

No. 02-12-00040-CV

IN THE COURT OF APPEALS
FOR THE SECOND DISTRICT OF TEXAS
AT FORT WORTH

CITY OF GRAPEVINE AND GRAPEVINE BOARD OF ADJUSTMENT,

Appellants,

v.

CBS OUTDOOR, INC.,

Appellee.

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BRIEF OF APPELLANTS

On Appeal from the 141st Judicial District Court, Tarrant County, Texas

RICK THOMPSON
State Bar No. 00788537
rthompson@hankinsonlaw.com
DEBORAH G. HANKINSON
State Bar No. 00000020
dhankinson@hankinsonlaw.com
HANKINSON LLP
750 North St. Paul St., Suite 1800
Dallas, Texas 75201
214.754.9190
214.754.9140 (fax)

MATTHEW C. G. BOYLE
State Bar No. 24001776
mboyle@boyle-lowry.com
MATTHEW L. BUTLER
State Bar No. 24073982
mbutler@boyle-lowry.com
BOYLE & LOWRY, LLP
4201 Wingren, Suite 108
Irving, Texas 75062
972.650.7100
972.650.7105 (fax)

ATTORNEYS FOR APPELLANTS CITY OF GRAPEVINE
AND GRAPEVINE BOARD OF ADJUSTMENT

ORAL ARGUMENT REQUESTED

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DEBORAH G. HANKINSON
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750 North St. Paul St., Suite 1800
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214.754.9190
214.754.9140 (fax)

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mboyle@boyle-lowry.com
MATTHEW L. BUTLER
State Bar No. 24073982
mbutler@boyle-lowry.com
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972.650.7100
972.650.7105 (fax)

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AND GRAPEVINE BOARD OF ADJUSTMENT

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IDENTITY OF PARTIES AND COUNSEL

Appellants/Defendants: City of Grapevine
Grapevine Board of Adjustment

**Appellate Counsel for
Appellants/Defendants:** Rick Thompson
Deborah G. Hankinson
Hankinson LLP
750 N. St. Paul St., Suite 1800
Dallas, Texas 75201

**Trial & Appellate Counsel
for Appellants/Defendants:** Matthew C. G. Boyle
Matthew L. Butler
Boyle & Lowry, LLP
4201 Wingren, Suite 108
Irving, Texas 75062

Appellee/Plaintiff: CBS Outdoor, Inc.

Counsel for Appellee/Plaintiff: Sydney Nell Floyd
Richard L. Rothfelder
Rothfelder & Falick, LLP
1201 Louisiana, Suite 550
Houston, Texas 77002

TABLE OF CONTENTS

Identity of Parties and Counsel ii

Index of Authorities v

Statement of the Case x

Appendix Index xi

Statement Regarding Oral Argument xii

Issue Presented xii

Statement of Facts 1

Summary of Argument 8

Argument 9

I. The District Court Did Not Have Jurisdiction Over the Suit for Judicial Review Because CBS Failed to Exhaust Its Administrative Remedies 10

 A. CBS Failed to Appeal the December 8 Decision 11

 B. The Appeal Filed by CBS in March 2011 Was Untimely Because CBS Disputes the City’s December 8 Decision 12

II. The District Court Did Not Have Jurisdiction Over CBS’s Claim for Injunctive Relief Because CBS Failed to Exhaust Its Administrative Remedies 14

III. CBS Cannot Allege a Proper Inverse Condemnation Claim Against the City or the Board 15

 A. CBS’s Inverse Condemnation Claims Are Barred Because CBS Failed to Exhaust Its Administrative Remedies 16

 B. The State Condemned CBS’s Billboard; Consequently, the City Cannot Be Sued for Inverse Condemnation of the Billboard 17

IV. There Is No Jurisdiction Over CBS’s Due Process Claim 19

V. CBS Failed to Allege a Claim for Declaratory Relief for Which the City’s Immunity From Suit Has Been Waived 21

VI. Governmental Immunity Bars CBS’s Claim for Attorney’s Fees Because the Court Has No Jurisdiction Over Any Statutory Claim Supporting an Award of Attorney’s Fees 25

 A. CBS Cannot Recover Attorney’s Fees Under the Declaratory Judgments Act Because CBS Failed to Plead a Valid Claim for Declaratory Relief 25

 B. CBS Cannot Recover Attorney’s Fees Under the Statute Providing for Judicial Review of the Board’s Decision Either 26

Prayer 28

Certificate of Service 29

INDEX OF AUTHORITIES

Cases	Page
<i>Bell v. City of Dallas</i> , 146 S.W.3d 819 (Tex. App.—Dallas 2004, no pet.)	16, 18
<i>Bland Indep. Sch. Dist. v. Blue</i> , 34 S.W.3d 547 (Tex. 2000)	10
<i>Bolkcom v. Cameron Appraisal Dist.</i> , No. 13-09-00577-CV, 2010 WL 3180334 (Tex. App.—Corpus Christi-Edinburg Aug. 12, 2010, no pet.)	19, 20
<i>Brownlow v. State</i> , 251 S.W.3d 756 (Tex. App.—Houston [14th Dist.] 2008), <i>aff'd</i> , 319 S.W.3d 649 (Tex. 2010)	17, 18
<i>Cameron Appraisal Dist. v. Rourke</i> , 194 S.W.3d 501 (Tex. 2006)	20
<i>City of Argyle v. Pierce</i> , 258 S.W.3d 674 (Tex. App.—Fort Worth 2008, pet. dismiss'd)	8, 16, 18
<i>City of Arlington v. Randall</i> , 301 S.W.3d 896 (Tex. App.—Fort Worth 2009, pet. denied)	20
<i>City of Beaumont v. Bouillion</i> , 896 S.W.2d 143 (Tex. 1995)	20-21
<i>City of Cibolo v. Koehler</i> , No. 04-11-00209-CV, 2011 WL 5869683 (Tex. App.—San Antonio Nov. 23, 2011, no pet.)	24
<i>City of Corinth v. NuRock Dev., Inc.</i> , 293 S.W.3d 360 (Tex. App.—Fort Worth 2009, no pet.)	26
<i>City of Dallas v. Blanton</i> , 200 S.W.3d 266 (Tex. App.—Dallas 2006, no pet.)	23
<i>City of Dallas v. Stewart</i> , No. 09-0257, 2012 WL 247966 (Tex. Jan. 27, 2012)	8, 16
<i>City of El Paso v. Heinrich</i> , 284 S.W.3d 366 (Tex. 2009)	21-23
<i>City of Houston v. Chemam</i> , No. 01-08-01005-CV, 2010 WL 143476 (Tex. App.—Houston [1st Dist.] Jan. 14, 2010, no pet.)	26
<i>City of N. Richland Hills v. Home Town Urban Partners, Ltd.</i> , 340 S.W.3d 900 (Tex. App.—Fort Worth 2011, no pet.)	26

<i>City of Paris v. Abbott</i> , No. 06-11-00065-CV, 2011 WL 5044267 (Tex. App.—Texarkana Oct. 21, 2011, pet. denied)	9, 11, 12, 14
<i>City of Univ. Park v. Benners</i> , 485 S.W.2d 773 (Tex. 1972)	1
<i>Dahl ex rel. Dahl v. State</i> , 92 S.W.3d 856 (Tex. App.—Houston [14th Dist.] 2002, no pet.)	8, 17, 18
<i>Gen. Servs. Comm'n v. Little-Tex Insulation Co.</i> , 39 S.W.3d 591 (Tex. 2001)	15, 16
<i>Hallco Tex., Inc. v. McMullen County</i> , 221 S.W.3d 50 (Tex. 2006)	15
<i>Hamilton v. Pechacek</i> , 319 S.W.3d 801 (Tex. App.—Fort Worth 2010, no pet.)	20
<i>Holland v. Wal-Mart Stores, Inc.</i> , 1 S.W.3d 91 (Tex. 1999)	27
<i>Horton v. City of Smithville</i> , No. 03-07-00174-CV, 2008 WL 204160 (Tex. App.—Austin Jan. 25, 2008, pet. denied)	11, 12, 14
<i>Howeth Invs., Inc. v. City of Hedwig Village</i> , 259 S.W.3d 877 (Tex. App.—Houston [1st Dist.] 2008, pet. denied)	19
<i>Johnson v. Univ. Life & Accident Ins. Co.</i> , 94 S.W.2d 1145 (Tex. 1936)	27
<i>Lamar Corp. v. City of Longview</i> , 270 S.W.3d 609 (Tex. App.—Texarkana 2008, no pet.)	2, 11, 12, 14
<i>Old South Amusements, Inc. v. City of San Antonio</i> , No. 04-09-00466-CV, 2010 WL 2772444 (Tex. App.—San Antonio 2010, no pet.)	21
<i>Parks v. DeWitt Cnty. Elec. Coop., Inc.</i> , 112 S.W.3d 157 (Tex. App.—Corpus Christi-Edinburg 2003, no pet.)	27
<i>Reata Constr. Corp. v. City of Dallas</i> , 197 S.W.3d 371 (Tex. 2006)	9
<i>State v. Allodial Ltd. P'ship</i> , 280 S.W.3d 992 (Tex. App.—Dallas 2009, no pet.)	23, 24
<i>TCI West End, Inc. v. City of Dallas</i> , 274 S.W.3d 913 (Tex. App.—Dallas 2008, no pet.)	16, 18

Tex. Ass'n of Bus. v. Tex. Air Control Bd., 852 S.W.2d 440 (Tex. 1993) 9

Tex. Dep't of Parks & Wildlife v. Miranda, 133 S.W.3d 217 (Tex. 2004) 9, 10

Tex. Dep't of Transp. v. Jones, 8 S.W.3d 636 (Tex. 1999) 9

Tex. Dep't of Transp. v. Sefzik, 355 S.W.3d 618 (Tex. 2011) 21

Tex. Educ. Agency v. Leeper, 893 S.W.2d 432 (Tex. 1994) 25

Tex. Natural Res. Conservation Comm'n v. IT-Davy,
74 S.W.3d 849 (Tex. 2002) 22, 24

Tony Gullo Motors I, LP v. Chapa, 212 S.W.3d 299 (Tex. 2006) 25

Town of Flower Mound v. Rembert Enters., Inc., No. 02-10-00408-CV,
2012 WL 662455 (Tex. App.—Fort Worth Mar. 1, 2012, no pet. h.) 26

Univ. of N. Tex. v. City of Denton, 348 S.W.3d 44
(Tex. App.—Fort Worth 2011, no pet.) 22-23

Univ. of Tex. Sys. v. Courtney, 946 S.W.2d 464
(Tex. App.—Fort Worth 1997, writ denied) 21

Westech Eng'g, Inc. v. Clearwater Constructors, Inc., 835 S.W.2d 190
(Tex. App.—Austin 1992, no writ) 27

Williamson County Regional Planning Comm'n v. Hamilton Bank of Johnson City,
473 U.S. 172, 195 (1985) 15-16

Winn v. City of Irving, 770 S.W.2d 10
(Tex. App.—Dallas 1989, no writ) 9, 11, 12, 14

Statutes and Constitutions

42 U.S.C. § 1983 19

TEX. BUS. & COMM. CODE § 15.21(b) 27

TEX. CIV. PRAC. & REM. CODE § 37.002(a) 25

TEX. CIV. PRAC. & REM. CODE § 37.004(a)	21
TEX. CIV. PRAC. & REM. CODE § 37.006(b)	21
TEX. CIV. PRAC. & REM. CODE § 37.009	25
TEX. CIV. PRAC. & REM. CODE § 41.001(7)	28
TEX. CIV. PRAC. & REM. CODE § 41.001(11)	28
TEX. CIV. PRAC. & REM. CODE § 42.001(5)	27
TEX. CIV. PRAC. & REM. CODE § 51.014(a)(8)	8
TEX. CONST. art. I, § 17(a)	15
TEX. LOC. GOV'T CODE § 211.009(b)	10
TEX. LOC. GOV'T CODE § 211.011(a)	10
TEX. LOC. GOV'T CODE § 211.011(a)(1)	26
TEX. LOC. GOV'T CODE § 211.011(b)	11
TEX. LOC. GOV'T CODE § 211.011(c)	13-15
TEX. LOC. GOV'T CODE § 211.011(f)	27
TEX. R. EVID. 201(d)	2
U.S. CONST. amend. XIV, § 1	19

Other Authorities

BLACK'S LAW DICTIONARY (6th ed. 1990)	1, 27
Grapevine, Tex., Zoning Ordinance § 43	2
Grapevine, Tex., Zoning Ordinance § 43.B.1	1

Grapevine, Tex., Zoning Ordinance § 43.D.2 2
Grapevine, Tex., Zoning Ordinance § 60 1
Grapevine, Tex., Zoning Ordinance § 60.A 6
Grapevine, Tex., Zoning Ordinance § 68.G 5, 10, 13, 14, 20

STATEMENT OF THE CASE

Nature of the Case:

This case arises from the State's condemnation of real property in the City of Grapevine. Because CBS's billboard overhung that real property, the State condemned the billboard to remove the aerial encroachment. CR 90. The State's petition for condemnation remains pending in Tarrant County court. *See State v. Sam's Real Estate Business Trust, et al.*, No. 10-85470-2, in County Court at Law No. 2 of Tarrant County, Texas.

CBS asked the City to permission to "shift" the billboard. The City refused, explaining that nonconforming billboards, like CBS's billboard, could not be "moved, altered, or adjusted" under the City's zoning ordinances. CR 44 (Tab G).

When the State ordered CBS to remove its billboard, CBS altered and adjusted the billboard without applying for or obtaining a permit for such work. The City then ordered CBS to remove its billboard. CR 171.

CBS appealed the City's decision to, and requested a variance from, the Board of Adjustment. The Board denied the appeal and the request for a variance. CR 196.

CBS filed this lawsuit against the City and the Board, asserting claims for judicial review of the Board's decision, injunctive relief, inverse condemnation, violations of due process, declaratory relief, and attorney's fees. CR 2-11 (Tab B).

Trial Court:

The Honorable John P. Chupp, 141st Judicial District Court of Tarrant County, Texas.

Course of Proceedings:

The City and the Board filed pleas to the jurisdiction asserting that governmental immunity barred CBS's claims.

Trial Court Disposition:

On January 5, 2012, the district court denied the City and the Board's plea to the jurisdiction. *See* CR 227-28 (Tab A).

APPENDIX INDEX

- Tab A District Court's Order Denying the City and the Board's Plea to the Jurisdiction (CR 227-28)
- Tab B CBS's Second Amended Petition (CR 2-13)
- Tab C State's Petition for Condemnation of CBS's Billboard in *State of Texas v. Sam's Real Estate Business Trust, et al.*, No. 10-85470-2, in the County Court at Law No. 2, of Tarrant County, Texas (CR 88-100)
- Tab D Special Commissioner's Award (CR 157-61)
- Tab E CBS's Objections to Award of Special Commissioners and Original Counterclaim (CR 112-15)
- Tab F CBS's Letter Dated October 25, 2010, Seeking Permission to "Shift" Its Billboard (CR 163-67)
- Tab G City of Grapevine's Letter Dated December 8, 2010, Denying CBS's Request to "Shift" the Billboard and Ordering CBS Not to "Move, Alter or Adjust" the Sign (CR 44)

STATEMENT REGARDING ORAL ARGUMENT

The City of Grapevine and the Grapevine Board of Adjustment respectfully request oral argument. This case involves complex facts and presents unique questions regarding governmental immunity from suit. For these reasons, oral argument should assist the Court in its decisional process.

ISSUE PRESENTED

Whether the trial court erroneously denied the City and the Board's plea to the jurisdiction on CBS's six causes of action.

STATEMENT OF FACTS

CBS Operates a Nonconforming Advertising Billboard in the City of Grapevine.

Plaintiff CBS Outdoor, Inc., erects and operates off-premise advertising signs and billboards in Texas and throughout the United States. CR 3. An “off-premise” billboard is one that advertises goods or services that are not sold or offered on the premises where the sign is located. *See* Grapevine, Tex., Zoning Ordinance § 60 (Sign Standards).

In 1983, CBS erected an off-premise billboard on property located adjacent to State Highway 114 in Grapevine. CR 3, 73. CBS leases the property for this billboard from Stacy-Trip, LLC, under a 99-year lease. CR 144.

Off-premises advertising signs, like CBS’s billboard, may no longer be erected within the City of Grapevine. *See* Grapevine, Tex., Zoning Ordinance § 60. CBS’s billboard was allowed to remain in place as a “nonconforming use.” A “nonconforming use” is a use or structure “which does not conform to the regulations prescribed in the district in which such use or structure is located, was in existence and lawfully constructed, located, and operating on the effective date of this ordinance and has since been in regular and continuous use.” *See* Grapevine, Tex., Zoning Ordinance § 43.B.1.¹ “Nonconforming uses” are permitted in the City so long as the use or structure is used, maintained “in good repair,” and not “remodeled

¹ *See City of Univ. Park v. Benners*, 485 S.W.2d 773, 777 (Tex. 1972) (“A nonconforming use of land or buildings is a use that existed legally when the zoning restriction became effective and has continued to exist.”); BLACK’S LAW DICTIONARY 577 (6th ed. 1990) (defining “nonconforming use” as “A structure the size, dimension or location of which was lawful prior to the adoption, revision or amendment of a zoning ordinance, but which fails to conform to the requirements of the zoning district in which it is located by reasons of such adoption, revision or amendment.”).

or enlarged.” See Grapevine, Tex., Zoning Ordinance § 43.D.2; Grapevine, Tex., Zoning Ordinance § 43 (“[N]o nonconforming use of land or buildings, nor any nonconforming structure shall be enlarged, changed, altered, or repaired, except in conformity with the following regulations . . .”). A failure to comply results in the loss of “nonconforming use” status and renders the use illegal. See Grapevine, Tex., Zoning Ordinance § 43.D.2.²

CBS’s billboard retained its “nonconforming use” status until January 2011, when the State of Texas ordered CBS to remove the billboard. CR 171.

The State of Texas Files Suit to Condemn CBS’s Nonconforming Billboard.

On September 24, 2010, the State of Texas filed condemnation proceedings in Tarrant County to acquire property adjacent to State Highway 114 in Grapevine including CBS’s billboard. CR 88-100 (Tab C).³ The State condemned the property as part of a state highway expansion project. CR 88-90.

Although the pole supporting CBS’s billboard was not located on the real property condemned by the State, the billboard itself hung over that property by four feet. CR 4. The State therefore sued CBS and petitioned to condemn the billboard in order to remove the

² “Municipal zoning ordinances requiring the termination of nonconforming uses under reasonable conditions are within the scope of municipal police power.” *Lamar Corp. v. City of Longview*, 270 S.W.3d 609, 616 (Tex. App.—Texarkana 2008, no pet.).

³ The State filed its petition for condemnation in County Court at Law No. 2 of Tarrant County. See *State v. Sam’s Real Estate Bus. Trust, a Delaware Statutory Trust, et al.*, No. 10-85470-2. In its amended plea to the jurisdiction, the City and the Board asked the district court to take judicial notice of the documents on file in the condemnation case. CR 31. The City and the Board then attached those documents to the brief in support of the plea. See CR 88-100, 107-09, 112-15. Judicial notice is mandatory if requested by a party, and the Court is supplied with the necessary information. See TEX. R. EVID. 201(d) (“A court shall take judicial notice if requested by a party and supplied with the necessary information.”).

aerial encroachment:

Further, the Texas Transportation Commission has found and determined that the two outdoor advertising signs, described in Exhibit "A" attached hereto, (hereinafter referred to as "two outdoor advertising signs") located partially on the land described in Exhibit "A" . . . cannot be adequately reconstructed at its present location, and that equity and fairness will necessitate the compensation of the Defendant for the full value of the said two outdoor advertising signs.

See CR 90 (Tab C). The State condemned "title to all that certain two outdoor advertising signs" and expressly requested:

The temporary right to enter upon the remainder of the herein described parcel for the sole purpose of removing those two certain outdoor advertising signs situated partially upon the herein described parcel and partially upon the remainder of the herein described parcel.

CR 100 (Tab C).

The City did not petition to condemn any property, and the City is not a party to the State's petition for condemnation.

The Special Commissioners Award CBS Zero Damages for the Billboard.

On November 10, 2010, the special commissioners—appointed by the county court at law—heard evidence regarding damages resulting from the State's "condemnation of the land and improvements." CR 159. The special commissioners awarded defendants almost \$2.35 million for the condemnation of the land and improvements; however, they awarded CBS zero damages for its nonconforming billboard. CR 157-61 (Tab D).

CBS filed objections to the award and asserted an inverse condemnation counterclaim against the State:

CBS seeks to recover compensation under Article I, § 17 of the Texas Constitution and the 5th Amendment to the Federal Constitution for the taking, damaging, and destruction of all of its property interests, whether characterized as real or personal, or tangible or intangible, caused by or arising out of the State's condemnation, including but not limited to, its billboard and leasehold.

CR 113 (Tab E). CBS specifically alleged that by "requiring the removal of the billboard for transportation purposes, specifically the expansion of [Highway] 114, the State intentionally exercised its power of eminent domain to take the property interests of CBS for public use."

CR 113. CBS pleaded for "the full amount of just and adequate compensation to which they are entitled." CR 113-14.

CBS Asks the City for Permission to "Shift" the Billboard Away from the Condemned Property in an Effort to Avoid Condemnation; The City Refuses and Orders CBS Not to "Move, Alter, or Adjust" the Nonconforming Billboard.

By letter dated October 25, 2010, CBS formally requested that the City grant them "leave or a special permit" to "shift" the face of the billboard away from the real property condemned by the State in order to eliminate the aerial encroachment. CR 4, 163-66. CBS requested the "shift of the Sign face" because it was aware that the City's zoning ordinances prohibited the "remodeling, alteration, [or] relocation" of its nonconforming billboard:

[I]t is our understanding that Grapevine's current regulations prohibit the construction, erection, remodeling, alteration, relocation, or expansion of a sign unless a zoning permit has been obtained in accordance with Section 60 of the Zoning Ordinance. Furthermore, we understand that Grapevine asserts new outdoor advertising structures such as CBS's Sign are not permitted in Grapevine, as this type of sign is not included within the classification of signs Grapevine allows.

CR 164 (Tab F). Not surprisingly, the State "supported" CBS's request and even offered to meet with Grapevine officials to advocate on CBS's behalf. See CR 165.

On December 8, 2010, City Building Official Scott Williams denied CBS's request and ordered CBS not to move, alter, or adjust the nonconforming billboard:

As your letter acknowledges, the sign is currently nonconforming under the applicable City codes. Accordingly, the sign cannot be moved, altered, or adjusted under the current conditions. Therefore, be advised that the City cannot approve your request.

CR 44 (Tab G) (the "December 8 Decision"); CR 47, 50.

Although the City's Zoning Ordinances permit a person "aggrieved" or "affected" by any decision of a building official to appeal the decision to the Board of Adjustment, *see* Grapevine, Tex., Zoning Ordinance § 68.G, CBS did not appeal the December 8 Decision, *see* CR 196.

The State Orders CBS to Remove the Billboard; CBS Instead Remodels the Billboard; The City Orders CBS to Remove the Billboard.

On January 7, 2011, the State's project manager ordered CBS to remove its billboard by February 1, 2011. CR 171. Instead of removing the billboard, CBS engaged a registered professional engineer to redesign and remodel it. *See* CR 70.

In its pleadings, CBS states that it "simply removed a four foot panel of the sign, thereby reducing the length of the sign face . . . and eliminating the encroachment." CR 4. The actual alterations to the billboard were far more extensive. The engineering drawings demonstrate that both sides of the billboard were completely remodeled:

Existing 14' by 49' sign faces are to be trimmed to a 14' by 44' faces.
Trim existing stringers, handrails, and catwalks and crossover catwalks for new 44' sign face length.

CR 70. CBS also reinforced the billboard with new top and bottom gussets. CR 70. CBS

did not apply for or obtain a permit from the City before performing this work.

On February 22, 2011, the City notified CBS that these alterations to the billboard violated the City's December 8 Decision and Zoning Ordinances and resulted in the loss of the billboard's nonconforming status. CR 47, 173.⁴ The City ordered CBS to remove the billboard within 30 days. CR 173.

CBS Attempts to Appeal the February 22, 2011 Enforcement Order; the City Denies the Appeal; and CBS Sues the City for Inverse Condemnation of the Billboard That Is Already Being Condemned by the State.

On March 8, 2011, CBS filed an appeal with the Board, challenging the February 22, 2011 decision that required CBS to remove the billboard. CR 72-79. CBS alternatively sought a "variance or special exception to permit CBS to conduct minor work to the Sign by reattaching a 4' panel that was removed to accommodate a request by the Texas Department of Transportation." CR 73. This appeal was filed three months after the December 8 Decision ordering CBS not to "move, alter, or adjust" the nonconforming billboard. CR 47. In its appeal, CBS admitted that the billboard had been "adjusted." CR 76.

The Board conducted a hearing to consider CBS's appeal. CR 47. The Board denied the appeal because CBS failed to timely appeal the original December 8 Decision, ordering CBS not to "move, alter, or adjust" its nonconforming sign. CR 47, 196.

⁴ In addition to remodeling the nonconforming billboard in violation of the December 8 Decision and City Ordinance § 43.D.2, CBS failed to obtain the required permit to modify the billboard. CR 173; *see* Grapevine, Tex., Zoning Ordinance § 60.A ("No sign . . . shall be painted, constructed, erected, remodeled, relocated, or expanded until a zoning permit for such sign has been obtained in accordance with the procedure set out in this Ordinance.").

On August 11, 2011, CBS filed this lawsuit against the City and the Board, asserting claims for judicial review, injunctive relief, inverse condemnation, for violations of due process, declaratory relief, and attorney's fees. CR 231; *see* CR 6-10. On September 19, 2011, the City and the Board filed a plea to the jurisdiction and answer, challenging the district court's jurisdiction over CBS's claims. CR 14. In response, CBS filed a Second Amended Petition. CR 2-13. The City and the Board then filed a first amended plea to the jurisdiction and answer. CR 14- 28.

The district court heard argument on the plea to the jurisdiction. The State, though not a party in the lawsuit, appeared at CBS's request and confirmed that the State intended to contest CBS's claims seeking "upwards of two million" dollars in "just compensation" for the billboard. RR 22-23, 33-34. The court then announced his disagreement with the City's decision to enforce its zoning ordinances:

And the state is going to have to—the budget-strapped state is going to have to spend \$1.5 million in tax dollars to pay someone for the sign when we could keep the sign and generate income for taxpayers? . . .

I don't think that's necessarily relevant to the issue of jurisdiction. I think it's relevant to the issue of the taxpayers of the state, but the city of Grapevine doesn't seem to care that they could get \$60,000 a year, which would probably pay for at least one teacher, but, you know.

RR 33, 35. The court then summarily denied the plea to the jurisdiction in its entirety. RR 39; CR 227-28 (Tab A).

The City and the Board timely filed this interlocutory appeal. *See* TEX. CIV. PRAC. & REM. CODE § 51.014(a)(8) (permitting appeal from a district court’s order that denies a plea to the jurisdiction filed by a governmental entity).

SUMMARY OF ARGUMENT

The State condemned CBS’s billboard—not the City or the Board. *See* Tab C. In that lawsuit, CBS has filed a counterclaim for inverse condemnation against the State, seeking just compensation for the taking of its billboard. *See* CR 90, 113-14. In this case, CBS has filed the same claim for inverse condemnation against the City and the Board, seeking the same “just compensation” for the taking of the same billboard. This is one reason why CBS cannot allege a valid inverse condemnation claim against the City or the Board. *See Dahl ex rel. Dahl v. State*, 92 S.W.3d 856, 861-62 (Tex. App.—Houston [14th Dist.] 2002, no pet.) (“[A] property owner cannot have a valid inverse condemnation claim if the property at issue is the subject of a properly brought condemnation or eminent domain action.”). As a result, the inverse condemnation claim is barred by the City and the Board’s governmental immunity from suit. *City of Argyle v. Pierce*, 258 S.W.3d 674, 683 (Tex. App.—Fort Worth 2008, pet. dismiss’d) (“When a plaintiff does not allege a valid inverse condemnation claim, governmental immunity applies, and the trial court should grant a plea to the jurisdiction.”).

The second reason CBS cannot allege a valid inverse condemnation claim is because CBS failed to exhaust its administrative remedies under the Local Government Code and the City’s Zoning Ordinances. *See City of Dallas v. Stewart*, No. 09-0257, 2012 WL 247966, at *12 (Tex. Jan. 27, 2012) (“[A] party asserting a taking must first exhaust its administrative

remedies and comply with jurisdictional prerequisites for suit.”). In fact, given CBS’s failure to exhaust its administrative remedies, the district court has no jurisdiction to entertain any of CBS’s six causes of action. *See, e.g., City of Paris v. Abbott*, No. 06-11-00065-CV, 2011 WL 5044267, at *7-*8 (Tex. App.—Texarkana Oct. 21, 2011, pet. denied) (failure to exhaust administrative remedies barred declaratory judgment claims); *Winn v. City of Irving*, 770 S.W.2d 10, 11 (Tex. App.—Dallas 1989, no writ) (failure to exhaust administrative remedies barred injunctive relief claim).

For these reasons, the Court should reverse the district court’s order denying the City and the Board’s plea to the jurisdiction and dismiss CBS’s claims for want of jurisdiction.

ARGUMENT

The City and the Board, as political subdivisions of the State, are entitled to immunity from suit, except when that immunity has been waived. *See Reata Constr. Corp. v. City of Dallas*, 197 S.W.3d 371, 374 (Tex. 2006). Governmental immunity from suit defeats a trial court’s subject matter jurisdiction and is properly asserted in a plea to the jurisdiction. *Tex. Dep’t of Transp. v. Jones*, 8 S.W.3d 636, 638 (Tex. 1999).

To determine whether the district court properly exercised its jurisdiction over CBS’s causes of action, the Court must review CBS’s pleadings to determine whether CBS pleaded facts that affirmatively demonstrate that the trial court has subject-matter jurisdiction. *See Tex. Ass’n of Bus. v. Tex. Air Control Bd.*, 852 S.W.2d 440, 446 (Tex. 1993). In so doing, the Court must accept as true the factual allegations in CBS’s pleadings. *Tex. Dep’t of Parks & Wildlife v. Miranda*, 133 S.W.3d 217, 226 (Tex. 2004). The Court must also consider any

relevant evidence submitted by the parties that is necessary to resolve the jurisdictional issues raised. *See Bland Indep. Sch. Dist. v. Blue*, 34 S.W.3d 547, 555 (Tex. 2000).

This Court reviews the district court's denial of the City and the Board's plea to the jurisdiction under a *de novo* standard of review. *See Miranda*, 133 S.W.3d at 226.

I. THE DISTRICT COURT DID NOT HAVE JURISDICTION OVER THE SUIT FOR JUDICIAL REVIEW BECAUSE CBS FAILED TO EXHAUST ITS ADMINISTRATIVE REMEDIES.

The City's Zoning Ordinances permit any person that is "aggrieved" or "affected" by any decision of a City building official to appeal that decision to the Board of Adjustment:

Appeals to the Board of Adjustment may be taken by any person aggrieved or . . . affected by any decision of the building inspector or other administrative officer of the City relative to the Zoning Ordinance. Such appeal shall be taken within fifteen (15) days after the date of the decision of the building inspector or other administrative officer has been rendered, by filing with the officer from whom the appeal is taken and within the Board of Adjustment a notice of appeal specifying the grounds thereof.

Grapevine, Tex., Zoning Ordinance § 68.G.⁵ The Board may then "reverse or affirm, in whole or in part, or modify the administrative official's order, requirement, decision, or determination from which an appeal is taken and make the correct order, requirement, decision, or determination." TEX. LOC. GOV'T CODE § 211.009(b).

Any person aggrieved by a decision of the Board may then appeal in court by filing "a verified petition stating that the decision of the board of adjustment is illegal in whole or in part." TEX. LOC. GOV'T CODE § 211.011(a). The verified petition must be filed within

⁵ The Texas Local Government Code authorizes cities to establish boards of adjustment and provides for judicial review of board decisions. *See* TEX. LOC. GOV'T CODE § 211.008-.011.

10 days “after the date the decision is filed in the board’s office.” TEX. LOC. GOV’T CODE § 211.011(b).

This statutory appeal process is an administrative remedy, which must be exhausted before a person aggrieved by a decision of a city building official may seek relief in court. *See City of Paris v. Abbott*, No. 06-11-00065-CV, 2011 WL 5044267, at *1 (Tex. App.—Texarkana Oct. 21, 2011, pet. denied); *Lamar Corp. v. City of Longview*, 270 S.W.3d 609, 613 (Tex. App.—Texarkana 2008, no pet.); *Horton v. City of Smithville*, No. 03-07-00174-CV, 2008 WL 204160, at *4 (Tex. App.—Austin Jan. 25, 2008, pet. denied) (mem. op.); *Winn v. City of Irving*, 770 S.W.2d 10, 11 (Tex. App.—Dallas 1989, no writ). Unless the aggrieved person exhausts this administrative remedy, the court lacks jurisdiction and must dismiss all claims arising from the building official’s decision. *See, e.g., Abbott*, 2011 WL 5044267, at *4-*7 (“Because Abbott did not appeal the denial of the building permit (the action from which his causes of action arise) to the City’s board of adjustment, he failed to exhaust his administrative remedies, and the trial court did not have subject-matter jurisdiction over the breach of contract claim.”); *Winn*, 770 S.W.2d at 11 (“It is settled that the administrative remedies provided by Local Government Code section 211.009-.010 . . . must be exhausted before matters regarding nonconforming uses may be brought before the courts.”).

A. CBS Failed to Appeal the December 8 Decision.

On December 8, 2010, the City denied CBS’s request to “shift” the billboard and advised CBS that its billboard could not be “moved, altered, or adjusted” because of its

nonconforming status. CR 44. CBS admittedly did not appeal this decision. CR 126.

Because CBS did not appeal the December 8 Decision to the Board, CBS failed to exhaust its administrative remedies with respect to the December 8 Decision. *See Abbott*, 2011 WL 5044267, at *4; *Lamar Corp.*, 270 S.W.3d at 613; *Horton*, 2008 WL 204160, at *4; *Winn*, 770 S.W.2d at 11. As a result, the district court lacked jurisdiction over any claims arising from or related to the City's December 8 Decision that CBS's billboard could not be "moved, altered, or adjusted" due to its nonconforming status. *Abbott*, 2011 WL 5044267, at *4; *Lamar Corp.*, 270 S.W.3d at 613; *Winn*, 770 S.W.2d at 11.

The very purpose of CBS's suit for judicial review is to challenge the December 8 Decision and demonstrate that "it was entitled to remove the four foot panel" from its billboard under the City's ordinances, without losing the billboard's nonconforming status. *See* CR 5-7. Thus, the district court lacked jurisdiction to entertain this claim. This Court should reverse the district court's order denying the plea to the jurisdiction on CBS's claim for judicial review.

B. The Appeal Filed by CBS in March 2011 Was Untimely Because CBS Disputes the City's December 8 Decision.

In January 2011, CBS altered and adjusted the billboard in direct violation of the December 8 Decision. On February 22, 2011, the City notified CBS that the alterations and adjustments to the nonconforming billboard violated the December 8 Decision and resulted in the loss of its nonconforming status. CR 173. The City therefore ordered CBS to remove its now illegal sign. CR 173.

CBS appealed the February 22, 2011 decision to the Board. CR 72-79. The appeal was filed within 15 days as required by City ordinance. *See* Grapevine, Tex., Zoning Ordinance § 68.G. The Board denied CBS's appeal because, among other reasons, CBS failed to appeal the December 8 Decision. *See* CR 196. CBS filed this suit for judicial review within 10 days of the Board's decision as required by the Local Government Code. CR 6; *see* TEX. LOC. GOV'T CODE § 211.011(c). Therefore, CBS maintains that it filed a timely appeal, exhausted its administrative remedies, and properly filed this suit for judicial review in the district court. CBS's position, however, is untenable.

The City's February 22, 2011 decision simply enforces its earlier December 8 Decision ordering CBS not to "move, alter, or adjust" the nonconforming billboard. *See* CR 173 ("You were previously advised in writing on December 8, 2010, that the sign could not be legally moved, altered, or adjusted."). The February 22, 2011 decision also imposes the penalty for CBS's violation of the December 8 Decision. CR 173.

In its appeal to the Board and in the district court, CBS argued that the City's February 22, 2011 decision should be reviewed in a vacuum—*i.e.*, without looking at the December 8 Decision. *See* CR 74; RR 20-29. According to CBS, it did not appeal the December 8 Decision because CBS "did not perform the work it described in the October 25, 2010 letter"—*i.e.*, "shift the Sign face." CR 74. When CBS "removed a four foot panel of the sign," rather than shift the face of the billboard as requested in the October 25, 2010 letter, CBS contends, the December 8 Decision was rendered moot. CBS's argument effectively rewrites the language of the City's December 8 Decision from "the sign cannot be moved, altered, or

adjusted” to “the sign cannot be moved, altered, or adjusted by shifting the Sign face as requested in your October 25, 2010 letter.” This argument finds no support in Texas law.

The City’s December 8 Decision is clear. It states that CBS’s nonconforming billboard “cannot be moved, altered, or adjusted.” CR 44. In its appeal of the February 22, 2011 decision and in this suit for judicial review, CBS attempts to challenge the City’s December 8 Decision—*i.e.*, that its billboard should not lose its nonconforming status because the sign was “moved, altered, or adjusted.” *See* CR 5-7, 75-78. Thus, any appeal should have been filed by December 23, 2010—*i.e.*, within 15 days of the December 8 Decision. *See* Grapevine, Tex., Zoning Ordinance § 68.G. CBS’s appeal filed on March 8, 2011 was thus two and one half months late, and CBS’s failure to exhaust its administrative remedies bars its suit for judicial review. *See Abbott*, 2011 WL 5044267, at *4; *Lamar Corp.*, 270 S.W.3d at 613; *Horton*, 2008 WL 204160, at *4; *Winn*, 770 S.W.2d at 11.

Indeed, CBS’s failure to exhaust its administrative remedies bars all claims asserted by CBS in this lawsuit.

II. THE DISTRICT COURT DID NOT HAVE JURISDICTION OVER CBS’S CLAIM FOR INJUNCTIVE RELIEF BECAUSE CBS FAILED TO EXHAUST ITS ADMINISTRATIVE REMEDIES.

In its second cause of action, CBS seeks temporary and permanent injunctive relief under Section 211.011(c) of the Texas Local Government Code. CR 7. Section 211.011(c) provides that a court may grant “a restraining order” during the pendency of a suit for judicial review “if due cause is shown.” TEX. LOC. GOV’T CODE § 211.011(c). CBS asks the district court to “sign an order enjoining the City . . . from removing the sign, interfering with CBS’

operation of the sign, or from issuing municipal court citations for CBS' continued operation pending final resolution" of this suit for judicial review. CR 7.

Because CBS failed to exhaust its administrative remedies, the district court has no jurisdiction over CBS's claim for judicial review under Section 211.011(c). *See* Part I. And in the absence of a valid claim for judicial review, the court has no jurisdiction to grant "a restraining order" under Section 211.011(c). *See* TEX. LOC. GOV'T CODE § 211.011(c).

III. CBS CANNOT ALLEGE A PROPER INVERSE CONDEMNATION CLAIM AGAINST THE CITY OR THE BOARD.

The City's governmental immunity is waived for valid inverse condemnation claims under Article I, Section 17 of the Texas Constitution. *See Gen. Servs. Comm'n v. Little-Tex Insulation Co.*, 39 S.W.3d 591, 598 (Tex. 2001). Article I, section 17 provides:

- (a) No person's property shall be taken, damaged, or destroyed for or applied to public use without adequate compensation being made, unless by the consent of such person, and only if the taking, damage, or destruction is for:
 - (1) the ownership, use, and enjoyment of the property, notwithstanding an incidental use, by:
 - (A) the State, a political subdivision of the State, or the public at large; or
 - (B) an entity granted the power of eminent domain under law; or
 - (2) the elimination of urban blight on a particular parcel of property.

TEX. CONST. art. I, § 17(a).⁶

⁶ CBS also alleges a takings claim under the Fifth Amendment; however, a federal takings claim is not ripe until state court proceedings have concluded. *See Hallco Tex., Inc. v. McMullen County*, 221 S.W.3d 50, 59 (Tex. 2006); *see Williamson County Regional Planning Comm'n v. Hamilton Bank of Johnson City*,

To allege a valid inverse condemnation claim, a plaintiff must allege (1) an intentional act by the governmental entity; (2) that resulted in the taking, damage, or destruction of the plaintiff's property, (3) for public use. *Little-Tex*, 39 S.W.3d at 598; *TCI West End, Inc. v. City of Dallas*, 274 S.W.3d 913, 916 (Tex. App.—Dallas 2008, no pet.). “When a plaintiff does not allege a valid inverse condemnation claim, governmental immunity applies, and the trial court should grant a plea to the jurisdiction.” *City of Argyle v. Pierce*, 258 S.W.3d 674, 683 (Tex. App.—Fort Worth 2008, pet. dismiss’d); see *TCI*, 274 S.W.3d at 916; *Bell v. City of Dallas*, 146 S.W.3d 819, 825 (Tex. App.—Dallas 2004, no pet.).

Whether particular facts are sufficient to constitute a taking is a question of law for the Court. *Little-Tex*, 39 S.W.3d at 598.

A. CBS’s Inverse Condemnation Claims Are Barred Because CBS Failed to Exhaust Its Administrative Remedies.

Because CBS failed to exhaust its administrative remedies, see Part I, CBS cannot assert a valid inverse condemnation claim. See *City of Dallas v. Stewart*, No. 09-0257, 2012 WL 247966, at *12 (Tex. Jan. 27, 2012) (“[A] party asserting a taking must first exhaust its administrative remedies and comply with jurisdictional prerequisites for suit.”). As a result, the Court has no jurisdiction over CBS’s inverse condemnation claim.

473 U.S. 172, 195 (1985) (“[I]f a State provides an adequate procedure for seeking just compensation, the property owner cannot claim a violation of the Just Compensation Clause until it has used the procedure and been denied just compensation.”). Because state proceedings have not concluded, CBS’s federal claims are not ripe and must be dismissed for want of jurisdiction as well. In any event, CBS’s federal claims fail for the same reasons set forth above.

Even if CBS had exhausted its administrative remedies, CBS cannot allege a takings claim against the City or the Board because the State condemned CBS's billboard.

B. The State Condemned CBS's Billboard; Consequently, the City Cannot Be Sued for Inverse Condemnation of the Billboard.

Condemnation is the procedure by which the State exercises its right to take private property for public use, without consent, on payment of just compensation. *See Brownlow v. State*, 251 S.W.3d 756, 760 (Tex. App.—Houston [14th Dist.] 2008), *aff'd*, 319 S.W.3d 649 (Tex. 2010). A claim for inverse condemnation is one by which a property owner sues the State to recover compensation when his property is taken for public use without proper condemnation proceedings. *See id.* “By definition, therefore, a property owner cannot have a valid inverse condemnation claim if the property at issue is the subject of a properly brought condemnation or eminent domain action.” *Dahl ex rel. Dahl v. State*, 92 S.W.3d 856, 861-62 (Tex. App.—Houston [14th Dist.] 2002, no pet.); *see Brownlow*, 251 S.W.3d at 760 (“A property owner cannot have a valid inverse condemnation claim if the property at issue was the subject of a previous, proper condemnation or sovereign domain action.”). “If the [property owner's] pleadings demonstrate that his inverse condemnation claim covers . . . the identical property lawfully condemned by the State, . . . he has no valid inverse condemnation claim, and sovereign immunity bars the suit.” *See Brownlow*, 251 S.W.3d at 760. CBS's inverse condemnation claim fails for this very reason.

On September 24, 2010, the State condemned CBS's billboard. *See* Tab C. The State specifically condemned the “two outdoor advertising signs . . . located partially on the” real

property condemned by the State. *See* CR 90. The State expressly requested the “temporary right to enter upon the remainder . . . for the sole purpose of removing those two certain outdoor advertising signs situated partially upon the” condemned real property. *See* CR 100. Indeed, CBS has filed a counterclaim in the condemnation proceeding for the State’s “inverse condemnation” of the billboard:

CBS seeks to recover compensation under Article I, § 17 of the Texas Constitution . . . for the taking, damaging, and destruction of all of its property interests, whether characterized as real or personal, or tangible or intangible, caused by or arising out of the State’s condemnation, including but not limited to, its billboard and leasehold.

CR 113 (Tab E). Given that CBS’s billboard has been condemned by the State, CBS’s claim for inverse condemnation against the City is invalid and barred by the City’s immunity. *See Brownlow*, 251 S.W.3d at 760; *Dahl*, 92 S.W.3d at 861-62.

In the district court, CBS emphasized the fact that the special commissioners awarded CBS zero damages for the billboard and that the State disputes any award of compensation to CBS for the billboard. RR 22, 35. These facts, however, simply evidence CBS’s dispute with the State regarding just compensation; these facts do not give rise to an inverse condemnation claim against the City.

Because CBS cannot allege a valid inverse condemnation claim against the City, the district court should have granted the City’s plea to the jurisdiction and dismissed CBS’s inverse condemnation claim for want of jurisdiction. *See TCI*, 274 S.W.3d at 916; *Pierce*, 258 S.W.3d at 683; *Bell*, 146 S.W.3d at 825.

IV. THERE IS NO JURISDICTION OVER CBS'S DUE PROCESS CLAIM.

CBS next alleges that the City “violated CBS’s due process rights” under the Texas Constitution “by enacting vague, indefinite, and arbitrary Regulations, and then applying those Regulations to CBS in an arbitrary manner.” CR 9.⁷ According to CBS, the City’s zoning ordinances are “vague and indefinite, so that men of common intelligence must guess and differ as to the meaning of the Regulations.” CR 9.⁸

CBS’s due process claims are barred as a matter of law because CBS failed to exhaust its administrative remedies, *see* Part I. Although the denial of due process is an exception to the general rule requiring exhaustion of administrative remedies, the exception was created “to protect property owners from the loss of property without an opportunity to be heard at the administrative level and without recourse to judicial review.” *See Bolkcom v. Cameron Appraisal Dist.*, No. 13-09-00577-CV, 2010 WL 3180334, at *2 (Tex. App.—Corpus Christi-Edinburg Aug. 12, 2010, no pet.) (mem. op.). CBS has not alleged a lack of notice

⁷ CBS also baldly states that the City and the Board violated its due process rights under the United States Constitution by enacting “vague, indefinite, and arbitrary” ordinances. *See* CR 9. The Fourteenth Amendment provides that a state shall not “deprive any person of life, liberty, or property, without due process of law.” U.S. CONST. amend. XIV, § 1. A person seeking redress for alleged violations of federal due process rights, however, must assert a cause of action under Section 1983. *See* 42 U.S.C. § 1983. CBS has not alleged a Section 1983 claim. As a result, the district court did not have jurisdiction over any claim for alleged violations of the federal due process clause.

⁸ An ordinance is unconstitutionally vague “when persons regulated by it are exposed to some risk or detriment without fair warning of the nature of the proscribed conduct.” *See Howeth Invs., Inc. v. City of Hedwig Village*, 259 S.W.3d 877, 904 (Tex. App.—Houston [1st Dist.] 2008, pet. denied). The merit of CBS’s claim that the City’s ordinances are so “vague and indefinite” that “men of common intelligence must guess and differ as to their meaning” is questionable, at best, given that CBS admitted “that Grapevine’s current regulations prohibit the construction, erection, remodeling, alteration, relocation, or expansion of a sign unless a zoning permit has been obtained in accordance with Section 60 of the Zoning Ordinance.” *See* CR 164.

or the lack of an opportunity to be heard. Indeed, the provisions of the Local Government Code and the City's Zoning Ordinances afford property owners meaningful relief to rectify any constitutional violations. *See* Part I; TEX. LOC. GOV'T CODE § 211.008-.011; Grapevine, Tex., Zoning Ordinance § 68.G. CBS simply failed to avail themselves of those safeguards. As a result, CBS's due process claim is barred as a matter of law. *See Bolkcom*, 2010 WL 3180334, at *2 (failure to exhaust administrative remedies barred due process claim).

Finally, CBS's due process allegations do not seek a declaration that the City's zoning ordinances are unconstitutionally vague, indefinite, and arbitrary. Rather, as its pleadings demonstrate, CBS seeks to have the decisions of the City and the Board set aside. CR 9. The Texas Supreme Court has made clear that such claims must be exhausted administratively. *See Cameron Appraisal Dist. v. Rourk*, 194 S.W.3d 501, 502 (Tex. 2006) ("The taxpayers here are seeking more than a declaration that taxing trailers is unconstitutional—they are seeking to have their individual assessments set aside. While the former claim need not be brought administratively, the latter must."). As a result, the district court erred in denying the City's plea to the jurisdiction on CBS's due process claims. This Court should reverse and dismiss the due process claims for want of jurisdiction.⁹

⁹ It is unclear what relief is actually being sought by CBS for the alleged violations of its due process rights. In its petition, CBS states that the "confusion that has resulted in this case renders the Regulations void for vagueness, and violates CBS's due process rights." CR 9. CBS does not specifically ask the district court to declare that any particular City ordinance is void for vagueness. *See* CR 11. CBS does, however, seek damages. Therefore, out of an abundance of caution, to the extent that CBS seeks damages resulting from the alleged violations of its due process rights, such claims would also be barred by the City's immunity from suit. As this Court recently recognized, "no private right of action exists against a governmental entity or its officials for money damages relating to alleged violations of Texas constitutional rights." *Hamilton v. Pechacek*, 319 S.W.3d 801, 812 (Tex. App.—Fort Worth 2010, no pet.); *see City of Arlington v. Randall*, 301 S.W.3d 896, 906-07 (Tex. App.—Fort Worth 2009, pet. denied) (citing *City of Beaumont v. Bouillion*,

V. CBS FAILED TO ALLEGE A CLAIM FOR DECLARATORY RELIEF FOR WHICH THE CITY'S IMMUNITY FROM SUIT HAS BEEN WAIVED.

Although the Declaratory Judgments Act contains a waiver of a city's immunity from suit, this waiver is a very limited one. *See* TEX. CIV. PRAC. & REM. CODE § 37.006(b).¹⁰ First, a city's immunity from suit is waived if a plaintiff seeks a declaration that a city ordinance is invalid. *See City of El Paso v. Heinrich*, 284 S.W.3d 366, 373 n.6 (Tex. 2009). Second, a city's immunity is waived if a plaintiff seeks a declaration construing a city ordinance. *See id.*; TEX. CIV. PRAC. & REM. CODE § 37.004(a).¹¹ Other claims for declaratory relief are barred by the city's immunity from suit. *See Heinrich*, 284 S.W.3d at 373; *Tex. Dep't of Transp. v. Sefzik*, 355 S.W.3d 618, 619 (Tex. 2011) (per curiam).

CBS's request for declaratory relief against the City is barred by the City's immunity from suit because it does not fall within the Declaratory Judgments Act's limited waiver of immunity. In its petition, CBS seeks the following declaratory relief:

896 S.W.2d 143, 147 (Tex. 1995)). The Court has also concluded that no private right of action exists against a governmental entity for alleged violations of the Texas constitutional due process clause. *See Univ. of Tex. Sys. v. Courtney*, 946 S.W.2d 464, 469 (Tex. App.—Fort Worth 1997, writ denied) (op. on reh'g); *see also Old South Amusements, Inc. v. City of San Antonio*, No. 04-09-00466-CV, 2010 WL 2772444, at *3 (Tex. App.—San Antonio 2010, no pet.) (mem. op.).

¹⁰ *See City of El Paso v. Heinrich*, 284 S.W.3d 366, 373 n.6 (Tex. 2009) (“For claims challenging the validity of ordinances or statutes, however, the Declaratory Judgment[s] Act requires that the relevant governmental entities be made parties, and thereby waives immunity.”); TEX. CIV. PRAC. & REM. CODE § 37.006(b) (“In any proceeding that involves the validity of a municipal ordinance or franchise, the municipality must be made a party and is entitled to be heard, and if the statute, ordinance, or franchise is alleged to be unconstitutional, the attorney general of the state must also be served with a copy of the proceeding and is entitled to be heard.”).

¹¹ *See* TEX. CIV. PRAC. & REM. CODE § 37.004(a) (“A person . . . whose rights, status, or other legal relations are affected by a statute, municipal ordinance, contract, or franchise may have determined any question of construction or validity arising under the . . . statute, ordinance, contract, or franchise and obtain a declaration of rights, status, or other legal relations thereunder.”).

CBS asks the [district court] to construe the pertinent sections of the City Code, including sections 43 and 60, and the following sections of the Local Government Code, in relation to CBS's cause of action for inverse condemnation: Sections 213.002, 216.003, 216.004, and 216.013. In doing so, the Court should declare that Defendants are not entitled to force the uncompensated removal of CBS's Sign.

CR 10. This request for declaratory relief does not waive the City's immunity from suit.

CBS does not seek a declaration that a section of the City Code or Local Government Code is invalid. Likewise, CBS's pleadings do not seek a declaration regarding the proper construction of any section of the City Code. Although CBS's request for declaratory relief includes the words "construe the pertinent sections of the City Code," in reality, CBS is challenging the actions of the City and the Board under the applicable provisions of the City Code. This is not a proper request for declaratory relief and is barred by the City's immunity from suit. *See Heinrich*, 284 S.W.3d at 373 n.6 ("Here, Heinrich is not challenging the validity of the bylaws or the governing statute, but rather petitioners' actions under them.").

CBS's request for declaratory relief also fails for two additional reasons. First, the purpose of the declaratory judgment requested by CBS is to recover damages from the City. *See* CR 10 ("the Court should declare that [the City and the Board] are not entitled to force the uncompensated removal of CBS's sign."). The Supreme Court, however, has made clear that a plaintiff "cannot circumvent the State's sovereign immunity from suit by characterizing a suit for money damages . . . as a declaratory-judgment claim." *Heinrich*, 284 S.W.3d at 371 (ellipsis in original) (quoting *Tex. Natural Res. Conservation Comm'n v. IT-Davy*, 74 S.W.3d 849, 856 (Tex. 2002)); *see also Univ. of N. Tex. v. City of Denton*, 348 S.W.3d 44, 49-55

(Tex. App.—Fort Worth 2011, no pet.) (“A legion of cases explain, however, that when a plaintiff seeks a declaration with the purpose of recovering damages from the State, immunity precludes the suit.”); *City of Dallas v. Blanton*, 200 S.W.3d 266, 280 (Tex. App.—Dallas 2006, no pet.) (same). Thus, CBS’s request for declaratory relief is barred by the City’s immunity from suit. See *Heinrich*, 284 S.W.3d at 371; *Blanton*, 200 S.W.3d at 280.

Second, CBS cannot recast its invalid inverse condemnation claim as a claim for a declaratory judgment in an effort to circumvent the City’s immunity from suit. See *State v. Allodial Ltd. P’ship*, 280 S.W.3d 992, 928 (Tex. App.—Dallas 2009, no pet.). In *State v. Allodial Limited Partnership*, the Texas Department of Transportation rejected Allodial’s request to construct a driveway between its property and a tollway service road. *Id.* at 925. Allodial sued TxDOT alleging breach of deed covenants, taking without just compensation, inverse condemnation, and violations of the Texas Constitution. *Id.* Allodial also requested a declaration “that TxDOT’s actions constituted a taking under article I, section 17 of the Texas Constitution.” *Id.* at 927. The district court denied TxDOT’s plea to the jurisdiction in its entirety.

The court of appeals affirmed the trial court’s denial of the plea to the jurisdiction on Allodial’s takings claim, but dismissed Allodial’s claims for declaratory judgment for want of jurisdiction. The court of appeals expressly rejected Allodial’s attempt to recast its valid takings claims as requests for declaratory relief:

[P]rivate parties cannot circumvent the State’s sovereign immunity from suit by characterizing a suit for money damages, such as a contract claim, as a declaratory judgment claim. . . .

To the extent Allodial seeks declaratory judgment on its taking claims in addition to its takings claims outside the declaratory judgment context, the taking claims amount to a claim for money damages. *See* TEX. CONST. art. I, § 17 (party entitled to “adequate compensation” for property taken, damaged or destroyed for or applied to public use). *See IT-Davy*, 74 S.W.3d at 860 (private parties not allowed to sue State for money damages under Declaratory Judgment Act). Accordingly, while we have concluded sovereign immunity does not completely shield TxDOT from Allodial’s taking claims in this case, these claims are not properly characterized as declaratory judgment claims. *See IT-Davy*, 74 S.W.3d at 856; *Callaway*, 971 S.W.2d at 151-52. The trial court erred in denying TxDOT’s plea to the jurisdiction on these claims.

Id. at 928; *see also City of Cibolo v. Koehler*, No. 04-11-00209-CV, 2011 WL 5869683, at *5-*6 (Tex. App.—San Antonio Nov. 23, 2011, no pet.) (“Although initially the Koehlers’ pleadings sought a declaratory judgment on their takings claim, which is impermissible, once the claims for declaratory relief were non-suited, immunity did not bar the takings claim outside that context.”). *Allodial* thus complies with the basic rule that “a litigant’s request for declaratory relief does not confer jurisdiction on a court or change a suit’s underlying nature.” *IT-Davy*, 74 S.W.3d at 855.

The same is true here. CBS simply recasts its inverse condemnation claim as a request for declaratory relief: “the Court should declare that [the City and Board] are not entitled to force the uncompensated removal of CBS’s sign.” CR 10. CBS’s inverse condemnation claim is a claim for money damages: “CBS seeks to recover compensation under Article I, Section 17 of the Texas Constitution . . . for the taking, damaging, and destruction of all of its property interest, including without limitation its sign and leasehold.” *See* CR 8. Thus, CBS’s requests for declaratory relief are improper and are barred by the City’s immunity from suit. *See Allodial*, 280 S.W.3d at 928.

For all these reasons, the trial court erred in denying the plea to the jurisdiction on CBS's claims for declaratory relief.

VI. GOVERNMENTAL IMMUNITY BARS CBS'S CLAIM FOR ATTORNEY'S FEES BECAUSE THE COURT HAS NO JURISDICTION OVER ANY STATUTORY CLAIM SUPPORTING AN AWARD OF ATTORNEY'S FEES.

Under Texas law, a prevailing party may not recover attorney's fees from an opposing party unless authorized by statute or by contract between the parties. *See Tony Gullo Motors I, LP v. Chapa*, 212 S.W.3d 299, 310-11 (Tex. 2006). There is no contract between CBS and the City or the Board. CBS seeks to recover attorney's fees under two statutes: (1) Section 37.009 of the Texas Civil Practice and Remedies Code; and (2) Section 211.011 of the Texas Local Government Code. CR 10. Neither statutory provision, however, authorizes CBS to recover attorney's fees.

A. CBS Cannot Recover Attorney's Fees Under the Declaratory Judgments Act Because CBS Failed to Plead a Valid Claim for Declaratory Relief.

Chapter 37 of the Texas Civil Practice and Remedies Code is commonly known as the Declaratory Judgments Act. *See* TEX. CIV. PRAC. & REM. CODE § 37.002(a). Section 37.009 of the Act provides for the recovery of attorney's fees:

In any proceeding under this chapter, the court may award costs and reasonable and necessary attorney's fees as are equitable and just.

TEX. CIV. PRAC. & REM. CODE § 37.009.

It is well-settled that Section 37.009 waives governmental immunity for attorney's fees claims in declaratory judgment cases. *See Tex. Educ. Agency v. Leeper*, 893 S.W.2d 432, 446 (Tex. 1994). However, as this Court has recognized, a court cannot exercise its

jurisdiction over a claim for attorney's fees under the Declaratory Judgments Act unless the court has jurisdiction over the underlying claim for declaratory relief. *City of Corinth v. NuRock Dev., Inc.*, 293 S.W.3d 360, 370 (Tex. App.—Fort Worth 2009, no pet.) (“Because we conclude that NuRock’s declaratory judgment claim must be dismissed, there is no basis for NuRock to recover fees pursuant to the Declaratory Judgments Act.”); *Town of Flower Mound v. Rembert Enters., Inc.*, No. 02-10-00408-CV, 2012 WL 662455, at *7 (Tex. App.—Fort Worth Mar. 1, 2012, no pet. h.) (same); *City of N. Richland Hills v. Home Town Urban Partners, Ltd.*, 340 S.W.3d 900, 913 (Tex. App.—Fort Worth 2011, no pet.) (same); see *City of Houston v. Chemam*, No. 01-08-01005-CV, 2010 WL 143476, at *8 (Tex. App.—Houston [1st Dist.] Jan. 14, 2010, no pet.) (mem. op.) (“Because the [Declaratory Judgments Act] does not itself confer jurisdiction or change a suit’s underlying nature, the trial court does not have jurisdiction to consider this claim or any claim for attorney’s fees arising under it.”).

Because CBS’s claim for declaratory relief must be dismissed, *see supra* Part V, its claim for attorney’s fees under Section 37.009 must be dismissed for want of jurisdiction as well. See *Home Town Urban*, 340 S.W.3d at 913; *NuRock*, 293 S.W.3d at 370.

B. CBS Cannot Recover Attorney’s Fees Under the Statute Providing for Judicial Review of the Board’s Decision Either.

As discussed above, Section 211.011 of the Local Government Code permits a person aggrieved by a decision of the Board to challenge the legality of the Board’s decision, *see* TEX. LOC. GOV’T CODE § 211.011(a)(1). Section 211.011 also provides for the recovery of “costs” if the court “determines that the board acted with gross negligence, in bad faith, or

with malice in making its decision.” TEX. LOC. GOV’T CODE § 211.011(f). CBS seeks attorney’s fees under this “cost” recovery provision. Whether CBS may recover attorney’s fees under Section 211.011 is a question of law for the Court. *See Holland v. Wal-Mart Stores, Inc.*, 1 S.W.3d 91, 94 (Tex. 1999).

Section 211.011(f) does not authorize recovery of attorney’s fees against the City in this case for three reasons. First, CBS failed to exhaust its administrative remedies. *See* Part I. As a result, the district court had no jurisdiction over CBS’s suit for judicial review, and Section 211.011(f) cannot support an award of attorney’s fees.

Second, “costs” do not include attorney’s fees. “Costs” are fees and charges required by law to be paid to courts or their officers, “such as filing fees and service fees.” *Parks v. DeWitt Cnty. Elec. Coop., Inc.*, 112 S.W.3d 157, 162 (Tex. App.—Corpus Christi-Edinburg 2003, no pet.). “Costs” do not generally include attorney’s fees. *See Johnson v. Univ. Life & Accident Ins. Co.*, 94 S.W.2d 1145, 1146 (Tex. 1936); *Parks*, 112 S.W.3d at 162; *Westech Eng’g, Inc. v. Clearwater Constructors, Inc.*, 835 S.W.2d 190, 206 (Tex. App.—Austin 1992, no writ) (“‘Costs’ generally do not include costs billed to the client as part of the attorney’s fee for services provided.”); BLACK’S LAW DICTIONARY 346 (6th ed. 1990) (“Generally, ‘costs’ do not include attorney’s fees unless such fees are by a statute denominated costs or are by statute allowed to be recovered as costs in the case.”).¹²

¹² And when the Legislature wants to authorize an award of attorney’s fees as part of costs, it knows how to do so in clear and unambiguous language. *See, e.g.*, TEX. BUS. & COMM. CODE § 15.21(b) (“In any such suit in which the plaintiff substantially prevails on the merits, the plaintiff shall be entitled to recover the cost of suit, including a reasonable attorney’s fee based on the fair market value of the attorney services used.”); TEX. CIV. PRAC. & REM. CODE § 42.001(5) (defining “litigation costs” as including not only “court costs” but also “attorney’s fees”).

Third, CBS has not properly alleged any facts to support a finding of gross negligence, bad faith, or malice. CBS has not alleged that the City or the Board (1) created an extreme degree of risk, considering the probability and magnitude of potential harm; or (2) acted with conscious indifference to the rights, safety, or welfare of others. *See* TEX. CIV. PRAC. & REM. CODE § 41.001(11) (gross negligence). CBS has not alleged that the City or the Board possessed “a specific intent” to cause them “substantial injury or harm.” *See* TEX. CIV. PRAC. & REM. CODE § 41.001(7) (malice). And CBS has not alleged any facts supporting a finding of bad faith. In the absence of such allegations, any claim for attorney’s fees under Section 211.011(f) fails as a matter of law and should be dismissed for want of jurisdiction.

PRAYER

For these reasons, the City and the Board respectfully ask the Court to reverse the trial court’s order denying the City and the Board’s plea to the jurisdiction and to render judgment dismissing CBS’s claims for want of jurisdiction.

Respectfully submitted,

By:  _____

RICK THOMPSON
State Bar No. 00788537
DEBORAH G. HANKINSON
State Bar No. 00000020
HANKINSON LLP
750 North St. Paul St., Suite 1800
Dallas, Texas 75201
214.754.9190
214.754.9140 (fax)

MATTHEW C. G. BOYLE
State Bar No. 24001776
MATTHEW L. BUTLER
State Bar No. 24073982
BOYLE & LOWRY, LLP
4201 Wingren, Suite 108
Irving, Texas 75062
972.650.7100
972.650.7105 (fax)

COUNSEL FOR APPELLANTS

CERTIFICATE OF SERVICE

I hereby certify that on March 28, 2012, a true and correct copy of this brief was served on the following counsel of record via electronic service:

Counsel for Appellee

Sydney Nell Floyd
Rothfelder & Falick, L.L.P.
1201 Louisiana, Suite 550
Houston, Texas 77002

 _____
Rick Thompson