NO. 20-0309

IN THE SUPREME COURT OF TEXAS

CITY OF BAYTOWN,
***Petitioner*,**

v.

ALAN SCHROCK,
***Respondent*.**

On Petition for Review from the First Court of Appeals
Houston, Texas
No. 01-17-00442-CV

PETITIONER'S BRIEF ON THE MERITS

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"The City" refers to Petitioner City of Baytown.

"Schrock" refers to Respondent Alan Schrock.

STATEMENT OF THE CASE

Nature of the Case:	This is a civil dispute over utility bills. Rather than paying $1,500 in outstanding utility bills he believed he did not owe, rental property owner Respondent stopped renting to tenants or caring for his property. His property fell into disrepair, and he sued the City. Respondent claimed the City's actions to withhold utility service to one of his rental properties pursuant to a utility ordinance amounted to a regulatory taking. He sought declaratory relief and damages for alleged property damage and lost rent.
Trial Court:	Harris County Civil Court at Law No. 1; Hon. George Barnstone, presiding.
Disposition of Trial Court:	At the jury trial, the trial court granted the City's motion for directed verdict after Schrock rested.
Parties in Court of Appeals:	Appellant: Alan Schrock Appellee: City of Baytown
Court of Appeals:	First Court of Appeals, Houston
Justices:	Justices Countiss, Radack and Goodman; opinion authored by Justice Countiss.
Citation:	*Schrock v. City of Baytown*, No. 01-17-00442-CV, 2019 WL 2621736 (Tex. App.—Houston [1st Dist.] June 27, 2019, pet. filed).

Disposition on Appeal:

The First Court of Appeals reversed the portion of the trial court's judgment granting the City a directed verdict on Respondent's regulatory taking claim and remanded for a new trial on that claim. The court of appeals affirmed the remaining portion of the trial court's judgment, granting the City a directed verdict on Respondent's declaratory judgment claim. The City filed motions for rehearing and for en banc reconsideration. On March 5, 2020, the court of appeals denied the City's motions for rehearing and for en banc reconsideration.

STATEMENT OF JURISDICTION

The Court has jurisdiction pursuant to Section 22.001(a) of the Texas Government Code because this appeal presents important issues of governmental immunity and regulatory takings law. The decision by the First Court of Appeals misapplies regulatory takings law, by expanding it beyond the regulation of land use to encompass complaints about a city's methods of enforcement of regulations and misapplication of regulations. The decision is in conflict with prior decisions of this Court, including *City of Houston v. Carlson*, 451 S.W.3d 828 (Tex. 2014), and of other courts of appeals, holding to the contrary.

ISSUES PRESENTED

1. Whether the court of appeals erred in holding that a city's application of a utility ordinance that is not a restriction on land use can constitute a regulatory taking.

2. Whether the court of appeals erred in finding that government action caused a regulatory taking of property when the property owner chose to abandon his property, stop renting to tenants, and allow the property to fall into disrepair.

INTRODUCTION AND REASONS TO GRANT REVIEW

This is a dispute over a $1,500 utility bill that the court of appeals escalates to a regulatory taking. Instead of paying an outstanding utility bill and seeking a refund of the funds he believed he did not owe, Schrock chose to abandon his rental property and allow it to stand vacant without utilities for seven years. In his words, "rather than acquiesce" and pay the funds he believed the City mistakenly charged him, Schrock "chose to stand up for his rights" and stopped trying to rent the property or care for it. *See* Response to City's Petition for Review at p. 9.

Schrock alleged that the penalties imposed by the City for his failure to pay the outstanding utility charges of his previous tenants, and the City's mistakes in collection efforts, amounted to a taking of his rental property. He sought damages for lost rent and property damage that occurred while the property was vacant.

In reversing the trial court's directed verdict in the City's favor, the First Court of Appeals creates a decision that clashes with this Court's precedent in *City of Houston v. Carlson*, 451 S.W.3d 828 (Tex. 2014), and fails to recognize that Schrock caused his own harm. In

Carlson, this Court held that a property owner does not allege a viable taking claim if the claim is based on the manner in which a city enforces its regulations, the penalties enforced pursuant to regulations, or a city's misapplication of the law. *Carlson*, 451 S.W.3d at 828; Appx. G. Therefore, the result is a phantom regulatory taking decision, whereby the First Court of Appeals disregards that Schrock failed to present any evidence at trial that could establish a viable taking claim as a matter of law.

Through its decision, the court of appeals confounds an already-muddled takings jurisprudence by finding that the jury should have determined the extent of Schrock's damages and the extent of governmental interference with his use of the Property. The court of appeals misunderstands how takings law works, and this Court should resolve the error.

STATEMENT OF FACTS

Generally, the court of appeals' opinion correctly states the nature of the case but obscures the fact that Schrock abandoned his rental property. Petitioner, the City of Baytown (the "City"), provides the following statement of facts that are pertinent to the issues presented for review.

I. Background Facts.

In 1993, Respondent, Alan Schrock, purchased a 1983-model mobile home (the "Property"), which is located in the City. 2RR41-42. Upon purchasing the Property, he began renting it to low-income tenants. *Id.* In addition to the Property, Schrock owned at least thirty other mobile homes that he used as rental properties. 2RR46:14.

At the time that Schrock purchased the Property, a City ordinance governing utilities authorized the City to impose a lien on property for unpaid municipal utility services to that property, whether the services were incurred by the property owner or a tenant. Appx. D; 4RRDX19. Ordinance 6005 was later codified as Section 98-65 of the City's Code of Ordinances. Appx. E; 4RRPX1.

Section 98-65 prohibited water, garbage, or sewer service to properties encumbered by utility liens, but if a customer agreed to a payment plan, the Supervisor of the Water Department was authorized to reconnect service. *Id.* Originally, Section 98-65(i) also provided a mechanism for a landlord to prevent a lien on his rental property by filing a written declaration, declaring that his property was a rental property that he did not wish to be security for the tenant's utility bills. Appx. E; 4RRPX1. Once on file with the City, a declaration would have prevented the imposition of a lien for non-payment of utility bills for service connected in the tenant's name after the filing of the declaration. *Id.*

In 2009, the City notified Schrock that he owed $1,999.67 for utility bills that ten of his prior tenants at the Property failed to pay over a period of sixteen years, and the City provided the names, account numbers and billing invoices for the bills. 3RR94-95. The time period during which the tenants failed to pay their utility bills occurred between March 1993 and January 2009. 4RRDX1. Schrock appealed, and, after a hearing, the City agreed to reduce the amount to $1,157.39. 3RR36-38.

Schrock admitted that he did not submit a written rental declaration for the period when his tenants incurred the delinquent charges as required at the time by Section 98-65(i) to avoid a lien. 3RR36-37; Appx. E; 4RRPX1. However, at trial, he claimed that the City had notice that the Property was used as a rental property because tenants provided copies of their leases when they applied for utility services. 2RR45:21-25; CR8.

Schrock testified that he knew at the time that if he paid $1,157.39, the City would not file a lien. 3RR37-38. Nevertheless, he chose not to pay the outstanding amount, so the City filed a lien on the Property pursuant to Section 98-65. 3RR38.

Even with the lien on the Property, the City continued to provide utility services to the Property, and Schrock continued renting it to tenants. 2RR67; 2RR72-73. After evicting a tenant in December 2009, Schrock rented to a new tenant in January 2010. 2RR74; 3RR30.

During the application process to set up water service, the City informed the new tenant that the City must speak to her landlord before connecting service. 2RR75-76. When Schrock contacted the City, the City informed him that he needed to pay the outstanding utility

bills for past service to his Property to acquire new water service for his tenant. 2RR77.

To rectify the situation, Schrock went to the City water department to pay the outstanding amount. 2RR78. However, he only brought one check filled out for the amount of the lien, and a City employee informed him that an additional tenant had failed to pay their water bill of $164.17. 3RR53. Because Schrock did not have another check with him, he left without paying. 3RR53-54.

Schrock testified that had he brought an additional check with him that day, he would have used it to pay the outstanding balance because he knew that the City would provide water to the Property once the outstanding amount was paid. 3RR47-48; 3RR54-56. When he informed his current tenant that the Property would be without water for a few days until he paid the balance the following week, the tenant moved out. 3RR54.

Schrock did not go to the water department again, until October 2010, seven months after his tenant moved out. 3RR55-57; 2RR86:6-17; 4RRPX34. This time he brought cash with him. 3RR55-57. Apparently angry about the situation, after he handed the cash to a City employee,

but before she finished writing a receipt, Schrock grabbed the money back from the clerk and left without paying. *Id*. Instead of paying under protest and seeking a refund of any amount he believed the City improperly charged him for his tenants' outstanding bills, Schrock stopped renting the Property altogether after the tenant vacated in January 2010. 2RR82:1-13; 3RR47-48; 3RR60:8-17; 3RR63; 3RR69:5-21; 3RR76:3-11.

In 2011, the City amended Section 98-65, repealing the provision that required a property owner to submit a declaration to show the property was rental property. 4RRDX18. As amended, Section 98-65(d) provides that the City shall not impose a lien on property that the City knows is rental property. Appx. F; 4RRDX13.

After two years of standing vacant without utilities, Schrock contacted the City and requested water service for approximately one month in March 2012, so he could address a mold problem and rat infestation. 3RR74-77. In response to his request, even with a lien on the Property, the City provided water without hesitation until April 2012, when Schrock contacted the water department and requested that the City discontinue water service to the Property. 3RR64. The

Property remained without water and other utilities for the next five years, and was without utility service at the time of trial. 3RR63. In fact, Schrock did not request utilities for the Property after the City released the lien. 3RR67.

Despite admitting that he knew the City would have provided utilities to the Property if he paid the outstanding amount, Schrock allowed the Property to stand vacant without any utilities for *seven years* (with the exception of one month in 2012). 3RR60:8-17; 3RR63; 2RR82:1-13; 2RR89:1-11; 3RR55-56; 3RR69:5-21; 3RR76:3-11. During the seven years that Schrock did not rent the Property to tenants, he also did not care for the Property. Schrock testified that the Property became infested with rats and mold, and was vandalized by third parties. 3RR6-11. To make the Property habitable again, Schrock claimed that he would need to repair walls, install all new appliances, pay to have electricity restored, install an air-conditioning system, replace carpet and make other renovations. 3RR22:13-23.

Schrock alleges in his Second Amended Petition, and attempted to prove at trial, that the City's acts of imposing a lien and withholding utilities through enforcement of Section 98-65 of the City's Code of

Ordinances caused the Property to fall into a state of disrepair, rendering it useless. CR6-10. More specifically, he alleges that the City unlawfully enacted certain provisions of Section 98-65, which conflicted with Texas Local Government Code Section 552.0025. CR5-11. He also alleges that the City made mistakes in its collection efforts because the City had notice that Schrock's Property was rental property and placed a lien on it anyway. *Id.*

In 1989, the Texas legislature adopted statutes that limit the ability of cities to impose liens in certain circumstances. *See* Appx. H; Tex. Loc. Gov't Code Ann. § 552.0025(e). The enacted legislation prohibits municipalities from imposing liens on property where the lien was for "bills for service connected in a tenant's name after notice by the property owner to the municipality that the property is rental property." *Id.* Moreover, Section 552.0025(b) provides that a municipality may not require a customer's utility bill to be guaranteed by a third party as a condition of connecting or continuing service. *Id.* at § 552.0025(b). Section 552.0025 does not provide an express remedy for a violation of the statute. *Id.*

II. Procedural History.

Originally, Schrock filed a lawsuit in Harris County Civil Court at Law Number 1 in January of 2012. CR180. After he amended his pleadings on July 19, 2012, adding federal taking and substantive due process claims, the City removed the case to federal court and moved to dismiss Schrock's federal claims. CR183-184; CR104-123.

In its opinion granting the City's motion to dismiss, the federal court: (1) dismissed Schrock's federal taking claim as unripe; (2) dismissed Schrock's substantive due process claim because it "was the same as his takings claim" and, therefore, unripe; (3) dismissed Schrock's declaratory judgment claim as ancillary to his taking claim; (4) found that even if Schrock's substantive due process and declaratory judgment claims could be deemed independent of his taking claim, they were barred by the applicable statute of limitations; and (5) remanded Schrock's state law inverse condemnation and other state law claims, so that he may "attempt" to seek compensation. CR104-123; *Schrock v. City of Baytown*, Civil Action No. 4:12-cv-02455 (S.D. Tex. Mar. 11, 2013). Schrock did not appeal the federal court's decision.

After remand, Schrock filed a Second Amended Petition, and the City moved for summary judgment. CR5-24; CR187-188. On June 4, 2013, the trial court held a hearing on the City's motion for summary judgment, and on June 13, 2013, the trial court granted the City's motion and dismissed Schrock's claims with prejudice. CR187-188. Schrock filed a motion to set aside dismissal and for a new trial, and the trial court denied the motion. CR188-190. Subsequently, Schrock appealed the trial court's order granting the City's motion for summary judgment. CR190.

The First Court of Appeals reversed the trial court's order. *Schrock v. City of Baytown*, No. 01-13-00618-CV, 2015 WL 8486504, at *6 (Tex. App.—Houston [1st Dist.] Dec. 10, 2015, pet. denied). "After taking as true all evidence favorable to Schrock, as the non-movant, and indulging every reasonable inference in his favor, we conclude that the City has not conclusively negated Schrock's regulatory-takings claim." *Id.*

At trial, after Schrock presented his case and rested, the City moved for a directed verdict. 3RR136-154. The City argued that Schrock had not presented a fact question for the jury, and, based on all

of the evidence he presented, Schrock had not met his burden of proving a regulatory taking as a matter of law. 3RR136-152. The trial court granted the City's motion for directed verdict. Appx. A; CR130-131.

Schrock filed a Motion for New Trial, which was overruled by operation of law. CR147-148. On appeal, the First Court of Appeals reversed the trial court's judgment as to Schrock's regulatory taking claim, remanded for a new trial on that claim, and affirmed the portion of the trial court's judgment granting a directed verdict on Schrock's declaratory judgment claim. Appx. C. In reversing the trial court's ruling, the First Court of Appeals held that a directed verdict on Schrock's regulatory taking claim was reversible error because fact questions remained regarding the extent of the City's interference with Schrock's investment-backed expectations, whether the City acted in bad faith to injure Schrock, and the extent of Schrock's damages. *See* Appx. B.

SUMMARY OF THE ARGUMENT

The First Court of Appeals erred in reversing the trial court's directed verdict. Schrock, as the property owner, bore the burden of establishing a taking as a matter of law. With all of the facts and

evidence presented at trial, Schrock failed to establish the fundamental requirement that a government regulation of property *use* caused his damages. The ordinance at issue in this case regulates the provision of utility services, not land use. With or without the existence of the ordinance, Schrock could use his Property as rental property.

The court of appeals' opinion cannot be reconciled with this Court's opinion in *City of Houston v. Carlson*, 451 S.W.3d 828 (Tex. 2014), or the numerous courts of appeals' cases rejecting taking claims based on the manner in which a city enforces its regulations, the penalties enforced pursuant to regulations, or the misapplication of regulations. Schrock's complaint that the City's method of enforcing its utility ordinance by imposing a lien and withholding utility service until Schrock paid the outstanding bills, does not, as a matter of law, constitute a taking. Likewise, his allegations that the City misapplied state law and misapplied the City's ordinance as to him also fail as a matter of law under *Carlson* because allegations of mistake are nothing more than claims of negligence, for which the City is immune.

Additionally, Schrock failed to establish that the City's intentional acts were the proximate cause of the taking, destruction, or damage to

his Property. In fact, Schrock testified and contends in his Response to the City's Petition for Review that he voluntarily abandoned his Property and left it unoccupied and without utilities for seven years. He admittedly chose to protest the City's actions instead of caring for his Property. Even after the City removed the lien, he continued to leave the Property empty without utilities. Schrock caused his own alleged harm, so there can be no taking as a matter of law.

Further, the Constitution limits compensation to damages for, or applied to, public use. Schrock presented no evidence or even alleged facts to show that the public obtained any use from his Property due to the City's acts.

For all of these reasons, the trial court correctly granted the City's motion for directed verdict. There was no need for the trial court to reach the issue of the extent of Schrock's damages or the extent of the City's interference with his use of the property as rental property because, as a matter of law, he did not present evidence to support a viable taking claim.

Therefore, the Court should reverse the First Court of Appeals' judgment that minor disputes over charges by governmental entities

can now be elevated to regulatory takings. A rule of law that would require compensation for such disputes would open the floodgates to litigation over the most trivial of billing disputes. The public should not be required to subsidize a property owner's personal decision to abandon his property because he disagrees with a minor utility bill.

ARGUMENT

Although government restrictions sometimes result in inconvenience to property owners, the "government is not generally required to compensate an owner for associated loss." *Carlson*, 451 S.W.3d at 831; Appx. G. "Government hardly could go on if to some extent values incident to property could not be diminished without paying for every such change… ." *Id.* (citing *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 124 (1978)).

Only when the regulation of property reaches a certain extreme may a property owner seek redress via an inverse condemnation claim. *Id.* "Inverse condemnation occurs when property is taken for public use without proper condemnation proceedings and the property owner attempts to recover compensation for the taking." *Rowlett/2000, Ltd. v. City of Rowlett*, 231 S.W.3d 587, 590 (Tex. App.—Dallas 2007, no pet.).

The takings clause of the Texas Constitution is premised on the notion that the government should not "forc[e] some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Id*. at 591 (quoting *Steele v. City of Houston,* 603 S.W.2d 786, 789 (Tex. 1980)). To state a taking claim, a property owner must allege facts to establish: (1) an intentional governmental act; (2) that caused the uncompensated taking of private property; (3) for public use. *Id*. The ultimate determination of whether the facts are sufficient to constitute a taking is a question of law. *Hearts Bluff Game Ranch, Inc. v. State*, 381 S.W.3d 468, 477 (Tex. 2012).

I. Standard of review.

Review of a directed verdict is de novo. *JPMorgan Chase Bank, N.A. v. Orca Assets G.P., L.L.C.*, 546 S.W.3d 648, 653 (Tex. 2018); *Donald v. Rhone*, 489 S.W.3d 584, 588 (Tex. App.—Texarkana 2016, no pet.). In conducting its review, the Court applies the same legal sufficiency standard as it applies in reviewing a no-evidence summary judgment. *King Ranch, Inc. v. Chapman*, 118 S.W.3d 742, 750 (Tex. 2003).

On appeal, a court may affirm a directed verdict on any ground that supports it. *RSL-3B-IL, Ltd. v. Prudential Ins. Co. of Am.*, 470 S.W.3d 131, 136 (Tex. App.—Houston [1st Dist.] 2015, pet. denied). "A court may instruct a verdict if no evidence of probative force raises a fact issue on the material questions in the suit." *Prudential Ins. Co. of Am. v. Fin. Review Servs., Inc.*, 29 S.W.3d 74, 77 (Tex. 2000). Accordingly, a directed verdict for a defendant is proper in two situations: (1) when a plaintiff fails to present evidence raising a fact issue essential to the plaintiff's right of recovery; and (2) when the plaintiff admits, or the evidence conclusively establishes, a defense to the plaintiff's cause of action. *Id.*

The Court reviews the evidence "in the light most favorable to the nonmovant, crediting evidence a reasonable jury could credit and disregarding contrary evidence and inferences unless a reasonable jury could not." *Merriman v. XTO Energy, Inc.*, 407 S.W.3d 244, 248 (Tex. 2013). "A no evidence challenge will be sustained when (a) there is a complete absence of evidence of a vital fact, (b) the court is barred by rules of law or of evidence from giving weight to the only evidence offered to prove a vital fact, (c) the evidence offered to prove a vital fact

is no more than a mere scintilla, or (d) the evidence conclusively establishes the opposite of the vital fact." *Id.* The nonmovant bears the burden of identifying evidence before the trial court that raises a genuine issue of material fact as to each challenged element of his cause of action. *See Boerjan v. Rodriguez*, 436 S.W.3d 307, 310 (Tex. 2014).

II. The court of appeals' opinion cannot be reconciled with this Court's opinion in *City of Houston v. Carlson* or a number of other cases rejecting takings claims that do not challenge a land-use regulation and are based on complaints about methods of enforcement or misapplication of regulations.

Generally, "a municipal government enjoys immunity from suit unless its immunity has been waived." *See Carlson*, 451 S.W.3d at 830 (citing *Reata Constr. Corp. v. City of Dallas*, 197 S.W.3d 371, 374 (Tex. 2006)); Appx. G. "It is well settled that the Texas Constitution waives government immunity with respect to inverse-condemnation claims," but "such a claim is predicated upon a *viable* allegation of taking." *Carlson*, 451 S.W.3d at 830 (citations omitted) (emphasis added); Appx. G; *see also Tex. Dep't of Transp. v. A.P.I. Pipe & Supply, LLC*, 397 S.W.3d 162, 166 (Tex. 2013) ("A trial court lacks jurisdiction … where a plaintiff cannot establish a viable takings claim.").

Takings are classified as either physical or regulatory. *Carlson*, 451 S.W.3d at 831 (citations omitted); Appx. G. A physical taking involves physical invasion of property by the government and causes a direct, physical effect. *Sheffield Dev. Co., Inc. v. City of Glenn Heights*, 140 S.W.3d 660, 671 (Tex. 2004).

"A regulatory taking is a condition of use so onerous that its effect is tantamount to a direct appropriation or ouster." *Carlson*, 451 S.W.3d at 831 (quoting *Lingle v. Chevron U.S.A. Inc.,* 544 U.S. 528, 537 (2005)); Appx. G. Typically, "a compensable regulatory taking occurs when governmental regulations deprive the owner of all economically viable use of his property or totally destroy his property's value." *City of Dallas v. VRC LLC*, 260 S.W.3d 60, 65 (Tex. App.—Dallas 2008, no pet.) (citing *Mayhew v. Town of Sunnyvale*, 964 S.W.2d 922, 936 (Tex. 1998)).

"In the intervening decades, the Court has applied regulatory takings analysis only to regulation of property. *See, e.g.*, *Penn Cent. Transp. Co.*, 438 U.S. at 125 (limiting its discussion to "land-use regulations")." *Carlson*, 451 S.W.3d at 831-32; Appx. G. Accordingly, there must be a direct restriction on the use of land to establish a taking and overcome the City's immunity. *Hearts Bluff Game Ranch,*

Inc., 381 S.W.3d at 483 (citing *Westgate, Ltd. v. State*, 843 S.W.2d 448, 452 (Tex. 1992)). "'Direct restriction,' as used herein, refers to an actual physical or legal restriction on the property's use." *Westgate*, 843 S.W.2d at 452.

To determine whether a regulation goes too far and amounts to a taking typically requires balancing the public's interest against that of the private landowner. *Penn Cent. Transp. Co.*, 438 U.S. at 124-25; *Sheffield Dev. Co., Inc.*, 140 S.W.3d at 672. Courts analyze three factors to conduct the balancing test: (1) the economic impact of the regulation on the property owner; (2) the extent to which the regulation has interfered with reasonable investment-backed expectations; and (3) the character of the governmental action. *Penn Cent. Transp. Co.*, 438 U.S. at 124. In addition, courts apply "a fact-sensitive test of reasonableness." *Sheffield Dev. Co., Inc.*, 140 S.W.3d at 672–73.

However, complaints about the manner in which a city enforces its regulations, the penalties pursuant to regulations, or the improper or mistaken application of regulations do not constitute a taking. *Carlson*, 451 S.W.3d at 831-33; *see also APTBP, LLC v. City of Baytown*, No. 14-17-00183-CV, 2018 WL 4427403, at *5 (Tex. App.—Houston [14th Dist.]

Sept. 18, 2018, no pet.) (mem. op.) (rejecting taking claim based on misapplication of building codes and apartment regulations); *Nat'l Media Corp. v. City of Austin*, No. 03-16-00839-CV, 2018 WL 1440454, at *5 (Tex. App.—Austin Mar. 23, 2018, no pet.) (mem. op.) (rejecting taking claim based on misapplication of city sign regulations); *CPM Tr. v. City of Plano*, 461 S.W.3d 661, 673 (Tex. App.—Dallas 2015, no pet.) (rejecting taking claim based on misapplication of sign regulations); *House of Praise Ministries, Inc. v. City of Red Oak*, No. 10-15-00148-CV, 2017 WL 1750066, at *7 (Tex. App.—Waco May 3, 2017, no pet.) (mem. op.) (rejecting taking claim based on misapplication of city's substandard building regulations); *Schmitz v. Denton Cty. Cowboy Church*, 550 S.W.3d 342, 356–57 (Tex. App.—Fort Worth 2018, pet. denied), *reh'g denied* (June 21, 2018) (rejecting taking claim based on manner of enforcement of ordinances). No balancing test is required when a plaintiff bases his taking claim on such allegations. *Id.* Indeed, property is not taken for public use within the meaning of the Constitution "where a party objects only to the infirmity of the process." *Carlson,* 451 S.W.3d at 833; Appx. G.

The Takings Clause is designed to secure compensation "in the event of otherwise *proper* interference amounting to a taking." *Lingle*, 544 U.S. at 537 (emphasis added). Accordingly, allegations that a city made mistakes in the application of regulations would "amount to nothing more than a claim of negligence on the part of [the city], for which [it] is immune under the Texas Tort Claims Act." *Carlson,* 451 S.W.3d at 833; Appx. G. "Mere negligence that eventually contributes to property damage does not amount to a taking." *Tarrant Reg'l Water Dist. v. Gragg*, 151 S.W.3d 546, 554 (Tex. 2004), holding modified by *Gilbert Wheeler, Inc. v. Enbridge Pipelines (E. Tex.), L.P.*, 449 S.W.3d 474 (Tex. 2014).

Thus, "it is not every damaging ... that should be compensated." *Steele*, 603 S.W.2d at 790. The constitution entitles aggrieved property owners to recompense only if their property has been taken for a public use. *Id.* The "public use" factor "distinguishes a negligence action from one under the constitution." *Id.* at 792; *see also Harris Cty. Flood Control Dist. v. Kerr*, 499 S.W.3d 793, 806-07 (Tex. 2016) ("A taking occurs when property is 'damaged for public use' in circumstances where 'a governmental entity is aware that its action will necessarily

cause physical damage to certain private property.' A conscious decision to damage certain private property for a public use is absent here.").

In *Carlson*, after an investigation revealed various safety violations at a condominium complex, the city of Houston ordered the condominium owners to make repairs and obtain a certificate of occupancy. 451 S.W.3d at 830; Appx. G. When the owners failed to repair the problems or obtain the certificate of occupancy, Houston ordered the property owners to vacate their homes pursuant to a City of Houston building code regulation, instead of issuing a citation. *Id.*

A group of condominium owners filed a lawsuit, complaining that Houston misapplied their safety regulations, and that their property was taken when the city ordered them to vacate. *Id.* The owners sought damages, including damages for years of lost use. *Id.*

This Court affirmed the trial court's decision to grant Houston's plea to jurisdiction, holding that the owners had not alleged a viable regulatory taking claim, and the city retained immunity. *Id.* at 831-33. The Court concluded that the owners were not challenging a land-use restriction, and instead, were challenging the procedure used by the

City to enforce its standards because their complaints were directed at the penalty imposed, the manner in which the city enforced its standards, and Houston's misapplication of regulations when ordering residents to vacate. *Id.*

> We do not doubt, and the city does not deny, that the order to vacate interfered with the use of the respondents' property. Yet nearly every civil-enforcement action results in a property loss of some kind. The very nature of the action dictates as much. Nevertheless, that property is not "taken for public use" within the meaning of the Constitution.

Id. at 832–33.

Similarly, in *APTBP, LLC v. City of Baytown,* an apartment complex owner sued the City for a taking, claiming that the City's misapplication of its apartment safety ordinances and denial of access to electricity prevented the owner from renting apartment units, caused loss of rental income, and created economic waste while the units sat empty. 2018 WL 4427403, at *2. The court of appeals applied *Carlson*, and held that APTBP failed to allege a viable taking. *Id.* at *5.

> APTBP does not allege that any particular regulations or standards are unreasonable restrictions on the use of the property at issue. Rather, APTBP complains about the City's misapplication or "wrongful" application of certain regulations and standards and the manner in which the City enforced certain standards and regulations in relation to

> APTBP, LLC's property. Based on *Carlson*, we conclude that APTBP has not alleged a viable regulatory taking.

Id.

Schrock alleges in his Second Amended Petition, and attempted to prove at trial, that the following actions by the City constitute a taking: (1) placing a lien on his Property and withholding utilities to the Property pursuant to Section 98-65 of the City's Code of Ordinances for his failure to pay the outstanding utility bills of ten of his prior tenants; (2) misapplying Texas Local Government Code Section 552.0025 by requiring a declaration that his Property was rental property; (3) misapplying Section 552.0025 by requiring Schrock to guarantee his tenants' utility bills as a condition of connecting service to the Property; and (4) misapplying Section 98-65 to Schrock because the City imposed the lien even though it had actual knowledge that the Property was rental property. CR6-10; 3RR31:23-25; 3RR32:1-12; 3RR35:13-25; 3RR36:1-6; 3RR73; 3RR145-146. Additionally, Schrock's Response to the City's Petition for Review makes the following contentions:

- "Schrock contends that *when the City refused to provide water service* to his tenant[s] *unless Schrock paid outstanding utility bills* owed to the City by several former tenants, and thereafter *the City encumbered Schrock's property for a debt he did not owe*, the City unlawfully 'took'

Schrock's property... ." Response at pp. 12-13 (emphasis added).

- "Moreover, *the means by which the City exercised its police power* in this case is breathtaking... ." *Id.* at p. 13 (emphasis added).

- "[T]he city ordinance used to justify the City's collection efforts and to place an encumbrance on Schrock's property was *directly contrary to state law* at that time." *Id.* (emphasis added).

- "[A]fter Schrock filed suit, the City amended its ordinances to comply with state law, and eventually released the lien... ." *Id.*

- Quoting counsel for the City: "*The city recognized it made a mistake and it sought to correct it*." *Id.* at p. 14 (emphasis in original).

- "*When the City refused to provide basic essential services*, such as water, wastewater and garbage collection to the tenants wanting to lease Schrock's property, the City caused Schrock to suffer lost profits... ." *Id.* at p. 18 (emphasis added).

- "Schrock *was denied water services* at his property because former residents left owing the City on unpaid utility bills." *Id.* at p. 19 (emphasis added).

- "[T]he City of Baytown refused to provide essential public services unless Schrock paid off the debts of third parties." *Id.* at p. 20.

- "The City *lacked authority* under state law to impose a lien… ." *Id.* (emphasis added).

- "Indeed, even the City admits it *made a mistake*." *Id.* (emphasis added).

Schrock does not challenge a land-use restriction or allege that the public obtained any use from his property due to the City's utility ordinance. Instead, Schrock's evidence and allegations are based on: (1) the City's process of collecting delinquent utility charges; (2) the City's imposition of penalties of withholding utility service and imposing a lien for the failure to pay delinquent utility charges; and (3) the City's mistakes in its collection efforts. Therefore, as a matter of law, Schrock did not present any evidence or make any allegations that could amount to a viable taking claim, so there was no need for the jury to reach the issue of the extent of the government interference or a calculation of damages.

Cities that provide water and sewer service charge their customers based on how much they use that service. *See* Tex. Loc. Gov't Code Ann. § 552.017. A city is not required to provide service to a customer who refuses to pay, and it is not unconstitutional to discontinue utility services when a person becomes delinquent. *City of Breckenridge v. Cozart*, 478 S.W.2d 162, 165 (Tex. Civ. App.—Eastland 1972, writ ref'd n.r.e.).

The beneficiaries of the City's efforts in collecting delinquent utility charges are its water and sewer customers, who must make up the loss for unpaid charges in the form of higher rates for water and sewer service. Thus, the City has a legitimate interest in collecting unpaid charges just as it has in enforcing building codes and other health and safety regulations.

Courts have held that the use of liens to collect unpaid utility bills is not unconstitutional. *See Dunbar v. City of New York*, 251 U.S. 516, 517 (1920); *Chatham v. Jackson*, 613 F.2d 73, 79 (5th Cir. 1980). However, it is undisputed that the Texas legislature adopted Section 552.0025 of the Texas Local Government Code, which limits the ability of cities to impose liens in certain circumstances. *See* Appx. H; Tex. Loc. Gov't Code Ann. § 552.0025. It is also undisputed that the City misapplied Section 552.0025 in this case.

Nevertheless, as this Court held in *Carlson*, the fact that the City may have made mistakes in billing for water and sewer service or misapplied state law does not amount to an unconstitutional taking of Schrock's Property. *Carlson*, 451 S.W.3d at 832-33; Appx. G. The First Court of Appeals' opinion to the contrary transforms regulatory taking

law into a form of negligent administration. *City of Deer Park v. Ibarra*, No. 01-10-00490-CV, 2011 WL 3820798, at *8 (Tex. App.—Houston [1st Dist.] Aug. 25, 2011, no pet.) (mem. op.) (explaining city is immune from negligent administration claim when no allegation of a premises-defect claim or injury as the result of the use of publicly owned automobiles.). Therefore, the trial court was correct to grant the City's motion for directed verdict, and the City requests that the Court reverse the First Court of Appeals' judgment.

III. Schrock caused his own harm, so he failed to establish a compensable taking claim as a matter of law.

"Proximate cause is an essential element of a takings case," and whether government action constitutes a taking is a question of law. *Hearts Bluff Game Ranch, Inc.*, 381 S.W.3d at 483; *Mayhew*, 964 S.W.2d at 933. "[W]ithout causation, there is no taking." *Hearts Bluff Game Ranch, Inc.*, 381 S.W.3d at 483. The City's intentional acts must "be the proximate cause of the taking, destruction, or damage to private property." *Id*. at 483.

The governmental entity must know that a specific act is causing identifiable harm or know that the harm is substantially certain to result from its action. *Gragg*, 151 S.W.3d at 555. "In a regulatory

taking, it is the passage of the ordinance that injures a property's value or usefulness." *Rowlett/2000, Ltd.*, 231 S.W.3d at 591 (citing *Lowenberg v. City of Dallas*, 168 S.W.3d 800, 802 (Tex. 2005)). As previously explained in Section II, this Court has held that "there must be a 'direct restriction' on the use of the land to establish a taking." *Hearts Bluff Game Ranch, Inc.*, 381 S.W.3d at 483 (citing *Westgate*, 843 S.W.2d at 452–53). "The word 'direct' seems plainly to indicate that the governmental entity must be the cause of the harm." *Id.*

The evidence Schrock presented at trial conclusively negates that the City caused Schrock's alleged damages. The ordinance at issue in this case allowed the City to place a lien on property and deny utility services to that property for a property owner or tenant's failure to pay for utility service to that property. It was not a substantial certainty that a property owner would leave his property without tenants or utilities for *seven years* as a result of the City's passage of a utility regulation.

In 2009, the City notified Schrock that he owed $1,999.67 for outstanding utility bills for ten of his prior tenants, who had failed to pay for certain utility services over a period of sixteen years. 3RR94-95;

4RRDX1. He appealed and, after a hearing, obtained a favorable reduction in charges to $1,157.39. 3RR37-38. However, Schrock chose not to pay the reduced amount, so the City filed a lien on the Property. 3RR38.

Even with a lien on the Property, Schrock testified that the City continued to provide utility services, and he continued renting the Property to tenants. 2RR67:3-4; 2RR72-73. It was not until Schrock evicted a tenant in December 2009, and a new tenant applied for water service in early 2010, that the City required Schrock to pay the outstanding amount before reconnecting water service. 2RR75:22-25; 2RR76:1-25; 2RR77:1-7; 3RR30.

Schrock testified that he had the ability to pay the minimal outstanding amount and believed the City would provide utilities to the Property if he paid. 3RR47-48; 3RR55-56. In fact, he testified that he attempted to pay, but initially brought only one check to the water department that he had filled out with the wrong amount. 3RR53. He admitted that he would have paid the correct amount had he brought an additional check. 3RR53-54. His tenant moved out instead of waiting a few days for Schrock to pay. 3RR54.

It is undisputed that after the tenant vacated in January 2010, Schrock stopped renting the Property altogether. 2RR89:1-11; 3RR69:5-21; 3RR76:3-11. In March 2012, after two years of standing vacant without utilities, Schrock sought water from the City to address problems with mold and a rat infestation, and the City turned on the water. 3RR63-64; 3RR74-77.

Approximately one month later, Schrock requested that the City turn *off* the water. 3RR64. The utilities otherwise remained off for seven years by his choice. In other words, Schrock took the minor inconvenience of paying a $1,500 utility bill for one of his thirty rental properties, and, instead of paying it under protest, he refused to request utility service or rent to tenants, and he allowed his property to allegedly suffer thousands of dollars in damages while vacant.

At worst, the City's actions pursuant to its regulations, even if wrongful, caused Schrock to incur a bill that he did not owe, but had the means to pay. As a matter of law, that does not amount to a taking of his Property.

As reinforced in Schrock's Response to the City's Petition for Review, "rather than acquiesce to an extortionate demand … Schrock

chose instead to stand up for his rights and directly challenge the abusive power of City Hall." Response at p. 9. He "chose" not to rent to tenants and to allow his property to fall into disrepair, so he could make some kind of statement. *Id.* He caused his own harm. His choice negates the possibility of a taking.

According to the opinion of the First Court of Appeals, a city may now be held responsible for an unconstitutional taking for property damage that a property owner could have at least prevented but, instead, voluntarily incurred. A rule of law that would require compensation under such circumstances would be manifestly unjust and open the floodgates to litigation. Furthermore, if a customer can convert a minor billing dispute into an unconstitutional taking by irrationally abandoning his property, cities, which must set their utility rates based on a predicted collection rate, will be deterred from reasonable collection efforts by the fear that a mistake over even a trivial amount will subject them to the risk of a disproportionate taking claim.

CONCLUSION AND PRAYER

Under the First Court of Appeals' reasoning and holding, takings law may now be expanded beyond the examination of property use regulations that proximately cause harm to property owners. To avoid the unjust consequences of such an expansion, which cannot be reconciled with established takings jurisprudence, the City respectfully requests that the Court grant its Petition for Review and reverse the First Court of Appeals' judgment regarding Schrock's regulatory taking claim. The City also prays for any other relief to which it may show it is entitled.

Respectfully submitted,

OLSON & OLSON, L.L.P.

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CITY OF BAYTOWN

CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing Brief on the Merits has a word count 6,616.

/s/ Allison S. Killian
Allison S. Killian

CERTIFICATE OF SERVICE

I certify that on the 5th day of April, 2021, I served *Petitioner's Brief on the Merits*, by serving Respondent's counsel, Robert W. Musemeche, Musemeche Law, P.C., 711 W. Bay Area Blvd., Suite 540, Webster, Texas 77598, robm@musemechelaw.com, via the electronic filing manager in compliance with Rule 9 of the Texas Rules of Appellate Procedure.

/s/ Allison S. Killian
Allison S. Killian

APPENDIX

APPENDIX TAB A

Trial Court's Final Judgment

"CLOSED"

CAUSE NO. 1007923

ALAN SCHROCK, *Plaintiff,*	§	**IN COUNTY CIVIL COURT**
v.	§	**AT LAW NO. 1**
THE CITY OF BAYTOWN, *Defendant.*	§	**HARRIS COUNTY, TEXAS**

In favor of D

FINAL JUDGMENT

On March 7, 2017, this case was called for trial. Plaintiff, Alan Schrock, appeared through his attorney of record, and Defendant, the City of Baytown, appeared through its attorneys of records. The parties announced that they were ready for trial.

A jury was duly accepted, impaneled, and sworn. After Plaintiff rested, Defendant moved for a directed verdict. The Court has considered the pleadings and official records on file in this cause, the evidence, and the arguments of counsel and is of the opinion that Defendant's motion for directed verdict should be granted and that judgment should be rendered for Defendant as a matter of law.

It is accordingly ADJUDGED that Alan Schrock, Plaintiff, take nothing and that the City of Baytown, Defendant, recover court costs from Plaintiff.

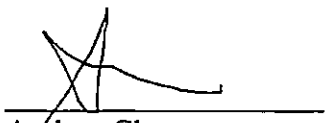
This judgment finally disposes of all parties and all claims and is appealable.

SIGNED this _____ day of MAR 14 2017, 2017.

JUDGE PRESIDING

FILED
2017 MAR 14 AM 8:13
Stan Stanart
COUNTY CLERK
HARRIS COUNTY, TEXAS

Approved to as to form:



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ATTORNEYS FOR THE CITY OF BAYTOWN

APPENDIX TAB B

First Court of Appeals' Opinion

Opinion issued June 27, 2019

In The

Court of Appeals

For The

First District of Texas

NO. 01-17-00442-CV

ALAN SCHROCK, Appellant

V.

CITY OF BAYTOWN, Appellee

On Appeal from the County Civil Court at Law No. 1
Harris County, Texas
Trial Court Case No. 1007923

O P I N I O N

Appellant, Alan Schrock, challenges the trial court's judgment, rendered after a jury trial, in favor of appellee, City of Baytown (the "City"), in Schrock's suit

against the City for taking his property[1] and for a declaratory judgment.[2] In two issues, Schrock contends that the trial court erred in granting the City a directed verdict on his claims.

We affirm in part and reverse and remand in part.

Background

This is the second appeal we have heard involving these parties.[3] In his previous appeal, Schrock challenged the trial court's rendition of summary judgment against him on his regulatory-taking and declaratory-judgment claims.[4] We held that the trial court erred in granting the City summary judgment and dismissing Schrock's claims, and we reversed the trial court's judgment and remanded the case to the trial court for further proceedings consistent with our opinion.[5]

In his second amended petition, Schrock alleged that in 1993, he purchased a house at 606 Vista Avenue in the City to use as a rental property (the "property"), which he did until approximately January 2010. Each time that Schrock leased the property to a new tenant, the City required, before it would connect utility services, including water service, in the tenant's name, that the tenant pay a deposit and

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1 *See* U.S. CONST. amend. V; TEX. CONST. art. I, § 17.

2 *See* TEX. CIV. PRAC. & REM. CODE ANN. §§ 37.001–.011.

3 *See Schrock v. City of Baytown*, No. 01-13-00618-CV, 2015 WL 8486504 (Tex. App.—Houston [1st Dist.] Dec. 10, 2015, pet. denied) (mem. op.).

4 *See id.* at *1, *4–9.

5 *See id.*

provide a copy of the lease agreement related to the property. Thus, whenever a new tenancy began, Schrock provided the City with a copy of the lease agreement, either by furnishing his new tenant with an extra copy to give to the City or by giving a copy of the lease agreement directly to the City himself.

In 2009, the City notified Schrock that he owed it $1,999.67 for unpaid utility services provided by the City to the property for ten of Schrock's prior tenants, dating back to 1993. The City gave Schrock copies of the relevant billing invoices, listing the names and account numbers of his prior delinquent tenants. The City demanded that Schrock pay the outstanding sum within fourteen days to avoid having a lien placed on the property. Schrock disputed the charges for utility services and requested an administrative hearing.

After a hearing, the City reduced the amount owed by Schrock to $1,157.39 for unpaid utility bills that had accrued over the preceding four years, rather than the preceding sixteen years. And it gave Schrock fourteen days to pay. Although after the administrative hearing, the City sent Schrock's attorney a notice detailing its decision, Schrock's attorney misfiled the notice. Because Schrock was not aware of the City's decision, he did not pay the sum assessed by the City, and on June 1, 2009, the City filed a lien against the property for unpaid utility services that it had provided directly to Schrock's tenants who had previously resided at the property. According to Schrock, the City failed to perfect its lien or provide him with notice

of the lien or his right to appeal. And the City continued to provide utility services, including water service, to the property until January 2010, when, pursuant to an ordinance, the City refused to provide services to Schrock's new tenant.[6]

In 1991, the City had enacted an ordinance requiring landlords who wished to prevent the City from filing liens against their rental properties and discontinuing utility services to those properties to submit a "declaration" that their properties were rental properties, which they did not wish to be security for their tenants' utility bills.[7]

Even so, according to Schrock, he complied with the City's ordinance each time that he leased the property to a new tenant because he provided a copy of the lease agreement to the City, either directly or through his tenant. And the City charged new tenants a higher deposit to connect utility services to the property

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6 *See* Baytown, Tex., Code of Ordinances, ch. 98, art. III, § 98-65(g) (1967) (amended 1991) ("No water, garbage or sewer services shall be provided to property encumbered by a lien filed pursuant to this section.").

7 *See id.* § 98-65(i) (amended 1991) ("The owner of any property, which property is rented to another and such tenant carries [C]ity water, sewer or garbage collection services in the tenant's name, may prevent the [C]ity from using that property as security for the water, sewer and garbage collection service charges for service to that property and from filing any lien on such property under this section by filing with the [C]ity utility billing division a declaration in writing specifically naming the service address of that property and declaring such to be rental property, which the owner does not wish to be security for the water, sewer and garbage collection service charges for service to that property.").

because of their status as tenants.[8] Thus, Schrock alleged that the City, at all times, had notice that Schrock used the property as rental property. Also, Schrock asserted that he had complied with the Texas Local Government Code, which provides that a "municipality's lien shall not apply to bills for service connected in a tenant's name after notice by the property owner to the municipality that the property is rental property."[9] The Local Government Code prohibits requiring, as a condition of connecting service, a third-party guarantee of a customer's utility bill or requiring, as a condition of connecting or continuing service, a customer to pay for service previously furnished to another customer at the same address.[10]

Later, in 2011, the City amended its ordinance, removing the requirement that a landlord file a "declaration." Rather, if the City "knows" that a property is occupied by a tenant, it may not file a lien against the property; however, it may report the tenant's delinquency to a credit bureau.[11] In 2012, the City further

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8 *See id.* § 98-65(i)(2) (amended 1991) (when rental declaration on file "the [C]ity shall collect a deposit in the amount of $125.00"); *see also* Baytown, Tex., Code of Ordinances, ch. 98, art. III, § 98-56(a), (b) (1967) (amended 2011) ("Whenever a consumer desires to establish service with the utility billing division, he shall tender to such division . . . the proper deposit. . . . A residential consumer occupying a single-family dwelling house shall be required to place on deposit the amount of $50.00 if he is the owner of the dwelling house; however, a residential consumer occupying a single-family dwelling house shall be required to place on deposit the amount of $200.00 if he is not the owner of the dwelling house.").

9 *See* TEX. LOC. GOV'T CODE ANN. § 552.0025(e).

10 *See id.* § 552.0025(a), (b).

11 *See* Baytown, Tex., Code of Ordinances, ch. 98, art. III, § 98-65(d)(4) (1967) (amended 2011) ("No lien for water charges, garbage collection charges, or sewer

amended its ordinance, allowing utility services to continue to be provided to a property in accordance with the Local Government Code.[12]

Schrock brought regulatory-taking[13] and declaratory-judgment[14] claims against the City. Regarding his regulatory-taking claim, Schrock alleged that since January 2010, the City had refused to provide water service to the property, and without water service, Schrock was not able to use the property as a rental property. Accordingly, Schrock was denied all economically viable use of the property, and the property fell into disrepair and became uninhabitable. Schrock never received any compensation from the City for its regulatory taking of his property.

Schrock further alleged that the City's actions, in the enactment and enforcement of its ordinance,[15] constituted an unreasonable interference with his right to use and enjoy the property and an "unlawful exercise of police

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charges shall be placed on a property if . . . [t]he [C]ity knows the property to be a single-family dwelling house and the delinquent water charges, garbage collection charges, or sewer charges to be for services provided to a residential consumer who is not the owner of the property."); *see id.* § 98-65(i) (1967) (amended 2011) (repealing former subsection (i), entitled "Rental property," and renumbering former subsection (j), entitled "Effect of section," as subsection (i)).

12 *See id.* § 98-65(g) (1967) (amended 2012) ("No water, garbage or sewer services shall be provided to property encumbered by a lien filed pursuant to this section, except as otherwise required by . . . Local Government Code § 552.0025.").

13 *See* U.S. CONST. amend. V; TEX. CONST. art. I, § 17.

14 *See* TEX. CIV. PRAC. & REM. CODE ANN. §§ 37.001–.011.

15 *See* Baytown, Tex., Code of Ordinances, ch. 98, art. III, § 98-65(g), (i) (amended 1991).

power . . . . which primarily and adversely affected a small number of landlords of single[-]family residences." According to Schrock, from 1991 to 2012, the City filed eighteen liens against rental properties, but only eight remained, including the lien on his property.[16] He argued that the City's enforcement of its ordinance was not "in response to a great public necessity," but constituted an "attempt to coerce a small number of landlords into paying their tenants' water bills" out of convenience because it was difficult for the City to collect from tenants who had moved. Schrock, on his regulatory-taking claim, sought "all actual damages resulting from the [City's] inverse condemnation of his [p]roperty."

Regarding his declaratory-judgment claim, Schrock sought a declaration that the City's enforcement of its ordinance[17] against him in 2010 "resulted in the inverse condemnation of [his] property for which no just compensation [was] paid." Further, Schrock sought a declaration that certain sections of the City's ordinance,[18] prior to their amendment, were "invalid, illegal, and/or unconstitutional" and conflicted with the Local Government Code.[19] And he sought a "clarification as to the validity of [the City's] utility lien" as well as a "clarification as to his rights under the current

16 It is undisputed that in June 2013, the City released its lien against the property.

17 *See id.*

18 *See id.*

19 *See* TEX. LOC. GOV'T CODE ANN. § 552.0025.

version" of the City's ordinance[20] and as to whether the City "c[ould] lawfully prevent [his] tenants from obtaining utility service[s] at the [p]roperty."

In its fourth amended answer, the City generally denied Schrock's claims and asserted certain affirmative defenses.

At trial, Schrock testified that in 1993, he purchased the property, which was a ten-year-old mobile home, for $21,000. In 2006 or 2007, Schrock spent $5,000 to $5,500 renovating the property, which included rebuilding the outer walls, installing and painting new siding, and installing new insulation. The trial court admitted into evidence photographs of the property after the renovation, but before any utility services were suspended by the City. In Schrock's opinion, the property would "have held up another 10 or 15 years with the new siding on it."

According to Schrock, he always intended to use the property as a rental property. And since 1993, he consistently rented the property, with never more than a one or two week gap in between tenants. In other words, Schrock "always ha[d] another tenant to move in" to the property, and that tenant would pay Schrock a deposit prior to the previous tenant even vacating. Regarding rent, Schrock testified that his tenants paid less than $2,000 a month and were generally lower-income individuals. The last tenant with whom Schrock signed a lease agreement was

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[20] *See* Baytown, Tex., Code of Ordinances, ch. 98, art. III, § 98-65(g) (amended 2011 and 2012).

required to pay a $400 deposit and $600 each month for rent. Schrock never foresaw a reason that would prevent him from using the property as a rental property.

Schrock explained that the lease agreement that he signed with each of his tenants required the tenant to provide and pay for his own utility services related to the property. And his tenants provided the City with a copy of their lease agreements when seeking the connection of utility services. According to Schrock, tenants were required to provide $125 deposits to the City for the connection of utility services, including water service, while owners of properties were only required to pay $50 deposits.

Schrock further testified that on March 31, 2009, the City sent him a letter, a copy of which the trial court admitted into evidence, stating that, as the owner of the property, he was responsible for "outstanding balances total[ing] . . . $1,999.67" related to unpaid utility services provided by the City to Schrock's tenants from 1993 through 2009. The City, in its letter, essentially wanted him to claim responsibility for the outstanding balances of ten of his previous tenants based on a 1991 City ordinance, which provided, at that time:

> **Sec. 98-65. Liens.**
>
> (a) *Water*. Liens for unpaid water charges shall be filed according to the following:
>
> (1) After the [C]ity has terminated a customer's water . . . , the supervisor of the utility billing division shall file a lien on the property served by the terminated water service and in the amount the customer

> whose service was terminated owed to the [C]ity for water service at the time of the termination of services.
>
> . . . .
>
> (g) *Reconnection of services*. No water, garbage or sewer services shall be provided to property encumbered by a lien filed pursuant to this section. However, the supervisor of the utility billing division shall be authorized to reconnect water, garbage and wastewater services if the customer agrees in writing to pay the accrued water and wastewater charges for [the] property . . . .
>
> . . . .
>
> (i) *Rental Property.*
>
> (1) The owner of any property, which property is rented to another and such tenant carries [C]ity water, sewer or garbage collection services in the tenant's name, may prevent the [C]ity from using that property as security for the water, sewer and garbage collection service charges for service to that property and from filing any lien on such property under this section by filing with the [C]ity utility billing division a declaration in writing specifically naming the service address of that property and declaring such to be rental property, which the owner does not wish to be security for the water, sewer and garbage collection service charges for service to that property.[21]

According to Schrock, he did not know of the ordinance's requirement of a "Rental Property Declaration" until he received the City's letter. And he had no idea that he could possibly be responsible for the outstanding balances for utility services owed by his tenants. In fact, his lease agreement with his tenants stated that they were to pay for utility services; Schrock "had nothing to do with it." And Schrock had never

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[21] The trial court admitted into evidence a copy of the City's ordinance prior to its amendments in 2011 and 2012. *See id.* § 98-65(a), (g), (i) (amended 1991).

received a letter from the City like the March 31, 2009 letter, and he owned approximately thirty-five rental properties by 2009.

Schrock also noted, in regard to the City's ordinance, that it conflicted with Texas law, which states that an "entity . . . cannot hold a third party responsible for somebody else's bill. In other words, the City had an agreement with the customer and they c[ould not] come along and make a third party responsible for th[e] [customer's] bill." Essentially, the City "couldn't do what they were doing."[22]

In response to the City's March 31, 2009 letter, Schrock sought a hearing "to contest the amount due and owing and/or [the] proposed lien" on the property. On April 21, 2009, a hearing was held during which Schrock was told that "the[] law" stated that "landlords of properties had to pay the water bills from [their] tenants that didn't pay [them]." Schrock agreed that, at the time of the hearing, he was the owner of the property and he had not yet filed with the City a "Rental Property Declaration" for the property.

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[22] The City concedes in its briefing that its ordinance, prior to its amendment in 2011 and 2012, "contradicted state law." *See* TEX. LOC. GOV'T CODE ANN. § 552.0025 ("Connection, Disconnection, and Liability for Municipal Utility Services"). The trial court admitted into evidence a copy of the City's amended ordinance, which created four "[e]xemptions" from the placement of liens for utility charges on a property and removed the requirement of a "Rental Property Declaration." *See* Baytown, Tex., Code of Ordinances, ch. 98, art. III, § 98-65(d), (g), (i) (amended 2011 and 2012).

Following the hearing, on April 24, 2009, the City sent Schrock a letter regarding its "[d]ecision concerning the appeal of the imposition of lien for unpaid utility services." That letter, a copy of which the trial court admitted into evidence, states:

> After having considered the testimony received at the hearing held on April 21, 2009, regarding the City's decision to impose a lien for unpaid utility services and after reviewing the billing records together with the Code of Ordinances of the City of Baytown, [the City] ha[s] determined that a lien in the following amount[] should be placed on the property as indicated hereinbelow:
>
> | Property Address | Account Number | Lien Amount |
> |---|---|---|
> | 606 Vista, Baytown, Texas | 1071-00625 | $1,157.39 |
>
> Such amount reflects the cost of utility services provided to the above-referenced property for only the past four years and excludes all late charges. . . .
>
> This decision is based upon the following facts presented at the hearing, namely that:
>
> 1. . . . Schrock admitted that he was the owner of the property at all times during which the unpaid utility services were provided by the City;
>
> 2. [T]he property has not been and cannot be declared as a homestead;
>
> 3. [T]here was no evidence presented contesting [the] above-referenced amount[] for services provided to . . . [the] property; and

> 4. [T]here was no rental declaration on file for the time period in question declaring that . . . Schrock d[id] not wish the property to be used as security for the utility service[] charges for services to the property.
>
> To avoid the imposition of [a] lien, . . . Schrock . . . must pay the above-referenced amount and send a check for the same to[] . . . [the City] on or before fourteen calendar days from the date of this letter. If payment has not been received or a payment arrangement has not been made within such time frame, the City shall no longer be stayed from the imposition of the lien in the amount referenced hereinabove. If a lien is filed, please be advised that the cost of the same will be included and such lien will bear interest . . . .

Schrock stated that he did not receive the City's letter or become aware of it because his attorney misfiled the letter in another client's file. However, Schrock also testified that he knew about the City's letter, and he knew that if he paid $1,157.39 a lien would not be attached to the property. According to Schrock, he was financially able to pay the lien at that time.

On May 1, 2009, Schrock submitted a "Rental Property Declaration" related to the property, asserting that the property constituted a rental property and that he did not "wish [the property] to be security for the water, sewer and garbage collection service charges for service to th[e] property." Although Schrock explained that the City always knew that the property constituted a rental property based on the deposits it had received from his tenants and the lease agreements that were required to be provided for such deposits, he still completed the declaration based on the advice of his attorney.

On May 27, 2009, the City executed a lien, and on June 1, 2009, the City filed the lien in the Harris County real property records. At the time that the City executed and filed its lien, a tenant lived at the property and the City was providing utility services, including water service, to the property. Thus, Schrock explained that he was not initially harmed by the execution of the lien, and he was not even aware of its attachment to the property in June 2009. Schrock noted that, at the time that the City executed and filed its lien, he had already filed the required "Rental Property Declaration" for the property.

At the end of December 2009, Schrock's tenant moved out of the property, and Schrock signed a lease agreement with a new tenant, George Cuellar, on or about January 10, 2010. When Cuellar moved to the property, he sought to have water service to the property "turned on." On or about January 20, 2010, Cuellar's wife, went to the City, with a copy of Cuellar's lease agreement, but a City employee told her that water service to the property could not be connected until the City spoke with Schrock. When Schrock spoke to the City that same day, he was told that the City would not provide utility services, including water service, to the property unless Schrock paid the lien attached to the property. According to Schrock, this was the first time that he ever became aware that the City had attached a lien to the property. At that time, Schrock was told by a City employee that it would cost $1,251.59 to pay off the lien, interest, and the filing fee.

When Schrock went to pay the lien; however, he was told that he was required to pay $1,415.76, rather than $1,251.59, because Schrock was also liable for the unpaid "water bill" of his last tenant who vacated the property in December 2009. In other words, Schrock was told, in addition to paying the lien amount, he was responsible for "pay[ing] [his] last tenant's water bill before [his] new tenant c[ould] get [water] service." According to Schrock, his tenant's unpaid water bill did not accrue until after the City had filed its lien on June 1, 2009; and, essentially, he was being asked to pay more to have the lien released than the actual cost of the lien itself. At trial, the court admitted into evidence a copy of certain e-mails between employees of the City, which confirmed that the unpaid water bill of Schrock's last tenant "was not included in the lien."

Although Schrock was financially able to pay the $1,415.76 amount in January 2010, he did not bring a check with him to cover the additional amount subsequently requested by the City. Thus, Schrock did not pay the $1,415.76 on or about January 20, 2010, and the City refused to connect utility services, including water service, to the property that day. When Cuellar learned that he could not obtain utility services for the property, he immediately moved out of the property. As a result, Schrock refunded Cuellar his $600 rent payment and his $400 deposit, and he reimbursed Cuellar for the deposits that Cuellar had made for gas and electricity. At the time that Cuellar vacated the property, Schrock did not have another tenant to

rent the property. Schrock explained that he was harmed because the lien placed on the property prevented any new tenant from securing utility services, including water service for the property.

On October 19, 2010, Schrock, on the advice of his attorney, attempted to pay the lien attached to his property for a second time. On that day, he was told that he would have to pay $1,502.01, in order to have utility services turned back on at the property, which included the lien amount, interest, a filing fee, and his last tenant's unpaid water bill. Schrock noted that the lien amount remained unchanged, even though in May 2010, one of his former tenants paid his delinquent utilities account with the City. Additionally, when Schrock went to make his lien payment, the City informed him that he would need to also address his "other 19 accounts" related to the other nineteen rental properties that he owned at the time. In other words, according to Schrock, he was told that he "had to pay everything that had ever been on any of [his] rent houses," which "could have been as much as 19 times" $1,500. Thus, Schrock believed that paying the lien attached to the property would not ultimately resolve his situation with the City.

Schrock further testified that at the time that he attempted to pay the lien for the second time, in October 2010, the property was still vacant and he could not rent it to anyone because the City would not provide utility services to a new tenant. And Schrock explained that if he did rent the property to a new tenant, but had not paid

the lien attached to the property, the City would simply deny services to that new tenant, as it had in the past.

Regarding the condition of the property, after the City stopped providing utility services to the property in January 2010, it became difficult for Schrock to maintain without a tenant living there. For instance, although Schrock "check[ed]" on the property once a week, rats gained access to the property through "the back of the cabinets," under the stove, and "the heating unit in the hall." The rats went "up in[to] the ceiling" and ate holes. Additionally, mold grew in various places inside the property, and in 2012, the property was "broken into by kids a couple of times [who] pretty much tore up [the] inside." According to Schrock, those individuals "tore the walls up," tore out the light fixtures and ceiling fans, "busted windows," ripped the doors off of cabinets, "pulled . . . pieces of the flooring up," and vandalized the air-conditioning unit. Further, Schrock testified that because the property was vacant for an extended period of time, the City "disconnect[ed] the . . . power wires," "pull[ed] the [electrical] meter out," and removed the gas meter.

The trial court admitted into evidence photographs of the property taken in 2012 after the property had been vandalized. Schrock explained that the photographs depicted the damage due to the vandalism, but also the damage done by rats and mold that had grown at the property. The trial court also admitted into

evidence photographs of the property taken "[v]ery recent[ly]," within three weeks or a month of trial.

Schrock testified that if the City had provided utility services, including water service, to the property then the property would have been occupied and the aforementioned damages would not have occurred. In fact, according to Schrock, no one had ever broken into any of his other rental properties, which all had tenants. In Schrock's opinion, the property was not currently habitable. And in order to make the property habitable, he would need to repair all of the walls, install new appliances, install a new air-conditioning system, replace the carpet, have "electric reconnected," "test the gas pipes . . . and have the gas meter reconnected," and potentially replace some wood on the exterior of the property. Schrock explained that it would cost $1,100 to have the "power wires" reconnected and the electrical meter replaced. It would also cost $400 to have the gas meter put back in, and approximately $4,922.52 to replace the air-conditioning system. Additionally, because of the rats, mold, and vandalism at the property, it would cost $8,500 to repair the drywall, approximately $2,000 to replace the carpet, and approximately $500 to replace the refrigerator, which had "complete[ly] rust[ed]" because the property was vacant. According to Schrock, nothing was "wrong" with the property before the City stopped providing utility services. At the time of trial, the property did not have utility services, including water service connected.

Schrock further explained that, in general, he had accumulated approximately twenty to thirty rental properties in the City and he originally planned to purchase three houses a year until he reached the age of sixty-five. At that time, he would begin selling the properties and using the money from those sales to support himself. However, once the City stopped providing utility services to the property in January 2010, he stopped buying rental properties, having bought his last two properties in 2009 or 2010. In Schrock's opinion, if the City had not tried to make him pay for his tenant's unpaid utility services then he would have continued with his investment plan.

On cross-examination, Schrock noted that he had never had difficulty securing utility services for his own home. And he testified that in 2012 he, based on the advice of a City employee, actually requested that "the water [for the property] . . . be turned on, like an emergency turn-on," by the City so that he could clean the property to remove the mold and rats. The trial court admitted into evidence a copy of Schrock's faxed request, dated February 28, 2012, which states: "To the City of Baytown [W]ater Dept. Please turn on the water service at [the property] ASAP using my 888 account with the floating deposit." When he made the request, Schrock was unsure whether the City would actually restore water service to the property.

Schrock further testified that on or about March 2, 2012, the City restored water service at the property, and on April 30, 2012, Schrock requested that the City turn off the water service. After he had the water service to the property temporarily restored, Schrock did not try to rent the property to a new tenant because it was "unrentable" or unlivable, as the electrical wires had been disconnected, there was no gas for the property, and it was infested with rats. According to Schrock, a City employee told him that "it was a mistake for [the City] to [have] turn[ed] [the] water back on" in 2012.

On June 13, 2013, the City released the lien attached to the property, and it filed the release in the Harris County real property records. Schrock conceded that he did not know whether, at the time of trial, the City would provide utility services, including water service, to a new tenant at the property since it was no longer encumbered by the lien. When asked whether the City ever said that he could not rent out the property, Schrock responded, "Not those words, no." However, Schrock also testified that although the lien no longer encumbered his property, the City had never told him that he was not responsible for his tenants' unpaid utility bills, and he did not know of anything preventing the City from attaching another lien to the property. Schrock never paid the lien that the City attached to his property in 2009.

Kevin Troller, assistant city manager for the City, testified that, in accordance with the City's ordinance, if a property owner had a "Rental Property Declaration"

on file, the City "would go after the tenant" for any unpaid utility services. However, if there was no "Rental Property Declaration" on file, then the City "would go after the [property] owner if [his] tenant did not pay." Troller conceded that irrespective of a "Rental Property Declaration" the City would have been aware whether the individual seeking utility services, including water service, at a given property was a property owner or a tenant and whether a property was a rental property because the deposit required for the installation of utility services depended on whether an individual was a property owner or a tenant. When asked whether "the City would be on notice at that point whether or not the property is [a] rental property," Troller stated, "Yes, sir."

Troller further testified that the City's ordinance was amended after 2010, and it no longer requires that "a third-party or [property] owner . . . be held responsible for someone else's [utility] bill." Troller stated that he was not aware that the City's ordinance, prior to its amendment, conflicted with Texas law.

After Schrock rested his case, the City orally moved for a directed verdict on Schrock's regulatory-taking claim, arguing that there were no disputed issues of material fact related to Schrock's regulatory-taking claim; the question of whether there was a regulatory taking was a question of law; the City's action did not constitute a taking as a matter of law; and there was no evidence that the City was responsible for Schrock's damages because "a substantial amount of the

damages . . . related to vandalism of the property" were unrelated to the purported regulatory taking. The trial court granted the City's motion and entered a directed verdict, holding that Schrock take nothing on his regulatory-taking claim and his declaratory-judgment claim against the City. Schrock filed a motion for new trial, which was overruled by operation of law.

Standard of Review

We review the trial court's grant of directed verdict de novo. *JP Morgan Chase Bank, N.A., v. Orca Assets G.P., L.L.C.*, 546 S.W.3d 648, 653 (Tex. 2018); *City of Keller v. Wilson*, 168 S.W.3d 802, 823 (Tex. 2005). Directed verdicts are reviewed under the same legal-sufficiency standard that applies to no-evidence summary judgments. *Merriman v. XTO Energy, Inc.*, 407 S.W.3d 244, 248 (Tex. 2013). We sustain a legal-sufficiency point when (1) there is a complete absence of evidence regarding a vital fact, (2) rules of law or evidence preclude according weight to the only evidence offered to prove a vital fact, (3) the evidence offered to prove a vital fact is no more than a scintilla, or (4) the evidence conclusively establishes the opposite of the vital fact. *City of Keller*, 168 S.W.3d at 810. We consider the evidence in the light most favorable to the nonmovant, crediting evidence a reasonable jury could credit and disregarding contrary evidence and inferences unless a reasonable jury could not. *Del Lago Partners, Inc. v. Smith*, 307 S.W.3d 762, 770 (Tex. 2010); *City of Keller*, 168 S.W.3d at 827. Conclusive

evidence cannot be disregarded. *See Dow Chem. Co. v. Francis*, 46 S.W.3d 237, 241 (Tex. 2001); *see also City of Keller*, 168 S.W.3d at 816 ("Evidence is conclusive only if reasonable people could not differ in their conclusions . . . .").

The nonmovant bears the burden of identifying evidence before the trial court that raises a genuine issue of material fact as to each challenged element of his cause of action. *See Boerjan v. Rodriguez*, 436 S.W.3d 307, 310 (Tex. 2014). A directed verdict in favor of the defendant is proper if the plaintiff "fails to present evidence raising a fact issue essential to [his] right of recovery," or the plaintiff "admits or the evidence conclusively establishes a defense to [his] cause of action." *Prudential Ins. Co. of Am. v. Fin. Review Servs., Inc.*, 29 S.W.3d 74, 77 (Tex. 2000). We may affirm a directed verdict on any ground that supports it. *RSL-3B-IL, Ltd. v. Prudential Ins. Co. of Am.*, 470 S.W.3d 131, 136 (Tex. App.—Houston [1st Dist.] 2015, pet. denied); *Exxon Corp. v. Breezevale Ltd.*, 82 S.W.3d 429, 443 (Tex. App.—Dallas 2002, pet. denied). However, if there is evidence that raises a material fact issue on any theory of recovery, a directed verdict is improper and the case must be reversed and remanded. *See Cox v. S. Garrett, L.L.C.*, 245 S.W.3d 574, 578 (Tex. App.—Houston [1st Dist.] 2007, no pet.) (citing *Szczepanik v. First S. Tr. Co.*, 883 S.W.2d 648, 649 (Tex. 1994)).

Regulatory-Taking Claim

In his first issue, Schrock argues that the trial court erred in granting a directed verdict that Schrock take nothing on his regulatory-taking claim because "there were material fact issues to be determined by the jury."

The Fifth Amendment of the United States Constitution provides that "private property [shall not] be taken for public use, without just compensation." U.S. CONST. amend. V. This constitutional protection has been incorporated through the Fourteenth Amendment to apply to the individual states. *Williamson Cty. Reg'l Planning Comm'n v. Hamilton Bank of Johnson City*, 473 U.S. 172, 175 n.1 (1985); *Hearts Bluff Game Ranch, Inc. v. State*, 381 S.W.3d 468, 477 n.19 (Tex. 2012). Similarly, Article I, section 17 of the Texas Constitution guarantees that "[n]o person's property shall be taken, damaged, or destroyed for or applied to public use without adequate compensation being made." TEX. CONST. art. I, § 17(a). Our case law on takings under the Texas Constitution is consistent with federal jurisprudence, and we consider federal and state takings claims together, as the analysis for both is complementary. *Hearts Bluff Game Ranch*, 381 S.W.3d at 477; *see also Sheffield Dev. Co. v. City of Glenn Heights*, 140 S.W.3d 660, 669 (Tex. 2004) (although takings provisions in state and federal constitutions worded differently, they are comparable).

A property owner whose property has been taken, damaged, destroyed for, or applied to public use without adequate compensation may bring an inverse condemnation claim. *City of Abilene v. Burk Royalty Co.*, 470 S.W.2d 643, 646 (Tex. 1971); *City of Hous. v. Boyle*, 148 S.W.3d 171, 177 (Tex. App.—Houston [1st Dist.] 2004, no pet.); *see also City of Hous. v. Carlson*, 451 S.W.3d 828, 831 (Tex. 2014) (where property owner believes compensation due, he may seek redress via inverse-condemnation claim). The claim is denominated as "inverse" because the property owner asserts the claim. *City of Hous. v. Texan Land & Cattle Co.*, 138 S.W.3d 382, 387 (Tex. App.—Houston [14th Dist.] 2004, no pet.) (internal quotations omitted).

Takings can be classified as either physical or regulatory takings. *Mayhew v. Town of Sunnyvale*, 964 S.W.2d 922, 933 (Tex. 1998). A physical taking occurs when the government authorizes an unwarranted physical occupation of an individual's property, whereas a regulatory taking occurs when a government's regulation injures the property's value or usefulness. *See Lowenberg v. City of Dall.*, 168 S.W.3d 800, 801–02 (Tex. 2005); *Mayhew*, 964 S.W.2d at 933; *see also City of Dall. v. Blanton*, 200 S.W.3d 266, 271 (Tex. App.—Dallas 2006, no pet.) ("A compensable regulatory taking can occur when [the] government[] . . . imposes restrictions that either deny a property owner all economically viable use of his

property or unreasonably interfere[] with the owner's right to use and enjoy the property.").

The United States Supreme Court and the Texas Supreme Court have recognized several theories of regulatory takings. *See Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 538–40 (2005); *Edwards Aquifer Auth. v. Day*, 369 S.W.3d 814, 838–39 (Tex. 2012); *City of Sherman v. Wayne*, 266 S.W.3d 34, 42–44 (Tex. App.—Dallas 2008, no pet.) ("At least three theories of regulatory takings have been discussed by the United States Supreme Court and the Texas Supreme Court . . . ."). Relevant to the instant case, a regulation may constitute a taking necessitating compensation if, under an "essentially ad hoc, factual inquir[y]," the government action unreasonably interferes with a property owner's use and enjoyment of the property. *Sheffield*, 140 S.W.3d at 672–73 (citing *Penn Cent. Transp. Co. v. City of N.Y.*, 438 U.S. 104, 124 (1978)).

To determine whether a regulatory taking has resulted from the government's unreasonable interference with a property owner's right to use and enjoy his property, courts must consider the following three factors: (1) the economic impact of the regulation on the property owner; (2) the extent to which the regulation interferes with the property owner's distinct investment-backed expectations; and (3) the character of the governmental action. *Id.* (citing *Penn Cent.*, 438 U.S. at 124); *Mayhew*, 964 S.W.2d at 935–36; *City of Hous. v. Maguire Oil Co.*, 342 S.W.3d

726, 736 & n.7 (Tex. App.—Houston [14th Dist.] 2011, pet. denied). These factors are not exclusive and no single factor is determinative. *Day*, 369 S.W.3d at 840; *Sheffield*, 140 S.W.3d at 672–73. A regulatory-taking analysis requires consideration of all the relevant surrounding circumstances. *Sheffield*, 140 S.W.3d at 672–73.

A. Economic Impact

The first factor, the economic impact of the regulation on the property owner, "compares the value that has been taken from the property with the value that remains in the property." *Mayhew*, 964 S.W.2d at 935–36. In other words, the proper inquiry considers the diminution in the value of the property brought on by the regulation in question. *Edwards Aquifer Auth. v. Bragg*, 421 S.W.3d 118, 139 (Tex. App.—San Antonio 2013, pet. denied). Lost profits and lost investment are relevant factors to consider in assessing the value of a property and the severity of the economic impact on a property owner. *Sheffield*, 140 S.W.3d at 677; *see also Cty. of El Paso v. Navar*, 511 S.W.3d 624, 631 (Tex. App.—El Paso 2015, no pet.) ("Lost profits are one relevant factor to consider in assessing the severity of the economic impact of governmental action, especially when the property affected has had a proven, profitable use at the time of the government action."); *Wayne*, 266 S.W.3d at 45 ("[I]t is incorrect to say that profit is not a consideration in determining the value of property."); *Park v. City of San Antonio*, 230 S.W.3d 860, 869 (Tex.

App.—San Antonio 2007, pet. denied); *see also Schrock v. City of Baytown*, No. 01-13-00618-CV, 2015 WL 8486504, at *5 (Tex. App.—Houston [1st Dist.] Dec. 10, 2015, pet. denied) (mem. op.) (explaining "lost rents" consideration in economic-impact analysis and recognizing "a property owner has a constitutionally protected property interest in lost rents"). Further, a property owner's inability to continue renting his property due to the government's regulation may constitute evidence of the economic impact. *See Village of Tiki Island v. Ronquille*, 463 S.W.3d 562, 578–79 (Tex. App.—Houston [1st Dist.] 2015, no pet.).

Schrock testified that he purchased the property in 1993 for $21,000. In 2006 or 2007, he spent $5,000 to $5,500 renovating the property, which included rebuilding the outer walls, installing and painting new siding, and installing new insulation. The trial court admitted into evidence photographs of the property after the renovation, but before any utility services were suspended by the City. Schrock opined that the property would "have held up another 10 or 15 years with the new siding on it."

From 1993 until January 2010, Schrock consistently rented the property, with never more than a one or two week gap in between tenants. According to Schrock, he "always ha[d] another tenant to move in" to the property. Schrock testified that his tenants paid less than $2,000 a month and his last tenant was required to pay $600 a month in rent and a $400 deposit.

In January 2010, Schrock signed a lease agreement with a new tenant, Cuellar. However, when Cuellar, on or about January 20, 2010, sought to have water service to the property "turned on," the City refused to do so unless Schrock paid the cost of the lien that the City had attached to his property as well as interest, a filing fee, and the unpaid "water bill" of one of Schrock's former tenants that accrued after the City had filed its lien. Because Schrock could not pay the amount owed on or about January 20, 2010, Cuellar vacated the property immediately because the City refused to provide water service. As a result, Schrock refunded Cuellar his $600 rent payment and his $400 deposit, and he reimbursed Cuellar for the deposits that he had made for gas and electricity. At the time that Cuellar vacated the property, Schrock did not have another tenant to rent the property. According to Schrock, the lien placed on the property prevented any new tenant from securing utility services, including water service, for the property, and thus, prevented Schrock from renting the property from January 2010 onward.

Schrock further testified that after the City stopped providing utility services to the property in January 2010, it became difficult to maintain the property without a tenant living there. For instance, rats gained access to the property through "the back of the cabinets," under the stove, and "the heating unit in the hall." The rats also went "up in[to] the ceiling" and ate holes. Additionally, mold grew in various places inside the property, and in 2012, the property was "broken into by kids a

couple of times [who] pretty much tore up [the] inside." Those individuals "tore the walls up," tore out the light fixtures and ceiling fans, "busted windows," ripped the doors off of cabinets, "pulled . . . pieces of the flooring up," and vandalized the air-conditioning unit. Further, because the property was vacant for an extended period of time, the City "disconnect[ed] the . . . power wires," "pull[ed] the [electrical] meter out," and removed the gas meter. According to Schrock, the property became uninhabitable.

Schrock also explained that if the City had provided utility services, including water service, to the property then the property would have been occupied and the aforementioned damages would not have occurred. In fact, no one had ever broken into any of his other rental properties, which all had tenants.

In order to make the property habitable again, Schrock testified that it would cost $1,100 to have the "power wires" reconnected and the electrical meter replaced. It would also cost $400 to have the gas meter put back in, and approximately $4,922.52 to replace the air-conditioning system. Additionally, because of the rats, mold, and vandalism at the property, it would cost $8,500 to repair the drywall, approximately $2,000 to replace the carpet, and approximately $500 to replace the refrigerator, which had "complete[ly] rust[ed]" because the property was vacant.

The City argues that the trial court properly granted a directed verdict on Schrock's regulatory-taking claim because Schrock provided "no evidence of the

value of the [p]roperty . . . to permit a fact finder to determine the difference in value [of the property] before and after the [purported] taking." However, such an argument unnecessarily limits the considerations that are to be taken into account in determining the economic impact of the regulation on Schrock.

As noted above, relevant to the economic-impact inquiry is the diminution in the value of the property brought on by the City's regulation; lost profits and lost investment suffered by Schrock because of the City's regulation; Schrock's ability, or lack thereof, to continue renting the property because of the City's regulation; and whether the property had a proven, profitable use at the time. *See Sheffield*, 140 S.W.3d at 677; *Navar*, 511 S.W.3d at 631; *Bragg*, 421 S.W.3d at 139; *Wayne*, 266 S.W.3d at 45; *Park*, 230 S.W.3d at 869; *Ronquille*, 463 S.W.3d at 578–79. These are disputed issues of material fact to be answered by the fact finder, i.e., the jury in the instant case, prior to the trial court's ultimate determination of the economic impact of the City's regulation on Schrock. *See City of Dall. v. Millwee-Jackson Joint Venture*, No. 05-13-00278-CV, 2014 WL 1413559, at *7 (Tex. App.—April 4, 2014, pet. denied) (mem. op.) ("Whether the City's action rises to the level of a regulatory taking requires resolution of several disputed facts necessary for application of the legal principles necessary to establish a regulatory taking[] claim."); *Wayne*, 266 S.W.3d at 39, 45–46 (regulatory-taking case with jury trial); *see also City of Lorena v. BMTP Holdings, L.P.*, 409 S.W.3d 634, 645 (Tex. 2013)

(evidence raised factual disputes with regard to extent of government's intrusion where property owner, regarding economic impact, asserted property had diminished in value due to government's moratorium); *Schrock*, 2015 WL 8486504, at *5–6 (recognizing fact issues regarding economic impact of regulation at summary-judgment stage). Notably, although the ultimate determination of whether a government's regulation constitutes a compensable taking is a question of law, "determining whether a [government] regulation is unconstitutional requires the consideration of a number of factual issues" and we must depend on the fact finder "to resolve disputed facts regarding the extent of the governmental intrusion on the property" and the "diminution in [a] property's value." *Mayhew*, 964 S.W.2d at 932–33, 936–37; *Wayne*, 266 S.W.3d at 45–46 (jury must make underlying factual determinations regarding extent of government intrusion and diminution in property's value); *see also Schrock*, 2015 WL 8486504, at *5.

And as for the City's argument that Schrock cannot testify as to the value of his property or the required expenses, we disagree. *See Redman Homes, Inc. v. Ivy*, 920 S.W.2d 664, 669 (Tex. 1996); *Wayne*, 266 S.W.3d at 49 n.12; *Blanton*, 200 S.W.3d at 274–75 (property owner's testimony concerning value and required expenses relevant to economic-impact inquiry); *see also BMTP Holdings*, 409 S.W.3d at 645 (considering property owner's assessment of diminished value of

property due to government's intrusion in considering whether factual dispute raised regarding economic impact on owner).

B. Interference with Investment-Backed Expectations

Under the second factor, the extent to which the regulation interferes with the property owner's distinct investment-backed expectations, "[t]he existing and permitted uses of the property constitute the 'primary expectation' of the [property owner] that is affected by regulation." *Mayhew*, 964 S.W.2d at 936. And the "[h]istorical uses of the property are critically important when determining the *reasonable* investment-backed expectation of the [property owner]." *Id.* at 937 (emphasis added). Existing property regulations at the time a property is purchased and knowledge of those existing regulations should be considered in determining whether a regulation interferes with investment-backed expectations. *Id.* at 936–38. The purpose of the investment-backed expectation requirement is to assess whether the property owner has taken legitimate risks with the reasonable expectation of being able to use the property, which, in fairness and justice, would entitle him to compensation. *Bragg*, 421 S.W.3d at 142.

The trial court admitted into evidence a copy of the City's ordinance in effect when Schrock purchased the property in 1993.[23] *See generally City of Farmers Branch v. Ramos*, 235 S.W.3d 462, 469 (Tex. App.—Dallas 2007, no pet.) (court

[23] *See id.* § 98-65(a), (g), (i) (amended 1991).

may also take judicial notice of City ordinance); *Blackwell v. Harris Cty.*, 909 S.W.2d 135, 140 n.2 (Tex. App.—Houston [14th Dist.] 1995, writ denied). Schrock testified that when he bought the property in 1993, he intended to always use it as a rental property, and at the time of purchase, he had no reason to believe that he would not be able to use the property as a rental property. Further, from 1993 until January 2010, Schrock consistently rented the property, with never more than a one or two week gap in between tenants. In other words, Schrock "always ha[d] another tenant to move in" to the property, and that tenant would pay Schrock a deposit prior to the previous tenant even vacating. Schrock never foresaw a reason that would prevent him from using the property as a rental property.

Schrock also testified that, in general, he had accumulated approximately twenty to thirty rental properties and he originally planned to purchase three houses a year until he reached the age of sixty-five. At that time, he would begin selling the properties and using the money from those sales to support himself. However, once the City stopped providing utility services to the property in January 2010, he essentially stopped buying rental properties, having bought his last two additional properties in 2010. At the time of trial, Schrock had bought only those two houses in the last seven years. In Schrock's opinion, if the City had not tried to make him pay for his tenant's unpaid utility services, then he would have continued with his investment plan.

Regarding the City's ordinance, Schrock explained that on March 31, 2009, the City sent him a letter, stating that, as the owner of the property, he was responsible for "outstanding balances total[ing] . . . $1,999.67" related to unpaid utility services provided by the City to Schrock's tenants from 1993 through 2009. The City, in its letter, essentially wanted Schrock to claim responsibility for the outstanding balances of ten of his previous tenants based on the City's ordinance.[24] According to Schrock, he did not know of the ordinance's requirement of a "Rental Property Declaration" until he received the City's letter. And he had no idea that he could possibly be held responsible for the outstanding balances for utility services owed by his tenants. In fact, his lease agreement with his tenants stated that they were to pay for utility services; Schrock "had nothing to do with it." Schrock had never received a letter from the City, like the March 31, 2009 letter, and he owned approximately thirty-five rental properties by 2009.

The City in its briefing states, as it did in the trial court, that it does not dispute that "Schrock bought the [p]roperty to rent to tenants." However, when considering the second factor, i.e., the extent to which the regulation interferes with Schrock's distinct investment-backed expectations, we are not only concerned with the nature of Schrock's investment-backed expectation, but also with the reasonableness of that expectation. *Mayhew*, 964 S.W.2d at 936–38. And Schrock's knowledge of existing

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[24] *See id.*

regulations is relevant to the ultimate determination of the extent that the City's ordinance inferred with his investment-backed expectations. *Id.* at 936.

These are disputed issues of material fact to be answered by the fact finder, i.e., the jury in the instant case, prior to the trial court's ultimate determination of the extent to which the City's ordinance interferes with Schrock's distinct investment-backed expectations. *See Millwee-Jackson Joint Venture*, 2014 WL 1413559, at *6–7 (fact finder required to resolve several fact issues including reasonableness of property owner's investment-backed expectation); *see also Mayhew*, 964 S.W.2d at 932–33, 936–37 (although ultimate determination of whether government's regulation constitutes compensable taking constitutes question of law, "determining whether a [government] regulation is unconstitutional requires the consideration of a number of factual issues" and we must depend on fact finder "to resolve disputed facts"); *Schrock*, 2015 WL 8486504, at *5–6 (recognizing, at summary-judgment stage, fact issues regarding extent to which regulation interferes with Schrock's distinct investment-backed expectations).

C. Character of Governmental Action

Regarding the third factor, the character of the governmental action, "the nature of the regulation is not as factually dependent as the other two [factors]." *Bragg*, 421 S.W.3d at 144 (internal quotations omitted). And as stated in our previous opinion, generally, "where courts have found direct governmental actions

in which the governmental defendant had regulatory authority over the matter causing the [property owner's] harm, they have generally found a taking." *Schrock*, 2015 WL 8486504, at *5 (internal quotations omitted); *see also Hearts Bluff Game Ranch*, 381 S.W.3d at 480. Here, "it is undisputed that the City had direct regulatory authority over the matter causing [Schrock's] harm." *Schrock*, 2015 WL 8486504, at *5.

However, this is not the only consideration under the third factor. Rather, relevant to the character of the governmental action is evidence that the government acted illegitimately or in bad faith and whether it directed the governmental action in order to injure the property owner, rather than for its purported purpose. *See Hearts Bluff Game Ranch*, 381 S.W.3d at 487–88 (evidence of bad faith "given due weight" as is evidence government "targeted one particular landowner"); *FLCT, Ltd. v. City of Frisco*, 493 S.W.3d 238, 272 (Tex. App.—Fort Worth 2016, pet. denied) (considering whether City intentionally targeted property owner); *Navar*, 511 S.W.3d at 631; *Comunidad Balboa, LLC v. City of Nassau Bay*, 402 S.W.3d 479, 486 (Tex. App.—Houston [14th Dist.] 2013, pet. denied) ("Whether the governmental entity acted in bad faith has often been a consideration in determining whether a governmental action gives rise to a compensable taking."); *Blanton*, 200 S.W.3d at 279 (relevant to character of governmental action whether City made decision to take unfair advantage of property owner); *see also Hallco Tex., Inc. v.*

McMullen Cty., 221 S.W.3d 50, 77–78 (Tex. 2006) (Hecht, J. dissenting) (noting timing of county's ordinance suggested may have been directed at injuring property owner rather than protecting county and considering whether evidence supported county's assertion ordinance adopted to protect health and safety of residents); *Sheffield*, 140 S.W.3d at 678–79 (evidence City attempted to take unfair advantage of developer when decision to rezone not made until developer closed on purchase of property).

Schrock testified that even though he, prior to May 1, 2009, had never submitted a "Rental Property Declaration," in order to assert that he did not "wish [the property] to be security for the water, sewer and garbage collection service charges for service to th[e] property," the City always knew that the property constituted a rental property based on the amount of a deposit it had received from Schrock's tenants for the initiation of utility services, including water service. Further, every time that the City provided one of Schrock's tenants with utility services, that tenant gave the City a copy of the lease agreement for the property.

Similarly, Troller, assistant city manager for the City, explained that irrespective of whether a property owner ever filed a "Rental Property Declaration," the City was aware whether an individual seeking utility services, including water service, at a given property was a property owner or a tenant and whether a property constituted a rental property because the amount of deposit required for the initiation

of utility services depended on whether a given individual was a property owner or a tenant. Further, when asked whether "the City would be on notice at that point[, i.e., at the time a deposit for utility services was paid,] whether or not the property [was a] rental property," Troller stated, "Yes, sir."

Schrock also testified that the City's ordinance, prior to its amendment in 2011 and 2012, conflicted with Texas law,[25] and the State concedes the same. And the record reveals that the City's ordinance, in 2011 and 2012, was amended to create exemptions from the placement of liens for unpaid utility services and to remove the "Rental Property Declaration" requirement entirely.[26] However, according to Schrock, at his April 21, 2009 hearing "to contest the amount due and owing and/or [the] proposed lien" on the property, he was told by the City that "the[] law" stated that "landlords of properties had to pay the water bills from [their] tenants that didn't pay [them]." Yet, Troller, who conducted Schrock's hearing and signed the City's April 24, 2009 letter regarding "the appeal of the imposition of lien for unpaid utility services," testified that that he was not aware that the City's ordinance, prior to its amendment, conflicted with Texas law.

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25 *See* TEX. LOC. GOV'T CODE ANN. § 552.0025.

26 *See* Baytown, Tex., Code of Ordinances, ch. 98, art. III, § 98-65(g) (amended 2011 and 2012).

Further, Schrock testified that when he attempted to pay the lien attached to the property on October 19, 2010, the amount of the lien remained unchanged, even though in May 2010, one of his former tenants actually paid a delinquent utilities account with the City. And when Schrock went to make his lien payment in October 2010, the City informed him that he would need to also address his "other 19 accounts" related to the other nineteen rental properties that he owned at the time. In other words, according to Schrock, he was told that he "had to pay everything that had ever been on any of [his] rent houses," which "could have been as much as 19 times" $1,500. Thus, Schrock believed that paying the lien attached to the property would not ultimately resolve his situation with the City.

Based on the foregoing, whether the City acted illegitimately or in bad faith and whether it directed its governmental action in order to injure Schrock, rather than for its purported purpose, are disputed issues of material fact to be answered by the fact finder, i.e., the jury in the instant case, prior to the trial court's ultimate determination of the character of the governmental action. *See Mayhew*, 964 S.W.2d at 932–33, 936–37 (although ultimate determination of whether government's regulation constitutes compensable taking constitutes question of law, "determining whether a [government] regulation is unconstitutional requires the consideration of a number of factual issues" and we must depend on the fact finder "to resolve disputed facts"); *Millwee-Jackson Joint Venture*, 2014 WL 1413559, at *6 (three

factors must be evaluated by trial court, as well as any other relevant consideration, to determine whether there has been regulatory taking, but "fact finder will be [the one] required to resolve several fact issues"); *Wayne*, 266 S.W.3d at 45–46 (jury must make underlying factual determinations); *see also Hallco*, 221 S.W.3d at 78 (Hecht, J. dissenting) ("Whether a regulatory taking has occurred is, as we have said, a question of law, but it must be answered after the relevant facts have been determined.").

D. Other Considerations

Although in determining whether a regulatory taking has resulted from the government's unreasonable interference with a property owner's right to use and enjoy his property, a court may consider the aforementioned three factors and any "surrounding circumstances" or other "relevant circumstances," little light has been cast as to what such relevant circumstances may be. *See Sheffield*, 140 S.W.3d at 672–73 (internal quotations omitted); *see also Day*, 369 S.W.3d at 840; *Bragg*, 421 S.W.3d at 145–46 (noting under "[o]ther [c]onsiderations" that courts may "consider the nature of the [property owner's] business beyond the financial considerations analyzed under the economic[-]impact factor"). Because Schrock has not asserted that there were "material fact issues to be determined by the jury" related to any such other necessary considerations, we do not express an opinion whether any

"surrounding circumstances" or other "relevant circumstances" raise additional fact issues. *See* TEX. R. APP. P. 47.1.

E. Damages

In his second amended petition, Schrock, on his regulatory-taking claim, sought "all actual damages resulting from the [City's] inverse condemnation of his [p]roperty." The City, however, argues that the trial court properly granted a directed verdict on Schrock's regulatory-taking claim because Schrock "provided no evidence of the value of the [p]roperty" on "[a]ny other date after 1993 when Schrock purchased the property," and thus, provided no evidence of damages.

In a condemnation proceeding, the burden to establish the value of the condemned property is on the condemnee. *Religious of Sacred Heart of Tex. v. City of Hous.*, 836 S.W.2d 606, 613 (Tex. 1992); *State v. Moore Outdoor Props., L.P.*, 416 S.W.3d 237, 247 (Tex. App.—El Paso 2013, pet. denied). The term "[m]arket value" means "the price the property will bring when offered for sale by one who desires to sell, but is not obliged to sell, and is bought by one who desires to buy, but is under no necessity of buying." *City of Harlingen v. Estate of Sharboneau*, 48 S.W.3d 177, 182 (Tex. 2001). Texas recognizes three approaches to determining the market value of a condemned property: the comparable sales approach, the income approach, and the cost approach. *State v. Cent. Expressway Sign Assocs.*, 302 S.W.3d 866, 871 (Tex. 2009); *Sharboneau*, 48 S.W.3d at 182; *see also City of*

San Antonio v. El Dorado Amusement Co., 195 S.W.3d 238, 247–48 (Tex. App.—San Antonio 2006, pet. denied) (discussing method of calculating damages in regulatory-taking case). The comparable sales method is the favored approach, but when comparable sales figures are not available, courts will accept testimony based on the other two methods. *Cent. Expressway*, 302 S.W.3d at 871. The cost approach looks to the cost of replacing the condemned property minus depreciation. *Id.* The income approach is appropriate when the property would be priced according to the rental income it generates. *Id.* All three methods are designed to approximate the amount a willing buyer would pay a willing seller for the property. *Id.*

Texas law allows income from a business operated on the property to be considered in two situations: (1) when the taking, damaging, or destruction of property causes a material and substantial interference with access to one's property and (2) when only a part of the land has been taken, so that lost profits may demonstrate the effect on the market value of the remaining land and improvements. *Id.*; *Dall. Cty. v. Crestview Corners Car Wash*, 370 S.W.3d 25, 39 (Tex. App.—Dallas 2012, pet. denied).

As previously noted, a property owner is qualified to testify as to the market value of his property. *See Redman Homes*, 920 S.W.2d at 669.

Schrock testified that he purchased the property in 1993 for $21,000. In 2006 or 2007, he spent $5,000 to $5,500 renovating the property, which included

rebuilding the outer walls, installing and painting new siding, and installing new insulation. The trial court admitted into evidence photographs of the property after the renovation, but before any utility services were suspended by the City. Schrock opined that the property would "have held up another 10 or 15 years with the new siding on it."

From 1993 until January 2010, Schrock consistently rented the property, with never more than a one or two week gap in between tenants. According to Schrock, he "always ha[d] another tenant to move in" to the property. Schrock testified that his tenants paid less than $2,000 a month and his last tenant paid $600 a month in rent and a $400 deposit.

In January 2010, Schrock signed a lease agreement with a new tenant, Cuellar. However, when Cuellar, on or about January 20, 2010, sought to have water service to the property "turned on," the City refused to do so unless Schrock paid the cost of the lien that the City had attached to his property as well as interest, a filing fee, and the unpaid "water bill" of one of Schrock's former tenants that accrued after the City had filed its lien. When Schrock could not pay the amount owed on or about January 20, 2010, Cuellar vacated the property immediately because the City would not provide water service to the property. As a result, Schrock refunded Cuellar his $600 rent payment and his $400 deposit, and Schrock reimbursed Cuellar for the deposits that he had made for gas and electricity. At the time that Cuellar vacated the

property, Schrock did not have another tenant to rent the property. According to Schrock, the lien placed on the property prevented any new tenant from securing utility services, including water service, for the property, and thus, prevented Schrock from renting the property from January 2010 onward.

Schrock further testified that after the City stopped providing utility services to the property in January 2010, it became difficult to maintain the property without a tenant living there. For instance, rats gained access to the property through "the back of the cabinets," under the stove, and "the heating unit in the hall." The rats also went "up in[to] the ceiling" and ate holes. Additionally, mold grew in various places inside the property, and in 2012, the property was "broken into by kids a couple of times [who] pretty much tore up [the] inside." Those individuals "tore the walls up," tore out the light fixtures and ceiling fans, "busted windows," ripped the doors off of cabinets, "pulled . . . pieces of the flooring up," and vandalized the air-conditioning unit. Further, because the property was vacant for an extended period of time, the City "disconnect[ed] the . . . power wires," "pull[ed] the [electrical] meter out," and removed the gas meter. According to Schrock, the property became uninhabitable.

Schrock also explained that if the City had provided utility services, including water service, to the property, then the property would have been occupied and the

aforementioned damages would not have occurred. In fact, no one had ever broken into any of his other rental properties, which all had tenants.

In order to make the property habitable again, Schrock testified that it would cost $1,100 to have the "power wires" reconnected and the electrical meter replaced. It would also cost $400 to have the gas meter put back in, and approximately $4,922.52 to replace the air-conditioning system. Additionally, because of the rats, mold, and vandalism at the property, it would cost $8,500 to repair the drywall, approximately $2,000 to replace the carpet, and approximately $500 to replace the refrigerator, which had "complete[ly] rust[ed]" because the property was vacant.

Based on the foregoing, we conclude that there is evidence that raises a material fact issue related to Schrock's damages.

* * *

As previously noted, in reviewing a case in which a verdict has been directed, we must view the evidence in the light most favorable to the party against whom the verdict was rendered and disregard all contrary evidence and inferences. *Del Lago Partners*, 307 S.W.3d at 770; *Qantel Bus. Sys., Inc. v. Custom Controls Co.*, 761 S.W.2d 302, 303–04 (Tex. 1988). If we conclude there is any evidence of probative value which raises a material fact issue, then we must reverse the judgment and remand the case to allow the jury to determine the issue. *Qantel Bus. Sys.*, 761 S.W.3d at 303–04; *Harris Cty. v. Walsweer*, 930 S.W.2d 659, 664 (Tex. App.—

Houston [1st Dist.] 1996, writ denied); *see also Wright v. Gen. Motors Corp.*, 717 S.W.2d 153, 155 (Tex. App.—Houston [1st Dist.] 1986, no writ) ("If an issue of fact is raised by the evidence, the case must go to the jury even [if] the court might set aside the verdict on the ground that it was not supported by sufficient evidence.").

Considering the evidence in the light most favorable to Schrock, we conclude, as noted above, that there is at least some evidence of probative force to raise several material fact issues related to Schrock's regulatory-taking claim. Accordingly, we hold that the trial court erred in granting the City a directed verdict on Schrock's regulatory-taking claim.

We sustain Schrock's first issue.

Declaratory-Judgment Claim

In his second issue, Schrock argues that the trial court erred in granting a directed verdict that Schrock take nothing on his declaratory-judgment claim because it does not merely restate his regulatory-taking claim, he challenges the validity of certain sections of the City's ordinance, the City's release of its lien on the property did not resolve the issue of the lien's validity, and Schrock seeks clarification of his rights under the current version of the City's ordinance.

In his second amended petition, related to his declaratory-judgment claim, Schrock sought a declaration that the City's enforcement of its ordinance,[27] prior to

[27] *See id.* § 98-65(g), (i) (amended 1991).

its amendment, against him in 2010 "resulted in the inverse condemnation of [his] property for which no just compensation [was] paid"; a declaration that certain sections of the City's ordinance,[28] prior to its amendment, were "invalid, illegal, and/or unconstitutional" and conflicted with the Local Government Code;[29] a "clarification as to the validity of [the City's] utility lien"; and a "clarification as to his rights under the current version" of the City's ordinance[30] and as to whether the City "c[ould] lawfully prevent [his] tenants from obtaining utility service[s] at the [p]roperty."

After Schrock rested his case, the City orally moved for a directed verdict, arguing that there were no disputed issues of material fact related to Schrock's regulatory-taking claim; the question of whether there was a regulatory taking was a question of law; the City's action did not constitute a taking as a matter of law; and there was no evidence that the City was responsible for Schrock's damages because "a substantial amount of the damages . . . related to vandalism of the property" were unrelated to the purported regulatory taking. While it is clear from the record that the City orally moved for a directed verdict on Schrock's regulatory-taking claim, it does not appear that the City argued that it was entitled to a directed verdict on

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28 *See id.*

29 *See* TEX. LOC. GOV'T CODE ANN. § 552.0025.

30 *See* Baytown, Tex., Code of Ordinances, ch. 98, art. III, § 98-65(g) (amended 2011 and 2012).

Schrock's declaratory-judgment claim. Nevertheless, following the City's motion, the trial court entered a directed verdict in favor of the City, holding that Schrock take nothing on his regulatory-taking claim *and* his declaratory-judgment claim. Under such circumstances, we treat the trial court's directed verdict on Schrock's declaratory-judgment claim as a sua sponte directed verdict. *See Harvey v. Elder*, 191 S.W.2d 686, 687 (Tex. App.—San Antonio 1945, writ ref'd); *Allen v. State Farm Lloyds*, No. 05-16-00108-CV, 2017 WL 3275912, at *14 (Tex. App.—Dallas Aug. 1, 2017, pet. denied) (mem. op.) (where directed-verdict motion specifies claim and trial court dismisses all claims, "[w]e treat this as a sua sponte directed verdict"); *Johnson v. Whitehurst*, 652 S.W.2d 441, 446 (Tex. App.—Houston [1st Dist.] 1983, writ ref'd n.r.e.) ("It has long been Texas law that a trial court may render a directed verdict on its own motion where there are no disputed issues of fact.").

Governmental immunity protects political subdivisions of the State, including cities. *Wichita Falls State Hosp. v. Taylor*, 106 S.W.3d 692, 694 n.3 (Tex. 2003). Governmental immunity, composed of both immunity from liability and immunity from suit, implicates a trial court's jurisdiction, and when it applies, precludes suit against a governmental entity. *Tex. Dep't of Parks & Wildlife v. Miranda*, 133 S.W.3d 217, 224 (Tex. 2004); *Tex. Nat. Res. Conservation Comm'n v. IT-Davy*, 74 S.W.3d 849, 853 (Tex. 2002); *City of Wimberley Bd. of Adjustment v. Creekhaven, LLC*, No. 03-18-00169-CV, 2018 WL 5074580, at *3 (Tex. App.—Austin Oct. 18,

2018, no pet.) (mem. op.). Absent an express waiver of governmental immunity, courts do not have subject-matter jurisdiction over suits against political subdivisions of the State. *State v. Shumake*, 199 S.W.3d 279, 283 (Tex. 2006); *Creekhaven*, 2018 WL 5074580, at *3.

The Declaratory Judgment Act ("DJA") gives Texas courts the power to "declare rights, status, and other legal relations whether or not further relief is or could be claimed." TEX. CIV. PRAC. & REM. CODE ANN. § 37.003(a). It provides that a person "whose rights, status, or other legal relations are affected" by a statute or an ordinance "may have determined any question of construction or validity arising under" the statute or ordinance and "obtain a declaration of rights, status, or other legal relations thereunder." *See id.* § 37.004(a). The DJA waives governmental immunity in a suit that involves the validity of a city's ordinance. *City of Dall. v. Albert*, 354 S.W.3d 368, 378 (Tex. 2011); *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 [DJA] requires that the relevant governmental entities be made parties, and thereby waives immunity.").

A declaratory judgment is appropriate only if a justiciable controversy exists as to the rights and status of the parties and the controversy will be resolved by the declaration sought. *Bonham State Bank v. Beadle*, 907 S.W.2d 465, 467 (Tex. 1995). There must be a real and substantial controversy involving a genuine conflict of

tangible interests and not merely a theoretical dispute. *City of Dall. v. VSC, LLC*, 347 S.W.3d 231, 240 (Tex. 2011); *Bonham State Bank*, 907 S.W.2d at 467. The DJA gives a court no power to decide hypothetical or contingent situations or to determine questions not essential to the decision of an actual controversy, even if such questions may in the future require adjudication. *City of Richardson v. Gordon*, 316 S.W.3d 758, 761 (Tex. App.—Dallas 2010, no pet.); *Robinson v. Alief Indep. Sch. Dist.*, 298 S.W.3d 321, 324–25 (Tex. App.—Houston [14th Dist.] 2009, pet. denied).

A case becomes moot if, since the time of its filing, a controversy ceases to exist because the issues are no longer "live" or the parties lack a legally cognizable interest in the outcome. *Heckman v. Williamson Cty.*, 369 S.W.3d 137, 162 (Tex. 2012) (internal quotations omitted). Courts may not decide moot controversies because the Texas Constitution prohibits advisory opinions on abstract questions of law. *See Klein v. Hernandez*, 315 S.W.3d 1, 3 (Tex. 2010).

In his second amended petition, Schrock first sought a declaration that the City's enforcement of its ordinance,[31] prior to its amendment, against him in 2010 "resulted in the inverse condemnation of [his] property for which no just compensation [was] paid." However, the DJA is "not available to settle disputes already pending before a court." *BHP Petroleum Co. v. Millard*, 800 S.W.2d 838,

[31] *See id.* § 98-65(g), (i) (amended 1991).

841 (Tex. 1990) (internal quotations omitted). And a trial court lacks jurisdiction over a declaratory-judgment claim that merely restates a plaintiff's claim for a taking. *Ronquille*, 463 S.W.3d at 583 ("Because [plaintiff's] Declaratory Judgment Act claim merely restates her takings claim, we hold that the trial court lacks jurisdiction over her request for declaratory judgment."); *City of Anson v. Harper*, 216 S.W.3d 384, 395 (Tex. App.—Eastland 2006, no pet.); *see also City of Hous. v. Williams*, 216 S.W.3d 827, 829 (Tex. 2007) ("[I]n every suit against a governmental entity for money damages, a court must first determine the parties' contract or statutory rights; if the sole purpose of such a declaration is to obtain a money judgment, immunity is not waived [by the DJA]."). Thus, we conclude that the trial court lacked jurisdiction over this portion of Schrock's declaratory-judgment claim.

Schrock next sought a declaration that certain sections of the City's ordinance,[32] prior to its amendment, were "invalid, illegal, and/or unconstitutional" and conflicted with the Local Government Code.[33] However, any declaratory relief sought regarding the validity of a city's ordinance is rendered moot by the amendment of the ordinance's challenged provisions. *See Speer v. Presbyterian Children's Home & Serv. Agency*, 847 S.W.2d 227, 228–30 (Tex. 1993) (claim of discriminatory practices in hiring adoption service workers that sought only

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32 *See id.*

33 *See* TEX. LOC. GOV'T CODE ANN. § 552.0025.

declaratory and injunctive relief became moot when entity stopped offering adoption services); *Gordon*, 316 S.W.3d at 762 (claim for declaratory-judgment moot where "city charter provision about which [plaintiff] complain[ed] . . . [was] amended" so that no future violations of that provision c[ould] occur"); *Trulock v. City of Duncanville*, 277 S.W.3d 920, 925–28 (Tex. App.—Dallas 2009, no pet.) (claim city ordinance unconstitutional rendered moot when City modified ordinance to delete challenged provisions). Here, it is undisputed that the City's ordinance at issue in this case was amended in 2011 and 2012 and the specific sections of the City's ordinance about which Schrock seeks a declaration, in this portion of his declaratory-judgment claim, have either been amended or removed entirely. *See* Baytown, Tex., Code of Ordinances, ch. 98, art. III, § 98 65(g), (i) (amended 2011 and 2012) (amending subsection (g), removing previous subsection (i), and no longer requiring "Rental Property Declaration"). Thus, we conclude that Schrock's request for a declaration that certain pre-amendment sections of the City's ordinance were "invalid, illegal, and/or unconstitutional" and conflicted with the Local Government Code is moot.

Regarding Schrock's request for a "clarification as to the validity of [the City's] utility lien," it is undisputed, and the evidence shows, that on June 13, 2013, the City released the lien attached to the property, and that release was filed in the Harris County real property records. Schrock, however, asserts that the City's

release of the lien does not render this portion of his declaratory-judgment claim moot because "the City has never confirmed that [he] is not liable for his tenants' water bills."

The trial court admitted into evidence a copy of the City's release of the lien that was previously attached to the property, and a copy of a June 18, 2013 letter that the City sent to Schrock regarding the release of its lien. That letter states: "Please find enclosed 'Release of Utility Lien' for the above referenced property. *The lien is paid in full* . . . ." (Emphasis added.) Further, the City's ordinance, as amended in 2011 and 2012, provides:

> **Sec. 98-65. Liens.**
>
> (a) *Water*. Liens for unpaid water charges shall be filed according to the following:
>
> (1) After the [C]ity has terminated a customer's water pursuant to subsection 98-62(i) or after the [C]ity terminates water service at the customer's request, the supervisor of the utility billing division shall file a lien on the property served by the terminated water service and in the amount the customer whose service was terminated owed to the [C]ity for water service at the time of the termination of services.
>
> . . . .
>
> (d) *Exemptions*. No lien for water charges, garbage collection charges, or sewer charges shall be placed on a property if:
>
> (1) A customer owes less than $50.00 for the aggregate sum of water charges, garbage collection charges, and sewer charges;
>
> (2) The customer is not delinquent in payment for water charges, garbage collection charges, or sewer charges;

. . .

(4) *The [C]ity knows the property to be a single-family dwelling house and the delinquent water charges, garbage collection charges, or sewer charges to be for services provided to a residential consumer who is not the owner of the property.*

(g) *Reconnection of services*. No water, garbage or sewer services shall be provided to property encumbered by a lien filed pursuant to this section, *except as otherwise required by V.T.C.A., Local Government Code § 552.0025*. . . .

See Baytown, Tex., Code of Ordinances, ch. 98, art. III, § 98-65(a), (d), (g) (amended 2011 and 2012) (emphasis added) (amending subsections (d) and (g), repealing former subsection (i), entitled "Rental property," renumbering former subsection (j), entitled "Effect of section," as subsection (i), and no longer requiring "Rental Property Declaration").

Under the amended ordinance, the City may not place a lien on a property if the City knows that the property is a single-family dwelling and the delinquent utility charges associated with the property are for services provided to a residential customer who is not the property's owner, like a tenant. We conclude that Schrock's request for a clarification as to the validity of the lien previously attached to the property, but now removed, is moot. *See Wright v. Hooker*, No. 12-17-00095-CV, 2017 WL 6350137, at *9 (Tex. App.—Tyler Dec. 13, 2017, no pet.) (mem. op.) ("Here, EMS released the lien on [plaintiff's] claims prior to the filing of this actions; thus, her claim for declaratory relief that EMS filed the lien in violation of Chapter

55 was moot prior to its filing . . . ."); *Englobal U.S., Inc. v. Jefferson Refinery, L.L.C.*, No. 09-14-00210-CV, 2015 WL 8476545, at *2 (Tex. App.—Beaumont Dec. 10, 2015, no pet.) (mem. op.) (in declaratory-judgment action part of dispute regarding validity of lien became moot after lien released); *Target Corp. v. Advanced Alarm Sys., Inc.*, No. 09-06-322-CV, 2007 WL 1628101, at *1–2 (Tex. App.—Beaumont June 7, 2007, no pet.) (mem. op.) (removal of lien by settlement rendered moot issue of lien's validity); *cf. Schrock*, 2015 WL 8486504, at *9 (holding summary-judgment burden not met related to Schrock's declaratory-judgment claim regarding validity of lien where copy of lien release not contained in record and no evidence lien release filed in county's real property records); *Jackson v. City of McKinney*, No. 05-00-00062-CV, 2001 WL 946811, at *4 (Tex. App.—Dallas Aug. 22, 2001, no pet.) (mem. op.) (release of lien did not render claim moot because absent declaratory judgment City could reassert liens).

Finally, Schrock sought a "clarification as to his rights under the current version" of the City's ordinance[34] and as to whether the City "c[ould] lawfully prevent [his] tenants from obtaining utility service[s] at the [p]roperty." Although the DJA waives immunity for certain claims, it is not a general waiver of governmental immunity. *Tex. Parks & Wildlife Dep't v. Sawyer Trust*, 354 S.W.3d

[34] *See* Baytown, Tex., Code of Ordinances, ch. 98, art. III, § 98-65(g) (amended 2011 and 2012).

384, 388 (Tex. 2011); *Heinrich*, 284 S.W.3d at 370. Rather, the DJA provides a limited waiver of immunity for claims challenging the validity or constitutionality of a statute or ordinance. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 37.006(b); *Heinrich*, 284 S.W.3d at 373 n.6; *Tex. Dep't of Ins. v. Green*, No. 01-15-00321-CV, 2016 WL 2745063, at *3 (Tex. App.—Houston [1st Dist.] May 10, 2016, pet. denied) (mem. op.); *see also Harvel v. Tex. Dep't of Ins.–Div. of Workers' Comp.*, 511 S.W.3d 248, 253 (Tex. App.—Corpus Christi 2015, pet. denied) (DJA's waiver of governmental immunity is "narrow"). Notably, the DJA does not waive governmental immunity when a plaintiff seeks a declaration of his rights under a statute, ordinance, or other law. *Tex. Dep't of Trans. v. Sefzik*, 355 S.W.3d 618, 621 (Tex. 2011). Schrock's request for a "clarification as to his rights under the current version" of the City's ordinance and as to whether the City "c[ould] lawfully prevent [his] tenants from obtaining utility service[s] at the [p]roperty," does not constitute a request for a declaration concerning the validity of the City's ordinance such that the City's immunity is waived. *See Creekhaven*, 2018 WL 5074580, at *4. Thus, we conclude that the trial court lacked subject-matter jurisdiction over this portion of Schrock's declaratory-judgment claim.

Based on the foregoing, we hold that the trial court did not err in granting the City a directed verdict on Schrock's declaratory-judgment claim.

We overrule Schrock's second issue.

In his second amended petition, Schrock sought attorney's fees pursuant to the DJA. In a portion of his second issue, Schrock asserts that "[b]ecause the trial court dismissed Schrock's declaratory[-]judgment claim in error, [he] is entitled to attorney's fees pursuant to the [DJA]." Because we have held that the trial court did not err in granting the City a directed verdict on Schrock's declaratory-judgment claim and Schrock does not assert that the trial court erred in failing to award him attorney's fees, irrespective of whether or not he prevailed on his declaratory-judgment claim, we need not address this portion of Schrock's second issue. *See* TEX. R. APP. P. 38.1, 47.1; *Washington v. Bank of N.Y.*, 362 S.W.3d 853, 854–55 (Tex. App.—Dallas 2012, no pet.) (party who does not adequately brief a complaint on appeal waives his issue); *see also Indian Beach Prop. Owners' Ass'n v. Linden*, 222 S.W.3d 682, 706 (Tex. App.—Houston [1st Dist.] 2007, no pet.) (party need not prevail to be awarded attorney's fees under DJA).

Conclusion

We reverse the portion of the trial court's judgment granting the City a directed verdict on Schrock's regulatory-taking claim against it, and we remand a portion of the case to the trial court for a new trial on Schrock's regulatory-taking claim. We affirm the remaining portion of the trial court's judgment.

Julie Countiss
Justice

Panel consists of Chief Justice Radack and Justices Goodman and Countiss.

APPENDIX TAB C

First Court of Appeals' Judgment

JUDGMENT

Court of Appeals

First District of Texas

NO. 01-17-00442-CV

ALAN SCHROCK, Appellant

V.

CITY OF BAYTOWN, Appellee

Appeal from the County Civil Court at Law No. 1 of Harris County. (Tr. Ct. No. 1007923).

This case is an appeal from the final judgment signed by the trial court on March 14, 2017. After submitting the case on the appellate record and the arguments properly raised by the parties, the Court holds that there was reversible error in the portion of the trial court's judgment granting appellee, City of Baytown, a directed verdict on the regulatory-taking claim of appellant, Alan Schrock. Accordingly, the Court **reverses** that portion of the trial court's judgment.

The Court further holds that there was no reversible error in the remaining portion of the trial court's judgment. Therefore, the Court **affirms** the remaining portion of the trial court's judgment.

The Court **remands** a portion of the case to the trial court for a new trial on appellant's regulatory-taking claim.

The Court **orders** that the appellant, Alan Schrock, pay one half of the appellate costs. The Court **orders** that the appellee, City of Baytown, pay one half of the appellate costs.

The Court **orders** that this decision be certified below for observance.

Judgment rendered June 27, 2019.

Panel consists of Chief Justice Radack and Justices Goodman and Countiss. Opinion delivered by Justice Countiss.

APPENDIX TAB D

City of Baytown Ordinance No. 6005

NUMBER	DESCRIPTION	OFFERED	ADMITTED	VOL.
DX - 19	Certified Copy of Ordinance 6005	157	157	3

CITY OF BAYTOWN
CERTIFICATION OF ORDINANCE

I, LETICIA BRYSCH, THE DULY APPOINTED CITY CLERK OF THE CITY OF BAYTOWN, HARRIS AND CHAMBERS COUNTIES, TEXAS, DO HEREBY CERTIFY AND ATTEST THAT AS PART OF MY DUTIES, I DO SUPERVISE AND ACT AS LAWFUL CUSTODIAN OF THE RECORDS OF THE CITY OF BAYTOWN; THAT THE ATTACHED DOCUMENT IS A TRUE AND CORRECT COPY OF ORDINANCE NO. 6005.

ORDINANCE NO. 6005

AN ORDINANCE AMENDING THE CODE OF ORDINANCES, CITY OF BAYTOWN, TEXAS BY AMENDING CHAPTER 31 "UTILITIES" ARTICLE IV "WATER SERVICE ", SECTION 31 -541 "WATER DEPOSITS AND REFUNDS ", SUBSECTION (B)(1) "AMOUNT OF DEPOSITS ", SO AS TO CHANGE THE AMOUNT OF DEPOSIT; AMENDING CHAPTER 31 "UTILITIES" ARTICLE IV, "WATER SERVICE ", SECTION 31 -59, "PROCEDURES AND REMEDIES FOR NONPAYMENT OF WATER BILLS AND VIOLATIONS OF CITY ORDINANCES" BY ADDING SUBSECTION (H) TO REGULATE DELIVERY OF WATER TERMINATION NOTICES AND TO PROHIBIT ALTERING NOTICE REQUIREMENTS AND PROHIBITING HINDRANCE OR INTERFERENCE WITH DELIVERY AND POSTING OF WATER TERMINATION NOTICES OR REMOVAL OF WATER TERMINATION NOTICES; AMENDING CHAPTER 31 "UTILITIES" ARTICLE IV, "WATER SERVICE ", SECTION 31 -59, "PROCEDURES AND REMEDIES FOR NONPAYMENT OF WATER BILLS AND VIOLATIONS OF CITY ORDINANCES" BY ADDING SUBSECTION (I) INCLUDING NOTICE REQUIREMENTS AND PROVIDING A PROCEDURE BY WHICH A CUSTOMER WHO HAS RECEIVED WATER TERMINATION NOTICE MAY REQUEST A HEARING ON THE DECISION TO TERMINATE; AMENDING CHAPTER 31 "UTILITIES" ARTICLE IV "WATER SERVICE ", SECTION 31 -60 "PENALTY FOR VIOLATION OF ARTICLE ", BY INCREASING THE PENALTY FOR VIOLATION OF ANY PROVISION OF CHAPTER 31 "UTILITIES" ARTICLE IV, "WATER SERVICE ", BY INCREASING THE FINE TO BE IMPOSED FOR SUCH VIOLATION FROM TWO HUNDRED AND N0/100 ($200.00) DOLLARS TO FIVE HUNDRED AND N0/100 ($500.00) DOLLARS; AMENDING CHAPTER 31 "UTILITIES" ARTICLE IV "WATER SERVICE ", BY ADDING SECTION 31 -63, "LIENS ", ESTABLISHING LIENS ON THE PROPERTY SERVED FOR WATER, SEWER AND GARBAGE SERVICE DELINQUENCIES IN EXCESS OF THE AGGREGATE SUM OF FIFTY AND N0/100 ($50.00) DOLLARS; PROVIDING FOR THE FILING OF SUCH LIEN; PROVIDING FOR NOTICE AND OPPORTUNITY FOR A HEARING WITHIN THIRTY DAYS AFTER THE FILING OF SUCH LIEN WHEREIN THE PROPERTY OWNER MAY PROVE THAT NO BILL FOR UTILITY SERVICES IS DUE AND OWING OR THAT THE SUBJECT PROPERTY HAS BEEN A HOMESTEAD AS DEFINED BY THE TEXAS CONSTITUTION AT ALL TIMES ON AND SUBSEQUENT TO THE DATE ON WHICH THE LIEN WAS FILED AND PROVIDING A PRESUMPTION THAT THE PERSON LAST LISTED IN THE TAX RECORDS OF THE COUNTY WHERE THE PROPERTY IS LOCATED AS OWNER OF THE SUBJECT PROPERTY IS IN FACT THE OWNER AND THAT THE ADDRESS LAST LISTED FOR SAID OWNER ON SAID TAX RECORDS IS IN FACT THE

CORRECT ADDRESS OF SAID OWNER; PROVIDING THAT NO WATER OR SEWER SERVICE SHALL BE PROVIDED TO PROPERTY ENCUMBERED BY SUCH LIEN UNLESS THE OWNER THEREOF AGREES IN WRITING TO PAY THE ACCRUED UTILITY CHARGES AND PAY ALL CURRENT UTILITY CHARGES AS THEY COME DUE; PROVIDING THAT SUCH LIEN WILL BE RELEASED BY THE CITY WHEN ANY PERSON OR ENTITY PAYS ALL PRINCIPAL, INTEREST AND THE LIEN FILING FEE ASSOCIATED WITH PROPERTY SO ENCUMBERED; PROVIDING FOR A DECLARATION BY A PROPERTY OWNER THAT SAID PROPERTY IS RENTAL PROPERTY, WHICH DECLARATION WILL HAVE THE EFFECT OF BLOCKING THE IMPOSITION OF A LIEN ON THAT PROPERTY FOR NON - PAYMENT OF UTILITY BILLS FOR SERVICE CONNECTED IN THE TENANTS NAME AFTER THE FILING OF THE DECLARATION BY THE OWNER; AMENDING CHAPTER 31 "UTILITIES" ARTICLE IV "WATER SERVICE ", SECTION 31 -55.1, "SERVICE CHARGE FOR WATER TURN ON" BY RAISING THE SERVICE CHARGE FOR WATER TURN ON FROM $5.00 TO $10.00; AMENDING CHAPTER 31 "UTILITIES" ARTICLE IV "WATER SERVICE" SECTION 31 -59(F) BY RAISING THE SERVICE CHARGE FOR WATER METER TESTS FROM $5.00 TO $15.00; AMENDING CHAPTER 31 "UTILITIES" ARTICLE IV "WATER SERVICE" SECTION 31 -59 BY ADDING SUBSECTION (J) PROVIDING A $15.00 CUT -OFF FEE'IN CASES WHERE THE WATER METER HAS BEEN TURNED OFF FOR NON - PAYMENT OF CHARGES FOR WATER OR SANITARY SEWER SERVICES, OR WHERE THE WATER METER HAS BEEN TURNED OFF FOR PAYMENT OF WATER SERVICES WITH A CHECK WHICH IS NOT HONORED BY THE DRAWEE BANK; REPEALING INCONSISTENT ORDINANCES; CONTAINING A SAVINGS CLAUSE AND SEVERABILITY CLAUSE; AND PROVIDING FOR THE PUBLICATION AND EFFECTIVE DATE THEREOF.

ADOPTED BY THE CITY COUNCIL AT ITS MEETINGS HELD ON SEPTEMBER 26, 1991.

WITNESS MY HAND AND SEAL OF THE CITY ON MARCH 6, 2017.

LETICIA BRYSCH, CITY CLERK

Published In: THE BAYTOWN SUN
Tuesday, October 1, 1991
Wednesday, October 2, 1991

910926-4

ORDINANCE NO. 6005

AN ORDINANCE AMENDING THE CODE OF ORDINANCES, CITY OF BAYTOWN, TEXAS BY AMENDING CHAPTER 31 "UTILITIES" ARTICLE IV "WATER SERVICE", SECTION 31-54, "WATER DEPOSITS AND REFUNDS", SUBSECTION (b)(1) "AMOUNT OF DEPOSITS", SO AS TO CHANGE THE AMOUNT OF DEPOSIT; AMENDING CHAPTER 31 "UTILITIES" ARTICLE IV, "WATER SERVICE", SECTION 31-59, "PROCEDURES AND REMEDIES FOR NONPAYMENT OF WATER BILLS AND VIOLATIONS OF CITY ORDINANCES" BY ADDING SUBSECTION (h) TO REGULATE DELIVERY OF WATER TERMINATION NOTICES AND TO PROHIBIT ALTERING NOTICE REQUIREMENTS AND PROHIBITING HINDRANCE OR INTERFERENCE WITH DELIVERY AND POSTING OF WATER TERMINATION NOTICES OR REMOVAL OF WATER TERMINATION NOTICES; AMENDING CHAPTER 31 "UTILITIES" ARTICLE IV, "WATER SERVICE", SECTION 31-59, "PROCEDURES AND REMEDIES FOR NONPAYMENT OF WATER BILLS AND VIOLATIONS OF CITY ORDINANCES" BY ADDING SUBSECTION (i) INCLUDING NOTICE REQUIREMENTS AND PROVIDING A PROCEDURE BY WHICH A CUSTOMER WHO HAS RECEIVED WATER TERMINATION NOTICE MAY REQUEST A HEARING ON THE DECISION TO TERMINATE; AMENDING CHAPTER 31 "UTILITIES" ARTICLE IV "WATER SERVICE", SECTION 31-60 "PENALTY FOR VIOLATION OF ARTICLE", BY INCREASING THE PENALTY FOR VIOLATION OF ANY PROVISION OF CHAPTER 31 "UTILITIES" ARTICLE IV, "WATER SERVICE", BY INCREASING THE FINE TO BE IMPOSED FOR SUCH VIOLATION FROM TWO HUNDRED AND NO/100 ($200.00) DOLLARS TO FIVE HUNDRED AND NO/100 ($500.00) DOLLARS; AMENDING CHAPTER 31 "UTILITIES" ARTICLE IV "WATER SERVICE", BY ADDING SECTION 31-63, "LIENS", ESTABLISHING LIENS ON THE PROPERTY SERVED FOR WATER, SEWER AND GARBAGE SERVICE DELINQUENCIES IN EXCESS OF THE AGGREGATE SUM OF FIFTY AND NO/100 ($50.00) DOLLARS; PROVIDING FOR THE FILING OF SUCH LIEN; PROVIDING FOR NOTICE AND OPPORTUNITY FOR A HEARING WITHIN THIRTY DAYS AFTER THE FILING OF SUCH LIEN WHEREIN THE PROPERTY OWNER MAY PROVE THAT NO BILL FOR UTILITY SERVICES IS DUE AND OWING OR THAT THE SUBJECT PROPERTY HAS BEEN A HOMESTEAD AS DEFINED BY THE TEXAS CONSTITUTION AT ALL TIMES ON AND SUBSEQUENT TO THE DATE ON WHICH THE LIEN WAS FILED AND PROVIDING A PRESUMPTION THAT THE PERSON LAST LISTED IN THE TAX RECORDS OF THE COUNTY WHERE THE PROPERTY IS LOCATED AS OWNER OF THE SUBJECT PROPERTY IS IN FACT THE OWNER AND THAT THE ADDRESS LAST LISTED FOR SAID OWNER ON SAID TAX RECORDS IS IN FACT THE CORRECT ADDRESS OF SAID OWNER; PROVIDING THAT NO WATER OR SEWER SERVICE SHALL BE PROVIDED TO PROPERTY ENCUMBERED BY SUCH LIEN UNLESS THE OWNER THEREOF AGREES IN WRITING TO PAY THE ACCRUED UTILITY CHARGES AND PAY ALL CURRENT UTILITY CHARGES AS THEY COME DUE; PROVIDING THAT SUCH LIEN WILL BE RELEASED BY THE CITY WHEN ANY PERSON OR ENTITY PAYS ALL PRINCIPAL, INTEREST AND THE LIEN FILING FEE ASSOCIATED WITH PROPERTY SO ENCUMBERED; PROVIDING FOR A DECLARATION BY A PROPERTY OWNER THAT SAID PROPERTY IS RENTAL PROPERTY, WHICH DECLARATION WILL

HAVE THE EFFECT OF BLOCKING THE IMPOSITION OF A LIEN ON THAT PROPERTY FOR NON-PAYMENT OF UTILITY BILLS FOR SERVICE CONNECTED IN THE TENANT'S NAME AFTER THE FILING OF THE DECLARATION BY THE OWNER; AMENDING CHAPTER 31 "UTILITIES" ARTICLE IV "WATER SERVICE", SECTION 31-55.1, "SERVICE CHARGE FOR WATER TURN ON" BY RAISING THE SERVICE CHARGE FOR WATER TURN ON FROM $5.00 TO $10.00; AMENDING CHAPTER 31 "UTILITIES" ARTICLE IV "WATER SERVICE" SECTION 31-59(f) BY RAISING THE SERVICE CHARGE FOR WATER METER TESTS FROM $5.00 TO $15.00; AMENDING CHAPTER 31 "UTILITIES" ARTICLE IV "WATER SERVICE" SECTION 31-59 BY ADDING SUBSECTION (j) PROVIDING A $15.00 CUT-OFF FEE IN CASES WHERE THE WATER METER HAS BEEN TURNED OFF FOR NON-PAYMENT OF CHARGES FOR WATER OR SANITARY SEWER SERVICES, OR WHERE THE WATER METER HAS BEEN TURNED OFF FOR PAYMENT OF WATER SERVICES WITH A CHECK WHICH IS NOT HONORED BY THE DRAWEE BANK; REPEALING INCONSISTENT ORDINANCES; CONTAINING A SAVINGS CLAUSE AND SEVERABILITY CLAUSE; AND PROVIDING FOR THE PUBLICATION AND EFFECTIVE DATE THEREOF.

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WHEREAS, the City Council of the City of Baytown, Texas, by Ordinance No. 943 § 6; Ordinance No. 1015 § 1; Ordinance No. 2328 § 1; Ordinance No. 3628 § 3; Ordinance No. 3966 § 1; and Ordinance No. 4458 § 1; Ordinance No. 4459 § 1, enacted a comprehensive residential water termination procedure; and

WHEREAS, the City Council of the City of Baytown, Texas, finds it to be in the public interest to modify certain time periods, limits, and procedures contained within and referred to in of the aforementioned ordinances to promote administrative efficiency; and

WHEREAS, the City Council of the City of Baytown, Texas, has determined that water, sewer and garbage service benefit (1) the occupants of the property served; (2) the owners of the property served; and (3) the property served; and

WHEREAS, the City Council of the City of Baytown, Texas, finds it to be in the public interest to impose liens on property for the delinquent sewer charges, garbage collection charges and water charges for those same purposes at that property; and

WHEREAS, the City Council of the City of Baytown, Texas finds it to be in the public interest to allow an exception to the water, sewer, and garbage collection lien filing procedures for landlords who do not wish their property to be security for water, sewer, and garbage collection services provided there; and

WHEREAS, the City Council of the City of Baytown, Texas, finds that adequate security for the public water, sewer, and garbage collection service funds in the cases in which liens are not filed due to the filing of a declaration of rental property will be provided by the requirement of an enhanced deposit for rental property; NOW THEREFORE

BE IT ORDAINED BY THE CITY COUNCIL OF THE CITY OF BAYTOWN, TEXAS:

Section 1: That Chapter 31 "Utilities" Article IV, "Water Service", Section 31-54, "Water Deposits and Refunds", Subsection (b)(1) "Amount of Deposits" of the Code of Ordinances, City of Baytown, Texas, shall be amended to hereafter read as follows:

(b) Amount of deposits.

(1) Residential consumers occupying single family dwelling houses shall be required to place on deposit the amount of fifty dollars ($50.00) if they are the owners of said dwelling houses; however residential consumers occupying single family dwelling houses shall be required to place on deposit the amount of one hundred twenty-five dollars ($125.00) if they are not the owners of said dwelling houses.

Section 2: That Chapter 31 "Utilities" Article IV, "Water Service", Section 31-59, "Procedures and Remedies for Nonpayment of Water Bills and Violations of City Ordinances", of the Code of Ordinances, City of Baytown, Texas, shall be amended by adding Subsections (h), (i), and (j) to read as follows:

Sec. 31-59. Procedures and remedies for nonpayment of water bills and violations of city ordinances.

(h) It shall be unlawful for any person to hinder or interfere with any Water Department employee or agent who is delivering water termination notices pursuant to Section 31-59(i)(1) of this title and chapter. It shall further be unlawful for any person, other than an occupant of the premises to which notice is delivered, to remove a water termination notice delivered by the Water Department from any premises to which the Water Department delivered that notice.

Sec. 31-59. Procedures and remedies for nonpayment of water bills and violations of city ordinances.

(i) NON-EMERGENCY TERMINATION: Whenever the City of Baytown is authorized to terminate a customer's water services against that customer's consent

and under the provisions of this section or whenever the City of Baytown otherwise terminates water services to a customer in a non-emergency situation other than by the customer's request, the City shall first provide notice in the form and manner described below to the customer and afford the customer an opportunity for a hearing in the form and manner described below before the termination of the services. If after the City has complied with the notice requirements as described below, the customer does not request a hearing for review of the termination within the specified time, the City may terminate water services to the customer on the day and at the time specified in the notice to the customer or within five calendar days thereafter. Any time elapsing after the declared termination date, the elapsing of which is due to the pendency of a hearing or the extension of time granted pursuant to a hearing, shall not be considered when calculating the five days in which the City may terminate water after a declared termination date.

1. NOTICE: Notice must be sent to a water customer at least eight days prior to the proposed termination date of the services to that customer if notice is sent by mail, or at least five days prior to termination if notice is delivered by the Water Department. The notice may be incorporated into the customer's monthly bill, sent by certified letter, or hand delivered to the customer by a Water Department employee or other person designated by the City of Baytown to deliver such notices. The notice must be written and clearly communicate the following information:

(a) the name of the customer whose service is proposed to be terminated;

(b) the address where service is proposed to be terminated;

(c) the reason for the proposed termination, including the amount of delinquency if nonpayment of charges is the reason for termination;

(d) the day and time on which the water service will be terminated unless conditions bringing about the termination are sooner remedied;

(e) the customer has the right to appear and be heard at a hearing to contest the proposed termination prior to the date of termination;

(f) the means by which the customer may arrange for such a hearing;

(g) the date by which the customer must request and set the hearing in order to receive it, which deadline may be no earlier than one day prior to the termination date, nor may that deadline ever be sooner than five days from the date sending of notice, the five days not including weekdays on which City offices are closed for holidays.

2. After the deadline for requesting a hearing, as described in part (i)(1)(g) of this section, has passed, a customer may still request a hearing to review the decision to terminate the customer's water service within 10 days of the aforementioned deadline upon presentation to the City Manager of an affidavit declaring that the customer, through no fault of that customer, did not receive notice of termination in time to act upon the same. When a hearing pursuant to this subsection is requested, the City Manager shall as soon as practicable make a determination of whether the appeal appears to be meritorious, and if the City Manager finds it is meritorious the City Manager shall order the continuation or restoration of services pending the appeal. If the hearing officer finds in favor of the customer, the hearing officer may order restoration of service.

3. If the customer to whom water service is proposed to be terminated is a landlord who supplies water services to tenant water users, the City shall attempt to give notice to the tenant water users pursuant to subsection (i)(1) of this section.

4. HEARING: Should any customer request a hearing to review the decision to terminate that customer's water services, the hearing shall be presided over by the City Manager or any fair and neutral person he may appoint, which person must be of managerial employment and not involved in the original decision to terminate services, hereafter in this context known as the hearing officer. The hearing shall be held no sooner than the next business day nor later than fifteen

business days after being requested by the customer. The hearing officer may, in his discretion delay or advance the hearing time upon showing of good cause by the customer. At the hearing, the customer shall be given the opportunity to be heard in person to present the customer's case, to present testimony from other persons, and to admit documents. The customer may be represented by counsel, though the City shall in no case provide counsel to the customer. The customer shall be given the opportunity to confront and cross examine any witnesses appearing against him at the hearing. The customer may request that a representative of the Water Department be present at the hearing and be subject to questioning. However, the rules of evidence or procedure for civil or criminal trials need not be enforced. The City's reasons for terminating the customer's water service shall be stated at the hearing. Upon reaching a final decision, the hearing officer shall state his reasons for reaching that decision and state the evidence on which the hearing officer relied in reaching those conclusions. Should the hearing officer find in favor of the customer, the customer's water service shall continue. Should the hearing officer find against the customer, the customer's water service shall be terminated. The hearing officer shall have the power to grant extensions, modify billings, and fashion other reliefs as would be equitable.

Sec. 31-59. Procedures and remedies for nonpayment of water bills and violations of city ordinances.

(j) In cases where the water meter has been turned off for nonpayment of charges for water, sanitary sewer service, garbage collection service, or where the water meter has been turned off for payment of utilities services with a check which is not honored by the drawee bank for any reason, a cut-off fee will be charged in the amount of fifteen dollars ($15.00).

Section 3: That Chapter 31 "Utilities" Article IV "Water Service", of the Code of Ordinances, City of Baytown, Texas, shall be amended by amending Section 31-59(f) to read as follows:

Sec. 31-59. Procedures and remedies for nonpayment of water bills and violations of city ordinances.

(f) Should any person request that their water meter be tested, the city water service division shall test their meter. If the meter test shows that

the meter registers more water than actually consumed, the last bill shall be corrected according to the test result and the meter shall be replaced. If the meter test shows that the meter correctly registers or registers less water than actually consumed, then the customer shall be charged a fifteen dollar ($15.00) meter testing fee.

Section 4: That Chapter 31 "Utilities" Article IV "Water Service", of the Code of Ordinances, City of Baytown, Texas, shall be amended by adding Section 31-63 "Liens" to read as follows:

Sec. 31-63. Liens.

(a) Water

1. After the City has terminated a customer's water pursuant to the requirements of Section 31-59 (i) of this article and chapter, or after the City terminates water service at the customer's request, the City's Supervisor of the Water Department shall file a lien on the property which the terminated water service served and in the amount that the customer whose service was terminated owed to the City of Baytown for water service at the time of the termination of services.

2. If a property receives water services illegally, without having an account with the City of Baytown Water Department, then the Supervisor of the Water Department shall file a lien against that property in the amount of the proper charge for the water actually used, or, if there is no way of determining the amount of water used, in the amount of the minimum monthly water charge that would have been charged to that property had a legitimate account been opened there multiplied by the number of months during which that property illegally received such water services.

(b) Garbage Collection

1. After the City has terminated a customer's water service pursuant to the requirements of Section 31-59 (i) of this title and chapter, or after the City terminates water service or garbage service at the customer's request, or after a customer without water service becomes more than fifty dollars ($50.00) delinquent for garbage service alone, the City's Supervisor of the Water Department shall file a lien on the property

which the terminated garbage collection service serviced and in the amount that the customer whose service was terminated owed to the City of Baytown for garbage collection service at the time of the termination of services.

2. If a property receives garbage collection services illegally, without having an account with the City of Baytown Water Department, then the Supervisor of the Water Department shall file a lien against that property in the amount of the minimum monthly garbage collection charge that would have been charged to that property had a legitimate account been opened there multiplied by the number of months during which that property illegally received such garbage collection services.

(c) Sewer service

1. After the City has terminated a customer's water service pursuant to the requirements of Section 31-59 (i) of this title and chapter, or after the City terminates water service or sewer service at the customer's request, or after a customer without water service becomes more than fifty dollars ($50.00) delinquent in payment for sewer charges alone to the City, the City's Supervisor of the Water Department shall file a lien on the property which the terminated water service served and in the amount that the customer whose service was terminated owed to the City of Baytown for sewer at the time of the termination of services or the accumulation of the aforementioned delinquency in payment for sewer services.

2. If a property receives sewer services illegally, without having an account with the City of Baytown Water Department, then the Supervisor of the Water Department shall file a lien against that property in the amount of the minimum monthly sewer charge that would have been charged to that property had a legitimate account been opened there multiplied by the number of months during which that property illegally received such sewer services.

(d) If a customer owes less than fifty dollars ($50.00) for the aggregate sum of water charges, garbage collection charges, and sewer charges, at the time of termination of any of those services, no lien shall be filed against the property served by those services. If the customer is not

delinquent in payment at the time of termination of any of the services, no lien shall be filed until that customer becomes delinquent in payment. No lien shall be filed on any property that the City knows to be a homestead as defined by the Texas Constitution.

(e) Any lien authorized by this section shall be filed with the County Clerk of Harris county, Texas, or with the County Clerk of the County in which the property to which the lien will be attached is located. The City shall then have a privileged lien on as many lots or pieces of property as the terminated services previously served and are described on the lien instrument by metes and bounds, or by City lot and block description, or by any other adequate description. The lien shall secure the charges made by the City for these above discussed services rendered to that property. Such a lien shall be filed pursuant to the authority granted in TEX.REV.CIV.STAT.ANN. art. 1175 § 11 (Vernon 1963), TEX.L.GOV'T.CODE §§ 51.072 and 402.017, and TEX.CONST. art. XI, § 5. The lien shall bear interest at a rate of ten percent 10% per annum. The Supervisor of the Water Department shall add to any lien filed pursuant to this section the amount of the filing fee charged by the County Clerk for filing that lien. The lien shall be effective against that property if the account holder or user of services at that property was either the owner of that property, a tenant of that property or a permissive holder of that property, or an adverse possessor of that property. It is further provided that for any charges for which the lien authorized by this section is designed to secure, suit may be instituted and recovery in the foreclosure of that lien may be had in the name of the City. The City Attorney is authorized to file such suits in a state court of competent jurisdiction.

(f) Notice and hearing. After the filing of a lien pursuant to this section, the City Clerk shall within thirty days of the filing of that lien give the owner of that property and the account holder notice that such a lien or liens have been filed on that property and inform the owner and account holder of their rights of appeal. Within thirty days of the postmark of the notice sent to the property owner or account holder, the property owner or account holder may appeal the decision to impose the lien on that property to the City Manager or any fair and impartial person

whom the City Manager may designate. The City Manager or his designee shall authorize the release of the lien if the property owner or account holder shows that no bill for the above mentioned services to his property encumbered by the lien or liens is owing, or if the property owner shows that the encumbered property is and at all times from the hour of filing of the lien or liens until the time of the appeal has been a homestead as defined by the Texas Constitution. The City Manager or his designee may modify or release the lien to reflect the true amount of delinquency in payment for services to the property if the owner or account holder demonstrates that a lesser bill is owing than the lien alleged or if the Supervisor of the Water Department cannot show that all the lien alleged is owing. The person last listed on the tax records of the County in which the property is located as being the owner of any given piece of property shall be presumed to be the owner for purposes of this subsection, and the address listed for the owner on said tax records shall be presumed to be the address of the owner.

(g) No water, garbage, or sewer services shall be provided to property encumbered by a lien filed pursuant to this title. Provided, however, that the Supervisor of the Water Department shall be authorized to reconnect water, garbage, and wastewater services if the customer agrees in writing to pay the accrued water and wastewater charges for such property in accordance with a payment schedule acceptable to the Supervisor of the Water Department, and that the customer also agrees to pay all current and future water and wastewater charges as they come due.

(h) Whenever a person or entity pays all principal, interest, and the filing fee of a lien validly filed pursuant to this section, the Supervisor of the Water Department shall execute a release of that lien and surrender it to the paying party. The release shall be prepared and approved as to form by the City Attorney and shall be duly notarized. The City shall not be responsible for filing that release.

(i) Declaration of Rental Property.

1. The owner of any property, which property is rented to another and such tenant carries City water, sewer, or garbage collection services in the tenant's name, may prevent the City from using that property as

security for the water, sewer, and garbage collection service charges for service to that property and from filing any lien on such property under the provisions of this Chapter by filing with the City Utilities Department a declaration in writing specifically naming the service address of that property and declaring such to be rental property which the owner does not wish to be security for the water, sewer, and garbage collection service charges for service to that property.

2. When such a declaration has been filed with the City prior to the time the account holder begins to receive services, the City shall collect a deposit in the amount of one hundred twenty-five dollars ($125.00) pursuant to § 31-54(b)(1) of this Article and Chapter. If a property owner wishes to declare in regard to the bill of a person or entity already receiving services at a particular property, that declaration shall not be effective until the posting of a deposit in the amount of one hundred twenty-five dollars ($125.00) required by § 31-54(b)(1) of this Article and Chapter.

3. Paragraph 2 of this subsection notwithstanding, an owner of property who files the above described declaration on property which is rented to another and the tenant is carrying the City water, sewer, or garbage collection services in the tenant's name at the time of the passage of this Section, then such declaration shall become immediately effective without the posting of a deposit in the amount of one hundred twenty-five dollars ($125.00) a described in § 31-54(b)(1) of this Article and Chapter. However, if water service is terminated to that tenant for delinquency in payment, a deposit in the amount one hundred twenty-five dollars ($125.00) pursuant to § 31-54(b)(1) of this Article and Chapter shall be collected before such City water, sewer, or garbage collection service is resumed. Any service account for water, sewer, or garbage collection service established after the passage of this Section shall be subject to paragraphs 1 and 2 above of this subsection.

4. The declaration of rental property shall be valid only so long as the person making such declaration owns such property, rents such property to another, and the tenant of such property carries City water, sewer, or garbage collection services in the tenant's name. The owner may revoke the declaration of rental property at any time by so notifying the City in writing.

(j) This section is cumulative of any other remedies, methods of collection or security available to the City under the charter and ordinances of the City or under state law.

Section 4: That Chapter 31 "Utilities" Article IV "Water Service", of the Code of Ordinances, City of Baytown, Texas, shall be amended by amending Section 31-55.1 to read as follows:

Sec. 31-55.1. Service Charge Water Turn On.

If the City turns on a customers water service at the request of the customer, said customer will be charged a service charge of ten dollars ($10.00).

Section 5: All ordinances or parts of ordinances inconsistent with the terms of this ordinance are hereby repealed; provided, however that such repeal shall only be to the extent of such inconsistency and in all other respects this ordinance shall be cumulative of all other ordinances regulating and governing the subject matter covered by this ordinance.

Section 6: If any section, subsection, sentence, clause, or phrase of this ordinance is for any reason held to be unconstitutional or invalid, that holding shall not affect the validity of the remaining portions of this ordinance. The City Council of the City of Baytown, Texas, hereby declares that it would have passed this ordinance in each section, subsection, sentence, clause, or phrase hereof irrespective of the fact that any one or more of the same be declared unconstitutional or invalid.

Section 7: This ordinance shall take effect from and after ten (10) days from its passage by the City Council. The City Clerk is hereby directed to give notice hereof by causing the caption of this ordinance to be published in the official newspaper of the City of Baytown at least twice within ten (10) days after passage of this ordinance.

INTRODUCED, READ and PASSED by the affirmative vote of the City Council of the City of Baytown, this the 26th day of September, 1991.

EMMETT O. HUTTO, Mayor

ATTEST:

EILEEN P. HALL, City Clerk

IGNACIO RAMIREZ, SR., City Attorney

C:1:73:1

APPENDIX TAB E

Original Version of Chapter 98, Section 98-65 of the City of Baytown Code of Ordinances

NUMBER	DESCRIPTION	OFFERED	ADMITTED	VOL.
PX - 1	Original Section 98.65	11	12	2

Sec. 98-65. Liens.

(a) *Water.* Liens for unpaid water charges shall be filed according to the following:

(1) After the city has terminated a customer's water pursuant to subsection 98-62(i) or after the city terminates water service at the customer's request, the supervisor of the utility billing division shall file a lien on the property served by the terminated water service and in the amount the customer whose service was terminated owed to the city for water service at the time of the termination of services.

(2) If a property receives water services illegally, without having an account with the city utility billing division, the supervisor of the utility billing division shall file a lien against that property in the amount of the proper charge for the water actually used or, if there is no way of determining the amount of water used, in the amount of the minimum monthly water charge that would have been charged to that property had a legitimate account been opened, multiplied by the number of months during which that property illegally received such water services.

(b) *Garbage collection.* Liens for unpaid garbage collection service shall be filed as follows:

(1) After the city has terminated a customer's water service pursuant to subsection 98-59(i) or after the city terminates water service or garbage service at the customer's request or after a customer without water service becomes more than $50.00 delinquent for garbage service alone, the supervisor of the utility billing division shall file a lien on the property serviced by garbage collection service and in the amount the customer whose service was terminated owed to the city for garbage collection service at the time of the termination of services.

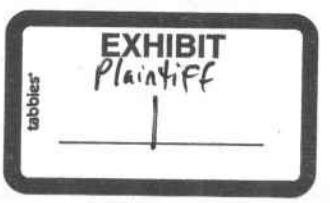
(2) If a property receives garbage collection services illegally, without having an account with the city utility billing division, the supervisor of the utility billing division shall file a lien against that property in the amount of the minimum monthly garbage collection charge that would have been charged to that property had a legitimate account been opened,
multiplied by the number of months during which that property illegally received such garbage collection services.

(c) *Sewer service.* Liens for unpaid sewer service shall be filed as follows:

(1) After the city has terminated a customer's water service pursuant to subsection 98-62(i) or after the city terminates water service or sewer service at the customer's request or after a customer without water service becomes more than $50.00 delinquent in payment for sewer charges alone to the city, the supervisor of the utility billing division shall file a lien on the property served by the water service and in the amount the customer whose service was terminated owed to the city for sewer service at the time of the termination of services or the accumulation of the delinquency in payment for sewer services.

(2) If a property receives sewer services illegally, without having an account with the city utility billing division, the supervisor of the utility billing division shall file a lien against that property in the amount of the minimum monthly sewer charge that would be have been charged to that property had a legitimate account been opened, multiplied by the number of months during which that property illegally received such sewer services.

(d) *Exemptions.* If a customer owes less than $50.00 for the aggregate sum of water charges, garbage collection charges and sewer charges at the time of termination of any of those services, no lien shall be filed against the property served by those services. If the customer is not delinquent in payment at the time of termination of any of the services, no lien shall be filed until that customer becomes delinquent in payment. No lien shall be filed on any property the city knows to be a homestead as defined by the state constitution.



(e) *Filing procedures.* Any lien authorized by this section shall be filed with the county clerk or with the county clerk of the county in which the property to which the lien will be attached is located. The city shall then have a privileged lien on as many lots or pieces of property as the terminated services previously served and are described on the lien instrument by metes and bounds or by city lot and block description or by any other adequate description. The lien shall secure the charges made by the city for the services rendered to that property. Such a lien shall be filed pursuant to the authority granted in Vernon's Ann. Civ. St. art. 1175, § 11; V.T.C.A., Local Government Code §§ 51.072 and 402.017; and state constitution article XI, section 5. The lien shall bear interest at a rate of ten percent per annum. The supervisor of the utility billing division shall add to any lien filed pursuant to this section that amount of the filing fee charged by the county clerk for filing that lien. The lien shall be effective against that property if the account holder or user of services at that property was either the owner of that property, a tenant of that property or a permissive holder of that property or an adverse possessor of that property. For any charges for which the lien authorized by this section is designed to secure, suit may be instituted and recovery in the foreclosure of that lien may be had in the name of the city. The city attorney is authorized to file such suits in a state court of competent jurisdiction.

(f) *Notice and hearing.* After the filing of a lien pursuant to this section, the city clerk shall within 30 days of the filing of that lien give the owner of that property and the account holder notice that such a lien has been filed on that property and shall inform the owner and account holder of their rights of appeal. Within 30 days of the postmark of the notice sent to the property owner or account holder, the property owner or account holder may appeal the decision to impose the lien on that property to the city manager or any fair and impartial person whom the city manager may designate. The city manager shall authorize the release of the lien if the property owner or account holder shows that no bill for the services to this property encumbered by the lien is owing or if the property owner shows that the encumbered property is and at all times, from the hour of filing of the lien until the time of the appeal, has been a homestead as defined by the state constitution. The city manager may modify or release the lien to reflect the true amount of delinquency in payment for services to the property if the owner or account holder demonstrates that a lesser bill is owing than the lien alleged or if the supervisor of the utility billing division cannot show that all the lien alleged is owing. The person last listed on the tax records of the county in which the property is located as being the owner of any given piece of property shall be presumed to be the owner for purposes of this subsection, and the address listed for the owner on the tax records shall be presumed to be the address of the owner.

(g) *Reconnection of services.* No water, garbage or sewer services shall be provided to property encumbered by a lien filed pursuant to this section. However, the supervisor of the utility billing division shall be authorized to reconnect water, garbage and wastewater services if the customer agrees in writing to pay the accrued water and wastewater charges for such property in accordance with a payment schedule acceptable to the supervisor of the utility billing division and the customer also agrees to pay all current and future water and wastewater charges as they come due.

(h) *Release.* Whenever a person pays all principal, interest and the filing fee of a lien validly filed pursuant to this section, the supervisor of the utility billing division shall execute a release of that lien and surrender it to the paying party. The release shall be prepared and approved as to form by the city attorney and shall be duly notarized. The city shall not be responsible for filing that release.

(i) *Rental property.*

(1) The owner of any property, which property is rented to another and such tenant carries city water, sewer or garbage collection services in the tenant's name, may prevent the city from using that property as security for the water, sewer and garbage collection service charges for service to that property and from filing any lien on such property under this section by filing with the city utility billing division a declaration in writing specifically naming the service address of that property and declaring such to be rental property, which the owner does not wish to be security for the water, sewer and garbage collection service charges for service to that property.

(2) When such declaration has been filed with the city prior to the time the account holder begins to receive services, the city shall collect a deposit in the amount of $125.00 pursuant to subsection 98-56(b)(1). If a property owner wishes to declare in regard to the bill of a person already receiving services at a particular property, that declaration shall not be effective until the posting of a deposit in the amount of $125.00 required by subsection 98-56(b)(1).

(3) Subsection (i)(2) of this section notwithstanding, an owner of property who files the declaration on property which is rented to another and the tenant is carrying the city water, sewer or garbage collection services in the tenant's name on the effective date of the ordinance from which this section derives, such declaration shall become immediately effective without the posting of a deposit in the amount of $125.00 as described in subsection 98-56(b)(1). However, if water service is terminated to that tenant for delinquency in payment, a deposit in the amount of $125.00 pursuant to subsection 98-56(b)(1) shall be collected before such city water, sewer or garbage collection service is resumed. Any service account for water, sewer or garbage collection service established after September 26, 1991, shall be subject to subsections (i)(1) and (2) this section.

(4) The declaration of rental property shall be valid only so long as the person making such declaration owns such property, rents such property to another and the tenant of such property carries city water, sewer or garbage collection services in the tenant's name. The owner may revoke the declaration of rental property at any time by so notifying the city in writing.

(j) *Effect of section.* This section is cumulative of any other remedies, methods of collection or security available to the city under the Charter and city ordinances or under state law.

(Code 1967, § 31-63; Ord. No. 6005, § 4, 9-26-91)

Secs. 98-66--98-90. Reserved.

Per City Attorney

"City Ordinance does not limit liability to the person to whom the service was given, as the City Council has determined that water, sewer, garbage and other utility services provided by the City benefit not only the occupants of the property serviced, but also the owners of the property and the property itself."

APPENDIX TAB F

Amended Version of Chapter 98, Section 98-65 of the City of Baytown Code of Ordinances

NUMBER	DESCRIPTION	OFFERED	ADMITTED	VOL.
DX - 13	Certified Copy of 98-65	17	17	2

CITY OF BAYTOWN
CERTIFICATION

I, LETICIA BRYSCH, THE DULY APPOINTED CITY CLERK OF THE CITY OF BAYTOWN, HARRIS AND CHAMBERS COUNTIES, TEXAS, DO HEREBY CERTIFY AND ATTEST THAT AS PART OF MY DUTIES, I DO SUPERVISE AND ACT AS LAWFUL CUSTODIAN OF THE RECORDS OF THE CITY OF BAYTOWN; THAT THE ATTACHED DOCUMENT IS A TRUE AND CORRECT COPY OF :

CHAPTER 98, SECTION 98-65(g) OF THE CITY OF BAYTOWN CODE OF ORDINANCES.

WITNESS MY HAND AND SEAL OF THE CITY ON JULY 7, 2016.

LETICIA BRYSCH, CITY CLERK

(SEAL)

DEFENDANT, CITY OF BAYTOWN'S
EXHIBIT
13
NO. 1007923

(c) No person shall be allowed to disconnect a water meter that meters a facility not discharging into the city's sanitary sewer system as stated in this section and then reconnect such meter to the city's water system within a 12-month period.

(d) Any person representing to the city that the facility for which a meter is installed, under this section, does not discharge waste into the city's sanitary sewer system when in fact it does or any person having facilities for which such a meter is installed who subsequently connects such facility to the city's sanitary sewer system without notifying the director of utilities shall be punishable as provided in section 1-14.
(Code 1967, § 31-61; Ord. No. 3317, § 1, 2-11-82)

Sec. 98-64. Study to determine charge when portion of water bypasses sewer.

(a) This section shall apply to those water users stated in section 98-63 who have facilities connected to the city sanitary sewer system and who make application to the director of utilities under this section.

(b) Any water user owning or having control of property on which there is located one or more facilities requiring water and such water provided to any such facility is not discharged into the city sanitary sewer system may make application to the director of utilities requesting that a study of the applicant's property and facilities be made for the purpose stated in this section and paying the fee required in this section.

(c) Requests for service under this section shall be made to the director of utilities. The applicant shall furnish all the information and other matters requested therein. The fee for making any study under this section shall be $35.00. No fee shall be required for studies initiated by the director of utilities subsequent to the first application. The fee is to reimburse the city for the expense of making the study. Each applicant shall agree, as a condition precedent to the director of utilities conducting the study and tests provided for in this section, including those initiated by the director of utilities, to indemnify and hold harmless the city from any and all such liability for any act or omission by the city, its agents and employees committed while conducting the studies and tests, causing or resulting in damages to the property or person of the applicant, his agents, employees and invitees.

(d) Upon receipt of a request and the fee required in this section, the director of utilities will, as soon as possible, make a study of the applicant's property and facilities. When, in the opinion of the director of utilities, based upon a study of the property and facilities of the applicant, it is impractical or unfeasible for the applicant to install one or more meters to measure the amount of water passing through the water meter serving such property and not being discharged into the city sanitary sewers, the director of utilities is authorized to deny such request.

(e) The director of utilities is authorized, at his discretion or on written request from an applicant, to make such additional studies from time to time of any such property and facilities to check the current accuracy of the filed study on any such property, and a new study based upon the latest available data shall be filed with the director of utilities to replace the prior one. No change in the basis of computing the sewer service charge for any property will be made until the first billing date after the filing by the director of utilities of the first or any subsequent report. Requests by an applicant for a restudy under this subsection will not be accepted or acted on more often than once in every 12-month period (annually) subsequent to the filing of the first report on the applicant's property.

(f) If it is necessary that certain testing instruments be installed or that existing equipment or facilities located on the applicant's property be altered, adjusted, disconnected or temporarily moved in order to facilitate the making of an engineering study or test under this section, all of such shall be done by and at the expense of the applicant.
(Code 1967, § 31-62; Ord. No. 3317, § 1, 2-11-82)

Sec. 98-65. Liens.

(a) *Water.* Liens for unpaid water charges shall be filed according to the following:

(1) After the city has terminated a customer's water pursuant to subsection 98-62(i) or after the city terminates water service at

the customer's request, the supervisor of the utility billing division shall file a lien on the property served by the terminated water service and in the amount the customer whose service was terminated owed to the city for water service at the time of the termination of services.

(2) If a property receives water services illegally, without having an account with the city utility billing division, the supervisor of the utility billing division shall file a lien against that property in the amount of the proper charge for the water actually used or, if there is no way of determining the amount of water used, in the amount of the minimum monthly water charge that would have been charged to that property had a legitimate account been opened, multiplied by the number of months during which that property illegally received such water services.

(b) *Garbage collection.* Liens for unpaid garbage collection service shall be filed as follows:

(1) After the city has terminated a customer's water service pursuant to subsection 98-59(i) or after the city terminates water service or garbage service at the customer's request or after a customer without water service becomes more than $50.00 delinquent for garbage service alone, the supervisor of the utility billing division shall file a lien on the property serviced by garbage collection service and in the amount the customer whose service was terminated owed to the city for garbage collection service at the time of the termination of services.

(2) If a property receives garbage collection services illegally, without having an account with the city utility billing division, the supervisor of the utility billing division shall file a lien against that property in the amount of the minimum monthly garbage collection charge that would have been charged to that property had a legitimate account been opened, multiplied by the number of months during which that property illegally received such garbage collection services.

(c) *Sewer service.* Liens for unpaid sewer service shall be filed as follows:

(1) After the city has terminated a customer's water service pursuant to subsection 98-62(i) or after the city terminates water service or sewer service at the customer's request or after a customer without water service becomes more than $50.00 delinquent in payment for sewer charges alone to the city, the supervisor of the utility billing division shall file a lien on the property served by the water service and in the amount the customer whose service was terminated owed to the city for sewer service at the time of the termination of services or the accumulation of the delinquency in payment for sewer services.

(2) If a property receives sewer services illegally, without having an account with the city utility billing division, the supervisor of the utility billing division shall file a lien against that property in the amount of the minimum monthly sewer charge that would be have been charged to that property had a legitimate account been opened, multiplied by the number of months during which that property illegally received such sewer services.

(d) *Exemptions.* No lien for water charges, garbage collection charges, or sewer charges shall be placed on a property if:

(1) A customer owes less than $50.00 for the aggregate sum of water charges, garbage collection charges and sewer charges;

(2) The customer is not delinquent in payment for water charges, garbage collection charges, or sewer charges;

(3) The city knows the property to be a homestead as defined by the state constitution; or

(4) The city knows the property to be a single-family dwelling house and the delinquent water charges, garbage collection charges,

or sewer charges to be for services provided to a residential consumer who is not the owner of the property.

(e) *Filing procedures.* Any lien authorized by this section shall be filed with the county clerk or with the county clerk of the county in which the property to which the lien will be attached is located. The city shall then have a privileged lien on as many lots or pieces of property as the terminated services previously served and are described on the lien instrument by metes and bounds or by city lot and block description or by any other adequate description. The lien shall secure the charges made by the city for the services rendered to that property. Such a lien shall be filed pursuant to the authority granted in Vernon's Ann. Civ. St. art. 1175, § 11; V.T.C.A., Local Government Code §§ 51.072 and 402.017; and state constitution article XI, section 5. The lien shall bear interest at a rate of ten percent per annum. The supervisor of the utility billing division shall add to any lien filed pursuant to this section that amount of the filing fee charged by the county clerk for filing that lien. The lien shall be effective against that property if the account holder or user of services at that property was either the owner of that property, a tenant of that property or a permissive holder of that property or an adverse possessor of that property. For any charges for which the lien authorized by this section is designed to secure, suit may be instituted and recovery in the foreclosure of that lien may be had in the name of the city. The city attorney is authorized to file such suits in a state court of competent jurisdiction.

(f) *Notice and hearing.* After the filing of a lien pursuant to this section, the supervisor of the utility billing division shall within 30 days of the filing of that lien give the owner of that property and the account holder notice that such a lien has been filed on that property and shall inform the owner and account holder of their rights of appeal. Within 30 days of the postmark of the notice sent to the property owner or account holder, the property owner or account holder may appeal the decision to impose the lien on that property to the city manager or any fair and impartial person whom the city manager may designate. The city manager shall authorize the release of the lien if the property owner or account holder shows that no bill for the services to this property encumbered by the lien is owing or if the property owner shows that the encumbered property is and at all times, from the hour of filing of the lien until the time of the appeal, has been a homestead as defined by the state constitution. The city manager may modify or release the lien to reflect the true amount of delinquency in payment for services to the property if the owner or account holder demonstrates that a lesser bill is owing than the lien alleged or if the supervisor of the utility billing division cannot show that all the lien alleged is owing. The person last listed on the tax records of the county in which the property is located as being the owner of any given piece of property shall be presumed to be the owner for purposes of this subsection, and the address listed for the owner on the tax records shall be presumed to be the address of the owner.

(g) *Reconnection of services.* No water, garbage or sewer services shall be provided to property encumbered by a lien filed pursuant to this section, except as otherwise required by V.T.C.A., Local Government Code § 552.0025. Notwithstanding this prohibition, the supervisor of the utility billing division shall be authorized to reconnect water, garbage and wastewater services if the customer agrees in writing to pay the accrued water and wastewater charges for such property in accordance with a payment schedule acceptable to the supervisor of the utility billing division and the customer also agrees to pay all current and future water and wastewater charges as they come due.

(h) *Release.* Whenever a person pays all principal, interest and the filing fee of a lien validly filed pursuant to this section, the supervisor of the utility billing division shall execute a release of that lien and surrender it to the paying party. The release shall be prepared and approved as to form by the city attorney and shall be duly notarized. The city shall not be responsible for filing that release.

(i) *Effect of section.* This section is cumulative of any other remedies, methods of collection or security available to the city under the Charter and city ordinances or under state law.

(Code 1967, § 31-63; Ord. No. 6005, § 4, 9-26-91; Ord. No. 11,624, § 1, 4-14-11; Ord. No. 11,646, §§ 2—4, 5-26-11; Ord. No. 11,893, § 1, 3-8-12)

APPENDIX TAB G

City of Houston v. Carlson, 451 S.W.3d 828 (Tex. 2014)

451 S.W.3d 828
Supreme Court of Texas.

CITY OF HOUSTON, Petitioner,
v.
James & Elizabeth CARLSON, et al., Respondents

No. 13–0435
|
Argued September 18, 2014
|
OPINION DELIVERED: December 19, 2014
|
Rehearing Denied January 30, 2015

Synopsis

Background: Former condominium unit owners filed suit against city for inverse condemnation. The County Court at Law, Harris County, Debra I. Mayfield, J., granted city's plea to jurisdiction, and owners appealed. The Houston Court of Appeals, 14th District, 401 S.W.3d 725, reversed and remanded. City's petition for review was granted.

The Supreme Court, Brown, J., held that owners failed to allege regulatory taking, as required to state claim for inverse condemnation.

Judgment of Court of Appeals reversed; case dismissed.

Willett, J., filed concurring opinion in which Devine, J., joined.

Procedural Posture(s): On Appeal.

***829** ON PETITION FOR REVIEW FROM THE COURT OF APPEALS FOR THE FOURTEENTH DISTRICT OF TEXAS

Attorneys and Law Firms

Sean Cody, Law Offices of Sean Cody, Houston, for Intervenor.

John B. Wallace, Senior Assistant City Attorney, Judith Lee Ramsey, Chief, General Litigation Section, David M. Feldman, Hope E. Hammill-Reh, Lynette Fons, City of Houston Legal Department, Houston, for Petitioner.

Robert G. Miller, William C. Ferebee, O'Donnell, Ferebee, Medley & Frazier P.C., Houston, for Respondent.

Opinion

Justice Brown delivered the opinion of the Court.

A group of former condominium owners brings this inverse-condemnation action against the City of Houston, alleging their property was taken when the city ordered residents to vacate the condominium complex. The trial court sustained a plea to the jurisdiction after concluding the owners had not alleged a taking. The court of appeals reversed, and we granted the city's petition for review. Having considered the record and relevant law, we agree with the trial court that the claim must be dismissed.

I

In 2007, a private dispute arose among members of a homeowners association. Park Memorial was a 108–unit condominium complex located in the Rice Military area of Houston. The complex was suffering from an increasing number of cosmetic and structural problems, and the condominium owners disagreed as to how best to address those issues. A majority wanted to market the entire property for redevelopment, but a few refused to sell. In July of 2008, one owner—in an apparent effort to encourage action—informed the City of Houston of certain safety concerns.

The city's subsequent investigation revealed various alleged structural, electrical, and plumbing problems. Of primary concern was evidence that an underground parking facility might fail, posing serious risk to the dozens of units located above the garage. Although the respondents fervently deny that the condominiums were unsafe, the record includes numerous photographs documenting various code violations.

After reviewing the results of its investigation, the city declared the condominiums uninhabitable. Officials posted the following notice throughout the complex:

> **NOTICE**
>
> Public Works & Engineering Department / Code Enforcement

> The City of Houston Building Code requires a Certificate of Occupancy to be posted in a conspicuous place on the premises of all commercial buildings.
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> ....
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> ***830** THIS NOTICE WILL ALLOW 10 BUSINESS DAYS FOR YOU TO APPLY FOR A CERTIFICATE OF OCCUPANCY
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> ....
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> **Failure to comply with this notice may subject you to a municipal court citation.**

The condominium owners did not apply for an occupancy certificate and did not make the requisite repairs.

After a month passed without compliance, the city opted not to issue a citation. Instead, the city ordered all residents to vacate the complex within thirty-one days. *See* HOUSTON, TEX., BLDG. CODE § 104.12 (2008) (authorizing officials to "order the use discontinued immediately" where a structure "creates a serious and immediate hazard"). At the request of residents and owners, the city conducted an administrative hearing, but then upheld the order to vacate. By December of 2008, all residents had vacated the complex.

After extensive litigation, sixteen property owners—the same owners appearing as the respondents here—ultimately obtained a permanent injunction in March of 2011 when a district court concluded the owners were not afforded due process of law. That court reversed the order to vacate, and a court of appeals affirmed. *See generally* *City of Houston v. Carlson,* 393 S.W.3d 350 (Tex.App.–Houston [14th Dist.] 2012, no pet.) (holding that the owners had been denied adequate hearing and that the city had failed to follow its own rules). The parties did not seek our review of that decision. Once the order to vacate was lifted, the homeowners association sold the complex for redevelopment.

The group of owners that filed the due-process claim later brought this inverse-condemnation action, alleging that their property was taken when residents were forced to vacate. They seek compensation for years of lost use and for other unspecified damages. The trial court sustained the city's plea to the jurisdiction, concluding that the owners had not alleged a taking. The court of appeals reversed, and the city timely filed a petition for review.

II

A municipal government enjoys immunity from suit unless its immunity has been waived. *Reata Constr. Corp. v. City of Dallas,* 197 S.W.3d 371, 374 (Tex.2006) (citation omitted). Without this waiver, courts have no jurisdiction to adjudicate any claim against the municipality. *Id.* It is well settled that the Texas Constitution waives government immunity with respect to inverse-condemnation claims. *City of Dallas v. VSC, LLC,* 347 S.W.3d 231, 236 (Tex.2011). Nevertheless, such a claim is predicated upon a viable allegation of taking. *Hearts Bluff Game Ranch, Inc. v. State,* 381 S.W.3d 468, 476 (Tex.2012) (citation omitted). "In the absence of a properly pled takings claim, the state retains immunity." *Id.* (citation omitted). Under such circumstances, a court must sustain a properly raised plea to the jurisdiction. *See id.* at 491–92 (dismissing case for lack of jurisdiction after concluding plaintiff had not alleged a taking). With respect to this case, the trial court and court of appeals disagree as to whether the respondents have alleged any taking of property. We review jurisdiction and sufficiency of the pleadings de novo. *See id.* at 476.

The right to acquire and maintain private property is among our most cherished liberties. As Locke explained, the value of private property lies not only in its objective utility, but also in any personal investment therein. *See* JOHN LOCKE, TWO TREATISES OF GOVERNMENT 134 (Thomas I. Cook ed., Hafner Press 1947) (1689). Accordingly, ***831** the right to undisturbed enjoyment of residential property is all the more sacred. The unique importance of the home is reflected in our Bill of Rights, which protects us from uncompensated dispossession, unwarranted search, and unwanted guests. *See* U.S. CONST. amends. III, IV, V. This Court, in particular, has long recognized the undisturbed enjoyment of private property as "a foundational liberty, not a contingent privilege." *Tex. Rice Land Partners, Ltd. v. Denbury Green Pipeline–Texas, LLC,* 363 S.W.3d 192, 204 n.34 (Tex.2012).

The preservation of these property rights is "one of the most important purposes of government." *Eggemeyer v. Eggemeyer,* 554 S.W.2d 137, 140 (Tex.1977). But government has other obligations as well, including ensuring the safety and security of its citizenry. *See Kelley v. Johnson,* 425 U.S. 238, 247, 96 S.Ct. 1440, 47 L.Ed.2d 708 (1976) (referring to "safety of persons and property"). To satisfy its responsibilities, government often imposes restrictions

on the use of private property. *See* Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104, 125, 98 S.Ct. 2646, 57 L.Ed.2d 631 (1978) (recognizing that regulations are used to promote "health, safety, morals, [and] general welfare") (citation omitted). Although these restrictions sometimes result in inconvenience to owners, government is not generally required to compensate an owner for associated loss. "Government hardly could go on if to some extent values incident to property could not be diminished without paying for every such change...." *Id.* at 124, 98 S.Ct. 2646 (quoting *Penn. Coal Co. v. Mahon,* 260 U.S. 393, 413, 43 S.Ct. 158, 67 L.Ed. 322 (1922)).

Nevertheless, when regulation of private property "reaches a certain magnitude ... there must be an exercise of eminent domain and compensation to sustain the act." *Mahon,* 260 U.S. at 413, 43 S.Ct. 158; *see also* U.S. CONST. amend. V (requiring "just compensation"); TEX. CONST. art. I, § 17 (requiring "adequate compensation"); *Hearts Bluff,* 381 S.W.3d at 477 (explaining that Texas takings jurisprudence is "consistent with federal jurisprudence"). Where a property owner believes compensation is due, he may seek redress via an inverse-condemnation claim. *State v. Hale,* 136 Tex. 29, 146 S.W.2d 731, 735 (1941). To plead inverse condemnation, a plaintiff must allege an intentional government act that resulted in the uncompensated taking of private property. *See City of Abilene v. Burk Royalty Co.,* 470 S.W.2d 643, 647 (Tex. 1971) (listing elements of inverse condemnation); *Hale,* 146 S.W.2d at 736 (requiring intent). A taking is the acquisition, damage, or destruction of property via physical or regulatory means. *See Mayhew v. Town of Sunnyvale,* 964 S.W.2d 922, 933 (Tex.1998); *Hale,* 146 S.W.2d at 736.

Although the respondents insist they have suffered a regulatory taking, their allegations do not support that claim. A regulatory taking is a condition of use "so onerous that its effect is tantamount to a direct appropriation or ouster." *Lingle v. Chevron U.S.A. Inc.,* 544 U.S. 528, 537, 125 S.Ct. 2074, 161 L.Ed.2d 876 (2005) (citation omitted). Yet the respondents do not contest any of Houston's property-use restrictions. They do not argue that it is unreasonable to require multi-family residential facilities to obtain occupancy certificates. They do not challenge the city's electrical, plumbing, or structural standards. Nor do they suggest that these standards are so burdensome as to interfere with the use of their property. In fact, the respondents' petition never once refers to the standards imposed by the city's building code.

***832** Instead, the respondents object only to the penalty imposed and the manner in which the city enforced its standards. The respondents complain, for example, that the city did not specify the alleged violations and that the punishment was excessive. They argue that the safety regulations were misapplied vis-à-vis their property. They further insist—and the courts ultimately confirmed—that the city's procedure failed to afford the condominium owners constitutionally adequate notice or hearing. Although these are troubling assertions, they do not implicate any property-use restriction. The only regulation challenged is a procedural one. *See* HOUSTON, TEX., BLDG. CODE § 104.12 (2008) (authorizing orders to vacate). Accordingly, even accepting all pleaded facts as true, the respondents have not alleged a taking.

The respondents appear to suggest that a civil-enforcement procedure alone can serve as the basis of a regulatory-takings claim. They have identified no authority for such a proposition. Historically, takings compensation was afforded only where the government physically acquired or destroyed private property. The U.S. Supreme Court did not recognize regulatory takings until 1922, when a newly enacted Pennsylvania statute prohibited any coal mining that might cause subsidence of certain surface structures. *Mahon,* 260 U.S. at 412–13, 43 S.Ct. 158. The *Mahon* Court found the statute to be a permissible exercise of the state's authority. *Id.* at 414, 43 S.Ct. 158. Nevertheless, the Court required the state to compensate mineral owners for any loss, reasoning that the use restriction was equivalent to "appropriating or destroying [the coal]." *Id.* at 414–15, 43 S.Ct. 158. In so holding, the Court emphasized both the regulatory context and the narrowness of the decision's reach. *See id.* at 415, 43 S.Ct. 158 ("[W]hile *property* may be regulated to a certain extent, if regulation goes too far, it will be recognized as a taking.") (emphasis added), 416 (eschewing "general propositions" and differentiating other circumstances).

In the intervening decades, the Court has applied regulatory takings analysis only to regulation of property. *See, e.g., Penn Cent.,* 438 U.S. at 125, 98 S.Ct. 2646 (limiting its discussion to "land-use regulations"). To our knowledge, neither the U.S. Supreme Court nor this Court has ever recognized a purely procedural regulatory taking. Granted, the respondents offer a host of cases as ostensible support for their position. [1] The cases are inapposite. In each of those disputes, the aggrieved party raised a direct challenge to a physical taking or land-use restriction. In addition, that party also objected to the procedure used to facilitate the disputed action. Here, the

aggrieved party challenges the latter but not the former. So while the respondents may be correct that "numerous cases involve both due-process violations and a takings claim," this case is not among them.

We do not doubt, and the city does not deny, that the order to vacate interfered with the use of the respondents' property. Yet nearly every civil-enforcement action results in a property loss of ***833** some kind. The very nature of the action dictates as much. Nevertheless, that property is not "taken for public use" within the meaning of the Constitution.[2] Accordingly, where a party objects only to the "infirmity of the process," no taking has been alleged. *Nasierowski Bros. Inv. Co. v. City of Sterling Heights,* 949 F.2d 890, 893–94 (6th Cir.1991) (quoting *Hammond v. Baldwin,* 866 F.2d 172, 176 (6th Cir.1989)) (other citations omitted). Further, it is immaterial that the city may have been mistaken regarding the actual safety of the complex. Even assuming the city made a mistake, the respondents' allegations would "amount to nothing more than a claim of negligence on the part of [the city], for which [it] is immune under the Texas Tort Claims Act." *Dalon v. City of DeSoto,* 852 S.W.2d 530, 538 (Tex.App.–Dallas 1992, writ denied). So while the facts alleged here might support a due-process action or perhaps a colorable claim under 42 U.S.C. § 1983, those allegations do not give rise to the takings claim necessary to establish a viable inverse-condemnation case.

* * *

In emphasizing the procedural nature of the dispute before us, we do not mean to suggest that due-process claims and takings claims are mutually exclusive. The city insists as much, and asks us to hold that an inverse-condemnation claim presumes due process of law. We decline the city's invitation to do so, as we need not consider the argument. As the U.S. Supreme Court has explained, a due-process inquiry "is logically prior to and distinct from the question whether a regulation effects a taking." *Lingle,* 544 U.S. at 543, 125 S.Ct. 2074. Consequently, the respondents' inverse-condemnation claim fails not because they have already prevailed on a due-process claim, but because they simply have not alleged a taking. The city therefore retains its immunity from suit. *Hearts Bluff,* 381 S.W.3d at 476. Accordingly, we reverse the court of appeals and dismiss this case for want of jurisdiction.

Justice Willett filed a concurring opinion, in which Justice Devine joined.

Justice Willett, joined by Justice Devine, concurring.

A leader is someone who helps improve the lives of other people or improve the system they live under.[1] —Sam Houston

I join the Court's opinion but write separately to underscore one important thing: The city that bears President Houston's name, while prevailing on the takings claim, acted rather shabbily toward its citizens ***834** residing at Park Memorial Condominiums.

After learning of the alleged code violations, the City hastily ordered residents from their homes when lesser means of enforcement were available. And when property owners raised legitimate concerns, City officials enforced the order in direct contravention of state law and the City's own protocol. *See City of Houston v. Carlson,* 393 S.W.3d 350, 357–61 (Tex.App.–Houston [14th Dist.] 2012, no pet.). In so doing, they ran afoul of the due-process requirements of the United States and Texas Constitutions. *Id.* In short, the City disregarded the constitutional rights of its own citizens.

Houstonians deserve better.

All Citations

451 S.W.3d 828, 58 Tex. Sup. Ct. J. 158

Footnotes

1 *See First English Evangelical Lutheran Church of Glendale v. L.A. Cnty.,* 482 U.S. 304, 107 S.Ct. 2378, 96 L.Ed.2d 250 (1987); *Kopplow Dev., Inc. v. City of San Antonio,* 399 S.W.3d 532 (Tex.2013); *Steele v. City of Houston,* 603 S.W.2d 786 (Tex.1980); *Hale,* 146 S.W.2d at 736; *Smith v. City of League City,* 338

S.W.3d 114 (Tex.App.–Houston [14th Dist.] 2011, no pet.); *; City of San Antonio v. El Dorado Amusement Co., Inc.*, 195 S.W.3d 238 (Tex.App.–San Antonio 2006, pet. denied); *Patel v. City of Everman,* 179 S.W.3d 1 (Tex.App.–Tyler 2004, pet. denied); *Tex. Parks & Wildlife Dep't v. Callaway,* 971 S.W.2d 145 (Tex.App.–Austin 1998, no pet.).

2 *See González–Álvarez v. Rivero–Cubano,* 426 F.3d 422, 430 (1st Cir.2005) ("The quota cancellation was a sanction[,] ... not a taking of private property for public use.... We fail to see how the cancellation ... is different from any other fine or forfeiture imposed under state law consequent to engaging in some harmful activity.") (emphasis omitted).

1 This quote is widely attributed to President Houston. A similar limited-government sentiment is found engraved near the gleaming white, 67–foot "Big Sam" statue in Huntsville, "the World's Tallest Statue of an American Hero":

> The great misfortune is that a notion obtains with those in power that the world, or the people, require more governing than is necessary. To govern well is a great science, but no country is ever improved by too much governing ... most men think when they are elevated to position, that it requires an effort to discharge their duties, and they leave common sense out of the question.

Sam Houston Statue, http://www.huntsvilletexas.com/department/division.php?fDD=4–12 (last visited Dec. 17, 2014).

APPENDIX TAB H

Tex. Loc. Gov't Code Ann. § 552.0025

Vernon's Texas Statutes and Codes Annotated
Local Government Code (Refs & Annos)
Title 13. Water and Utilities (Refs & Annos)
Subtitle A. Municipal Water and Utilities
Chapter 552. Municipal Utilities
Subchapter A. Public Utility Systems in General

V.T.C.A., Local Government Code § 552.0025

§ 552.0025. Connection, Disconnection, and Liability for Municipal Utility Services

Effective: April 1, 2009
Currentness

(a) A municipality may not require a customer to pay for utility service previously furnished to another customer at the same service connection as a condition of connecting or continuing service.

(b) A municipality may not require a customer's utility bill to be guaranteed by a third party as a condition of connecting or continuing service.

(c) A municipality may require varying utility deposits for customers as it deems appropriate in each case.

(d) Except as provided in Subsections (e) and (f), a municipality may by ordinance impose a lien against an owner's property, unless it is a homestead as protected by the Texas Constitution, for delinquent bills for municipal utility service to the property.

(e) The municipality's lien shall not apply to bills for service connected in a tenant's name after notice by the property owner to the municipality that the property is rental property.

(f) The municipality's lien shall not apply to bills for service connected in a tenant's name prior to the effective date of the ordinance imposing the lien. This subsection shall not apply to ordinances adopted prior to the effective date of this Act.

(g) The municipality's lien shall be perfected by recording in the real property records of the county where the property is located a notice of lien containing a legal description of the property and the utility's account number for the delinquent charges. The municipality's lien may include penalties, interest, and collection costs.

(h) The municipality's lien is inferior to a bona fide mortgage lien that is recorded before the recording of the municipality's lien in the real property records of the county where the property is located. The municipality's lien is superior to all other liens, including previously recorded judgment liens and any liens recorded after the municipality's lien.

Credits

Added by Acts 1989, 71st Leg., ch. 304, § 1, eff. Aug. 28, 1989. Renumbered from V.T.C.A., Local Government Code § 402.0025 by Acts 2007, 80th Leg., ch. 885, § 3.76(a)(2)(A), eff. April 1, 2009.

V. T. C. A., Local Government Code § 552.0025, TX LOCAL GOVT § 552.0025
Current through the end of the 2019 Regular Session of the 86th Legislature

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