
Case Nos. 08-1003, 08-1005, and 09-0064

IN THE SUPREME COURT OF TEXAS

**KIRBY LAKE DEVELOPMENT, LTD.,
MITER DEVELOPMENT CO., L.L.C.,
TAYLOR LAKE, LTD., and
FRIENDSWOOD DEVELOPMENT COMPANY,**

Petitioners,

v.

CLEAR LAKE CITY WATER AUTHORITY,

Respondent.

On Petitions for Review from the Fourteenth Court of Appeals at Houston, Texas

PETITIONERS' CONSOLIDATED BRIEF ON THE MERITS

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RECORD AND OTHER REFERENCES

The record is much the same in the three cases addressed in this Brief. When a portion of the record is found in more than one case, Petitioners have included that portion of the record from only one of the cases in their Appendix. The index to the Appendix identifies the case in which each item in the Appendix is found.

Citations in this Brief to the Appendix are as follows:

“App. ____”

“App. ____, CR ____”

Citations to portions of the record not found in the Appendix begin with this Court’s case number, followed by the record reference as follows:

“No. 08-1003 CR ____”

“No. 08-1005 CR ____”

“No. 09-0064 CR ____”

TO THE HONORABLE SUPREME COURT OF TEXAS:

Petitioners Kirby Lake Development, Ltd. (“Kirby Lake”), Miter Development Co., L.L.C. (“Miter”), Taylor Lake, Ltd. (“Taylor Lake”), and Friendswood Development Company, Ltd. (“Friendswood”) (collectively, the “Developers”) file, pursuant to this Court’s June 12, 2009 directive, their Consolidated Brief on the Merits.

STATEMENT OF THE CASE

The Kirby Lake and Friendswood Contract Cases (Nos. 08-1003 & 09-0064)

The Developers allege that Clear Lake City Water Authority (the “Authority”) breached its agreements with the Developers when the Authority refused to include, in its September 11, 2004 bond election, any authorization to sell bonds to purchase water, sewer, and drainage facilities that the Developers had constructed within the boundaries of the Authority some years earlier. The Authority claimed that its agreement to include such authorization in “any bond election” meant only one election. It asserted that because two bond propositions failed to pass in 1998 (at the urging of members of the Authority’s board of directors), it had no further contractual obligation.

Kirby Lake, Miter, and Taylor Lake (collectively, the “Kirby Lake Developers”) were the first to file suit for breach of contract. On September 5, 2006, the Honorable Patricia Hancock, 113th Judicial District Court of Harris County, Texas entered final judgment for the Kirby Lake Developers, awarding contract damages in amounts that the

parties had stipulated. App. 1.¹ Judge Hancock signed an amended judgment *nunc pro tunc* on January 29, 2007, correcting a clerical error in the judgment. App. 2.

The Authority appealed; the Kirby Lake Developers were the appellees.

On August 7, 2008 the Fourteenth Court of Appeals at Houston, Texas reversed the trial court's judgment and rendered judgment for the Authority. *Clear Lake City Water Authority v. Kirby Lake Dev., Ltd.*, No. 14-08-00013-CV, 2008 WL 3062234 (Tex. App.—Houston [14th Dist.] Aug. 7, 2008, pet. filed) (Hedges, C.J., joined by Boyce, J., and Hudson, Sr. J.) (hereinafter the "Kirby Lake Contract Case"). App. 5. The court of appeals rejected the Authority's argument that the trial court lacked subject matter jurisdiction because the Authority is immune from suit. The court concluded, though, that the Authority's agreement to include a measure for authorization of bonds to purchase the facilities in "any bond election" meant only one bond election. Thus, the court held that the Authority's obligation to pay for the facilities (which the Authority continues to use to provide service for its customers) ended in May 1998 when the voters defeated the proposed bonds, and the Authority did not breach the agreements by refusing to include a measure to purchase the facilities in its 2004 bond election.

The court of appeals denied the Kirby Lake Developers' Motion for Rehearing, for Reconsideration En Banc, and to Consolidate Appeals on October 23, 2008.

Friendswood also filed suit in Harris County District Court. No. 09-0064 CR 18-65, 239-41. The Authority filed a Plea to the Jurisdiction or, Alternatively, for Summary

¹ Judge Hancock had previously granted the Kirby Lake Developers partial summary judgment on liability and denied the Authority's motion for summary judgment. App. 3, 4.

Judgment asserting governmental immunity from suit and that its agreement with Friendswood obligated it to include authorization to sell bonds to pay Friendswood in only one bond election. No. 09-0064 CR 70-236. Friendswood then filed its own Motion for Summary Judgment. No. 09-0064 CR 323-83. On February 12, 2007 the Honorable David J. Bernal, 281st Judicial District Court of Harris County, Texas denied the Authority's Plea to the Jurisdiction and entered Final Judgment granting Friendswood's Motion for Summary Judgment. App. 20; App. 21.²

The Authority appealed; Friendswood was the appellee.

On December 9, 2008 the Fourteenth Court of Appeals at Houston, Texas, holding that it was bound by the earlier decision in the Kirby Lake Contract Case, reversed the trial court's judgment and rendered judgment that Friendswood take nothing against the Authority. *Clear Lake City Water Authority v. Friendswood Development Co., Ltd.*, No. 14-07-00404-CV, 2008 WL 5131932 (Tex. App.—Houston [14th Dist.] Dec. 9, 2008, pet. filed) (Frost, J., joined by Anderson, J., and Hudson, Sr.J.) (hereinafter the "Friendswood Case"). App. 22.

The Kirby Lake Contract Case and Friendswood Case are sometimes collectively referred to in this brief as the "Contract Cases".

² Judge Bernal first denied the Authority's Plea to the Jurisdiction by order dated February 5, 2007. No. 09-0064 CR 686. Judge Bernal vacated that order on February 8, 2007 and on February 12, 2007, again denied the Authority's Plea to the Jurisdiction. The Authority, however, took an interlocutory appeal of the February 5 order; the Fourteenth Court of Appeals affirmed, concluding that the Texas Legislature waived the Authority's immunity from suit in Section 271.142 of the Texas Local Government Code. *Clear Lake City Water Authority v. Friendswood Dev. Co., Ltd.*, 256 S.W.3d 735 (Tex. App.—Houston [14th Dist.] 2008, pet. dism'd). App. 23.

The Takings Case (No. 08-1005)

The Kirby Lake Developers also allege that the Authority took their property without compensation when the Authority refused to include in its September 11, 2004 bond election authorization to sell bonds to pay the Developers and repudiated any further obligations under the agreements.

The Kirby Lake Developers filed suit in Harris County Civil Court at Law for an unconstitutional taking.³ The Authority filed a plea to the jurisdiction, No. 08-1005 CR 150-59, arguing that the plaintiffs' petition merely stated a contractual dispute with the Authority, not a valid takings claim. On August 24, 2006 the Honorable R. Jack Cagle, County Court at Law No. 1 of Harris County, Texas granted the Authority's plea to the jurisdiction and entered Final Judgment. App. 27. Thereafter, Judge Cagle amended the judgment to clarify that he had neither considered nor ruled on the Kirby Lake Developers' contract claims, which were then still pending in Harris County District Court. App. 28.

The Kirby Lake Developers appealed; the Authority was the appellee.

On August 5, 2008 the Fourteenth Court of Appeals at Houston, Texas affirmed the trial court's dismissal of the Kirby Lake Developers' inverse condemnation claims for lack of subject matter jurisdiction. *Kirby Lake Dev., Ltd. v. Clear Lake City Water*

³ The Kirby Lake Developers initially combined their takings claim with their breach of contract claim in their Harris County District Court lawsuit. The district court case had been pending for some time when the Authority filed a plea to the jurisdiction asserting that the district court lacked jurisdiction over the takings claim because by statute the county court at law is vested with exclusive jurisdiction over all condemnation matters in Harris County. *See* TEX. GOV'T. CODE ANN. § 22.225(e). The Kirby Lake Developers then non-suited the takings claim and re-filed it in the county court at law.

Authority, No. 14-06-00924-CV, 2008 WL 3016308 (Tex. App.—Houston [14th Dist.] Aug. 5, 2008, pet. filed) (Frost, J., joined by Fowler and Seymore, J.J.) (hereinafter the “Takings Case”). App. 7. The court of appeals held that the Kirby Lake Developers have no takings claim because they pleaded that their contracts allow the Authority to use the facilities free of charge until the Authority purchases them and have treated the agreements as still in effect by suing to enforce them. Thus the Kirby Lake Developers “consented” to the Authority’s use of the facilities, an affirmative defense to a takings claim that negates the trial court’s subject matter jurisdiction.

The court of appeals denied the Kirby Lake Developers’ Motion for Rehearing, for Reconsideration En Banc, and to Consolidate Appeals on October 23, 2008.

STATEMENT OF JURISDICTION

This Court has jurisdiction over this appeal because it is a case in which the courts of appeals hold differently from prior decisions of other courts of appeals and of this Court upon a question of law material to a decision of the case. TEX. GOV'T CODE ANN. § 22.001(a)(2). Thus this Court has jurisdiction to resolve the inconsistencies in these decisions and thereby remove unnecessary uncertainty in the law and unfairness to litigants. *See* TEX. GOV'T. CODE ANN. § 22.225(e).

This Court also has jurisdiction over this appeal because the courts of appeals committed errors of law which are of such importance to the jurisprudence of the state that they should be corrected. TEX. GOV'T CODE ANN. § 22.001(a)(6).

ISSUES PRESENTED

1. Did the courts of appeals err when they held that, as a matter of law, the Authority's agreement to include a measure authorizing the sale of bonds to pay the Developers in "any bond election" means only one bond election?

2. Alternatively, is the Authority's agreement to include a measure authorizing the sale of bonds to pay the Developers in "any bond election" ambiguous, requiring remand for trial?

3. Did the courts of appeals err when they reversed the judgments of the district courts and rendered judgment for the Authority?

4. Where a governmental authority unequivocally repudiates its contractual obligation to pay for private property, and instead announces its intention to use such property in perpetuity without any compensation, does a valid inverse condemnation claim arise?

5. May a contract claim and a takings claim against a governmental authority be pleaded and pursued in the alternative – particularly when the governmental authority has repudiated the contract?

6. Did the court of appeals err when it affirmed the trial court's dismissal of the Kirby Lake Developers' inverse condemnation claim for lack of subject-matter jurisdiction?

STATEMENT OF FACTS

The courts of appeals correctly stated the nature of the case except as pointed out below. Much of the pertinent factual background is detailed in the court of appeals' opinion in *Clear Lake City Water Authority v. Kirby Lake Development, Ltd.*, 123 S.W.3d 735 (Tex. App.—Houston [14th Dist.], pet. denied) (hereinafter "Kirby Lake I"), App. 6, and in the court of appeals' opinion in *Clear Lake City Water Authority v. Friendswood Development Co., Ltd.*, 256 S.W.3d 735 (Tex. App.—Houston [14th Dist.] 2008, pet. dismissed), App. 23, affirming (on interlocutory appeal) the trial court's denial of the Authority's plea to the jurisdiction (hereinafter "Friendswood I").

The Parties

The Authority is a water control and improvement district created to provide, operate, and maintain waterworks systems, sanitary and storm sewer systems, and drainage facilities to serve the land within its boundaries. It operates under the authority of the Texas Constitution, the 1963 statute that created it, and Chapters 49 and 51 of the Water Code. *Friendswood I*, 256 S.W.3d at 738.

The Developers constructed water, sewer, and drainage facilities in the housing developments that they built on their various tracts of land within the boundaries of the Authority. *Id.*; *Kirby Lake I* at 739-40.

In comparison with other similar special districts, the Authority is huge. More than 12,000 acres were within its borders when it was formed, and it has since annexed an additional six square miles so that today it comprehends more than 16,000 acres. It has more than 50 full time employees, and levies and assesses user fees and property

taxes on more than 17,000 single family homes, more than 9,000 apartment units, and thousands of business establishments. Each year, aside from bond proceeds, the Authority assesses and collects more than \$8 million in user fees and taxes. Thus, in terms of both area and revenues, it is among the largest, if not the largest, special district in the State of Texas. No. 09-0064 CR 19-20.

The Authority grew so large, and acquired such a huge tax base, by encouraging development. From the time it was formed in 1963 through the early part of 1998, the Authority's official written policy, and its normal practice and procedure, was to support construction of water supply, waste disposal, and drainage facilities by reimbursing developers for the cost of constructing those facilities in accordance with rules promulgated by the Texas Natural Resource Conservation Commission (now the Texas Commission on Environmental Quality). For more than 35 years after it was formed, the Authority entered into scores of such agreements, and conducted numerous bond elections to authorize the issuance of hundreds of millions of dollars of bonds to pay for such facilities. No. 09-0064 CR 20.

The Agreements

Consistent with that long-standing policy, the Authority entered into agreements with the Developers, each entitled Sales Agreement and Lease of Facilities and signed at various times between 1994⁴ and 1998 (collectively, the "Agreements"). App. 8-11, 24. Under the Agreements, the Developers were to install water, sewer, and drainage lines

⁴ The earlier of the two agreements between the Authority and Taylor Lake is dated January 11, 1993, but was actually signed on January 11, 1994. App. 9, CR 148, ¶ 1.

and undertake related excavation, grading, and construction work within the bounds of the Authority. The Agreements provided that the Developers would then lease the completed water distribution lines, sanitary sewer lines, and drainage facilities (collectively, the “Facilities”) to the Authority, which would use them to provide water and sewer service to the homes built on the Developers’ land. App. 8, CR 107; App. 9, CR 140; App. 10, CR 157; App. 11, CR 122; App. 24, CR 104. *See Kirby Lake I* at 740, 743-44.

The leases were “without charge until such time as the Authority acquires” the Facilities. *Id.* The Agreements gave the Authority the right to purchase the Facilities either with bond proceeds or with the approximately \$8 million it collects each year from user fees and property taxes. *Id.* at § 3.01, CR 105-06, 137, 155-56, 120-21, 102. While the Authority had the right to use general revenues to purchase the Facilities, it was not obligated to do so, and could rely solely on bond proceeds. *Id.* The Authority’s obligation to pay with bond proceeds was conditioned on voter approval of bonds at a bond election. *Id.* The Authority disclaimed any promise about when it would hold a bond election, or that any bond measure would be approved by the voters, but it did promise to include a measure for purchase of the Facilities in any election it did hold:

The Authority intends to call a bond election in the near future, but is not obligated to do so, and the Authority cannot predict when, if ever, such an election and bond sale will occur, or when, if ever the Authority will have other funds available and allocated for the purchase of the Facilities. The Authority shall have the right to purchase the Facilities with funds available from a source other than a bond sale for such purpose, but shall have no obligation to do so. The Authority does agree, however, that it shall include in any bond election it does hold subsequent to the effective

date of this Agreement bond authorization in an amount sufficient to pay the purchase price of the Facilities.

Id. (italicized and bold-faced text in originals).⁵

The 1998 Bond Elections and Kirby Lake I

The Authority conducted a bond election in May 1998, and another in October 1998. Each of those elections would have authorized the issuance of bonds sufficient to permit the Authority to honor its contractual obligations to purchase the Facilities. However, in the weeks leading up to those elections, some of the members of the Authority's board of directors campaigned against the bond authorization measures, and on each occasion the measures failed. *See Kirby Lake I*, 123 S.W.3d at 740-41.⁶

In view of what they regarded as an official effort to sabotage the elections and evade the Authority's contractual obligations, the Kirby Lake Developers (along with a fourth claimant) filed the *Kirby Lake I* suit shortly after the October 1998 election. In the 1998 lawsuit, the Kirby Lake Developers took the position that under the Agreements, the Authority was obligated to purchase the Facilities not only from bond proceeds, but from general revenues even in the absence of the authorization of a bond issuance. The case proceeded to trial, and resulted in a jury verdict favoring the Kirby Lake Developers.

The Authority appealed the District Court's judgment. On appeal, the Fourteenth Court of Appeals reversed the judgment. It held that while the Authority was obligated to

⁵ The 1994 Taylor Lake Agreement has identical text, except that the text is not in italic or bold-face type, and it provides that the Authority intends to call a bond election "in March or May of 1994" rather than "in the near future". App. 9, CR 137.

⁶ The court of appeals described the authorization as being "soundly defeated in both elections" in 1998 without acknowledging the conduct of the Authority's board members in those elections.

include the bond authorization measure in its elections, it was not obligated to purchase the Facilities out of other Authority funds in the event that such an election were to fail. *Id.* at 744-45.

The 2004 Bond Election

After the Court of Appeals handed down its decision in *Kirby Lake I*, the Authority announced its intention to conduct another bond authorization election, scheduled for September 11, 2004. App. 12, CR 1050-57; No. 09-0064 CR 349-56. At the time, the purchase price for the Facilities under the Agreements totaled a bit less than \$2.5 million (with some \$1.3 million owed to the Kirby Lake Developers and \$1.2 million owed to Friendswood). App. 17, CR 661-62, ¶¶ 8, 9; App. 25, CR 357-58. In the election, the Authority sought voter authorization of \$29.1 million in bonds. App. 12, CR 1052; No. 09-0064 CR 351. However, the Authority's board elected to not include, within the \$29.1 million of bond funds that it sought, the \$2.5 million required to pay for the Facilities. App. 16, CR 303-04, ¶ 2; No. 09-0064 CR 349-58.

The Kirby Lake Developers wrote to the Authority to urge that it include an additional \$1.3 million of bonds in its election authorization. App. 13, CR 307-08; No. 08-1005 2d Supp. CR 79-80. The Authority, in its response delivered one day before the election, advised that it would not do so because "any obligation to seek voter approval to issue bonds to reimburse [the Kirby Lake Developers] has already been satisfied." App. 14, CR 310; No. 08-1005 2d Supp. CR 81.

Friendswood also lodged a protest, urging that the Authority was obligated to include an authorization for the approximately \$1.2 million to pay for Friendswood's

Facilities. App. 25, CR 357-58. The Authority's response to Friendswood was largely identical to its response to the Kirby Lake Developers. App. 26, CR 359.

The September 11, 2004 election proceeded with a proposition for the \$29.1 million, but without the additional \$2.5 million that would have been required to purchase the Facilities. App. 24, CR 303-04, ¶¶ 1, 2; App. 26. The voters overwhelmingly (416 in favor and 40 opposed) approved the authorization of \$29.1 million in bonds. App. 15, CR 782, ¶ 3; No. 09-0064 CR 362; No. 08-1005 2d Supp. CR 82-86.

The Kirby Lake Contract Case

The Kirby Lake Developers again sued, alleging that the Authority breached the Agreements by refusing to include in the 2004 election the additional authorization for \$1.3 million in bonds to pay the Kirby Lake Developers. The district court granted the Kirby Lake Developers summary judgment on liability and causation, and entered final judgment on the stipulated amount of damages. App. 1, CR 1173-74; App. 2, 5th Supp. CR 1-3; App. 3, CR 311.

The Authority appealed the district court's judgment, and on August 7, 2008 the Fourteenth Court of Appeals at Houston, Texas reversed the trial court's judgment and rendered judgment for the Authority. App. 5. The court of appeals denied the Kirby Lake Developers' Motion for Rehearing, for Reconsideration En Banc, and to Consolidate Appeals on October 23, 2008.

The Takings Case

On May 31, 2006, the Authority for the first time asserted that the district court lacked jurisdiction over the Kirby Lake Developers' takings claim. No. 08-1005 CR 10 at ¶ 21. The Authority cited a statute providing that Harris County Civil Courts at Law have exclusive jurisdiction over all Harris County eminent domain proceedings, including inverse condemnation proceedings. *See* TEX. GOV'T CODE ANN. § 25.1032(c). Having determined that the Authority was correct, the Kirby Lake Developers non-suited their takings claim in the District Court Case and re-filed it in the Harris County Civil Court at Law No. 1 on June 7, 2006. No. 08-1005 CR 3-12. Several weeks later, the Kirby Lake Developers amended their petition. App. 29, CR 262-69.

In the new takings case, the Authority filed a First Amended Plea to the Jurisdiction or, Alternatively, for Summary Judgment, arguing that the County Court at Law lacked subject matter jurisdiction because, as pleaded, the Kirby Lake Developers' claim against the Authority was merely a contractual dispute, not a valid takings claim. No. 08-1005 CR 150-59. Judge Jack Cagle agreed, and entered Final Judgment for the Water Authority on August 24, 2006. App. 27, CR 306. Judge Cagle entered an Amended Final Judgment on October 3, 2006, clarifying that in his earlier Final Judgment he had neither considered nor ruled on the Kirby Lake Developers' contract claims then pending in the district court. App. 28, CR 337-38.

The Kirby Lake Developers then appealed, and the Fourteenth Court of Appeals affirmed the trial court's judgment. App. 7. The court of appeals denied the Kirby Lake

Developers' Motion for Rehearing, for Reconsideration En Banc, and to Consolidate Appeals on October 23, 2008.

The Friendswood Case

Friendswood filed suit on October 6, 2006, alleging that the Authority breached its Agreement by refusing to include in the 2004 election the additional authorization for \$1.2 million to pay Friendswood. The Authority filed a Plea to the Jurisdiction or, Alternatively, for Summary Judgment asserting governmental immunity from suit and that its agreement with Friendswood obligated it to include authorization to sell bonds to pay Friendswood in only one bond election. No. 09-0064 CR 70-236. Friendswood then filed its own Motion for Summary Judgment. No. 09-0064 CR 323-83.

The district court first denied the Authority's Plea to the Jurisdiction by order dated February 5, 2007, but vacated that order on February 8, 2007. No. 09-0064 CR 686, 734. On February 12, 2007 the district court again denied the Authority's Plea to the Jurisdiction and entered Final Judgment granting Friendswood's Motion for Summary Judgment. App. 20, CR 739-40; App. 21, CR 738.

The Authority immediately took an interlocutory appeal of the February 5 order (before the district court vacated it on February 8). The Fourteenth Court of Appeals affirmed, concluding that the Texas Legislature waived the Authority's immunity from suit in Section 271.142 of the Texas Local Government Code. *Friendswood I*, App. 23.

Meanwhile, the Authority had taken a separate appeal of the district court's Final Judgment. On December 9, 2008 the Fourteenth Court of Appeals at Houston, Texas reversed the trial court's Final Judgment and rendered judgment that Friendswood take

nothing against the Authority. App.22. As to the Authority's argument that it was immune from suit, the court of appeals held that it was bound both by its earlier decision in *Friendswood I* and by the Kirby Lake Contract Case, and that as a matter of law the Authority's agreement to include a measure for authorization of bonds to purchase the Facilities in "any bond election" meant only one bond election. *Id.* at *1.

The Sham 2006 Election

On November 7, 2006, while all these cases were pending in the trial courts, the Authority held a bond election in which the only ballot measures were for purchase of the Facilities at issue here and purchase of similar facilities from other parties under similar agreements.

The Authority's board of directors called the November 2006 election with the intention and determination that the bond proposition would fail. The board then took actions calculated to ensure its failure. Thus, the measure's failure was not merely predictable, but inevitable.

Before the 2006 election took place, James D. Bonham, a highly experienced and reputable attorney who has for many years specialized in representing municipal utility districts and other special purposes districts in and around Harris County, Texas, testified in the Kirby Lake Contract Case by means of his affidavit. App. 19, CR 1199-1219. *See also* No. 09-0064 CR 32-52. It was obvious to Mr. Bonham that the Authority's board had put the bond proposition on the November 7, 2006 ballot in hopes that it would be defeated. In Mr. Bonham's words (written before the election), the motion made and passed by the board at its meeting calling the election "all but invites the voters to reject

the bond proposition.” *Id.*, CR 1203-04, ¶ 15. Mr. Bonham recognized that the board wanted the proposition to be defeated in hopes of bolstering the Authority’s legal position in this litigation. *Id.*

A front page article in the October 19, 2006 edition of the Bay Area Citizen newspaper confirmed Mr. Bonham’s view. App. 18, Ex. A, CR 1195; No. 09-0064 CR 62. The article included quotations from Authority board member John Branch which rather than encouraging voters to support the proposition, instead outlined how a negative vote would help the Authority’s legal position. *Id.* The front-page article was followed a few days later by a letter to the editor in which several residents within the Authority’s boundaries wrote to oppose the bond proposition, using language that, if not crafted by the Authority’s lawyers, was surely reviewed by them. App. 18, Ex. B, CR 1197; No. 09-0064 CR 64.

Moreover, the Authority’s board of directors communicated directly with the voters within the confines of the district about the election by means of its periodic “Newsletter.” App. 18, Ex. C, CR 1190-93; No. 09-0064 CR 57-60. The board’s desire to see the proposition defeated was quite clear from the content and tone of the Newsletter. For example, the board did not ask voters to approve the proposition (as was the case for the 2004 election), but rather stated that the voters were called upon to “express their will concerning approval or disapproval of funding to reimburse certain developers for water, sewer, and drainage facilities installed during the 1990s.” *Id.*, CR 1190.

Except for the 1998 and 2006 elections conducted by the Authority, no Texas bond election has ever occurred in which, after calling the election, the board of directors of a MUD or other special purpose district then failed to support, or at least remain neutral regarding, each bond proposition on the ballot. App. 19, CR 1201, ¶ 7; No. 09-0064 CR 34.

The Authority attempted to use the results of the November 2006 election in both Contract Cases. No. 08-1003 CR 1247, 1290; No. 09-0064 CR 86, 175-81, 258-303. The district courts properly refused to consider that evidence. No. 08-1003 CR 1283, 4th Supp. CR 1-2; No. 09-0064 CR 735-37. The Developers assert that the November 2006 election and the events leading up to it are cogent evidence of the Authority's intent.

The Authority Continues to Use the Facilities Free of Charge

To this day, as it acknowledges, the Authority continues to use the Facilities free of charge (and continues to assess taxes and fees to hundreds of homeowners based on such use).

SUMMARY OF THE ARGUMENT

The decisions in the Contract Cases and the Taking Case, taken together, create a judicial exception to the constitutional requirement that no private property may be taken without just compensation. Under those decisions, a governmental entity may agree to purchase private property with payment conditioned upon some future event. If that condition fails, then the governmental entity may take the property without compensation. And that is true even where, as here, it was the governmental entity which instigated and caused the failure of the condition.

The decision in the panel in the Takings Case attempts to disguise this erosion of the constitution takings protection by pretending that the situation is temporary, because the governmental entity can use the private property for free only until a purchase occurs. But this is willful blindness. It ignores the decision by the panels in the Contract Cases which assures that no such purchase ever shall occur.

The holdings in both the Contract Cases and in the Takings Case are obviously flawed. In the Contract Cases, the district courts properly ruled that “in any bond election” means “in each bond election” rather than, as the court of appeals held, in only one election, and nevermore. The court of appeals’ construction of the agreements between the Developers and the Authority means that when voters failed to approve the sale of bonds to pay for the facilities in the May 1998 bond election, the Developers forfeited any contractual right to payment. The court of appeals’ construction is plainly wrong; it renders the Agreements meaningless and results in the very forfeiture that the court in *Kirby Lake I* was careful to avoid.

The court of appeals' holding that the Authority's obligation to seek voter authorization to sell bonds to pay the Developers ended with the May 1998 bond election cannot be reconciled with the holdings in *Kirby Lake I* and the Takings Case, or with Texas case authority holding that in this context "any" means "every" or "all."

As to the Takings Case, the Authority took a clear and deliberate action – excluding any ballot measure to pay for the Facilities in the 2004 election – intended to assure that there would be no funds for any payments under the Agreements. At the same time, the Authority announced that it was no longer bound by those agreements, and could use (and assess fees and levy taxes for) the Facilities in perpetuity, with absolutely no payment obligation of any nature.

In view of those facts, the Takings Case is not merely some garden variety contract dispute about whether one party owes any further payment to the other. Rather, the Authority's view is that it effectively owns the Facilities, that it may (and does) assess fees for their use, and that it may (and does) assess ad valorem taxes on the homes connected to the Facilities. The Authority's view is that the one thing it need never do, and will never do, is pay even a single cent for the Facilities.

Under these circumstances, the court of appeals' holding that the Kirby Lake Developers "consented" to the Authority's use of the Facilities free of charge does not withstand scrutiny. The court simply accepted the Authority's argument that the mere existence of a contract precludes a takings claim and refused to take into account the Authority's repudiation of the Agreements and its appropriation of the Facilities without payment.

The Kirby Lake Developers had the right to pursue their contract claim in the alternative. But, if that claim fails, the Kirby Lake Developers have an inverse condemnation claim because, considered fairly and fully, the Authority's actions amount to its taking of private property for public use without compensation.

ARGUMENT AND AUTHORITIES

I. The Court of Appeals’ Construction of the Agreements in the Contract Cases Is Plainly Wrong.

A. The Agreements Require the Authority to Include Bond Authorization in Each Election.

In Section 3.01 of the Agreements, the Authority gives notice that its payment for the Facilities is likely to come from bond proceeds, and that the availability of those proceeds depends on a successful bond authorization election. The Authority further warns that there is no guarantee that any particular bond election will result in passage of authorization to pay for the Facilities. However, in the same provision, the Authority offers the Developers a countervailing assurance:

The Authority does agree, however, that it shall include in any bond election it does hold subsequent to the effective date of this Agreement bond authorization in an amount sufficient to pay the purchase price of the Facilities.

This is simple and basic. In exchange for the Developers agreeing to build the Facilities, the Authority agreed to purchase those Facilities once they were built, and toward that end, it agreed to include bond authorization to allow for such purchase “in any bond election” that it held.

Texas courts have held that the use of “any” in analogous provisions means “every” or “all.” See, e.g., *Branham v. Minear*, 199 S.W.2d 841, 845-46 (Tex. Civ. App.—Eastland 1947, writ ref’d n.r.e.). The dispute in *Branham* was over title to the mineral rights in two tracts of land. The appellants argued that the trial court erred in holding that, as a matter of law, Minear’s title to “any minerals on said land” gave Minear

ownership of all the minerals on the land. The court of appeals upheld the trial court's decision:

The adjective “any” may have slightly different meanings depending on the context and appurtenant facts. But . . . in construing statutes and other instruments, “any” is equivalent to and has force of “every” and “all.” . . . We think that “any minerals” as used in the deed in question, undoubtedly meant “all minerals.”

Id. See also *Hime v. City of Galveston*, 268 S.W.2d 543, 545 (Tex. Civ. App.—Waco 1954, writ ref'd n.r.e.) (“the word ‘any’ has been judicially construed to mean: ‘each’ or ‘every’ or ‘all’”); *Doherty v. King*, 183 S.W.2d 1004, 1007 (Tex. Civ. App.—Amarillo 1944, writ dism'd) (same).

The same is true here. “Any” election must mean “all” elections until the Developers are paid for the Facilities. The court of appeals, however, read these cases to “generally recognize that depending on the context, ‘any’ can also be used in the singular sense, *i.e.*, to mean ‘one’ or even ‘the next one.’” 2008 WL 3062234 at *4. The court went on to say, “The ultimate question, therefore, is: what does the phrase in question mean in the context of the agreement at issue in this case?” *Id.*

B. The Court of Appeals Failed to Consider the Agreements as a Whole.

“One of the basic tenets of contract interpretation is the assumption that the parties intend every part of an agreement to mean something. . . . Contracts are to be read as a whole, and an interpretation that gives effect to every part of the agreement is favored so that no provision is rendered meaningless or as surplusage.” *J.M. Davidson, Inc. v. Webster*, 128 S.W.3d 223, 235 (Tex. 2003).

The court of appeals acknowledged this basic tenet, 2008 WL 3062234 at *3, but failed to apply it. Instead, the court considered the language of only one paragraph (in Section 3.01) of the Agreements:

Taken in isolation, the sentence emphasized by appellees – “The Authority does agree . . . that it shall include in any bond election it does hold subsequent to the effective date of this Agreement . . .” could reasonably be interpreted either way, as requiring the issue to be on every bond election ballot until it passes or just on the next such ballot. However, the balance of the paragraph clearly indicates that only one election was contemplated. . . The paragraph’s first sentence states that the Water Authority “intends to call *a* bond election” but it cannot predict when or if “such *an* election . . . will occur. . . Furthermore, use of the phrase “in the near future,” additionally indicates that a single election was intended. . . . In context, the sentence containing the phrase “any bond election” clearly refers to the next election held after the effective date of the agreement.

Id. at *4 (citations omitted).

The court of appeals ignored, however, the Agreements’ overall structure and purpose. The central purpose of the Agreements was that the Developers would construct the facilities and the Water Authority would ultimately purchase them. The Agreements are called “Sales Agreement and Lease of Facilities.” *See* App. 8, CR 103; App. 9, CR 134; App. 10, CR 153; App. 11, CR 118; App. 24, CR 100. The “Whereas” provisions state that the Developers and the Water Authority “desire to provide for the design, engineering, construction, *acquisition*, operation, maintenance, lease, and *sale*” of the facilities. *Id.*

The court of appeals also ignored other germane provisions in the Agreements. Section 3.01 of each Agreement, entitled “Purchase and Assignment,” provides that “*the Developer agrees to sell and the Authority agrees to purchase all completed portions of*

the Facilities” *Id.* at CR 105, 137, 155-56, 120-21, 102-03 (emphasis added). Section 3.02 of each Agreement details how the purchase price will be calculated. *Id.* at CR 106, 137-38, 156, 121, 103. Section 3.03 further details the Authority’s rights and obligations regarding the issuance of bonds “to finance purchase” of the facilities. *Id.* Section 3.04 sets forth conditions that the Developers must meet in connection with the purchase and assignment. *Id.* at CR 106, 138, 156, 121, 103. Section 4.01 allows the Authority to lease the Facilities without charge, but only “until such time as the Authority acquires such portions; provided that such lease shall terminate upon the acquisition by the Authority of all the Facilities.” *Id.* at CR 107, 140, 157, 122, 104.

The effect of the court of appeals’ opinion is that upon failure of one bond election – indeed, a bond election in which members of the Authority’s board actively campaigned to ensure its failure – these other provisions are rendered meaningless. What are the implications of this? Have the Agreements terminated? Does the Authority’s continuing use of the facilities at no charge give rise to a trespass or *quantum meruit* claim? Can the Developers excavate and remove the facilities, leaving the homeowners with no water or sewer service? The opinion does not say.

The court of appeals attempted to justify its harsh result by noting what the Agreements do not say:

Had the possibility of repeated ballot placement been contemplated, the parties likely would have stated so in express terms. The agreement uses the noun phrase “any bond election,” which is singular, rather than the phrase “any bond elections,” which is plural. The agreement also does not state that a bond measure would be submitted to voters repeatedly until approved. To the contrary, the central point of the paragraph, as explained above, is that the bond measure would be included on the very next bond

proposal ballot. We therefore find the agreement to be unambiguous in obligating the Water Authority to place the measure only on the next ballot after the effective date of the agreement.

2008 WL 3062234 at *4 (citations omitted).

But there are other significant things, not noted in the opinion, that the Agreements do not say. They do not say that if one election fails, then the Authority's contractual obligation to pay for the facilities ends. They do not say that the Authority has the right to lease the facilities free of charge forever in the event that one bond election fails. Each of these things, in these Agreements drafted by the Authority, would have been quite simple to say, particularly if something so drastic as a forfeiture were intended.

Moreover, if the Authority believed that its purchase obligations dissolved after one election, then why did it include a measure for purchase of the Facilities on the October 1998 ballot (albeit a measure that it separated out from the others, and urged the voters to reject)? And why did it call an election in November 2006 for the sole purpose of manufacturing evidence that the voters would still reject any measure for bond funds to pay the Developers? Again, about these matters, the court of appeals' opinion is silent.

At the very least, the Agreements are ambiguous and this case should be remanded for trial. Indeed, the fact that two district court judges (along with, it powerfully appears, the three-justice panel in *Kirby Lake I*) interpreted "any election" to mean "each election" rather than "only one election" strongly suggests that, at a minimum, reasonable minds can differ about the meaning of this language.

C. The Court of Appeals' Opinions Are at Odds with *Kirby Lake I*. Indeed, the Opinions Are Directly Contrary to *Kirby Lake I*.

The court of appeals' opinions cannot be reconciled with *Kirby Lake I*. In *Kirby Lake I*, the Authority argued that voter approval of bonds was a condition precedent to its obligation to pay the Developers. The Developers countered that such voter approval could not be a condition precedent because making it such a condition would result in a forfeiture of their contractual rights, which forfeiture is disfavored by the law. *Kirby Lake I* at 745.

The court of appeals appreciated that the law disfavors forfeitures, and that it should, if possible, interpret Section 3.01 of the Agreements (the identical provision at issue in this case) to avoid such forfeiture. *Id.* (citing *Criswell v. European Crossroads Shopping Ctr., Ltd.*, 792 S.W.2d 945, 948 (Tex. 1990)). And, the court of appeals explained why its interpretation of the Agreements avoided any forfeiture:

Moreover, the failure of the condition precedent at a given time does not result in a forfeiture, only a delay in payment. Nowhere in the contracts does it provide that the failure to obtain voter approval forfeits appellees' right to receive payment for their facilities. *The Authority is not excused from performing its obligation to pay when voters do not, in a particular election, approve the sale of bond funds to pay appellees*; its obligation to pay simply does not arise at that time. . . . This conclusion is further supported by the fact that, under the contracts, the Authority was permitted to lease the facilities until such time as it purchased them – a provision that demonstrates *the parties contemplated a continuing contractual relationship of an unspecified duration*.

Kirby Lake I at 745 (emphases added).

The court of appeals' opinion in the Kirby Lake Contract Case (adopted in the Friendswood Case) pretends away any conflict between its holding and *Kirby Lake I*.

“[T]he point of the discussion in the cited portion of *Kirby Lake I* was that voter approval was a condition precedent to the Water Authority’s obligation to purchase the facilities. The issue of whether the Water Authority was obligated to place the bond measure in every election until it passed was not directly before us in *Kirby Lake I*; therefore, the suggestion referenced by appellees is not controlling of the issue.” 2008 WL 3062234 at *5, n.6.

Respectfully, the *Kirby Lake I* decision, in explaining why its construction of the Agreements worked no forfeiture, quite plainly relied on the fact that the Authority continued to have an obligation to include a bond measure in future elections. Five years later, though, the opinion here does precisely what *Kirby Lake I* professed to avoid – work a forfeiture of the Developers’ contractual right to payment for water, sewer, and drainage facilities for which the Authority plainly agreed to pay.

II. The Court of Appeals’ Opinion in the Takings Case Is Also Wrong.

A. The Kirby Lake Developers Did Not Consent to a Taking by the Authority.

In its plea to the jurisdiction in the Takings Case, the Authority’s essential contention was that in bringing their inverse condemnation claim, the Kirby Lake Developers “have simply rehashed their contract claims.” No. 08-1003 CR 155. The Authority argued in the trial court and in the court of appeals that under *General Services Commission v. Little-Tex Insulation Co., Inc.*, 39 S.W.3d 591, 598 (Tex. 2000), the Kirby Lake Developers have no takings claim because, by contract, the Kirby Lake Developers

have permitted the Authority to use the Facilities until the voters approve bonds to pay for them.

The court of appeals accepted this argument:

In their petition, the Developers allege that, under the Agreements, the Authority is allowed to lease and use the Facilities at no charge until the Authority purchases the Facilities and that the Authority has not purchased the Facilities. Presuming without deciding that the Authority's alleged breaches of the Agreements resulted in recoverable contract damages to the Developers, the facts alleged in the Developers' petition affirmatively negate the trial court's subject-matter jurisdiction by showing that the Developers agreed to allow the Authority to lease and use the Facilities free of charge until the Authority purchases the Facilities. . . . Under the applicable standard of review, the facts alleged in the Developers' petition affirmatively negate the trial court's subject-matter jurisdiction by showing that the Developers consented to any alleged taking by the Authority.

2008 WL 3016308 at *4 (citing *Little-Tex*; *State v. Steck Co.*, 236 S.W.2d 866 (Tex. Civ. App.—Austin 1951, writ ref'd); and *Hightower v. City of Tyler*, 134 S.W.2d 404 (Tex. Civ. App.—El Paso 1939, writ ref'd)).

This holding stretches *Little-Tex* holding well past its breaking point. And, it ignores not only the facts, but also other more pertinent authority.

1. Several Important Facts Distinguish the Takings Case from *Little-Tex*.

In *Little-Tex*, Dalmac Construction Company had contracted to build a sports facility for Texas A&M University. Dalmac sought a \$2.4 million upward adjustment to the \$30 million contract price based on changes to the specifications; Texas A&M agreed to pay one-eighth that amount, prompting Dalmac's lawsuit. *Little-Tex*, 39 S.W.3d at 593-94. In determining that Dalmac had no constitutional takings claim, this Court held that Dalmac had failed to show the requisite intentional State action. "[T]he State does

not have the requisite intent under constitutional-takings jurisprudence when it withholds property or money from an entity in a contract dispute. Rather, the State is acting within a color of right under the contract and not under its eminent domain powers.” *Id.* at 598-99.

The facts here, however, take this case well beyond the *Little-Tex* holding. In *Little-Tex*, the university had paid some \$30 million under its contract, and was arguing about whether it was contractually obligated to pay an additional fraction of the purchase price. Here, by contrast, the Authority has not paid a single cent for the Facilities. Moreover, here the Authority takes the position that it has absolutely no remaining contractual obligations under the Agreements, and hence no obligation to make any payment ever for the Facilities. *See* App. 12, CR 81; App. 13, CR 75, ¶ 3. In the Authority’s view, the only remaining purpose of the Agreements is to bestow upon it the perpetual right to assess and collect fees and taxes for use of the Facilities, but with absolutely no obligation to compensate the Kirby Lake Developers.

2. The Existence of a Contract Does Not Bar an Inverse Condemnation Claim.

In the court of appeals’ view, the existence of a contract is talismanic; if there is an agreement between the Authority and the Kirby Lake Developers, there can be no takings claim. In so deciding, the court of appeals ignored this Court’s opinion in *State v. Holland*, 221 S.W.3d 639 (Tex. 2007), and other pertinent authority confirming that the existence of a contract no more establishes the invalidity of a takings claim than the absence of a contract establishes the validity of such a claim.

In *Holland*, an individual brought a takings claim based upon the State’s supposed wrongful use of his patented water treatment processes. The State filed a plea to the jurisdiction, urging that no takings claim could exist in view of contracts under which the State had paid companies controlled by Holland to install equipment that incorporated the patented processes. Reasoning that the State’s contracts were not with the patent holder, Holland himself, but rather with companies he controlled, the trial court denied the plea, and the appeals court affirmed the denial. This Court reversed and held that the existence of an express or implied contract is “immaterial to determining the capacity in which the State is acting.” *Id.* at 643. Rather, the crucial inquiry is the State’s intent. *Id.* Because the evidence showed that Holland had voluntarily provided the water treatment processes to the State pursuant to contractual arrangements, and that the State had accepted those processes under the contractual arrangements, the State lacked the intent required to establish a takings claim. *Id.* at 644.

A different panel of the Fourteenth Court of Appeals relied on *Holland* in a more recent decision that cannot be reconciled with the opinion below. In *Southwestern Bell Telephone, L.P. v. Harris County*, 267 S.W.3d 490 (Tex. App.—Houston [14th Dist.] 2008, no pet.), rejected Harris County’s argument that it was merely acting pursuant to contract rights when the alleged taking occurred. In that case, Southwestern Bell (“SWBT”) purchased a private utility easement from a private landowner. Harris County later purchased the underlying property as part of a street-widening project, subject to the easement agreement; under the terms of the easement agreement, Harris County as landowner could improve the underlying property “so long as the improvements do not

unreasonably impair [SWBT's] use of the easement.'" *Id.* at 495. The project required SWBT to relocate telecommunications facilities in the easement, which SWBT refused to do without compensation.

Harris County filed suit in district court for an injunction requiring SWBT to move its facilities and bear the relocation costs. SWBT countered by filing an inverse condemnation suit in county court at law. The county court granted Harris County's plea to the jurisdiction. The court of appeals reversed, rejecting Harris County's argument that it was acting pursuant to its contract rights in the easement agreement and SWBT had no takings claim. Because Harris County was acting as a governmental entity with condemning powers, "we find Harris County's argument that it was acting pursuant to colorable contract rights unpersuasive." *Id.* at 497. *See also Texas Parks & Wildlife Dep't v. Callaway*, 971 S.W.2d 145, 150 (Tex. App.—Austin 1998, no pet.) ("The existence of a contract is not talismanic, but merely leaves the state's immunity from suit intact; it does not build an impenetrable wall nullifying the possibility of other waivers of and exceptions to that immunity."); *City of Garden Ridge v. Ray*, No. 03-06-00197-CV, 2007 WL 486395 at *4 (Tex. App.—Austin Feb. 15, 2007, no pet.) (recognizing that an inverse condemnation claim can co-exist with a breach of contract action, but declining to allow such a claim where the pleadings failed to allege an intentional act resulting in a taking of private property); *Texas Southern Univ. v. State Street Bank & Trust Co.*, 212 S.W.3d 893, 913-17 (Tex. App.—Houston [1st Dist.] 2007, pet. denied) (Keyes, J., concurring in part and dissenting in part) (explaining that where a contract has been fraudulently induced, its existence does not negate an intent to take property).

Here, the Kirby Lake Developers do not contest that the Authority intended to perform its contractual obligations when it first undertook them in 1998. However, it is apparent that some six or so years later, in 2004, the Authority emphatically repudiated those undertakings. At that time, the Authority announced it had no further contractual obligations to any of the Developers, but that it would continue (as it has done) to use the Facilities, free of charge. These facts distinguish this case from the authorities relied upon by the court of appeals because the Authority is not acting pursuant to a contract; it is taking property without compensation.

3. The Opinion's Fundamental Assumption that a Contract Claim and a Takings Claim Cannot Be Pursued Alternatively Is Mistaken.

In concluding there can be no taking because the Kirby Lake Developers consented to the Authority's lease of the facilities until such time as the Authority purchases them, the court of appeals observed:

Under the Developers' petition, the Agreements are still in effect. The petition shows that rather than rescind the Agreements based on an alleged material breach by the Authority, the Developers have treated the Agreements as still in effect by continuing to demand performance under the Agreements and suing to enforce the Agreements.

2008 WL 3016308 at *5 (also noting that construction of the Agreements is the subject of another lawsuit).

In the Contract Cases, however, the Developers did not demand performance under the Agreements. Rather, they sued for contract damages when the Agreements were breached.

As pleaded in the Kirby Lake Developers' petition, the Authority expressly repudiated the Agreements and any continuing obligation under them. App. 29, CR 266. Indeed, (as also pleaded in the Kirby Lake Developers' petition) the Authority stipulated that it considered any obligation to the Kirby Lake Developers under the Agreements to have been satisfied. *Id.*, CR 266-67. And, (as pleaded in the Kirby Lake Developers' petition), the Authority continued to use the facilities with no intention to pay for them. *Id.*, CR 268.

Texas law allows plaintiffs to plead alternative, seemingly inconsistent causes of action. *See, e.g., In re Kellogg Brown & Root, Inc.*, 166 S.W.3d 732, 740 (Tex. 2005) (a party generally cannot recover in *quantum meruit* when there is a valid contract covering the services or materials furnished, but may seek relief under both theories because pleading in the alternative is allowed); Tex. R. Civ. P. 48. This case is a perfect example of why. The Kirby Lake Contract Case effectively holds that the Agreements – under which purchase of the facilities was clearly contemplated – failed in May 1998. Thus the Authority is not acting under “color” of a lease agreement that contemplates purchase in the future. It is using property with no intention of paying for it. If the court of appeals' opinion in the Kirby Lake Contract Case is right, then the Kirby Lake Developers should be allowed to plead, and recover under, their takings claim.

B. The Takings Opinion Cannot Be Squared with the Decision in the Contract Cases.

The Texas Constitution mandates that “[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. I, § 17. The court of appeals’ opinion holds that the Kirby Lake Developers have no takings claim because in the Agreements, “the Developers agreed to allow the Authority to lease and use the Facilities free of charge until the Authority purchases the Facilities.” 2008 WL 3016308, *4. Thus, “the Developers consent to the Authority’s use of the Facilities free of charge until the Authority purchases the Facilities, which has not occurred.” *Id.* at *5. The court presumed without deciding “that the Authority’s alleged breaches of the Agreements resulted in recoverable contract damages to the Developers” *Id.* at *4.

In the Kirby Lake Contract Case, a different panel of the Fourteenth Court of Appeals ruled that the Authority’s purchase obligation ended when the voters failed to approve bond funds for purchase of the Facilities in a single bond election held in May 1998. 2008 WL 3062234, *4. In consequence of the holding in the Kirby Lake Contract Case, the time “until the Authority purchases the Facilities” is forever. Obviously, with the purchase obligation having disappeared by reason of the May 1998 bond election, there never will be a purchase. Thus, the notion that the Kirby Lake Developers have merely consented to lease the facilities free of charge “until the Authority purchases the Facilities” is Orwellian. It is quite plain that the Kirby Lake Developers never have consented to simply give the facilities to the Water Authority free of charge, to use forever.

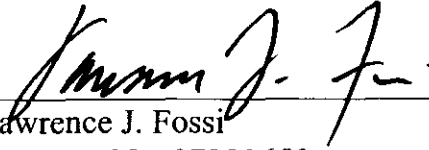
If the opinion in the Kirby Lake Contract Case is right, then the court of appeals’ opinion in the Takings Case is wrong.

CONCLUSION AND PRAYER

For the reasons stated above, this Court should grant the Developers' petitions for review in the Contract Cases, reverse the portions of the judgments of the court of appeals holding that the Authority did not breach the Agreements, and render judgment affirming the judgments of the district courts. Alternatively, this Court should grant the Developers' petitions for review in the Contract Cases, reverse the portions of the judgments of the court of appeals holding that the Authority did not breach the Agreements, and remand the cases for trial.

Also for the reasons stated above, this Court should grant the Kirby Lake Developers' petition for review in the Takings Case, reverse the Amended Final Judgment entered by the trial court dismissing their takings claim for lack of subject matter jurisdiction, and reverse the judgment of the court of appeals affirming the trial court's dismissal of their claim.

Respectfully submitted,



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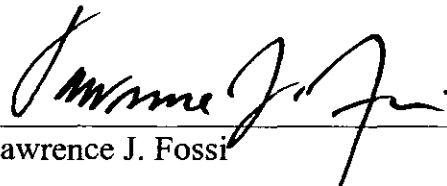
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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the 10 day of July 2009, a copy of the foregoing Petitioners' Consolidated Brief on the Merits was served by facsimile and by United States First Class Mail on Respondent Clear Lake City Water Authority, through its counsel of record:

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