IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
WACO DIVISION

FAZZINO INVESTMENTS, LP for itself and all others similarly situated,	§	
***Plaintiffs*,**	§	
v.	§	**CASE NO. 6:25-cv-00001-ADA-DTG**
BRAZOS VALLEY GROUNDWATER CONSERVATION DISTRICT,	§	
Defendant.	§	

DEFENDANT BRAZOS VALLEY GROUNDWATER CONSERVATION DISTRICT'S REPLY IN SUPPORT OF ITS RULE 12(c) MOTION FOR JUDGMENT ON THE PLEADINGS AND/OR RULE 56 MOTION FOR SUMMARY JUDGMENT (DOC. 50)

TO THE HONORABLE UNITED STATES DISTRICT COURT:

Defendant Brazos Valley Groundwater Conservation District (the "District") provides its Reply in support of its Motion under Federal Rule of Civil Procedure 12(c) for Judgment on the Pleadings and/or under Federal Rule of Civil Procedure 56 for Summary Judgment (Doc. 50) to dismiss the claims of Fazzino Investments, LP, for itself and others similarly situated ("Plaintiff"). In support thereof, the District respectfully states the following:

I. EXECUTIVE SUMMARY

The essence of Plaintiff's claim based on the District's Amended Rules remains "the District can't do that," *not* "the District can't do that . . . without paying just compensation." And that claim is not a takings claim, because a takings claim can only arise from an "otherwise proper interference" with a plaintiff's property rights. Put another way, does Plaintiff's takings claim contend that, *other than* the defect of the District not paying just compensation to Plaintiff, the District's amendment of its Rules is an "otherwise proper" act? The answer is unquestionably "no." Plaintiff's arguments regarding all the ways that the Amended Rules violate Texas law—both statutory and common law—amount to a full-scale attack on the legality of the Amended Rules, but a takings suit is not the forum for adjudicating whether the District complied with Texas law. If Plaintiff wants to challenge the Amended Rules' validity, it must do so through the proper state-law mechanism—not through a federal takings claim.

Additionally, because the legality—and therefore the applicability—of the Amended Rules remains an open, contested issue reserved for a state-law mechanism designed to resolve it, their applicability has not been finally determined. Contrary to Plaintiff's incorrect statements, the "finality" element of *Williamson County* remains the law, and Plaintiff has purposefully failed to satisfy that necessary predicate to ripen its claim.

Plaintiff cannot overcome its square-peg-in-a-round hole problem. Plaintiff wants a court to find that the District's amendment of its rules is in violation of Texas law, and thus is illegal/*ultra vires*. There are causes of action that allow for

adjudication of such a challenge, but a takings claim—the only pleaded claim before this Court—is not one of them, as it cannot be predicated on an illegal/*ultra vires* act. The fact that the order-of-operations Plaintiff would have this Court apply also precludes ripeness further emphasizes that Plaintiff's case does not fit within the sole pleaded claim.

II. ARGUMENT AND AUTHORITIES

A. A "takings claim" predicated on a government action that is alleged to be illegal/outside the entity's legal authority is not a takings claim at all.

Takings claims are a creature of the Fifth Amendment's Takings clause: "nor shall private property be taken for public use, without just compensation." U.S. Const., amend. V. Fifth Amendment takings cases thus have a specific—*and limited*—purpose: "this provision does not prohibit the taking of private property, but instead places a condition on the exercise of that power." *First English Evangel. Luth. Church v. Cnty. of L.A.*, 482 U.S. 304, 314 (1987). The Supreme Court thus noted what the Takings clause does *not* do versus what it does: "this basic understanding of the Amendment makes clear that it is designed not to limit the governmental interference with property rights per se, but rather to secure compensation in the event of otherwise proper interference amounting to a taking." *Id.* at 315; *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 543 (2005); *see also E. Enters. v. Apfel*, 524 U.S. 498, 554 (Breyer, J., dissenting) (observing that the Takings clause "refers to the taking of 'private property . . . for public use without just compensation.' U.S. Const., Amdt. 5. As this language suggests, at the heart of the Clause lies a concern, not with preventing arbitrary or unfair government action, but with

providing *compensation* for legitimate government action that takes 'private property' to serve the 'public' good." (emphasis in original)).

Stated plainly, the rule is that takings claims are for (1) obtaining just compensation for (2) "legitimate government action" that takes private property for a public purpose, *not* for challenging a government action as illegal, unauthorized, arbitrary, or unfair. Thus, a takings claim is implicated *only* "in the event of *otherwise proper interference* amounting to a taking."

The dispositive question is whether Plaintiff views the Amended Rules as an "otherwise proper interference" with its property interests. Its allegations make clear it does not. Plaintiff's complaints that the District's rule amendments violate state common law and do not follow the District's enabling legislation (Chapter 36 of the Water Code) are—as a matter of law—complaints that the District board's act of amending the rules was *ultra vires* and without legal authority.[1]

Districts like Defendant, creatures and creations of Texas state law, have only the powers expressly granted to them by the Texas Legislature. *Chambers-Liberty Cntys. Navigation Dist. v. State*, 575 S.W.3d 339, 349 (Tex. 2019) (powers of districts like Defendant—those created pursuant to Tex. Const. art. XVI, § 59—"are limited to those 'conferred by law'"). A government officer acts "'without legal authority,' and thus *ultra vires*, if he exceeds the bounds of his granted authority or if his acts conflict

[1] Another rather clear "tell" that what Plaintiff has brought is really a legality/validity challenge in takings clothing is the relief it requests: Plaintiff seeks only to enjoin the operation of the Amended Rules, and disavows any claim for just compensation.

with the law itself." *Hous. Belt & Terminal Ry. Co. v. City of Hous.*, 487 S.W.3d 154, 158 (Tex. 2016); *see also Chambers-Liberty Cntys. Navigation Dist.*, 575 S.W.3d at 349 (applying the principle that an act is "without legal authority" if the act is in conflict with the constraints of the law because "a public officer has no discretion or authority to misinterpret the law").[2] The scope of *ultra-vires* actions includes not just allegations that the act is contrary to the entity's enabling legislation; it also includes allegations that an officer of the entity misinterpreted some other relevant law. *Hall v. McRaven*, 508 S.W.3d 232, 240 (Tex. 2017) (a complaint against a university chancellor that he improperly interpreted federal privacy laws was a proper *ultra-vires* complaint). In short, no entity or government official in Texas has the authority to violate the law, and any action that does so is *ultra vires* as a matter of law. Thus, any act that is violative of an entity's enabling legislation, other state law, or is otherwise unlawful or illegal is as a matter of law outside the entity's authority and *ultra vires*.

The Fifth Circuit and subordinate district courts consistently follow the rule that allegedly *ultra-vires* acts cannot support a takings claim. *Lafaye v. City of New Orleans*, 35 F.4th 940, 943 (5th Cir. 2022) (considering a circumstance where a city

[2] Defendant notes for the Court that pursuant to Texas law on governmental immunity and the *ultra-vires* exception to that immunity, "even though the suit is, for all practical purposes, against the state," the underlying entity is immune from suit, so such a claim must proceed against a government official of that entity in his/her official capacity. *Chambers-Liberty Cntys. Navigation Dist.*, 575 S.W.3d at 348–49. However, in cases where a statute has waived an entity's immunity for claims challenging the legality of the entity's actions—as Texas Water Code Section 36.251 does—the entity itself is the proper defendant in such suit.

acted *ultra vires* by acting contrary to state law, the Fifth Circuit applied the rule that "to allege a cognizable takings claim, a plaintiff must challenge an action that would have been legal if only it had been compensated" and held that the defendant city's *ultra-vires* action therefore did not constitute a taking.); *Doe 1 v. Harris Cnty., Tex.*, 2022 U.S. Dist. LEXIS 234337, at *16 (S.D. Tex. 2022) (where plaintiffs alleged an *ultra-vires* action, the court held that "[t]heir pleadings belie a takings claim because they allege that Defendants' actions are not legal. This ends the inquiry regarding Plaintiffs' takings claim.") *citing Lafaye*, 35 F.4th at 943.

Plaintiff asserts that the Amended Rules are improper in numerous ways that violate both Texas statutory and common law, which would necessarily render the amendment of the District's rules *ultra vires*.[3] The Supreme Court cautions that

[3] Plaintiff is consistent in this stance through its Complaint, discovery responses, other pleadings, and even its Response to this Motion (Doc. 51). While Plaintiff on the one hand makes the blanket statement in its Response that it does not contend that the rule changes were outside the District's authority . . . it then goes on to list multiple ways that it contends the rule changes *are* outside the District's authority. *See, e.g.,* Doc. 51, p. 12, n.6 (contending that the District's reduction in the amount of groundwater that can be pumped from the same acreage is "in violation of Texas law"); p. 13 (stating that rules that treat people in the same aquifer differently "will always be unconstitutional," and further asserting that "Plaintiff seeks relief in the form of a declaration that the changes to Rules 6.1 and 7.1 result in an *unlawful* two-tiered scheme . . ." (emphasis added)); p. 16 (alleging fault with the rule amendments because they do not rely on a logical rationale such as "best available science," a term found in the District's statutory grant of power found at Texas Water Code Section 36.0015). Plaintiff even offers a two-page discussion of how the District's consideration of "desired future conditions" of the aquifer was inappropriate and how Plaintiff contends the concerns should have been addressed—both questioning the District's compliance with its statutory authority under Texas Water Code Section 36.1132 (requiring that permits be managed to achieve desired future conditions) and essentially advancing the kind of "substantially advances" challenge expressly barred in takings cases by *Lingle*. 544 U.S. at 543–45.

takings law is not designed for "limit[ing] governmental interference with property rights" or "preventing arbitrary or unfair government action" predicated on that government action being illegitimate and not an otherwise proper act of interference, but that is exactly what Plaintiff seeks to do here.

So long as Plaintiff (1) asks this Court to analyze the lawfulness of the Amended Rules and decide whether they are within the District's authority and/or are otherwise proper, but (2) does so via a takings claim alone, *that* claim is not a valid claim and must be dismissed. The key is that if the regulation is unlawful, it is simply impermissible. And a claim to challenge the lawfulness of a regulation can be pursued in a number of ways,[4] but a takings claim is not one of them.

B. *Willamson County* is still good law; *Knick* preserves, rather than eliminates, the "final decision" requirement, which Plaintiff has not satisfied.

Plaintiff invokes *Knick v. Twp. of Scott*, 588 U.S. 180 (2019), as if *Knick* somehow opened the doors of federal court to every regulatory-takings complaint regardless of whether the plaintiff ever obtained a final decision from the government. That is not what *Knick* held.

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[4] For example, a due process claim could be a mechanism to challenge the propriety of state action. *Lingle,* 544 U.S. at 540–42 (observing that a challenge to a regulation as arbitrary or irrational may sound in due process, while further noting that such an inquiry is not appropriate for determining whether a taking has occurred). And, under state law, if a plaintiff contends that governmental officials are acting outside/contrary to their limited statutory authority, the plaintiff may bring an *ultra-vires* action seeking to enjoin those officials from acting outside the limits of their legal authority. *See Hous. Belt & Terminal Ry. Co.*, 487 S.W.3d at 161. Defendant notes that the same legal position that could be asserted in an *ultra-vires* action—that the District's Rule Amendments are contrary to state law—also could be addressed in a Texas Water Code Section 36.251 rule challenge, which may be brought against the District itself.

Knick eliminated only the *state-procedures-for-compensation* component of the *Williamson County* ripeness framework. It did not eliminate the independent, longstanding requirement that a takings plaintiff obtain a final, definitive position from the government. *See Knick*, 588 U.S. at 187–88 ("*Williamson County* held that the developer's Fifth Amendment claim was not 'ripe' for two reasons. First, the developer still had an opportunity to seek a variance from the appeals board, so any taking was therefore not yet final. [] Knick does not question the validity of this finality requirement, which is not at issue here."). The Supreme Court reaffirmed this again in *Pakdel v. City and Cnty. of San Francisco*, recognizing that while the "finality requirement is relatively modest," the rationale of the finality requirement "ensures that a plaintiff has actually 'been injured by the Government's action' and is not prematurely suing over a hypothetical harm." 594 U.S. 474, 478–79, (2021).

Other federal courts' position regarding the finality prong is consistent. The Fifth Circuit held that "whenever the property owner has ignored or abandoned some relevant form of review or relief, such that the takings decision cannot be said to be final, the takings claim should be dismissed as unripe." *Urban Devs. LLC v. City of Jackson*, 468 F.3d 281, 293 (5th Cir. 2006) citing *Hidden Oaks Ltd. v. City of Austin*, 138 F.3d 1036, 1041 (5th Cir. 1998).

In *Coates v. Hall*, the Western District of Texas likewise adhered consistently to the finality requirement as an essential component of takings ripeness. "The Fifth Circuit has strictly construed the finality prong . . . a property owner alleging a takings claim must seek 'variances or waivers, when potentially available, before a court will

hear their takings claims.'" 512 F. Supp. 2d 770, 785 (W.D. Tex. 2007). Even though a clear form of review and relief exists here (Texas Water Code Section 36.251), Plaintiff has not identified any such path it pursued. Under *Urban Developers*, Plaintiff's inaction renders the claim unripe and nothing in *Knick* disturbs this sound prerequisite to a ripe and valid takings claim.

Knick does not help Plaintiff. *Knick* simply removed one of the two *Williamson County* prongs. The "final-decision" prong remains, and it is dispositive here. Plaintiff cannot bypass an available form of relief. In this case, Plaintiff's purposeful refusal to seek any review—particularly the available mechanism of a Texas Water Code Section 36.251 rule challenge—renders its takings claim unripe, and the case should be dismissed.

C. Plaintiff avoids Section 36.251 review because it would resolve—against Plaintiff—the very legality questions it improperly asks this Court to decide first.

At heart, Plaintiff's ripeness problem is not about futility; it is about avoidance. Chapter 36 provides a direct and tailor-made mechanism—Texas Water Code Section 36.251—for challenging a groundwater district's rules. That avenue exists precisely to test the legality and validity of a Texas district's regulations in state court, with a full administrative record and the appropriate standard of review. Rather than invoke that procedure, Plaintiff seeks to bypass it entirely and litigate a facial challenge to the District's rules in the guise of a federal takings case without ever submitting those rules to the statutory review the Legislature created for that purpose.

The most plausible explanation for Plaintiff's refusal to file a Section 36.251 rule challenge is obvious: it knows that such a challenge would fail, foreclosing its effort to

invalidate the District's Amended Rules wholesale. Section 36.251 would require Plaintiff to confront the scientific, technical, legal, and policy foundations of the District's rulemaking—issues it has raised and challenged by embedding them improperly in an invalid and premature takings claim. Ripeness doctrine does not permit a plaintiff to skip the very procedure designed to resolve such a dispute and instead ask a federal court to adjudicate the legality of the governmental entity's rules via a takings claim.

Because Plaintiff elected not to pursue a claim via the statutory mechanism that could yield a final, reviewable decision, its takings claim remains unripe. A plaintiff cannot manufacture federal jurisdiction by avoiding the state-law process that the Legislature provided to challenge District rules. In the event that the Court has not already dismissed Plaintiff's takings claim on the basis that it is not a valid takings claim, the Court should dismiss the claim as unripe.

III. CONCLUSION AND PRAYER

Plaintiff's Complaint is inextricably interwoven with and based on contentions that the District's act of amending its rules was illegal, unlawful, outside its authority, and contrary to state law (both statutory and common law). Plaintiff's complaints are *not* that the District's rule amendments were otherwise fully legal and proper, if only the Plaintiff had been paid just compensation. Plaintiff may be able to state some sort of claim against the District to challenge the legality/validity of its Amended Rules—indeed, Section 36.251 of the Texas Water Code provides just such a mechanism—but the one thing the law is clear on is that the claim Plaintiff has pleaded is not a takings claim. Yet Plaintiff stands pat, and that is the *only* claim it has pleaded. This Court therefore should grant Defendant's Motion for Judgment on

the Pleadings and/or Motion for Summary Judgment, and dismiss Plaintiff's takings claim. Defendant further respectfully requests any and all other relief to which it may be entitled.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 3rd day of December, 2025, I caused a true and correct copy of the foregoing to be transmitted by the Court's electronic filing system to the parties listed below:

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