AFFIRMED and Opinion Filed June 4, 2020

In the
Court of Appeals
Fifth District of Texas at Dallas

No. 05-19-00667-CV

TEJAS MOTEL, L.L.C., Appellant
V.
CITY OF MESQUITE, ACTING BY AND THROUGH ITS BOARD OF ADJUSTMENT, Appellee

On Appeal from the 298th Judicial District Court
Dallas County, Texas
Trial Court Cause No. DC-18-16933

MEMORANDUM OPINION

Before Justices Molberg, Carlyle, and Evans
Opinion by Justice Carlyle

Tejas Motel, L.L.C. appeals from the trial court's order granting the City of Mesquite's plea to the jurisdiction and dismissing Tejas's claims. Tejas contends the trial court erred by granting the City's plea and abused its discretion by not granting it a continuance to pursue additional discovery. We affirm.

Background

Tejas acquired land in the City of Mesquite in 2006 from one of its members who had owned the land for many years. The Tejas Motel is located on the property and has been operating there since 1970.

The property's use as a motel was authorized under the City's 1973 Comprehensive Zoning Ordinance. In 1997, the City passed Ordinance No. 3137, which created two categories of lodging facilities within the City and placed conditions on their uses. The ordinance defined "Limited Service" facilities as being those that do not meet the standards of "General Service" facilities, which have: (1) internal hallways for primary room access; (2) a meeting room of at least 450 square feet; (3) a recreational facility; and (4) a restaurant located either on-site or on an adjoining site. "Limited Service" facilities became "nonconforming uses" under the ordinance, meaning those not permitted in the district in which they are located.

The Tejas Motel is not a "General Service" motel under Ordinance No. 3137. Nor does it meet the additional criteria imposed by Ordinance No. 3963, passed in 2008, which requires among other things: (1) a minimum of 150 guest rooms; (2) a meeting room of at least 4,000 square feet; (3) a business center with at least two computers having internet access, two printers, and a fax machine; and (4) either a swimming pool or fitness center.

Although the Tejas Motel has been nonconforming under the City's zoning ordinances since 1997, the City did not specifically address that nonconformance until 2018.

In April 2018, the City passed Ordinance No. 4553, changing the manner in which the City's Board of Adjustment could amortize[1] nonconforming properties. Then, in June 2018, the City Council unanimously passed a resolution—purportedly in response to citizen complaints about conditions and criminal activities at nonconforming lodging facilities—asking the Board of Adjustment to consider establishing a date by which five of the city's nonconforming facilities would be required to comply. The Tejas Motel was among those five.

The Board scheduled a public hearing for July 26, 2018 to determine whether to establish a compliance date for the Tejas Motel. In addition to providing notice directly to Tejas and publishing notice in the "Daily Commercial Record," the City posted the Agenda for the July 26 meeting both on the bulletin board in City Hall and on the City's website. That Agenda described that the Board would:

> Conduct a public hearing to consider a request submitted by the City of Mesquite City Council for amortization of a legal non-conforming use (motel) located at 4405 East U.S. Highway 80. Per Section 1-304.C. of the Mesquite Zoning Ordinance, the Board of Adjustment will hold a public hearing to determine whether continued operation of the nonconforming use located at 4405 East U.S. Highway 80 will have an adverse effect on nearby properties. If, based on the evidence presented at the public hearing, the Board determines that continued operation of the use will have an adverse effect on nearby properties, it shall proceed to establish a compliance date for the nonconforming use.

[1] "Amortization" in this context refers to "[a] method of terminating a nonconforming use by allowing it to continue only for a specified grace period, so that the owner may recover all or part of the investment. After the grace period expires, the use must be ended." *Amortization*, BLACK'S LAW DICTIONARY (11th ed. 2019).

A city planning department employee explained the two-step process at the beginning of the July 26 meeting, and that the Board would undertake the second step at a later meeting. The parties then announced they had reached an agreement. Tejas, represented by counsel, agreed to accept amortization of the property in exchange for being granted until May 1, 2019 to cease operations or bring the motel into compliance. The City introduced evidence that the nonconforming use would adversely affect nearby properties. Thus, based both on the City's evidence and on Tejas's agreement, the Board determined that the Tejas Motel's continued operation as a nonconforming use would adversely affect other nearby properties.

Before moving on to step two, the Board asked Tejas whether it objected to completing the second inquiry then and there, rather than scheduling a separate hearing to determine a reasonable compliance date. Tejas's attorney confirmed it did not object to moving forward. With Tejas and the City in agreement, the Board determined that May 1, 2019 was a reasonable compliance date under the criteria established by the City's ordinances.

After the hearing, Tejas's attorney reviewed and edited a draft of the Board's decision, and electronically signed that draft before Tejas and the City jointly submitted it to the Board on July 30. The Board executed the "Decision and Order"

in the form submitted by the parties on July 31, and notice of the Board's decision was emailed to Tejas's attorney the following day.[2] The notice stated:

> Please find enclosed the Decision and Order of the Board of Adjustment in Case No. BOA0718-0079.
>
> Any interested person wishing to appeal this decision is required to file a petition for Writ of Certiorari in a district court, county court at law within ten (10) days of the date this decision is filed in the Board's office in accordance with section 211.011 of the Texas local Government Code. The decision was filed in the Board's office on July 31, 2018.

Tejas denies receiving that notice, but introduced no evidence supporting its contention.

Tejas filed its petition in early November, more than three months after the Board filed its decision and emailed it to Tejas's attorney. In its third amended petition and first supplement, the live pleading when the City answered, Tejas asserted the following causes of action: (1) an appeal from the Board's amortization decision under section 211.011 of the Texas Local Government Code; (2) a claim for a declaratory judgment that the Board's amortization decision was void based on a Texas Open Meetings Act violation; (3) a claim for a declaratory judgment that the City's ordinances are unconstitutional as applied against Tejas and otherwise invalid; (4) a claim for a monetary judgment based on an alleged taking of Tejas's

[2] The Board's custodian of records attempted to email the decision to Tejas's attorney at 4:53 pm on July 31, but the email did not go through because an extra letter was inadvertently added to the attorney's email address. The Board re-sent the email at 8:01 am the following morning.

property in violation of state and federal law; and (5) a claim for declaratory and injunctive relief based on ultra vires actions taken by the Board.

With its answer, the City filed special exceptions, a plea to the jurisdiction as to all claims, and a conditional motion for summary judgment as to the Texas Open Meetings Act claim. The court set the City's motions for hearing on March 29, 2019.

Tejas responded to the motion for summary judgment on March 22. Two days before the hearing, Tejas filed a fourth amended petition asserting claims against the board members in their official capacities. Tejas's attorney also filed a petition in intervention on behalf of a frequent guest of the motel, seeking relief for the City's alleged Open Meetings Act violations. The day before the hearing, Tejas filed (1) a supplement to its fourth amended petition and (2) a response to the City's plea to the jurisdiction. Within its response, Tejas requested a continuance to allow it to conduct additional discovery concerning when the Board filed its minutes from the July 26 hearing. The City objected to Tejas's fourth amended petition and first supplement thereto as untimely.

There is no reporter's record from the March 29 hearing. On May 17, the trial court entered an order granting the City's plea to the jurisdiction in its entirety, dismissing Tejas's claims for lack of jurisdiction, and denying the City's conditional motion for summary judgment as moot.

The order states the trial court considered: (1) the plea to the jurisdiction; (2) Tejas's response; (3) all of the evidence presented; and (4) the argument of counsel.

It does not mention the court reviewing "all pleadings" on file. We do not presume trial courts granted leave to file untimely pleadings when the order at issue lacks a recitation that the court reviewed or considered "all pleadings." *See John C. Flood of DC, Inc. v. SuperMedia, L.L.C.*, 408 S.W.3d 645, 654 (Tex. App.—Dallas 2013, pet. denied); *Gatesco Q.M., Ltd. v. City of Houston*, 333 S.W.3d 338, 343–44 (Tex. App.—Houston [14th Dist.] 2010, no pet.) (applying this untimely-pleading analysis in the plea-to-the-jurisdiction context); *cf. B.C. v. Steak N Shake Ops., Inc.*, No. 17-1008, 2020 WL 1482586, at *4 (Tex. Mar. 27, 2020) (we presume leave of court when the order states the court considered "all pleadings," when the record fails to indicate the pleading was *not* considered, and the opposing party does not show surprise). Thus, we consider Tejas's third amended petition and supplement as Tejas's live pleading.

The trial court did not err by granting the City's plea to the jurisdiction.

In its first issue, Tejas contends the trial court should have denied the City's plea to the jurisdiction because its appeal under Local Government Code section 211.011 was timely and, in any event, at least a portion of its claims are not subject to immunity or exhaustion requirements.

A plea to the jurisdiction is a dilatory plea challenging a court's authority to determine the subject matter of an action. *Rawlings v. Gonzalez*, 407 S.W.3d 420, 425 (Tex. App.—Dallas 2013, no pet.). Because the existence of subject-matter

jurisdiction is a question of law, we review a trial court's ruling on a plea to the jurisdiction de novo. *Id.*

A governmental entity may base its plea to the jurisdiction either on the pleadings or on evidence negating jurisdictional facts. *Tex. Dep't of Parks & Wildlife v. Miranda*, 133 S.W.3d 217, 226 (Tex. 2004). To the extent a plea to the jurisdiction is based on the pleadings, we determine whether the claimant has pleaded facts affirmatively demonstrating the trial court's jurisdiction, construing the pleadings liberally and in favor of the claimant. *Id.*

When a jurisdictional challenge is based on evidence implicating the merits of a cause of action, we consider the relevant evidence submitted by the parties to determine whether the jurisdictional issues can be determined as a matter of law. *Id.* at 227–28. This standard of review "generally mirrors that of a summary judgment under Texas Rule of Civil Procedure 166a(c)." *Id.* at 228.

For jurisdictional challenges based on evidence, we take all evidence favorable to the nonmovant as true, drawing every reasonable inference and resolving all doubts in the nonmovant's favor. *City of Dallas v. Prado*, 373 S.W.3d 848, 853 (Tex. App.—Dallas 2012, no pet.). If the evidence creates a question of fact on the jurisdictional issue, the plea to the jurisdiction must be denied so the factfinder can resolve that issue. *Id.* But if the evidence is undisputed or fails to raise a genuine issue of fact, the plea to the jurisdiction can be resolved as a matter of law. *Id.*

Tejas's appeal under Local Government Code section 211.011 was untimely.

"The requirement that one timely file a petition for writ of certiorari to challenge a zoning board decision is part of an administrative remedy, which is provided by the Texas Local Government Code and must be exhausted before board decisions may be challenged in court." *Allen v. City of Baytown*, No. 01-09-00914-CV, 2011 WL 3820963 at *4–5 (Tex. App.—Houston [1st Dist.] Aug. 25, 2011, no pet.) (mem. op.). This exhaustion requirement is typically both mandatory and jurisdictional, even regarding certain constitutional claims, such as takings claims, that are beyond a municipality's jurisdiction to decide. *See City of Dallas v. Stewart*, 361 S.W.3d 562, 579–80 (Tex. 2012); *see also Tellez v. City of Socorro*, 226 S.W.3d 413, 414 (Tex. 2007) (per curiam) (jurisdiction exists once a party files a petition within ten days after a zoning board decision) (quoting *Davis v. Zoning Bd. of Adjustment*, 865 S.W.2d 941, 942 (Tex. 1993) (per curiam)). Though "a constitutional claim may be asserted for the first time in the district court upon appeal of the agency order, a failure to comply with the appeal deadlines and/or failure to so assert the constitutional claim at that time, precludes a party from raising the issue in a separate proceeding." *Stewart*, 361 S.W.3d at 580.

To obtain judicial review under section 211.011, Tejas was required to present its verified petition challenging the legality of "the decision of the board of adjustment . . . within 10 days after the date the decision is filed in the board's office." TEX. LOC. GOV'T CODE § 211.011(b). It did not.

The Board's July 31 written "Decision and Order" triggered the statutory deadline. Section 211.011(b), requires that the document "filed in the board's office" must, at a minimum, "be sufficient to disclose the intention of the Board" with respect to the action of which the party complains on appeal. *Reynolds v. Haws*, 741 S.W.2d 582, 586 (Tex. App.—Fort Worth 1987, writ denied) (draft decision filed in the board's office held sufficient to trigger the statutory deadline under section 211.011's predecessor).

The Board's "Decision and Order" (1) summarizes the July 26 hearing; (2) explains the Board's findings; (3) concludes by stating "the use must cease operations and the certificate of occupancy for this use shall be revoked on May 1, 2019 unless the use becomes a conforming use in accordance with the Mesquite Zoning Ordinance"; (4) is signed by both the chair of the Board and its custodian of records; and (5) is signed by attorneys for the parties. This document, filed in the Board's office and emailed to Tejas's attorney by the very next morning, "sufficient[ly] . . . disclose[d] the intention of the Board" with respect to setting a compliance date for the Tejas Motel. *Reynolds*, 741 S.W.2d at 586.[3]

[3] We do not view this conclusion to conflict with other courts' holdings that filing board minutes triggers the deadline in the absence of a separate decision or summary of decision like the one we have here. *See, e.g.*, *Risoli v. Bd. of Adjustment*, No. 03-17-00385-CV, 2017 WL 4766724, at *3–4 (Tex. App.—Austin Oct. 20, 2017, no pet.) (mem. op.); *E. Cent. Indep. Sch. Dist. v. Bd. of Adjustment*, 387 S.W.3d 754, 762 (Tex. App.—El Paso 2012, pet. denied).

Tejas did not appeal within ten days of the "Decision and Order"—a decision Tejas (1) stipulated was reasonable and (2) jointly submitted to the Board for filing. Instead, it waited more than three months to file the underlying suit. Because Tejas did not timely appeal the Board's decision under the statutory mechanism provided by the Legislature for obtaining judicial review, the trial court lacked jurisdiction over Tejas's state-law claims. That includes the open meetings act claim, *Harker Heights Condos., LLC v. City of Harker Heights*, No. 13-17-00234-CV, 2019 WL 1388739, at *5 (Tex. App.—Corpus Christi–Edinburg Mar. 28, 2019, pet. denied); the state takings claim, *Murphy*, 557 S.W.3d at 241; and the declaratory judgment claim, *City of Grapevine v. CBS Outdoor, Inc.*, No. 02-12-00040-CV, 2013 WL 5302713, at *9 (Tex. App.—Fort Worth Sept. 19, 2013, pet. denied) (mem. op.).

Tejas also made as-applied constitutional challenges to the ordinances in its live pleading. *See Patel v. Tex. Dep't of Licensing and Regulation*, 469 S.W.3d 69, 87 (Tex. 2015) (describing similar constitutional challenges as being as-applied under principles of substantive due course of law). These differ from facial challenges, which present pure questions of law and are exempt from exhaustion requirements, and thus they too perished when Tejas did not timely appeal. *See City of Richardson v. Bowman*, 555 S.W.3d 670, 686–87 (Tex. App.—Dallas 2018, pet. denied). In this posture, those claims impermissibly seek to collaterally attack the legality of the board's decision to amortize the property. *See Stewart* 361 S.W.3d at

580 ("A party cannot attack collaterally what she chooses not to challenge directly.").

We affirm the trial court's dismissal of the state-law claims and as-applied constitutional challenges because Tejas failed to trigger the court's jurisdiction when it failed to petition for writ of certiorari within ten days of the decision.

Tejas failed to state any viable federal constitutional claim.

Although a city is not immune from federal constitutional claims, a trial court may grant a plea to the jurisdiction if a constitutional claim is not viable. *See City of Dallas v. Saucedo-Falls*, 268 S.W.3d 653, 657–58 (Tex. App.—Dallas 2008, pet. denied); *Nat'l Media Corp. v. City of Austin*, No. 03-16-00839-CV, 2018 WL 1440454, at *7 (Tex. App.—Austin Mar. 23, 2018, no pet.) (mem. op.).

To state a viable due-process or takings claim in this context, a claimant must demonstrate that a constitutionally protected, vested, property interest has been infringed. *See Dallas Cnty. v. Gonzales*, 183 S.W.3d 94, 111 (Tex. App.—Dallas 2006, pet. denied); *see also Hallco Tex., Inc. v. McMullen Cty.*, 221 S.W.3d 50, 56 (Tex. 2006); *Nat'l Media Corp.*, 2018 WL 1440454, at *6. "A right is 'vested' when it has some definitive, rather than potential, existence." *Nat'l Media Corp.*, 2018 WL 1440454, at *6. "A constitutionally protected property interest is an individual entitlement grounded in state law, which cannot be removed except 'for cause,'" and

which "cannot be based on a mere unilateral expectation." *Gonzales*, 183 S.W.3d at 111 (cleaned up).[4]

"Property owners do not have a constitutionally protected, vested right to use property in any way they choose without restriction and despite existing rules in force at the time they acquire it." *Mbogo v. City of Dallas*, No. 05-17-00879-CV, 2018 WL 3198398, at *8 (Tex. App.—Dallas June 29, 2018, pet. denied). In *Mbogo*, the claimant operated an auto-repair shop that became a nonconforming use under a zoning ordinance adopted in 1988. *Id.* at *1. The claimant acquired its property in 1991, knowing the shop was a nonconforming use at the time, and invested $80,000 improving it. *Id.* The city allowed the claimant to continue operating the shop as a nonconforming use for many years, but it eventually set a compliance date for amortization and denied a specific-use permit. *Id.* at *2. After the claimant refused to close the repair shop, the city sued to enjoin the continuing nonconforming use. *Id.* at *3. The claimant countersued, alleging various claims under the Texas constitution, and the trial court granted the city's plea to the jurisdiction. *Id.*

We affirmed because the claimant had no constitutionally protected, vested due process interest in continuing to use the property as a repair shop in violation of the city's ordinances. *See id.* at *5, 8, 10. And we rejected the takings claim, noting

[4] *See* Jack Metzler, *Cleaning Up Quotations*, 18 J. APP. PRAC. & PROCESS 143 (2017), available at https://lawrepository.ualr.edu/appellatepracticeprocess/vol18/iss2/3 (discussing and explaining the "cleaned up" parenthetical, a way to shorten unnecessarily lengthy citations); *Cadena Comercial USA Corp. v. Tex. Alcohol & Beverage Comm'n*, 518 S.W.3d 318, 341 n.18 (Tex. 2017) (Willett, J., dissenting).

that, "although the City's ordinances limit the particular use of [the claimant's] property, the City has not destroyed or deprived him of any vested right to make use of the property." *Id.* at *9.

The same is true here. Tejas acquired the property in 2006, long after it became a nonconforming use. The City allowed Tejas to continue operating the motel for many years, but it eventually set a compliance date—which Tejas stipulated was reasonable—and denied Tejas's request for a continuing-use permit. Tejas, like the claimant in *Mbogo*, has no constitutionally protected interest in continuing to use the property in violation of the City's zoning ordinances when it acquired the property knowing it was in violation of those ordinances. *See Mbogo*, 2018 WL 3198398, at *8; *City of Grapevine*, 2013 WL 5302713, at *8 ("[W]hile CBS may have a vested property right in its sign, it does not have a vested property right in maintaining the sign as a nonconforming use under the City's relevant zoning ordinances.").

Tejas argues it does not need a vested property interest because it "has a protected interest in its reasonable investment-backed expectations." This argument refers to one of the factors we look at in determining whether there has been a regulatory taking under the principles first announced in *Penn Central Transport Co. v. New York City*, 483 U.S. 104, 124 (1978). Those are: (1) the economic impact of the regulation on the property owner; (2) the character of the governmental action; and (3) the extent to which the regulation interferes with the property owner's

distinct and reasonable investment-backed expectations. *Penn Central*, 438 U.S. at 124; *Hearts Bluff Game Ranch, Inc. v. State*, 381 S.W.3d 468, 477–78 (Tex. 2012).

"The reasonable investment-backed expectation of the claimant is critical to this analysis because it distinguishes this concept from those situations in which the landowner's property has been totally destroyed." *Mayhew v. Town of Sunnyvale*, 964 S.W.2d 922, 937 (Tex. 1998). In *Mayhew*, the supreme court determined there was no regulatory taking because the plaintiff had no reasonable investment-backed expectation that the town would approve his development proposal in violation of its zoning ordinances. *Id.*

Similarly, we explained in *Mbogo* that, because the claimant knew when he purchased the property that operating the repair shop was a nonconforming use, any money he put into that business was invested at his own risk. 2018 WL 3198398, at *7. The claimant's "reliance and expectation that the City would allow him to continue using the property as a nonconforming use or under a [permit] in perpetuity was not reasonable." *Id.* at *5. We further noted that, as is the case here, any impairment on the property owner's rights was mitigated, at least to some extent, by the city's granting an extended period of time in which the property owner could recoup his investment through operating as a nonconforming use. *Id.* at *7.

Tejas cannot establish a reasonable investment-backed expectation in continuing to operate the motel as a nonconforming use. *See id.* at *6. Tejas cites no record evidence documenting the amount or timing of its investments in the

property, Tejas makes no argument concerning the other two *Penn Central* factors, and the record undisputedly establishes that Tejas agreed to the amortization timeline. *See Hearts Bluff*, 381 S.W.3d at 477–78.

Tejas's federal constitutional claims fail because it has no vested property interest in maintaining a nonconforming use and because it has no reasonable investment-backed expectations in continuing that use. The trial court did not err in granting the City's plea to the jurisdiction, and we overrule Tejas's first issue.[5]

Tejas waived any error relating to its request for a continuance.

In its second issue, Tejas contends the trial court abused its discretion by denying its request for a continuance, which it embedded in its response to the plea to the jurisdiction instead of as a separate filing. We review for abuse of discretion. *See Joe v. Two Thirty Nine Joint Venture*, 145 S.W.3d 150, 161 (Tex. 2004). "[W]hen a continuance is sought to pursue additional discovery, the motion must describe the evidence sought, explain its materiality, and show the party requesting the continuance has used due diligence to obtain the evidence." *Zaidi v. N. Tex. Tollway Auth.*, No. 05-17-01056-CV, 2018 WL 6426798, at *1 (Tex. App.—Dallas Dec. 6, 2018, no pet.) (mem. op.). But a party that requests a continuance must obtain

[5] To the extent Tejas asserted other federal constitutional claims in its third amended petition and supplement, it has failed to sufficiently identify those claims on appeal or cite appropriate record evidence and authorities differentiating them from the other claims to demonstrate they were not also subject to dismissal. *See* TEX. R. APP. P. 38.1(i). Thus, Tejas has preserved nothing for our review that we have not addressed elsewhere in this opinion.

a written ruling to preserve any error for appeal, and Tejas failed to do so here. *See Bench Co., Inc. v. Nations Rent of Tex., L.P.*, 133 S.W.3d 907, 909 (Tex. App.—Dallas 2004, no pet.).

If the trial court implicitly denied Tejas's request for a continuance, TEX. R. APP. P. 33.1(a)(2)(A), it did not abuse its discretion, because Tejas failed to show it diligently pursued discovery. *See Zaidi,* 2018 WL 6426798, at *1. Tejas devoted an entire paragraph of its November 2018 Original Petition to the issue of when the Board's minutes were filed. The City filed its plea to the jurisdiction contending Tejas's appeal was untimely on January 29, 2019. Tejas waited until March 28, 2019, the day before the hearing, to ask for a continuance to conduct discovery regarding when the Board filed its minutes. It neither specified what discovery it sought nor provided information about the steps it had taken to pursue the discovery. We overrule Tejas's second issue.

* * *

Having overruled both of Tejas's issues, we affirm the trial court's order granting the City's plea to the jurisdiction and dismissing Tejas's claims against the City.

/Cory L. Carlyle/
CORY L. CARLYLE
JUSTICE

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Court of Appeals
Fifth District of Texas at Dallas

JUDGMENT

TEJAS MOTEL, L.L.C., Appellant No. 05-19-00667-CV V. CITY OF MESQUITE, ACTING BY AND THROUGH ITS BOARD OF ADJUSTMENT, Appellee	On Appeal from the 298th Judicial District Court, Dallas County, Texas Trial Court Cause No. DC-18-16933. Opinion delivered by Justice Carlyle. Justices Molberg and Evans participating.

In accordance with this Court's opinion of this date, the judgment of the trial court is **AFFIRMED**.

It is **ORDERED** that appellee City of Mesquite, acting by and through its Board of Adjustment recover its costs of this appeal from appellant Tejas Motel, L.L.C.

Judgment entered this 4th day of June, 2020.