UT LAW CLE THE UNIVERSITY OF TEXAS SCHOOL OF LAW

PRESENTED AT

28th Annual Land Use Conference

April 4-5, 2024
Austin, TX

Land Use Case Law Updates

James L. Dougherty, Jr.

LAND USE CASE LAW UPDATES

James L. Dougherty, Jr.
Attorney at Law
Houston, Texas

Presented to
Land Use Conference
University of Texas CLE
April 4-5, 2024
Austin, Texas

TABLE OF CONTENTS

I. SHORT-TERM RENTAL REGULATIONS

Background. In *Zaatari v. City of Austin*, No. 03-17-00812-CV, 2019 Tex. App. LEXIS 10290 (Tex. App.—Austin Nov. 27, 2019, pet. denied), the Austin Court of Appeals invalided multiple sections of the City of Austin's zoning ordinance that restricted short-term rentals. Section 25-2-950 of the ordinance applied selectively to single-family residences that were "not owner-occupied" and "not associated with

an owner-occupied principal residential unit." It terminated licenses to occupy such units after April 1, 2022. The panel majority ruled that the termination violated the Texas Constitution's prohibition of retroactive laws. Another section, 25-2-795, banned the following at residences while being used for short-term rentals: (i) "assemblies, including 'a wedding, bachelor or bachelorette party, concert, sponsored event, or any similar group activity other than sleeping,' whether inside or outside, after 10:00 p.m.;" (ii) "outdoor assemblies of more than six adults at any time;" and (iii) use by "more than six unrelated adults or ten related adults" at any time. The court held these bans on assemblies unconstitutional. In 2021, the Texas Supreme denied the City's petition for review.

Also in 2021, the Fort Worth Court of Appeals decided two short-term rental cases. In *Draper v. City of Arlington*, 2021 Tex. App. LEXIS 5681 (Tex. App.—Fort Worth July 15, 2021, pet. denied), the court allowed two City of Arlington ordinances to be enforced (by denying a temporary injunction). One ordinance (a zoning ordinance) restricted the location of short-term rentals to a special "STR Zone" and high-and medium-density residential areas. The other ordinance (a non-zoning ordinance) regulated the operation of short-term rental properties. The court ruled that the *plaintiffs had failed to show*, at the hearing for temporary injunction: (i) violation of the Texas substantive-due-course-of-law rights clause, TEX. CONST. art. I, § 19; or (ii) violation of the Texas equal-rights clause, TEX. CONST. art. I, § 3, because the City's regulations were "rationally related to objectives within the City's police powers." The court also ruled that the plaintiffs lacked standing to sue for alleged abridgements of their tenants' rights to freedom of assembly under TEX. CONST. art. I, § 27 or freedom of movement under TEX. CONST. art. I, § 19.

In its other 2021 decision, *City of Grapevine v. Muns*, No. 02-19-00257-CV, 2021 Tex. App. LEXIS 10133 (Tex. App.—Ft. Worth, Dec. 23, 2021, pet. denied*)* (op. on rehearing)*,* the Fort Worth Court of Appeals ruled that *plaintiffs had adequately pleaded* their constitutional challenges to a non-zoning ordinance that prohibited short-term rentals in the City. The court ruled that the homeowners sufficiently pleaded: (i) a regulatory taking under TEX. CONST. art. I, § 17, based on allegedly unreasonable interference with their right to use and enjoy their properties and interference with their "reasonable investment-backed expectations in buying and improving their properties;" (ii) unconstitutional retroactivity under TEX. CONST. art. I, § 16, "because it takes away their 'fundamental and settled' vested property rights . . . to lease their property on a short-term basis;" and (iii) denial of substantive due course of law under TEX. CONST.. art. I, § 19, because the purpose is "not rationally related to a legitimate governmental interest," and "when considered as a whole," the ordinance's "real-world effect" as applied to the homeowners "could not arguably be rationally related to, or is so burdensome as to be oppressive in light of, the governmental interest." The court rejected a claim that the ordinance was "impliedly preempted by Chapter 156 of the Texas Tax Code alone or in combination with Chapter 92 of the Texas Property Code." The court rejected the City's claim that it was immune from homeowners' claims for injunctions.

Updates. In 2023, in *City of Grapevine v. Muns*, 671 S.W.3d 675 (Tex., June 16, 2023), the Texas Supreme Court denied a petition to review the *City of Grapevine* decision, which left the Court of Appeals opinion standing. In a concurring opinion, Justice Young suggested that the Supreme Court should wait for a more appropriate case to decide the constitutional issues that were swirling around short-term rental ordinances, including a question of possibly "distinct" meanings of the "Takings and Due Course of Law Clauses of the Texas Constitution:"

> Given the seeming prevalence of short-term rental bans, and of the opposition against them, I am confident that other cases—unburdened by potentially dispositive collateral questions—will lead to a better vehicle for this Court to address the bans' constitutionality.
>
> Waiting for such a case may provide more time for other lower court to opine on the issue, for one thing. See, e.g., Zaatari v. City of Austin, 615 S.W.3d 172 (Tex. App.—Austin 2019, pet. denied). It may also allow advocates and scholars to more fully develop *the original—and perhaps distinct—meaning of the Takings and Due Course of Law Clauses of the Texas Constitution,* which play such a key role in the parties' arguments here. See City of Baytown v.

Title search: Land Use Case Law Updates

First appeared as part of the conference materials for the
28th Annual Land Use Conference session
"Land Use Case Law Updates Part 1"