

FILED
IN SUPREME COURT
OF TEXAS

JUN - 1 2009

BLAKE HAWTHORNE, Clerk
BY _____ Deputy

Case No. 09-0064

IN THE SUPREME COURT OF TEXAS

FRIENDSWOOD DEVELOPMENT COMPANY, LTD.,

Petitioner,

v.

CLEAR LAKE CITY WATER AUTHORITY,

Respondent.

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

PETITIONER'S REPLY TO RESPONSE TO PETITION FOR REVIEW

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TO THE HONORABLE SUPREME COURT OF TEXAS:

Petitioner Friendswood Development Company, Ltd. ("Friendswood") files this reply to the Response to Petition for Review filed by Respondent Clear Lake City Water Authority (the "Authority").

I. Introduction

This case presents the question whether a governmental entity can deliberately sabotage its ability to honor a purchase agreement, repudiate any further payment obligation under that agreement, continue to use the unpaid-for property with no compensation to the property's owner, and announce that it intends to do so forever, without ever becoming liable under the contract.

II. This Court Has Jurisdiction

The Authority argues that this Court lacks jurisdiction under Sections 22.001(a)(2) and 22.225(c) of the Texas Government Code because the Fourteenth Court of Appeals has harmonized this case, the Kirby Lake Contract Case,¹ the Kirby Lake Takings Case,² and *Kirby Lake I.*³ Response at xi-xii.

The cases, however, cannot be reconciled. In *Kirby Lake I*, the court of appeals construed agreements between the Authority and other developers (in all respects the

¹ *Clear Lake City Water Auth. v. Kirby Lake Dev., Ltd.*, No. 14-00013-CV, 2008 WL 3062234 (Tex. App.—Houston [14th Dist.] Aug. 7, 2008, pet. filed).

² *Kirby Lake Dev., Ltd. v. Clear Lake City Water Auth.*, No. 14-06-00924-CV, 2008 WL 3016308 (Tex. App.—Houston [14th Dist.] Aug. 5, 2008, pet. filed).

³ *Clear Lake City Water Auth. v. Kirby Lake Dev., Ltd.*, 123 S.W.3d 735 (Tex. App.—Houston [14th Dist.] 2003, pet. denied).

same as the agreement at issue here) to mean that voter-approved bond funds are a condition precedent to the Authority's obligation to purchase the Facilities, assuring the developers that its interpretation would not work a forfeiture of their right to payment. In the Kirby Lake Contract Case, the court construed the same contracts to mean that the Authority was required to put the bond proposition to the voters only once, thereby working the very forfeiture that *Kirby Lake I* had promised was avoided. In the case below, the court of appeals applied the holding in the Kirby Lake Contract Case to the agreement between Friendswood and the Authority, meaning that when voters failed to approve the sale of bonds to pay for the Facilities in the May 1998 bond election, Friendswood forfeited any contractual right to payment. And, in the Kirby Lake Takings Case, the court concluded that the developers have no takings claim because their contracts allow the Authority to use the Facilities free of charge until the Authority purchases them – never mind that there never will be a purchase.

Further, as explained in Friendswood's petition for review, the court of appeals' construction of the developers' agreements with the Authority cannot be reconciled with other Texas court decisions that the use of "any" in analogous provisions means "every" or "all." *See* Petition for Review at vii & n. 3.

The Authority argues that Friendswood has not pointed to any appellate opinion that "holds differently" from the opinion now on review, urging a narrow interpretation of the Court's conflicts jurisdiction. Response at xii-xiii. This Court's conflicts jurisdiction, however, is not so narrowly constrained. "For cases filed after 2003 (as this one was), a conflict is sufficient for jurisdiction 'when there is inconsistency in the

respective decisions that should be clarified to remove unnecessary uncertainty in the law and unfairness to litigants.”” *In the Matter of H.V.*, 252 S.W.3d 319, 323 (Tex. 2008 (quoting *Henry Schein, Inc. v. Stromboe*, 102 S.W.3d 675, 701 (Tex. 2003))). *See also Snyder Communications, L.P. v. Magana*, 142 S.W.3d 295, 298 (Tex. 2004) (“[C]onflicts jurisdiction can exist when a court of appeals correctly states the law, but misapplies it.”).⁴

III. *Kirby Lake I* Contemplated Future Bond Elections to Compensate the Developers

The Authority argues that *Kirby Lake I* left unresolved the question of whether the Authority was obligated to include propositions in future bond elections to compensate the Kirby Lake developers, citing a passage from footnote 7 of the opinion. Response at 7. In footnote 7, however, the court discussed, and rejected, the developers’ contention that it was wrongful for the Authority to make the measure for authorizing bonds to purchase the Facilities separate from other measures on the October 1998 ballot. The passage had nothing to do with the Authority’s obligation to include such a measure in each election that it holds.

Earlier in the opinion, the Fourteenth Court appreciated that forfeitures are disfavored under the law and explained why its interpretation of the Agreements avoided any forfeiture:

⁴ This Court also has jurisdiction over this appeal under Section 22.001(a)(6) of the Government Code because, particularly when considered together with the Kirby Lake Takings Case, the court of appeals has committed an error of law of such importance to the state’s jurisprudence that it should be corrected.

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

Kirby Lake I at 745 (emphases added).

IV. The District Court Properly Ignored Stein's Public Opinion Survey and the Sham 2006 Bond Election

In its Statement of Facts, the Authority notes public opposition to reimbursement of the Friendswood and the other developers, as evidenced by a public opinion survey conducted by Professor Robert M. Stein, Jr. and the November 2006 bond election, which voters defeated. Response at 8-10. The Authority says nothing about why either Stein's survey or the 2006 election are relevant, because they are not. The district court properly refused to consider both.

Stein's survey was inherently speculative. Neither he nor anyone else has a crystal ball to tell us what would have happened at the September 11, 2004 election had the \$1.15 million been sought to pay Friendswood, in addition to the \$29.1 million that was overwhelmingly approved. Further, Stein's methodology was unreliable under the test set forth in *Merrell Dow Pharmaceuticals, Inc. v. Havner*, 953 S.W.2d 706 (Tex. 1997).

As to the November 7, 2006 bond election, the Authority held that election for the purpose of manufacturing evidence for this case and for the Kirby Lake Contract Case.

The Authority's breach, however, was absolute when it deliberately excluded from the September 2004 bond election ballot an authorization for the purchase of the Facilities. What occurs at any election after that date cannot expunge the Authority's liability. And, as the evidence below showed, the Authority's board of directors called the November 2006 election with the intention and determination that the bond proposition would fail. The board then took actions calculated to ensure its failure. *See* App. 12, CR 32-52; App. 13, CR 54-65. Thus, the measure's failure was not merely predictable, but inevitable.

V. There Are No Other Grounds to Affirm the Court of Appeals' Judgment

The Authority's argument that it was obligated to include bond authorization to pay Friendswood in only one bond election, like the court of appeals' opinion below and in the Kirby Lake Contract Case, is confined to the language of Section 3.01 of the Agreement. Response at 11-13. When considered as a whole, the Agreement plainly contemplates that Friendswood would construct the Facilities and the Authority would purchase them. *See* Petition for Review at 8-12. Thus, the court of appeals' interpretation of the Agreement is wrong, and there are no other grounds to affirm the court of appeals' judgment.

A. The Contract Is Not Terminable at Will.

The Authority urges that if the Agreement is read to require the Authority to include payment authorization for Friendswood in more than one bond election, then the Agreement is a "perpetual contract" of the sort disfavored by courts and consequently is terminable at will. Response at 13-14. Indeed, the Authority claims that it terminated the

Agreements when it rejected the developers' demand to place an authorization measure on the 2004 ballot. *Id.* at 14.

This argument fails at several levels. At the outset, the Authority's conduct is contrary to its claim of termination. The Authority continues to use the Facilities free of charge (and continues to assess taxes and fees to hundreds of homeowners based on such use). If the Authority actually had terminated the Agreement, then it should have ceased using the Facilities, and returned those Facilities to their rightful owner – Friendswood. What the Authority actually did in 2004 was not to terminate the Agreement, but instead to repudiate the Authority's unfulfilled contractual obligations while retaining all of its contractual benefits.

Further, the Agreement is not of indefinite duration. Rather, both the lease that is part of the Agreement, and the Agreement itself, terminate once the Authority has fully paid for the Facilities. *See* Agreement at Section 4.01 (providing that the lease “terminates” upon the Authority's acquisition of the Facilities),⁵ Section 4.03 (indicating that “termination of the Agreement” occurs contemporaneously with termination of the lease),⁶ and Section 4.05 (similarly indicating that “this Agreement is in effect” only so long as the lease continues).⁷ By contrast, the contract at issue in the case relied upon by the Authority, *Clear Lake City Water Authority v. Clear Lake Utility Co.*, 549 S.W.2d 385 (Tex. 1977), had no provision for termination whatsoever. *Id.* at 388.

⁵ App. 7, CR 104.

⁶ App. 7, CR 105.

⁷ App. 7, CR 105.

And, the Authority's argument ignores that it is statutorily authorized to "contract . . . for the joint construction, financing, ownership, and operation" of any facilities necessary to accomplish its purposes, and that its contracts may be of "*unlimited duration* . . . on the terms and conditions the board may consider desirable" for the purchase of facilities. TEX. WATER CODE ANN. §§ 49.213(a) & 49.213(c)(4) (emphasis added).

B. The Contracts Do Not Contravene the Reserved Powers Doctrine.

Citing *City of Corpus Christi v. Bayfront Associates, Ltd.*, 814 S.W.2d 98 (Tex. 1991), the Authority urges that by requiring it to include authorization to purchase the Facilities in any bond election, the Agreement would result in an abdication of the Authority's function of holding bond elections and issuing bonds. Response at 14-15. The agreement at issue in *Bayfront Associates*, however, was held to be invalid to the extent it purported to *preclude* a governmental entity from holding a bond election and issuing bonds. 814 S.W.2d at 107. The Agreement here does not give Friendswood the right to call a bond election or issue bonds. It merely requires that the Authority include, in any bond election it might choose to conduct, authorization for the amount required to purchase the Facilities.

VI. The Authority Is Not Immune from Suit

Finally, the Authority is not immune from suit. The organic statute governing the Authority, Section 49.066 of the Water Code, plainly waives immunity. *See* TEX. WATER CODE ANN. § 49.066 (stipulating not only that a special district may "sue and be sued," but also allowing that a suit for contract damages "may be brought"; detailing how

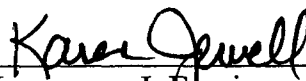
a district may be served with a lawsuit; providing a mechanism for enforcement of a judgment against a district; confining the district's liability in several ways; forbidding certain types of lawsuit unless such suits are brought by the Texas Attorney General; and excusing a district from posting a bond for appeal, injunction, or costs).

And, the 2005 amendments to the Local Government Code expressly allow Friendswood's suit in this case. TEX. LOC. GOV'T CODE §§271.151 – 271.160. The 2005 amendments nowhere suggest any distinction between real property and personal property as the Authority suggests. Response at 15. Under the Agreement, Friendswood is obligated to provide goods – water, sewer, and drainage pipelines – and services – construction of the water, sewer, and drainage facilities, and construction of street improvements. *See* Agreement at Article I and Article V. Thus this suit falls under the Local Government Code's waiver of immunity.

CONCLUSION AND PRAYER

For the reasons stated above and in its petition for review, this Court should grant Friendswood's petition for review, reverse the portion of the judgment of the court of appeals holding that the Authority did not breach the Agreement, and render judgment affirming the judgment of the district court. Alternatively, this Court should grant Friendswood's petition for review, reverse the portions of the judgments of the courts below holding that the Authority did not breach the Agreement, and remand this case for trial.

Respectfully submitted,



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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the 29th day of May 2009, a copy of the foregoing Petitioner's Reply to Response to Petition for Review was served by facsimile and by United States First Class Mail, certified, return receipt requested on Respondent Clear Lake City Water Authority, through its counsel of record:

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