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Supreme Court of Texas.

Kirby Lake Development, Ltd., Miter Development Company, Taylor Lake, Ltd., and Friendswood Development Company, Ltd., Petitioners,

v.

Clear Lake City Water Authority, Respondent.

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

January 19, 2010.

Oral Argument

Appearances:Lawrence J. Fossi, Fossi & Jewell LLP, Houston, TX, for petitioners.

Ramon G. Viada, III, Viada & Strayer, The Woodlands, TX, for respondent.

Before:

Chief Justice Wallace B. Jefferson; Nathan L. Hecht, Harriet O'Neill, Dale Wainwright, David Medina, Paul W. Green, Phil Johnson, Don R. Willett and Eva M. Guzman, Justices.

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CHIEF JUSTICE WALLACE B. JEFFERSON: The Court is ready to hear argument in 08-1003, Kirby Lake Development vs. Clear Lake City Water Authority.

MARSHALL: May it please the Court, Mr. Fossi will present argument for the Petitioners. The Petitioners have reserved two minutes for rebuttal.

ORAL ARGUMENT OF LAWRENCE J. FOSSI ON BEHALF OF THE PETITIONER

ATTORNEY LAWRENCE J. FOSSI: May it please the Court, these consolidated cases present questions about the scope of a legislative waiver of immunity from suit, and they present questions at the intersection of takings law and contract law. I'd like to discuss how both these types of questions are about the separation of powers under the Texas Constitution. They are really about the larger question of who under our Constitution decides what. I will touch very briefly on the salient facts. The parties signed sales and lease agreements similar to scores of earlier agreements that the Authority had signed with scores of other developers. The developers here did everything

that they promised to do. They ordered distribution lines, the sanitary sewer lines, they made the drainage improvements which the Authority then leased, and those leases were, quote, “without charge until such time as the Authority acquires the facilities.” The Authority immediately began assessing fees and taxes on those facilities and it continues to do so to this day. It was obligated to purchase the facilities only out of bond proceeds, but it promised that, quote, “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 then conducted two remarkable bond elections in 19- --

JUSTICE HARRIET O'NEILL: And would your position be that, as you read that language, that it has to be included in any bond election until the end of time?

ATTORNEY LAWRENCE J. FOSSI: Yes. Yes, until it passes. And let me say that that's not so extraordinary or wild, as the affidavit of Mr. Bonham establishes, a very deeply experienced bond attorney. No, there had never been an instance where a board or board members, particularly a board chairman, would sign a contract in year one and then in year two actively attempt to subvert and undermine it. These bond elections almost always succeed. This has always been mostly a timing measure, and Mr. Bonham's view further is that there is implicit in undertaking an agreement like this, an obligation to support the bond measure or at least to remain neutral in it. So I don't think that we're imposing any great burden on the Authority if it is until the end of time, which of course it wouldn't be. In time these facilities deteriorate and subdivisions come and go, and it's a small burden for them to include this in their bond elections. That's our view there.

JUSTICE PAUL W. GREEN: Your position is sort of tied to the public attitude about this, isn't it? I mean it's -- in other words until the public comes around to your point of view, which is a political question, it seems to me, that you're not in a position to recover.

ATTORNEY LAWRENCE J. FOSSI: Well, I think in effect certainly if we lose in the election, we lose in the election.

JUSTICE PAUL W. GREEN: And you have.

ATTORNEY LAWRENCE J. FOSSI: And we have. And this would be a hard case if we'd been included in the 2004 election, and some of the board members had campaigned against us, then you'd be faced with --

JUSTICE PAUL W. GREEN: Well, what about -- I mean okay, so they did. There is a counter campaign to that, presumably, that the developers would contest the arguments made by these board members. It's a political question that so far the developer has been unable to persuade the public.

ATTORNEY LAWRENCE J. FOSSI: Well, you know, in the 2004 election, there were several million dollars for new development, okay, and notwithstanding that the Authority had, some of the board members on the Authority had taken the view, “Oh, no subsidies for developers.” They wanted the subsidies in that election; they just wanted them for the developers and development of their choice, okay? So is it a political question? I suppose that you can always, especially if you're on a board or authority board, you can always generate enough antipathy toward a measure to cause it to fail, but I think that that is an extraordinary thing for a board to be doing. Having signed an agreement

saying we will acquire this, we'll put you -- and get bond proceeds.

JUSTICE PAUL W. GREEN: Sign an agreement with a political organization, that is to say an organization has elected officials. Isn't that what you're gambling on?

ATTORNEY LAWRENCE J. FOSSI: I think what we're -- I think the developers undertook some gambles. In truth, bond measures like this almost never if ever fail. They just didn't fail. That's how the Clear Lake --

JUSTICE HARRIET O'NEILL: Well, but --

ATTORNEY LAWRENCE J. FOSSI: I'm sorry.

JUSTICE HARRIET O'NEILL: But the way this reads, just to follow up on Justice Green's question, the way the agreement reads, it's sort of like, you know, we can have one or not have one. They could decide never to have a bond election. They could decide to -- there didn't seem to be much obligation on the Water Authority.

ATTORNEY LAWRENCE J. FOSSI: Yeah, I think in fact there had been, as a matter of practice, an understanding, a communication, a level of trust that developed over time between the members of the Clear Lake City Water Authority and various developers, okay, which is why and how it became the largest such governmental agency in the state.

JUSTICE HARRIET O'NEILL: I mean if you base it on level of trust, there would be no need for a contract. I mean we're bound by the contract language which seems fairly -- it doesn't put much on the Water Authority in terms of the bond election.

ATTORNEY LAWRENCE J. FOSSI: It doesn't put much on them, but it did put at least it put on them, I think, two things. Certainly it put on them the obligation to include us in the 2004 election, which by the way, was for $29 million. It would have required only an additional two and a half to pay us and it passed by an overwhelming margin of more than nine to one.

JUSTICE HARRIET O'NEILL: Let me ask you about the part of the agreement that says, “The Authority shall have the right to purchase the facilities with funds available from a source other than a bond sale.” What sort of discretion did they have to use other funds to pay for the facilities?

ATTORNEY LAWRENCE J. FOSSI: They have unlimited discretion, and each -- the latest information on that from their latest filings is that they had $8 million available in the most recently ended fiscal year from fees and taxes and assessments outside of revenues they collected from bond proceeds. They are entirely free today to write that check. They have simply searched for any way and every way not to have to do so.

JUSTICE PHIL JOHNSON: Did that statement disclose how much of that $8 million came from fees and service charges on these particular projects?

ATTORNEY LAWRENCE J. FOSSI: It doesn't break it out --

JUSTICE PHIL JOHNSON: It doesn't break it out?

ATTORNEY LAWRENCE J. FOSSI: -- subdivision by subdivision, no. And this an

accretion of many, many subdivisions.

JUSTICE PHIL JOHNSON: But the only way they get those is through fees and services charges on the water facilities; is that correct?

ATTORNEY LAWRENCE J. FOSSI: Water and sewer, correct.

JUSTICE PHIL JOHNSON: Water and sewer, so the very type thing that the developers put in is the revenue source for the district?

ATTORNEY LAWRENCE J. FOSSI: Exactly. It is exactly --

JUSTICE PHIL JOHNSON: The only revenue source for the district.

ATTORNEY LAWRENCE J. FOSSI: It is the -- well, that and bond proceeds, yes.

JUSTICE PHIL JOHNSON: And bond -- yeah, but bond proceeds you have to pay back.

ATTORNEY LAWRENCE J. FOSSI: It's the only net revenues. It is the net -- it's the life blood of the Water Authority, absolutely right. And the Commission was very -- excuse me, the Authority was very, very happy to have us do this, to sign these agreements. And you know, if you believe Mr. Bonham, it had at least a duty to be neutral in the bond elections, and it wasn't that. But certainly it had a duty to include us in the election in 2004.

CHIEF JUSTICE WALLACE B. JEFFERSON: Well, let me ask about this, and Justice O'Neill has already laid this out to a certain extent, but I'm reading the contract and the purchase and assignment, and it says, “The Authority intends to call a bond election but is not obligated to do so, and the Authority cannot predict when, if ever, an election and bond sale will occur.” And then on the language that she was talking about, sources from other funds, “The Authority shall have the right to use funds from another source, but shall have no obligation to do so.”

ATTORNEY LAWRENCE J. FOSSI: We don't agree with that.

CHIEF JUSTICE WALLACE B. JEFFERSON: So every time I, when I'm reading this language, I want to give you an opportunity to say how is the Authority bound either to hold another bond election or to find sources outside a bond election to pay this 70 percent that was, that the developers incurred?

ATTORNEY LAWRENCE J. FOSSI: Kirby Lake I, Chief Justice, was about whether the Authority was bound to use other sources, and the decision there was no, it's not. And we accept that, we're not here to reargue that today. The developers cannot do anything to force the Authority ever to have another bond election. It just so happens that they've had one -- two of them and then a sham one in 2006, a total Chicago Black Sox throw the World Series away sham election for purposes of this litigation, but they've had two significant bond elections since then. If there had been none, we wouldn't be here. We would have no complaint. That would simply be tough luck for us. And that's a risk we certainly took when we entered into the agreement, so we accept that risk. So I hope that's an answer to your question.

JUSTICE NATHAN L. HECHT: You own the facilities?

ATTORNEY LAWRENCE J. FOSSI: Yes, isn't that curious? We own them.

JUSTICE NATHAN L. HECHT: Why don't you cancel the lease?

ATTORNEY LAWRENCE J. FOSSI: Well, that -- what would happen if we went out there and pulled the pipes out, you know, what kind of havoc would we wreck? The Authority talks out of both sides of its mouth on this issue, in the contract briefing, it says, “Well, we terminated the agreement in 2004 when we repudiated it and told you all our obligations are done.” In the takings case, it says, “Oh, those agreements are still in effect, and we're using it with your consent because we can lease it until we acquire it, but we never have to acquire it now because we never have to put you in another bond election.”

JUSTICE NATHAN L. HECHT: But I understand all that, but since you do own it and you can cancel the lease, why don't you just get an injunction against them from ever using the facilities?

ATTORNEY LAWRENCE J. FOSSI: Perhaps that's the next step. It seems to us we have, what we would prefer to do, of course, is have our contract remedy. We have contract remedies. It's a much better remedy for us; it's much less disruptive to the homeowners out there.

JUSTICE NATHAN L. HECHT: A lot of angry homeowners.

ATTORNEY LAWRENCE J. FOSSI: Pardon me? Yes, you certainly have --

JUSTICE NATHAN L. HECHT: A lot of angry homeowners, if they can't [Inaudible]--

ATTORNEY LAWRENCE J. FOSSI: Our customers, by the way, yes.

JUSTICE NATHAN L. HECHT: Right.

ATTORNEY LAWRENCE J. FOSSI: Okay. Let me talk about immunity for just a moment. I think there are three, there are challenges to immunity. There are three reasons why the legislative waiver of immunity from suit exists here. One is under the organic statute, and that survives notwithstanding Tooke against Mexia, and if you read the appendix to Tooke in the majority opinion, the organic statute here is one of the most detailed and clear about that waiver, not as perfectly clear as it might be, but it's certainly left in the gray zone there, and I'm not going to repeat our arguments about that. The second argument goes to 271, which is the legislative enactment, the amendments in 2005 to the Texas Local Government Code, and you have the phrase “goods or services,” and the Court below in the Friendswood [Ph.] case went with us on services, and we have a very capable detailed brief from the Amicus Greater Houston Homeowners Association, the builders in Houston have filed a brief that details further this argument on services. I want to talk about goods for just a moment, because I think it's clear when you read the legislative history here, what we have was sort of an iterative process. This Court decided Tooke against Mexia, and the legislature said, “Wait a second, we had not understood it that way. That may be the correct analysis, that may have been the way it should have been since 1970,” but they didn't understand it that way. And they said, “We intend for this waiver of immunity from suit to be more broad.” And they then enacted these amendments in 2005, and in effect I think created a better mousetrap as a consequence of that process, but when they did it, the legislative history is clear; they wanted retroactively to waive immunity from suit in certain types of cases. And when

they said “goods or services,” they didn't mean that to be exclusive, excluding real estate, they meant everything, goods or services. There is nothing in that legislative history to suggest they wanted to exclude real estate. There is everything in that legislative history to show that they thought they were including it. They identified some of the cases that they disagreed with. They identified the Satterwhite case, which involved a contract for real estate. They identified -- I'm going to have to look at my notes now -- the McMahon Contracting case, the PKG Contracting case. It would be, it simply strains to think that they would want to eliminate contracts for real estate, and I hope that this Court when it addresses the opinion below will say, “No, the Legislature properly, it was its province to respond to our decision in Tooke, and it did it and we need to honor that now,” and “goods or services” has a broad expansive meaning, and it shouldn't be so narrowly confined as it has been. I'd like to talk now about the merits, and to talk to you about two whipsaws that we face in this case. The first is a whipsaw across time. In 2003, confronted with the argument that its reading of the agreements would impermissibly work a forfeiture, the Fourteenth Court said as follows, and this is in that Kirby Lake I case, and again, we're not here to reargue its decision, we accept its decision. But it was explaining why there was no forfeiture, and I think it got this right. It said, “Moreover” -- I'm reading from page 745 -- “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 appellee's 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.” Okay. That was the conclusion, that was the explanation from that Court about why there was no forfeiture in 2003. In other words, it's too bad that your authorization measure did not pass this time, but the Authority's obligation to include you in its ballots continues. So there is no forfeiture. In 2008, however, the Fourteenth Court had a different conclusion. It said that “any” means one and only. And here's how it dealt with the language in its opinion from five years earlier. It said, “The point of the discussion in the cited portion of Kirby Lake One was that voter approval was a condition precedent to the Water Authority's obligation to purchase the facilities. The issue of whether the Water Authority was obligated to place the bond measure in every election until it passed was not directly before us in Kirby Lake I, therefore the suggestion referenced by appellees is not controlling of this issue.” With due respect to the really truly capable Justices of the Fourteenth Court, that is not any kind of an explanation. The two opinions squarely contradict each other on that point.

JUSTICE NATHAN L. HECHT: But the part again, the part I have never understood about that is why it would ever work a forfeiture if you can just cancel the lease and you've got your property back? Which was, I assume that's the reason it's structured as a lease in the first place.

ATTORNEY LAWRENCE J. FOSSI: You know, the agreement says that the -- it doesn't give us a cancellation right of the lease. We don't have that right in the agreement. It says that the lease terminates once the Authority has acquired the facilities.

JUSTICE NATHAN L. HECHT: But surely if they repudiate the agreement, as they said, as they say they have, at least at one point they say they have.

ATTORNEY LAWRENCE J. FOSSI: We'd be here fighting about that issue, okay? The

Water Authority has not agreed with us on a single point. They have a hundred reasons why we're wrong about everything, even if one reason runs around a corner and runs into another reason going the other way. I don't think it's at all clear that we have a termination right when we're dealing with homeowners out there in a subdivision where this public agency is operating. Perhaps we do and perhaps that's the next step, and I hope it doesn't get to that.

JUSTICE NATHAN L. HECHT: Can you run the water agency?

ATTORNEY LAWRENCE J. FOSSI: Can we?

JUSTICE PAUL W. GREEN: Can you all just substitute and run it yourself?

ATTORNEY LAWRENCE J. FOSSI: I've not given that thought, but I don't know that we would have any authority to do that.

CHIEF JUSTICE WALLACE B. JEFFERSON: Well, the contract requires the Authority to operate and maintain the leased facilities; correct?

ATTORNEY LAWRENCE J. FOSSI: It does.

CHIEF JUSTICE WALLACE B. JEFFERSON: And to provide insurance on it.

ATTORNEY LAWRENCE J. FOSSI: Correct.

CHIEF JUSTICE WALLACE B. JEFFERSON: So that's the -- I mean they're -- so the Authority has an obligation that it seems to me gives them some -- in other words, this isn't just a free, a gratuitous installation of equipment, the Authority does have some obligations that continue on through the lease.

ATTORNEY LAWRENCE J. FOSSI: I agree with that.

CHIEF JUSTICE WALLACE B. JEFFERSON: Okay.

ATTORNEY LAWRENCE J. FOSSI: I agree. Those are minuscule compared to the payment obligations that they are evading, but yes, I think that that's true. Okay, I want to talk now about the second whipsaw, which is not a whipsaw across time but a whipsaw across claims. The Kirby Lake contract and takings claims were born in the same lawsuit. They became separated because of the statute that says you try your takings case in Harris County in the County Court at Law. On Tuesday, on a Tuesday last August, one panel of the Fourteenth Court held that the developers have no takings claim because the developers agreed to allow the Authority to lease and use the facilities free of charge until the Authority purchases the facilities. Thus that panel concluded the developers consent to the Authority's use of the facilities free of charge until the Authority purchases the facilities, which has not occurred. And they said they assume that we have a valid contract claim on our alleged contract claim, that we would have damages on that claim. That was Panel Number One on Tuesday. That Thursday a different panel ruled in the contract case and it said, “The Authority had fully satisfied its obligation by including the developers in the 1998 elections and it had no further obligation.” So that means the Authority will never again have to include the developers in a bond election, and why should they? They are off the hook now financially; they can use this, collect fees from this and never pay for this. Under the contract decision then, that time until the Authority purchases the facilities that was in the takings case, that will never occur,

that is never. There is no way that a single panel could have rendered both of these decisions. They are not in the same logical universe, they contradict one another.

CHIEF JUSTICE WALLACE B. JEFFERSON: Counsel, I see that your time has expired. Are there any further questions at this point? We'll hear from you back on rebuttal.

ATTORNEY LAWRENCE J. FOSSI: Okay. Thank you, Your Honor.

CHIEF JUSTICE WALLACE B. JEFFERSON: Thank you, counsel. The Court is ready to hear argument now from the Respondent.

MARSHALL: May it please the Court, Mr. Viada will present argument for the Respondents.

ORAL ARGUMENT OF RAMON G. VIADA, III ON BEHALF OF THE RESPONDENT

ATTORNEY RAMON G. VIADA, III: I think in order to get a handle on this case, it's proper to look at the economic realities of these kinds of contracts. The Malcolmson case that's cited in the briefing materials, a case out of the First Court of Appeals of Houston talks about the nature of these types of reimbursement or prefunding agreements. Basically, to look at the landscape of the law from the big picture we can step back and look at the Crown Hill case, and this Court's case holding in the Turtle Rock vs. College Station case, and that is that when developers do subdivisions, frequently it is required under city ordinances or under governmental entities regulations that are supervising the installation of the supervisions that as a condition applied approval or as a condition of providing services to the development, that the developer dedicates to the public the streets and roadways, the sewer and water lines that lead right up to the houses, because ultimately it's the governmental entity that's going to be maintaining those systems, maintaining those roads, that need to make sure that the road surfaces drain properly and so forth. This Supreme Court has said that under those circumstances the governmental entity does not have to pay compensation for those types of development dedications that are necessary to bring the subdivision on line with the governmental entity. So step one is in this particular contract it was the Authority that was providing a service to the developers in the sense of providing them a utility commitment to go forward with their development. The Authority made sure that through its engineering supervision of the installation of the water lines and the streets, that the streets and the lines were going in according to TNRCC regulations that were in effect at the time, and that if the voters approved bonds to pay a portion of the developer's costs, then the Authority would pay a portion of those costs to the developer. These are not contracts where, for example, the governmental entity says, “We'd like you to build us a courthouse or a new stadium or what-have-you,” the developer comes into the scene, builds something for the governmental entity and then there's a payment for that type of service.

JUSTICE NATHAN L. HECHT: But do you think that the developers anticipated at that time, or the Authority itself for that matter, that board members would oppose the election and basically tell people -- and this doesn't seem to me to be a hard choice for voters -- “You can either continue to use everything you've got and not pay for it, or you can continue to use it and pay for it. Now which would you like to do?” “Well, I think I won't pay for it.” Okay. Was there a contemplation that, oh yes, this looks like a reimbursement, but

actually it's just pie in the sky?

ATTORNEY RAMON G. VIADA, III: I think that at the time these contracts were entered that the Board that was in effect at the time assumed that the voters would pass the bonds as they had in most of the other elections that had gone before the electorate. That typically these, the propositions go before the electorate in a fairly omnibus format. This is in the Clear Lake area and there are a lot of rocket scientists, real rocket scientists who live out there, and a number of them did figure out that some of this bond money was going to reimburse or subsidize private development. The movement began from the grass roots that, wait a minute, we don't mind our tax dollars going to pay for infrastructure that's being used to maintain the plant, but we don't want to pay tax dollars for developers to subsidize their costs for the development.

JUSTICE NATHAN L. HECHT: But I guess if you don't pay tax dollars at the outset, it ups the price of the house.

ATTORNEY RAMON G. VIADA, III: That's true, and I would assume that the developers who had to run this by the voters first understood that either the money was going to come to them through the Water Authority or they were going to have to charge more money for their end product, and that was the risk that they took, that there was a, the voters had to approve the bonds in order for the Authority to be obligated to pay. And the voters, as the Court knows, have never approved these bonds. What the District Court did in two of these cases below was simply to say that the voters are out of it. Because the Authority did not place these propositions on a ballot, that not only does the Water Authority become obligated to pay, it doesn't matter whether the voters had voted it down. In other words, the developers get a TKO if in the third election the Authority says, “We're not going to put them in there,” and the developers sue, they automatically are able to get, as they see it, all the reimbursement that they claim they are entitled to under the contracts. But the contracts require that the voters approve the bond funds. The Malcolmson case makes the point that these types of contracts do require that the developers assume the risk that the voters are going to say no, and if the voters say no, that means that the developers don't get reimbursed in this sort of an arrangement.

JUSTICE NATHAN L. HECHT: Can they cancel the lease?

ATTORNEY RAMON G. VIADA, III: Can they cancel the lease? I haven't analyzed that question, but the lease is for an indefinite term. The developers have not told us, “Stop supplying the homeowners with water or sewer, or pay us some rent for the water and sewer.” That hasn't happened yet, it's not in our case, but we've continued to supply the water and sewer to the homeowners there. We've continued under the lease obligation to maintain the lines, to insure the lines, provide indemnity on the lines, which was the arrangement, the default arrangement in the event that the voters didn't approve the bonds.

JUSTICE NATHAN L. HECHT: And I didn't quite understand that part because I was unclear. Did the Authority take the position at some point that the contracts were no longer valid?

ATTORNEY RAMON G. VIADA, III: No.

JUSTICE NATHAN L. HECHT: They've been terminated?

ATTORNEY RAMON G. VIADA, III: The Authority has never taken the position that the contracts in their entirety, are terminated or no longer valid. I think that the Authority's position from the outset has been, and you can see that in Footnote No. 7 of the first Kirby Lake opinion, we did argue the point that the contracts called for one election that was being contemplated at the time that they were entered. When the voters said no in that election, our obligation to go back to the voters in every successive election isn't there in the contract. When the developers came to us at election three and said that the contract requires that you put us in every election potentially until the end of time, we said, “No, we put you in one election and that's all we have to put you in.”

JUSTICE HARRIET O'NEILL: But if the language is unclear, in order to avoid a forfeiture, you'd have to read into the agreement a continuing requirement to include it in the bond.

ATTORNEY RAMON G. VIADA, III: No, I don't believe that's the case, Your Honor. The argument about the forfeiture, I think, is a red herring. There is no forfeiture because the Authority does not own the lines. We haven't taken the lines; all we have is a lease to start out with. They haven't forfeited anything, they still own the lines and if the Authority wants to own the lines, then we would have to pay for them.

JUSTICE PHIL JOHNSON: But if you only have the obligation to put it on one bond, proposal and they say no, at that point under your view the lease continues in perpetuity. You have the right to use as long as you want to their property?

ATTORNEY RAMON G. VIADA, III: We have the right -- we have the --

JUSTICE PHIL JOHNSON: And they can't terminate the lease. What would be their basis for terminating then? There is no breach, it seems to me like.

ATTORNEY RAMON G. VIADA, III: Well, I didn't say that they can't terminate the lease.

JUSTICE PHIL JOHNSON: What would be their basis for terminating the lease? It goes on until you buy it, I thought.

ATTORNEY RAMON G. VIADA, III: That would be correct.

JUSTICE PHIL JOHNSON: All right, and you haven't bought it, so how would they have a basis for terminating the lease unless you breached somehow, I guess is what's troubling me on this. And if you only have to put it on one and you did, you're not breaching the lease because you're just maintaining their equipment, but they can't get their equipment, they can't terminate the lease. Why haven't you effectively -- you just keep using their equipment and they can't do anything about it.

ATTORNEY RAMON G. VIADA, III: Well, and I'll take it a step at a time, Your Honor. Number one, they haven't tried to do anything about it in the sense of terminating the lease.

JUSTICE PHIL JOHNSON: Okay, but I'm asking you why is it not some type of a taking? If you're using their property, they can't get it back because there is no breach because you only had to put it on one time, whereas if you have

to put it on every time and you don't, then you breach and they have a choice.

ATTORNEY RAMON G. VIADA, III: It's not a taking because we have the, we have assumed possession of the lines pursuant to a lease agreement. That's a contract. We have --

JUSTICE PHIL JOHNSON: Consent.

ATTORNEY RAMON G. VIADA, III: That the, that the developers said, “Hook up to our lines,” we did. We have a lease agreement. We've been able to use the lines pursuant to that lease agreement with their consent up until this very moment. We have been providing the homeowners who purchased the homes from the developers services through those lines with their consent under a written lease agreement, so --

JUSTICE PHIL JOHNSON: Then we go to Justice O'Neill's question, if you just keep it in perpetuity, is that not some kind of a forfeiture?

ATTORNEY RAMON G. VIADA, III: I don't believe it's a forfeiture, number one, because that lease agreement was a bargained-for agreement whereby the Authority agreed to maintain lines and to insure lines, which confers value on the developers, which confers value on the property owners ultimately because they don't have to maintain the lines. This is an agreed-upon exchange. I don't know that it, I don't know how that it can be a taking if the government did not appropriate property that is owned by the citizen --

JUSTICE PHIL JOHNSON: Well, this --

ATTORNEY RAMON G. VIADA, III: -- without, without bargained-for consideration.

JUSTICE PHIL JOHNSON: Move away from the taking to the forfeiture though, because I understand your consent argument on that. But the forfeiture, they've got property they can't do anything with because the government is not going to let them have it, and they have no way of -- you're not going to give it back to them apparently.

ATTORNEY RAMON G. VIADA, III: Well --

JUSTICE PHIL JOHNSON: And they've got property and you're using it and getting revenues from it and maintaining it, and I understand all that, but they still have property in the ground and they can't get it. And there's just no -- they have no option, it seems to me like. Isn't that some kind of a forfeiture --

ATTORNEY RAMON G. VIADA, III: Well --

JUSTICE PHIL JOHNSON: -- of the right to use?

ATTORNEY RAMON G. VIADA, III: I understand that the, that their contention is, is that they, that they deserve to be paid, but the contract requires that the payment be made with bond funds. It is a political question, not a contractual question, and that until the voters vote yes on bonds, that the Water Authority is not obligated to convert that agreed-upon leasehold into a complete purchase.

JUSTICE PHIL JOHNSON: You could pay them out of the funds that you have though, couldn't you, under the contract?

ATTORNEY RAMON G. VIADA, III: Certainly the contract gives the Authority the power, but not the obligation to use other funds.

ATTORNEY RAMON G. VIADA, III: Turning to the immunity question, we took an interlocutory appeal in the Friendswood case but dismissed it early on because we had won the case on the merits. I started my brief by addressing the merits first because we think the merits, we should win this case on the merits even if there is jurisdiction, but we argued that there isn't, and we believe that the Court, that the Fourteenth Court in the Friendswood case construed the immunity statute too broadly, and reads the Ben Bolt case to require that the contract immunity statute be read broadly. That's been the rule of this Court and of our Legislature that immunity statutes are read, are strictly construed, and there is no provision in Section 271.152 that requires a broad construction of that statute in contrast to, for example, the Tort Claims Act or all the other statutes that this Court has construed narrowly.

JUSTICE HARRIET O'NEILL: And isn't there just a fundamental difference though between a tort claim and a contract claim? And we want to construe governmental immunity less broadly in the contract context because we want entities to contract with the government, as opposed to a tort, money damages suit. So there would be some argument for construing sovereign immunity stricter in a tort case than in a legislatively created contract sort of adjudication venue. Those cases don't seem to -- strict construction on governmental immunity doesn't seem to apply to the contract context.

ATTORNEY RAMON G. VIADA, III: Well, I certainly think the Legislature is in a position to write a different rule. I know that in the Code Construction Act there is the provision that waivers of immunity, there is not a waiver of immunity unless it's clear and unambiguous. The Legislature has said that's the way they want their codes construed, and certainly if they wanted this particular statute treated any differently, then they could very easily put a provision in the statute that says that this immunity statute should be read broadly by the Courts. In this particular case we even have the Court of Appeals that's saying that this contract appears to be one where there is no service that's being provided to the Water Authority, at least in a direct sense, that the developers are providing a service ultimately to the property owners who will purchase their properties. But really, the only thing that the Water Authority was doing in this contract was providing a utility commitment, assuming possession of water lines according to a lease, and then standing ready to purchase the property if as and when the voters would ever approve of it.

JUSTICE DAVID M. MEDINA: It seems like what they did here was a bait-and-switch. They baited the developer to come in and do all these things, and under the contract there would be some type of opportunity for them to recoup their money, and then the members went out and said, “Well, we don't want the voters to vote on this.”

ATTORNEY RAMON G. VIADA, III: Yeah. I don't really view it as bait-and-switch. There were different boards at different times, Your Honor, and you had a board that was much more developer-friendly, and then you had a board that came on, a number of people came on that were elected to the board that were opposed to voter reimbursements. I don't think that this was any

conspiracy from the top down, I think that the people in Clear Lake decided that they didn't want to subsidize developers with their tax dollars.

CHIEF JUSTICE WALLACE B. JEFFERSON: But you started out talking about the bigger picture, and I think Justice Medina makes a good point. There are benefits to a community, to a tax base for a city to develop property, and you can go about it a couple or ways. You can say to the developer, "You're going to have to take on all these obligations if you want to build here. You're going to build it and we're not going to, there is not going to be a bond election, you're going to just have to have higher prices for the residences." In which case the developer may so, "No, we're not going to develop that piece of property, there is another city that's going to give us this incentive to build, to develop this property by giving us this bond election round and this remedy to recoup some of our funds." And if that sort of dialogue is taking place, why isn't this, it seems at least like it could be a bait-and-switch, like you're inviting them to come, getting free services and then walking away from the deal.

ATTORNEY RAMON G. VIADA, III: Your Honor, I respectfully disagree. I don't think it is a bait-and-switch. I think the contract is full of express high-lighted language. It says the Water Authority may but has no obligation to use funds other than voter approved bond funds. The contract says the voters haven't approved any bonds to purchase these facilities. Until the voters do approve bonds to purchase these facilities, the Water Authority has no obligation to purchase them. I thought it was as clear as it could be on the face of that contract that the developers were at risk, that if the voters said that they didn't want their tax money being used for that purpose, that the developers were going to have to live with that no answer from the voters that the taxes wouldn't be used for that purpose, and that it is a political question at this point as to whether or not the --

JUSTICE HARRIET O'NEILL: It seems to me that what we're stuck with is just we're trying to construe this contract is what we're trying to do, and this language is not abundantly clear. The Authority does agree it shall include in any bond election it does hold subsequent to the effective date of this agreement bond authorization. It's not crystal clear to me whether that's one election or all elections, and how are we -- if it's ambiguous, how are we to resolve that?

ATTORNEY RAMON G. VIADA, III: Well, two points, Your Honor. One is in the Fourteenth Court opinion, Justice Hedges made the point that that sentence read alone would be ambiguous, but that when it's viewed in context, it's not ambiguous at all, that the Authority was talking about one election. Number two, we raised the point about the reserve powers doctrine. If the Court were to construe or if a jury were to find that really what the parties intended was that there would be elections from now until the end of time potentially, that it would in effect be a way of saying that one board on the Water Authority can put into a contract an obligation that all future boards, no matter who gets elected, they have to continually put that same item on the ballot from now until 2025.

JUSTICE NATHAN L. HECHT: But surely if the consideration for that agreement is to take something of value and hold onto it, yes, you bind future boards, or you can turn around and give it up, but I don't see how the government -- Justice Medina calls it "bait-and-switch," which kind of sounds like theft to me to just say, "We're going to keep what you gave us and not give you anything in return." There are economic reasons why maybe homeowners should

pay, maybe taxpayers should pay, but you shouldn't just get to take it. That's the difficulty.

ATTORNEY RAMON G. VIADA, III: Yeah, well again, I would respectfully disagree that there has been any taking of this particular property. We're using it under a lease and the developers have not asked for it back. How has it been taken?

JUSTICE DAVID M. MEDINA: Well, I think it's effectively been taken when you don't have the use of your property if you haven't been compensated for it, and I think this is what perhaps Justice Johnson was alluding to in his discussion. I thought you said that the contract gave you the power, or your client the power to make payments from funds on hand. Maybe I misunderstood what that meant, but that there -- so you have the discretion to make or not make these payments?

ATTORNEY RAMON G. VIADA, III: The contract, the contract says that the Water Authority has the right but not the obligation, and our view of that is that they certainly have in their discretion the power to pay with other funds, but not the obligation under the contract, if there is no contractual duty under the contract to pay with funds that the voters have not approved.

CHIEF JUSTICE WALLACE B. JEFFERSON: Are there any further questions? Thank you, counsel. The Court is ready to hear rebuttal.

JUSTICE HARRIET O'NEILL: Mr. Fossi, something I'm confused about is, if the authority breached the agreement by not including this reimbursement in the bond election--what are the damages? Does it just follow then that reimbursement is allowed? It seems to me that the remedy would be a declaration that it would be in any future ones, but I struggled with the concept of -- you should have included it and you didn't, and so here is all the money.

REBUTTAL ARGUMENT OF LAWRENCE J. FOSSI ON BEHALF OF PETITIONER

ATTORNEY LAWRENCE J. FOSSI: We have cited cases and the Rich against McMullan case, I think is a leading case, and there are others in our briefing. And what they say is this, that where there is a condition precedent and one party prevents it from being performed, okay, makes it, makes it impossible, then that party is not able to say, “Well, our breach did not cause you any damages.” Okay? What we do have is we have the plain fact of an election in 2004 that passed by a more than nine to one margin, and we've cited three or four cases in our briefing that say they are not free to prevent this condition precedent from happening, and then say, “Oh, but, you know, you still have more to prove.” The courts at that point assume that the condition would have been fulfilled. That's what the Texas law has been on that point. So I think that's where we are under Texas law, and I think those cases are pretty clear.

JUSTICE HARRIET O'NEILL: So you presumed that the voters would approve it even though twice they hadn't?

ATTORNEY LAWRENCE J. FOSSI: Well, you know, we have the crystal ball problem there. We do know they approved it by more than nine to one, an almost 30 million dollar bond measure.

JUSTICE HARRIET O'NEILL: Well, but my understanding is, is any bond measure

would be required to break down this specific bond purpose.

ATTORNEY LAWRENCE J. FOSSI: Absolutely not required. That became the Authority's practice when they wanted to target us for a defeat in '98. They separated us out in the second election and they said to the voters, “Go pass number one but vote no on number two.” And by the way, that so-called grass roots movement was led by Gayle Yoder, the chairman of the commission, who signed the contracts at issue here, and then led the campaign against these measures. So no, they're not required to do that, they did that as a matter of choice to isolate us, and had they isolated us in 2004 but included us, this would be a much more interesting and difficult case, but they didn't even do that. Very quickly on rebuttal, the statement that the Authority terminated the agreements is made on Respondent's brief on the merits at the bottom of page 28. As I said, they take one position when convenient and another at another time. To get back to the point you made, Justice O'Neill --

CHIEF JUSTICE WALLACE B. JEFFERSON: Mr. Fossi, your time has expired. Are there any further questions?

JUSTICE HARRIET O'NEILL: I'd like to hear his response to it.

CHIEF JUSTICE WALLACE B. JEFFERSON: Okay.

ATTORNEY LAWRENCE J. FOSSI: Very quickly. On this contract, if you look at that language, any bond election it does hold subsequent to the effective date of this bond authorization of this agreement, excuse me, that language subsequent to the effective date of this agreement is surplusage, it's redundant. You're not going to have authorized bonds in an election before the agreement. Why is it there? It's there to underline and emphasize that this obligation continues into the future. Look also at the second sentence in Section 301 -- excuse me -- 303, and you will discover that same phrase popping up in connection with “a bond election,” not the bond election, the only bond election, the bond election immediately following this agreement.

Finally, you've got five judges who have read it one way and three who have read it the other, and the five who have read it one way, including, you know, some experienced trial court judges like Patricia Hancock who has been there a long time and is a repository of common sense, have understood exactly what [inaudible].

CHIEF JUSTICE WALLACE B. JEFFERSON: Justice Johnson?

JUSTICE PHIL JOHNSON: Does the record reflect whether the properties in the subdivision were assessed pro rata, any pro rata assessments on those lots? Is that reflected in the record one way or the other?

ATTORNEY LAWRENCE J. FOSSI: I don't know. They are assessed pro rata for purposes of -- they have two kinds of payments. They pay fees for the services that they get and they pay taxes to the Water Authority. There is in the record a public offering --

JUSTICE PHIL JOHNSON: When they purchase the lots, when the lots are sold, were there any, any part of that sale allocated to pro rata assessments for water, sewer and all of that installation, or does the reflect --

ATTORNEY LAWRENCE J. FOSSI: I'm afraid I can't answer that question. Thank

you very much.

CHIEF JUSTICE WALLACE B. JEFFERSON: Thank you, counsel. The cause is submitted. That concludes the arguments for this morning, and the Marshall will adjourn the Court.

MARSHALL: All rise.

[End of proceedings.]

Kirby Lake Development, Ltd., Miter Development Company, Taylor Lake, Ltd., and Friendswood Development Company, Ltd., Petitioners, v. Clear Lake City Water Authority, Respondent.
2010 WL 303247 (Tex.) (Oral Argument)

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