezes failed to exhaust their administrative remedies by pursuing a rezoning application such that it is a jurisdictional bar to their writ of certiorari.

II. BOARDS OF ADJUSTMENT, DUE PROCESS

Background. When courts apply procedural due process requirements to administrative or "quasi-judicial" decision-making in land use cases, they can consider the extent to which the following elements are present in the process:

a. an unbiased decision;
b. adequate notice of the hearing;
c. a hearing in which witnesses are sworn and in which there is an opportunity to introduce evidence and an opportunity for cross-examination; and
d. a decision based on the record supported by reasons and findings of fact
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