AFFIRMED IN PART, REVERSED IN PART, AND REMANDED and Opinion Filed July 1, 2020

In The
Court of Appeals
Fifth District of Texas at Dallas

No. 05-19-00545-CV

STEPHEN RICHARD SELINGER AND NANCY L. DAIL, Appellants
V.
CITY OF MCKINNEY, TEXAS, Appellee

On Appeal from the 429th Judicial District Court
Collin County, Texas
Trial Court Cause No. 429-04150-2018

MEMORANDUM OPINION

Before Justices Bridges, Whitehill, and Nowell
Opinion by Justice Whitehill

This is an appeal from an order sustaining the City of McKinney's plea to the jurisdiction and dismissing appellants' lawsuit.

Appellants are Nancy L. Dail, who owns land in the City's extraterritorial jurisdiction, and Stephen Richard Selinger, a would-be developer of that land. They sued the City, alleging that the City unlawfully denied Selinger's subdivision plat application because he wouldn't agree to pay a sum certain (roughly $482,000) if the City ever extended its water and sewer lines to the subdivision. Appellants

asserted several claims, but their main thrust is that the City's conduct constituted an uncompensated regulatory taking of their property. The City's plea to the jurisdiction challenged appellants' pleadings on several grounds, chief among them lack of ripeness and, as to Selinger, lack of standing. On appeal, the City has added a mootness challenge.

As to ripeness, we conclude that the appellants pled enough facts to constitute an exaction—a governmental demand for action as a condition of permitting a proposed development—that is ripe for challenge in a takings lawsuit.

As to standing, we conclude that appellants pled enough facts to show that the denial of Selinger's plat after he spent money to prepare and submit it is an injury that is actual, concrete, and particularized enough to give him standing to sue.

As to mootness, we conclude that the submission of a new plat application by a nonparty limited liability company does not affect or obviate the injuries alleged by appellants in this lawsuit, even if the company is controlled by Selinger. Thus, this case is not moot.

We generally agree with appellants on their other issues as well. Appellants do not challenge the dismissal as to one specific request for attorney's fees, so we affirm the dismissal to that extent but otherwise reverse and remand for further proceedings.

I. Background

A. Factual Allegations

We draw these allegations from appellants' live pleading:

Dail owns a tract of land situated entirely within Collin County and the City's extraterritorial jurisdiction (ETJ). Selinger contracted to buy that tract for development.[1]

Selinger proposed to subdivide the tract into approximately 331 lots, and he submitted his plan to City authorities. The City's water and sewer services don't serve that part of its ETJ, and the City has no plans to extend those services to it. Accordingly, Selinger's development plan included construction of necessary sewer infrastructure including a package plant. Selinger also reached an agreement with the North Collin Special Utility District to supply water to the subdivision. These were permanent solutions to the subdivision's water and sewer needs.[2]

Appellants alleged that Selinger's plat complied with all City standards except the requirement to pay an exaction[3] and connect to City water and sewer facilities. While attempting to negotiate a facilities agreement, the parties reached an impasse

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[1] Although appellants pled that Selinger had "a legally binding contract to purchase the property," their counsel conceded at oral argument that it was an option contract.

[2] At oral argument, the City took the position that it had the power to compel the subdivision to use the City's water and thus that its developer had no legal right to obtain water elsewhere. But this argument was not part of the City's jurisdictional plea or raised in the City's appellate briefs, so we do not address it.

[3] An exaction occurs if a governmental entity requires an action by a landowner as a condition to obtaining government approval of a requested land development. *City of Carrollton v. RIHR Inc.*, 308 S.W.3d 444, 449 (Tex. App.—Dallas 2010, pet. denied); *see also infra* at Part IV.B.1.

over the City's insistence that Selinger pay the City about $482,000 if and when the City's water and sewer transmission lines were extended to the development.

Because Selinger would not agree to the $482,000 fee, the City Council denied Selinger's plat application.

B. Procedural History

Ten days after the City Council denied Selinger's application, Selinger sued the City.

The City answered and included a plea to the jurisdiction.

Dail joined the case as a plaintiff in the first amended petition. Appellants filed three more amended petitions, and their fourth amended petition was their live pleading when the trial court rendered final judgment.

Their live pleading asserted six counts: (i) inverse condemnation and/or unconstitutional taking, (ii) taking under Government Code Chapter 2007, (iii) declaratory judgment that the City's subdivision ordinance was unconstitutional and violated Local Government Code § 212.904, (iv) violation of Local Government Code § 212.904, (v) appeal under Local Government Code § 212.904, and (vi) due process violations.

The City answered appellants' fourth amended petition and again included a plea to the jurisdiction. The City also filed a brief supporting its plea. Appellants responded to that brief.

After a hearing, the trial judge granted the City's plea and dismissed the lawsuit "with prejudice for want of subject matter jurisdiction." Appellants timely appealed.

C. Postjudgment Events

The City's appellate brief asserts that the same day appellants filed their notice of appeal they also submitted a new subdivision plat that was substantially the same as the old one except that it did not request any variances, it agreed to comply with the City's water and sewer connection requirements, and it agreed to pay required impact fees. The City further asserts that these developments moot the appeal.

Appellants' reply brief disputes the City's mootness argument, arguing that the City's own supporting appendix shows that the new subdivision application was submitted by Norhill Energy LLC.

The City submitted a supplemental brief with evidence attached purporting to show that Selinger is a manager of Norhill Energy LLC. Appellants also submitted a supplemental brief.

II. Issues Presented

The "Issues Presented" section of appellants' opening brief recites that "[s]everal issues are presented, including the following . . . ." It then recites four issues. However, the City's jurisdictional plea presented seven arguments, and the argument section of appellants' opening brief addresses each of them under a

separate heading. Focusing on appellants' argument, we construe their brief to raise the following seven issues:

1. Appellants' claims were ripe.
2. Selinger had standing to sue.
3. The City failed to show a jurisdictional defect regarding appellants' Government Code Chapter 2007 claims.
4. The City failed to show a jurisdictional defect regarding appellants' federal takings claims.
5. The City failed to show a jurisdictional defect regarding appellants' Local Government Code § 212.904 claims.
6. Appellants are entitled to avail themselves of the Declaratory Judgments Act's attorney's fee provisions.
7. The City failed to show a jurisdictional defect regarding appellants' due process claims.

III. STANDARD OF REVIEW

We review an order granting a jurisdictional plea de novo. *See Tex. Dep't of Parks & Wildlife v. Miranda*, 133 S.W.3d 217, 228 (Tex. 2004).

The City's plea was a pleadings challenge. Thus, we construe the pleadings liberally in appellants' favor and look to their intent. *See id*. at 226. If the pleadings don't contain sufficient facts to affirmatively demonstrate the trial court's jurisdiction but also don't affirmatively demonstrate incurable jurisdictional defects, "the issue is one of pleading sufficiency and the plaintiffs should be afforded the opportunity to amend." *Id*. at 226–27. If the pleadings affirmatively negate

jurisdiction, then a jurisdictional plea may be granted without allowing the plaintiffs an opportunity to amend. *Id*. at 227.

IV. ANALYSIS

A. Jurisdictional Challenges, Generally

Jurisdiction means a court's power, under the constitution and laws, to determine a dispute's merits and render judgment. *Ysasaga v. Nationwide Mut. Ins. Co.,* 279 S.W.3d 858, 864 (Tex. App.—Dallas 2009, pet. denied); *see also Univ. of Tex. Sw. Med. Ctr. at Dallas v. Loutzenhiser,* 140 S.W.3d 351, 359 (Tex. 2004) ("The failure of a jurisdictional requirement deprives the court of the power to act (other than to determine that it has no jurisdiction), and ever to have acted, as a matter of law.").

Before a court may proceed to resolve a case's merits, it must have jurisdiction over (i) the parties or the property at issue, (ii) the suit's subject matter, (iii) authority to enter the requested judgment; and (iv) capacity to act as a court. *Miranda*, 133 S.W.3d at 226 (citing *State Bar of Tex. v. Gomez* 891 S.W.2d 243, 245 (Tex. 1994)). Although there are some instances where questions concerning a court's jurisdiction and the case's merits are intertwined, *see id*. at 230, a court ordinarily must not proceed on a case's merits until legitimate challenges to its jurisdiction are decided, *id*. at 228.

This case involves an array of subject matter jurisdiction challenges concerning the justiciability of Selinger's and Dail's claims. Justiciability includes

the mootness, standing, and ripeness doctrines. *See Patterson v. Planned Parenthood of Houston & Se. Tex., Inc.*, 971 S.W.2d 439, 442 (Tex. 1998).

These jurisdictional justiciability doctrines arise from the constitutional separation of powers rule against courts' rendering advisory opinions. *Id.* at 442–43. Stated differently, to avoid issuing unconstitutional advisory opinions, courts must first determine that the subject claims present a non-advisory, justiciable controversy.

The City asserts all three justiciability doctrines here. Although much of the parties' debate concerns the case's underlying merits, we can resolve all three of the City's subject matter jurisdiction challenges without reaching the case's merits, over which we express no opinions. For the reasons explained below, none of the City's challenges defeats the trial court's or our power to determine Selinger's and Dail's substantive claims.

B. Issue One: Did appellants plead ripe takings claims?

Yes. They alleged that the City denied Selinger's plat because he refused to agree to a contingent $482,000 payment as a condition of plat approval. Those facts amount to an exaction, so appellants' takings claims were ripe.

This section discusses ripeness and not standing, which we discuss later in Part IV.C.

1. The Law of Ripeness and Exaction Takings

Ripeness is a component of subject matter jurisdiction. *Sw. Elec. Power Co. v. Lynch*, 595 S.W.3d 678, 682 (Tex. 2020). Ripeness concerns whether the facts are sufficiently developed so that an injury has occurred or is likely to occur rather than being contingent or remote. *Id.* at 683. If a claimant's injury is based on hypothetical facts or events that haven't happened yet, the case isn't ripe, and the court lacks subject matter jurisdiction. *Id.*

Under the federal and Texas constitutions, the government must compensate a property owner for taking his property for a public use. *See* U.S. CONST. amends. V, XIV; TEX. CONST. art. I, § 17.

The government commits a "regulatory taking" if it imposes restrictions that either deny a property owner all economically viable use of his property or unreasonably interfere with his right to use and enjoy his property. *City of Carrollton v. RIHR Inc.*, 308 S.W.3d 444, 449 (Tex. App.—Dallas 2010, pet. denied).

And a distinct kind of regulatory taking occurs when the government conditions approval of a permit or some other type of approval on an exaction from the property owner. *Id.* Specifically, an exaction occurs if a governmental entity requires an action by a landowner as a condition to obtaining government approval of a requested land development. *Id.*

An exaction is a compensable taking unless the government imposed condition (i) bears an essential nexus to substantially advancing some legitimate government interest and (ii) is roughly proportional to the proposed development's proposed impact. *Town of Flower Mound v. Stafford Estates Ltd. P'ship*, 135 S.W.3d 620, 634 (Tex. 2004). In *Town of Flower Mound*, for example, the supreme court held that a potentially compensable exaction occurred when a town conditioned plat approval on the developer's rebuilding a nearby road at its expense. *Id*. at 623–24, 634–43.

Moreover, an exaction can occur even if the owner refuses to agree to the condition. In *City of Carrollton*, the city refused to issue building permits unless the property owner reimbursed the city about $40,000 for repairing a collapsed retaining wall not located on the owner's property. 308 S.W.3d at 446–48. Instead of paying, the owner sued the city for an unconstitutional taking and won. *Id*. at 448. We rejected the city's argument that no exaction occurs if the property owner doesn't acquiesce in the condition, reasoning that the exaction is the government's demand of some fee, reward, or other compensation by the landowner. *Id*. at 450–51; *see also Koontz v. St. Johns River Water Mgmt. Dist.*, 570 U.S. 595, 612, 619 (2013) ("monetary exactions" must satisfy nexus and proportionality requirements even when government ultimately denies the permit).

2. Applying the Law to the Facts

The City argues that appellants' claims aren't ripe because (i) the $482,000 fee has not been imposed and (ii) even if Selinger approved the facilities agreement he would not have to pay the $482,000 unless and until the City extends its water and sewer lines to the property. Appellants argue that they were injured, and their claims ripened, when the City denied Selinger's plat because he wouldn't agree to pay $482,000 in the event City water and sewer lines were built to the property.

We agree with appellants.

As we have said, an exaction occurs if a governmental entity requires a land owner to take an action as a condition to obtaining government approval for a requested land development. *City of Carrollton*, 308 S.W.3d at 449.

Logically, any demand for an action the land owner is not already legally required to take might qualify as an exaction. *See id*. at 451 (noting that one meaning of "exaction" is "A fee, reward, *or other compensation* arbitrarily or wrongfully demanded") (emphasis supplied; other emphasis omitted). The definition of exaction is broad enough to include a demand that the owner assume a contingent liability. And we find no cases holding a government's demand for land owner action qualifies as an exaction only if the demand is for a present monetary payment or land dedication. Thus, we conclude that demanding Selinger's commitment to pay $482,000 under certain circumstances—a commitment that would be recorded against the property (according to appellants' pleading)—as a condition of plat

approval constituted an exaction and a sufficient injury for ripeness purposes even though the demanded payment was contingent rather than definite.

We sustain appellants' first issue.[4]

C. Issue Two: Did Selinger adequately plead standing?

Yes, because he pled that the City caused him actual, concrete, and particularized injuries in the form of his allegedly unlawfully denied plat and the money he spent to prepare and submit it.

1. Applicable Law

Standing, like ripeness, is a threshold issue implicating subject matter jurisdiction. *Patterson v. Planned Parenthood of Houston & Se. Tex., Inc.*, 971 S.W.2d 439, 442 (Tex. 1998). Ripeness examines when an action may be brought, while standing focuses on who may bring an action. *Id.*

The general test for standing is whether there is a real controversy between the parties that will be actually be determined by the judicial declaration sought. *Tex. Ass'n of Bus. v. Tex. Air Control Bd.*, 852 S.W.2d 440, 446 (Tex. 1993). Unless a statute confers standing, the plaintiff generally must show that he possesses an interest in the conflict distinct from the general public's interest, such that the defendant's actions have caused the plaintiff some particular injury. *Williams v. Lara*, 52 S.W.3d 171, 178 (Tex. 2001). That is, "[f]or standing, a plaintiff must be

[4] Appellants' first issue also asks us to grant a summary judgment motion that they filed but the trial court never ruled on. We decline.

personally aggrieved; his alleged injury must be concrete and particularized, actual or imminent, not hypothetical." *DaimlerChrysler Corp. v. Inman*, 252 S.W.3d 299, 304–05 (Tex. 2008) (footnotes omitted).

"A plaintiff does not lack standing simply because he cannot prevail on the merits of his claim; he lacks standing because his claim of injury is too slight for a court to afford redress." *Id.* at 305; *accord Farmers Tex. Cty. Mut. Ins. Co. v. Beasley*, 598 S.W.3d 237, 241 (Tex. 2020) ("[T]he mere fact that a plaintiff may ultimately not prevail on the merits of the lawsuit does not deprive the plaintiff of standing.").

2. Applying the Law to the Facts

The question is whether appellants' live pleading alleges facts that, if true, show an actual controversy between Selinger and the City in the sense that the City has caused him a particular injury that sets him apart from the general public. A commonsense reading of appellants' live pleading shows that the answer is yes.

Appellants alleged that Selinger possessed multiple rights that were impaired, diminished, or nullified by the City's "unlawful actions." Specifically, they alleged that Selinger was injured in (i) his rights under his contract with Dail, (ii) his right to have the City consider his subdivision application without violating the state or federal constitutions, and (iii) his expenses incurred in the form of application fees and engineering, planning, and legal costs. Setting aside the merits of Selinger's

claims, which are not before us in a standing inquiry, these are concrete and particularized injuries sufficient to survive a pleadings challenge.

The City, however, argues that (i) Selinger has only an option to buy Dail's land and (ii) an option contract isn't sufficient to confer standing under two Texas appellate decisions. *See City of Harlingen v. Obra Homes, Inc.*, No. 13-02-268-CV, 2005 WL 74121 (Tex. App.—Corpus Christi–Edinburg Jan. 13, 2005, no pet.) (mem. op.); *Chambers Cty. v. TSP Dev., Ltd.*, 63 S.W.3d 835 (Tex. App.—Houston [14th Dist.] 2001, pet. denied). We conclude, however, that those cases are distinguishable.

The *Chambers County* case involved claims under the Private Real Property Rights Preservation Act, Texas Government Code Chapter 2007. 63 S.W.3d at 837. That statute limits standing to property owners who possess "legal or equitable title," and the court of appeals held that a potential buyer under an option contract did not qualify as an "owner." *Id*. at 840. Here, however, appellants pled that Selinger had "a legally binding contract to purchase the property" and pled no facts suggesting he held only an option contract. Given this case's posture, our analysis is limited to the pleadings. Thus, *Chambers County* is distinguishable.[5]

The *City of Harlingen* case is also distinguishable. Developer Obra Homes had an option to buy some undeveloped land and attempted to have that land rezoned

[5] However, appellants admitted at oral argument that Selinger's contract was in fact an option contract, so this issue could be revisited in the trial court.

for single family homes. However, its rezoning efforts failed, the option contract expired, and Obra Homes never acquired the property. Nevertheless, Obra Homes sued the City of Harlingen on takings and due process claims, and it obtained a judgment against the city after a jury trial. On appeal, the court of appeals held that Obra Homes lacked standing to sue, but only after concluding from the pleadings and trial record that Obra Homes had sued *solely* for loss of use and enjoyment of the property itself—not for injuries to its earnest money contract or expenses in seeking rezoning. 2005 WL 74121, at *4–5. Accordingly, the court of appeals considered only whether Obra Homes had standing to sue for a taking of the real property itself, and because Obra Homes held only an option the court held it did not. *Id*. at *4–5, 8.

Here, by contrast, Selinger has claimed that the City injured his rights in his plat application and the money he spent to prepare and submit the application, not just property rights in the property itself. For standing purposes, the question is not whether these are recoverable damages items on the merits but only whether Selinger has alleged a concrete, particularized injury from the City's conduct. *See DaimlerChrysler Corp.*, 252 S.W.3d at 304–05 (test for standing); *see also City of Carrollton*, 308 S.W.3d at 452–54 (upholding award of expenses incurred during exaction period). Selinger's allegation that the City unlawfully denied his plat after

he incurred expenses in preparing and submitting it asserts a concrete and particularized injury. We conclude it suffices to give him standing.[6]

We sustain appellants' second issue.

D. Issue Three: Did appellants plead sufficient facts to satisfy Government Code § 2007.003?

Yes. The City concedes as much in its appellee's brief.

Appellants pled statutory claims under Government Code Chapter 2007, also known as the Private Real Property Rights Preservation Act. *See Chambers Cty.*, 63 S.W.3d at 837. Chapter 2007 provides that sovereign immunity to suit and liability is waived to the extent of liability created under that chapter. TEX. GOV'T CODE § 2007.004(a). However, as to municipalities, Chapter 2007 applies only to an action "that has effect in the extraterritorial jurisdiction of the municipality, excluding annexation, and that enacts or enforces an ordinance, rule, regulation, or plan that does not impose identical requirements or restrictions in the entire extraterritorial jurisdiction of the municipality." *Id.* § 2007.003(a)(3), (b)(1).

In its jurisdictional plea, the City argued that jurisdiction was lacking over appellants' Chapter 2007 claims because the City imposes the same restrictions throughout its ETJ. However, appellants correctly argue that their live pleading expressly alleged that the City does not impose its restrictions uniformly, naming

[6] Given our disposition, we express no opinion whether an option holder has standing to assert a takings claim based solely on his rights in the property itself.

another property in the ETJ that allegedly did not have the same requirements imposed on it.[7] The City's appellate brief concedes that this is sufficient to defeat this ground in the City's jurisdictional plea. We agree.

We sustain appellants' third issue.

E. Issue Four: Did appellants plead sufficient facts to show that their federal takings claims are ripe?

Yes. The City concedes that appellants' federal takings claims are ripe based on recent Supreme Court authority. *See Sw. Elec. Power Co.*, 595 S.W.3d at 682 (ripeness is a component of subject matter jurisdiction).

The City's jurisdictional plea argued that appellants' federal takings claims were not ripe because Texas state law provides an adequate procedure for seeking just compensation—specifically, an inverse condemnation action under Texas Constitution article I, § 17. For support, the City relied on authorities grounded in a subsequently overruled Supreme Court's decision. *See Williamson Cty. Reg'l Planning Comm'n v. Hamilton Bank of Johnson City*, 473 U.S. 172 (1985), *overruled by Knick v. Township of Scott, Pa.*, 139 S. Ct. 2162 (2019).

Knick holds that a property owner has an actionable Fifth Amendment takings claim when the government takes his property without paying for it and that he need

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[7] Appellants assert both that their pleading was sufficient to satisfy § 2007.003 and that the City's argument goes to the merits rather than to jurisdiction. We express no opinion regarding the latter premise.

not first obtain a state court denial of a state law just compensation claim. 139 S. Ct. at 2167–68. The City concedes that its position is untenable in *Knick*'s wake.

Appellants agree that their federal claim is ripe under *Knick*, although they also argue that the Texas Supreme Court already allowed federal takings claims to proceed alongside state claims. *See Town of Flower Mound*, 135 S.W.3d at 646 (indicating that federal and state claims may be brought in the same action).

Because we agree with the parties that appellants' federal takings claims are ripe, we sustain appellants' fourth issue.

F. Issue Five: Did appellants plead sufficient facts to show jurisdiction over their Local Government Code § 212.904 claims?

Yes. Appellants pled sufficient facts to make out § 212.904 claims and declaratory judgment claims that the City's subdivision ordinance is invalid under the Texas Constitution and § 212.904.

1. Additional Background

We begin with the statute. Texas Local Government Code § 212.904 is entitled "Apportionment of Municipal Infrastructure Costs." TEX. LOC. GOV'T CODE § 212.904. The statute establishes these rules and procedures:

- If a municipality requires as a condition of approving a property development project that a developer must bear some of the costs of municipal infrastructure improvements, "the developer's portion of the costs may not exceed the amount required for infrastructure improvements that are roughly proportionate to the proposed development as approved by a professional engineer who holds a license issued under Chapter 1001, Occupations Code, and is retained by the municipality." *Id.* § 212.904(a).

- If the developer disputes the determination made under § 212.904(a), it may appeal to the municipality's governing body, which shall make its determination within thirty days after the developer finishes presenting any testimony or other evidence. *Id.* § 212.904(b).
- If the developer disputes the governing body's determination, it may appeal that determination to county or district court within thirty days. *Id.* § 212.904(c).
- A developer who prevails in a § 212.904 appeal is entitled to recover costs and reasonable attorney's fees, including expert witness fees. *Id.* § 212.904(e).
- A municipality may not require a developer to waive its right to a § 212.904 appeal as a condition of approving a development project. *Id.* § 212.904(d).

Next, we summarize appellants' § 212.904 claims.

First, count three sought a declaratory judgment that the City's subdivision ordinance, on which the proposed facilities agreement was predicated, was invalid under the Texas Constitution and Local Government Code § 212.904.

Second, count four alleged that the City violated § 212.904(a) "by failing to make the determination" required by that subsection and thus prevented appellants from appealing to the City Council under § 212.904(b). They sought a judgment that (i) the City's $482,000 demand was not roughly proportionate and (ii) awarded them costs and attorney's fees under § 212.904(e).

Third, in count five they alleged in the alternative that the City Council's denial of Selinger's plat was a ruling on a § 212.904(b) appeal and this lawsuit should be treated as a § 212.904(c) appeal of that ruling's rough proportionality

determination. They again sought a judgment that the City's $482,000 demand was not roughly proportionate and a recovery of costs and attorney's fees under § 212.904(e).

The City's jurisdictional plea asserted the following:

> The court does not have subject matter jurisdiction over Plaintiffs' declaratory judgment claims seeking an interpretation of Texas Local Government Code Section 212.904 . . . as Plaintiffs have asserted no viable claim under Section 212.904, and have asserted no appeal under Section 212.904, which appeal is required in order to invoke the provisions of Section 212.904. As Plaintiffs have failed to exhaust their administrative remedies under Section 212.904, this court lacks jurisdiction to hear such claims at this time.

The City's appellee's brief clarifies that it intended to assert two points: (i) appellants failed to state a § 212.904 claim and (ii) appellants failed to exhaust administrative remedies by appealing under § 212.904(c).

2. Applying the Law to the Facts

a. Declaratory Judgment Claims (Count Three)

Although appellants' briefing is sketchy, it sufficiently argues that they pled declaratory judgment claims that the City's subdivision ordinance is invalid because it violates the Texas Constitution and Local Government Code § 212.904.[8] *See St. John Missionary Baptist Church v. Flakes*, 595 S.W.3d 211, 213–14 (Tex. 2020) (per curiam) (appellate courts should be reluctant to conclude that issues are waived for inadequate briefing). A claim that an ordinance is invalid is cognizable under

[8] Appellants do not dispute that the City's "failure to plead a viable § 212.904 claim" argument is jurisdictional, so we assume without deciding that it is.

the Declaratory Judgments Act. *See* TEX. CIV. PRAC. & REM. CODE §§ 37.004(a), 37.006(b).

We conclude that appellants sufficiently pled a declaratory judgment claim challenging the City's subdivision ordinance's validity.

b. Claims for § 212.904 Relief (Counts Four and Five)

As to counts four and five, appellants argue that these are pleadings in the alternative: either (i) the City violated § 212.904(a) because the $482,000 demand was not approved by a professional engineer as roughly proportionate to the proposed development (count four) or (ii) if the demand was approved by a professional engineer, this lawsuit is an appeal of the City Council's determination adhering to that demand (count five). They further argue that they pled sufficient facts to show subject matter jurisdiction over these claims.[9]

The City responds that appellants haven't pled enough facts to make out a § 212.904 claim or show administrative exhaustion because they didn't plead that they actually requested an appeal before the City Council or received a determination from the City Council sufficient to support a judicial appeal under § 212.904(c).

We agree with appellants. Appellants have pled that the City Council's decision denying the plat because Selinger wouldn't agree to the $482,000 contingent payment was the Council's determination of appellants' appeal and was

[9] Appellants do not dispute that compliance with § 212.904's procedures is a jurisdictional prerequisite, so we assume without deciding that it is.

erroneous because it was either (i) made without the required engineer's approval under § 212.904(a) or (ii) exceeded an amount roughly proportionate to the proposed development. Section 212.904 does not require any particular procedure for an appeal to the municipality's governing body, nor does it prescribe a specific form for that body's appealable determination. *See* LOC. GOV'T CODE § 212.904(b), (c); *cf. Mira Mar Dev. Corp. v. City of Coppell, Tex.*, 421 S.W.3d 74, 80–81 (Tex. App.—Dallas 2013, pet. denied) (describing § 212.904 procedures used in that case). We find no authority showing that appellants' alleged facts don't satisfy § 212.904. We conclude that appellants adequately pled facts showing jurisdiction over counts four and five.

3. Conclusion

We sustain appellants' fifth issue.

G. Issue Six: Did appellants plead facts showing jurisdiction over their claims for attorney's fees under the Declaratory Judgments Act?

Yes. As discussed above regarding issue five, appellants sufficiently pled declaratory judgment claims seeking to invalidate the City's subdivision ordinance.

The City's jurisdictional plea included a broad assertion that the trial court lacked jurisdiction over all of appellants' claims for attorney's fees, regardless of the legal theory, because (i) Texas Constitution Article I, § 17 doesn't authorize a fee recovery and (ii) appellants invoked the Declaratory Judgments Act solely as a vehicle to recover attorney's fees.

Appellants don't dispute that fees aren't recoverable for a Texas Constitution takings claim, so we affirm the dismissal as to those fees.

However, appellants argue that they properly invoked the Declaratory Judgments Act, which authorizes the trial court to award fees. *See* TEX. CIV. PRAC. & REM. CODE § 37.009. Specifically, they argue that they invoked § 37.004(a) to test the City's subdivision regulations on which the City based its exaction from appellants.

The City repeats its trial court argument that appellants' declaratory judgment claims are improper because they afford appellants no greater remedy than their substantive takings claims.[10] *See City of Carrollton*, 308 S.W.3d at 454–55.

We agree with appellants. Their live pleading included declaratory judgment claims seeking to invalidate the City's subdivision ordinance as invalid under the Texas Constitution and Local Government Code § 212.904. A claim that an ordinance is invalid is cognizable under the Declaratory Judgments Act. *See* TEX. CIV. PRAC. & REM. CODE §§ 37.004(a), 37.006(b). That relief is distinct from the other relief appellants seek. Thus, the trial court had jurisdiction to entertain appellants' declaratory judgment related fee claims.

We sustain appellants' sixth issue as to their declaratory judgment fee claims.

[10] Again appellants don't dispute that the City's argument raises a jurisdictional defect, so we assume without deciding that it does.

H. Issue Seven: Did appellants plead facts showing jurisdiction over their due process claims?

Yes. The district court is presumed to have subject matter jurisdiction, and the City's argument that there is no damages remedy for violating the Texas Constitution's due process clause doesn't identify a jurisdictional defect.

Appellants' last count was for damages resulting from a denial of their due process rights. They did not specify whether they were invoking federal or state constitutional due process rights, although they cited a passage from *City of Harlingen* addressing federal due process.

The City's jurisdictional plea argued that there was no jurisdiction over appellants' state law due process claims because no damage remedy is available under the Texas Constitution's due process clause.

Appellants' opening brief argues only that the availability of damages under the Texas Constitution's due process clause is a merits question, not a jurisdictional defect. We construe this to mean appellants have abandoned (or never intended to assert) any federal due process claims.[11]

The City's appellate brief reiterates that damages are unavailable for state constitutional violations, but it cites no authority for the premise that this is a jurisdictional defect. In the City's principal authority, the supreme court held that

[11] Appellants' reply brief says that Selinger expressly asserted "his federal rights" in the trial court, but we don't consider arguments made for the first time in a reply brief. *See Sanchez v. Martin*, 378 S.W.3d 581, 590 (Tex. App.—Dallas 2012, no pet.) ("[W]e cannot consider matters raised for the first time in a reply brief.").

there is no private damages cause of action under the Texas Constitution's free speech and assembly rights. *See City of Beaumont v. Bouillion*, 896 S.W.2d 143, 149–50 (Tex. 1995). But the court then rendered a take nothing judgment against the claimants, never suggesting that the defect was jurisdictional.

We agree with appellants. Courts of general jurisdiction, such as Texas's district courts, are presumed to have subject matter jurisdiction absent a contrary showing. *See In re Entergy Corp.*, 142 S.W.3d 316, 322 (Tex. 2004) (orig. proceeding). A showing that a claim is legally meritless does not mean the trial court lacks jurisdiction to render such a judgment. *See City of Port Isabel v. Pinnell*, 161 S.W.3d 233, 241 (Tex. App.—Corpus Christi–Edinburg 2005, no pet.) ("Failure to state a claim is a defect which should be challenged by special exceptions, not by a plea to the jurisdiction."); *see also* TEX. R. CIV. P. 91a.

We sustain appellants' seventh issue.

V. MOOTNESS

Finally, we consider the City's mootness argument. We conclude the case is not moot because the City's treatment of the new plat application will not affect this controversy.

A case becomes moot if there ceases to be a justiciable controversy between the parties, whether because the issues presented are no longer "live" or the parties lack a legally cognizable interest in the outcome. *Glassdoor, Inc. v. Andra Grp., LP*,

575 S.W.3d 523, 527 (Tex. 2019). If a case becomes moot, the court must vacate all prior orders and judgments and dismiss the case for want of jurisdiction. *Id*.

Here, appellants' claims are predicated on the City's denying Selinger's plat after he refused to agree to pay roughly $482,000 in water and sewer impact fees if City water and sewer lines were ever extended to the property. Appellants claim to have been injured by this denial. They assert, for example, that the City's conduct is an exaction that "reduce[d] the value of the property by at least 25%." They also seek costs and attorney's fees under various laws.

The City's mootness argument relies on evidence that a new plat for the same property was submitted at the same time appellants appealed in this case. Specifically, Norhill Energy, LLC submitted the plat. The City has submitted evidence to us showing that Selinger is Norhill's organizer and manager. The City's evidence also shows that Norhill has sued the City over its plat on claims unrelated to appellants' claims in this case. The City argues that the attempted "do over" plat moots the claims arising from the first plat.

Appellants make several responses, including: (i) they are not Norhill, which is a separate entity, (ii) they are suing for damages that have already accrued, regardless of what happens to Norhill's plat, (iii) Norhill's plat proposes to connect to the City's water and sewer, but that doesn't mean that the City didn't mishandle Selinger's plat, which did not contain such a proposal, and (iv) the City's treatment of Norhill's plat cannot undo its wrongful actions on Selinger's plat.

We agree with appellants. A limited liability company is a legal entity separate from its members. *Sherman v. Boston*, 486 S.W.3d 88, 94 (Tex. App.—Houston [14th Dist.] 2016, pet. denied). The fact that Norhill has filed a new plat fails to establish that appellants did not suffer the damages they claim from the City's treatment of Selinger's plat. Nor does it affect appellants' claims that the City's conduct violated statutes and constitutional provisions or that the City's subdivision ordinance is itself illegal and unconstitutional. *See City of Harlingen*, 2005 WL 74121, at *3–4 (developer's claims against city for zoning decisions not mooted when developer's right to buy property expired).

We reject the City's mootness argument.

VI. DISPOSITION

We affirm the trial court's order granting the City's plea to the jurisdiction to the extent it dismissed appellants' claims for attorney's fees regarding their takings claims under the Texas Constitution. In all other respects, we reverse the order granting the plea to the jurisdiction. We remand the case for further proceedings consistent with this opinion.

/Bill Whitehill/
BILL WHITEHILL
JUSTICE

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Court of Appeals
Fifth District of Texas at Dallas

JUDGMENT

STEPHEN RICHARD SELINGER AND NANCY L. DAIL, Appellants

No. 05-19-00545-CV V.

CITY OF MCKINNEY, TEXAS, Appellee

On Appeal from the 429th Judicial District Court, Collin County, Texas
Trial Court Cause No. 429-04150-2018.
Opinion delivered by Justice Whitehill. Justices Bridges and Nowell participating.

In accordance with this Court's opinion of this date, we **AFFIRM** in part and **REVERSE** in part the trial court's Order Granting Plea to the Jurisdiction. We **REVERSE** the trial court's Order Granting Plea to the Jurisdiction to the extent it dismissed Counts 1, 2, 3, 4, 5, and 6 of appellants Stephen Richard Selinger and Nancy L. Dail's Fourth Amended Petition, with the exception that we **AFFIRM** the Order Granting Plea to the Jurisdiction to the extent it dismissed appellants Stephen Richard Selinger and Nancy L. Dail's claims for attorneys' fees regarding their takings claims under the Texas Constitution. We **REMAND** this cause to the trial court for further proceedings consistent with this opinion.

It is **ORDERED** that appellants Stephen Richard Selinger and Nancy L. Dail recover their costs of this appeal from appellee City of McKinney, Texas.

Judgment entered July 1, 2020.