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MUNICIPAL UTILITY DISTRICTS - TEXAS

The Hanover Insurance Company v. Binnacle Development, L.L.C.

United States Court of Appeals, Fifth Circuit - January 12, 2023 - 57 F.4th 510

Construction contractor's payment-bond surety, as contractor's assignee, brought action under Texas law against land developers to recover amounts allegedly due on contracts that developers had with contractor to complete paving and infrastructure projects in county municipal utility district.

The United States District Court for the Southern District of Texas granted surety's motion for summary judgment. Developers appealed.

The Court of Appeals held that:

- Texas Water Code section authorizing economic disincentive clauses for construction delay in district contracts did not apply, and
- Damages clause was an unenforceable liquidated damages clause seeking penalties.

Texas Water Code section authorizing economic disincentive clauses for late completion of construction work on a district contract "made by the board" did not apply to contracts between land developers and contractor to complete paving and infrastructure projects in county municipal utility district, even though county managed the public bidding process, which contractor won, and county planned to purchase the infrastructure after completion, where county was not a party to any of the contracts.

Texas Water Code section authorizing economic disincentive clauses for late completion of construction work on a district contract "made by the board" required county municipal utility district to be a contracting party to contracts that land developers had with contractor to complete paving and infrastructure projects in the district, in order for section to apply; section limited its applicability to contracts "made by the board," and boards governed districts.

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Chapter of Texas Water Code governing "Provisions Applicable to All Districts," including a section authorizing economic disincentives for late completion of construction work on a district contract "made by the board," applies only to districts unless a section narrows its application to certain types of districts.

Incorporation of Texas Government Code chapter governing performance and payment bonds on public works projects into Water Code did not convert private contracts between land developers

and contractor to complete paving and infrastructure projects in county municipal utility district into district contracts that would be subject to Water Code section authorizing economic disincentive clauses for late completion of construction work on a district contract "made by the board"; whether Government Code chapter even applied was unclear due to absence of any public entity in contracts, and even if chapter did apply, it was not inconsistent to conclude that the Water Code section in issue applied only to contracts "made by the board" of a district.

Definition of "district facility" under Texas Water Code, as any plant or equipment supplied for the business or operations of a district, did not alter the requirement that a contract be made by a district board in order to trigger applicability of Water Code section authorizing economic disincentive clauses for late completion of construction work on a district contract, in action concerning private contracts that land developers had with contractor to complete paving and infrastructure projects in county municipal utility district.

Texas Water Code section authorizing economic disincentive clauses for late completion of construction work on a district contract "made by the board" could not be incorporated into land developers' private contracts with contractor for paving and infrastructure projects in county municipal utility district; there was no statutory text suggesting that private parties could rely on, or were protected by, section when there was no contract executed by a district board, and developers were trying to make Water Code apply to contracts between private parties that one day might have been assumed by a district.

Texas Water Code section authorizing economic disincentive clauses for late completion of construction work on a district contract "made by the board" allows economic disincentive clauses only in contracts where a district is a contracting party.

Under Texas law, damages clause in private contracts between land developers and contractor to complete paving and infrastructure projects in county municipal utility district was not a limitation of liability clause but rather was an unenforceable liquidated damages clause seeking a penalty, where clause was entitled "liquidated damages for delay/economic disincentive," clause expressly provided for liquidated damages of $2,500 for each calendar day of delay, and clause did not set a ceiling on liability.

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