IN THE
TENTH COURT OF APPEALS

No. 10-19-00020-CV

DAVID A. BAUER, LARRY W. JACKSON,
AND BAUER JACKSON, LTD,

Appellants

v.

CITY OF WACO,

Appellee

From the 74th District Court
McLennan County, Texas
Trial Court No. 2011-4140-3

MEMORANDUM OPINION

David A. Bauer, Larry W. Jackson, and Bauer Jackson, Ltd., (the developers} sought to develop land (the property) in the City of Waco. After various applications for permits were filed, where some were granted and some withdrawn, and proposed plats were denied and then approved after City-recommended modifications were made, the developers sued the City for declarations pursuant to Texas Local Government Code Chapter 245, asserting they had "vested rights" to build a lake on the property under City

ordinances in effect at the time the lake was first proposed, prior to the modifications of those ordinances. Following multiple amendments to their petition, the developers also raised dedicatory exaction and takings claims and a declaratory judgment claim regarding an 8-inch water line on the property and, after amending the petition for the seventh time, a declaratory judgment claim regarding a lift station. The City filed a motion for summary judgment, plus two supplemental motions, which the trial court granted as to the developers' entire case. Because the trial court did not err in granting summary judgment on each of the developers' claims, the trial court's judgment is affirmed.

SUMMARY JUDGMENT

In one issue, the developers contend the trial court erred in granting summary judgment regarding their entire case and assert they are entitled to attorney's fees. They complain as well about the City's argument in its first supplemental motion for summary judgment that Bauer and Jackson had no justiciable interest in part of the lawsuit.

Standard of Review

We review a trial court's summary judgment de novo. *KCM Fin. LLC v. Bradshaw*, 457 S.W.3d 70, 79 (Tex. 2015); *Nichols v. McKinney*, 553 S.W.3d 523, 527 (Tex. App.—Waco 2018, pet. denied). Our review is limited to consideration of the summary judgment evidence presented to the trial court. *See* TEX. R. CIV. P. 166a(c) (no oral testimony may be considered in support of a motion for summary judgment). We take as true all

evidence favorable to the nonmovant and indulge every reasonable inference and resolve any doubts in the nonmovant's favor. *Valence Operating Co. v. Dorsett*, 164 S.W.3d 656, 661 (Tex. 2005). A party moving for traditional summary judgment must state specific grounds, and a defendant who conclusively negates at least one of the essential elements of each of the plaintiff's causes of action or who conclusively establishes all the elements of an affirmative defense is entitled to summary judgment. *KCM Fin. LLC*, 457 S.W.3d at 79; *Cathey v. Booth*, 900 S.W.2d 339, 341 (Tex. 1995).

Summary judgments must stand on their own merits. *Anderson Hosp. & Tumor Inst. v. Willrich*, 28 S.W.3d 22, 23 (Tex. 2000). Accordingly, the non-movant has no burden to respond to or present evidence regarding the motion until the movant has carried its burden. *See id.*; *Nichols*, 553 S.W.3d at 527. And when the trial court's judgment does not specify which of several grounds proposed was dispositive, we affirm on any ground presented in the motion that has merit and was preserved for review. *See Joe v. Two Thirty Nine J.V.*, 145 S.W.3d 150, 157 (Tex. 2004).

Chapter 245—Vested Rights

In their first cause of action, the developers sought declaratory relief regarding its "vested rights" under Chapter 245 of the Texas Local Government Code. *See* TEX. LOC. GOV'T CODE Ch. 245. The developers requested four declarations:

1. the December 7, 2010, and later amendments relative to the excavation of material, specifically sections 28.747(92) and 28.748(2) of the Waco City Ordinances, are inapplicable to the Property because the developers' rights under Chapter 245 to construct a lake, of the size

shown in its 2009 and 2010 plans submitted to the City, were vested prior to the amendments;

2. their vested rights include the right to build lakes and water supply reservoirs under the M-2 zoning ordinances in effect at the date they presented plans for development to the City in 2009 and on September 8, 2010 or on October 8, 2010--the date the City issued the first permit under which the developers began construction of the lake;

3. the City cannot limit the size of the lakes or reservoirs or the time period in which they are to be completed; and

4. the City cannot prevent the developers from removing excavated material or dictate the hours the material can be removed.

Generally, Chapter 245 of the Local Government Code recognizes a developer's "vested rights" in a project and requires a regulatory agency to review a permit application based on the regulations in effect at the time the original application is filed. *See* TEX. LOC. GOV'T CODE § 245.002; *Milestone Potranco Dev., Ltd., v. City of San Antonio*, 298 S.W.3d 242, 248 (Tex. App.—San Antonio 2009, pet. denied). Chapter 245 may be enforced through mandamus or declaratory or injunctive relief, and a political subdivision's immunity from this type of suit is waived. *Id*. § 245.006(a), (b). Further, court costs and attorney's fees may be awarded to the prevailing party. *Id*. (c).

The City asserted several grounds on which the trial court should grant summary judgment. In one of those grounds, the City claimed that a declaration of the developer's vested rights would not resolve the dispute because the text of the pre-amendment ordinance does not support the developers' claim. In support of this ground, the City attached copies of the prior ordinance in question along with the ordinance as amended

and an added ordinance which affects the developers' plans.

On appeal, however, the developers do not address this ground. When a party moves for summary judgment on multiple grounds and the trial court does not specify the basis for its summary judgment, "the appealing party must show it is error to base it on any ground asserted in the motion." *Star-Telegram, Inc. v. Doe*, 915 S.W.2d 471, 473 (Tex. 1995). If the appealing party fails to negate or challenge all possible grounds on which summary judgment could have been granted, we will uphold the judgment on those grounds. *Lesher v. Coyel*, 435 S.W.3d 423, 429 (Tex. App.—Dallas 2014, pet. denied); *see Heister v. W. Shamrock*, No. 10-01-00366-CV, 2003 Tex. App. LEXIS 5160, *2 (Tex. App. Waco June 18, 2003, no pet.) (mem. op.).

Accordingly, because the developers did not challenge the summary judgment of their Chapter 245-vested rights claim on all the grounds asserted by the City, the trial court did not err in granting summary judgment as to the developers' first cause of action.

Exaction Claim

The developers' second cause of action was a claim for a taking of the property resulting from a "dedicatory exaction." According to the developers' seventh amended petition, on January 4, 2013, they submitted plats to the City which complied with all of the requirements contained in previous requirement letters from the City regarding the developers' preliminary and final plats for a development on the property called the South Fork Addition. However, the City Council voted to deny the preliminary and final

plats. Later in January, the City sent the developers a letter which required the developers to dedicate a 20-foot wide, minimum, general utility easement for the watermain which was already installed on the property as a condition of receiving final approval of the development of the property. The developers submitted revised plans, under protest, which complied with this requirement.

The developers complained in their petition that the requirement to dedicate a 20-foot easement for the City's 8-inch watermain, or alternatively a 19-foot, 4-inch easement, was an exaction which resulted in a regulatory taking and inversely condemned and damaged the property without just compensation. They also sought money damages, costs, and reasonable attorney's fees.

The City moved for summary judgment on this cause of action for several different reasons. One of those reasons was that the developers' claim was not ripe because they did not request a variance after the plat was denied and the 20-foot easement requirement for the 8-inch watermain was imposed. For a regulatory taking claim to be ripe, there must be a final decision regarding the application of the regulations to the property at issue. *Mayhew v. Town of Sunnyvale*, 964 S.W.2d 922, 929 (Tex. 1998). A "final decision" usually requires both a rejected development plan and the denial of a variance from the controlling regulation. *Id*. The City presented summary judgment evidence that the developers did not request a variance to the 20-foot easement requirement.

The developers do not argue on appeal that the trial court erred in basing its

summary judgment for this cause of action on the developers' failure to request a variance. Again, because the developers did not challenge the summary judgment of their exaction claim on a ground presented by the City, the trial court did not err in granting summary judgment as to the developers' second cause of action. *See Star-Telegram, Inc. v. Doe*, 915 S.W.2d 471, 473 (Tex. 1995); *Lesher v. Coyel*, 435 S.W.3d 423, 429 (Tex. App.—Dallas 2014, pet. denied); *see Heister v. W. Shamrock*, No. 10-01-00366-CV, 2003 Tex. App. LEXIS 5160, *2 (Tex. App. Waco June 18, 2003, no pet.) (mem. op.).

Watermain Taking Claims/Watermain Easement Size

In their third cause of action, the developers contend the City unlawfully installed the 8-inch watermain on property that remained outside the South Fork Addition and claim the unlawful installation resulted in a taking of the property, without just compensation, pursuant to Article I, Section 17 of the Texas Constitution. Alternatively, in their fourth cause of action, the developers contend that if installation of the watermain by the City was lawful, the developers request a declaration from the trial court that the City had no easement greater than the width of the 8-inch watermain on such portions of the property when the watermain was installed.

Watermain taking

The developers contend on appeal that the City failed to address their third cause of action that the watermain installation is a taking. We disagree with the developers. In its supplemental and second supplemental motions for summary judgment, the City

asserted that summary judgment should be granted on the developers' third cause of action because the watermain was approved by the developers' predecessor in title.

As it pertains to this case, Article 1, Section 17 of the Texas Constitution provides that:

> No person's property shall be taken,… for or applied to public use without adequate compensation being made, *unless by the consent of such person* and only if the taking, … is for: (1) the ownership, use, and enjoyment of the property, notwithstanding an incidental use, by: (A) the State, a political subdivision of the State, or the public at large….

TEX. CONST. art. I, § 17(a) (emphasis added).

The City provided summary judgment evidence through the affidavit of Mike Sykora, the Senior Planner for the Public Works Department of the City of Waco, that a prior owner of the property asked the City to install the watermain in question. Sykora stated that Omega Industries, Inc., previous owner of the property, provided a letter to the City of Waco dated August 31, 1979, advising the City that it wished to install a waterline on its property and that it would like to retain ownership of the line. In return, Omega would guarantee the right to tap the line to anyone to whom it sold any portion of the property. The letter also advised that if Omega sold the property, which Sykora felt "it obviously did," the ownership of the line would go to the City of Waco. The letter from Omega to the City was attached as an exhibit to Sykora's affidavit. A letter from the City to the vice president of Omega, which was also attached to Sykora's affidavit, advised Omega that a final inspection of the waterline indicated a satisfactory completion

of the waterline installation. The developers do not dispute this evidence. Instead, they contend they did not know about the watermain until the lawsuit began.

A landowner may consent to property being taken or damaged without payment of any compensation. TEX. CONST. art. I, § 17; *Town of Flower Mound v. Rembert Enters.*, 369 S.W.3d 465, 479 (Tex. App.—Fort Worth 2012, pet. denied); *Hale v. Lavaca Cnty. Flood Control Dist.*, 344 S.W.2d 245, 248 (Tex. Civ. App.—Houston 1961, no writ). Consequently, a person who consents to the governmental action cannot validly assert a takings claim. *Kirby Lake Dev., Ltd. v. Clear Lake City Water Auth.*, 320 S.W.3d 829, 844 (Tex. 2010); *State v. Steck Co.*, 236 S.W.2d 866, 869 (Tex. Civ. App.—Austin 1951, writ ref'd) (by making the contract, manufacturing the cigarette tax stamps, and delivering them to the State voluntarily and with its own consent, appellee cannot now say the stamps were taken without compensation); *Hightower v. City of Tyler*, 134 S.W.2d 404, 406 (Tex. Civ. App.—El Paso 1939, writ ref'd) (rejecting claim that city's use of water and sewer lines was a taking, because "appellants gave consent to the City to make such use of the lines as was made"). This includes a person who claims title under another who consented to the action. *See City of Round Rock v. Smith*, 687 S.W.2d 300, 303 (Tex. 1985) (holding that homeowners did not state a claim for inverse condemnation because the developer consented to the taking); *Bennett v. Tarrant Cty. Water Control & Improvement Dist. No. One*, 894 S.W.2d 441, 448 n. 8 (Tex. App.—Fort Worth 1995, writ denied) (landowners would not be entitled to compensation because they claim title through the original grantees

who consented to the taking).

The summary judgment evidence established that the prior owner of the property requested the installation of the watermain complained about by the developers. Thus, regardless of whether they knew about the watermain before or after the commencement of the lawsuit, the developers, who claim title under the prior owner of the property, cannot now claim the installation of the watermain was a taking. The trial court did not err in granting summary judgment on the developers' third cause of action.

Size of Easement

The developers also contend on appeal that the City failed to address their fourth cause of action regarding the size of the easement on the property outside the Southfork Addition. Again, we disagree with the developers.

The developers specifically brought their fourth cause of action pursuant to the Texas Uniform Declaratory Judgments Act, seeking all relief provided by the Act, including declaratory relief, temporary and permanent injunctions, attorneys' fees, and costs of court. In its supplemental motion for summary judgment, the City argued that the developers' UDJA claim should be dismissed because it was barred by governmental immunity. At the time the City's supplemental motion for summary judgment was filed, the developer's fourth cause of action was the only UDJA claim other than the developers' Chapter 245-vested rights claim. The other claims brought by the developers were constitutional takings claims.

The UDJA generally permits a person who is interested in a deed, or whose rights, status, or other legal relations are affected by a statute, to obtain a declaration of rights, status, or other legal relations thereunder. TEX. CIV. PRAC. & REM. CODE § 37.004(a); *Tex. Parks & Wildlife Dep't v. Sawyer Trust*, 354 S.W.3d 384, 388 (Tex. 2011). And while the UDJA waives immunity for certain claims, such as challenges to the validity of a municipal ordinance or statute, TEX. CIV. PRAC. & REM. CODE § 37.006(b), and actions falling within Chapter 245 of the Texas Local Government Code, TEX. LOC. GOV'T CODE § 245.006(a), (b), it is not a general waiver of immunity. *Sawyer Trust*, 354 S.W.3d at 388; *City of El Paso v. Heinrich*, 284 S.W.3d 366, 373 n.6 (Tex. 2009). In other words, there is no general right to sue a state agency for a declaration of rights. *Sawyer Trust*, 354 S.W.3d at 388; *Tex. A&M Univ. v. Carapia*, 494 S.W.3d 201, 207 (Tex. App.—Waco 2015, pet. ref'd). Thus, immunity will bar even an otherwise proper UDJA suit that has the effect of establishing a right to relief against the State or its political subdivisions for which the Legislature has not waived immunity. *Id*.

The developers did not challenge the validity of a statute or ordinance as described by the UDJA in their fourth cause of action. It was the developers' burden to plead facts establishing jurisdiction, and they have not done so. *See Tex. Dep't of Parks & Wildlife v. Miranda*, 133 S.W.3d 217, 226 (Tex. 2004). Thus, this cause of action is barred by governmental immunity; and the trial court did not err in granting the City's summary

judgment as to the developers' fourth cause of action. [1]

Lift Station Declaratory Judgment

The developers' fifth and final cause of action requested a declaration from the trial court, pursuant to the Texas Declaratory Judgments Act, that a specific lift station lot on the property "is—and has been since it's public use began—owned by the City [of Waco]." The developers also prayed for injunctive or mandamus relief to require the City to transfer the lift-station-lot out of the developers' names and into the City's name. The City responds on appeal, and raises for the first time, that it has governmental immunity from the requested relief.

Sovereign immunity "implicates" the trial court's subject-matter jurisdiction. *Engelman Irrigation Dist. v. Shields Bros*., 514 S.W.3d 746, 751 (Tex. 2017). It does not, however, necessarily equate to a lack of subject-matter jurisdiction for all purposes. *Id*. Regardless, the defense of sovereign immunity may be raised for the first time on appeal on pending claims. *Rusk State Hosp. v. Black*, 392 S.W.3d 88, 95 (Tex. 2012); *Manbeck v. Austin Indep. Sch. Dist*., 381 S.W.3d 528, 530 (Tex. 2012).

Again, the developers did not challenge the validity of a statute or ordinance as described by the UDJA in their fifth cause of action. It was the developers' burden to

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[1] A plaintiff deserves "a reasonable opportunity to amend" his petition unless the pleadings affirmatively negate the existence of jurisdiction. *Tex. A&M Univ. Sys. v. Koseoglu*, 233 S.W.3d 835, 839 (Tex. 2007); *Harris County v. Sykes*, 136 S.W.3d 635, 639 (Tex. 2004). However, after reviewing the developers' seventh amended petition, a remand would serve no purpose because pleading additional facts cannot overcome the City's immunity. *See Koseoglu*, 233 S.W.3d at 840.

plead facts establishing jurisdiction, and they have not done so. *See Tex. Dep't of Parks & Wildlife v. Miranda*, 133 S.W.3d 217, 226 (Tex. 2004). Thus, this cause of action is barred by governmental immunity; and the trial court did not err in granting the City's summary judgment as to the developers' fifth cause of action.[2]

Justiciable Interest

The developers also complain on appeal about the City's ground raised in its supplemental motion for summary judgment that Bauer and Jackson, individually, had no justiciable interest in the property because they sold the property to Bauer Jackson, Ltd. Specifically, the City argued that any declaratory judgment or injunctive relief on Bauer and Jackson's "vested rights" claims pursuant to Chapter 245 would serve no purpose.

Because the developers have not prevailed on their Chapter 245 vested rights claim, we need not address whether or not Bauer and Jackson, individually, have a justiciable interest in the property.

ATTORNEY'S FEES

Lastly, the developers contend Chapter 245 provides for an award of attorney's fees, contrary to the City's argument in its supplemental motion for summary judgment. Again, because the developers have not prevailed on their Chapter 245 vested rights

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[2] Again, after reviewing the developers' seventh amended petition, a remand would serve no purpose because pleading additional facts cannot overcome the City's immunity. *See Koseoglu*, 233 S.W.3d at 840.

claim, we need not discuss whether or not the Chapter provides for attorney's fees in this case.

CONCLUSION

Based on the foregoing, the developers' sole issue is overruled. Accordingly, the trial court's summary judgment is affirmed.

TOM GRAY
Chief Justice

Before Chief Justice Gray,
Justice Davis, and
Justice Neill
Affirmed
Opinion delivered December 9, 2020
[CVO6]