

IN THE COURT OF APPEALS, THIRD SUPREME JUDICIAL DISTRICT
OF TEXAS, AT AUSTIN

NO. 3-86-107-CV

MARY ARNOLD, ET AL.,

APPELLANTS

vs.

CITY OF AUSTIN, TEXAS,

APPELLEE

FROM THE DISTRICT COURT OF TRAVIS COUNTY, 345TH JUDICIAL DISTRICT
NO. 370,394, HONORABLE JUAN GALLARDO, JUDGE PRESIDING

Mary Arnold, Roberta Crenshaw, Susan Toomey Frost, and the Attorney General of Texas appeal from a summary judgment upholding the validity of certain ordinances of the City of Austin. We will dismiss the cause as moot and will vacate the district court's judgment.

THE CONTROVERSY

In October 1984, the City, by ordinance, approved Townlake Joint Venture's ^{1/} site plan for the construction of a 15-story office building and parking garage on a two-acre tract (Lot A)

^{1/} Townlake Joint Venture is a four-member partnership.

owned by Townlake and situated adjacent to city parkland. The site plan implicitly authorized, among other things, the construction of a parking lot on the parkland itself. In January 1985, the City, by a second ordinance, purported to dedicate a public street across the parkland to provide access to Lot A. The dedication of the street was made "subject to" Townlake's performance of nine conditions, including the construction and maintenance of the street and payment of \$25,000. Arnold, Crenshaw, and Frost filed suit against the City in February 1985 seeking a declaratory judgment that the ordinances, as enacted, violated Tex. Rev. Civ. Stat. Ann. arts. 1019 and 1112 (Supp. 1987), Tex. Parks & Wild. Code Ann. § 26.001 (Supp. 1987), and the Austin City Charter. Townlake then intervened and also filed a counterclaim, alleging, among other things, malicious prosecution.

In July 1985, the Attorney General filed suit against the City seeking a declaratory judgment that the ordinances, among other things, unlawfully converted public property to private use. The Arnold suit and the Attorney General's suit were consolidated the following month. All four parties subsequently filed motions for summary judgment. On March 3, 1986, Townlake petitioned for bankruptcy under Chapter 11. On March 21, 1986, the trial court granted summary judgment for the City and Townlake, and severed and abated the counterclaim pending this appeal. In December 1986, Lumbermen's Investment Corporation ^{2/} foreclosed upon, and became the new owner of, Lot A. In February 1987, Townlake filed a motion in the bankruptcy court to dismiss its bankruptcy petition, which motion was granted.

^{2/} Lumbermen's Investment Corporation has never been a party to this proceeding.

BASIC PRINCIPLES

A cause becomes "moot" when the underlying controversy ceases to exist. *Texas Employment Com'n v. Camarena*, 710 S.W.2d 665 (Tex. App. 1986, no writ). While a cause may be kept alive, despite its apparent mootness, if there exists some cognizable danger of recurrence of a challenged activity, something more than a mere theoretical possibility of recurrence is required to obviate mootness. See 1A C.J.S. Actions §§ 38, 43 (1985). Generally speaking, appellate courts sit to adjudicate presently existing controversies, not controversies that existed in the past or that may exist at some unknown point in the future. *Town of Refugio v. Strauch*, 29 S.W.2d 1041 (Tex. 1930). Because mootness, whenever it occurs, deprives an appellate court of jurisdiction, such court must dismiss a cause (and not merely the appeal) on its own motion when it has notice of facts showing that the substantial questions presented in the trial court no longer exist. *Freeman v. Burrows*, 171 S.W.2d 863 (Tex. 1943); *In re Ivey*, 534 S.W.2d 163 (Tex. Civ. App. 1976, writ ref'd n.r.e.); see 5 Am.Jur.2d Appeal and Error § 913 (1962). However live the issues once were, however much the parties or the public may desire a declaration of law, and however far the litigation may have progressed when the mooting events occur, our law compels dismissal of a moot lawsuit. Compare 3 L. Levy (ed.), Encyc. of the American Constitution 1278 (1986).

This cause arose out of Townlake's intention to build a high-rise office building on a tract of land that it then owned. To that end, Townlake persuaded the City to enact ordinances, one of which is in the nature of a conditional contract, dedicating certain city parkland for Townlake's benefit and use. See Matthews, Municipal Ordinances § 11.03 (1983); McQuillen, Municipal Corporations §§29.03, 33.58 (1981). Subsequent to the passage of these ordinances, however, Townlake petitioned for bankruptcy and ultimately lost the tract in question through

foreclosure. It is apparent, therefore, that Townlake presently lacks the capability to develop Lot A as previously planned. And there is nothing in the record to suggest that Lumbermen's or anyone else intends to develop Lot A or otherwise assert any rights under the ordinances. Indeed, we can find no authority indicating Lumbermen's or anyone else could assert any rights under these ordinances. Under these circumstances, we are forced to the conclusion that we lack jurisdiction to entertain this appeal.

The cause is therefore dismissed and the judgment vacated. Each party is ordered to pay the costs incurred by each, respectively, in both the trial and appellate courts. Univ. Interschol. League v. Jones, 715 S.W.2d 759 (Tex. App. 1986, writ ref'd n.r.e.).

Earl W. Smith, Justice

[Justices Smith,* Brady and Aboussie]

Cause Dismissed and Judgment Vacated

Filed: November 25, 1987

[Do Not Publish]

*Before Earl W. Smith, Justice (Retired) Third Court of Appeals, sitting by assignment. See Tex. Gov't Code § 73.012 (Supp. 1987).