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SUPREME COURT OF TEXAS
BLAKE A. HAWTHORNE, CLERK

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 at Houston, Texas
Cause No. 01-17-00442-CV

RESPONDENT'S BRIEF

Respectfully submitted,

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[1] Respondent's trial and appellate counsel, Mr. David Sedegh, filed a motion for extension of time to respond to the Petition for Review. Subsequently, Mr. Sedegh filed a motion for withdrawal, which was granted by this Court on October 7, 2020.

INDEX OF AUTHORITIES

Cases

Rules and Statutes

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TO THE HONORABLE JUSTICES OF THE SUPREME COURT OF TEXAS:

Respondent, Alan Schrock, (hereafter "Schrock" or "Respondent") submits Respondent's Brief in response to the Petitioner, City of Baytown's (hereafter "City" or "Petitioner") Petition for Review and Petitioner's Brief on the Merits, filed in accordance with rule 55.3 of the Texas Rules of Appellate Procedure. In opposition to the City's Petition for Review, and in response to the Petitioner's Brief on the Merits, the Respondent respectfully submits as follows:

STATEMENT OF THE CASE

The primary issue in this case is whether a landowner may recover damages for inverse condemnation under Article I, Section 17 of the Texas Constitution and The Fifth Amendment of the United States Constitution (the Takings Clause) where the government has denied essential city services and improperly placed a lien on the property for the debt of a third person, in direct violation of state law, to such a degree as to render the property unusable for the landowner's reasonable investment backed expectations.

Schrock has maintained that the City's refusal to provide city water, sewer and garbage services to one of Schrock's rental properties (unless Schrock paid off all of the debts owed to the City by some of Schrock's former tenants) was a proximate cause to his loss of rental income, and caused him other damages, amounting to an unlawful "taking" without just compensation.

After Schrock presented evidence and rested his case, the trial court directed verdict in favor of the City, and Schrock appealed. The First Court of Appeals reversed the trial court's directed verdict, and found in favor of Schrock's "takings" claim, but it affirmed the portion of the trial court's decision to direct verdict against Schrock on his claim for declaratory judgment and attorneys fees.

STATEMENT OF ISSUES PRESENTED

1. Whether the court of appeals was correct to reverse the trial court's directed verdict against Schrock's inverse condemnation claims because the evidence admitted not only raised a material fact on Schrock's takings claim, but the evidence also supports a regulatory taking as a matter of law.

2. Whether the court of appeals was correct to remand the case for a new trial on Schrock's takings claims, where the jury can decide just compensation (damages).

STATEMENT OF FACTS

The Respondent provides the following statement of facts pursuant rule 55.3(b) of the Texas Rules of Appellate Procedure to in order to clarify the record. For example, the Respondent never "abandoned" his rental property. (Petitioner's Statement of Facts, Brief on the Merits, at page 3). Rather, the City put a lien on the property in May of 2009, refused to provide water service to the property beginning in January of 2010, and didn't release the lien until June 24, 2013. (PX 4; II R.R. at 81; DX 12). Schrock lost his tenant and was unable to relet the property without water service. (II R.R. at 80). Additional relevant facts include the following: Schrock has been a lifelong resident of the city of Baytown, and purchased the property at issue in this case in 1993 for the specific purpose of using it as rental property. (II R.R. at 38). He has owned the property continuously from 1993 to the present date. (II R.R. at 41-42). When Schrock bought the property, he fully expected to be able to use the property as rental property for years to come, and in fact, as recently as 2007 or 2008 invested approximately $5000 in additional improvements to the property with the expectation that he would be able to rent out the property for at least another 10 years. (III R.R. at 4). It was rare for Schrock to have an extended period of vacancy in any of his properties prior to the dispute made the basis of this case, as he was

often capable of finding a new tenant within a very short period of time after a prior tenant vacated the property. (II R.R. at 42).

When Schrock first learned of a possible assessment against his property for the past due utility bills of his former tenants, he sought the assistance of counsel and attempted to resolve the issue with the City, only to have his attorney verbally threatened by the City, who then withdrew as counsel in the matter. (II R.R. at 50-52)

Further, after learning in 2009 that the City had imposed an ordinance that required landlords to submit a formal declaration stating they did not want their property to be used as collateral for unpaid debts of tenants, Schrock filed such declarations on all of his rental properties (II R.R. at 66). Moreover, the city knew that Schrock's property was rental property because the City water department had a policy in place wherein the City required a substantially higher deposit to be paid by tenants when seeking water service as opposed to the owner of the property. (II R.R. at 45) Nevertheless, on June 1, 2009, despite knowing Schrock had previously filed a "rental property declaration" on May 1, 2009 (PX 2) and knowing all the unpaid utility debts were from former tenants and not Schrock himself, the City filed a lien in the real property records of Harris County, Texas against property owned by Schrock. (PX 4). The first time that Schrock ever heard about the lien being filed

on his property was in January of 2010 when his tenant was told that he could not secure water service at the property. (II R.R. at 60).

Upon learning that his tenant would be unable to maintain and secure water service in his own name unless Schrock made payment of lien, Schrock attempted to pay off the lien. (II R.R. at 77-78). However, the City refused to accept Schrock's check, and instead, insisted he pay additional sums over and above the actual lien amount -- even refusing to accept Schrock's attempt at partial payment. (II R.R. at 79). Later, when Schrock returned to the City with cash to make payment on the lien, he became concerned when he was told by the City water department official "now, we need to talk about your other 19 accounts." (II R.R. at 87). Upon hearing this threat, Schrock was fearful the City would repeat its bad faith collection efforts, and he would face substantial liens on all of his other 19 properties. (II R.R. at 87-88; 92-93). Schrock brought suit against the City on January 19, 2012. (CR 180) The city refused to remove or release its utility lien until June 24, 2013. (DX 12)

SUMMARY OF THE ARGUMENT

"I hope we once again have reminded people that man is not free unless government is limited. There's a clear cause and effect here that is as neat and predictable as a law of physics: as government expands, liberty contracts."

— Ronald Reagan

This dispute is based upon an abuse of power by a municipal government. The City of Baytown unlawfully terminated and thereafter refused to provide essential city functions, including water, sewer and garbage service, because a landowner refused to pay off utility debts owed to the City by some of his prior tenants. Alan Schrock has been fighting the City of Baytown since 2009 for what he believes to be an unlawful regulatory scheme and attempted government overreach related to uncollected utility bills. At the time of the trial below, Schrock owned 19 rental properties within the city limits of Baytown, Texas. (II R.R. at 88). Rather than acquiesce to an extortionate demand that he pay the City for delinquent utility bills he did not personally incur (or else he would be denied the most basic of essential city services --water to his property) Schrock chose instead to stand up for his rights and directly challenge the abusive power of City Hall. (PX-10; II R.R. at 57-59).

The City continues to mischaracterize the facts in this case as one of a petty disagreement over a "minor" $1,500 utility bill. (Petition for Review at page 7; Petitioner's Brief on the Merits, at page 1). Putting aside what appears to be an

unfortunate display of hubris by the City to assume a $1,500 assessment is an insignificant amount of money (when the landowner believes any assessment *at all* is unjust) the City ignores the fundamental flaw in forcing a landowner, through regulation, to pay the debts of another in order to utilize one's own property. Indeed, the City even put a lien on Schrock's property to secure payment of debts Schrock did not owe. (PX-4) Finally, the City fails to recognize or even address the undisputed evidence of its bad faith when Schrock attempted to pay the $1,500 lien debt, and he was advised by the City that all of his remaining rental properties would be similarly assessed, causing Schrock to fear the sum could be in excess of $30,000. (II R.R. at 87-88; 92).

The City has vigorously defended its improper conduct in the courts, having not only appealed twice (seeking rehearing *en banc* both times), but also seeking removal of the controversy to federal court based upon Schrock's claims under the Fifth and Fourteenth Amendments to the United States Constitution.

The City falsely frames the dispute in the case at bar as being "minor" and fears the opinion of the Court of Appeals, if left unchecked, would open a floodgate of litigation over "trivial" amounts. (Petitioner's Brief on the Merits at 33). Indeed, the City would have this Court establish a new rule in the state's takings jurisprudence – namely, that there is no violation of a citizen's constitutional rights

unless the government believes from its subjective perspective alone, *ipse dixit*, that the amount of alleged damage is significant (enough) to seek redress in the courts.

Or course, the City's position in this regard is nonsensical. There is no jurisdictional threshold for which compensation may be sought from an unlawful taking. The Constitution of Texas states in pertinent part as follows: "[n]o person's property shall be taken, damaged, or destroyed for or applied to public use without adequate compensation being made, unless by the consent of such person . . ." *TEX. CONST. ART. 1, § 17(a)*. The word "property" as used in this section means "not only the thing owned, but also every right which accompanies ownership and is its incident." *Gulf, C. & S.F. Ry. Co. v. Fuller*, 63 Tex. 467, 469 (1885). The word "damages" is meant to include "every loss or diminution of what is a man's own, occasioned by the fault of another." *Fuller*, 63 Tex. at 470. More important, this Court has also made clear, "[t]he protection of one's right to own property is said to be one of the most important purposes of government. That right has been described as fundamental, natural, inherent, inalienable, not derived from the legislature and as pre-existing even constitutions." *Eggemeyer v. Eggemeyer*, 554 S.W.2d 137, 140 (Tex. 1977); *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922).

The record in this case clearly demonstrates the City demanded Schrock make payment of delinquent utility bills owed by third parties, and when Schrock refused,

the City denied his tenant access to water at the property. (II R.R. at 73-76) In fact, the tenant, who had just moved into Schrock's rental property, vacated the property as soon as he became aware that water would not be provided by the City. (II R.R. at 80-81) Thus, as a direct and proximate consequence of the City's actions, Schrock lost rents, and over time, diminution to the value of his real property.

Justice compels the City to compensate Schrock for his damages because the City's actions created an impermissible taking under the law. *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922); *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 123 (1978); *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 435 (1982); *Hearts Bluff Game Ranch, Inc. v. State*, 381 SW.3d 468, 477 (Tex. 2012).

For more than ten years, Schrock has not shied away from fighting to protect his rights and liberties against the overreach of his local government. Unfortunately, the trial court committed a reversible error by taking the case away from the jury before it could determine the value of just compensation owed to Schrock for the City's wrongful conduct. The court of appeals corrected that error, and has given Schrock the chance to fight again another day. This Court should deny the City's Petition.

ARGUMENT AND AUTHORITIES

I. The trial court erred in directing verdict against Schrock's inverse condemnation claims, and the court of appeals was correct to reverse.

In Texas, the ownership of private property is a fundamental right. *Eggemeyer,* 554 S.W.2d 137 at 140. Further, it is well settled that any taking by the government of private property shall afford the property owner with a claim for just compensation under the Fifth Amendment of the United States Constitution, which provides in pertinent part: "private property shall not be taken for public use, without just compensation." U.S. CONST. AMEND V. This protection is afforded through the *Fourteenth Amendment* to apply to the individual states. *Hearts Bluff Game Ranch, Inc. v. State*, 381 SW.3d 468, 477 n. 19 (Tex. 2012). Moreover, the Texas Constitution provides similar protection: "[n]o person's property shall be taken, damaged, or destroyed for or applied to public use without adequate compensation being made, unless by the consent of such person . . ." TEX. CONST. ART. 1, § 17(A). This court has recognized that our takings case law is consistent with federal jurisprudence. *Mayhew v. Town of Sunnyvale*, 964 S.W.2d 922, 933-34 (Tex. 1998).

a. No disputed facts – just disagreement on the power of the state to exact unconstitutional demands.

During her opening statement in the trial court, counsel for the City told the jury "the City of Baytown and Mr. Schrock don't have a big dispute as to the

sequence of events that happened in this case." (II R.R. at 32) Indeed, the City admitted to the jury:

> "[a] number of different circumstances, *including possibly the interactions with Mr. Schrock*, led the city to realize that there were some problems with the way that they were handling liens and dealing with delinquent water bills. And as a result of that, the city made changes to not only its policies, but to its ordinances. The city recognized it made a mistake and it sought to correct it."

(II R.R. 36) (emphasis added).

Again, during argument before the trial court on their motion for directed verdict, the City suggested the material facts in the case (that it refused to provide water to Schrock's property unless the bills of former tenants were paid) are not in dispute, (III R.R. at 127) and that the only question of fact relates to damages. (III R.R. at 130). Most recently, in its Brief on the Merits, the City concedes as follows:

> "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 attendance 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."

(Petitioner's Brief on the Merits, at page 9).

Finally, the City further concedes "[i]t is also undisputed that the City misapplied section 552.0025 in this case." (Petitioner's Brief on the Merits, at page

28). Thus, because the City admits it has harmed Schrock via an unlawful property lien and regulatory process that were in direct conflict with state law, the First Court of Appeals correctly reversed the trial court, and this Court should deny the Petition for Review.

b. Physical taking or regulatory overreach? Both are compensable takings. Both exist in this record.

The trial court's difficulty in application of law to the "undisputed" facts stems from the character of the City's conduct in this case. The City's actions are not only a physical interference with Schrock's property interest by denying utility services, but the City's wrongful conduct also falls under the category of an unconstitutional conditions exaction takings case. *See Nollan v. California Coastal Comm'n*, 483 U.S. 825 (1987); *Dolan v. City of Tigard*, 512 U.S. 374 (1994); *Town of Flower Mound v. Stafford Estates Ltd. P'ship*, 135 S.W.3d 620 (Tex. 2004).

In the trial court, the City argued that its right to a directed verdict was based upon the *Penn Central* factors. (III R.R. at 105). Those factors include:

1. the regulation's economic impact on the claimant;
2. the character of the government action; and
3. the extent to which the regulation interferes with the distinct investment backed expectations of the claimant.

Penn Cent., 438 U.S. at 128. But, the City presented the trial court with a flawed analysis of the law as applied to the facts, and does so here in its Brief on the Merits. The City concedes Schrock purchased the property for investment backed purposes. (III R.R. at 106) The City also conceded to the trial court that the City had no legitimate public purpose in a lien that was contrary to state law. (III R.R. at 107-08) The City then argues the "regulatory burden imposed by the City is probably the primary criteria." (III R.R. at 107). (It appears counsel for the City is referencing the first of the three *Penn Central* factors, the economic impact on the claimant). If so, then the City's argument is without merit. 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 and a diminution in the value of his investment property. *Sheffield Dev. Co., Inc. v. City of Glenn Heights*, 140 S.W3d 660, 667-68 (Tex. 2004). The particular rental property in this case is a single family residential rental unit. The record reflects that Schrock's clear intention when he purposed the property in 1993 was for rental, and that with a few exceptions, the property had been successfully leased until the City condemned it by refusing city services. It is disingenuous for the City to argue that without access to water, the property was either habitable or capable of any other

economically viable use. Thus, under the *Penn Central* factors, on this record, the court of appeals was correct to reverse the trial court.

c. Physical taking and direct interference or regulatory overreach? Both are compensable takings. Both exist in this record.

A compensable taking may occur when the government "physically appropriates or invades the property, or when it unreasonably interferes with the landowner's right to use and enjoy the property, such as by restricting access or denying a permit for development." *Westgate, Ltd. v. State*, 843 S.W.2d 448, 452 (Tex. 1992); *see also City of Austin v. Teague*, 570 S.W.2d 389 (Tex. 1978). Further, a permanent physical invasion, however minimal, "eviscerates" the owner's right to exclude others from entering and using property. *See Dolan v. City of Tigard*, 512 U.S. 374, 384 (1994).

Additionally, it is well settled that when a government appropriates private property for public use without adequate compensation, the property owner may sue for damages in an inverse condemnation suit. *City of Austin v. Teague*, 570 S.W.2d 389 (Tex. 1978); *Westgate, Ltd. v. State*, 843 S.W.2d 448, 452 (Tex. 1992). These disputes are often highly fact driven, and the courts have been unable to find a specific formula to determine fairness or justice related to the economic injuries imposed on a property owner as a result of a takings action by the government. *Penn*

Cent. Transp. Co., 438 U.S. 104 at 124 (1978). The court of appeals reviewed the record in this case and found the evidence raised a material fact issue on Schrock's regulatory takings claim. Their opinion is well reasoned and thorough. Accordingly, this Court should deny review, or alternatively, decide an unconstitutional taking occurred as a matter of law, and permit a new trial on damages alone for several significant reasons.

For example, in *Westgate,* a landowner began construction of a shopping center and was already substantially completed when first learning of a planned highway expansion that would greatly impact the project, including an inevitable actual condemnation proceeding to acquire some of the property. 843 S.W.2d 448 at 450. The shopping center developer found it difficult to lease the project with the likelihood of road construction and disruption to business, and brough an inverse condemnation counter-claim in the case seeking lost rent revenue. In ruling against the developer, this Court held that proposed plans and a delayed announcement of a future highway expansion was not enough to establish a direct restriction on the landowner's property in order to justify a claim of inverse condemnation. 843 S.W.2d 448 at 452. However, the *Westgate* Court also reaffirmed the principle that a property owner should be compensated for damages due to a direct governmental restriction, defined as "an actual physical or legal restriction on the properties use,

such as a blocking of access or denial of a permit for development. *Id*. at 452. In the case at bar, 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 in violation of the Texas and United States Constitutions. (C.R. 5-24) 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 *Westgate, Ltd. v. State*, 843 S.W.2d 448, 452 (Tex. 1992).

Finally, the means by which the City exercised its police power in this case is both astonishing and unacceptable, especially when one considers 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. See Baytown, Texas, Code of Ordinances, ch. 98, art. III, §98 – 65 (g) (1967) (amended 1991); cf. TEX. LOC. GOV'T CODE ANN. §552.0025. It is noteworthy that after Schrock filed suit, the City amended its ordinances to comply with state law, and eventually released the lien on Schrock's property, some four years after the lien was originally filed. (PX -4; DX-10, 12).

d. Using water as a carrot, while beating Schrock with a stick to pay someone else's debts is a compensable taking.

It would be absurd for a city to refuse police or fire protection to a homeowner who was delinquent on their ad valorem taxes, but still living at the property. Similarly, it would be unheard of for a city to refuse water and wastewater services to a resident who was actually current and in good standing on their utility account. Cities provide services to their constituents. It's what they do. However, it is without dispute that Schrock was denied water services at his property because former residents left owing the City on unpaid utility bills. When the City leveraged their basic purpose and duty of providing city services to Schrock to collect a debt owed by someone else, the City became responsible to Schrock for a compensable taking based upon a *Nollan/Dolan* theory of recovery, as adopted and expanded to include an "essential nexus/rough proportionality" test by this Court in *Stafford Estates*, 135 S.W.3d 620 at 642. While *Nollan* dealt with a city's conditional demand for a beach easement in exchange for the granting of a building permit; and the *Dolan* Court addressed a city's conditional grant of land use variance in exchange for the dedicated greenbelt set aside by the property owner, this Court found the exactions analysis among the cases to be the same in determining whether there has been a compensable taking. 135 S.W.3d at 635. In *Stafford Estates*, this Court found that the city's requirement that a property owner privately pay for improvements to nearby

public streets in exchange for subdivision development approval was improper, finding that governmental approval of a development of property on some exaction is a compensable taking unless (1) there is an essential nexus between the exaction (the pre-condition) and the government's substantial advancement of some legitimate public interest; (2) and the pre-condition is roughly proportional to the projected impact of the proposed development." Id., at 634. Thus, the question of law that appears to have sent the trial court unwittingly into reversible error is this: to what extent can a government properly exact an extortionate demand from a property owner in exchange for a valuable government benefit? Schrock contends the analysis is connected to a finding of fact on the character of the government's actions, and the extent to which the regulation interferes with the investment backed expectations of the claimant. *Penn Cent.*, 438 U.S. at 128.

In the case at bar, the City of Baytown refused to provide essential public services unless Schrock paid off the debts of third parties. The City lacked authority under state law to impose a lien of encumbrance on Schrock's property on the facts in this record, and thus, it had no legitimate public interest in doing so *as to Schrock* individually. The result of the City's conduct was immediate and clear, as Schrock's rental property became -- and remained uninhabitable. Under any reasonable

standard, the City's conduct was wrong and thwarted Schrock's investment backed expectations. Indeed, even the City admits it made a mistake. (II R.R. 36).

II. Because Schrock alleges a regulatory taking claim, and not a violation of procedural due process, the opinion of the court of appeals is sound.

The City worries that without intervention from this Court, the opinion of the appellate court will create "an unwarranted expansion of regulatory taking law" and create "a new kind of regulatory taking where a minor inconvenience to a property owner and simple utility bill dispute can overcome governmental immunity." (Petition for Review at 12). The City argues the appellate court's reversal and remand of Schrock's regulatory claim is contrary to this Court's decision in *City of Houston v. Carlson*, 451 S.W3d 828 (Tex. 2014). However, the City is wrong and its reliance on *Carlson* is misplaced for several significant reasons.

a. The facts in *Carlson* are distinguishable

First, the facts in *Carlson* are strikingly distinguishable from the case at bar. For example, in *Carlson*, the City of Houston had serious and verifiable safety concerns over alleged violations of the City's building codes regarding the structural, electrical and plumbing integrity of a 108 unit condominium complex. *Carlson*, 451 S.W.3d at 829. In the furtherance of a legitimate public purpose, the City of Houston ordered residents to vacate pursuant to an ordinance granting such power where a structure posed "a serious and immediate hazard." 451. S.W3d. at 830. The

complex was eventually sold for redevelopment, and the property owners brought suit alleging they had been denied due process to address or resist the alleged code violations. *Id.* The *Carlson* court ruled the condominium owners, complaining of due process only, could not sustain a "viable" allegation of taking. 451 S.W.3d at 830.

However, in contrast, the City compelled Schrock to pay for delinquent utility bills that Schrock did not personally incur or even legally owe. The City's underlying ordinance was not in compliance with state law and the City is excluded from claiming any legitimate state interest in connection with the enforcement, willful or not, of the improper regulation. *Bolton v. Sparks*, 362, S.W.2d 946, 950 (Tex. 1962); *City of Lorena v. BMTP Holdings, L.P.*, 409 S.W.3d 634 (Tex. 2013). Thus, on these facts, the City cannot stand shoulder to shoulder with the City of Houston to argue that the City's attempt to collect a delinquent utility bill under a sham lien ordinance rises to a serious and immediate hazard requiring government action. The problem with the City's position, of course, is that Schrock was not delinquent on his own utility bills, and he did not legally owe the City for the debts of his former.

b. The due process claims in *Carlson* are dissimilar to Schrock's claim for a *per se* regulatory taking.

Further, the opinion of the court of appeals is not inconsistent with this Court's analysis and decision in *Carlson* where this Court held a civil-enforcement

procedure alone cannot serve as the basis of a regulatory takings claim. *Carlson*, 451 S.W.3d at 832. This court found that a due process violation, in the context of a plea to the jurisdiction, would not be sufficient to waive governmental immunity. Id.

The City contends that "[a] regulatory taking is a condition of use so onerous that its effect is tantamount to a direct appropriation or ouster" citing *Carlson*, 451 S.W.3d at 831 (quoting *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528 (2005) (Petitioner's Brief on the Merits at page 19). However, the City's reliance upon *Carlson* and *Lingle* are misplaced. The *Lingle* Court did not stand for such a proposition. Rather, the *Lingle* Court distinguished between the typical takings case which requires compensation for a direct government appropriation or physical invasion of private property, and remarked that beginning with Justice Holmes's opinion in *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922) the jurisprudence had evolved to recognize that "government regulation of private property *may*, in some instances, be so onerous that its effect is tantamount to a direct appropriation or ouster ---and that such 'regulatory takings' may be compensable under the Fifth Amendment." *Lingle*, 544 U.S. 528 at 537 (emphasis added). That government regulations *may* be so onerous as to effect an ouster is not equivalent to a standard which requires that the regulations under scrutiny *must* create an ouster in order for

a regulatory taking to occur.[2] For example, in *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1014 (1992) the Court reasoned that regulatory takings which completely deprive an owner of "all economically beneficial use[s] of her property, would be a *per se* regulatory taking. *Lucas*, 505 U.S. 1003 at 1014. The *Lucas* Court also reasoned that if a physical appropriation of private property was to be meaningfully enforced "the Government's power to redefine the range of interests included in the ownership of property was necessarily constrained by constitutional limits." Id.

In the trial court, Schrock 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. (II R.R. at 58-59). But on appeal, Schrock does not merely complain of a flawed administrative process alone as in *Carlson*. Rather, Schrock argues that the imposition of a lien and refusal to provide water service to his tenants based upon a flawed City Ordinance is a direct regulatory taking by virtue of the City's extortionate demands upon him; and he seeks compensation for the impact he suffered due to the City's wrongful conduct. The opinion of the court of appeals correctly reasoned that the City's conduct was

[2] Of course, even in this case, there was a physical ouster when Schrock's tenant terminated the lease and vacated for lack of city services at the property. (II R.R. at 74-76, 80-81).

an impermissible taking under the *Penn Central* factors and this Court's holding in *Mayhew v. Town of Sunnyvale,* 964 S.W.2d 922 (Tex. 1998). On this record, and against these precedents, the court of appeals was correct to reverse the trial court's granting of directed verdict on Schrock's takings claim. And, in the alternative, Schrock contends his regulatory takings claims is supported by the *Nollan/Dolan* unconstitutional conditions doctrine as adopted by this Court in *Stafford Estates*, 135 S.W.3d 620.

III. Schrock did not cause his own damages. The City did. And, it's for the jury to decide.

In its second issue presented, the City contends the court of appeals has permitted Schrock to unfairly claim damages for a regulatory taking despite Schrock's actions which the City believes is the cause of his actual damages. Notwithstanding the fact the City unlawfully prevented Schrock's tenant to secure water service, or the City's improper lien which was created on May 24, 2009 and not released until four years later on June 13, 2013 (DX-11) during which time, Schrock was denied the full use and economic benefits of his property, the City ignores other relevant causation facts in the record. For example, Schrock's attempt to pay the lien in cash, only to learn he might be facing additional assessments on his other 19 properties (II R.R. at 87); or Schrock's attempts to clean, restore and maintain the property once he was informed by neighbors of rats at the

property (III R.R. at 60); or the additional costs associated with vandalism at the property in October of 2012 (PX 39); or dealing with a trespass to try title due to the City's lien. Under this record, and these facts, the City's complaint appears at best to be one of causation and a question of fact, best handled by a jury for an amount of just compensation, if any, to be awarded. Accordingly, the court of appeals correctly reversed the trial court and on remand, the City's argument will surely be advanced to the trier of fact.

CONCLUSION AND PRAYER

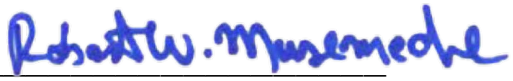
The City concedes that the beneficiaries of their efforts in trying to collect delinquent utility charges from some landlords are the other water and sewer customers served by the City, who must otherwise make up the deficit in the form of higher rates. (Petitioner's Brief on the Merits at page 28). However, rather than simply and timely terminate service on a past due account, or seek collection only from the customers who actually owed the bill, the City devised a plan to exact payment from the deeper pockets of a small number of landlords who the City thought might be susceptible to an extortionate demand. Schrock almost gave in to the comfort of his checkbook as a means to clear himself of the City's nuisance, until he realized the threat of a lien on one of his rental properties opened the door to the City's demand for payment on them all. (II R.R. at 83, 87). He stood his ground and has been fighting city hall ever since. The City's position in this case is untenable.

The ordinance they seek to uphold as a shield against liability has been amended to comply with state law, likely due to Schrock's resilience. (II R.R. at 36). The court of appeals reviewed the record and reversed the trial court because evidence was admitted raising a material fact issue on Schrock's claim seeking just compensation for an unconstitutional taking. The opinion of the court of appeals is correct, notwithstanding the City's bold assertion **"[t]he court of appeals misunderstands how takings law works…"** (Petitioner's Brief on the Merits at 2). On the contrary, the City has presented no valid argument or legitimate reason for this Court to exercise jurisdiction to disturb those rulings below.

THEREFORE, Respondent, Alan Schrock, respectfully requests that this Court deny Petitioner's petition for review, or if the Court grants the petition, affirm the court of appeals' judgment. Respondent also requests such other and further relief, general or special, at law or in equity, to which he may be justly entitled to receive

Respectfully submitted,

Musemeche Law, P.C.

By: 

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CERTIFICATE OF COMPLIANCE

I hereby certify that this Respondent's Brief was prepared using Microsoft Word 2010, which indicates the total work count (exclusive of those items listed in rule 9.4 (i)(1) of the Texas Rules of Appellate Procedure, as amended) is 5,564 words.

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CERTIFICATE OF SERVICE

I hereby certify that I served a true and correct copy of the foregoing document upon all counsel of record, via e-filed, on this 26th day of April, 2021, at the following address:

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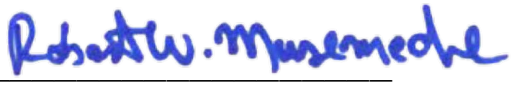
By: 
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