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SUPREME COURT OF TEXAS
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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

CITY OF BAYTOWN'S REPLY TO RESPONSE TO PETITION FOR REVIEW

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CITY OF BAYTOWN

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TO THE HONORABLE SUPREME COURT OF TEXAS:

Comes now Petitioner City of Baytown and, in support of its Petition for Review seeking review and reversal of the court of appeals' improvident judgment, would show:

STATEMENT IN REPLY

The Response to Petition for Review (the "Response") fails to address the considerations enumerated in Rule 56.1 of the Texas Rules of Appellate Procedure concerning the factors the Court considers in deciding whether to grant a petition for review. It reads more like a response to a request this Court has not yet made for briefing on the merits.[1] Nevertheless, the Response includes important information that confirms the need for the Court to review and reverse the First Court of Appeals' judgment that elevates a dispute over a water bill into a constitutional issue.

Namely, Schrock confirms that he caused his own alleged harm. Response at p. 9. Without causation, there can be no taking as a matter of law. *See Hearts Bluff Game Ranch, Inc. v. State*, 381 S.W.3d 468, 483 (Tex. 2012).

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[1] This Reply to Response to Petition for Review does not address every merits-based argument presented in the Response and will appropriately address the merits if the Court requests briefing on the merits.

Additionally, Schrock admits that his utility bill grievance is based on his objection to the City's manner of enforcement, including the City's mistake in imposing a lien, in collecting delinquent utility bills for water service to his rental property. *See* Response at p. 13. The First Court of Appeals' opinion finding a regulatory taking of his property based on such an allegation directly contradicts the precedent this Court set in *City of Houston v. Carlson*. *See City of Houston v. Carlson*, 451 S.W.3d 828, 832–33 (Tex. 2014).

ARGUMENT

I. The Response confirms that the court of appeals' opinion conflicts with this Court's opinion in *City of Houston v. Carlson*.

"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 (citing *Hearts Bluff Game Ranch, Inc.,* 381 S.W.3d at 476) (emphasis added); *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."). Determining whether certain facts are enough to constitute a

taking is a question of law. *Hearts Bluff Game Ranch, Inc.,* 381 S.W.3d at 476. To establish a waiver of governmental immunity, a plaintiff must present factual allegations showing an intentional government act that caused the uncompensated taking of private property for public use. *Carlson*, 451 S.W.3d at 830-31.

Accordingly, the Court has historically applied regulatory taking analysis only to the regulation of property. *Id.* at 832. When a property regulation "reaches a certain magnitude … there must be an exercise of eminent domain and compensation to sustain the act." *Id.* at 831. Thus, a regulatory taking is described as "a condition of use 'so onerous that its effect is tantamount to a direct appropriation or ouster.'" *Id.* at 831 (citing *Lingle v. Chevron U.S.A. Inc.,* 544 U.S. 528, 537 (2005) (citation omitted)).

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. When the owners failed to repair the problems or obtain the certificate of occupancy, Houston ordered the property owners to vacate their homes 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 held that the condominium owners had not alleged a viable taking claim. *Id.* 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 and the manner of enforcement. *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.

Therefore, where a property owner "objects only to the 'infirmity of the process,' no taking has been alleged." *Id.* Moreover, this Court also held that allegations that a city made a mistake or misapplied the law do not amount to a viable taking claim and "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." *Id.* at 833.[2]

Indeed, "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). Yet, the court of appeals in this case held that the jury should have reached the question of damages for a regulatory taking. *See* Appx. B to City's Petition for Review.

The Response makes the following contentions, confirming that the court of appeals' opinion conflicts with *Carlson*:

- "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).

[2] A number of courts of appeals also reject taking claims based on misapplication of the law. *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.).

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

- "The 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).

- "After 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.

- "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).

- "The 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).

These are allegations: (1) about the City's manner of collecting delinquent utility charges; (2) about the penalties of withholding utility service and imposing a lien for the failure to pay delinquent utility charges; and (3) that the City made mistakes in its collection efforts. Pursuant to *Carlson*, such allegations do not amount to allegations of a taking of Schrock's property. *Carlson*, 451 S.W.3d at 832-33.

Cities that provide water and sewer service charge their customers based on how much they use that service. *See* Appx. F; 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.).

Indeed, 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 clearly has a legitimate interest in collecting unpaid charges just as it has in enforcing building codes and other health and safety regulations. Accordingly, cities are

authorized to take actions to protect themselves from the risk of non-payment. Historically, those actions have included the requirement that customers post security deposits and the imposition of liens against properties where the service was received.

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 statutes that limit the ability of cities to impose liens in certain circumstances and that the City misapplied those statutes in this case. *See* Appx. G; Tex. Loc. Gov't Code Ann. § 552.0025.

Nevertheless, as this Court held in *Carlson*, the fact that the City may have made a mistake in billing for water and sewer service, or misapplied the law, does not amount to an unconstitutional taking, and, the court of appeals' opinion to the contrary transforms regulatory taking law into a form of negligent administration. *Carlson*, 451 S.W.3d at 832-33; *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.). There was no need for the jury to reach the issue of damages or the extent of diminution in value to Schrock's property because, as a matter of law, the undisputed factual allegations and evidence presented do not amount to a viable taking claim. Therefore, the trial court was correct to grant the City's motion for directed verdict, and the City requests that the Court review and reverse the First Court of Appeals' judgment.

II. The Response confirms that Schrock caused his own harm.

It is undisputed that Schrock could have paid the outstanding charges under protest and filed suit to recover the $1,500 payment. 3RR:47-48; 55-56. Instead, he chose to abandon any efforts to rent or maintain his property *for seven years* and sued the City for an unconstitutional taking of his property.

As explained in his Response, "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. Thus, he admittedly made a *choice* to allow his property to fall into disrepair, so he could make some kind of statement. Now, according to

the court of appeals' opinion, a city may be held responsible for an unconstitutional taking for property damage that a property owner could have at least prevented but, instead, voluntarily incurred.

"Proximate cause is an essential element of a takings case," and whether government action amounts to a taking is a matter of law. *Hearts Bluff Game Ranch, Inc.*, 381 S.W.3d at 483. The trial court granted the City's directed verdict and concluded that, given the undisputed facts, the City's actions did not cause Schrock's alleged damages. CR167. In his Response, Schrock confirms that he chose to "stand up for his rights" instead of "acquiesce." Response at p. 9. He caused his own harm, and, therefore, there can be no taking as a matter of law.

III. Contrary to the Response, there are no allegations of an exaction or a physical taking in this case.

For the first time, Schrock presents an allegation in the Response that the City's acts to collect delinquent utility bills are somehow a physical taking or exaction. This case does not involve physical occupation by the City of Schrock's property or an exaction. *Lingle*, 544 U.S. at 546; *Tarrant Reg'l Water Dist.*, 151 S.W.3d at 554. In any event, such allegations cannot be raised at this point. *State of Cal. Dep't of*

Mental Hygiene v. Bank of Sw. Nat. Ass'n, 354 S.W.2d 576, 581 (Tex. 1962).

CONCLUSION AND PRAYER

The undisputed facts establish that Schrock caused his own alleged harm and only complains about the 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 and sets a dangerous precedent that will lead to countless new lawsuits and confusion regarding a city's enforcement of regulations.

If a customer can convert a minor billing dispute into an unconstitutional taking by irrationally abandoning their 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. Moreover, it is the customers who must ultimately make up for the loss for uncollected charges.

Therefore, the City requests that the Court 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,

OLSON & OLSON, L.L.P.

By: */s/ Allison S. Killian*

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CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing Reply to Response to Petition for Review has a word count 2,346.

/s/ Allison S. Killian
Allison S. Killian

CERTIFICATE OF SERVICE

I certify that on the 13th day of January, 2021, I served *City of Baytown's Reply to Response to Petition for Review*, 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

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APPENDIX TO CITY OF BAYTOWN'S REPLY TO RESPONSE TO PETITION FOR REVIEW

APPENDIX TAB F

Tex. Loc. Gov't Code Ann. § 552.017

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 B. Acquisition of Interests for Drainage, Sewage, or Water Supply Purposes

V.T.C.A., Local Government Code § 552.017

§ 552.017. Water Systems in Home-Rule Municipalities

Effective: April 1, 2009
Currentness

(a) A home-rule municipality may exercise the exclusive right to own, construct, and operate a water system for the use of the municipality and its residents. The municipality may regulate the system and may prescribe rates for the water furnished.

(b) The municipality may acquire by purchase, donation, or other means suitable land inside or outside the municipality for construction of the system, including any necessary rights-of-way.

(c) The municipality may take the necessary action to operate and maintain the system and to require water customers to pay charges imposed for the water furnished.

(d) The municipality may create, from revenue received from operating the water system, a separate fund dedicated solely to extending, operating, maintaining, repairing, and improving the water system. This revenue may be pledged for paying the principal of and providing an interest and sinking fund on bonds issued for these purposes, subject to applicable regulations in the municipal charter.

Credits

Acts 1987, 70th Leg., ch. 149, § 1, eff. Sept. 1, 1987. Amended by Acts 1989, 71st Leg., ch. 304, § 2, eff. Aug. 28, 1989. Renumbered from V.T.C.A., Local Government Code § 402.017 by Acts 2007, 80th Leg., ch. 885, § 3.76(a)(2)(B), eff. April 1, 2009.

V. T. C. A., Local Government Code § 552.017, TX LOCAL GOVT § 552.017
Current through the end of the 2019 Regular Session of the 86th Legislature

End of Document

APPENDIX TAB G

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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