

In the  
Supreme Court of Texas

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KIRBY LAKE DEVELOPMENT, LTD., MITER  
DEVELOPMENT COMPANY, TAYLOR LAKE, LTD.,  
and FRIENDSWOOD DEVELOPMENT COMPANY, LTD.,

*Petitioners,*

v.

CLEAR LAKE CITY WATER AUTHORITY,

*Respondent.*

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RESPONDENT'S BRIEF ON THE MERITS

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Taylor Lake, Ltd.

Friendswood Development Company, Ltd.

Plaintiffs/Appellees/Petitioners

Clear Lake City Water Authority

Defendant/Appellant/Respondent

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## **RECORD REFERENCES**

Three appeals, each with separately paginated appellate record, are consolidated for review by this Court. The Authority will cite each record by using this Court's case number as a prefix, followed by the abbreviation "CR" to indicate Clerk's Record or by RR to indicate Reporter's Record, followed by the page number. For example, (08-1003 CR 33) signifies page 33 of the Clerk's Record in Supreme Court Cause Number 08-1003.

**In the  
Supreme Court of Texas**

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**KIRBY LAKE DEVELOPMENT, LTD.,  
MITER DEVELOPMENT COMPANY, TAYLOR LAKE, LTD.  
AND FRIENDSWOOD DEVELOPMENT COMPANY, LTD.,**

*Petitioners,*

v.

**CLEAR LAKE CITY WATER AUTHORITY,**

*Respondent.*

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**RESPONDENT’S BRIEF ON THE MERITS**

---

TO THE HONORABLE SUPREME COURT OF TEXAS:

Respondent Clear Lake City Water Authority (the “Authority”) appears to file its brief on the merits, requesting this Court to deny or refuse the petition for review, or otherwise affirm the judgments of the Fourteenth Court of Appeals.

**I. STATEMENT OF THE CASE**

*Nature of the Case:* This petition for review arises out of a local government contract dispute. The Authority is a water control and improvement district operating under TEX. CONST. art. XVI, § 59 and TEX. WATER CODE ANN. Chaps. 49, 51. The petitioners are all real estate developers and will be referred to generically as “the Developers.”

The present dispute is a sequel to the first round of litigation between the Authority and three of the four Developers: Kirby

Lake Development, Ltd. (“Kirby”), Miter Development Co. (“Miter”), and Taylor Lake, Ltd. (“Taylor”). This first round of litigation is described and resolved in *Clear Lake City Water Auth. v. Kirby Lake Dev. Co.*, 123 S.W.3d 735 (Tex. App.—Houston [14th Dist.] 2003, pet. denied) (“*Kirby I*”).

As discussed in *Kirby I*, in the mid-1990s, the Authority conditionally agreed to purchase water, sewer, and drainage facilities installed by the Developers on their properties, subject to voter approval of bonds to fund the purchase price. In elections held in May and in October 1998, the electorate defeated bond propositions to fund the purchase of the facilities of these and other developers with similarly-worded contracts. The current dispute arises out of a bond election held in September 2004, in which the Authority submitted a bond proposition to fund capital improvements and maintenance, but refused to submit what would have been a third proposition asking the voters to approve the sale of bonds to finance the purchase of facilities constructed by these and other developers.

Based on the Authority’s refusal to submit a developer reimbursement proposition in September 2004, Kirby, Miter, and Taylor filed lawsuits for breach-of-contract (hereinafter, the “Kirby Contract Case”) (08-1003 CR 754-62) and for inverse condemnation (hereinafter, the “Kirby Takings Case”) (08-1005 CR 262-69). The fourth petitioner, Friendswood Development Company, Ltd. (“Friendswood”), filed its own breach-of-contract action (hereinafter, the “Friendswood Contract Case”) (09-0064 CR 2-11, 239-40). As a common denominator of all three suits, the Developers contend that their contracts required the Authority to place their reimbursement requests on the ballot of each and every future bond election, potentially forever, unless and until the electorate were to vote in favor of the bonds. (*Id.*). The Developers further contend that the Authority, by refusing to place a developer reimbursement measure on the September 2004 ballot, repudiated the contracts and must now pay the purchase price despite the voters’ disapproval of bond funding for that purpose in the two elections held in 1998. (*Id.*).

*Trial Courts:*

(1) *Kirby Contract Case* — 113<sup>th</sup> Judicial District Court of Harris County, Hon. Patricia Hancock presiding, Cause No. 2005-17524.

(2) *Kirby Takings Case* — Harris County Civil Court at Law No. 1, Hon. R. Jack Cagle presiding, Cause No. 866299.

(3) *Friendswood Contract Case* — 281st Judicial District Court of Harris County, Hon. David Bernal presiding, Cause No. 2006-63998.

*Trial Court Dispositions:* (1) *Kirby Contract Case* — On May 10, 2005, the Authority filed a motion for final summary judgment requesting dismissal with prejudice of the contract claims of Kirby, Miter, and Taylor (the “Kirby Developers”). (08-1003 CR 28-168). On June 24, 2005, the Kirby Developers moved for partial summary judgment, contending that the Authority, by refusing to include their reimbursement claims on the ballot of the September 2004 election, breached the contracts as a matter of law. (*Id.* at 174-84). On August 16, 2005, the 113<sup>th</sup> district court denied the Authority’s motion for summary judgment (*id.* at 171) and granted these Developers’ motion for partial summary judgment. (*Id.* at 311).

On August 7, 2006, Kirby, Miter, and Taylor moved for final summary judgment, asserting that the summary judgment evidence established causation, damages, and interest all as a matter of law. (08-1003 CR 764-949). On August 17, 2006, the Authority filed a second motion for summary judgment, contending that governmental immunity from suit barred the Kirby Developers’ claims. (*Id.* 952-64).

On September 6, 2006, the district court granted a final summary judgment for the Kirby Developers, awarding damages totaling \$1,307,956, plus interest and costs. (08-1003 CR 1173; 08-1003 5th Supp. CR 1-3). On November 27, 2006, the district court overruled the Authority’s motion for new trial and to amend the final judgment. (08-1003 2d Supp. CR 1).

(2) *Kirby Takings Case* — On July 16, 2006, the Authority filed an amended plea to the jurisdiction or, alternatively, a motion for summary judgment, each motion separately requesting dismissal with prejudice of the Kirby Developers’ takings claims on multiple grounds. (08-1005 CR 150). On August 4, 2006, the Authority supplemented its plea/motion by clarifying its grounds for dismissal. (*Id.* at 272). On August 24, 2006, the county court at law granted the Authority’s plea to the

jurisdiction and signed a final judgment dismissing the case with prejudice for want of subject matter jurisdiction. (*Id.* at 317). The court declined to rule on the Authority's alternative motion for summary judgment. (*Id.*). On October 3, 2006, the court signed an amended final judgment which clarified the grounds for its dismissal with prejudice. (*Id.* at 337-38).

(3) *Friendswood Contract Case*— On December 22, 2006, the Authority filed a plea to the jurisdiction, or, alternatively, motion for summary judgment requesting dismissal with prejudice of Friendswood's contract both on the ground of governmental immunity from suit and on the merits. (09-0064 CR 70-236, 665-85). On January 4, 2007, Friendswood filed a motion for final summary judgment on liability and damages, contending that the Authority, by refusing to include their reimbursement claims on the ballot of the September 2004 election, breached the contract as a matter of law and that, as a matter of law, the Authority was estopped from relying on the condition precedent of voter approval. (*Id.* at 323-83). On February 12, 2007, the district court denied the Authority's jurisdictional plea/motion for summary judgment (*id.* at 738) and granted Friendswood's motion for partial summary judgment. (*Id.* at 739-40). The final judgment awards damages totaling \$1,120,239.99, plus interest and costs, and orders the Authority to raise taxes to pay the judgment. (*Id.*). On March 13, 2007, the Authority moved for reconsideration of the summary judgment (*id.* at 783-801), which motion the district court overruled by operation of law.

*Parties in the  
Courts of Appeals:*

The Authority was the appellant in the Kirby Contract Case and Friendswood Contract Case. In the Kirby Takings Case, the Authority was the appellee.

In the Kirby Takings Case, the appellees were Kirby, Miter and Taylor. Kirby, Miter, and Taylor were the appellants in the Kirby Takings Case.

In the Friendswood Contract Case, Friendswood was the appellee.

*Court of Appeals:*

Fourteenth Court of Appeals decided all three appeals.

In the Kirby Contract Case, the panel consisted of Chief Justice Hedges, Justice Boyce; Senior Justice Hudson; Justice Hedges authored the opinion.

In the Kirby Takings Case, the panel consisted on Justices Fowler, Frost, and Seymore; Justice Frost authored the opinion.

In the Friendswood Contract Case, the panel consisted of Justices Anderson and Frost, and Senior Justice Hudson; Justice Frost authored the opinion.

*Appellate Dispositions:*

(1) *Kirby Contract Case* — On August 7, 2008, the Court of Appeals reversed the judgment for Kirby, Miter, and Taylor and rendered judgment for the Authority. *Clear Lake City Water Auth. v. Kirby Lake Dev., Ltd.*, 274 S.W.3d 41, 47 (Tex. App.—Houston [14th Dist.] 2008, pet. filed) (*Kirby II*). While the Court disagreed with the Authority’s contention that immunity barred this suit, the Court agreed with the Authority on the merits. The Court construed the agreements to require the Authority to place a developer reimbursement proposition on the ballot of only a single bond election, which obligation the Authority had satisfied when it submitted the first developer reimbursement proposition to the voters in its May 1998 bond election. *Id.*, at 45-47.

(2) *Kirby Takings Case* — On August 5, 2008, the Court of Appeals affirmed the trial court’s order granting the Authority’s plea to the jurisdiction. *Kirby Lake Dev. Co. v. Clear Lake City Water Auth.*, No. 14-06-00924-CV, 2008 WL 3016308, 2008 Tex. App. LEXIS 5887 (Tex. App.—Houston 14th Dist.] 2008, pet. filed) (mem. op.) (*Kirby III*). Affirming on only one of the numerous grounds asserted by the Authority in its plea to the jurisdiction and preserved in its appellee’s brief, the Court of Appeals wrote: “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.” Slip Op., at 7.

(3) *Friendswood Contract Case* — On December 9, 2008, the Court of Appeals reversed the judgment for Friendswood and rendered judgment for the Authority. *Clear Lake City Water Auth. v. Friendswood Dev. Co.*, No. 14-07-404-CV, at slip op. 2 (Tex. App.—Houston [14<sup>th</sup> Dist.] 2008, pet. filed) (mem. op.) (following *Friendswood II*).

## II. STATEMENT OF THE ISSUES

### ISSUE # 1

The Court of Appeals correctly held that the contracts did not obligate the Authority to submit a developer reimbursement proposition to the voters in more than one bond election. Thus, the Court of Appeals correctly rendered judgment for the Authority on the Developers' claim that the Authority breached the contracts by refusing to submit such a proposal to the voters in the September 2004 bond election.

### ISSUE # 2

The judgment in the contract cases can be affirmed on two other merits grounds briefed by the Authority but not considered by the Court of Appeals. TEX. R. APP. P. 55.3(c)(2). To construe the contracts as requiring the Authority to include a developer payment proposition in every future bond election would run afoul of the principles stated in *Clear Lake City Water Authority v. Clear Lake Utilities*, 549 S.W.2d 385 (Tex. 1977), namely, that: (a) contracts which contemplate continuing performance (or successive performances) and which are indefinite in duration can be terminated at the will of either party; and (b) the Authority cannot bind itself in such a way as to restrict indefinitely its legislative discretion to set the ballot of its bond elections.

### ISSUE # 3

As a matter of law, the Developers' breach-of-contract claims fit no recognized waiver of the Authority's governmental immunity from suit.

### ISSUE # 4

The Court of Appeals correctly affirmed the order granting the Authority's plea to the jurisdiction in the Kirby Takings Case, because the Authority acquired and is using the Kirby Developers' facilities with their consent.

## ISSUE # 5

The dismissal with prejudice in the Takings Case can be affirmed on the merits as a summary judgment for the Authority on the grounds that (1) the Authority is not using the developers' property with the requisite intent for a taking, and (2) by virtue of the parties' express lease agreement, the Kirby Developers have consented to the Authority's use of the facilities. TEX. R. APP. P. 55.3(c)(2).

### III. **CONDITIONAL REMAND POINTS NOT CONSIDERED BY THE COURT OF APPEALS.**

The Court of Appeals did not reach all of the issues briefed by the Authority. *See Kirby II*, 274 S.W.3d at 46-47; *Friendswood II*, Slip Op. at 2 n.3. In the event that this Court were to reverse any of the judgments on review, the Authority, pursuant to TEX. R. APP. P. 53.4, requests that the following issues not considered by the Court of Appeals be remanded for decision in the first instance by that court:

#### **CONDITIONAL REMAND POINT # 1**

In the Kirby and Friendswood Contract Cases, the district courts erred in granting summary judgment for the Developers, because the Developers failed to prove conclusively the causation element of their contract causes action. That is, the Developers failed to prove that one of the express conditions precedent to payment in the contract — i.e., voter approval of bonds to finance the purchase of their facilities — would have occurred but for the Authority's refusal to submit a developer reimbursement proposition to the voters in September 2004.

#### **CONDITIONAL REMAND POINT # 2**

Even if, *arguendo*, it is the Authority's burden to *disprove* that the condition precedent would have occurred — that is, to show that the voters would have *rejected* a developer reimbursement bond proposition in the September 2004 bond election had such a proposition been submitted then — the evidence submitted in the Kirby and Friendswood Contract Cases raises a material fact issue on that affirmative defense. In this connection, the district court in the Friendswood Contract Case erred in striking the Schweinle affidavit, the directors' affidavits, and the 2006 election results, all being relevant to this defense.

### **CONDITIONAL REMAND POINT # 3**

Friendswood failed to prove conclusively the satisfaction of other conditions precedent in the contract and implied by law — namely, (i) that Friendswood owns the facilities, (ii) that it stands ready to convey unencumbered title ownership to the facilities and assign all warranties and guarantees relating to such facilities, and (iii) that it has tendered title documents to the facilities to the Authority’s attorney, who rejected the same in bad faith. In this connection, the district court erred in striking the Schweinle affidavit, which raised a fact issue on Friendswood’s failure to satisfy these conditions precedent.

### **CONDITIONAL REMAND POINT # 4**

In the Kirby Contract Case, the district court erred in denying the Authority’s motion for reconsideration of the summary judgment.

### **CONDITIONAL REMAND POINT # 5**

In the Contract Cases, the district courts erred in awarding contractual interest because the Developers failed to prove conclusively the applicable interest rate.

### **CONDITIONAL REMAND POINT # 6**

In the Contract Cases, the district courts erred in setting the pre- and post-judgment interest rates.

### **CONDITIONAL REMAND POINT # 7**

In the Kirby Contract Case, the district court erred in issuing a writ of execution.

### **CONDITIONAL REMAND POINT # 8**

In the Friendswood Contract Case, the mandatory injunction commanding the Authority to raise taxes to pay the judgment is not supported by the pleadings, the evidence, or by any stated ground in the motion for summary judgment.

#### IV. STATEMENT OF FACTS.

##### A. The Developer Contracts.

1. Public Funding of Utility Lines: General Overview. Water control and improvement districts such as the Authority are “political subdivisions of the State,”<sup>1</sup> authorized to purchase and operate waterworks and sewer systems.<sup>2</sup> As an exercise of legislative discretion, a water district may require developers to bear the entire cost of installing water, sewer, and drainage facilities on their properties, without any expectation of reimbursement, as a condition precedent to the district’s commitment to furnish water and sewer capacity to the development. *See, e.g., City of College Station v. Turtle Rock Corp.*, 680 S.W.2d 802, 806 (Tex. 1984) (“Texas courts have expressly recognized that municipalities can require the ‘donation’ of streets, alleys, water mains, and sewer mains as a condition to subdivision development.”); *Crownhill Homes, Inc. v. City of San Antonio*, 433 S.W.2d 448, 460 (Tex. Civ. App.—San Antonio 1968, writ ref’d n.r.e.); *Johnson v. Benbrook Water & Sewer Auth.*, 410 S.W.2d 644, 647 (Tex. Civ. App.—Fort Worth 1966, writ ref’d n.r.e.), *cert. denied*, 393 U.S. 836 (1968); TEX. WATER CODE ANN. § 49.218(d) (allowing water districts to condition the provision of services on the applicant dedicating easements to enable the district to provide services). This is the general rule in other states as well.<sup>3</sup>

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<sup>1</sup> *Willacy County Water Control & Improvement District No. 1 v. Abendroth*, 142 Tex. 320, 177 S.W.2d 936, 937 (1944).

<sup>2</sup> *See* TEX. WATER CODE ANN. § 51.402.

<sup>3</sup> *See also Town of Wheatland v. Allison*, 577 P.2d 1006, 1009 (Wyo. 1978) (“It is not unusual for cities and towns to impose on developers of new additions the entire cost of on-site water systems — including facilities for domestic, commercial and fire-protection use.”); *City of Sierra Vista v. Cochise*

In *Crownhill Homes* – an opinion which informed the rule and reasoning of this Court’s *Turtle Rock* decision – the San Antonio Court of Civil Appeals explained the rationale for judicial deference to local legislative discretion to decide who will pay for the water, sewer, and drainage lines connecting the private subdivisions to the public utility system:

The policy of determining who will pay the cost of water extensions in subdivisions is closely related to the rate making policy of the city. Appellant would in effect have our courts require the municipality either to raise the water rates, or issue revenue bonds as an alternative to the present regulations. If appellant is correct, the right to determine water rates would then be divested out of the governing body of the City and ultimately determined instead by the developers’ judgment, or the City’s judgment as to how many water customers can be generated by the sale of houses and what rates would have to be charged to pay for the new subdivision’s on-site extensions. But it is not a municipal function to speculate in concert with developers in the subdivision business. The Legislature expressly excluded extensions in establishing the factors for rate charges necessary to retire revenue bonds. If we agreed with appellant, and if extensions were now included as a factor in rate making, the court’s mandate would in effect be a substitution of its judgment for the judgment of the Legislature and local governing body. This would be an incorrect court function.

*Crownhill Homes*, 443 S.W.2d at 460.

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*Enterprises, Inc.*, 144 Ariz. 375, 381, 697 P.2d 1125, 1130 n.1 (Ariz. App.1985) (“The municipality also has the power to impose conditions on subdivision development, including the dedication of streets, alleys, drains, water mains, sewer mains and the like.”); *Blevens v. Manchester*, 103 N.H. 284, 286, 170 A.2d 121, 122 (1961) (“Since the subdivider of land creates the need for local improvements which are of special benefit to the subdivision, it is considered reasonable that he should bear the cost rather than the municipality and the general taxpayer.”); *Mid-Continent Builders, Inc. v. Midwest City*, 539 P.2d 1377, 1379 (Okla. 1975) (“It also is to be remembered, in regard to Appellants’ contention that the city ‘took’ their property by forcing them to dedicate the water mains to city use as a condition of approving their plat, that no one required Appellants to subdivide this property and devote it to the public enterprise of city building. They could have kept it unplatted and have devoted it to any use that did not require the filing of a plat and an invitation to people to come in, to buy tracts and to build homes. However, when they did embark upon these developmental activities, necessarily they must comply with the existing ordinances.”).

In *Crownhill Homes*, the Court also explained why it is proper for a local government to require developers to donate these facilities as a condition for receiving services:

Appellant complains of the constitutionality of the regulations which require the developer to donate the on-site water mains to the city, and the refusal of the Water Works Board to reimburse the developer for this expenditure. The authorities hold that the municipality has the right to impose conditions on subdivision development, including the “donation” of streets, alleys, drains, water mains, sewer mains and the like. See *Lombardo v. City of Dallas*, 124 Tex. 1, 73 S.W.2d 475 (1934) and the many cases cited in Shepard Texas Citations following this authority. The overwhelming weight of authority is that such donation is not a taking of appellant’s property for public use without reimbursement. The exercise of governmental discretion to impose reasonable regulations as a condition for the use of property, or as a condition precedent to the subdivision of land, does not amount to a taking of private property for public use without just compensation.

...

The water mains in question are constructed for the benefit ultimately of the potential lot owner, not the subdivider who bought the raw land and transformed it into a residential lot. It has been held that there is an implied dedication of such water main to the lot owners, the water consumer, and the public generally for this purpose. By virtue of such implied dedication the municipality may use the mains to supply water to the lot owners and to connect with its fire protection facilities without compensation to the subdivider. *City of Danville v. Forest Hills Development Corporation*, 165 Va. 425, 182 S.E. 548 (1935); *Hightower v. City of Tyler*, 134 S.W.2d 404 (Tex. Civ. App.—El Paso 1939); *City of Houston v. Lakewood Estates, Inc.*, 381 S.W.2d 697 (Tex. Civ. App.—Houston 1964). The United States Court of Appeals in upholding a trial court’s refusal of a recovery by the developer stated:

“The water systems were installed for the purpose of making the lots within the subdivision salable and usable for residential purposes. Their intended purpose from the outset was to serve the purchasers of lots, the consumers of water, and the public. . . the action of the city and county in taking charge and control of such systems for use in furthering the public purpose to which they were dedicated did not constitute the wrongful taking or

appropriation of property of plaintiffs which rendered the city and county liable in damages for conversion. . .”

*Trentman v. City and County of Denver, Colorado*, 129 F. Supp. 624 (D. Colo. 1956); *aff'd*, 236 F.2d 951 (10th Cir. 1956).

*Crownhill Homes*, 443 S.W.2d at 460-61.

Accordingly, since it is proper for a local government to require a developer to donate water, sewer, and drainage facilities without *any* reimbursement, it is likewise proper for a local government to offer some level of reimbursement on terms and conditions that the local legislative body finds to be in the public’s best interest. In Texas, state regulations permit water districts to contribute a maximum of 70 percent of a developer’s construction costs. *See* 30 TEX. ADMIN. CODE § 293.47. Such was the arrangement here. In addition, a district can condition reimbursement on voter approval of public funding. As one court has noted, this type of prefunding contract does not guarantee eventual payment, but puts the developer at risk of receiving no reimbursement if the bonds are not approved by the voters:

A “prefunding agreement” allows a developer to proceed with preparations for and construction of various facilities — such as those for water, sanitary sewage, drainage, retention, and recreation — while waiting for a condemning entity to issue and to get approval on bonds to acquire the facilities and to reimburse the developer for related costs and expenses. **The developer builds in advance at its own risk: if the condemning entity cannot issue bonds or get approval, if the developer constructs the project contrary to regulation or agreement, or under like circumstances, the developer generally will not be reimbursed.** The rules of the Texas Commission on Environmental Quality (“TCEQ”) (formerly known as the Texas Natural Resource and Conservation Commission), which rules govern the pond and ditch projects and the condemnation proceedings here, expressly allow for prefunding agreements for the financing and construction of water, wastewater, drainage, and recreational facilities under certain conditions. *See* 30 TEX. ADMIN. CODE §§ 293.46, 293.47, 293.50 (2002) (Tex. Comm’n on Env’tl. Quality). The

summary judgment evidence showed that it is common and accepted practice for developers to prefund projects such as the building of water, sewage, drainage, and recreational facilities until the water district can reimburse the developers through bond funds.

*Malcomson Rd. Util. Dist. v. Newsom*, 171 S.W.3d 257, 273 n.11 (Tex. App.—Houston [1st Dist.] 2005, pet. denied) (emphasis added).

2. Authority Policies. In their brief, the Developers allege that the contracts at issue were entered pursuant to a “longstanding” “written official policy” to reimburse developers. *See* Brief, at p. 3. The only record reference for this assertion, however, is a citation to unsworn pleadings filed in the Friendswood Contract Case. Unsworn pleadings are not competent summary judgment evidence. The summary judgment evidence establishes the contrary – that during the decade between 1989 and 1998, the Authority had no policy of reimbursing all developers. Some were reimbursed; others were not. Schweinle Aff. (09-0064 CR 441). But in all of the cases in which the Authority paid any portion of the cost of developer-constructed infrastructure, the source of the funding has been proceeds from the sale of voter-approved general revenue and tax bonds. (*Id.*)<sup>4</sup>

3. Essential Terms. In the present case, the Developers owned real property which they intended to develop, or had already developed, into single-family residential lots. To convert their raw land into saleable lots, the Developers also desired water, sewer and drainage services from the Authority, and thus, they approached the Authority for a utility

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<sup>4</sup> The district court in the Friendswood Contract Case excluded the Schweinle Affidavit as immaterial. (09-2009 CR 736). This was error. In construing a contract, a court may examine the parties’ negotiations and all other relevant incidents bearing on their intent. *Sun Oil Co. (Delaware) v. Madeley*, 626 S.W.2d 726, 734 (Tex.1982).

commitment.<sup>5</sup> They also sought public financial participation, subject to voter approval, to offset an agreed-upon portion of the costs they would incur to install water, sewer, and drainage facilities necessary to connect their lots to the Authority’s water plant, sewage treatment plant, and drainage system — a form of participation which the taxpaying public is free to approve or disapprove.

The contracts at issue were entered in early and mid 1990s – the first Taylor contract was signed in 1994, the Kirby contract in 1997, the Miter, Friendswood and second Taylor contracts in 1998.<sup>6</sup> Each contract commits the Authority to provide water and wastewater utility capacity to the Developer’s property.<sup>7</sup> The agreements do not require the Developers to develop their property or to construct any facilities.<sup>8</sup> The agreements contain no timetable for development. No written term obligates the Developers to build anything for the Authority. The contracts are unilateral in the sense that they impose duties on the Developers only if the Developers follow through with their development plans. As required by state regulation, the contracts require the Developers to ensure that any facilities and roads constructed in the subdivision comply with TNRCC quality standards.<sup>9</sup>

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<sup>5</sup> See Agrs., Art. II; Schewinle Aff., at ¶ 5 (2009-0064 CR 442).

<sup>6</sup> See Agreements, execution page.

<sup>7</sup> See Agrs. Art. II.

<sup>8</sup> Indeed, by law the sale-lease agreement could not be a valid construction contract because it neither describes with specificity the project to be constructed, nor is there any evidence that it was publicly bid. TEX. WATER CODE ANN. §§ 49.271-.273.

<sup>9</sup> See Agrs. at § 1.01 (“The Developer shall cause the facilities to be constructed pursuant to the Contracts in accordance with the Rules of the Commission. The Developer shall provide for inspection by the Authority’s engineers of work performed under the Contracts.”); *see also* 30 TEX. ADMIN. CODE

In section 3.01 of each of the agreements, the Authority agreed to acquire the facilities, and reimburse the Developers for certain of their construction costs, subject to voter approval of bonds to fund the reimbursements in “a bond election” that the Authority then intended to call “in the near future”:

The Authority intends to call **a bond election in the near future**, but it 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. The Authority further agrees that it shall include purchase of the Facilities in any bond issue sold subsequent to such election.<sup>10</sup>

In section 3.03, the parties further agreed that “[t]he Authority shall have **no obligation to obtain approval from the voters** of bonds to finance the purchase of the Facilities. . . .”<sup>11</sup>

The contracts contain no recitals which anticipate a potentially infinite number of future bond elections in the event the voters rejected the bond proposition in the single

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§ 293.46(1) (“Prior to entering into construction contracts for such facilities, the developer and district shall execute an agreement setting out the terms of reimbursement, providing for the use of the facilities by the district until reimbursement and providing that the construction contract will be awarded and administered in accordance with commission regulations and applicable statutes relating to districts.”); *id.* at § 293.46(2) (requiring TCEQ approval of construction contracts awarded by developer).

<sup>10</sup> See Kirby Agr., at ¶ 3.01 (emphasis added); Miter Agr., at ¶ 3.01 (emphasis added); 1998 Taylor Lake Agr., at ¶ 3.01; Friendswood Agr., at ¶ 3.01 (emphasis added). The 1994 Taylor agreement varies from this formulation only slightly: Where the other contracts provide that “The Authority intends to call a bond election in the near future . . .,” the 1994 Taylor agreement provides that “The Authority intends to call a bond election in March or May of 1994 . . .” 1994 Taylor Agr., at ¶ 3.01.

<sup>11</sup> See Agrs., at ¶ 3.03 (emphasis added).

election expressly contemplated in the contract. The contracts provide no process to administer multiple future elections for an indefinite time into the future.

The Authority took possession of the facilities under an express lease agreement in each contract that remains currently in effect.<sup>12</sup> The Developers still hold legal title to the facilities.<sup>13</sup> The lease agreement is supported by express consideration – the Authority alone must “operate” (or furnish utilities to the end users), maintain and insure the facilities.<sup>14</sup> No bonds have been approved by the voters to fund the Authority’s acquisition of the facilities.

### **B. The 1998 Bond Elections.**

In two bond elections held in 1998, the voters of the Authority overwhelmingly rejected propositions to reimburse these plaintiffs as well as several other developers who had entered similar prefunding agreements with the Authority.

1. The May 1998 Bond Election. On May 2, 1998, the Authority held a bond election in which the voters would decide whether to approve the sale of ad valorem tax bonds to finance the facilities constructed (or to be constructed) in 14 developer-owned projects, including the projects in issue in this case.<sup>15</sup> In the same bond proposition, the

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<sup>12</sup> See Agrs., at ¶ 4.01 (“The Developer (in this Article, sometimes called ‘Lessor’) shall lease and hereby does lease all inaccurate, complete, and operable portions of the Facilities to the Authority (in this Article, sometimes called ‘Lessor’) without charge until such time as the Authority acquires such portions; provided that the lease shall terminate upon the acquisition by the Authority of all the Facilities. **In consideration therefore, the Authority shall alone operate and maintain the Leased facilities or cause the same to be operated and maintained.**”) (emphasis added).

<sup>13</sup> See Stipulation of July 21, 2006, at ¶ 11 (08-1003 CR 962).

<sup>14</sup> See fn. 12 *supra*. See also Agrs., at ¶ 4.02 (maintenance obligation); ¶ 4.05 (insurance obligation).

<sup>15</sup> See Order Calling May 2, 1998 Bond Election (08-1003 CR 997-98; 09-0064 CR 449-67).

voters were also asked to approve the sale of bonds to finance the expansion and maintenance of the Authority's existing plant.<sup>16</sup> Because these two items were tied together in a single bond proposition, the voters had no choice but to vote them all up, or all down. The May 1998 bond proposition requested total bond authorization of \$37.6 million, approximately \$5.6 million of which would be for developer reimbursement items, and \$26.8 million for Authority infrastructure and maintenance items, plus another \$5.1 million for transactional costs.<sup>17</sup>

The May 1998 bond proposal encountered stiff voter opposition.<sup>18</sup> Two candidates who were challenging incumbents for positions on the board ran on a platform of "Vote No" to any new taxes. During the campaign, one of the Authority's five directors, Gayle Yoder, circulated a memorandum to residents in her neighborhood stating that she opposed the combined format of the proposition. By combining the Authority "necessities" and developer "subsidies" in the same proposition, she complained, the voters had been deprived of a choice to approve bonds to pay for one and reject bonds for the other.<sup>19</sup>

The bond proposition failed by a margin of 1366 votes for to 1751 votes against.<sup>20</sup> In addition, the voters rejected the reelection bids of the two incumbent directors who had

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<sup>16</sup> *Id.*

<sup>17</sup> *Id.*

<sup>18</sup> See Yoder Affidavit and attached letters to the editor and editorials (08-1003 CR 1064-85; 09-518, 521-39).

<sup>19</sup> (08-2003 CR 66-68, 1064-65); see also *Kirby Lake I*, 123 S.W.3d at 740-41.

<sup>20</sup> See Order Canvassing Results of May 2, 1998 Bond Election (08-1003 CR 1020-26, at 1024; 09-0064 CR 474-80).

supported the combined ballot format, and elected two newcomers to the Board who had campaigned on the platform of stopping the practice of subsidizing developers.<sup>21</sup>

2. The October 1998 Bond Election. On October 3, 1998, the Authority held a second bond election to resubmit the same bond proposals to the voters that they had rejected in May. This time, however, the Authority split the proposals into two separate propositions and ballot items: one to fund the expansion and maintenance of the Authority's plant (Proposition I) and the other to fund the developer reimbursements (Proposition II). Proposition I sought bond authorization of approximately \$24.4 million, and the Proposition II developer reimbursement items totaled \$6.87 million.<sup>22</sup>

In this second election, the electorate was even more emphatic in its rejection of the proposal to reimburse the developers with public funds. Proposition II failed by a nearly 2-to-1 margin, 562 votes for to 1093 votes against, while Proposition I passed by a 2-to-1 margin, 1109 votes for to 561 votes against.<sup>23</sup>

### **C. The *Kirby I* Litigation.**

In late 1998, three of the Developers – Kirby, Miter, and Taylor (the Kirby Developers) – sued the Authority in the 113<sup>th</sup> District Court, alleging that the agreements

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<sup>21</sup> See *Yoder Aff.*, at ¶¶ 3-4 (08-1003 CR 1064-65; 09-0064 CR 518-19).

<sup>22</sup> See Order Approving Engineering Report and Calling Oct. 3, 1998 Bond Election (08-1003 CR 1027-37; 09-0064 CR 481-92).

<sup>23</sup> See Order Canvassing Oct. 3, 1998 Bond Election (08-1003 CR 1045-49; 09-0064 493-98). A comparison of the election tallies on these two propositions demonstrates that while the electorate strongly favored paying taxes for major infrastructure improvements and systemic maintenance by the Authority itself, those same voters, by an equally large margin, opposed authorizing the expenditure of public funds to support the projects of private developers such as the plaintiffs.

obligated the Authority to purchase their facilities “as soon as possible” without limitation on the source of funding. Friendswood did not file suit at this time. The Kirby Developers argued that the Authority had breached the agreements (1) by refusing to pay on demand with any available funds on hand, (2) by encouraging the voters to reject the developer reimbursement bonds, and (3) by submitting the developer reimbursement proposition separately from the Authority’s ‘necessity’ item proposition in the October 1998 bond election.<sup>24</sup> The trial court entered judgment for the developers on all of these contract theories (as well as on the alternative theory of *quantum meruit*). On appeal, the Fourteenth Court reversed and rendered for the Authority on these contract and equitable claims. Among the Court’s holdings, which the Kirby Developers are collaterally estopped to deny, were the following:

1. The contracts “unambiguously require the Authority to reimburse appellees only with voter-approved bond funds that are legally available and allocated for that purpose.” *Kirby I*, 123 S.W.3d at 744.
2. The contracts impose “no obligation on the Authority to obtain voter approval.” *Id.*, at 746.
3. There is “no language in the contracts to support the contention that separating the propositions was a breach of contract.” *Id.* “The contracts contain no requirement that the ballot language be structured in any particular way; all that was required was that the developers be included in any subsequent election, and they were.” *Id.*

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<sup>24</sup> See *Kirby I*, 123 S.W.3d at 752; Plaintiffs’ Petition in *Kirby I* (CR 63-75).

4. “[T]he actions of Yoder and the other Authority board members in connection with the bond elections . . . do not constitute a breach of the contracts as a matter of law.” *Id.*, at 748.

However, one of the central issues raised by the present case was left unresolved by the Court of Appeals:

The Authority also argues, as additional support for its contention that it did not breach the contracts by refusing to combine the bond elections, that the October 1998 election was outside of the scope of the Kirby Lake, Miter, and Taylor Lake contracts because it was only required to include a proposition for developer reimbursements in one election. **We express no opinion on the Authority’s interpretation of the provision**, as appellees make no argument in response and neither party raises this interpretation of the provision as an issue.

*Id.*, at 747 n.7 (emphasis added).

#### **D. The September 2004 Bond Election.**

On September 11, 2004, the Authority held a bond election in which the voters were asked to authorize the issuance of ad valorem tax bonds in the amount of \$29.1 million to finance the expansion and maintenance of the Authority’s existing plant and to construct a major trunk line under Space City Boulevard.<sup>25</sup> The Authority, however, refused at that time to submit what would have been a third proposition asking for the voters to approve the sale of bonds to finance the facilities constructed by the Developers.<sup>26</sup> In the September 2004 bond election, the voters approved the bonds in a light turnout, by a 416-to-40 margin.<sup>27</sup>

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<sup>25</sup> See Order Calling Sept. 11, 2004 Bond Election (08-1003 CR 1050-57; 09-0064 505-12).

<sup>26</sup> See Correspondence exchanged between Kirby developers’ counsel (K. Jewell) and Authority’s counsel (W. Schweinle) (08-1003 CR 98-101); see also correspondence between Friendswood (Stunja) and Gayle Yoder (Board president) (09-0064 CR 357-60).

<sup>27</sup> See Order Canvassing Sept. 11, 2004 Bond Election (08-1003 CR 1058-61; 09-0064 513-17).

Contrary to the Developers' unsupported assertion in their brief, 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. No evidence exists to show that the Authority has refused to acquire the facilities and reimburse with voter-approved bond funds. Although that condition precedent still has not occurred, nothing prevents the Authority from submitting the issue to the voters yet again. However, the Authority is no longer contractually obligated to do so.

**E. Voter Preference Studies.**

In May 2006, public opinion surveys of registered voters within the Water Authority were conducted under the auspices of Professor Robert Stein, a Rice University political scientist.<sup>28</sup> Five hundred potential voters were asked how they would ballot on the following proposition:

In order to finance the Authority's share of water, sewer, and drainage facilities under contracts with developers the Clear Lake City Water Authority would have to issue approximately \$7 million in bonds. Would you be likely to vote against the bond issue, for it, or would you probably not vote?<sup>29</sup>

The "approximately \$7 million" corresponds with the \$6.87 million in bond authorization requested for developer reimbursements during the October 1998 bond election; by September 2004 none of those developers had released their potential claims.<sup>30</sup>

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<sup>28</sup> See Stein Aff. (09-0064 CR 540-41, 551-70).

<sup>29</sup> *Id.* at Ex. B, p.4, 12 (08-1003 CR 1113, 1121; 09-0064 CR 554, 562).

<sup>30</sup> See Schweinle Aff., at ¶ 7 (09-0064 CR 444).

In the survey, potential voters were also asked the strength of their preference for the reimbursement proposal and their reason for supporting or opposing it. Thirty-nine percent said they would vote against the proposition; 13% said they would vote for it; 39% were unsure how they would ballot; and 8% said they would not vote.<sup>31</sup> Supporters of the proposition felt it “helps the community’s need for quality water systems” and “it is the right thing to do.” Opponents believed “developers should bear the cost of building the water system,” the reimbursements would mean “higher taxes,” and “expense and cost to the District.”<sup>32</sup> Professor Stein discovered that the opponents are more committed to their position than supporters are to theirs.<sup>33</sup> He concluded as follows:

The historical record since 1998 and current public opinion unambiguously indicate that voters in the Clear Lake City Water Authority have in the past and continue to be strongly opposed to reimbursing developers. Our findings further suggest that had the voters been asked to ballot on developer reimbursement in 2004 they would have defeated this proposition. Furthermore, there is strong evidence to suggest that voter sentiment continues to be against reimbursement. By a wide (3:1) margin voters in the Water Authority would oppose a future proposition to issue bonds to reimburse developers. Moreover, there is scant evidence to suggest that public sentiment against developer reimbursement is likely to change. The strength of voter sentiment against reimbursement is significantly greater than the strength of voter support for reimbursement.

Given the weight of evidence reported above we conclude that voters in the Clear Lake City Water Authority would not have passed a bond initiative to reimburse developers in 2004 and would not do so in 2006.<sup>34</sup>

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<sup>31</sup> See Stein Aff., at Ex. B, pp. 4, 12 (08-1003 CR 1113, 1121; 09-0064 CR 554, 562).

<sup>32</sup> *Id.* at Ex. B, pp. 4, 13 (08-1003 1113, 1122; 09-0063 CR 554, 563).

<sup>33</sup> *Id.* at Ex. B, pp. 4, 14 (08-1003 CR 1113, 1123; CR 554, 564).

<sup>34</sup> See Stein Aff., Ex. B, at p. 9 (08-1003 CR 1118; 09-0064 CR 559).

## **F. The November 2006 Bond Election.**

On August 24, 2006, the Authority's Board called a bond election to allow the voters to decide for a third time whether to approve the tax-subsidized reimbursements sought by these Developers, in addition to reimbursements that might later be alleged to be owed to other developers that had entered similar contracts with the Authority. The election was held on November 7, 2006.<sup>35</sup> Consistent with Professor Stein's findings, the voters turned out in large numbers to reject the bond proposition by a greater than 5-to-1 margin: 264 votes for, 1,697 against.<sup>36</sup>

An election result is conclusively presumed to be valid if there is no timely election contest to challenge it.<sup>37</sup> The Developers have asserted no election contest or any other arguable cause of action to challenge the validity of the November 2006 bond election. Nevertheless, in their brief they decry the election as a "sham," speculating that the 1,697 citizens who went to the polls and voted to reject the use of taxes to subsidize developers

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<sup>35</sup> See Item # 4 of Minutes of 8/24/2006 Board Meeting (attached to Byrd Aff.) (08-1003 1228-32; 09-0064 CR 579-81).

<sup>36</sup> See Order Canvassing Returns of Nov. 17, 2006 Bond Election. (08-1003 CR 1254-60; 09-0065 CR 583-89). The actual turnout was even greater than the official returns show, given that 320 votes could not be counted due to a voting machine malfunction. (*Id.*).

<sup>37</sup> An election contest includes any type of suit in which the validity of an election or any part of the elective process is made the subject matter of the litigation. See *Rossano v. Townsend*, 9 S.W.3d 357, 361 (Tex. App.--Houston [14th Dist.] 1999, no pet.). In an election contest, a district court's authority to act is limited to the subjects or grounds expressly or impliedly authorized by the Election Code. *Id.* (citing TEX. ELEC. CODE ANN. § 221.003). The tribunal shall attempt to ascertain whether the outcome of the contested election, as shown by the final canvass, is not the true outcome because, *inter alia*, an election officer or other person officially involved in the administration of the election engaged in fraud. *Id.*

might have approved the bonds if not for an allegedly biased newsletter sent by the Authority to the citizens.

The newsletter speaks for itself. It accurately describes the bond proposition and the purpose of the election. The Board stated therein: “the Board finds it appropriate to submit the issue to the voters for a third time, so that the will of the people, which is an express condition precedent of the contracts, can be heard. **If the voters approve the bonds, it will be the Board’s directive to purchase the facilities.**” (09-0064 CR 300) (emphasis added). There is nothing fraudulent about this. Nor is there any competent evidence to invalidate any of the 1,697 “No” votes.

**G. The Authority Is Not Using the Facilities “Free of Charge.”**

According to the Developers, the Authority is using their lines “free of charge.” *See* Brief, at p. 11. No record references are offered to support this assertion. To the contrary, as noted above, the Authority is obligated under the lease agreement to maintain and insure the facilities, and no allegation has been made that the Authority has breached or repudiated that lease obligation.

**V. SUMMARY OF ARGUMENT.**

It has long been settled Texas law that a local government can require private developers to construct wholly at their own expense water, sewer, and drainage facilities for public use as a condition precedent to their receiving water, sewer, and other public utility services. Nevertheless, some public entities, including the Authority, have from time to time *conditionally* agreed by contract to reimburse private developers for certain of their costs for

such facilities. Apart from any such voluntary contractual commitment, the Authority has no obligation to spend public funds to reimburse any private developer for the cost of utility facilities.

The Court of Appeals correctly held that the Authority did not breach the contracts, and thus, the Court correctly reversed the summary judgment for the Developers and rendered judgment for the Authority on the Developers' contract claims. The Authority's obligation to submit a developer reimbursement proposition to the voters in "any bond election" referred to the one and only bond election that the parties acknowledged was likely to be called "in the near future." The Developers thus assumed the risk, low as it may have seemed at the time, that if the electorate disapproved the bonds, the public would not be contractually obligated to absorb any portion of the Developers' costs. It is for this reason that the parties had expressly provided for this contingency by agreeing to a leasehold of the facilities of indefinite duration. They did not contemplate, or agree to provide for, an infinite number of future elections in the event the electorate instead decided that the time had come to stop subsidizing private developments with public funds.

The judgment in the contract cases can also be affirmed on three other preserved grounds not reached by the Court of Appeals. *See* TEX. R. APP. P. 55.3(c)(2). First, were the contracts construed to require the Authority to include developer reimbursement measures on the ballot of all bond elections, potentially into eternity, such a contract term would be terminable at will; and the Authority terminated these contracts in 2004, when it refused to place a developer reimbursement measure on the ballot. Second, were the contracts

construed to forever deprive the local government of its legislative discretion to set the ballot for its future bond elections, the contract would be void as a matter of law under the reserved powers doctrine. Third, since the gravamen of the present suit is one to compel the Authority to purchase real estate from the Developers, the Authority is immune from the Developers' contract claims.

In the Kirby Takings Case, the Court below correctly held that the Authority has not taken any property interest from the Kirby Developers that they themselves did not convey to the Authority consensually. Alternatively, the Court should affirm the trial court's judgment as a summary judgment on the ground that the Authority is not using the facilities with the requisite intent to trigger a violation of the takings clause; and, in any event, as a matter of law, the Kirby Developers have consented to the Authority's use of the facilities pursuant to the parties' express lease agreement. *See* TEX. R. APP. P. 55.3(c)(2).

In their brief, the Kirby Developers have sidestepped the only ground on which the Court of Appeals has affirmed the dismissal of their takings claim – the defense of consent. They instead have erected a strawman to knock down. Basically, their arguments boil down to the following two points:

First, they contend that the existence of a contract between the parties does not, by itself, preclude a claim for inverse condemnation. The Authority does not contend otherwise. What the Authority does contend, however, is that where, as here, the *only* claim asserted is one for payment of money allegedly owed under a contract by which the owner voluntarily transferred possession to the State of the property for which payment is sought, such claim

lies only in contract, not in inverse condemnation. This is because the State has assumed possession of the property in its capacity as a contracting party and not as the sovereign exercising its sovereign power to condemn.

Second, the Kirby Developers further contend, inconsistently with their first argument, that their claims for breach of contract in the parallel contract suit, and those asserted in this suit for inverse condemnation, are alternative theories; and thus, they wrongly conclude, if they lose on one theory, they necessarily win on the other. Nothing about this argument is valid. Since the Developers' inverse condemnation claims are predicated upon their underlying claims of a breach of contract by the Authority *and upon nothing else*, the inverse condemnation claim necessarily fails. Further, as the Court of Appeals correctly held, even if the developers' contract claims were valid – which *Kirby II* correctly decided they are not – the inverse condemnation claim fails because the Authority assumed possession of the facilities and is using them in its capacity as a lessee and not as the sovereign.

## **VI. ARGUMENT.**

### **A. The Authority Had No Duty to Hold Multiple Bond Elections.**

The interpretation of a contract presents a question of law for the Court. *State Farm Fire & Cas. Co. v. Reed*, 873 S.W.2d 698, 699 (Tex. 1993). The meaning the Court must impart to the phrase “any bond election” is a function of context, because the word “any” can mean all, but it can also mean one, as the *Kirby II* opinion correctly noted. *See also Standard v. Sadler*, 383 S.W.2d 391, 395 (Tex. 1964) (“The word ‘any’ has a variety of meanings, depending on the context in which it is used.”). What the parties intended the phrase “any

bond election” to mean must therefore be understood by examining the full context of Section 3.01 of the contracts, in which that phrase was used:

The Authority intends to call **a bond election** in the near future, but it 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. The Authority further agrees that it shall include purchase of the Facilities in any bond issue sold subsequent to such election.

In this passage, as the Court of Appeals correctly held, the phrase “any bond election” plainly refers to *the* bond election the Authority was *then* contemplating for the “near future.” Since the contracts further provide that the Authority was under “no obligation” to call any future bond election, even the one then contemplated, the contracts also contemplated that *if* “any” such election (singular) were in fact held, the Authority would then ask the voters whether they approved of the issuance of ad valorem tax bonds to finance the developers’ projects. In a separate section of the contracts entitled “Issuance of Bonds,” the contracts expressly acknowledge that the Authority “shall have no obligation to obtain approval of the voters of bonds to finance purchase of the Facilities.”<sup>38</sup> Thus, the contracts clearly put the Developers at risk of non-payment if the voters refused to authorize the expenditure of their tax dollars to complete the sale.

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<sup>38</sup> See all Agr., at § 3.03 (CR 106, 121, 138, 156).

1. Case Authorities. In their brief, the Developers have cited three appellate opinions construing “any” to mean “every.” Distinguishing each of these cases, the *Kirby II* panel correctly noted that “these and other authorities generally recognize that depending on the context, ‘any’ can also be used in a singular sense, *i.e.*, to mean ‘one’ or even ‘the next one.’” *Kirby II*, 274 S.W.3d at 45.

In *Branham v. Minear*, 199 S.W.2d 841, 846 (Tex. Civ. App.—Eastland 1947, writ ref’d n.r.e.), a deed reserving “any minerals on said land” was construed to reserve “all minerals.” In their brief, the Developers have selectively quoted from the *Branham* opinion to suggest that ‘any’ always means ‘all.’ Below, however, is the full passage with omitted text in boldfaced type:

**The controversy involves a determination of the meaning of ‘any minerals on said land.’ We have not been cited to a case construing the exact language quoted and have found none. It is not disputed that a reservation was made in said deed, nor is it denied that there was a severance of such minerals as were reserved.** The adjective ‘any’ may have slightly different meanings depending on the context and appurtenant facts. **But in 3 Words and Phrases, Perm. Ed., beginning on page 529, many cases are collated showing that** in construing statutes and other instruments ‘any’ is equivalent to and has force of ‘every’ or ‘all.’ **We shall not here attempt to cite side cases, but they seem conclusive.** We think that **as found by the learned trial court, ‘any minerals’ as used in the deed in question, undoubtedly meant ‘all minerals.’ Neither can there be any doubt that the words, ‘any minerals on said land,’ included the oil and gas; that the term ‘minerals’ includes oil and gas is so well settled as to need no citation of authorities; that ‘on said land’ means in, under and that may be produced from said land is equally well settled.**

*Id.* at 845-46 (boldface added). The *Branham* Court, therefore, was not saying that “any” always means “all,” but simply that a reservation “any minerals” (plural) can only mean that

all minerals are reserved. In other contexts, WORDS AND PHRASES can just as well be cited for its digest of cases using “any” in its singular sense of ‘a or an’ or ‘any one out of a number.’ See 3A WORDS AND PHRASES, 67-69 (West 1953).

The Developers’ other two cases construe statutes in which the Legislature intended ‘any’ in the statute to be construed inclusively, to refer to a class of circumstances. In *Hime v. City of Galveston*, 268 S.W.2d 543 (Tex. Civ. App.—Waco 1954, writ ref’d n.r.e.), the statute conferred benefits on civil service employees who had left their employment “for any reason.” Thus, “any reason” was construed to encompass death, so that the employee’s widow was entitled to death benefits. In *Doherty v. King*, 183 S.W.2d 1004, 1007 (Tex. Civ. App.—Amarillo 1944, writ dism’d), the statute provided that “any” rural high school district may consolidate with “any contiguous Common School District.” After reviewing the liberal purposes to be achieved, the Court stated that “[i]n **construing statutes**, the word ‘any’ is equivalent to and has force of ‘every’ or ‘all.’” *Id.* (quoting 3 WORDS AND PHRASES, 530). Still, *Doherty* acknowledges the meaning of “any” to be a function of context: **“While ‘any’ is derived from ‘one’ and indeed has been used as synonymous with ‘a’ or ‘an’, or ‘either’, it does not necessarily mean only one person, but may have reference to more than one or to many, and indeed it has been frequently used in its enlarged and plural sense as meaning . . . an indefinite number . . .”** *Id.* (emphasis added; ellipses in original; quoting 3 C.J. 231).

2. Context. The meaning of “any” in this case boils down to context, and, according to the Developers, “any bond election” must mean “all bond elections,” because,

they say, “the central purpose of the Agreements was that the Developers would construct the Facilities and the Authority would ultimately purchase them.” *See* Brief, at p. 10. As discussed above, the contracts did not require the Developers to construct anything; the Developers were always free to decide whether to develop their properties or not; and only if they did develop the properties were they then obligated to follow state regulations in constructing the facilities and to permit the Authority to use the facilities as a condition precedent to the Authority’s commitment to provide service to the eventual homeowners and maintain the utility lines.

As the Court of Appeals correctly held in *Kirby I*, the Authority’s obligation to “purchase” the facilities – that is, to participate in 70 percent of each Developer’s construction costs in exchange for full legal title – is conditioned on voter approval of bond funding. The Authority has “the right, but no obligation” to use funds not approved by the voters. As is customary in this type of arrangement, “[t]he developer builds in advance at its own risk: if the condemning entity cannot issue bonds or get approval . . . the developer generally will not be reimbursed.” *Malcomson Rd. Util. Dist. v. Newsom*, 171 S.W.3d 257, 273 n.11 (Tex. App.—Houston [1st Dist.] 2005, pet. denied).

Agreeing to put it to a vote implicitly put the Developers at risk that the vote would be “No” and that the Authority would not acquire the facilities. Indeed, that is why the parties provided for a lease of indefinite duration. The contract impliedly contemplated the situation presented by the present case, where (1) in the single election expressly contemplated by the agreement the voters have rejected the issuance of bonds to fund the

purchase of the facilities, (2) the Authority has the right, but no obligation, to purchase them with other funds, and (3) the developer remained the owner of the facilities with the Authority, as tenant, maintaining and insuring the lines and serving the development for an indefinite duration, unless and until the Authority exercises its option to purchase the lines. The contract does not expressly require the Authority to include these Developers' claims in all future bond elections potentially until the end of time.

Had the parties made an agreement to place the measure on the ballot of all future elections, one would expect to see a provision for the administration of that obligation in the centuries to come, for example, long after the party representatives had died, long after the facilities had deteriorated and had been replaced, and long after the Developer companies had ceased to operate as Texas companies with legal standing. As the Court of Appeals observed in *Kirby I*, the parties may well have expected the voters to approve the bonds in the single election that was held,<sup>39</sup> but they did not agree to hold multiple elections, potentially forever, if the voters rejected the bonds in that single election.

3. Construction Disfavoring Forfeitures. In *Kirby I*, the Developers argued that voter approval of bond funding could not be a condition precedent because it would lead to a forfeiture. The *Kirby I* Court rejected that argument. In the present case, the Developers have resurrected it in another guise: if “any bond election” does not mean “every bond election until it passes,” the Developers now contend, they will suffer a “forfeiture.”

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<sup>39</sup> *Kirby I*, 123 S.W.3d at 745 (“That it may be appeared highly unlikely, at the time appellees entered those contracts, that the voters would not approve a bond sale is no reason to rewrite the plain language of the contracts.”).

To address this argument, a discussion of the presumption against forfeitures is in order. The general rule is that “a forfeiture by finding a condition precedent is to be avoided when possible under another reasonable reading of the contract.” *Hudson v. Wakefield*, 645 S.W.2d 427, 430 (Tex. 1983). In *Kirby I*, the Kirby Developers argued that if the Court treats voter approval of bond funding as a condition precedent, they will suffer a forfeiture, since the voters refused to approve bond funding and the Authority is using the facilities “free of charge.” However, like all rules of construction, the presumption against forfeitures is merely a presumption; it does not trump the parties’ clear and express agreement to condition the Authority’s obligation to buy the facilities on voter approval of bond funding. “Courts do not resort to arbitrary rules of construction where the intention of the parties is clearly expressed in unambiguous language.” *Abilene v. Texas & Pac. Ry. Co.*, 136 Tex. 333, 150 S.W.2d 1003, 1006 (1941).

As the *Kirby I* Court stated: “[T]he payment provision of the contracts unambiguously provides that the Authority’s obligation to pay is expressly conditioned upon the receipt of voter-approved bond funds. To construe the payment provisions another way would be contrary to the plain language of the contracts.” *Kirby I*, 123 S.W.3d at 745 (internal citations deleted). In other words, as the *Kirby I* Court recognized, an unconditional sale was not the object of the contract; rather, the Authority conditionally agreed to devote public funds to a certain percentage of the Developers’ construction costs if and only if the electorate approved of bonds to finance public participation.

In dicta, the *Kirby I* Court did go to say that there had been no forfeiture in any event. But even there, the Court did not suggest, let alone hold, that the Authority was *obligated* to submit these Developers' claims in every bond election potentially in perpetuity:

[T]he 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. That it may have appeared highly unlikely, at the time appellees entered to these contracts, that voters would not approve a bond sale is no reason to rewrite the plain language of the contracts. 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. This provision that demonstrates the parties contemplated a continuing contractual relationship of an unspecified duration.

*Id.*

To be sure, nothing in the contracts forecloses a future Board of Directors from submitting more developer reimbursement propositions to the voters. If such an election were held and the bond proposition were to pass, the Developers' conditional right to payment would then ripen. However, the Developers' conditional right to payment is not corollary to any duty on the part of the Authority to bring the issue back to the voters, time and time again, in *every* bond election it may hold from 1998 potentially until the end of time. Further, in any event, there is no forfeiture in this situation because all the Authority has received is a leasehold; the Developers remain the owner of their facilities. In exchange for the leasehold, the Authority has conferred value on each Developer's property by making it viable for development and sale as single family lots — by providing utilities, assuming

responsibility for insuring and maintaining the utility lines, and by agreeing to indemnify the developer for certain liabilities relating to the lines. *See, e.g., City of Annapolis v. Waterman*, 357 Md. 484, 745 A.2d 1000, 1010 n.8 (2000) (“In many instances, it is ultimately to a developer's sales advantage to offer to dedicate to the local government water and sewer facilities, streets, recreational areas or other sites because, if the offer is accepted, the local government, not the future residents of the subdivision, generally will be responsible for maintenance of the facilities.”).

In the final analysis, therefore, the non-occurrence of the condition precedent was a basic assumption of these contracts. The “bond election” (singular) that the parties contemplated “in the near future” would necessarily result in one of two possible outcomes – bonds approved, or bonds rejected. The Developers bargained for a single up-or-down vote by the electorate. To read the contracts to require payment regardless of whether the electorate rejected the bonds would ignore the whole reason conditioning payment on voter approval – to allow the people to decide if *they* want public funds spent on private development.

To date, in three elections spread over nearly a decade, the people of Clear Lake have made that decision by ever increasing majorities. No valid challenge has been made to the democratic process in which the people have voiced their disapproval. The Authority did not dictate the will of the people; rather, it is implementing the will of the people. This Court, therefore, should reject the Developers’ invitation to use the presumption against forfeitures to override the election result expressly bargained for by the parties.

**B. Judgment in the Contract Cases Can Be Affirmed on Other Merits Grounds.**

Two other well-settled rules of construction – neither of which was addressed by the Court of Appeals – operate to prevent the contracts from being interpreted as imposing any perpetual obligation to submit developer reimbursement propositions to the voters in every future bond election:

1. Presumption of At-Will Termination of Perpetual Contracts. Perpetual contracts of the sort alleged by the Developers are disfavored by law. “[C]ontracts which contemplate continuing performance (or successive performances) and which are indefinite in duration can be terminated at the will of either party.” *Fort Worth Indep. Sch. Dist. v. City of Fort Worth*, 22 S.W.3d 831, 841 (Tex. 2000) (quoting *Clear Lake City Water Auth. v. Clear Lake Util. Co.*, 549 S.W.2d 385, 390-91 (Tex. 1977)).

The contracts at issue contain no time limit on the Authority’s alleged duty to include developer reimbursement propositions in “all” future bond elections. To read “any bond election” in section 3.01 of the contract to mean “all bond elections” would impose a potentially perpetual obligation on the Authority, since conceivably the voters might *never* approve of reimbursing the Developers with property taxes. If read to impose such a perpetual obligation, therefore, it must also be read as terminable at the will of either party, and the Authority terminated it when it rejected the Developers’ demands in September 2004 to place the reimbursement issue on the ballot for the third time.<sup>40</sup>

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<sup>40</sup> (CR 86, 101).

2. Construction Disfavoring Alienation of Legislative Discretion. “It is well settled that separation of powers and the judiciary’s deference to the legislative branch require that judicial power not be invoked to interfere with the elective process.” *Blum v. Lanier*, 997 S.W.2d 259, 261 (Tex. 1999) (challenge to ballot language of a city referendum election); *see also State of Texas ex rel. Edwards v. Reyna*, 160 Tex. 404, 333 S.W.2d 832, 833 (1960) (“the conduct of elections is primarily a matter for legislative regulation and control”).

To read the contracts as imposing a potentially perpetual obligation to include developer reimbursements in all future bond elections runs afoul of the reserved powers doctrine, which provides that certain substantive powers of government cannot be contracted away under any circumstances. *Clear Lake City Water Auth. v. Clear Lake Utils., Co.*, 549 S.W.2d at 391 (Authority cannot bind itself to provide indefinite water and sewer service). A local governmental entity “cannot by contract or otherwise surrender its governmental or legislative functions, nor can it legally enter into any contract which will embarrass or control its legislative powers and duties or which amount to an abdication of its governmental function or of its police power.” *Fidelity Land & Trust Co. of Texas v. City of West University Place*, 496 S.W.2d 116, 117 (Tex. Civ. App.—Houston [14<sup>th</sup> Dist.] 1973, writ ref’d n.r.e.) (quoting *Bowers v. City of Taylor*, 16 S.W.2d 520, 521 (Tex. Comm’n App. 1929, holding approved)).

The Authority’s power to hold bond elections — which subsumes the power to choose the scope of bond propositions to be submitted to the voters — is a governmental function which governmental entities cannot bargain away. *See City of Corpus Christi v. Bayfront*

*Assocs., Ltd.*, 814 S.W.2d 98, 107 (Tex. App.—Corpus Christi 1991, writ denied) (“As a matter of law, under the contract, the City’s obligation to assist Bayfront could not include a preclusion from holding the bond election and subsequently issuing the bonds.”); *cf. Bielamowicz v. Cedar Hill Indep. Sch. Dist.*, 136 S.W.3d 718, 719-20 (Tex. App.—Dallas 2004, pet. denied) (a school board’s decision where to hold a special bond election is a discretionary governmental function).

The Legislature has given each board of directors of Texas water districts the *discretion* to submit multiple issues in a single bond election. *See* TEX. WATER CODE ANN. § 49.106(c) (“The board *may* submit multiple purposes in a single proposition at an election.”) (emphasis added). A contract which purports to bind all future boards of directors to include certain propositions in all future elections would abrogate that discretion.

The facts of *Kirby I* well illustrate why agreements to control the ballot of all future elections cannot be enforceable as a matter of public policy. In that case, the presence of the developer reimbursement proposition on the May 1998 ballot galvanized heavy turnout and voter opposition to all of the bond propositions on the ballot — both the developer reimbursements and the Authority necessities — and all of them failed. *Kirby I*, 123 S.W.3d at 740-41. It can thus be seen that the turnout and outcome of a bond election can be dramatically affected by what is on the ballot. This Court can well imagine the ‘poison pills’ the public might be made to swallow every time they are asked to vote on unrelated bond propositions. A governing body entering such a contract could effectively prevent future boards from controlling the content of the ballot and thereby impair the entity’s ability to raise taxes to fund projects critical to the operation of the entity.

For these reasons, if the contract in this case were read to obligate the Authority to include developer reimbursement propositions in multiple future bond elections, that term must also be read to be terminable at will, or as discretionary, to avoid invalidation under the reserved powers doctrine.

**C. Governmental Immunity Bars the Developers' Breach-of-Contract Suits.**

1. Governmental Immunity from Suit: General Principles. Governmental immunity is a jurisdictional bar to suit for breach of contract against local governmental entities absent a legislative waiver. *See City of Mexia v. Tooke*, 197 S.W.3d 325, 334 (Tex. 2006). Any such waiver must be “clearly and unambiguously stated.” *Reata Constr. Corp. v. City of Dallas*, 197 S.W.3d 371, 375 (Tex. 2006); *see also Tooke*, 197 S.W.3d at 336-343; TEX. GOV'T CODE ANN. § 311.034. Statutes waiving governmental immunity are “strictly construed” (*see City of Houston v. Jackson*, 192 S.W.3d 764, 770 (2006)); and Texas courts “generally resolve ambiguities by retaining immunity.” *Wichita Falls State Hosp. v. Taylor*, 106 S.W.3d 692, 697 (Tex. 2003). *See also Mission Consol. Indep. Sch. Dist. v. Garcia*, 253 S.W.3d 653, 655 (Tex. 2008) (“We interpret statutory waivers of immunity narrowly, as the Legislature’s intent to waive immunity must be clear and unambiguous.”) (citing TEX. GOV'T. CODE ANN. § 311.034))

In these cases, the Developers have contended that two statutes authorize their breach-of-contract suit against the Authority — TEX. WATER CODE ANN. § 49.066(a) and TEX. LOC. GOV'T CODE ANN. § 271.152. As shown below, neither of these statutes waives the Authority’s immunity from suit.

2. Section 49.066(a). Section 49.066(a) of the Water Code confers capacity on water districts to “sue and be sued.” *Id.* According to *City of Mexia v. Tooke*, the phrase “sue and be sued” in an entity’s organic law does not, by itself, waive immunity from contract enforcement suits; and in connection with that ruling this Court expressly listed Section 49.066(a) as one of the “sue and be sued” statutes called directly into question by the Court’s holding.<sup>41</sup>

In the wake of *Tooke*, several of the courts of appeals have held that Section 49.066 of the Water Code does not waive a water district’s immunity from a suit for breach of contract. *See, e.g., Clear Lake City Water Auth. v. Friendswood Dev. Co.*, 256 S.W.3d 735, 745 (Tex. App.—Houston [14th Dist.] 2008, pet. dism’d by agr.) (“after carefully reviewing section 49.066 under existing precedents, we conclude that in this statute the Legislature did not waive the Authority’s immunity from suit by clear and unambiguous language”); *Engelman Irrigation Dist. v. Shields*, No. 13-08-153-CV, 2008 Tex. App. LEXIS 3329, at \*22 (Tex. App.—Corpus Christi May 8, 2008, no pet.) (mem. op.) (“The words ‘sue or be sued’ in section 49.066(a) of the Texas Water Code do not, by themselves, waive governmental immunity.”); *Valley Mun. Utility Dist. No. 2 v. Rancho Viejo, Inc.*, No. 13-07-545-CV, 2008 Tex. App. LEXIS 1109, 2008 WL 384320, at \*2-4 (Tex. App.—Corpus Christi Feb. 14, 2008, no pet. h.) (mem. op.) (“We conclude that section 49.066(a) of the Texas Water Code does not serve as a clear and ambiguous waiver of governmental immunity.”); *Boyer, Inc. v. Trinity River Auth.*, 279 S.W.3d 354, 358 (Tex. App.—Fort

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<sup>41</sup> *Tooke*, 197 S.W.3d at 328-29 and n. 1, 355 Appendix A.

Worth 2008, pet. filed) (“We agree with the San Antonio court of appeals that this provision does not waive sovereign immunity.”); *Bexar Metro. Water Dist. v. Educ. and Econ. Dev. Joint Venture*, 220 S.W.3d 25, 31 (Tex. App.—San Antonio 2006, pet. dismiss’d) (“We . . . conclude and hold that section 49.066 of the Texas Water Code does not waive Bexar Met’s immunity from the Joint Venture’s suit.”). No appellate decision holds differently.

3. Section 271.152. Section 271.152 of the Local Government Code is a limited waiver of immunity from suit for “certain” contract claims, not for all types of contract claims. *See City of Galveston v. State*, 217 S.W.3d 466, 470 (Tex. 2007) (noting that the statutory waiver of local governmental immunity from contract suits is not a “blanket waiver[ ]” but “appl[ies] only to specified claims”). It provides:

§ 271.152. WAIVER OF IMMUNITY TO SUIT FOR CERTAIN CLAIMS.

A local governmental entity that is authorized by statute or the constitution to enter into a contract and that enters into a **contract subject to this subchapter** waives sovereign immunity to suit for the purpose of adjudicating a claim for breach of the contract, **subject to the terms and conditions of this subchapter**.

TEX. LOC. GOV’T CODE ANN. § 271.152 (emphasis added).

A “contract subject to this subchapter” is a defined term meaning “a written contract stating the essential terms of the agreement for providing goods or services to the local governmental entity that is properly executed on behalf of the local governmental entity.” *Id.* at § 271.151(b). Furthermore, one of the “terms and conditions” of the waiver subchapter is that payment “must be due and owed.” TEX. LOC. GOV’T CODE ANN. § 271.153(a).

As demonstrated below, the agreements in this case are not “contracts subject to this subchapter” because (1) they do not state the essential terms for any enforceable sales

agreement, and (2) the essence of the agreement is not to provide “goods or services” to the Authority, but real estate. Further, the Developers do not seek any “balance due and owed” under the contract.

a. “*Written Contract Stating The Essential Terms.*” Immunity bars suit on a contract that fails to state, or express, its essential terms. *Learners Online, Inc. v. Dallas Independent School District*, No. 05-08-00946-CV, 2009 Tex. App. LEXIS 5502 (Tex. App.—Dallas July 20, 2009, no pet. h.). The material terms in any sales contract include: (1) identification of the property being sold, (2) the consideration or price paid for the property, and (3) the parties’ consent to exchange the property for the agreed price. *John Wood Group USA, Inc. v. ICO, Inc.*, 26 S.W.3d 12, 20 (Tex. App.—Houston [1st Dist.] 2000, pet. denied). The agreements do not identify the property to be purchased; they only indicate an “approximate” number of lots each developer intends to develop. The contracts articulate no purchase price. That item is obviously left for future agreement.

b. “*Goods.*” The installed facilities to be sold are fixtures, not goods. *See, e.g., Clear Lake City Water Auth. v. Friendswood Dev. Co., Ltd.*, 256 S.W.3d at 738-40.

c. “*Services.*” The Court of Appeals below rejected the Authority’s immunity-based jurisdictional challenge, citing its earlier holding in the Authority’s interlocutory appeal, *Clear Lake City Water Auth. v. Friendswood Dev. Co.*, 256 S.W.3d 735, 751 (Tex. App.—Houston [14th Dist.] 2008, pet. dism’d by agr.) (*Friendswood I*). In that case, after holding initially (and correctly) that the essence of these prefunding agreements was a sale of real estate and not a contract to provide services, the Court reversed itself on rehearing, holding that *Ben Bolt-Palito Blanco Consol. Indep. Sch. Dist. v. Texas Political Subdivisions*

*Property/Casualty Joint Self-Insurance Fund*, 212 S.W.3d 320 (Tex. 2006) (hereinafter, “*Ben Bolt*”), requires a “liberal construction” of the applicable immunity statute – a construction contrary to the long line of Texas cases holding that immunity waivers must be construed narrowly. According to *Friendswood I*, the Developer’s construction of roads and facilities “appears to be directed towards and to benefit the Subdivision and its residents, rather than the Authority.” *Id.*, at 750-51. Nevertheless, the Court reasoned that under *Ben Bolt*, the contract need only provide an incidental service to the Authority:

If the school district’s participation in the election of the fund’s governing board was sufficient to constitute the provision of services in the insurance contract in *Ben Bolt*, then we conclude that Friendswood Development’s agreement to hire third parties to construct the Facilities and to build the streets, roads, and bridges is likewise sufficient to constitute the provision of services to the Authority. Applying the *Ben Bolt* court’s liberal construction of the applicable statute, we conclude that the Agreement is a written contract stating the essential terms of the agreement for providing services to the Authority for the construction of the Facilities as well as for the construction of streets, roads, and bridges in the Subdivision.

*Friendswood I*, 256 S.W.3d at 751.

This reading of Section 271.152 stands the contracts on their heads and effectively nullifies the Legislature’s intent to limit the waiver to contracts providing “goods or services to” the defendant local government. The objective of the Developer contracts was to secure commitments from the Authority to provide water and wastewater capacity to the Developers’ properties. “If every contract that confers some attenuated benefit on a governmental entity constitutes a contract for a “service,” the limitation of contracts covered by section 271.152 to ‘contract for goods or services provided to the entity’ loses all meaning.” *East Houston Estate Apts., L.L.C. v. City of Houston*, No. 01-08-00966-CV, 2009

Tex. App. LEXIS 4899, at \*30-31 (Tex. App.—Houston [1st Dist.] June 25, 2009, no pet. h.) (not yet published) (quoting TEX. LOC. GOV'T CODE ANN. § 271.151(2)). The issue is whether a “central purpose” of the agreement is to provide “goods or services” to the local government. *Id.* As the First Court of Appeals has noted in rejecting a claim for breach of a city’s contract to provide loans for urban rehabilitation:

It is clear that, while the City would benefit in a general way from having East Houston’s apartment units refurbished and from the availability of more housing for low-income families, nothing in the contract obligated East Houston to provide any municipal service directly to the City. The central purpose of the agreement between the City and East Houston was to facilitate a loan of money from the City's portion of federal funds and from private funds to a private entity for the purpose of renovating East Houston's empty apartment building. The City was thus a conduit of federal funds and a facilitator of the project, but no services were provided directly to the City. This is clearly not the type of "service" envisioned by section 271.152.

*East Houston Estate Apts.*, 2009 Tex. App. LEXIS 4899, at \*30; *see also Donna Indep. Sch. Dist. v. Gracia*, No. 13-07-00255-CV, – S.W.3d – 2008 Tex. App. LEXIS 8085, at \*13-14 (Tex. App.—Corpus Christi Oct. 23, 2008, no pet.) (Vela, J. concurring) (opining that settlement agreement in which terminated school teacher agreed to forego administrative remedies in exchange for neutral character reference, did not provide any ‘service’ to the school district).

The *Ben Bolt* opinion, it should be noted, does not anywhere state that the local governmental contract waiver statute – unlike every other waiver statute – should be “liberally construed.” Rather, *Ben Bolt* stressed the unique relationship of the parties as the determining factor. *See Ben Bolt*, 212 S.W.3d at 327; *see also East Houston Estate Apts.*, at \*31 (“the *Ben Bolt* court looked to the special relationship between the parties to conclude

that they provided mutual services to each other — Ben Bolt, a school district, provided board members to the fund, another state governmental entity, while the fund provided insurance coverage to Ben Bolt in exchange for premium payments.”). The dispute in *Ben Bolt* grew out of an interlocal contract calling for *mutual services* by local governmental entities – specifically, a coverage dispute between a self-insurance risk pool and one of its constituent members, Ben Bolt ISD, which by law and contract participated in the governance of the pool. *Ben Bolt*, 212 S.W.3d at 327.<sup>42</sup> In *Ben Bolt*, this Court expressly distinguished self insurance among local governments from the “ordinary seller-consumer” transaction, such as is present here. *Id.*

In Section 271.151(2) of the Local Government Code, the term “service” is itself undefined. Terms not defined in a statute are given their ordinary meaning.<sup>43</sup> “Service” is commonly understood to mean “[d]uty or labor to be rendered by one person to another, the former being bound to submit his will to the direction and control of the latter.” *See, e.g.*, BLACK’S LAW DICTIONARY, at p. 1227 (5<sup>th</sup> ed. 1978).

The central purpose of the sales-lease agreements in this case is not for the Developers to render any duty or labor to the Authority. Indeed, the agreements do not obligate the

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<sup>42</sup> Under the Texas Interlocal Cooperation Act, TEX. GOV’T. CODE ANN. § 791.001 *et seq.*, local governments are authorized to pool self-insurance funds, agree to cover one another’s risks and liabilities, and create a common agency, or risk pool, to manage their joint self-insurance funds. All of the constituent members serve one another under the interlocal coverage agreement by participating administratively in the governance of the risk pool and by contributing their own funds to the joint fund held in trust by the risk pool. The relationship between a risk pool and its member entities is thus analogous to that between a partnership and its individual partners. The services of the pool to its constituent members are indistinguishable from those of its constituent members to one another. Indeed, in the context of an interlocal agreement, the Act defines “governmental functions **and services**” to include any “governmental functions in which the contracting parties are mutually interested.” *Id.* § 791.003(3)(N).

<sup>43</sup> *City of San Antonio v. Hartman*, 201 S.W.3d 667, 672 n.19 (Tex. 2006).

Developers to develop their property at all. The Developers’ only obligation is dictated by state regulation — to ensure that the facilities, if constructed, will comply with TNRCC quality standards. *See* Agr. at § 1.01; 30 TEX. ADMIN. CODE § 293.46(1); *id.* at § 293.46(2) (requiring TCEQ approval of construction contracts awarded by developer). The State has imposed these standards as a condition on the Authority’s ability to serve the public through those utility lines; the Developers’ compliance with them is not a service *to* the public but instead a prerequisite for receiving service *from* the public. Accordingly, immunity from suit is not waived by Section 271.152 of the Local Government Code.

d. “*Balance Due and Owed.*” The statutory limitation on damages only permits recovery of the “balance due and owed under the contract,” *see* TEX. LOC. GOV’T CODE ANN. § 271.153(a), a provision with no reasonable meaning other than to preserve immunity from suit for payments not yet due.<sup>44</sup> Voter approval of bonds to purchase the Developers’ facilities is a condition precedent to any purchase obligation on the part of the Authority. *Kirby Lake I*, 123 S.W.3d at 744. However, the voters have not approved bonds to finance the purchase of the facilities. Accordingly, the Developers cannot prove as a matter of law that the amount they seek by this suit is “due and owed.”

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<sup>44</sup> *Cf. City of Alton v. Sharyland Water Supply Corp.*, 277 S.W.3d 132 (Tex. App.—Corpus Christi 2009, pet. filed) (op. on reh’g) (“In this case, section 271.153(a) does not provide Sharyland an avenue for recovery. There is neither a balance due and owed by Alton under the agreements, nor is there any amount due from change orders, additional work, or interest.”) (internal citation omitted); *Judson Indep. Sch. Dist. v. ABC/Associated Benefit Consultants, Inc.*, 244 S.W.3d 617, 621 (Tex. App.—San Antonio 2008, no pet.) (“section 271.153(a) does not provide an avenue for recovery as there is no balance due and owed by Judson ISD to ABC”); *City of San Antonio v. Polanco & Co.*, No. 04-07-00258-CV, 2007 Tex. App. LEXIS 8634, at \*14, 2007 WL 3171360, at \*5 (Tex. App.—San Antonio Oct. 31, 2007, pet. denied) (mem. op.) (“We agree with the City and hold that regardless of whether the contract was for goods or services, . . . 271.153(a) does not provide an avenue for recovery as there is no balance due from the City to Polanco.”).

#### **D. The Takings Claims Were Properly Dismissed.**

The Court of Appeals correctly affirmed the order dismissing the Kirby Takings Case for want of jurisdiction. When a plaintiff fails to allege a valid inverse condemnation claim, governmental immunity bars the suit. *See General Services Com'n v. Little-Tex Insulation Co.*, 39 S.W.3d 591, 599 (Tex. 2001) (affirming grant of plea to the jurisdiction where plaintiff invoked Article I, Section 17 but failed to allege a valid takings claim).

1. Essential Elements. TEX. CONST. art. I, § 17 provides in relevant part 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 . . . .**” *Id.* (emphasis added). To recover on a takings claim, a plaintiff must establish that (1) the governmental unit intentionally performed certain acts, (2) that resulted in a “taking” of property, (3) for public use. *Little-Tex*, 39 S.W.3d at 598. Whether a taking has occurred is a question of law. *Id.* Moreover, if the State has acquired the plaintiff’s property with the plaintiff’s consent, no compensation is required. *See State v. Steck*, 236 S.W.2d 866, 870 (Tex. Civ. App. – Austin 1951, writ ref’d).

2. Developer Consent. It is well established that “[w]hen an entity voluntarily enters into a contract and delivers a product to the state pursuant to that contract, the entity thereby consents to the state’s possession of the product.” *Green Int’l v. State*, 877 S.W.2d 428, 435 (Tex. App. – Austin 1994, writ denied). In their pleadings, the Kirby Developers have admitted that they delivered possession of their facilities to the Authority pursuant to the parties’ lease agreement: “[p]ending the purchase of the Facilities, the Sales Agreements allow the Water Authority to lease the Facilities free of charge, and to use them to provide

water, wastewater, and drainage services to Water Authority residents.” (CR 265). Thus, the Court of Appeals correctly dismissed this case because, on the face of the pleadings, the Kirby Developers have consented to the Authority’s possession and use of the facilities.

In their brief, the Developers have not addressed, or attempted to distinguish, the line of Texas cases relied upon by the Court of Appeals, which establishes that an alleged taking “by the consent” of the owner is not actionable. TEX. CONST. art. I, § 17; *see, e.g., Steck*, 236 S.W.2d at 870 (holding that “Appellee by making the contract, manufacturing the stamps and delivering them to the State did so voluntarily and with its own consent, and can not now say the stamps were taken under the power of eminent domain”); *Hightower v. City of Tyler*, 134 S.W.2d 404, 407 (Tex. Civ. App.—El Paso 1939, writ ref’d) (developers who connected their facilities to the City of Tyler’s water and sewer system thereby consented to the City’s use of the facilities to furnish services to homeowners). These cases control the outcome here.

3. Requisite Intent to Take. In their brief, the Kirby Developers contend that if their contract claims fail, their takings claims must succeed, since inverse condemnation is an alternative theory of relief. This argument is frivolous. Pleading in the alternative is not the same as prevailing in the alternative; a plaintiff pleading a contract and takings claim may fairly lose on both. *See Kirby I, supra*. As noted above, local governments can require private developers to construct at their expense and dedicate to the public all water, sewer and drainage facilities. *See Turtle Rock Corp.*, 680 S.W.2d at 806; *Crownhill Homes*, 433 S.W.2d at 460; *Johnson*, 410 S.W.2d at 647. There is no free-standing constitutional obligation for a governmental entity to compensate a developer required to dedicate utility

lines necessary to connect the developer's property to the public water, sewer, and drainage system.

In this case, although the Developers did not agree to dedicate the facilities unconditionally to the Authority, they did expressly and unequivocally assume the risk of non-payment and expressly bargained for a lease of potentially perpetual duration if the voters did not approve bonds to finance the purchase price. *See Kirby I, supra*. Hence, the Authority's continued possession of the facilities under that perpetual lease agreement is not a taking, and the Kirby Developers in this case are collaterally estopped by the *Kirby I* opinion from arguing otherwise.

In addition, as this Court has held, "the State does not have the requisite intent under constitutional-takings jurisprudence when it withholds property or money from an entity in a contract dispute." *See Little-Tex*, 39 S.W.3d at 598-99. The Court has further reasoned that:

Texas courts have long recognized that the State wears two hats: the State as a party to the contract and the State as sovereign. The State, in acting within a color of right to take or withhold property in a contractual situation, is acting akin to a private citizen and not under any sovereign powers. In this situation, the State does not have the intent to take under its eminent domain powers; the State only has an intent to act within the scope of the contract.

*Id.* at 599 (internal citations deleted).

Based on this same principle, the *Kirby I* Court has already rejected the inverse condemnation claims of these same three Kirby Developers, who there, as here, asserted that the Authority's refusal to pay for the facilities in alleged breach of the same prefunding agreements constituted a taking. *See Kirby I*, 123 S.W.3d at 755. Other post-*Little-Tex*

decisions of this Court and of the other of the Courts of Appeals confirm that the State’s mere refusal to pay for property delivered under a contract is not a taking. *See, e.g., State v. Holland*, 221 S.W.3d 639, 643-44 (Tex. 2007); *Texas Southern Univ. v. State Street Bank & Trust Co.*, 212 S.W.3d 893, 910-11 (Tex. App.—Houston [1st Dist.] 2007, pet. denied).<sup>45</sup> Federal takings jurisprudence is the same.<sup>46</sup>

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<sup>45</sup> *See also Freedman v. Univ. of Houston*, 110 S.W.3d 504, 506, 509 (Tex. App. – Houston [1st Dist.] 2003 no pet.) (“when the State enters into a contract, it lacks the intent to take property under its eminent domain powers and thus does not commit a ‘taking.’”); *Kaufman Cty. v. Crow*, 176 S.W.3d 921, 927 (Tex. App. – Dallas 2005 pet. denied) (when the County Auditor refused to pay and the Commissioners Court voted not to pay, they acted with the intent to avoid payment of illegal claims for jobs that had not gone through a bidding process rather than the intent to act under the power of eminent domain.); *Taub v. Harris County*, No. 01-93-00007-CV, 1996 Tex. App. LEXIS 1216, at \*12 (Tex. App.—Houston [1st Dist.] 1996, writ denied) (not designated for publication) (holding that because “the District was acting under color of contract,” “its refusal to perform its obligations under the agreement does not constitute a taking, though it may give rise to a breach of contract”); *Imagents, Inc. v. Univ. of Tex. Health Science Ctr.*, No. 14-94-00781-CV, 1995 Tex. App. LEXIS 2463, at \*8-10 (Tex. App.—Houston [14th Dist.] Oct. 12, 1995, no writ) (not designated for publication) (rejecting claim that State’s failure to pay for the use of plaintiff’s equipment was a taking, reasoning that “Imagents chose to perform under the contract and deliver its materials to UTHSC for cyclotron services. Thus, Imagents’ allegations establish that it voluntarily consented to the actions of UTHSC under the contract”).

<sup>46</sup> *Bailey v. United States*, 53 Fed. Cl. 251 (Fed. Cl. 2002) (“that a claimant’s contractual claim is extinguished is not in and of itself the basis for a taking claim. . . . The lack of a complete contract remedy . . . because the contract theory does not yield recovery, does not give life to a takings theory”); *Commonwealth Edison Co. v. United States*, 56 Fed. Cl. 652, 656 (Fed. Cl. 2003) (when a claim for a taking is “dependent on existence of” the contract, then the rights are enforceable through a contract remedy”); *Conoco Phillips v. United States*, No. 02-1367C, 2006 US Claims LEXIS 269, at \*26-27 (Fed. Cl. Sept. 12, 2006) (the court was “aware of no authority that would identify as a Fifth Amendment taking the acquisition of property by the government pursuant to a valid contract with a willing seller”); *Home Savings of America FSB v. United States*, 51 Fed. Cl. 487, 495-96 (Fed. Cl. 2002) (“the lack of a ‘complete’ contract remedy, either because it would not include interest or because the contract theory does not yield recovery, does not give life to a takings theory. If the contract remedy does not produce a recovery, it is because the contract did not give a right to a recovery. In the absence of that contract remedy, no other property right is implicated”); *Integrated Logistics Support Sys. v. United States*, 42 Fed. Cl. 30, 34 (Fed. Cl. 1998) (when a party makes a “. . . transfer of property to the government pursuant to a lawfully executed bilateral agreement, the government cannot be compelled to render just compensation for the alleged taking of such property”); *La Gloria Oil & Gas Co.* 72 Fed. Cl. 544 (Fed. Cl. 2006) (“When a contract between plaintiff and the government covers the property the plaintiff asserts has been “taken” the court must look to the contract to determine whether the plaintiff is entitled to damages.”); *Zoeller v. United States*, 65 Fed. Cl. 449 (Fed. Cl. 2005) (“Only contract remedies are available when the rights were contemplated by contract. This is especially so when even the remedies were contemplated by contract. Thus, no taking claim is available.”).

In their petition for review, the Developers have set up a straw man argument, arguing that the mere *presence* of a claim for breach of contract does not by itself defeat an inverse condemnation claim. The Authority does not argue otherwise. The Developers, however, have missed the point of what *besides* a mere contract dispute is required to establish a compensable taking. Each of the cases the Developers have cited is easily distinguishable because, in each, the State, in addition to breaching an easement agreement, also exercised its condemnation power as sovereign to appropriate other interests in the realty that were outside the scope of the State's easement.

Thus, in *Southwestern Bell Tel., L.P. v. Harris County*, 267 S.W.3d 490 (Tex. App.—Houston [14th Dist.] 2008, no pet.), the county, wearing its sovereign hat, forced a private utility company to relinquish part of its utility easement on certain property which the county was planning to use as a roadway and also forced the company, at its expense, to relocate equipment from its easement to other property. *Id.*, at 496-97 (“Only a government entity with condemning powers could force a private utility company to relocate equipment and relinquish part of its easement to public right-of-way, and under Texas case law, these actions constitute a taking.”). These actions were deemed a taking, since under the parties’ contract, the utility company had not agreed to surrender its easement, move its equipment, or render services to the county. *Id.*<sup>47</sup>

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<sup>47</sup> *Southwestern Bell* appears to have been overruled in a related case on other grounds. See *Southwestern Bell Tel., L.P. v. Harris County Toll Rd. Auth.*, 282 S.W.3d 59, 61 (Tex. 2009) (“Although the first and third elements are present here, Harris County asserts, and the court of appeals held, that SBC does not have a vested property interest in the public right-of-way on which its facilities are located. We conclude that whatever interest SBC has, that interest did not include the right to require the county to pay for relocation of its facilities.”).

In *Texas Parks & Wildlife Department v. Callaway*, 971 S.W.2d 145, 152 (Tex. App.—Austin 1998, no pet.), the State opened a canal for unlimited public use in contravention of the parties’ easement agreement limiting the State’s use of the property. *Id.*, at 147-48. The Austin Court of Appeals held that the State’s act of opening the property to the public was an exercise of sovereign condemnation power because it negated the easement altogether. *Id.*, at 150-51.

In this case, the Developers have wholly failed to explain how the Authority has asserted dominion over their facilities in a way that goes beyond a mere refusal under the contract to consummate the sale and pay the contract price for title to the facilities which the developers stipulate they still hold. They have admitted in their brief that the Authority did not defraud them into the lease agreement: the Kirby Developers, they say, “do not contest that the Authority intended to perform its contractual obligations when it first undertook them in 1998.” Developers’ Brief, at p. 26.

This concession is also dispositive. *See, e.g., City of Corinth v. Nurock Dev., Inc.*, No. 2-07-422-CV, 2009 Tex. App. LEXIS 5939 (Tex. App.—Fort Worth July 30, 2009, no pet. h.) (following *Holland*). In *Nurock*, the parties settled a prior case, and in that settlement agreement Nurock, a developer, agreed to make certain improvements to a public road. It was undisputed that the road construction was part of the consideration that Nurock voluntarily promised to provide in the context of the settlement agreement. When the city failed to fund part of the settlement, Nurock sued the city for inverse condemnation. On the city’s appeal from the district court’s denial of the city’s plea to the jurisdiction, Nurock argued that because the city breached the settlement agreement before the improvements

were made, the agreement was no longer enforceable, and, therefore, the city's acceptance of the improvements constituted an illegal taking. The Fort Worth Court of Appeals disagreed:

The City's alleged breach of the agreement is immaterial to whether the City had the requisite intent to take the improvements **when the agreement was executed**. While the City's alleged breach may have excused NuRock from making the improvements, it does not alter the fact that the improvements were agreed to well before the alleged breach occurred.

*Id.*, 2009 Tex. App. LEXIS 5939, at \*12 (internal footnotes omitted; emphasis added).

Accordingly, the Court held that the City accepted the road improvements under color of its contract with NuRock, and not pursuant to its powers of eminent domain. *Id.*

4. Repudiation. In the present appeal the Developers seek recognition of a new takings theory based on an alleged "emphatic repudiation" of the contract. According to this argument, a simple "garden variety" breach of contract cannot give rise to a taking, but an "emphatic repudiation" of one can.

No authority has been or can be cited to support such a claim. The relevant inquiry is whether the governmental entity is withholding payment for property received under color of a contract, not the form of the breach. The Developers have conceded that the Authority took possession of the facilities under the lease agreement. Moreover, for reasons stated in *Kirby II*, 274 S.W.3d at 46, and for the other reasons stated above, it is clear that the Authority has not repudiated the contracts. The Authority has no obligation to acquire the facilities unless the voters approve bonds to fund the acquisition, and no such bonds have been approved. The Authority, therefore, is using the lines pursuant to the parties' express lease agreement, maintaining them, insuring them, and carrying out its commitment to

furnish utilities to the developments – all of which added value to the Developers’ properties and made those properties saleable.

**E. Alternatively, Issues Not Considered by the Court of Appeals Should Be Remanded for Decision by That Court.**

The Authority raised and briefed several points in the Court of Appeals which that Court did not consider in its three decisions here on review. Were this Court to reverse any of those decisions, the Authority requests a remand to the Court of Appeals for that Court to consider those undecided points. *See* TEX. R. APP. P. 53.4. The points are as follows:

1. Fact Issues On Causation. In the Kirby Lake and Friendswood Contract cases, the Developers failed to prove causation conclusively — that is, they failed to prove that if the Authority had in fact included a developer reimbursement proposition in the September 2004 bond election, the voters would have approved the bonds and the condition precedent to payment would have occurred. Therefore, the Developers failed to carry that burden and the summary judgment must be reversed. *See, e.g., Fair v. Uhr*, 310 S.W.2d 125, 128 (Tex. Civ. App.—Fort Worth 1958, writ ref’d n.r.e.) (“[I]f a promisor (as one in the position of Fair) prevents or hinders the occurrence of a condition, **and the condition would have occurred except for such prevention or hindrance**, the condition is ordinarily excused.) (citing RESTATEMENT (First) OF CONTRACTS § 295); RESTATEMENT (SECOND) OF CONTRACTS § 245 (1981), comment b (“if it can be shown that the condition [precedent] would not have occurred regardless of the lack of cooperation, the failure of performance did not contribute materially to its non-occurrence and the rule does not apply.”). In addition, the Authority raised a genuine issue of fact on causation by proof of the following:

a. *Outcome of 1998 Elections.* In May and October of 1998, the electorate twice refused to authorize bonds to purchase the Developers’ facilities, as well as facilities that had been installed by other developers under similar contracts. In the October 1998 election, with a clear choice to make, the voters demonstrated that while they approved of tax-funded expenditures for the construction of necessary infrastructure and maintenance, they strongly disapproved of spending tax dollars to subsidize private development.<sup>48</sup> On the basis of this evidence alone, a reasonable jury could fairly conclude that a mere five years later, in September 2004, the electorate would have voted down a third proposition to reimburse these same developers out of tax bonds.

b. *Structure of the Ballot.* If the Authority had included a proposition for developer reimbursements in the September 2004 bond election, the ballot would *not* have been vaguely worded to hide from the voters the developer reimbursement items that they had twice rejected in 1998. All five directors who were on the Authority’s board in September 2004 would have put this issue before the voters using the same split ballot format that the Authority had used in October 1998<sup>49</sup> — especially in light of the approval of that format by this Court of Appeals in *Kirby I.*<sup>50</sup> For this reason the Court cannot assume that simply because the voters approved the September 2004 bond proposition, the voters would have also approved a separate proposition to reimburse developers.

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<sup>48</sup> See Order Canvassing October 3, 1998 Bond election (08-1003 CR 1045-49; 09-0064 CR 493-505).

<sup>49</sup> See Affidavits of Yoder, Branch, Savely, Johnson and Ferguson. (08-1003 CR 1064-97; 09-0064 CR 519, 598-605).

<sup>50</sup> *Kirby Lake I*, 123 S.W.3d at 747 (“The contracts contain no requirement that the ballot language be structured in any particular way . . .”).

c. *Opinion Polls.* The two Stein-Murray public opinion polls conducted in 2006 show that a large majority of the pool of likely voters in the Authority remain opposed to subsidizing developers.<sup>51</sup> Professor Stein's affidavits and attached studies, taken as a whole, are sufficient to establish that voters in the Clear Lake City Water Authority would not have passed a bond initiative to reimburse developers in 2004.

d. *November 2006 Election Results.* The 5-to-1 landslide defeat of the developer reimbursement proposition in November 2006 shows that since 1998 the electorate has not grown any more enthusiastic about paying taxes to subsidize private development; the opposite is true.

2. Fact Issue On Friendswood's Ability To Perform. In the district court below, Friendswood failed to prove conclusively that it provided the required proof to the Authority of its ability to convey unencumbered title ownership to the facilities and assign all warranties and guarantees relating to them. See Friendswood Agr., Sec. 3.4; *Dixie Oil Co. v. McBurnett*, 6 S.W.2d 83, 84 (Tex. Comm'n App. 1928, judgment approved) ("The rule is well settled that where parties enter into a contract providing that the purchase of property is subject to the approval or acceptance of the title by the purchaser's attorney, if the latter disapproves or refuses to accept it, the seller is not entitled to enforce specific performance of the contract without pleading and proving that the attorney's rejection of the title was arbitrary or in bad faith."). A reversal and remand for trial on that condition precedent is therefore in order.

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<sup>51</sup> See Stein Affidavit and attached reports (08-1003 CR 1099-1126; 09-0064 CR 540-78).

3. Fact Issues on Developer Interest. The Agreements provides for interest paid *at the lesser rate* of interest on bonds *actually sold* to reimburse the Developers or of the interest the Developers *actually incurred*.<sup>52</sup> In the Contract Cases, the Developers failed to prove either rate of interest conclusively. Accordingly, the summary judgments cannot stand.

4. Excessive Statutory Interest Rates. Where, as here, the contract sets the interest rate, the contract rate governs. *See* TEX. FIN. CODE ANN. §§ 304.002, 304.003, 304.103. The Developers all failed to prove the applicable contract rate.

5. Error In Refusing To Consider 2006 Election Results. In the Kirby Contract Case, the district court abused its discretion in refusing to grant the Authority’s post-judgment motion for new trial to supplement the summary judgment record with the November 2006 election results. (08-1003 CR 1247-56). In the Friendswood Contract Case, the district court erred in excluding those results from the Authority’s summary judgment record on the ground of relevancy. (09-0064 CR 697, 736). The landslide rejection of the bond proposition in November 2006 is highly probative to the issue of causation – whether the electorate would have passed a developer reimbursement proposition had it been submitted to the voters in September 2004.

6. Error In Issuing A Writ of Execution. In the Kirby Contract Case, the trial court erred by issuing a writ of execution to the enforce the judgment. *See Willacy County Water Control & Improvement Dist. No. 1 v. Abendroth*, 177 S.W.2d 936, 937 (Tex. 1944)

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<sup>52</sup> *See* Agr. at 3.02 (providing that the rate of interest is “equal to the lesser of (i) the rate of interest actually incurred by the Developer to fund such payments or, if the purchase price is paid in whole or in part from the proceeds of bonds by the Authority (ii) the average net effective rate borne by such bonds; . . . .”) (CR 103).


(“Public policy exempts political subdivisions of the State performing governmental functions from execution or garnishment proceedings.”).

7. Error In Ordering The Authority To Raise Taxes. In the Friendswood Contract Case, the district court erred in decreeing that “Pursuant to Section 49.066(b) of the Texas Water Code, the Court orders Defendant’s board of directors to levy, assess and collect taxes or assessments to pay the amounts awarded to Plaintiff in this Final Judgment.” (09-0064 CR 740). This mandatory injunction to raise taxes is baseless because (1) no pleadings support it, (2) Friendswood’s summary judgment motion did not request that injunction, and (3) Friendswood failed to adduce any evidence to support the injunction.

## **VI. CONCLUSION**

For the foregoing reasons, the respondent Authority requests this Court to dismiss, deny, or refuse the Developers’ petition for review. If the review is granted, the Authority requests the Court to affirm the judgments of the Court of Appeals. Alternatively, in the event any of the judgments are reversed, the Authority requests a remand to the Court of Appeals for consideration of other issues briefed in, but not decided by, that court. *See* TEX. R. APP. P. 53.4. The Authority also requests any other and further relief to which it may be entitled.

Respectfully submitted,

By: 

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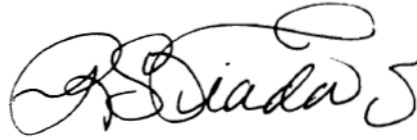
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ATTORNEYS FOR RESPONDENT  
CLEAR LAKE CITY WATER AUTHORITY

**CERTIFICATE OF SERVICE**

Pursuant to the provisions of TEX. R. APP. P. 9.5, I certify that on August 21, 2009, a true and correct copy of the foregoing petition was served on the following persons by U.S. certified mail, return receipt requested:

Lawrence J. Fossi  
Karen Jewell  
Fossi & Jewell, L.L.P.  
4203 Yoakum Blvd., Suite 100  
Houston, Texas 77006

A handwritten signature in black ink, appearing to read "R. Viada III", written in a cursive style. The signature is positioned above a horizontal line.

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Ramón G. Viada III