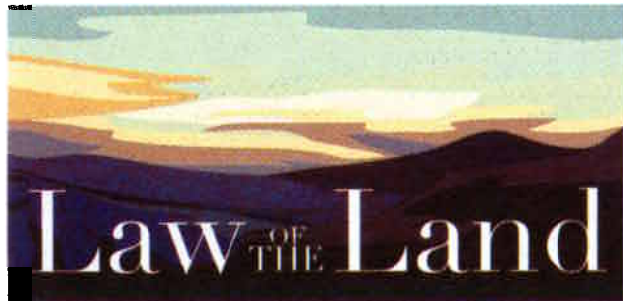


THREE KEY OPINIONS ON IMMUNITY, ZONING AND PLATTING

by REID WILSON

In 2004, the Texas Supreme Court issued three major land use decisions — an unprecedented number — which addressed unsettled areas in official immunity, zoning and platting. In all three, the court considered federal case law in reaching its result.

Courts have been steadily broadening the concept of official immunity to shield public officials from individual immunity. In *Ballantyne, et al. v. Champion Builders Inc.*, decided on July 9, 2004, the court provided a road map of the history and scope of Texas' version of official immunity. It's a 50-year-old doctrine intended to encourage confident decision-making by public officials — despite



the inevitability of errors — and to ensure availability of capable candidates for public service, by eliminating most individual liability.

The court held that zoning board of adjustment (ZBA) members are entitled to official immunity under the following three conditions:

1. The board acted within the scope of its authority. The action must fall within state law authorizing action by the official. Whether the ZBA made an incorrect decision or had never previously revoked the permit

was irrelevant.

2. The ZBA must have been involved in discretionary — not ministerial — action. A discretionary action is one involving personal deliberation, judgment and decision, in contrast to a ministerial act, which is one where the law is so precise and certain that it leaves nothing to the exercise of discretion or judgment.

3. The ZBA must be acting in subjective good faith. If reasonably prudent officials under the same or similar circumstances would have believed their conduct was justified based on the information available, then the challenged officials' subjective good faith supports their assertion of official immunity. Neither negligence nor the ZBA member's actual motivation is relevant. The action need not be correct but only justifiable.

In *Ballantyne*, the court found that the personal animus the board members displayed toward apartment residents did not preclude the court from finding that the ZBA acted in good faith. In fact, the subjective animus was irrelevant to the determination of whether official immunity protected board members. In support of its finding, the Texas Supreme Court analogized to U.S. Supreme Court decisions interpreting qualified immunity for federal officials.

Flower Mound

On May 7, 2004, in a rare win for landowners, the Texas Supreme Court in *Town of Flower Mound v. Stafford Estates Limited Partnership* upheld a \$425,000 judgment in favor of a developer who had been required to replace an adequate asphalt road in good repair with a new concrete road. The roads had the same traffic capacity. The court found the requirement constituted a taking.

As a preliminary matter, lawyers should take note of two actions by the *Flower Mound* court. It permitted the developer to sue after the fact. The city had argued that

the developer should be barred from later objections to the city's actions if the developer had received the benefit of city approvals of its plans and complied with those approvals. Also, the court applied the two-part test put forth in the U.S. Supreme Court decisions in 1994's *Dolan v. City of Tigard* and 1987's *Nollan, et ux. v. California Coastal Commission*, as well as the similar requirements of the Texas Supreme Court's 1984 decision in *City of College Station v. Turtle Rock Corp.* These cases deal with government extractions: any requirements the government places on a developer to do or provide something as a condition to receiving government development approval.

The Texas Supreme Court restated and applied the well settled *Dolan* two-pronged test as follows:

Conditioning governmental approval of a development of property on some extraction is a compensable taking unless the condition (1) bears an essential nexus to the substantial advancement of some legitimate interest and (2) is roughly proportional to the projected impact of the proposed development.

After a thorough review of federal takings jurisprudence, the Texas Supreme Court rejected several arguments by the city that would limit the application of *Dolan*.

The court decided that *Dolan* is not limited to required dedications — such as streets, easements and parks — but rather also applies to off-site improvements, such as the new concrete road in this case and contributions to a park land fund in *Turtle Rock*. The court next determined that *Dolan* applies to adjudicative and legislative decisions, depending on the circumstances of the particular case, and rejected a proposed bright-line adjudicative/legislative distinction

between the two that the city had asserted. The court concluded that the government bears the burden of proof; it must make an individualized determination that the extraction is related in nature and extent to the impact of the proposed development.

In *Flower Mound*, the court found that the new road met the essential nexus requirement in that a strong public policy requires safe and adequate traffic within a city. However, the court found that the new road clearly failed the rough proportionality test, since the city did not make an individualized determination that the new concrete road was required based on the impact of the new development, and the new concrete road had the same capacity as the existing asphalt road.

Sheffield Development

Cities won big in the third case, which involved platting. On March 5, 2004, in *Sheffield Development Co. Inc. v. City of Glenn Heights*, the Texas Supreme Court addressed down-zoning, which is rezoning a tract of land to less-dense uses, i.e. from high-rise apartments to lower density apartments. The court upheld the city's down-zoning decision, which the city made after a 15-month moratorium against takings claims.

According to the opinion, the developer had conducted significant due diligence before buying an already zoned development tract, including meeting with city officials to determine if any change in the city's development regulatory scheme was contemplated and being told no such change was in the works. Almost immediately after the developer purchased the tract, the city established a moratorium on development applicable to 12 zoning districts, including the developer's tract. After the city extended the moratorium to a total of 15 months, it then down-zoned the property, decreasing allowed density. The city increased the minimum lot size from 6,500 square feet to 12,000 square feet, such that the land value dropped 50 percent. The developer sued, alleging that the city's action constituted a regulatory taking.

The Texas Supreme Court reviewed federal regulatory taking jurisprudence, stating that it offered guidance for a state constitution takings claim. The court focused on the U.S. Supreme Court's 1978 decision in *Penn Central Transportation Co., et al. v. New York City, et al.* After holding that a down-zoning to reduce development density is legitimate to deal with the city's desire to reduce its ultimate population potential, the court applied the three *Penn Central* factors — the regulation's economic impact, the developer's investment-backed expectation and the character of the governments action — as follows.

Looking to the regulation's economic impact, the court found the down-zoning did not take all economic value of the property (which would result in a taking), but only 50 percent. Furthermore, even that reduced value was four times the developer's purchase price. Since land development is inherently speculative, it is a risk borne by a developer.

The court found the investment backing the developer's expectations at the time of the down-zoning was simply the lot purchase price and due diligence expenses, a small fraction of the investment the developer would have to make for full development. Thus, the court deemed the developer's investment to be minimal.

The court viewed the character of the government's rezoning action as general. It affected numerous tracts, not just the developer's, and thus it was not like an exaction imposed on a single developer. Developers should expect the risk of rezoning, particularly in growing communities.

Despite acknowledging that the city "took unfair advantage" of the developer — including dragging out its decision-making process to extract concessions from the developer — the court found that legitimate public policy reasons supported the city's rezoning decision. The holding in *Sheffield* is particularly powerful considering how it differs from the refusal to up-zone in the court's previous significant zoning

decision in *Mayhew v. City of Sunnyvale*, decided in 1998. In *Mayhew*, the factual circumstances were much more favorable for the city. Despite a much more sympathetic developer with strong facts, the court stated ". . . we think the city's zoning decisions apart from the faulty way they were reached, were not materially different from zoning decisions made by cities everyday. On balance, we conclude that the rezoning was not a taking."

Finally, the court ruled that a 15-month moratorium is valid and not a taking, noting that the rezoning process is slow and that the moratorium advanced a legitimate government interest.

These three cases show a significant influence of federal law on Texas state land use law. Government officials won one, developers won one and cities won one. Who will win the next round waits to be seen. ■■■■

Reid Wilson is one of the few land use attorneys in the great unzoned city of Houston. His practice on behalf of landowners involves land use regulations unique to Houston as well as traditional land use matters in most zoned communities in the area. He has served as chairman of the commission that revised the zoning ordinance and comprehensive plan of West University Place, a home rule city embedded within the inner loop area of Houston, as well as of the Houston Bar Association's 1992 zoning study group, which monitored Houston's most recent and unsuccessful zoning attempt, which voters rejected in 1993.