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

LONESTAR AIRPORT HOLDINGS, LLC,	§	
	§	
Plaintiff,	§	
	§	**CIVIL ACTION NO.**
v.	§	**1:22-CV-00770-RP**
	§	
CITY OF AUSTIN, TEXAS,	§	
Defendant.	§	

DEFENDANT'S REPLY IN SUPPORT OF ITS MOTION TO DISMISS FIRST AMENDED COMPLAINT

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

A. Plaintiff's Desired Reading of Article 15 Ignores Its Plain Meaning and Is Not Consistent with Texas Contract Law and Federal Aviation Law.

Plaintiff's interpretation of Article 15 ignores the provision's unambiguous language and structure. Article 15 consists of four sentences. The language requiring the City's "agreement" is found in two places in the second sentence, which is the sentence Plaintiff contends establishes its exclusive right to participate in an Expansion or a New Facility (and the only sentence that could establish such a right). That sentence is structured in an "if/then" format: *If* Plaintiff provides written notice of its "interest[ ] in investing" in an Expansion or a New Facility, *then*—"subject to [the City]'s agreement"—the parties will "work together in good faith to enter into an agreement . . . on mutually agreeable terms" either to amend the Lease (if the Expansion does not require additional land) or to give Plaintiff the right to develop, construct, or operate the Expansion (if it requires additional land) or New Facility. Critically, both references to an agreement are located in the "then" clause—the first at the beginning (immediately *after* "then"), and the second at the end—leading to the inescapable conclusion that all of the rights created by that clause are conditioned on the City's agreement and cannot be exercised unilaterally by Plaintiff.

Plaintiff argues that the agreement language refers only to the City's *initial* "determination" that "the growth of operations of existing or new air carriers requires" an Expansion or a New Facility. (Dkt. 49 at 9–10.) But that determination is addressed in the first sentence of Article 15, not the sentence with the agreement language. Moreover, the agreement language is not limited to particular subjects or qualified in any other way. While it may be plausible to argue that the *entirety* of Article 15 is dependent on the City's agreement, it is not reasonable to adopt the interpretation urged by Plaintiff, which would deprive the agreement language of any effect within the very clause in which it is found. Even if one were to conclude that the agreement language somehow refers back to Plaintiff's notice of its "interest[ ] in investing" in an Expansion or a New Facility

(in the "if" clause), that approach would still not result in Plaintiff's desired interpretation because the "if" clause does not invoke the necessity of the project, but Plaintiff's *interest in participating in it*. However one views it, Plaintiff's reading of Article 15 is not textually credible.[1]

Plaintiff's argument that Article 15's plain meaning should be discarded as "illusory" because it requires the City's approval is not supported by any Texas case law. Texas courts do not jettison agreed-upon contractual language simply because it "is difficult to imagine the parties could have intended such a result." (Dkt. 49 at 10.) Rather, Texas courts "presume parties intend what the words of the contract say" and look to "[o]bjective manifestations of intent," not to what the parties later allege they "intended to say but did not."[2] Even when the plain meaning of a provision would lead to an unlikely result—and, to be clear, there is nothing implausible about the requirement that Plaintiff get the City's agreement before embarking on a project as significant as an Expansion or a New Facility—a court still "cannot go beyond the plain language of the lease to construe it in light with [a party]'s desired interpretation."[3]

Plaintiff's argument that Article 15 is an enforceable agreement to negotiate ignores the Texas Supreme Court's decision in *Vizant*, 576 S.W.3d 362 (Tex. 2019). In *Vizant*, the airport entered into a consulting agreement capping the compensation to be paid to the consultant, but

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[1] Plaintiff's flawed interpretation is the source of its equally erroneous contention that the City approved Plaintiff's participation in an Expansion or a New Facility. (Dkt. 49 at 9.) At most, the complaint alleges that the City determined the Airport needed to expand capacity and engaged in "active negotiations" with Plaintiff to reach an agreement under Article 15. (*See* Dkt. 38 at ¶¶ 193, 194, 196.) The complaint does not allege that the parties entered into such an agreement. Otherwise, that alleged contract would be the subject of another baseless breach claim.

[2] *URI, Inc. v. Kleberg Cnty.*, 543 S.W.3d 755, 763 (Tex. 2018); *see also Endeavor Energy Res., L.P. v. Energen Res. Corp.*, 615 S.W.3d 144, 148 (Tex. 2020) ("The most important consideration in interpreting a lease is the agreement's plain, grammatical language.").

[3] *TotalEnergies E&P USA, Inc. v. Dallas/Fort Worth Int'l Airport Bd.*, No. 02-20-00054-CV, 2022 Tex. App. LEXIS 1993, at *9 (Tex. App.—Fort Worth Mar. 24, 2022, pet. denied) (although parties might have meant to limit drilling commitment to horizontal wells, that was not reflected in plain language of lease) (citing *First Bank v. Brumitt*, 519 S.W.3d 95, 110 (Tex. 2017)).

provided that the airport would make "a good faith effort to receive board authorization to increase the compensation," and "if approved," the parties would amend the contract to reflect the higher amount. *Id.* at 364-65. When the Board rejected the consultant's request for an amendment, the consultant sued for breach of contract, alleging that the Board had failed to make the promised good-faith effort. *Id.* at 365. On appeal, the Supreme Court held that because "agreements to negotiate toward a future contract are not legally enforceable," the airport's promise to make a "good faith effort" to authorize a higher payment did not state the essential terms of a legally enforceable agreement and, thus, did not waive the airport's immunity from suit.[4]

Vizant forecloses Plaintiff's claims based on Article 15. Like the "good faith effort" provision in *Vizant*, Article 15 is, at heart, an agreement to negotiate a future contract. It is unenforceable not because it leaves some terms of a potential agreement to be agreed upon later—that is a position the City has never taken—but because it leaves open almost all of the *essential terms* of a potential agreement. Other than the names of the parties and the general subject matter, Article 15 is inscrutable. It does not specify or even generally describe the scope of the future lease, its length, the approved uses of the premises, the amount of rent, or any terms or conditions

[4] *Id.* at 371 (citing *Fischer v. CTMI, L.L.C.*, 479 S.W.3d 231, 242 (Tex. 2016) ("To be sure, contracting parties' 'agreement to enter into negotiations, and agree upon the terms of a contract, if they can, cannot be made the basis of a cause of action.'") (quoting *Radford v. McNeny*, S.W.2d 472, 474 (Tex. 1937)); *Barrand, Inc. v. Whataburger, Inc.*, 214 S.W.3d 122, 139 (Tex. App.—Corpus Christi–Edinburg 2006, pet. denied) ("Regardless of whether a duty of good faith and fair dealing arose under the parties' agreement, Whataburger is not obligated to execute new contracts with Barrand."); *John Wood Group*, *Inc. v. ICO, Inc.*, 26 S.W.3d 12, 21 (Tex. App.—Houston [1st Dist.] 2000, pet. denied) ("By contrast, under Texas law, an agreement to negotiate in the future is unenforceable, even if the agreement calls for a 'good faith effort' in the negotiations."); *Maranatha Temple, Inc. v. Enter. Prods. Co.*, 893 S.W.2d 92, 104 (Tex. App.—Houston [1st Dist.] 1994, writ denied) ("The fact that this particular agreement to negotiate in the future includes a term calling for the appellees to put forth a 'good faith effort' in the negotiations does not remove the agreement from this rule. The agreement, whatever its specific language, is still an agreement to enter into future negotiations, and, as such, it is unenforceable.")).

relating to construction, operations, maintenance, repairs, parking, financing, insurance, grant assurances, assignments, subleasing, or any other material issue, all of which would need to be negotiated before any potential agreement under Article 15 would be mutually acceptable to the parties.[5] All Article 15 says is that the parties will agree to negotiate in good faith. That promise, under *Vizant*, is not enforceable.[6]

In response to the City's argument that Plaintiff's interpretation of Article 15 is contrary to federal aviation law, Plaintiff attacks a straw man. The City is not arguing, as Plaintiff contends, that Article 15 is unenforceable under federal aviation law in all circumstances. Instead, the City's argument is based on Plaintiff's own pleadings, which allege an exclusive, *airport-wide* right to develop new infrastructure, including facilities relating to air-carrier services.[7] In the Opposition, Plaintiff tacitly concedes that this broad interpretation of Article 15 conflicts with federal law. (Dkt. 49 at 12–13 (distinguishing between "permissible" and "forbidden" exclusive rights).) To satisfy federal aviation law, Article 15 must be read far more narrowly than Plaintiff contends, permitting development of a much more limited project if and when desired and agreed to by both parties. This inherent conflict between the Plaintiff's purported scope of Article 15 and the legally permissible scope of that provision underscores the conclusion that Article 15 does not contain all

[5] The Texas Statute of Frauds requires a right-of-first-refusal clause regarding the conveyance of a lease to describe the lease premises with reasonable certainty. *See* TEX. BUS. & COM. CODE § 26.01(b)(5). Article 15 does not pass that test.

[6] *Vizant* also disproves Plaintiff's arguments that the Chapter 271 waiver of immunity covers all of the promises in the Lease because the Lease *as a whole* states all essential terms, and that the enforceability of Article 15 is not a proper jurisdictional argument. (Dkt. 49 at 3, 4.) The *Vizant* Court found there was no waiver of immunity for the "good faith effort" provision even though the consulting agreement as a whole was complete, and it also had no trouble determining the unenforceability of that provision as part of its jurisdictional analysis.

[7] (*See* Dkt. 38 at ¶¶ 8 (alleging Article 15 grants the right to participate in "any expansion at the South Terminal or construction of new facilities at the Airport"), 47 (alleging Article 15 covers "the construction of any new passenger terminal or concourse, including . . . other facilities at the Airport . . . to accommodate the growth of operations of Airlines (or other air carriers) . . . .").

material terms and is unenforceable under Plaintiff's interpretation. Moreover, Plaintiff's assertion that the FAA's Part 16 process is the only means by which to resolve a question of federal aviation law is misinformed. Federal courts have long held that the interpretation of a contract relying on federal aviation law is not confined to the FAA.[8] This case does not raise the question of whether the City violated its grant assurances when it entered into the Lease—it did not. The point here is that Plaintiff's claims, based on its own expansive reading of Article 15, which Plaintiff is asking this Court to adopt, would violate the City's grant assurances if taken at face value.

Finally, the Court should deny Plaintiff's repeated requests for leave to amend its pleadings to assert ambiguity and allege facts regarding intent beyond the four corners of the Lease. Any amendment would be futile: the City's reading of Article 15 is the only reasonable interpretation that is consistent with the provision's plain meaning, and thus, Plaintiff's reliance on extrinsic facts would violate Texas law. *See Brumitt*, 519 S.W.3d at 110 (prohibiting reliance on extrinsic evidence to make a contract "say what it unambiguously does not say").[9] Plaintiff amended its complaint once already in response to the City's original motion, which was virtually identical to the current motion. Plaintiff has had ample opportunity to clarify its pleadings; that ship has sailed.

B. Plaintiff's Non-Article 15 Contract Claims Are Foreclosed by the Lease.

Instead of addressing the essence of its non-Article 15 contract claims—that the City breached the Lease by exercising the power of eminent domain—Plaintiff diverts attention to other

[8] *E.g.*, *Gary Jet Ctr. Inc. v. Gary/Chicago Int'l Airport Auth.*, No. 2:13-CV-453 JVB, 2014 U.S. Dist. LEXIS 45201, at *12-14 (N.D. Ind. Apr. 2, 2014) (when lease requires airport sponsor to comply with federal grant assurances, court has jurisdiction to evaluate such compliance to determine whether sponsor breached contract); *Bos. Exec. Helicopters, LLC v. Maguire*, 45 F.4th 506, 515-18 (1st Cir. 2022) (looking to 49 U.S.C. § 47107's prohibition of "exclusive rights" to inform court's interpretation of settlement agreement providing for "non-exclusive" airport lease).

[9] Magistrate Judge Hightower has already found that such parol evidence is not relevant at this stage of the proceeding. (Dkt. 48 at 6.)

makeweight allegations supposedly arising out of events predating the condemnation proceeding. This misdirection does not rebut the City's arguments. Indeed, Plaintiff concedes that the City has statutory eminent-domain power and that nothing in Article 34 limits that power. (Dkt. 49 at 8.) Plaintiff also does not dispute that Article 34 grants a broad right to the City to condemn Plaintiff's "entire . . . Interest" under the Lease, *expressly including any rights Plaintiff might have under Articles 2 or 15*. Lease arts. 1.01, 34.01, 34.03. Thus, the existence of any legally enforceable rights under Articles 2 or 15, as alleged by Plaintiff, cannot prevent the City from exercising its condemnation rights. To the extent Plaintiff maintains its breach-by-condemnation claims (*see* Dkt. 38 at ¶¶ 173, 216, 226), such claims are foreclosed by the Lease and should be dismissed.[10]

Moreover, Plaintiff's distinction between condemnation and "pre-condemnation" claims is artificial and relies more on artful pleading than real differences. Any claim based on Plaintiff's perceived rights under Article 15 fails regardless of when it arose because, as explained above, Article 15 is not enforceable. And all of the remaining "pre-condemnation" claims are based on statements allegedly made by the City merely expressing its intent to acquire Plaintiff's leasehold interest—either through a voluntary buy-out or via condemnation.[11] These allegations are not factually independent of the City's exercise of its condemnation rights, but are elements of it. (*See*

[10] Plaintiff argues that its quiet-enjoyment claim cannot be dismissed on ripeness grounds. (Dkt. 49 at 2.) To state a valid quiet-enjoyment claim, Plaintiff must plausibly allege all of the essential elements *either* under Texas common law, which requires an actual or constructive eviction (*see* Dkt. 43 at 3), *or* under the lease if it departs from the traditional elements of the common law. *E.g.*, *Goldman v. Alkek*, 850 S.W.2d 568 (Tex. App.—Corpus Christi–Edinburg 1993, no writ). Because Article 2 does not depart from the common law and Plaintiff does not and cannot allege an eviction, Plaintiff has failed to state a valid quiet-enjoyment claim. Whether that defect warrants dismissal under Rule 12(b)(1) or 12(b)(6) is irrelevant; either way it should be dismissed.

[11] (*See* Dkt. 38 at ¶¶ 175 (complaining of statement of "intent to take control of the property"), 177 (letter communicating "desire to buy-out Lonestar and regain control"), 178 (memorandum discussing "intention to buy out Lonestar's interest"), 180 (statement of intent to "demolish the South Terminal and build a New Facility, purportedly requiring the City to pursue condemnation"), 181 (condemnation notice).)

id. at ¶ 173 (characterizing the City's acts as being part of a single "course of conduct").) Because the City cannot and did not breach the Lease by exercising its condemnation rights, the City's initial expressions of its intent to exercise those same rights cannot be a breach of the Lease either.

In any event, the Court should reject Plaintiff's contention that if at least one of its contract theories passes muster under Rule 12(b)(6), then all of them must survive. For that proposition, Plaintiff cites to dicta in *BBL, Inc v. City of Angola*, 809 F.3d 317, 325 (7th Cir. 2015). But the Fifth Circuit (and every other circuit except the Seventh Circuit) has never adopted the position that Rule 12(b)(6) does not permit dismissals of parts of claims, and district courts in this circuit routinely dismiss or strike portions of claims or affirmative defenses while allowing other portions to survive.[12] Further, unlike in *BBL*, where the motion to dismiss was directed at "*certain elements*" of a single claim, 809 F.3d at 323, the City here is asking the Court to dismiss separate theories of contractual liability that Plaintiff could have pleaded as separate claims. To refuse to dismiss under these circumstances would elevate the form of Plaintiff's allegations over their substance.[13]

The Court should also reject Plaintiff's bid to save its non-Article 15 contract claims by conditioning the City's condemnation rights on its acceptance of Plaintiff's own *pre-taking* valuation of the rights being condemned. Artcile 34 is certainly not a liquidated-damages clause, as Plaintiff is apparently suggesting. Rather, Article 34 merely provides that if the City condemns Plaintiff's interest under the Lease, Plaintiff will be entitled to "compensation for the Fair Market

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[12] *E.g.*, *Hamilton v. Lawnmasters of Shreveport, LLC*, No. 17-1000, 2021 U.S. Dist. LEXIS 45081 (W.D. Tex. Mar. 9, 2021) ("Rule 12(b)(6) allows a party to move to dismiss a claim *or part of a claim* for failure to state a claim upon which relief can be granted.") (emphasis added).

[13] *See IBM v. Priceline Group, Inc.*, No. 15-137-LPS-CJB, 2017 U.S. Dist. LEXIS 54285, at *19, *21 (D. Del. Apr. 10, 2017) (stating that the rationale of *BBL* would give litigants "a perverse incentive to lump together every possible disparate theory of [liability] into one unwieldly [ ]claim, in the hopes that a single theory with wings would carry other theories past the Rule 12(b)(6) stage, when in fact those other theories should never have gotten off the ground").

Value of Tenant's Interest so taken." Lease art. 34.03. The Lease *does not* predetermine the fair market value (if any) of certain Lease rights in condemnation. Nor does it guarantee a minimum level of compensation that must be offered to Plaintiff in advance of the condemnation judgment. Nor does it foreclose the City from taking the position it has taken here: that some of Plaintiff's interests under the Lease, such as the unenforceable right under Article 15, have *no fair market value*. As Judge Hightower has recognized, the state condemnation proceeding will determine, at a minimum, the compensation owed to Plaintiff due to the City's exercise of its condemnation rights. (*See* Dkt. 47 at 10.) Plaintiff's assertion that the City has *already* breached the Lease by failing to agree to Plaintiff's position on compensation—when the Lease does not so require and the Special Commissioners have not even held their hearing, much less issued their award—is premature and not based on any reasonable interpretation of the actual language of the Lease.

C. Plaintiff's Taking Claims Remain Legally Defective.

Plaintiff argues that its takings claims are ripe because allegations of an "imminent risk of constitutional injury . . . satisfy Article III where injunctive relief is at issue." (Dkt. 49 at 2.) But this general proposition does not apply in this context under *Knick*. In *Knick*, the Supreme Court held that a takings claim does not accrue until the government actually takes property without paying for it.[14] Furthermore, and directly contrary to Plaintiff's argument, the Court reaffirmed its long-standing prohibition on awarding injunctive relief in takings claims: "As long as an adequate provision for obtaining just compensation exists, there is no basis to enjoin the government's

[14] *Knick v. Twp. of Scott*, 139 S. Ct. 2162, 2171 (2019) ("[A] property owner has a constitutional claim for just compensation *at the time of the taking*.") (emphasis added). The same rule applies to takings claims brought under Texas law. *See Westgate, Ltd. v. State*, 843 S.W.2d 448, 452–53 (Tex. 1992) (holding that property is not taken under Article I, section 7 of Texas Constitution where government has imposed no current, direct restriction on property's use).

actions effecting a taking."[15] The same logic applies to takings claims seeking declaratory relief, which federal courts have routinely found to be barred under *Knick*.[16] As the City explained in its prior briefing, no taking has occurred in this case under Texas law, and Plaintiff therefore lacks standing to bring its takings claims. (*See* Dkt. 39 at 8-9, Dkt. 43 at 2.) Plaintiff is putting the cart before the horse. When the Special Commissioners' hearing occurs on January 31, 2023, Plaintiff may seek just compensation at that hearing and then continue to pursue just compensation during the judicial phase of the proceeding (Plaintiff does not allege otherwise). But until then, *Knick* forecloses the injunctive and declaratory relief Plaintiff seeks.

Plaintiff also argues that even though the Texas legislature has declared the acquisition of real property for airport purposes to be a public function, the City's stated public purpose is an improper "pretext" to "avoid its contractual obligations." (Dkt. 49 at 16.) This allegation invokes Texas Government Code § 2206.001, which prohibits a taking that is "is for a public use that is merely a pretext to confer a private benefit on a particular private party." TEX. GOV'T CODE § 2206.001(b)(2). Importantly, this statute does not prohibit allegedly "pretextual" takings that benefit the government or the public. The statute also contains several exceptions. Specifically, it "does not affect the authority" of a government "to take private property" for "transportation projects, including . . . airports," *id.* § 2206.001(c)(1), or "to condemn a leasehold estate on property owned by the governmental entity." *Id.* § 2206.001(d). In those situations, Texas law does

[15] *Knick*, 139 S. Ct. at 2176; *see also id.* at 2166 ("the federal and nearly all state governments provide just compensation remedies to property owners who have suffered a taking"); *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1018 n.21 (1984) ("Equitable relief is not available to enjoin an alleged taking of private property for a public use, duly authorized by law, when a suit for compensation can be brought against the sovereign subsequent to the taking").

[16] *See Pharm. Research & Mfrs. of Am. v. Williams*, 525 F. Supp. 3d 946, 952 (D. Minn. 2021) (citing cases); *Baptiste v. Kennealy*, 490 F.Supp.3d 353, 391 (D. Mass. 2020) (holding that declaratory relief for takings claim, without just compensation, is "functional equivalent of an unwarranted injunction" and is foreclosed under *Knick*).

not prohibit the taking even when it is supposedly a "pretext" to benefit a particular private party.

Here, Plaintiff does not allege that the City is conferring a private benefit on a private party. Assuming for the sake of argument that the City's primary goal is to "avoid its contractual obligations" (and it is not), Plaintiff does not allege any facts showing that this purpose does not benefit the City and is not essentially public in nature. At any rate, the City qualifies under both statutory exceptions because the taking is for an airport transportation project and the City is condemning a leasehold estate on its own property. Thus, Plaintiff's pleadings do not rebut the Texas legislature's declaration of a public purpose or establish a taking that is "clearly private in nature." In the absence of any other allegations of fraud, bad faith, or arbitrary and capricious conduct,[17] Plaintiff cannot maintain its takings claims on the basis of a "pretextual" purpose.

Lastly, Plaintiff's attempts to extend *Kimball* and *Blue Mound* to the facts of this case are unavailing. Both of those opinions recognize that the taking of a "going concern" is not generally compensable. *Kimball*, 338 U.S. at 11–12; *Blue Mound*, 449 S.W.3d at 683. The *Blue Mound* court relied on *Kimball's* discussion of *City of Omaha* to hold that the condemnation of a privately-owned public-utility system for government use is an exception to the general rule. 449 S.W.3d at 684. And *Kimball* found another exception when the taking is temporary. 338 U.S. at 7. Other federal courts have also recognized that the *Kimball* exception is based on the temporary nature of the taking.[18] Plaintiff has not alleged that this case falls within one of these two exceptions. *See AMV-HOU, Ltd. v. Capital Metro. Transp. Auth.*, 262 S.W.3d 574, 584 (Tex. App.—Austin 2008, no pet.) (rejecting a claim to recover going-concern value).

[17] Plaintiff did not plead fraud, bad faith (outside of the context of Article 15), or arbitrary and capricious conduct in its Complaint or First Amended Complaint.

[18] *See Yuba Nat. Res., Inc. v. U.S.*, 904 F.2d 1577, 1581 (Fed. Cir. 1990); *Front Royal & Warren Cnty. Indus. Park Corp. v. Town of Front Royal*, 749 F. Supp. 1439, 1444 (W.D. Va. 1990).

* * *

For the foregoing additional reasons, the City's motion to dismiss should be granted.

Respectfully submitted,

WINSTEAD PC

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ATTORNEYS FOR DEFENDANT CITY OF AUSTIN, TEXAS

CERTIFICATE OF SERVICE

I hereby certify that, on November 15, 2022, I electronically submitted the foregoing document with the clerk of the United States District Court for the Western District of Texas, using the electronic case management CM/ECF system of the Court which will send notification of such filing to all counsel of record who are deemed to have consented to electronic service.

/s/ Thomas J. Forestier
Thomas J. Forestier