
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' REPLY TO RESPONDENT'S BRIEF ON THE MERITS

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ORAL ARGUMENT REQUESTED

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TO THE HONORABLE SUPREME COURT OF TEXAS:

Petitioners Kirby Lake Development, Ltd., Miter Development Co., L.L.C., Taylor Lake, Ltd., and Friendswood Development Company, Ltd. (collectively, the “Developers”) file this reply to Respondent’s Brief on the Merits (“Brief”).¹

I. INTRODUCTION

The central question in these consolidated cases is whether this Court will countenance a judicially created exception to Article 1, Section 17 of the Texas Constitution. The Texas Constitution unequivocally promises that no person's property shall be taken or applied to public use without adequate compensation being made. The court of appeals, however, has determined that the Authority is free to enter into agreements to purchase water, sewer, and drainage facilities, and then actively undermine the bond elections that would have provided the purchase money, and then exclude the agreements from further bond election ballots despite having promised to include them in "any" election, and then proceed to use the facilities (and assess fees and taxes from homeowners connected to the facilities) despite having unequivocally repudiated any further obligations under the agreements.

In its brief on the merits, the Authority has dreamed up yet more reasons why it can continue to use the facilities in perpetuity, without ever fulfilling its contractual purchase obligation or paying just compensation for a taking. First, the Authority suggests that a governmental entity may require private developers to donate water and sewer facilities as a condition to precedent to receiving services to their new

¹ Capitalized terms not defined herein are as defined in Petitioners’ Consolidated Brief on the Merits.

developments. Brief at 1-4. That is true, and where such requirements are laid down at the outset, courts will respect and enforce them. Here, however, there were no such requirements. Rather, the Authority entered into agreements to pay for the Facilities, and then repudiated its agreements.

The Authority also claims the agreements create "perpetual" obligations in contravention of public policy, and hence are terminable at will. *Id.* at 28. It is clear, however, that the agreements are not indefinite in duration. (And, if the Authority genuinely believes it is contravening public policy, then why does it continue to use and benefit from the Facilities?)

Next, the Authority argues that the agreements are tantamount to an abdication by the Authority of its proper governmental function, and are accordingly void. *Id.* at 29-31. This is risible. The Authority grew to its prodigious size on the strength of scores of identical agreements, and nothing in the case law remotely supports the Authority's argument.

Or, if the other end-runs fail, the Authority argues it enjoys immunity from suit. *Id.* at 31-38. This argument runs into three impenetrable obstacles: (a) this Court's decision in *Tooke*, (b) a subsequent legislative waiver of immunity from suit in contract cases such as these, and (c) a court of appeals decision rejecting the argument.

Finally, the Authority argues that even if there otherwise would have been a taking, it has no liability because the Developers have consented to the taking by entering into the agreements, and this is nothing more than a contract dispute. *Id.* at 39-45.

Nothing in Texas law, though, suggests that the facts here can be construed as any manner of consent. And, this is not merely some garden variety contract dispute.

Acknowledging the possibility that all its arguments will fail, the Authority urges that there are fact issues that require this Court to remand rather than render upon reversal. *Id.* at 46-50. All of the supposed fact issues, however, are illusory, and the case is ripe for disposition in all regards as a matter of law.²

II. ARGUMENT

In its Statement of Facts, the Authority discusses at length Texas cases that explain why it is proper for local governments to require developers to “donate” streets, alleys, and water and sewer facilities as a condition to subdivision development. Brief at 1-4. Those cases, however, have nothing to do with the facts of this case. Here, the Authority agreed to purchase the Facilities, and then repudiated its obligation to do so.

In their Petitioners’ Consolidated Brief on the Merits, the Developers addressed the Authority’s arguments on the meaning of “any bond election” and the issue of consent. Those arguments will not be repeated here. This Reply addresses why none of the Authority’s remaining arguments have merit.

A. The Judgments in the Contract Cases Cannot Be Affirmed on Other Merits Grounds.

1. The Agreements Are Not Unenforceable Perpetual Contracts.

The Authority urges that if “any bond election” is read to mean “all bond elections,” then the Agreements are “perpetual contracts” that are disfavored by courts

² The only possible factual issue remaining is whether “any election” in the Agreements means “each election” rather than “only one election.” *See* Petitioners’ Consolidated Brief on the Merits at 19.

and consequently are terminable at will. Brief at 28. Indeed, the Authority claims it already has terminated the Agreements, and that it did so when it rejected the Developers' demand to place an authorization measure on the 2004 ballot. *Id.*

This argument fails at several levels. At the outset, the Authority's conduct is contrary to its claim of termination. 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). If the Authority actually had terminated the Agreements, then it should have ceased using the Facilities, and returned those Facilities to their rightful owners – the Developers. What the Authority actually did in 2004 was not to terminate the Agreements, but instead to repudiate the Authority's unfulfilled contractual obligations while retaining all of its contractual benefits. The Authority announced that “any obligation” it might ever have had “to seek voter approval to issue bonds to reimburse [the Developers] has already been satisfied.”³ App. tab 14; App. tab 16, ¶ 3; App. tab 25.

Further, the Agreements are not of indefinite duration. Rather, both the leases that are part of the Agreements, and the Agreements themselves, terminate once the Authority has fully paid for the Facilities. *See* Agreements (App. tabs 8, 9, 10, 11, 24) at Section 4.01 (providing that the lease “terminates” upon the Authority's acquisition of the Facilities), Section 4.03 (indicating that “termination of the Agreement” occurs contemporaneously with termination of the lease), and Section 4.05 (similarly indicating

³ The Authority also argues that “no evidence exists to prove that the Authority has ever ‘repudiated’ the contract by taking the position that it would never purchase the facilities under any circumstances. . . . [N]othing prevents the Authority from submitting the issue to the voters yet again.” Brief at 13. This is nothing more than a made-up appellate argument. There is no evidence that the Authority ever intends to pay for the Facilities. To the contrary, the Authority announced that “any obligation,” not just its contractual obligation, to seek voter approval for bonds to pay for the Facilities has been satisfied.

that “this Agreement is in effect” only so long as the lease continues). By contrast, the contract at issue in *Clear Lake City Water Authority v. Clear Lake Utility Co.*, 549 S.W.2d 385 (Tex. 1977), had no provision for termination whatsoever. *Id.* at 388. And, in *Fort Worth Independent School District v. City of Fort Worth*, 22 S.W.3d 831 (Tex. 2000), nothing in the contract at issue committed the city “to a lasting arrangement in violation of any prohibition against such things.” *Id.* at 841.

Finally, the Authority’s argument ignores that it is statutorily authorized to “contract . . . for the joint construction, financing, ownership, and operation” of any facilities necessary to accomplish its purposes, and that its contracts may be of “*unlimited duration . . . on the terms and conditions the board may consider desirable*” for the purchase of facilities. TEX. WATER CODE ANN. §§ 49.213(a) & 49.213(c)(4) (emphasis added). The Authority does not argue that this statutory authorization is invalid.

2. The Agreements Do Not Contravene the Reserved Powers Doctrine.

The Authority urges that by requiring it to include authorization to purchase the Facilities in any bond election, the Agreements would result in an abdication of the Authority’s function of holding bond elections and issuing bonds, and would “embarrass” the Authority’s ability to do so. Brief at 29-30. This is so, argues the Authority, because including a measure to purchase the Facilities on any bond ballot might galvanize voter sentiment against the authorization of all bonds and “impair the entity’s ability to raise taxes to fund projects critical to the entity.” *Id.* at 30.

This argument is flawed. Unlike the contracts at issue in the cases cited by the Authority, the Agreements do not in any manner surrender, suspend, or abdicate any

Authority function. *Cf. City of Corpus Christi v. Bayfront Assocs.*, 814 S.W.2d 98, 107 (Tex. 1991) (agreement held to be invalid to the extent it purported to *preclude* a governmental entity from holding a bond election and issuing bonds); *Clear Lake City Water Auth. v. Clear Lake Util. Co.*, 549 S.W.2d 385, 392 (Tex. 1977) (agreement precluded Authority from extending water and sewer services to particular persons or entities under rates and terms Authority deemed best); *Fidelity Land & Trust Co. v. City of West University Place*, 496 S.W.2d 116, 118 (Tex. Civ. App.—Houston [14th Dist.] 1973, writ ref'd n.r.e.) (deed effectively caused city to lost control over operation of its sewer system).

The Agreements here do not give the Developers the right to set a tax rate, equalize assessments, call a bond election, decide where to hold an election, or issue bonds. They merely require that the Authority include, in any bond election it might choose to conduct, authorization for the amount required to purchase the Facilities.

Besides having no legal foundation, the argument is insincere. As the Authority's board of directors has demonstrated, it can rally voter support when it wants a bond measure to pass, as it did in 2004, and galvanize voter opposition when it wants the measure to fail, as it did twice in 1998 (and, even more egregiously, in 2006). In 1998 and 2006, it was not the ballot measure that "dramatically affected" the "turnout and outcome of a bond election." Brief at 30. Rather, it was the board's signs urging voters to "Stop using taxes to subsidize developers" and newsletters encouraging voters to defeat certain bond measures. *See Kirby Lake I* at 740-41; App. tab 18. Thus, a \$29.1 million bond proposition supported by the board could win with overwhelming support in 2004

(even though several millions dollars of the bonds were to “subsidize” new development), while a proposition one-tenth the size was throttled two years later.

B. The Authority Is Not Immune from Suit.

1. The Authority’s Immunity from Suit Is Waived by the ‘Organic Statute’ in the Water Code.

In *Tooke v. City of Mexia*, 197 S.W.3d 325 (Tex. 2006), this Court held that the mere formulation of “sue and be sued” in a statute creating a governmental entity (which the Court called the “organic statute”) is insufficient, without more, to waive liability from suit. *Tooke*, 197 S.W.3d. at 337, 342. Instead, waiver is to be determined from an examination of the context of such language in the organic statute. *Id.* at 337, 340-43.

The organic statute at issue in *Tooke*, section 51.075 of the Local Government Code, “simply states that a home-rule municipality ‘may plead and be impleaded in any court.’” *Tooke*, 197 S.W.3d at 333. In analyzing the statute, this Court did not insist that, to waive immunity from suit, such a statute must contain a statement that such immunity is waived. Instead, the Court was guided by the principles set forth in its earlier decision in *Wichita Falls State Hospital v. Taylor*, 106 S.W.3d 692 (Tex. 2003), regarding how one determines whether an organic statute includes a waiver of immunity. Indeed, the *Tooke* opinion quoted from *Wichita Falls* at length:

“First, a statute that waives the State’s immunity must do so beyond doubt, even though we do not insist that the statute be a model of ‘perfect clarity.’ . . . For example, we have found waiver when the provision in question would be meaningless unless immunity were waived. . . .

“Second, when construing a statute that purportedly waives sovereign immunity, we generally resolve ambiguities by retaining immunity. . . .

“Third, if the Legislature requires that the State be joined in a lawsuit for which immunity would otherwise attach, the Legislature has intentionally waived the State's sovereign immunity. . . .

“Finally, we are cognizant that, when waiving immunity by explicit language, the Legislature often enacts simultaneous measures to insulate public resources from the reach of judgment creditors. . . . Therefore, when deciding whether the Legislature intended to waive sovereign immunity and permit monetary damages against the State, one factor to consider is whether the statute also provides an objective limitation on the State's potential liability. . . .”

Tooke, 197 S.W.3d at 330 (quoting *Wichita Falls*, 106 S.W.3d at 697-98).

Undertaking this analysis, the Court examined section 51.075 and its three statutory antecedents, and determined that none referred to a municipality's immunity from suit, but that each “appears to use common language to refer to an entity's *capacity* to be involved in litigation.” *Id.* at 333. Further, the Court observed that the 1858 statute used both the “plead and be impleaded” and “sue and be sued” language, but then dropped the “sue and be sued” phrase in 1913. “Nothing suggests the Legislature intended so radical a change in the liability of municipalities by omitting four words. Rather, the drafters of the 1913 statute likely believed they could say the same thing the 1875 statute did with a third as many words.” *Id.*

Based on this analysis, this Court in *Tooke* determined to overrule its earlier holding in *Missouri Pacific Railroad Co. v. Brownsville Navigation District*, 453 S.W.2d 812 (Tex. 1970), that the appearance of the phrase “sue and be sued” in an organic statute invariably denoted a waiver of immunity from suit. Rather, “the effect of a ‘sue and be sued’ clause in an organic statute depends on the context in which it is used. The words

can mean that immunity is waived, but they can also mean only that a governmental entity, like others, has the capacity to be sued.” *Id.* at 337.

The *Tooke* court then held section 51.075 of the Local Government Code up against the test in *Wichita Falls*. As noted, that statute was astonishingly brief, saying only that a home-rule municipality “may plead and be impleaded in any court.” In view of the *Wichita Falls* factors, it was plain to the *Tooke* court that the “plead and be impleaded” language spoke simply to capacity, and did not evince any waiver. *Id.* at 342-43.

The organic statute governing the Authority, section 49.066 of the Water Code, is a world away from the terseness of the home-rule municipality provision in *Tooke*. See TEX. WATER CODE ANN. § 49.066.⁴ It plainly waives a district’s immunity.⁵ The statute states that a district may sue and be sued. *Id.*, § 49.006(a). It then proceeds to make clear that such a statement is not merely an indication of the district’s capacity, but rather is a waiver of immunity. The statute stipulates not only that the district may “sue and be sued,” but that “a suit for contract damages *may be brought . . .*” *Id.* The statute then

⁴ Section 49.066 is part of a 1995 codification designed to achieve procedural uniformity among the different types of water districts. See Act of May 25, 1995, 74th Leg., R.S., ch. 715, 1995 Tex. Gen. Laws 3755; DAVID B. BROOKS, TEXAS PRACTICE: COUNTY AND SPECIAL DISTRICT LAW § 46.3 (2d. ed. 2002). The Authority originally was created by a 1963 statute that appeared at article 8280-280 of Vernon’s Texas Civil Statutes. See Act of May 6, 1963, 58th Leg., H.B. No. 1003, ch. 101. Significantly, the Legislature enacted section 49.066, with its “sue and be sued” language, at a time when the well-established rule in Texas, unchallenged in the 25 years since this Court’s ruling in the *Missouri Pacific* decision, was that such language waived governmental immunity. See, e.g., *Loyd v. ECO Resources, Inc.*, 956 S.W.2d 110, 122 (Tex. App.—Houston [14th Dist.] 1997, no pet.) (construing “sue and be sued” in section 49.066(a) of the Water Code as a general waiver of immunity from suits for breach of contract.

⁵ The Developers respectfully submit that the several Courts of Appeals decisions holding to the contrary, Brief at 32-33, are wrongly decided.

details how a district may be served with such a lawsuit, and provides a mechanism for enforcement of a judgment against a district. *Id.*, § 49.066(c), (b). Having exposed the district to suit, the statute then confines the district’s liability in several ways. It sets forth the “only” conditions under which a contract against a district will be enforceable – when it is in writing and approved by the district’s board. *Id.*, § 49.066(a). It forbids certain types of lawsuits, unless such suits are brought by the Attorney General of the State of Texas. *Id.*, § 49.066(d), (e). And, the statute excuses a district from posting a bond for appeal, injunction, or costs. *Id.*, § 49.066(f).

2. Alternatively, the Authority’s Immunity from Suit Is Waived by Recent Enactments to the Local Government Code.

In 2005, the Texas Legislature enacted – and made retroactive – provisions to the Local Government Code that expressly allow the types of damages sought by the Developers in this case – “the balance due and owed by the local governmental entity under the contract” and “interest as allowed by law.” TEX. LOC. GOV’T CODE §§271.153(a). *See generally id.* at §§271.151-160; *Tooke* at 342, n.81, 344-46. The Agreements plainly fall within the ambit of the Local Government Code.

a. The Agreements are written contracts stating their essential terms.

The essence of the Authority’s argument is that the Agreements are not binding contracts because they fail to contain essential terms describing the property to be sold and setting a purchase price. Brief at 34. This is a ludicrous argument. As to the Kirby Lake Developers, the Authority *stipulated* the purchase price for the Facilities, the date of their completion, and that the Kirby Lake Developers had good title to the Facilities.

App. tab 17. And, the Authority identified the Facilities sufficiently to specify what the Authority would be buying and how much it would pay if the bond elections passed. *See, e.g.,* App. tab 19 at CR 1212.

The Agreements plainly state that the property being sold is the Facilities (defined as “water distribution lines, sewer lines and drainage lines”) within each particular subdivision. And, the Agreements plainly provide a method for determining the purchase price. Thus, the Agreements are nothing like the Memorandum of Understanding found not to contain the essential terms of a contract in *Learners Online, Inc. v. Dallas Independent School District*, No. 05-08-00946-CV, 2009 WL 2138974 (Tex. App.—Dallas, July 20, 2009, no pet. h.).

b. The Agreements are contracts providing “goods.”

The Court of Appeals’ conclusion in *Clear Lake City Water Authority v. Friendswood Development Co.*, 256 S.W.3d 735 (Tex. App.—Houston [14th Dist.] 2008, pet. dismissed) (relied upon by the courts below) that the Facilities are “fixtures,” not “goods,” and therefore their sale does not fall under the waiver of immunity in the Local Government Code, is wrong. First, it is undermined by the expressed intent of the 2005 enactments. As plainly stated by the Bill Analyses prepared by both the House Committee on Civil Practices and the Senate Committee on State Affairs, “C.S.H.B. 2039 clarifies and re-expresses the legislature’s intent that all local governmental entities that are given the statutory authority to enter into contracts shall not be immune from suits arising from those contracts, subject to the limitations set forth in C.S.H.B. 2039.” HOUSE COMM. ON CIVIL PRACTICES, BILL ANALYSIS, Tex. H.B. 2039, 79th Leg., R.S.

2005 (App. tab 7, at 2); SENATE COMM. ON STATE AFFAIRS, BILL ANALYSIS, Tex. H.B. 2039, 79th Leg., R.S. 2005. The limitations referred to are not limitations making a distinction between “goods” and “real property.” Rather, they are (a) limitations on actual damages set forth in Section 271.153(a) (allowing recovery of only the balance due under the contract, plus change orders, plus interest) and (b) the concomitant exclusion of consequential and exemplary damages, and damages for unabsorbed office overhead, in section 271.153(b). *See* TEX. LOC. GOV’T CODE §§ 271.153.

It is quite clear that, by “goods and services,” the Texas Legislature most certainly did not intend to exclude real property. Again, as the legislative history to the 2005 amendments makes clear, the Texas Legislature thought it was overruling various court rulings in which a governmental entity was held to be immune from suit as regards a breach of contract action arising from, among other things, construction contracts involving real property. *See* HOUSE COMM. ON CIVIL PRACTICES, BILL ANALYSIS, Tex. H.B. 2039, 79th Leg., R.S. 2005 (App. tab 7, at 1). The House’s Bill Analysis expressly states that the legislation was intended to overrule the effect of such recent cases as *City of Mesquite v. PKG Contracting, Inc.*, 148 S.W.3d 209 (Tex. App.—Dallas 2004) (judgment reversed by *PKG Contracting, Inc. v. City of Mesquite*, 197 S.W.3d 388 (Tex. 2006)); *Carrollton v. McMahan Contracting, L.P.*, 134 S.W.3d 925 (Tex. App.—Dallas 2004) (judgment reversed by *McMahan Contracting, L.P. v. City of Carrollton*, 197 S.W.3d 387 (Tex. 2006)); *Satterfield & Pontikes Const., Inc. v. Irving ISD*, 123 S.W.3d 63 (Tex. App.—Dallas 2003) (judgment reversed by *Satterfield & Pontikes Const., Inc. v. Irving ISD*, 197 S.W.3d 390 (Tex. 2006)). In *PKG Contracting*, the contract was for

construction of a storm drainage system, exactly as here. In *McMahon Contracting*, the contract was for street repairs, exactly as here. In *Satterfield*, the contract was a construction contract for a new school building. The contracts in *PKG Contracting*, *McMahon Contracting*, and *Satterfield* all involved, plainly, real estate.

The Texas Legislature cited these cases as being overruled by its legislation because the legislation covered them. This Court reversed the judgments in all three cases based on the enactment of the 2005 amendments to the Local Government Code for the same reason.

Further, the 2005 amendments nowhere suggest any distinction between real property and personal property. Rather, the phrase “goods or services” is intended as a sweeping description of all contracts. And, the 2005 amendments expressly comprehend “change orders” to contracts. TEX. LOC. GOV’T CODE §§271.153(a)(2). “Change orders” is, of course, common parlance in construction contracts involving real estate.

c. The Agreements are contracts providing “services.”

The Fourteenth Court of Appeals held that the Agreements are contracts providing services and therefore fall under the waiver of immunity in the Local Government Code. The court got it right.

The Agreements obligate the Developers to provide not simply goods, but also services – construction of the water, sewer, and drainage facilities, and construction of street improvements. *See* Agreements at Article I and Article V; *see also Kirby Lake I*, 123 S.W.3d at 740 (in entering into the Agreements at issue here, the Authority undertook to “pay a portion of the costs incurred in *constructing* water and sewer

facilities,” and “agreed to reimburse the developer 70% of the costs of *constructing* the facilities”) (emphasis added).

The Authority describes these obligations as nothing more than a requirement that the Developers comply with state quality standards. Brief at 38. To the contrary, however, the Facilities and the street improvements were constructed as required by the Authority – not just to meet quality standards, but to meet all plans and specifications as directed by the Authority.

d. There is a balance due and owed.

The Authority argues that no balance is due and owed under the Agreements because the voters have not approved bonds to pay for the Facilities. Brief at 38. As discussed above at page 11, however, the Authority has acknowledged the amounts owed to the Developers. Simply because there are no bond funds for payment does not mean that the amount is not owed.

C. The Kirby Lake Developers Stated a Takings Claim.

The Developers demonstrated in their brief on the merits that this case is not merely a contractual dispute over payment and that the Developers did not consent to the Authority taking their property without compensation.

The Authority also argues that the Developers’ concession that the Authority intended to perform its contractual obligations when the Authority first undertook them in 1998 is dispositive of the takings claim, citing *City of Corinth v. Nurock Development, Inc.*, No. 2-07-422-CV, 2009 WL 2356931 (Tex. App.—Fort Worth, July 30, 2009). Brief at 44. In *Nurock*, however, the court merely held that Nurock had failed to state an

“extraction-type” taking for road improvements Nurock agreed to make as part of a settlement agreement that the city allegedly breached in other ways. *Nurock* does not stand for the proposition the Authority urges here – that the Authority, having agreed initially to pay for the Facilities, can never be found liable for taking them later.

D. There Are No Other Grounds for Remand.

1. There Is No Fact Issue on Causation.

The September 11, 2004 bond election, at which the Authority wished very much to authorize \$29.1 million in bonds, and encouraged the voters to support the proposition, passed by a margin of more than 10 to 1 (410 in favor and 46 opposed). The Authority urges, however, that the Developers failed to prove causation – that the voters would have approved additional bond funds to pay the Developers – and thus the Developers were not entitled to summary judgment. Brief at 46-47.

By reason of its deliberate breach of the Agreements, this argument is not available to the Authority. When it willfully refused to include the approximately \$2.5 million owed to the Developers on the 2004 ballot, and thereby prevented the possibility of a favorable vote, the Authority’s obligations under the Agreements became absolute. *Marvin v. Rogers*, 115 S.W. 863, 865 (Tex. Civ. App. 1909)s (“[W]here a contract is made which is performable at the time of the occurrence of a future event, the law imputes to the promisor an agreement that he will put no obstacle in the way of the happening of that event, and that he will hold himself in readiness to co-operate where his co-operation is a necessary element of the happening of the contingency. If, in violation of this implied covenant on his part, he does something which prevents the happening of

the event, the contract becomes absolute and must be performed as if the event had occurred.”).

Stated otherwise, in view of the Authority’s refusal to include an additional \$2.5 million in the 2004 proposition, the Developers are entitled to recover without proving that the proposition would have succeeded. The Authority’s repudiation of its contractual obligation precludes it from insisting that the Developers offer proof of what no mortal can prove: how 456 voters would have cast their ballot on September 11, 2004 if the bond proposition totaled \$31.6 million instead of \$29.1 million. *See also Rich v. McMullan*, 506 S.W.2d 745, 747 (Tex. Civ. App.—San Antonio 1974, writ ref’d n.r.e.) (“It is elementary that one who prevents or makes impossible the performance of a condition precedent upon which his liability under a contract is made to depend cannot avail himself of its nonperformance.”); *II Deerfield Ltd. Partnership v. Henry Building, Inc.*, 41 S.W.3d 259, 265 (Tex. App.—San Antonio 2001, pet. denied) (same); *Ebberts v. Carpenter Production Co.*, 256 S.W.2d 601, 617-18 (Tex. Civ. App.—Beaumont 1953, writ ref’d n.r.e.) (promisee is relieved from proving that condition has happened or would have happened where “promisor’s own act makes it impossible for the condition to occur, on which his promise depended”).

The Authority counters by relying on *Fair v. Uhr*, 310 S.W.2d 125 (Tex. Civ. App.—Fort Worth 1958, writ ref’d n.r.e.) and Comment (b) to Section 245 of the Restatement (Second) of Contracts for the proposition that if the Authority proved the voters would have defeated a proposition to pay the Developers, or at least raised a fact question on that issue, then the Developers were not entitled to summary judgment. Brief

at 46-27. However, it would, quite simply, be impossible for the Authority to show that the 456 voters who cast their ballots in September 2004 to approve, by a more than 10-to-1 margin, a \$29.1 million bond proposition, would have cast their ballots to defeat the proposition if it totaled \$31.6 million. As the District Court stated during the oral argument on the cross-motions for summary judgment in the Kirby Lake Contract Case, the Authority would need to have the jury peer into a crystal ball.

The Authority points to three types of supposed evidence to support its lack of causation affirmative defense:

a. Structure of the ballot and the 1998 elections.

The Authority offered affidavits from each of its directors claiming they would have used a “split ballot format” to isolate any Developer bond authorization provision from the remaining \$29.1 million of provisions, which were all lumped together. *See* Brief at 47. The Authority argues that this tactic would have caused a defeat just as it did in 1998. *Id.* The directors’ threat to structure the ballot in a manner that might facilitate defeat of a Developer measure is surely evidence of the Authority’s unwavering determination to repudiate its obligations to the Developers. As evidence that the voters would have rejected a Developer authorization, though, it is grossly and wholly speculative. Nor does the defeat of the propositions in 1998 raise any fact question about what would have happened in 2004.

b. The Stein public opinion poll.

The Authority makes much of a public opinion survey conducted by Professor Robert M. Stein, Jr., claiming that the survey shows that a proposition with an additional

\$1.3 million in bonds to pay the Kirby Lake Developers and \$1.2 million to pay Friendswood would have been defeated on September 11, 2004. Brief at 13-14.

Stein's survey is, of course, inherently speculative. Neither he nor anyone else has a crystal ball to tell us what would have happened at the September 11, 2004 election had the approximately \$2.5 million been sought, in addition to the \$29.1 million that was overwhelmingly approved. Further, Stein's methodology was unreliable under the test set forth in *Merrell Dow Pharmaceuticals, Inc. v. Havner*, 953 S.W.2d 706 (Tex. 1997), for the following independent reasons:

i. Stein never asked whether the poll participants would have approved an additional \$2.5 million.

Stein's report announces that it will use his "survey instrument" to "determine how voters in Clear Lake City Water Authority would ballot on a developer reimbursement proposition now and in 2004." No. 08-1003 CR 1110; No. 09-0064 CR 551. However, as a review of the report reveals, he did not attempt to locate any of the 456 voters who voted in the September 2004 election to ask them how they would have voted had the bond amount been \$31.6 million instead of \$29.1 million. And, although his survey posed 20 different questions, *none* of those questions asked whether, in September 2004, the respondents would have voted to approve the issuance of \$31.6 million of bonds. Having failed to make any such inquiries in his public opinion survey, Stein had no basis for formulating any opinion about causation in this case.

ii. Stein used the wrong dollar amount.

At the time of the September 11, 2004 election, the total owed to the Developers was approximately \$2.5 million. However, in conducting the survey that underpins his expert opinions, Stein did not ask whether the respondents would approve \$1.3 million in bonds (for the Kirby Lake Developers) or \$1.2 million in bonds (for Friendswood). Instead, he asked whether they would approve *\$7 million* in bonds. No. 08-1003 CR 1121; No. 09-0064 CR 562. When asked why he used \$7 million, Professor Stein testified it was a number he received from the Authority’s legal counsel. No. 08-1003 CR 607-608; No. 09-0064 CR 707-08. He said he was unaware that the reimbursement amount sought by the Kirby Lake Developers was closer to \$1 million than \$7 million, acknowledged that the reimbursement amount was an “important” fact, and said he had asked the Authority’s counsel to confirm the amount precisely because it was important.

Id.

iii. Stein’s survey responses are unreliable on their face.

Stein acknowledged that in October of 1998, there were at least 50,355 registered voters within the confines of the Authority’s boundaries, and that the number in 2004 would have been at least that high, if not higher. *See* No. 08-1003 CR 600; No. 09-0064 CR 541. Stein surveyed 499 registered voters. Of them, 175 claimed to have voted in the September 11, 2004 bond election – in other words, 35.1% of the respondents claimed to have voted. No. 08-1003 CR 1123; No. 09-0064 CR 556. This would translate to 17,660 voters in the September 11, 2004 bond election if the same turnout percentage were applied to the total number of registered voters. However, the total turnout for that

election was only 456. In other words, extrapolating Stein's results out to the registered voter population, it appears that *39 times* more people claimed to have voted than actually voted. Obviously, the responses suggest either that the poll was grossly unrepresentative, or that it is grossly unreliable. Either way, the survey fails to come close to meeting the Texas requirement that an expert's methodology be reliable. In the words of the *Havner* court, "if the foundational data underlying opinion testimony are unreliable, an expert will not be permitted to base an opinion on that data because any opinion drawn from that data is likewise unreliable." 953 S.W.2d at 174.

iv. There is no basis to believe that public opinion surveys regarding special districts are reliable.

Before his survey in this case, Stein had never before conducted any public opinion survey involving any water control and improvement district, municipal utility district, or other similar special district. No. 08-1003 CR 612; No. 09-0064 CR 702-03. More fundamentally, he was unaware of a single other public opinion survey that had been taken in advance of a bond election or other election for any water control and improvement district, municipal utility district, or other similar special district, and that consequently there is no way to determine whether such polling has any predictive value. No. 08-1003 CR 615-19; No. 09-0064 CR 710-14. Given that, as Stein admits, the great preponderance of MUD and other special district bond elections succeed (No. 08-1003 CR 620-21; No. 09-0064 CR 709-10), and given that there is no data to suggest that public opinion surveys regarding water district elections are reliable because no such survey ever has been taken and then compared with subsequent election results, and

given that the 2004 proposition passed by a more than 10 to 1 margin, it is plain that there neither is nor can be the type of “objective, independent validation of the expert’s methodology” that *Havner* demands. *See Havner*, 953 S.W.2d at 712.

c. The 2006 election.

The Authority’s breach occurred in 2004. The breach was absolute and nothing that took place thereafter can excuse the breach or expunge the Water Authority’s liability. And, it is abundantly clear that the November 7, 2006 election was a set-up job in which the Authority called the election with the intention that it should fail, and then took steps to assure it would fail, all in order to advance its legal position in this appeal.⁶ Thus, the District Courts properly excluded evidence of the 2006 election because it was irrelevant.⁷

2. There Is No Fact Issue on Friendswood’s Ability to Perform.

The Agreements require that, at the closing of the Authority’s purchase of the Facilities, the Authority may insist on conveyance documents “as may be necessary to evidence” among other things “title to the Facilities” and the assignment of warranties relating to the Facilities. App. tab 24, § 3.04. Pointing to this language, the Authority claims Friendswood has “failed to prove conclusively that it provided proof to the Authority of its ability to convey unencumbered title ownership to the facilities and assign all warranties and guarantees relating to them.” Brief at 48.

⁶ The 2006 election is discussed in Petitioners’ Consolidated Brief on the Merits at pp. 9-11.

⁷ In the Kirby Lake Contract Case, evidence of the 2006 election was also untimely; the election was held two months after the District Court entered final judgment and more than a month after the Authority filed its motion for new trial, which the District Court denied. *See* No. 08-1003 CR 1283.

This is a sophistical argument, actuated by an endless desire to nit-pick and hair-split, but not by any genuine concern about Friendswood's ability to perform. Obviously, it is only at a closing of the purchase and sale transaction that Friendswood would be obligated to furnish the Authority with conveyances, assignments, or other instruments that may be necessary to evidence Friendswood's title to the Facilities and the absences of encumbrances or liens thereon. No closing ever has occurred, of course, because the Authority has never issued bonds with which to pay Friendswood, or otherwise evinced any intent to perform. Moreover, the Authority clearly repudiated any further obligations under the Agreement, and thereby excused Friendswood from going through the motions of a closing. *See, e.g., Zucht v. Stewart Title Guaranty Co.*, 207 S.W.2d 414, 418 (Tex. Civ. App.—San Antonio 1947, writ dism'd) (after buyer repudiated contract for purchase and sale of real estate, seller was not required to “do the useless thing of tendering him a deed”); *Mar-Len of Louisiana, Inc. v. Gorman-Rupp Co.*, 795 S.W.2d 880, 887 (Tex. App.—Beaumont 1990, writ denied) (“Simply put, the appellant breached the contract by repudiation. Having done so at a time when all conditions precedent had not been technically completed, it cannot now complain that all conditions precedent had not been fulfilled.”); *Modern Aero Sales, Inc. v. Winzen Research, Inc.*, 486 S.W.2d 135 (Tex. Civ. App.—Dallas 1972, writ ref'd n.r.e.) (seller's repudiation of his obligations under an option agreement for purchase of aircraft constituted breach of the agreement and excused buyer from further tender of purchase money).

Unlike *Dixie Oil Co. v. McBurnett*, 6 S.W.2d 83 (Tex. Comm'n App. 1928), Brief at 48, this is not a suit for specific performance of a purchase contract subject to title

approval by the Authority; nor did the Authority's attorney reject Friendswood's title. The parties never got to the point of "closing" the transaction. The Authority's breach in 2004 made this case what Friendswood alleged: a breach of contract suit for damages.

3. There Are No Fact Issues on Interest.

a. Two years of "developer interest."

Section 3.02 of the Agreements makes developer interest (to which the Developers were entitled under the Agreements) subject to rules and applicable orders of the TCEQ and, indeed, TCEQ rules limit the interest to two years from the completion of construction. Thus, even though the Facilities had been completed for some eight years (or more) at the time of final judgment, the Developers sought only two years of developer interest. The rate for developer interest was, under the Agreements, the lesser of the rate of interest on bonds sold to purchase the Facilities or the interest actually incurred by the Developers.

The Authority argues that the Developers failed to prove either rate conclusively. Brief at 49. Obviously, the fact that no bonds were sold to purchase the Facilities is the fault of the Authority. The Developers used, as the interest rate for developer interest, the interest rates borne by the bonds issued in May of 2005 under authorization of the September 2004 election. *See* No. 08-1003 CR 795-98. In other words, the Developers used the rate that would have applied if the Authority had honored the Agreements.

b. Prejudgment and post-judgment interest.

The breach occurred on September 11, 2004, and the district courts awarded prejudgment interest from that date through the date of judgment at the statutory

prejudgment rate of 6% per annum. The Authority argues that the contract rate governs, and the Developers failed to prove that rate. Brief at 49. The Developers submit that the 6% rate is appropriate.⁸ The agreement regarding developer interest plainly was intended only for the period before a bond election, and even then with significant limitations, and the lawful prejudgment interest rate therefore should apply from the time of the breach until judgment. Nor is there any basis for having the developer interest rate, with its particular uses and limitations, trump the lawful post-judgment rate.

4. There Was No Error in Ordering that Execution May Issue.

Evidently referring to the portion of the Amended Final Judgment in the Kirby Lake Contract Case ordering that “execution issue for this judgment,” the Authority urges that a writ of execution is contrary to public policy. Brief at 49-50. First, no writ of execution has issued. If and when the Developers seek issuance of such a writ, there will be time enough for the issue to be joined. Second, the Authority quotes out of context from the case it cites, which is hardly so sweeping as the Authority suggests. At issue in *Willacy County Water Control & Improvement District No. 1 v. Abendroth*, 177 S.W.3d 936 (Tex. 1944), was whether a writ of *garnishment* could issue against the special purpose district. The appeals court said that the special purpose district was exempt from garnishment proceedings. *Id.* at 323. Obviously, this is not a garnishment proceeding or other proceeding in which the Authority has “no interest.” This is a lawsuit in which the Authority is a party defendant and has had a final judgment entered against it. Finally,

⁸ Indeed, the only mistake is that in submitting its order to the trial court, Friendswood should have requested interest at 8.25%, which was the published post-judgment rate at the time of judgment.

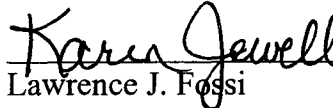
the Authority offers no explanation of why public policy should protect it from a writ of execution, particularly as, under the Authority's organic statute, the District Court can go further, and order the authority's board of directors to levy, assess, and collect taxes or assessments to pay the judgment. TEX. WATER CODE ANN. § 49.066(b). For the same reason, the District Court did not err in the Friendswood case when it ordered the Authority's board of directors to levy, assess and collect taxes or assessments to pay the judgment. Brief at 50. The statute grants the courts that authority, and the Developers were not required to plead or prove that an "injunction" should issue. *Id.*

CONCLUSION AND PRAYER

For the reasons stated above and in Petitioners' Consolidated Brief on the Merits, 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 and in Petitioners' Consolidated Brief on the Merits, 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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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the 8th day of September 2009, a copy of the foregoing Petitioners' Reply to Respondent's 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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