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 REPLY BRIEF ON THE MERITS

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SUMMARY OF THE REPLY

The Respondent's Brief expands on Schrock's new allegations of a physical taking and an exaction that Schrock raised for the first time in his Response to Petition for Review. He cannot raise new theories at this point in the litigation. However, even if Schrock had raised these theories in the trial court, they fail. This case does not involve the City's physical acquisition, occupation, or possession of Schrock's Property, nor has the City placed any condition on the development of Schrock's Property.

Schrock's utility bill grievance is based on his objection to the City's collection efforts for delinquent utility bills for water service to his rental property, including the City's mistake in imposing a lien and withholding utilities. Therefore, this case fits squarely within the precedent set by this Court in *City of Houston v. Carlson*. In *Carlson*, this Court held that property is not taken for public use within the meaning of the Constitution when a property owner's taking claim is based on complaints about the penalties imposed by regulations, the manner of enforcement of regulations, or the mistaken or misapplication of regulations. *City of Houston v. Carlson*, 451 S.W.3d

828 (Tex. 2014). Pursuant to *Carlson*, Schrock cannot meet his burden to establish a taking as a matter of law because he does not contest a property-use restriction. *Id.* at 831.

Lastly, Schrock failed to establish at trial that the City's intentional acts were the proximate cause of the taking, destruction, or damage to his Property. It is undisputed that Schrock could have paid the outstanding charges under protest and filed suit to recover his $1,500 payment. Instead, he chose to abandon any efforts to rent or maintain his Property for seven years and sued the City for a taking for alleged damages to the Property while it stood vacant.

The only harm that the City could have reasonably expected to occur from the imposition of a lien and withholding utilities was that a property owner may have to pay a bill that he did not owe, and the City may have to reimburse him. It was not foreseeable that Schrock would abandon his Property, refuse to seek utilities for seven years, and let the Property waste away for all of that time because he disagreed with the utility bill. Therefore, the trial court correctly granted the City's directed verdict. Schrock caused his own alleged harm, so there can be

no taking as a matter of law, and this Court should reverse the court of appeals' judgment.

ARGUMENT

I. There are no allegations of a physical taking in this case, and Schrock may not raise such allegations now.

For the first time, in this Court, Schrock attempts to allege that the City's collection efforts related to delinquent utility bills somehow amount to a physical taking. Such allegations may not be raised for the first time at this stage. *Stafford v. Stafford*, 726 S.W.2d 14, 15 (Tex. 1987) (party cannot raise an issue on appeal if it was not raised in party's pleadings or during trial); *Gray-Taylor, Inc. v. Tennessee*, 587 S.W.2d 668, 671 (Tex. 1979) (arguments raised for first time will not be considered by Supreme Court); *State of Cal. Dep't of Mental Hygiene v. Bank of Sw. Nat. Ass'n*, 354 S.W.2d 576, 581 (Tex. 1962) (allegation not contained in pleadings or raised in trial court cannot be raised for the first time on appeal). However, even if Schrock could raise a physical taking claim now, the claim fails.

Takings are classified as either physical or regulatory. *Mayhew v. Town of Sunnyvale,* 964 S.W.2d 922, 933 (Tex. 1998). "Physical takings occur when the government authorizes an unwarranted physical

occupation of an individual's property." *Id.* (citing *Yee v. City of Escondido,* 503 U.S. 519, 522 (1992)). While "physical possession is, categorically, a taking for which compensation is constitutionally mandated," a restriction on property-use or a diminution in value resulting from regulatory action within the government's police power may or may not be a compensable taking depending on the circumstances. *City of Houston v. Maguire Oil Co.*, 342 S.W.3d 726, 735 (Tex. App.—Houston [14th Dist.] 2011, pet. denied) (citing *Sheffield Dev. Co., Inc. v. City of Glenn Heights*, 140 S.W.3d 660, 669–70 (Tex. 2004).

There are "sharp distinctions between physical takings and regulatory takings." *Lowenberg v. City of Dallas*, 168 S.W.3d 800, 802 (Tex. 2005). Physical takings are "relatively rare, easily identified, and usually represent a greater affront to individual property rights," while regulatory takings "are ubiquitous and most of them impact property values in some tangential way." *Id.* (citing *Tahoe–Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 535 U.S. 302, 324 (2002)). The longstanding distinction between physical and regulatory takings "makes it inappropriate to treat cases involving physical takings as

controlling precedents for the evaluation of a claim that there has been a 'regulatory taking,' and vice versa." *Tahoe–Sierra Pres. Council, Inc.*, 535 U.S. at 323.

The Respondent's Brief alleges that the City's actions in denying utility service amount to a physical interference with Schrock's property interest. *See* Respondent's Brief at 18. Schrock does not elaborate on how his utility bill dispute is akin to a physical interference with his property interest, and the only case he cites in an attempt to support his new claim is *Westgate, Ltd. v. State*, 843 S.W.2d 448 (Tex. 1992). *Westgate* does not support Schrock's new novel argument, and this case is not a physical takings case nor analogous to one.

Westgate is an eminent domain case, in which the State of Texas and City of Austin filed a condemnation action against a developer for the purpose of obtaining a right-of-way across the developer's property for the widening of U.S. Highway 290, and the developer filed a counterclaim for inverse condemnation. *Westgate, Ltd.*, 843 S.W.2d at 450. The developer sought lost profits for the period between the government's announcement of the widening project and the government's actual acquisition of the developer's property. *Id.* at 451.

Schrock acknowledges that this Court ruled against the developer because a landowner may not recover economic damages from the government for future plans to condemn. *Id*. at 453. In fact, this Court held in *Westgate* that "where the government has not physically appropriated, denied access to, or otherwise directly restricted the use of the landowner's property," a landowner may not recover damages for inverse condemnation. *Id*. at 450.

Schrock has admitted that his utility bill grievance is based on his objection to the City's manner of enforcement of its utility ordinance, including the City's mistake in imposing a lien, and the subsequent penalty of withholding utilities. Such allegations fit squarely under *City of Houston v. Carlson* as discussed *infra* in Section III. Schrock does not cite any cases analogizing utility bill grievances or the withholding of utilities to physical occupation, appropriation or possession of property. Schrock simply concludes, "The City's conduct amounted to a direct taking, a form of actual physical taking in that the City's refusal to provide water legally restricted the landowner's lawful and intended purpose for the property." *See* Respondent's Brief at 22.

Such conclusory allegations are insufficient, and, in any event, should not be considered at this point of the proceedings.

II. There are no allegations of an exaction in this case, and Schrock may not raise such allegations now.

Like his new physical taking claim, for the first time, in this Court, Schrock attempts to equate his utility bill dispute to an exaction. He cannot raise this theory now, but even if he could, the theory fails. *Stafford*, 726 S.W.2d at 15; *Gray-Taylor, Inc.*, 587 S.W.2d at 671; *State of Cal. Dep't of Mental Hygiene*, 354 S.W.2d at 581.

An exaction "occurs when the government requires an owner to give up his right to just compensation for property taken in exchange for a discretionary benefit conferred by the government." *Maguire Oil Co.*, 342 S.W.3d at 736 (citing *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 548 (2005)). Schrock cites *Nollan v. California Coastal Comm'n*, 483 U.S. 825 (1987), *Dolan v. City of Tigard*, 512 U.S. 374 (1994), and *Town of Flower Mound v. Stafford Estates Ltd. P'ship*, 135 S.W.3d 620 (Tex. 2004) to support his new theory that a utility bill dispute should be analyzed as an unconstitutional exaction.

However, unlike in this case, both *Nollan* and *Dolan* involved Fifth Amendment takings challenges of land use decisions conditioning

approval of property development on the dedication of portions of property to public use. *Nollan*, 483 U.S. 825; *Dolan*, 512 U.S. 374. Specifically, in each case, the government demanded that a property owner dedicate an easement allowing public access to the property as a condition of granting a development permit. *Id.*

In *Nollan*, the California Coastal Commission required that property owners provide public access to a portion of their property between the owner's seawall and the ocean in exchange for a permit to build a larger residence on their beachfront property. 483 U.S. at 828. In *Dolan*, a city required that a commercial property owner dedicate a portion of its property for a greenway with a bike and pedestrian path in exchange for a permit to expand a store and parking lot. 512 U.S. at 380.

The United States Supreme Court began both cases by stating that had the government simply required the property owners to dedicate portions of their properties for public use, rather than conditioning the grant of a permit on such a dedication, a per se physical taking would have occurred. *Dolan*, 512 U.S. at 384; *Nollan*, 483 U.S. at 831; *see also Lingle*, 544 U.S. at 546. "The question was

whether the government could, without paying the compensation that would otherwise be required upon effecting such a taking, demand the easement as a condition for granting a development permit the government was entitled to deny." *Lingle*, 544 U.S. at 546–47.

In *Nollan*, the Court held that the government could require the easement without compensation so long as the exaction would substantially advance the same government interest that would furnish a valid ground for denial of the permit. *Lingle*, 544 U.S. at 547 (citing *Nollan*, 483 U.S. at 834–37). "The Court further refined this requirement in *Dolan,* holding that an adjudicative exaction requiring dedication of private property must also be roughly proportional ... both in nature and extent to the impact of the proposed development." *Lingle*, 544 U.S. at 547 (citing *Dolan*, 512 U.S. at 391) (internal quotation marks omitted).

Stafford Estates is similar to *Nollan* and *Dolan* and involved a takings challenge under the Texas Constitution and the Fifth Amendment. *Stafford Estates Ltd. P'ship*, 135 S.W.3d 620. In *Stafford Estates*, the town of Flower Mound required a developer to construct and pay for improvements to a public street adjacent to its property in

exchange for approval of certain plats. *Id.* at 623. The question in *Stafford Estates* was "whether an exaction as a condition of government approval of development is a compensable taking." *Id.* at 640.

Schrock's attempt to raise an exaction taking theory fails. In addition to the fact that Schrock is not entitled to raise this argument at this stage of the litigation, this case is fundamentally different than *Nollan*, *Dolan*, and *Stafford Estates*. The Court would have to drastically expand the application of *Nollan*, *Dolan*, and *Stafford Estates* to cases that do not involve property development because Schrock does not seek to develop the Property, and the City has not placed any condition on the development of Schrock's Property. Furthermore, the City has not asked him to dedicate any portion of the Property for public use in exchange for granting him something the City was entitled to deny, like a development permit or plat approval.

This is a utility bill dispute, whereby Schrock contends: (1) the City made mistakes in applying its ordinances to require Schrock to pay for outstanding utility bills for utility services provided to the Property; (2) the City mistakenly placed a lien on the Property when he did not pay the bills; (3) the City mistakenly withheld utilities to the rental

Property when he did not pay the lien; and (4) the City misapplied state law in requiring him to pay the bills and in placing a lien on the Property. These allegations cannot be molded into an exaction claim. Instead, they fit squarely within the analysis provided by this Court in *City of Houston v. Carlson*.

III. *City of Houston v. Carlson* is directly on point and controls.

City of Houston v. Carlson and its progeny are directly on point, and Schrock's attempts to distinguish *Carlson* are unsuccessful. Schrock does not address *APTBP v. City of Baytown* or any of the other cases that apply *Carlson* that the City cited in its Brief on the Merits.

In *Carlson*, the city of Houston required a group of property owners to make repairs to their condominium property. 451 S.W.3d at 830. When the owners failed to make the required repairs, Houston ordered them to vacate their homes pursuant to a building regulation, and a group of owners sued. *Id.* The homeowners complained that Houston made mistakes in applying its regulations, and the order to vacate amounted to a taking. *Id.*

This Court concluded that the owners were not challenging a land-use restriction. *Id.* at 832-33. Rather, the property owners challenged

the procedure used by the City to enforce its standards because the owners' complaints were directed at the penalty imposed, the manner of enforcement of its regulations, and Houston's misapplication of regulations. *Id.* The Court held that even though the order to vacate interfered with the property owners' use of their property, the property was "not taken for public use within the meaning of the Constitution" because the property owners only objected to the infirmity of the process. *Id.* Moreover, the condominium owners' allegations that Houston's "regulations were misapplied vis-à-vis their property ... amount to nothing more than a claim of negligence," for which the City is immune. *Id.* at 833.

Schrock is not challenging a land-use restriction either. He only complains about the City's manner of enforcement of its utility ordinance, the penalties imposed by the City for Schrock's failure to pay outstanding utility bills associated with his Property (i.e. the lien and withholding of utilities), the City's misapplication of its utility ordinance, and the City's misapplication of state law.

Rather than distinguishing *Carlson*, Schrock reinforces its application. He does not attempt to show that he is challenging a

property-use restriction. Instead, he confirms that his dispute is really about whether he "legally owe[s]" a utility bill that he "did not personally incur." *See* Respondent's Brief at 26.

Schrock explains that he "clearly complains about the manner in which the City set up what he believed to be a sham *process* to review the disputed utility billing accounts and provide him with an opportunity to be heard." *Id.* at 28 (emphasis added).[1] And, showing that his dispute is based on the penalties imposed for his failure to pay outstanding bills, Schrock "argues that the imposition of a lien and refusal to provide water service to his tenants ... is a direct regulatory taking by virtue of the City's extortionate demands upon him." *Id.* at 28. He also continues to complain about the City's mistakes in applying state law and its utility ordinance. *Id.* at 17; 25.

Schrock states that *Carlson* is unlike this case because *Carlson* involved health and safety regulations. However, Schrock ignores the

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[1] Schrock followed the City's administrative process for appealing the utility bills, and, after a hearing, he received a favorable result in the reduction of the amount owed. CRPX12.

cases cited by the City, in which courts of appeals across Texas applied *Carlson* in evaluating various types of regulations and found no taking.[2]

In *APTBP, LLC v. City of Baytown*, the Fourteenth Court of Appeals rejected an apartment complex owner's attempted taking claim based on allegations that the City misapplied its apartment safety ordinances and denied the complex access to electricity, which allegedly prevented the owner from renting apartment units. *See* 2018 WL 4427403, at *5. In *National Media Corporation v. City of Austin*, the Third Court of Appeals rejected National Media Corporation's attempted taking claim based on the city of Austin's alleged "illegal actions" in wrongly applying sign regulations. *See* No. 03-16-00839-CV, 2018 WL 1440454, at *5 (Tex. App.—Austin Mar. 23, 2018, no pet.) (mem. op.).

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[2] *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.); *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.); *CPM Tr. v. City of Plano*, 461 S.W.3d 661, 673 (Tex. App.—Dallas 2015, no pet.); *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.); and *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).

In *CPM Trust v. City of Plano*, the Fifth Court of Appeals rejected billboard owners' attempted taking claim based on the city of Dallas' misapplication of its municipal sign ordinance. 461 S.W.3d at 673. In *House of Praise Ministries, Inc. v. City of Red Oak*, the Tenth Court of Appeals rejected a church's attempted taking claim based on a city's enforcement of its substandard building code, noting that the church did not contest a property-use restriction. *See* 2017 WL 1750066, at *7. Moreover, in *Schmitz v. Denton County Cowboy Church*, the Second Court of Appeals rejected a church's attempted taking claim based on the manner in which the town of Ponder enforced its zoning ordinances. *See* 550 S.W.3d at 356–57.

Therefore, *Carlson* controls this case. This Court should reverse the court of appeals' judgment because it cannot be reconciled with *Carlson* or *Carlson's* progeny of cases rejecting attempted takings claims based on challenges to penalties imposed by regulations, the manner in which a city enforces its standards or the misapplication of regulations.

IV. *Penn Central* does not apply to this case. If it did apply, its fact-sensitive test of reasonableness supports reviewing and reversing the court of appeals' judgment.

A party challenging government action as an uncompensated taking of private property may allege: (1) a physical taking; (2) a land-use exaction; (3) a total regulatory taking under the United States Supreme Court's decision in *Lucas v. South Carolina Coastal Council*; or (4) a taking under *Penn Central Transportation Company v. City of New York*. *Rowlett/2000, Ltd. v. City of Rowlett*, 231 S.W.3d 587, 591 (Tex. App.—Dallas 2007, no pet.) (citing *Sheffield Dev. Co., Inc.*, 140 S.W.3d at 671-72). A total regulatory taking occurs when a regulation "deprives an owner of *all* economically beneficial uses of his land" and "is limited to the extraordinary circumstance when *no* productive economically beneficial use of land is permitted." *Tahoe–Sierra Pres. Council, Inc.*, 535 U.S. at 330 (emphasis in original).

Anything less than a total loss of value from a land-use restriction requires a *Penn Central* analysis. *Id.* A *Penn Central* taking is implicated in those situations where there is not a complete taking, but the property-use regulation goes too far, causing an unreasonable

interference. *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 124-25 (1978).

The question is whether the government is "forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Id.* at 123. To answer the question, courts balance the public's interest against that of the private landowner and apply "a fact-sensitive test of reasonableness." *Sheffield Dev. Co., Inc. v. City of Glenn Heights*, 140 S.W.3d 660, 672-73 (Tex. 2004).

This Court, as well as the courts of appeals applying *Carlson*, recognized that complaints regarding the manner of enforcement of regulations, misapplication of regulations, and penalties enforced pursuant to regulations do not implicate any of the four types of takings. It was not necessary to analyze those disputes under *Penn Central* because, like here, the plaintiffs did not challenge a property-use restriction.

Even if the Court applied *Penn Central* to this case, a "fact-sensitive test of reasonableness" supports reviewing and reversing the court of appeals' ruling. Schrock chose not to comply with City

regulations he disagreed with, and he chose to stop renting to tenants in January 2010.

It is not fair or just to require the public to subsidize Schrock's irrational decision to abandon his Property because he disagrees with a municipal utility charge. Yet, under the rationale of the court of appeals, the public should bear the burden of any costs associated with a property owner's personal decision to abandon his property rather than pay a bill under protest and seek a refund.

V. Causation is an essential element of a taking claim, and whether Schrock has a viable taking claim is a matter of law, not a matter of fact for the jury.

"Without causation there is no taking" because causation "is an essential element of a takings case." *Hearts Bluff Game Ranch, Inc. v. State*, 381 S.W.3d 468, 483 (Tex. 2012). In 1941, this Court held that the "true test" is whether the government's intentional acts were the proximate cause of the taking or damaging of property. *Id.* (quoting *State v. Hale*, 136 Tex. 29, 37, 146 S.W.2d 731, 737 (1941)).

In the absence of a "direct restriction" on the use of land, a property owner cannot show governmental action caused a taking. *Hearts Bluff Game Ranch, Inc.*, 381 S.W.3d at 483 (citing *Westgate,*

Ltd., 843 S.W.2d at 452). "The ultimate determination of whether the facts are sufficient to constitute a taking is a question of law." *Mayhew*, 964 S.W.2d at 933.

Schrock agrees that the relevant facts are undisputed but illogically argues, without providing any supporting case law, that causation in this case is "best handled by a jury." *See* Respondent's Brief at 16; 30. He points out that he attempted to pay the lien, but decided not to because he worried that the City would charge him for outstanding bills for services provided to his other properties. Respondent's Brief at 29. However, there is no evidence that the City charged Schrock for outstanding bills for services to his other properties, and Schrock has not made those claims. Nevertheless, after his tenant vacated in 2010, Schrock stopped renting the Property, and it sat vacant for seven years.

He did not attempt to rent his Property after the City removed the lien or after the City turned on the water for Schrock for one month in 2012 to address a rat infestation. 3RR63. In fact, once he dealt with the rat infestation, Schrock instructed the City to turn off the water,

which the City did, and the Property sat vacant for at least five more years without utilities. 3RR64.

It is undisputed that when Schrock learned that the City required him to pay the outstanding utility charges for his tenant to get water service in January 2010, Schrock had the ability to pay and attempted to pay. 3RR47-48; 53-54. However, he only brought one check to the water department, and he made it out for the wrong amount. 3RR53. When Schrock informed his tenant that he would have to wait a few days for water until Schrock could resolve the issue, the tenant moved out. 3RR54. For some unknown reason, Schrock did not go back to the water department or otherwise attempt to pay the outstanding bills for nearly ten months after his initial visit. 2RR86.

Ultimately, instead of paying the outstanding bills and subsequently seeking a refund of the charges he believed he did not owe, Schrock "chose" to "stand up for his rights and directly challenge the abusive power of City Hall." *See* Respondent's Brief at 12. He decided to abandon the Property and leave it vacant for almost a decade, during which time it suffered from a rat and mold infestation, and was vandalized.

At the conclusion of the trial, counsel for the City argued that the only harm that the City could have reasonably expected to occur from the imposition of the lien and withholding of utilities was that Schrock may have to pay a bill that he did not owe, and the City may have to reimburse him. 3RR152. It was not foreseeable that Schrock would abandon the Property, refuse to seek utilities for seven years, and let the Property waste away because he disagreed with the utility bill.

The trial court considered the undisputed facts and correctly determined that, as a matter of law, the City did not cause a taking or damaging of Schrock's Property. The court reasoned that the City did not refuse to ever provide utilities to the Property; the City required Schrock to pay a bill in order to obtain utilities. 3RR153. The City "didn't say you can't have it... . It's a question of you have to pay the money." *Id.* Schrock chose not to pay, and he chose to leave his Property vacant for seven years. He caused his own harm, which negates his taking claim.

CONCLUSION AND PRAYER

There is a growing trend in which claimants ask courts to award them compensation for an unconstitutional taking in disputes that do

not involve direct restrictions on property-use in order to overcome governmental immunity. This case is part of that trend.

The trial court recognized that under the undisputed facts, Schrock did not meet his burden to prove a viable taking claim. He caused his own alleged harm and only complains about the City's manner of collecting delinquent utility charges, the penalties imposed for nonpayment, and the City's acts of misapplying the law to his situation.

Finding a taking from these facts cannot be reconciled with long-established takings jurisprudence. It will set a dangerous precedent that will allow property owners to overcome governmental immunity by alleging that a city made mistakes in applying the law and its ordinances.

The City requests that the Court grant its Petition for Review and reverse the First Court of Appeals' judgment as to Schrock's taking claim that expands taking law beyond the examination of property-use regulations that proximately cause harm to property owners. The City also prays for any other relief to which it may show it is entitled.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing *Petitioner's Reply Brief on the Merits* has a word count of 4,407.

/s/ Allison S. Killian
Allison S. Killian

CERTIFICATE OF SERVICE

I certify that on the 11th day of May, 2021, I served *Petitioner's Reply 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.

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