



Hallco Texas

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Delivered and Filed: April 16, 1997

AFFIRMED

This case involves the question of how a county may properly regulate placement of solid waste disposal facilities under Texas law. Appellant Hallco Texas Inc. ("Hallco") bought 128 acres of land within about two miles of Choke Canyon Lake, and began the licensing process before the Texas Natural Resource Conservation Commission. Meanwhile, the McMullen County Commissioners Court apparently got wind of the plan. Acting under Tex. Health & Safety Code Ann. Section(s) 364.012 (Vernon 1990), they passed an ordinance barring any solid waste disposal facility from operating within three miles of Choke Canyon Lake. Hallco claims this ordinance violates its rights under both the Texas and U.S. constitutions, as well as state law. Appellees McMullen County and its Commissioners Court ("County") were granted summary judgement on Hallco's claims. The judgement did not specify the ground on which it was granted.

In two points of error Hallco argues the trial court erred by granting McMullen County summary judgement and by refusing to consider newly discovered evidence after summary judgement was granted. We affirm the judgement of the trial court.

STANDARD OF REVIEW

To prevail on a motion for summary judgment, a movant must establish that there is no genuine issue as to any material fact and that the movant is entitled to judgement as a matter of law. Tex. R. Civ. P. 166a(c). In deciding whether or not there is a disputed material fact issue precluding summary judgment, evidence favorable to the non-movant will be taken as true; every reasonable inference must be indulged in favor of the non-movant and any doubts resolved in their favor. *Nixon v. Mr. Property Management Co.*, 690 S.W.2d 546, 548-49 (Tex.1985). Judgment will be affirmed only when there is no genuine issue of material fact as to one or more of the essential elements of plaintiff's claims. *Gibbs v. General Motors Corp.*, 450 S.W.2d 827, 828 (Tex. 1970).

If the summary judgement order does not specify the grounds on which the trial court granted summary judgment, the nonmoving party on appeal must negate any grounds on which the trial court could have granted the order; *Malooly Bros., Inc. v. Napier*, 461 S.W.2d 119, 121 (Tex. 1970); *Sipes v. Petry & Stewart*, 812 S.W.2d 428 (Tex. App.--San Antonio 1991, no writ).



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The proponents of an ordinance whose constitutionality is challenged, and who move for summary judgment, must establish affirmatively by summary judgement proof that conditions either conclusively support passage of the ordinance or make that action debatable or issuable. *Baccus v. City of Dallas*, 450 S.W.2d 389 (Tex. Civ. App.--Dallas 1970), writ ref'd n.r.e, 454 S.W.2d 391, 392 (Tex. 1970); *City of University Park v. Benners*, 485 S.W.2d 773, 779 (Tex. 1972).

PROPRIETY OF SUMMARY JUDGMENT

In its first point of error, Hallco contends the trial court erred in granting summary judgement for McMullen County. Appellant states his initial point in broad form and goes on with seven specific attacks on the summary judgment. A single broad point of error in an appeal of the granting of a summary judgement permits appellant to raise every legal attack on the summary judgment. *Malooly Bros.*, 461 S.W.2d at 121; *Spencer v. City of Dallas*, 819 S.W.2d 612, 615 (Tex. App.--Dallas 1991, no writ). Appellant is able to raise not only arguments focusing on whether a genuine issue of material fact was raised by the summary judgment evidence, but also is able to contest non-evidentiary issues, such as the legal interpretation of a statute. See *Cassingham v. Lutheran Sunburst Health Serv.*, 748 S.W.2d 589, 590 (Tex. App.--San Antonio 1988, no writ).

Hallco begins its attack on the summary judgement on a trio of constitutional grounds. Hallco argues, first, that McMullen County's action works a taking, in that it is deprived of nearly all the value of its property by regulatory action. Second, Hallco argues that because there is no rational basis for the county's action, its due process rights have been violated. Third, Hallco argues that the county's action violates its right to equal protection of the law by discriminating against its waste disposal facility while operating its own. We take each of these in turn.

1. The Takings Claim

Hallco argues the McMullen County ordinance works a taking because the value of its land with the waste disposal facility permitted and operating is so much greater than the current value of the land. We find summary judgement was proper on Hallco's takings claim.

The traditional form of a taking occurs when the character of a government action is a permanent physical occupation of the land. *Loretto v. TelePrompter Manhattan CATV Corp.*, 458 U.S. 419, 427-428, 102 S. Ct. 3164, 3171, 73 L. Ed.2d 868 (1982). An act short of actual physical invasion, appropriation or occupation can amount to a compensable taking. *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 112 S. Ct. 2886, 120 L. Ed.2d 798 (1992); *City of Austin v. Teague*, 570 S.W.2d 389 (Tex. 1978); *DuPuy v. City of Waco*, 396 S.W.2d 103 (Tex. 1965).

However, every government action which has an effect on property values is not necessarily compensable. *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 43 S. Ct. 158, 67 L. Ed.. 322 (1922). All property is held subject to the valid exercise of the police power and compensation is generally not



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required for losses resulting therefrom. *City of College Station v. Turtle Rock Corp.*, 680 S.W.2d 802, 804 (Tex. 1984). Whether a particular ordinance is a proper exercise of the police power or constitutes a compensable taking is a question of law for the court, and the ordinance is presumed to be a valid exercise of the police power absent a contrary showing by the plaintiff on the basis of which reasonable minds could not differ. *City of Pharr v. Pena*, 853 S.W.2d 56, 60 (Tex. App.--Corpus Christi 1993, writ denied). The mere fact that a regulation may prevent the most profitable use of property does not conclusively establish that there has been a taking. *Id.*; *Andrus v. Allard*, 444 U.S. 51, 67, 100 S. Ct. 318, 327, 62 L. Ed.2d 210 (1979).

We find that Halco's takings claim must fail because he did not have a cognizable property interest of which the government action could deprive him.

Halco's takings claim is grounded in the idea that it has a constitutionally protected property interest or entitlement to use its property for waste disposal, and that the McMullen County ordinance deprived him of that right or entitlement. However, Halco has never had the right to dispose of industrial waste on its property, and does not now have a right to dispose of such waste. In *Board of Regents v. Roth*, 408 U.S. 564, 92 S. Ct. 2701, 33 L. Ed.2d 548 (1972), a due process case, the Supreme Court noted that property rights are not created by the Constitution, but by existing rules or understandings that stem from an independent source of state law. *Roth*, 408 U.S. at 577.

In Texas, the Legislature has defined when property owners may dispose of solid waste on their property via the permitting process; Tex. Health & Safety Code Ann. Section(s) 361.061 -- .345 (Vernon 1992 & Supp. 1997). Even if Halco already had a permit, by definition it would not have a property interest in disposal of solid waste. TNRCC regulations define permits as not being a property interest or a vested right in the permittee. See 30 Tex. Admin. Code Section(s) 305.122 (b) (West 1996).

The only way the McMullen County regulation affected Halco was in denying it the right to operate a solid waste facility on the proposed site. A mere expectancy of future services which would render the land more valuable, in the absence of a contract, is not a vested property right for purposes of determining whether a taking has occurred. *Estate of Scott v. Victoria County*, 778 S.W.2d 585, 592. (Tex. App.--Corpus Christi 1989, no writ). The McMullen County ordinance does not otherwise impact on use of the property. Because Halco did not have a property interest in disposal of solid waste on its property, we hold that the ordinance in question did not constitute a taking as a matter of law.

2. The Due Process Claims

Halco next complains that its due process rights were violated because there was no rational basis for McMullen County to bar operation of its facility, given its sophisticated design. We find summary judgment was proper on Halco's due process claim.



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An ordinance is subject to constitutional attack on grounds that it is so unreasonable and arbitrary that it deprives one of property without due process of law. *City of West University Place v. Ellis*, 134 Tex. 222, 134 S.W.2d 1038, 1040 (1940). Texas courts disagree as to whether the Texas constitutional provision contained in Tex. Const. art. 1, sec. 19 is interpreted more stringently than the guarantee contained in U.S. Const. amdt. XIV. See, e.g., *Trinity River Auth. v. URS Consultants*, 889 S.W.2d 259, 263 (Tex. 1994). However, because we have held that the interest asserted by Hallco is not a property interest, it is axiomatic that Hallco cannot complain that he was deprived of a property interest without due process of law.

3. The Equal Protection Argument

Hallco also challenges the ordinance on equal protection grounds. It notes first that McMullen County operates a municipal garbage disposal facility; it argues that this fact shows the county's actions are irrational discrimination against its plan to open its own solid waste disposal facility in the county.

The test under the Equal Protection Clause of the U.S. Constitution is whether similarly situated actors are treated similarly; legislation which classifies is presumed to be valid and will be sustained if the classification drawn by the statute is rationally related to a legitimate state interest. *City of Cleburne et al. v. Cleburne Living Center et al.*, 473 U.S. 432, 439, 105 S. Ct. 3249, 3254, 87 L. Ed.2d 313 (1985). Here the actors are not similarly situated in any sense of the word. Not only does McMullen County's landfill lie outside the three-mile zone, but it takes household garbage, not the industrial wastes contemplated in Hallco's permit application. Moreover, regulating the siting of a solid waste disposal facility by keeping it away from a source of drinking water and water-based recreation is rationally related to the statute's purpose. Because Hallco cannot show that similarly situated actors are being treated in a dissimilar way, we hold that Hallco was not denied equal protection of the laws under the U.S. Constitution by McMullen County's action.

Under the Texas Constitution's equal protection clause, as with the federal constitution, similarly situated individuals must be treated equally under the statutory classification unless there is a rational basis for not doing so. *Whitworth v. Bynum*, 699 S.W.2d 194, 197 (Tex. 1985). Even when the purpose of a statute is legitimate, equal protection analysis still requires a determination that the classifications drawn by the statute are rationally related to the statute's purpose. *Id.* We hold that Hallco was not denied equal protection of the laws under the Texas Constitution.

SUMMARY JUDGEMENT IN THE LAND USE CONTEXT

Hallco further argues the summary judgement in favor of McMullen County is flawed because summary judgement is an inappropriate means of dealing with complex land use cases. We believe this argument lacks merit.



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Hallco argues *Mayhew v. Town of Sunnydale*, 774 S.W.2d 284 (Tex. App.--Dallas 1989, writ denied), cert. denied, 498 U.S. 1087, 111 S. Ct. 963, 112 L. Ed.2d 1049 (1991) held that summary judgement is an inappropriate means for dealing with complicated land use cases such as this one. Mayhew states in dicta that "this case illustrates the difficulty presented in attempting by way of summary judgement to dispose of complex and difficult lawsuits involving federal and state constitutional claims." Mayhew, 774 S.W.2d at 286. However, we do not read Mayhew as holding that summary judgement is inappropriate for complicated land use cases. We also note that the drafters of Texas' summary judgement rule meant it to apply to every type of action. Roy W. McDonald, Summary Judgments, 30 Tex. L. Rev. 285, 286 (1952).

HALLCO'S STATUTORY COMPLAINTS

Finally, Hallco argues McMullen County violates provisions of both the Texas Government Code and the Texas Health and Safety Code. We disagree.

Hallco argues, first, that it could not be subject to McMullen County's ordinance because its permit application was pending at the time of passage, and only those laws in effect at the time of application could apply to its permit. Tex. Gov't. Code Ann. Section(s) 481.143 (Vernon Pamph.1997). Second, Hallco argues that McMullen County's action under Tex. Health & Safety Code Ann. Section(s) 364.012 represents an impermissible usurpation of TNRCC's permitting authority by counties. We take each of these contentions in turn.

1. Does McMullen County's after-enacted ordinance affect Hallco's permit?

Hallco seeks to invoke the procedural protections of Tex. Gov't. Code Ann. Section(s) 481.143 (Vernon Pamph. 1997), which provides in pertinent part:

"(a) The approval, disapproval, or conditional approval of an application for a permit shall be considered by each regulatory agency solely on the basis of any orders, regulations, ordinances, rules, expiration dates, or other duly adopted requirements in effect at the time the original application for the permit is filed. . ."

However, we think this statute is inapplicable to the present situation, for several reasons.

The Definitions section of the statute is found at Tex. Gov't. Code Ann. sec. 481.142 (Vernon Pamph. 1997): Section(s) 481.142. Definitions

In this section:

"(1) "Political subdivision" means a political subdivision of the state, including a county, a school district, or a municipality.



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(4) "Regulatory agency" means an agency, bureau, department, division, or commission of the state or any department, agency, board, commission, or governing body of a political subdivision in its capacity of processing, approving, or issuing permits." (emphasis added)

A county cannot come under section 481.143 unless it is acting in its capacity of processing, approving or issuing permits. No permit application was ever filed with McMullen County, and McMullen County has no authority to grant this type of permit. Moreover, the term "regulatory agency" in section 481.143 does not apply to the governing body of a municipality acting in its legislative capacity. *Williamson Pointe Venture v. City of Austin*, 912 S.W.2d 340 (Tex. App.--Austin 1995, no writ). We find this reasoning persuasive.

2. Did TNRCC's authority to grant permits for solid waste disposal in Texas preempt McMullen County's ordinance-making authority in this area?

Under this sub-point Hallco attempts to set up a conflict between Tex. Health & Safety Code Ann. Section(s) 364.012 (Vernon 1992) and Tex. Health & Safety Code Ann. Section(s) 361.151 (Vernon 1992 & Supp. 1997). We think this contention lacks merit.

Tex. Health & Safety Code Ann. Section(s) 361.151 states in pertinent part:

"(c) The commission, by specific action or directive, may supersede any authority granted to or exercised by a county under this chapter."

We read "this chapter" to mean the Solid Waste Disposal Act, Tex. Health & Safety Code Ann. Section(s) 361.001-361.540 (Vernon 1992 & Supp. 1997). We note, however, that the statute authorizing McMullen County's action is found under section 364. We see no statutory conflict that must be resolved by this Court.

We find the trial court did not err in granting summary judgment to McMullen County. We overrule Hallco's first point of error.

POINT OF ERROR TWO

In its second point of error, Hallco alleges the court below erred reversibly by not granting its Motion for Reconsideration based on newly discovered evidence. Hallco cites *Hatton v. Highlands Ins. Co.*, 631 S.W.2d 787 (Tex. App.--Tyler 1982) as support for this proposition. However, *Hatton* involved a motion for new trial based on jury misconduct and interpreted Tex. R. Civ. P. 327, which is limited to instances when a new trial is sought on grounds of jury misconduct. Because this is an appeal from summary judgment, which means that no jury is involved, we presume that what Hallco



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is talking about is a motion for new trial based on newly discovered evidence. Such a motion is directed to the discretion of the trial court and will not be disturbed on appeal absent a showing of abuse of discretion. *Cliff v. Huggins*, 724 S.W.2d 778 (Tex. 1987).

A trial court does not abuse its discretion when it refuses to consider instruments filed after it has granted summary judgment. *Axcell v. Phillips*, 473 S.W.2d 554, 560 (Tex. Civ. App.--Houston [1st Dist.] 1971, writ ref'd n.r.e.); *White v. Wah*, 789 S.W.2d 312, 320 (Tex. App.--Houston [1st Dist.] 1990, no writ). It also does not abuse its discretion when a new trial is sought on information known to nonmovant at the time the summary judgement is granted. *Malooly Bros.*, 461 S.W.2d at 121. The record reflects that the information in question - the testimony of a plaintiff's expert, which had been pre-filed with Hallco's permit application before the TNRCC - was known to Hallco before summary judgement was granted. We find the trial court did not abuse its discretion in refusing to grant a new trial on the basis of newly discovered evidence.

CONCLUSION

The judgement of the trial court is in all things affirmed.

TOM RICKHOFF, JUSTICE

DO NOT PUBLISH

