No. 12-19-00172-CV

IN THE COURT OF APPEALS FOR THE STATE OF TEXAS
12TH JUDICIAL DISTRICT AT TYLER, TEXAS

NECHES AND TRINITY VALLEYS GROUNDWATER CONSERVATION DISTRICT,
Appellant

v.

MOUNTAIN PURE TX, LLC,
Appellee

On Appeal from the 2nd Judicial District, Cherokee County, Texas
Trial Court No. 2016-08-0543

BRIEF OF AMICI CURIAE HARRIS-GALVESTON SUBSIDENCE DISTRICT, FORT BEND SUBSIDENCE DISTRICT, LOWER TRINITY GROUNDWATER CONSERVATION DISTRICT, SOUTHEAST TEXAS GROUNDWATER CONSERVATION DISTRICT, AND OTHER GROUNDWATER CONSERVATION DISTRICTS IN SUPPORT OF APPELLANT

GM ELLIS LAW FIRM PC
GREGORY M. ELLIS
State Bar No. 06562500
2104 Midway Ct.
League City, TX 77573
(713) 705-4861—Phone
(512) 319-6698--Fax
Greg.Ellis@gmservices.info
ATTORNEY FOR AMICI CURIAE HARRIS-GALVESTON SUBSIDENCE DISTRICT, FORT BEND SUBSIDENCE DISTRICT, LOWER TRINITY GROUNDWATER CONSERVATION DISTRICT, SOUTHEAST TEXAS GROUNDWATER CONSERVATION DISTRICT, ET AL

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INTRODUCTION

The following is an amicus curiae brief filed in support of the Brief filed by the Appellant Neches and Trinity Valleys Groundwater Conservation District ("NTVGCD"). In so doing, the amici curiae – who are likewise Texas subsidence districts and groundwater conservation districts – intend to both summarize and supplement the central argument set forth in Appellant's Brief, in the hopes of furthering this Court's understanding of the core underlying issue in the present lawsuit, which is whether the Appellee Mountain Pure TX, LLC ("Mountain Pure")

has failed to plead a viable regulatory takings claim. The underlying facts are set forth in Appellant's Brief and adopted herein.

STATEMENT OF INTEREST

This amicus brief is presented by the Harris-Galveston Subsidence District, Fort Bend Subsidence District, Brazoria County Groundwater Conservation District, Hays Trinity Groundwater Conservation District, Kinney County Groundwater Conservation District, Mid-East Texas Groundwater Conservation District, Lower Trinity Groundwater Conservation District, Southeast Texas Groundwater Conservation District, Trinity Glen Rose Groundwater Conservation District, Bandera County River Authority and Groundwater District, Blanco-Pedernales Groundwater Conservation District, and Gonzales County Underground Water Conservation District, (jointly, the "Amici") in support of Appellant. The Amici subsidence districts and groundwater conservation districts[1] – like Appellant NTVGCD – are political subdivisions of the State of Texas, created by the Texas Legislature to accomplish the purposes of Article XVI, Section 59 of the Texas

[1] *See* TEX. SPEC. DIST. LOC. LAWS CODE *§§ 8801.001 et seq.;* TEX. SPEC. DIST. LOC. LAWS CODE *§§ 8834.001 et seq.;* TEX. SPEC. DIST. LOC. LAWS CODE *§§ 8826.001 et seq.;* TEX. SPEC. DIST. LOC. LAWS CODE *§§ 8843.001 et seq.;* TEX. SPEC. DIST. LOC. LAWS CODE *§§ 8846.001 et seq.;* TEX. SPEC. DIST. LOC. LAWS CODE *§§ 8866.001 et seq.;* TEX. SPEC. DIST. LOC. LAWS CODE *§§ 8807.001 et seq.;* TEX. SPEC. DIST. LOC. LAWS CODE *§§ 8868.001 et seq.;* TEX. SPEC. DIST. LOC. LAWS CODE *§§ 8870.001 et seq.; Chapter 629, Acts of the 62nd Legislature, Regular Session, 1971 as amended by Chapter 654, Acts of the 71st Legislature, Regular Session, 1989; TCEQ Order Number 2000-0929 WR (October 11, 2000); and TCEQ Order Number 101692-DO4 (November 12, 1993).*

Constitution.[2] Pursuant to Chapter 36 of the Texas Water Code, as well as their respective enabling acts, they are charged with regulating groundwater withdrawals within their jurisdictions "to provide for the conservation, preservation, protection, recharging, and prevention of waste of groundwater, and of groundwater reservoirs or their subdivisions, and to control subsidence caused by withdrawal of water from those groundwater reservoirs or their subdivisions."[3] To this end, they are each authorized within their jurisdiction to promulgate and enforce rules,[4] issue permits to owners and operators of wells,[5] and sue to recover civil penalties for rule, permit, or order violations.[6]

To accomplish these goals, Texas groundwater conservation districts must regulate the amount of groundwater that may be withdrawn from aquifers, so as to permit the judicious use of groundwater by all, without causing subsidence or depleting the aquifers. In so regulating groundwater use, one of the primary tools utilized by groundwater conservation districts is the requirement that all nonexempt

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2 *See* TEX. CONST. art. XVI, § 59(a), (b); TEX. SPEC. DIST. LOC. LAWS CODE § 8801.002; TEX. SPEC. DIST. LOC. LAWS CODE § 8834.002; TEX. SPEC. DIST. LOC. LAWS CODE *§ 8826.002;* TEX. SPEC. DIST. LOC. LAWS CODE *§ 8843.002;* TEX. SPEC. DIST. LOC. LAWS CODE *§ 8846.002;* TEX. SPEC. DIST. LOC. LAWS CODE *§ 8866.002;* TEX. SPEC. DIST. LOC. LAWS CODE *§ 8807.002;* TEX. SPEC. DIST. LOC. LAWS CODE *§ 8868.002;* TEX. SPEC. DIST. LOC. LAWS CODE *§ 8870.002; Chapter 654, § 6, Acts of the 71st Legislature, Regular Session, 1989; TCEQ Order Number 2000-0929 WR, P.6. (October 11, 2000); and TCEQ Order Number 101692-DO4, P.8. (November 12, 1993).*

3 *See* TEX. WATER CODE § 36.0015.

4 *See* TEX. WATER CODE § 36.101.

5 *See* TEX. WATER CODE § 36.113.

6 *See* TEX. WATER CODE § 36.102.

owners or operators extracting groundwater obtain a permit to do so – thereby permitting effective monitoring of usage within each district – or else face monetary penalties.

In the present case, Mountain Pure argues that they have pled a viable takings claim because NTVGCD's routine enforcement *actions* supposedly interfered with both Mountain Pure's ability to operate the bottling plant upon its property, as well as its relationship with its tenant. As demonstrated below, however, the Amici would show instead that the Trial Court's ruling is based upon a fundamentally erroneous understanding of Texas "takings" law, because the Texas Supreme Court has explicitly made clear that to plead a viable takings claim a plaintiff must attack a regulation not the governmental actions undertaken to enforce a regulation.

The Amici would further note that they – and indeed, all of the rest of Texas's groundwater conservation districts – frequently undertake enforcement efforts indistinguishable from those NTVGCD actions alleged to have given rise to Mountain Pure's "takings" claim. Accordingly, were this Court to uphold the central premise underlying the Trial Court's ruling – i.e. that a litigant can state a valid "takings" claim merely by complaining of a district's *actions* in carrying out its statutory duties, rather than challenging *the underlying rules* themselves – such a holding would strip groundwater conservation districts (such as Amici) of vital protections afforded them under the governmental immunity doctrine.

In turn, loss of that governmental immunity would expose Texas groundwater conservation districts to the risk of becoming ensnared in lengthy "takings" litigation (as here) every time they sought to fulfill their core duty of requiring groundwater users to obtain a permit. Precisely to prevent such a misapplication of the proper relationship between the takings doctrine and governmental immunity, Amici have filed this brief and are paying all fees and expenses to prepare it.[7]

BACKGROUND

Appellee Mountain Pure owns and operates a water bottling plant within the jurisdiction of Appellant NTVGCD in Palestine, Texas. Mountain Pure's plant utilizes water recovered from an excavated spring, which NTVGCD argues is a "well" requiring a permit as defined in NTVGCD's District Rules. For several years prior to 2016, NTVGCD had sent letters urging Mountain Pure to comply with its Rules.

In 2016, NTVGCD again notified both Mountain Pure and its tenant Ice River Springs Palestine, LLC ("Ice River"), a water bottling company, of the permit requirement and of the possible civil penalties for failure to comply. When neither Mountain Pure nor Ice River applied for a permit, NTVGCD filed suit against both entities seeking an injunction to compel them to comply with NTVGCD's Rules and asking the court to impose civil penalties authorized under Chapter 36 of the Water

[7] *See* TEX. R. APP. P. 11.

Code. Thereafter, tenant Ice River then terminated its lease with Mountain Pure and abandoned the bottling plant; Ice River would eventually be non-suited from the present litigation.

In answer to NTVGCD's suit, Mountain Pure filed a counterclaim against NTVGCD, claiming that it had tortiously interfered with the Ice River lease; the trial court dismissed that claim via a plea to the jurisdiction. In its Fifth and Sixth Counterclaims, Mountain Pure asserted a "takings" action based upon its loss of use of the bottling plant and of its business relationship with its tenant Ice River. NTVGCD, in turn, filed a plea to the jurisdiction as to Mountain Pure's takings counterclaim, as well as a no-evidence motion for partial summary judgment alleging there was no evidence to support a taking. The Trial Court denied NTVGCD's plea as to the takings claim and also denied its summary judgment motion. NTVGCD has now filed the current interlocutory appeal of both those judgments.

ARGUMENT AND AUTHORITIES

1. Mountain Pure Failed to Plead a Valid "Takings" Claim

In its Appellant's Brief, NTVGCD alleged three distinct points of error committed by the Trial Court, the first two of which pertained to its plea to the jurisdiction and the other to its summary judgment motion. The present amicus brief is concerned solely with those first two points of error concerning NTVGCD's plea

to the jurisdiction. Upon closer examination, it is plain that both of these points of error are necessarily premised upon a common concept: whether Mountain Pure has adequately pled a takings claim. This is because Texas law clearly requires that – when a party has failed to adequately plead a takings claim – a trial court should grant a governmental entity's plea to the jurisdiction by reason of the government's inherent immunity from suit. Governmental immunity deprives the court of jurisdiction to hear any claim against a governmental entity absent a validly-pled exception. See *Edwards Aquifer Authority v. Horton*, 2010 Tex. App. LEXIS 736 at *7 (Tex. App. – San Antonio Feb. 3, 2010, pet. denied), citing *TCI West End, Inc. v. City of Dallas*, 274 S.W.3d 913, 916 (Tex. App. – Dallas 2008, no pet.). See also *City of Houston v. Carlson*, 451 S.W.3d 828, 830 (Tex. 2014) ("In the absence of a properly pled takings claim, the state retains immunity").

In the present case, there simply is no question that Mountain Pure has failed to plead a viable taking claim. To begin with, Mountain Pure has at no time alleged that NTVGCD actually *physically* occupied (or *physically* destroyed) its water bottling plant so as to give rise to a claim for a "physical taking." *Mayhew v. Town of Sunnyvale*, 964 S.W.2d 922, 933 (Tex. 1998). See also *City of Dallas v. Blanton*, 200 S.W.3d 266, 271 (Tex. App. – Dallas 2006, no pet.), and especially *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 535 U.S. 302, 322-25 (2002), which clearly – and strictly – distinguishes between the two types of

takings by holding that regardless of the severity of the burden imposed only actual physical occupation creates a physical taking. *Tahoe-Sierra*, 535 U.S. at 323, n.18.

As to the other species of taking recognized by Texas courts – i.e. regulatory taking – Mountain Pure's claim likewise fails. This is because Texas caselaw has repeatedly made clear that to sufficiently plead such a claim the plaintiff must complain about the underlying government regulation rather than the manner in which the government entity sought to enforce that regulation. The leading case in this regard is the Texas Supreme Court's decision in *Carlson*.

In *Carlson*, the City of Houston's code enforcement department determined – possibly erroneously – that a condominium complex was structurally unsafe and ordered the condominium owners to either obtain a certificate of occupancy or face a municipal citation. When the owners failed to obtain a certificate, the City then ordered all residents to vacate the complex. After lengthy litigation, the City's evacuation order was overturned on due process grounds and the condominium owners subsequently filed a takings lawsuit to recover lost rents for the years they had been barred from their complex. However, the Texas Supreme Court rejected the regulatory taking claim noting that the owners never once questioned the City of Houston's right to require occupancy certificates nor objected to the various City-mandated standards that a structure must meet to obtain such a certificate. *Carlson*, 451 S.W.3d 831-32.

Instead, the *Carlson* court at page 832 noted that the owners had only objected to the excessive penalty imposed and "the manner in which the city enforced its standards." Faced with such deficient pleadings, the court expressly rejected the owners' assertion that "a civil-enforcement procedure alone can serve as the basis of a regulatory-takings claim." *Ibid.* The court further held that this was so even if the City of Houston had "been mistaken regarding the actual safety of the complex." *Carlson*, 451 S.W.3d at 833. Although not cited in *Carlson*, that opinion's focus upon the underlying regulation itself – rather than enforcement by the City – meshes neatly with the Texas Supreme Court's earlier holding in *Lowenberg v. City of Dallas*, 168 S.W.3d 800, 802 (Tex. 2005), where it stated that "[i]n a regulatory taking, it is the passage of the ordinance that injures a property's value or usefulness."

In our own case, Mountain Pure has clearly failed to meet its *Carlson*-imposed burden to focus its takings claim upon the specific statutes – i.e. Water Code Ch. 36, and Special District Local Laws Code Ch. 8863 – giving rise to NTVGCD's regulatory powers. As repeatedly discussed in NTVGCD's Appellant's Brief, Mountain Pure – in its response to Appellant's Third Plea to the Jurisdiction – stated that it:

> … does not necessarily view this as a regulatory takings case. Rather, it was the wrongful, intentional actions of the District and its commissioners (sic) that resulted in the unlawful taking of Defendant's property.

CR 475. Moreover, in its recent Brief of Appellee, Mountain Pure in no way attempted to clarify or disown that earlier statement. Instead, at page 10 of its Brief, Mountain Pure explicitly chose to "double down" on their fatal error by flatly stating that:

> Assuming that Appellant intends to state that Appellee has not challenged the constitutionality or enforceability of the regulations themselves, that argument has no bearing on Appellee's counterclaim and takings claim. Appellee does not contend that the rules and regulations are invalid, but rather tha[t] Appellant's action (as opposed to the regulations as written) in fining, filing suit and restricting Appellee and its tenant's access to the spring water on Appellee's property constitutes an unlawful taking.

Accordingly, Mountain Pure's acknowledged attempt to maintain a viable takings claim based upon NTVGCD's actions undertaken to enforce its regulatory powers – rather than the underlying regulations themselves – is patently invalid under the standard laid down by the Texas Supreme Court in *Carlson*. 451 S.W.3d at 831-33.

NTVGCD would further note that in the five years since the *Carlson* decision was issued no less than four different Texas appellate courts have seen fit to apply the *Carlson* holding to fact situations similar to our own. See first *House of Praise Ministries, Inc. v. City of Red Oak*, 2017 Tex. App. LEXIS 4095 *17 (Tex. App. – Waco May 3, 2017, no pet.), citing *Carlson* in similarly holding that where a plaintiff's takings claim complained only about the city's enforcement of its zoning code, rather than any particular provision of the zoning code itself, the plaintiff had failed to viably plead a takings claim. In particular, the *House of Praise* court

reiterated at *22 that "[t]he key to a regulatory taking claim is the offending regulation."

See also *Nat'l Media Corp. v. City Of Austin*, 2018 Tex. App. LEXIS 2093 *13-15 (Tex. App. – Austin, Mar. 23, 2018, no pet.)(granting city's plea to the jurisdiction where plaintiff complained only of city's finding that its billboard did not satisfy city's sign regulations rather than the regulations themselves); *APTBP, LLC v. City Of Baytown*, 2018 Tex. App. LEXIS 7604 *10-14 (Tex. App. – Houston [14th Dist.] Sept. 18, 2018, no pet.)(upholding grant of city's plea to the jurisdiction because "government interference arising from the improper application or misapplication of regulations and standards does not constitute a taking"); and *CPM Trust v. City of Plano*, 461 S.W.3d 661, 673 (Tex. App. – Dallas 2015, no pet.)(upholding grant of city's plea to the jurisdiction, because "appellants do not contest the sign regulations in the city's zoning ordinance, but rather complain about the City's misapplication of certain regulations as to their property. Based on *Carlson*, we conclude appellants have not alleged a taking….").

To the extent Mountain Pure seeks to somehow distinguish these cases by reiterating its above-cited allegation that NTVGCD supposedly "restrict[ed] Appellee and its tenant's access to the spring water on Appellee's property," NTVGCD would note that Mountain Pure's **own** loss of use is simply not determinative of whether a compensable taking "for public use" has occurred so as

to entitle it to compensation. In *Carlson*, 451 S.W.3d at 832-33, the Texas Supreme Court specifically commented on just this distinction:

> We do not doubt, and the city does not deny, that the city's order to vacate interfered with the owners' use of the respondents' property. Yet nearly every civil-enforcement action results in a property loss of some kind. The very nature of the action dictates as much. Nevertheless, that property is not "taken for public use" within the meaning of the Constitution.

Accord, *CPM Trust*, 461 S.W.3d at 673.

In sum, in issuing the *Carlson* opinion, the Texas Supreme Court expressly endorsed a broad view of immunity for governmental entities such as NTVGCD when confronted with "takings" litigation. That is, to even state a viable cause of action a takings claim must be directed against the statutes establishing that entity's regulatory authority and not its enforcement actions undertaken pursuant to that authority. This is so regardless of whether 1) the entity's exercise of authority was mistaken or misguided, or 2) the action substantially interfered with plaintiff's right to use and enjoy its property.

Amici have filed the present brief for the sole purpose of urging this Court to preserve *Carlson's* broad view of the immunity enjoyed by governmental entities so as to permit them to carry out the necessary (though not always popular) tasks assigned to them by the legislature without fear of unwarranted litigation.

CONCLUSION

Accordingly, the amici curiae request that this Court give careful consideration to the arguments set forth in both the present brief, and those submitted by Appellant.

Respectfully submitted,

GM ELLIS LAW FIRM PC
GREGORY M. ELLIS
2104 Midway Ct.
League City, TX 77573
(713) 705-4861—Phone
(512) 319-6698—Fax
Greg@GMEllis.law

/s/ Gregory M. Ellis
Gregory M. Ellis
State Bar No. 06562500

ATTORNEY FOR AMICI CURIAE HARRIS-GALVESTON SUBSIDENCE DISTRICT, FORT BEND SUBSIDENCE DISTRICT, BRAZORIA COUNTY GROUNDWATER CONSERVATION DISTRICT, HAYS TRINITY GROUNDWATER CONSERVATION DISTRICT, KINNEY COUNTY GROUNDWATER CONSERVATION DISTRICT, MID-EAST TEXAS GROUNDWATER CONSERVATION DISTRICT, LOWER TRINITY GROUNDWATER CONSERVATION DISTRICT, SOUTHEAST TEXAS GROUNDWATER CONSERVATION DISTRICT, TRINITY GLEN ROSE GROUNDWATER CONSERVATION DISTRICT, BANDERA COUNTY RIVER AUTHORITY AND GROUNDWATER DISTRICT, BLANCO-PEDERNALES GROUNDWATER CONSERVATION DISTRICT, AND GONZALES COUNTY UNDERGROUND WATER CONSERVATION DISTRICT

CERTIFICATE OF COMPLIANCE

I certify that this document complies with the typeface requirements of Texas Rule of Appellate Procedure 9.4(e) because it was prepared on a computer in a conventional typeface no smaller than 14-point for text and 12-point for footnotes. In reliance on the word count feature of the program used to create the brief, I also certify that the brief complies with the word-count limitation in Rule 9.4(i) as it contains **2,897** words, excluding any parts exempted by 9.4(i)(l).

/s/ Gregory M. Ellis
Gregory M. Ellis

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the above and foregoing document has been sent on this the 6th day of September, 2019, to the parties listed below via the method indicated:

John D. Stover
SKELTON SLUSHER BARNHILL
WATKINS WELLS PLLC
1616 S. Chestnut
Lufkin, Texas 75901
jstover@skeltonslusher.com
ATTORNEY FOR APPELLANT

[ ] first class mail
[ ] certified mail, electronic receipt requested
[x] electronic mail
[x] electronic service, via eService

Danny Crabtree, *Pro Hac Vice*
ATTORNEY AT LAW
114 S. Pulaski
Little Rock, Arkansas 72201
danny.crabtree@sbcglobal.net

[ ] first class mail
[ ] certified mail, electronic receipt requested
[x] electronic mail
[x] electronic service, via eService

Jeffrey L. Coe
ATTORNEY AT LAW
603 E. Lacy St. (75801)
P.O. Box 1157
Palestine, Texas 75802-1157
jeff@coelawfirm.com
ATTORNEYS FOR APPELLEE

[ ] first class mail
[ ] certified mail, electronic receipt requested
[x] electronic mail
[x] electronic service, via eService

/s/ Gregory M. Ellis