

City of Austin v Garza, 124 S W 3d 867 (Tex App – Austin 2003, no pet)

OPINION

DAVID PURYEAR, Justice

This case concerns the development of commercial property over the Barton Creek Watershed. Eli Garza applied for and was granted the right to develop property in what was once known as the Garza Ranch in the Barton Creek Watershed. The City of Austin (City) subsequently refused to allow development to proceed under the terms set out in the final and approved subdivision plat. The City disputed the validity of one of the notes contained in the plat, which would have allowed up to seventy percent impervious cover under certain circumstances. Garza sought and obtained a judicial declaration that development could proceed pursuant to the subdivision plat notes. In finding in Garza's favor, the trial court upheld the validity of the disputed plat note on various equitable and legal grounds. Because we agree with the trial court's conclusions of law, we affirm.

STATEMENT OF FACTS

On February 21, 1991, the City passed Ordinance Number 910221-E, the Interim Ordinance. ^{FN1} The Interim Ordinance was *869 a temporary amendment to the Comprehensive Watershed Ordinance (CWO) and reduced the permissible amount of impervious cover ^{FN2} a commercial developer could lay from up to seventy percent to eighteen percent ^{FN3}. On March 1, 1991, and during the effective period of the Interim Ordinance, Garza filed an application for approval of a subdivision plat covering approximately thirty-five acres at the intersection of Mopac and William Cannon in south Austin. The City Planning Commission (Commission) approved the plat on May 7, 1991. The plat was recorded on September 11, 1991, and contained the following notes:

FN1. The Interim Ordinance read in relevant part as follows:

ORDINANCE NO. 910221-E

AN ORDINANCE ADOPTING INTERIM NON-DEGRADATION REGULATIONS FOR THE BARTON CREEK WATERSHED AND THE WATERSHEDS CONTRIBUTING TO BARTON SPRINGS

Part 1 Chapter 13.2 (Land use) Article V (Water Quality related Development Intensities) of the Austin City Code of 1981 is hereby amended for an interim period to read as provided in the attached Exhibit A incorporated herein as if repeated verbatim.

Part 6 This ordinance shall automatically expire and have no effect on August 23, 1991.

DIVISION 5 Barton Springs and Contributing Zone
Sec. 13.2.584 UPLANDS ZONE

(b) Impervious cover shall be limited to the following:

Maximum Impervious Cover (NSA)

Use Recharge Non-Recharge Zone

Zone

Commercial 18% 30%

Sec 13 2 585 TRANSFER OF DEVELOPMENT INTENSITY

There shall be no transfer of development within this zone

FN2 Impervious cover is defined as the total horizontal area of covered spaces, paved areas, walkways, and driveways ' See Austin City Code § 25 1-23

FN3 As indicated in note 1 the Interim Ordinance was effective February 21 1991 through August 23, 1991 The expiration date was later extended to October 27, 1991

6 This subdivision shall be developed constructed and maintained in accordance with the terms and conditions of Chapter 13 2 Article V and chapter 13 7 Article V *dated June 1 1988* ^{FN4}

FN4 Chapter 13 2 Article V of the City Code deals with "Water Quality Related Development Intensities" Chapter 13 7 Article V deals with "Environmental Protection and Management" With the date the Plat Note would seem to indicate that development would proceed under the CWO, which was in effect on June 1, 1988

10 Block E Lot 2 and Block A Lot will be deeded to the City of Austin as an extension of the Williamson Creek Greenbelt This dedication will take place prior to or simultaneously with final plat approval

(Emphasis and footnote added) Plat Note 11 dealt with the transfer of impervious cover credits and contained a table with two main columns-one marked "DONATING TRACTS" and the other "RECEIVING TRACTS" The donating tracts were Lots 1 and 2 of Block A and Lot 2 of Block E (Plat Note 10 above) containing 46,574 square feet The 46,574 donated square feet was transferred to and allocated between the "receiving tracts" which were Lots 1, 2, 3 and 4 of Block B and Lots 1 of Blocks C, D and E ^{FN5}

FN5 Under a regulatory scheme which allowed a developer to take advantage of transfer credits, the donation of property to the City effectively meant that Garza could increase the square footage of the receiving tracts For example if a developer donated a 2,000 square foot lot to the City, the developer could then, for purposes of determining impervious cover, add 2,000 square feet to the total square footage of another lot If the receiving lot were 4,000 square feet, without the donation the donation would enlarge that lot to 6,000 square feet for purposes of determining impervious cover For purposes of determining the percentages of impervious cover then, one would use the 6,000 total lot size instead of the 4,000 square feet actual lot size Impervious cover measuring 2,000 square feet would equate to 33% impervious cover with the donation and 50% impervious cover without the donation

In 1997, Garza contracted to sell some of the "receiving tracts" Lots 1, 3 and 4 of Block B approximately five and one half acres to Gordon Dunaway Provident Realty Advisors Inc Closing was contingent upon obtaining a Consolidated Site Development Permit from the City The City ***870** rejected the application because it did not conform to the Interim Ordinance ^{FN6}

FN6 According to state and local law the regulatory scheme in place at the time Garza originally filed his plan to develop, the Interim Ordinance, should have governed all subsequent development undertaken pursuant to their application.

Garza filed suit which Provident later joined, seeking a declaratory judgment that the provisions of the CWO governed the development of the subdivision and not the Interim Ordinance. The City argued that the inclusion of the date in Plat Note 6 was at best a mistake, and at worst Garza's deliberate attempt to circumvent the Interim Ordinance. Garza argued that the Commission had the authority to and did authorize the plat with the date reflected in the note. Garza also cited section 245.002(d) of the Local Government Code which would allow him to develop pursuant to the regulatory scheme indicated in the recorded subdivision plat. The City claimed that section was unconstitutional. Garza also contended that any procedural defects in approving his subdivision map, for example the failure to receive a formal variance, was validated by Vernon's Annotated Texas Civil Statutes of the State of Texas, articles 974d-39, 974d-40 and 974d-44 (the "Validation Statutes").^{FN7} The Validation Statutes provide that governmental acts and proceedings of a municipality since adoption or attempted adoption of the charter are validated as of the dates on which they occurred. See West End Pink, Ltd. v. City of Irving, 22 S.W.3d 5, 8 (Tex. App. Dallas 1999, pet. denied). The purpose for the Validation Statutes is to give effect to an ordinance passed in good faith, but plagued by some procedural or minor defect. See City of Murphy v. City of Parker, 932 S.W.2d 479, 485 (Tex. 1996). They are not intended to put the Legislature's stamp of approval on otherwise void enactments. *Id.* The City asserted that the defect was not procedural but substantive thus not subject to the Validation Statutes. Garza also questioned, under equitable estoppel principles, whether it would be fair for the City to deny the enforceability of Plat Note 6 after having accepted his donation of land as shown in Plat Note 10. The City's position was that municipalities in general were not subject to estoppel when exercising their regulatory power over land use. According to the City, regardless of the source of the mistake, the City could not now be bound by it.

FN7 Act of June 16, 1991, 72d Leg., R.S., ch. 861, § 1, 1991 Tex. Gen. Laws 2964, repealed by Act of May 22, 2001, 77th Leg., R.S., ch. 1420, § 12.111(5), 2001 Tex. Gen. Laws 4343; Act of March 8, 1993, 73d Leg., R.S., ch. 6, § 1, 1993 Tex. Gen. Laws 15, repealed by Act of May 22, 2001, 77th Leg., R.S., ch. 1420, § 12.111(6), 2001 Tex. Gen. Laws 4343; Act of June 16, 1995, 74th Leg., R.S., ch. 792, § 1, 1995 Tex. Gen. Laws 4144; Act of May 22, 2001, 77th Leg., R.S., ch. 1420, § 12.111(9), 2001 Tex. Gen. Laws 4343.

The trial court ruled in Garza's favor and issued the following conclusions of law. First, Garza's dedication and the City's acceptance constituted a substantial benefit to the City and estopped the city from repudiating Plat Note 6. Second, the Commission had authority to approve all the notes found in Garza's plat, thus Garza was entitled to have his site plan application reviewed and approved under the CWO per Plat Note 6. Third, Section 245.002(d) of the Government Code allowed Garza, as a permit holder, to enforce the recorded Plat Notes against the City. Fourth, the Interim Ordinance could not be applied to the Garza property after October 1991 because, by its own terms and from its inception, was intended to expire and did expire in October 1991. *871 Fifth, any defects that occurred in the process of approving the plat were validated. The trial court also awarded Garza attorney's fees.


The City disputes each of these conclusions of law on appeal and requests that we reverse the award of attorney's fees.

STANDARD OF REVIEW

Declaratory judgments are reviewed under the same standards as other judgments and decrees. See Tex. Civ. Prac. & Rem. Code Ann. § 37.010 (West 1997). The trial court's conclusions of law will be upheld on appeal if the judgment can be sustained on any legal theory supported by the evidence. See Westech Eng'g, Inc. v. Clearwater Constructors, Inc., 835 S.W.2d 190, 196 (Tex. App. Austin 1992, no writ). Because we find two independent legal theories by which to support the trial court's judgment, we affirm and address only those two grounds.

DISCUSSION

Constitutionality of section 245.002(d)

[1]  The City argued at trial and on appeal that section 245.002(d) was an unconstitutional delegation of authority to private actors. Section 245.002(d) reads:

Notwithstanding any provision of this chapter to the contrary, a permit holder may take advantage of recorded subdivision Plat Notes, recorded restrictive covenants required by a regulatory agency, or a change to the laws, rules, regulations, or ordinances of a regulatory agency that enhance or protect the protect, including changes that lengthen the effective life of the permit after the date the application for the permit was made without forfeiting any rights under this chapter.

Tex. Loc. Gov't Code Ann. § 245.002(d) (West Supp. 2003).

The City argues that section 245.002(d)


allows developers like Garza, in addition to the locked-in right to develop the project under regulations in place when the initial application is filed, to cherry-pick what other regulations will govern development of his project. Rather than applying the comprehensive set of regulations in effect at the time of the first application, section 245.002(d) allows a developer to pick and choose bits and pieces of other development regulation passed over time to compile his own set of applicable regulations. By granting developers that authority to compile their own set of rules, § 245.002(d) unconstitutionally delegates governmental authority to private actors.

Under the language of § 245.002(d), there is a delegation of governmental authority to private actors here, because no set regulatory scheme applies to projects. Rather, the developers get to pick and choose what regulations will apply to their project over time. That ability to decide what rules apply is a delegation of governmental authority.

In reviewing the constitutionality of Section 245.002(d), we apply several well-settled principles. If possible, we are to construe a statute in a manner that renders the statute constitutional and to give effect to the Legislature's intent. Texas Mun. League Intergovernmental Risk Pool v. Texas Workers Comp. Comm'n, 74 S.W.3d 377, 381 (Tex. 2002). We presume that the Legislature intended for the law to comply with the United States and Texas Constitutions, to achieve a just and reasonable result, and to advance a public rather than a private interest. *Id.* A presumption exists that the legislative body has ~~*872~~ acted within its power. See Patterson v. Dallas, 355 S.W.2d 838, 841 (Tex. Civ. App. Dallas 1962, writ ref'd n.r.e.). We should construe statutes in a

manner avoiding serious doubt of their constitutionality. See Federal Sav. & Loan Ins. Corp. v. Glen Ridge I Condos, Ltd., 750 S.W.2d 757, 759 (Tex. 1988) (citing Commodity Futures Trading Comm'n v. Schor, 478 U.S. 833, 840, 106 S.Ct. 3245, 92 L.Ed.2d 675 (1986)). The Legislature, however, may not authorize an action that our Constitution prohibits. See Texas Mun. League, 74 S.W.3d at 381. Were serious doubts to arise, we are to determine whether a construction of the statute is fairly possible to avoid the constitutional question entirely. See id. The party challenging a statute has the burden to prove its unconstitutionality. See Walker v. Gutierrez, 111 S.W.3d 56, 66 (Tex. 2003). Article III,^{FN8} Section 1 of the Texas Constitution vests in the Legislature the power to make laws and determine public policy. See FM Props. Operating v. City of Austin, 22 S.W.3d 868, 873 (Tex. 2000). The Legislature can delegate authority to private entities if the legislative purpose is discernible and there is protection against the arbitrary exercise of power. See Proctor v. Andrews, 972 S.W.2d 729, 735 (Tex. 1998) (quoting Office of Pub. Ins. Counsel v. Texas Auto. Ins. Plan, 860 S.W.2d 231, 237 (Tex. App. Austin 1993, writ denied)).

FN8 The Texas Supreme Court in Proctor distinguished between a legislative delegation under Article II and Article III of the Texas Constitution. See 972 S.W.2d at 732-33. Section 1 of Article II explicitly prohibits the Legislature from delegating its lawmaking power to the executive or judicial branches. See id. at 733. Section 1 of Article III vests the power to make laws with the Legislature. See id. Both Articles II and III are at issue where the Legislature has delegated its lawmaking authority to the other branches of government. See id. Only Article III is at issue where the Legislature has made a delegation to a non-governmental entity.

[2]  Our first inquiry necessarily must be whether there has been, in fact, a delegation of legislative powers. The City challenges the constitutionality of the delegation at issue here because the delegation allows the developer to pick and choose what regulations will apply to their project over time.^{FN9}

FN9 A delegation of legislative powers occurs when a private entity is given the power (1) to make rules, (2) determine public policy, (3) provide the details of the law, (4) promulgate rules and regulations to apply the law, or (5) ascertain conditions upon which existing laws may operate. See FM Properties, 22 S.W.3d at 873. As set out above, the City argued that allows developers like Garza were allowed to cherry-pick between regulations thus compiling their own set of applicable regulations. Their complaint then is not that Garza was allowed to make rules, determine public policy, provide the details of the law or promulgate rules and regulations but that Garza was allowed to ascertain conditions upon which existing laws may operate.

Section 245.002(d) allows a permit holder^{FN10} to take advantage of recorded subdivision Plat Notes. See id. § 245.002(d).^{FN11} By contrast, ***873** section 245.002(a) requires regulatory agencies to consider only the orders, regulations, ordinances, rules, expiration dates, or other properly adopted requirements in effect at the time the original application for the permit is filed. See id. § 245.002(a). In effect, paragraph (d) allows a property owner to elect between developing pursuant to the notes within the subdivision plat or pursuant to the regulatory scheme in effect at the time the owner originally filed for a permit.

FN10 A permit means a license, certificate, approval, registration, consent, permit, or other form of authorization required by law, rule, regulation, order, or ordinance that a person must obtain to perform an action or initiate, continue, or complete a project for which the permit is sought. See Tex. Loc. Gov't Code Ann. § 245.001(1) (West Supp. 2003).



FN11 We find it unnecessary to address whether section 245.002(d) in its entirety amounts to an impermissible delegation of legislative powers. The relevant portion of section 245.002(d) deals with subdivision Plat Notes. Whether and to what extent the remaining portions of (d) are unconstitutional is not relevant to this appeal. Were those portions of the statute unconstitutional, our mandate would have been to strike those portions and save the remainder the remainder being the section dealing with subdivision Plat Notes. See Quick v. City of Austin, 7 S.W.3d 109, 115 (Tex. 1998).

The issue is whether in allowing private parties the choice to develop their property under (1) the regulatory scheme in place at the time they originally filed the application to subdivide or (2) the regulatory scheme as set out in their final and approved subdivision plat the legislature has delegated its power to create laws? We think not.

In FM Properties Operating v. City of Austin, the Texas Supreme Court held that a statute that allowed private landowners to create their own water quality regulations and exempt themselves from the applicable regulations was a delegation of legislative powers. See 22 S.W.3d at 875. The statute allowed private landowners owning 500 contiguous acres or more, to designate their property as water quality protection zones. See id. at 870. The legislature intended the statute to relieve certain landowners from municipal regulatory chaos. See id. Landowners designating 500 to 1000 acres had to seek approval for their water quality plan with the Texas Natural Resource Commission (TNRCC) while landowners designating more than 1000 acres were not required to seek TNRCC pre approval. See id. at 871. In addition to complying with state and federal law a plan had to conform with one of two general objectives: (1) maintaining background levels of water quality in waterways, or (2) capturing and retaining the first 1.5 inches of rainfall from developed areas plus state and federal law. See id. Once designated the water quality zones were not subject to municipal land and water use regulations. See id. at 872. The supreme court held the statute unconstitutional on the grounds it delegated legislative power to private landowners by allowing them to decide whether and how to create their own water quality regulations, make their own rules, ascertain conditions upon which the statute may operate, and "exempt themselves from the enforcement of municipal regulations." See id. at 876.

The supreme court went on to make a key distinction that we believe is conclusive on the delegation issue before us. In addressing the dissent, the majority distinguished delegations which allow private parties to choose between two distinct regulatory schemes versus delegations which allow private parties to create part of the regulatory scheme that they choose. See id. at 879 (emphasis in original). Here, the Legislature has allowed a private landowner to choose between two regulatory schemes: the one applicable at the time of the original application to subdivide and the one indicated in the subdivision plat. The landowner does not create either regulatory scheme; both were the product of the City's lawfully delegated power to regulate land use. The developer is held to an election between two regulatory schemes. While in some respects the developer is allowed to "ascertain conditions upon which existing laws may operate," the choice is limited to one of two regulatory schemes created pursuant to a municipality's lawfully delegated authority. Because section 245.002(d) allows the developer to choose between two distinct ***874** regulatory schemes but does not allow the developer to create the scheme, it is not a delegation of legislative power. See id. at 870.

Estoppel


[3]  [4]  We hold that a second independent legal basis supports the trial court's judgment. The trial court held that the city was estopped from denying the validity of Plat

Note 6 because the City had accepted Garza's dedication of property. In reply, appellant argues that a municipality may not be estopped in the exercise of its governmental functions. See City of Hutchins v. Prasifka, 450 S.W.2d 829, 836 (Tex. 1970), City of Corpus Christi v. Gregg, 155 Tex. 537, 289 S.W.2d 746, 750 (1956), City of San Angelo v. Deutsch, 126 Tex. 532, 91 S.W.2d 308, 309 (Tex. 1936), see also City of San Marcos v. R.W. McDonald, 700 S.W.2d 674, 676 (Tex. App. Austin 1985, no writ). The general rule urged by appellants has an exception where a city has received a substantial benefit as a result of its own mistake. In City of San Angelo, Deutsch loaned money to a third party who gave Deutsch a note and deed of trust on the property. See 126 Tex. 532, 91 S.W.2d 308. Before making the loan, though, Deutsch checked the county tax records for tax liens on the property. See id. Finding none, Deutsch made the loan. See id. Upon default by the borrower, Deutsch realized the county tax records were wrong and that the property was encumbered by unpaid taxes. See id. at 309. Deutsch argued that the city was estopped from asserting a claim for the unpaid taxes because of his reliance upon the city's error. See id. The supreme court held that a city could not be estopped by the negligence of its officials in the exercise of its governmental function when the city has received no benefit from the error.

The opinion is expressed in a number of decisions that a city may be estopped even when it is acting in its public [governmental] capacity if it has received or accepted benefit from the transaction. In such case, exception is properly made to the general rule which has been discussed, because there is added to the equities existing in favor of the individual on account of his reliance and injury the established and compelling equitable principle that the city may not, after having accepted benefit from the unauthorized act, repudiate it so far as it imposes an obligation upon it or is disadvantageous to it. Doty v. Barnard, 92 Tex. 104, 107, 47 S.W. 712, 17 Tex. Jur. pp. 135, 136, s. 7. This exception is not applicable here because the city received no benefit from the unauthorized entries made in the tax records.

See id. at 311-12 (citations omitted). In Doty v. Barnard, the supreme court said: A person cannot accept and reject the same instrument, or, having availed himself of it as to part, defeat its provisions in another part, 92 Tex. 104, 47 S.W. 712, 713-14 (Tex. 1898) (quoting Herman on Estoppel and Res Judicata). Again, this exception to the general rule applies even where the city is acting in its governmental capacity. See Deutsch, 91 S.W.2d at 312, Gregg, 289 S.W.2d at 750-51, see also Roberts v. Haltom City, 543 S.W.2d 75, 80 (Tex. 1976) ('The court's equitable power to prevent injustice must not be frustrated by rules of law that limit or preclude the responsibility of the city for the conducts of its officers'). While we acknowledge that the applicability of estoppel against municipalities is rare, we conclude that it would be manifestly unjust for the City to retain the benefits of its mistake yet avoid its obligations. The City argues that Garza is prohibited from developing his property pursuant to the Plat Notes because the Commission had no authority to *875 approve a subdivision plat that did not conform to the applicable land use regulations in place at the time the application to subdivide was filed. However, we find that it would be manifestly inequitable for the City to retain the land Garza donated so that he could take advantage of transfer credit provisions available only under the CWO and later deny him the benefit of developing under the CWO.

Attorney's Fees

[5]  The City asks that we reverse the award of attorney's fees provided we find in their favor. The award of attorney's fees is discretionary and cannot be reversed on appeal absent a clear abuse of discretion. See Texas Dept. of Pub. Safety v. Moore, 985 S.W.2d 149, 157 (Tex. App. -Austin 1998, no pet.). A trial court abuses its discretion when

it acts without regard to guiding legal principles or supporting evidence. See Bocquet v. Herring, 972 S.W.2d 19, 21 (Tex. 1998). Since we have affirmed the legal basis supporting the trial court's judgment, we affirm the award of attorney's fees. See Steel v. Wheeler, 993 S.W.2d 376, 381 (Tex. App. Tyler 1999, pet. denied) (affirming the award of attorney's fees to the prevailing party in a declaratory judgment action).

CONCLUSION

There are two independent legal bases supporting the trial court's judgment in Garza's favor. We hold that section 245.002(d)'s reference to "Plat Notes" does not create an unconstitutional delegation of legislative power to a private entity. Further, we hold that the City is estopped to deny the validity of Plat Note 6 because it accepted Garza's dedication of property. We affirm the trial court's judgment.