NUMBER 13-19-00357-CV

COURT OF APPEALS

THIRTEENTH DISTRICT OF TEXAS

CORPUS CHRISTI – EDINBURG

TEXAS GENERAL LAND OFFICE, Appellant,

v.

LA CONCHA CONDOMINIUM ASSOCIATION, ITS OWNERS, DR. CLAY PADGINTON, CINDY CLENDENEN, AND ROBERT STEENBOCK, Appellees.

On appeal from the 357th District Court of Cameron County, Texas.

MEMORANDUM OPINION

Before Chief Justice Contreras and Justices Longoria and Hinojosa
Memorandum Opinion by Chief Justice Contreras

Appellant, the Texas General Land Office (the GLO), contests the trial court's order denying its Rule 91a motion to dismiss a suit brought by appellees La Concha Condominium Association (the Association), its owners, Dr. Clay Padginton, Cindy

Clendenen, and Robert Steenbock.[1] *See* TEX. R. CIV. P. 91a. The GLO contends by three issues that: (1) appellees did not plead a legally valid takings claim under the Texas Constitution or the Private Real Property Rights Preservation Act (PRPRPA); (2) appellees failed to exhaust their administrative remedies, thereby precluding their statutory takings claim; and (3) appellees' requests for injunctive and declaratory relief and attorney's fees are impermissible. We reverse and render.

I. BACKGROUND

This case concerns a wooden walkway constructed over dunes adjacent to the La Concha condominium complex. In 2017, the City of South Padre Island (the City) issued a building permit to erect the walkway, dubbed "Seaside Circle," which is on City-owned land and which is intended to provide the public with beach access. Appellees sued the City, alleging that construction of the walkway materially diminished the value of their property and thus constituted an unconstitutional taking without just compensation.[2] They sought damages, an order enjoining the City from further construction and compelling it to remove the walkway, and attorney's fees under the PRPRPA. *See* TEX. GOV'T CODE ANN. § 2007.026.

Appellees' seventh amended petition, filed on March 20, 2019, added the GLO as

[1] Appellees Padginton, Clendenen, and Steenbock are individual unit owners at the La Concha condominium complex. Though these three individuals are specifically named as plaintiffs in appellees' pleadings, appellees include all of the La Concha unit owners.

[2] The City filed a plea to the jurisdiction arguing that the Association and Padginton lacked standing to bring suit. In 2018, we upheld the trial court's denial of the City's plea. *City of S. Padre Island v. La Concha Condo. Ass'n*, No. 13-18-00037-CV, 2018 WL 5289720, at *6 (Tex. App.—Corpus Christi–Edinburg Oct. 25, 2018, no pet.) (mem. op.) (concluding that the Association "has standing to assert takings claims on behalf of the individual condominium owners, with respect to the individually-owned units as well as the common areas of the condominium"). We also noted that, even though the suit sought damages, "[a] statutory waiver of immunity is unnecessary for a takings claim" and therefore, "the fact that the PRPRPA does not waive immunity for damages claims does not deprive the trial court of jurisdiction in this case." *Id.* at *5. The City did not allege in that case that appellees had failed to plead facts showing a valid takings claim against it, and we did not address that question. *See id.*

a defendant. The GLO moved to dismiss under Texas Rule of Civil Procedure 91a, contending that appellees' claims against it have "no basis in law or fact" because (1) the GLO has sovereign immunity[3] to suit; (2) appellees failed to exhaust their administrative remedies prior to filing suit; and (3) there is "no basis" for injunctive or declaratory relief or attorney's fees. *See* TEX. R. CIV. P. 91a. Appellees filed a response, including evidence, and the GLO filed a reply to the response. After a hearing, the trial court denied the GLO's Rule 91a motion. This appeal followed.

II. APPELLATE JURISDICTION

We first address whether we have jurisdiction over the appeal. *See M.O. Dental Lab v. Rape*, 139 S.W.3d 671, 673 (Tex. 2004) ("[W]e are obligated to review *sua sponte* issues affecting jurisdiction."). Unless an interlocutory appeal is authorized by statute, our jurisdiction extends only to the review of final judgments. *Bison Bldg. Materials, Ltd. v. Aldridge*, 422 S.W.3d 582, 585 (Tex. 2012). We strictly construe statutes granting interlocutory appeals because they are a narrow exception to the general rule that interlocutory orders are not immediately appealable. *CMH Homes v. Perez*, 340 S.W.3d 444, 447 (Tex. 2011).

The judgment on appeal here, entitled "Order Denying [the GLO]'s Rule 91a Motion to Dismiss All Claims Against the GLO," is not final, and there is no statute generally authorizing an interlocutory appeal of an order denying a Rule 91a motion. However, the Texas Legislature has authorized an immediate appeal from any interlocutory order that "grants or denies a plea to the jurisdiction by a governmental unit,"

[3] "Sovereign immunity" protects the State and State-level governmental agencies such as the GLO from suit, while "governmental immunity" protects political subdivisions of the State such as counties, cities, and districts. *Lubbock Cty. Water Control & Imp. Dist. v. Church & Akin, L.L.C.*, 442 S.W.3d 297 (Tex. 2014).

TEX. CIV. PRAC. & REM. CODE ANN. § 51.014(a)(8), and "plea to the jurisdiction" includes a Rule 91a motion if it alleges a lack of subject matter jurisdiction. *See City of Magnolia 4A Econ. Dev. Corp. v. Smedley*, 533 S.W.3d 297, 299 (Tex. 2017) ("This Court considers 'plea to the jurisdiction' not to refer to a particular procedural vehicle, but rather to the substance of the issue raised."); *City of Austin v. Liberty Mut. Ins.*, 431 S.W.3d 817, 822 (Tex. App.—Austin 2014, no pet.) (stating that, because the City's Rule 91a motion challenged the trial court's subject matter jurisdiction, § 51.014(a)(8) permitted an interlocutory appeal of the trial court's denial of the motion).

In its Rule 91a motion, the GLO made three arguments concerning jurisdiction, paralleling the issues raised on appeal. Each of those arguments relies on the GLO's sovereign immunity, which, if applicable, defeats a trial court's subject matter jurisdiction. *Tex. Parks & Wildlife Dep't v. Sawyer Tr.*, 354 S.W.3d 384, 388 (Tex. 2011). Thus, by denying the Rule 91a motion, the trial court effectively denied "a plea to the jurisdiction by a governmental unit" for purposes of appellate jurisdiction. TEX. CIV. PRAC. & REM. CODE ANN. § 51.014(a)(8); *Smedley*, 533 S.W.3d at 299; *City of Austin*, 431 S.W.3d at 822. Therefore, we have jurisdiction over this interlocutory appeal.

III. RULE 91A MOTION TO DISMISS

A. Standard of Review

Dismissal is appropriate under Rule 91a "if the allegations, taken as true, together with inferences reasonably drawn from them, do not entitle the claimant to the relief sought . . . [or] no reasonable person could believe the facts pleaded." TEX. R. CIV. P. 91a.1. Whether the dismissal standard is satisfied depends "solely on the pleading of the cause of action, together with any pleading exhibits permitted by Rule 59." TEX. R. CIV. P.

91a.6. We review the merits of a Rule 91a motion de novo. *City of Dallas v. Sanchez*, 494 S.W.3d 722, 724 (Tex. 2016).

When a Rule 91a motion challenges the trial court's subject matter jurisdiction on the pleaded facts, our review is analogous to that of a plea to the jurisdiction. *See id.* In evaluating a plea to the jurisdiction based on the pleadings, we construe the pleadings liberally in favor of the pleader, look to the pleader's intent, and accept as true the factual allegations in the pleadings. *Tex. Dep't of Parks & Wildlife v. Miranda*, 133 S.W.3d 217, 226, 228 (Tex. 2004). "This rubric is 'consistent with the requirement in Rule 91a to take the allegations, together with any reasonable inferences, as true.'" *Reaves v. City of Corpus Christi*, 518 S.W.3d 594, 605 (Tex. App.—Corpus Christi–Edinburg 2017, no pet.) (citing *Wooley v. Schaffer*, 447 S.W.3d 71, 75 (Tex. App.—Houston [14th Dist.] 2014, pet. denied)). Still, "while Rule 91a 'requires courts to take all factual allegations in the pleadings as true, legal conclusions need not be taken as true.'" *Id.* (citing *Auzenne v. Great Lakes Reins., PLC*, 497 S.W.3d 35, 39 n.2 (Tex. App.—Houston [14th Dist.] 2016, no pet.)).

The parties dispute whether it is appropriate for us to consider the evidence attached to appellees' response to the Rule 91a motion. In *Reaves*, this Court held that, when a governmental unit files a Rule 91a motion to dismiss on subject matter jurisdiction grounds, we do not apply the rules ordinarily applicable to pleas to the jurisdiction to the extent they differed from those contained in Rule 91a. *Id.* Instead, consistent with Rule 91a, we limit our review to the pleadings and do not consider extrinsic evidence. *See id.* (holding that the case must "be judged under the constraints of rule 91a, since that is the procedural framework which the City's motion invoked, upon which the appellants relied,

and by which the trial court decided this case").[4]

Appellees argue that we "must" consider the evidence because it is necessary to resolve the jurisdictional issues raised. *See Bland Indep. Sch. Dist. v. Blue*, 34 S.W.3d 547, 555 (Tex. 2000) ("[A] court deciding a plea to the jurisdiction is not required to look solely to the pleadings but may consider evidence and must do so when necessary to resolve the jurisdictional issues raised.").[5] Appellees cite *Chambers-Liberty Counties Navigation District v. State*, a case in which the defendant navigation district filed both a plea to the jurisdiction and a Rule 91a motion to dismiss, both asserting governmental immunity, and the trial court denied both. 575 S.W.3d 339, 343 (Tex. 2019) (combined appeal & orig. proceeding). In assessing the jurisdictional issues, the Texas Supreme Court applied the traditional rules governing pleas to the jurisdiction and considered evidence submitted by the parties insofar as it affected the jurisdictional analysis. *See id.* at 349–50.

We find the *Chambers-Liberty* case distinguishable because the defendants there filed a separate plea to the jurisdiction in addition to their Rule 91a motion, and the appeal was taken from the denial of both the plea and the motion. *See id.* at 343.[6] This case, on

[4] Thus, although a jurisdiction-based Rule 91a motion is considered a "plea to the jurisdiction" for purposes of the interlocutory appeal statute, it is not equivalent to such a plea for all purposes. *See Reaves v. City of Corpus Christi*, 518 S.W.3d 594, 605 (Tex. App.—Corpus Christi–Edinburg 2017, no pet.); *Wooley v. Schaffer*, 447 S.W.3d 71, 84 (Tex. App.—Houston [14th Dist.] 2014, pet. denied) ("Rule 91a is unique, an animal unlike any other in its particulars."); *but see City of Austin v. Liberty Mut. Ins.*, 431 S.W.3d 817, 823 n.1 (Tex. App.—Austin 2014, no pet.) (stating that a Rule 91a motion challenging jurisdiction "effectively constitutes a plea to the jurisdiction").

[5] The exhibits attached to appellees' response were as follows: (1) a map and photographs of the affected area; (2) our 2018 memorandum opinion arising out of this case; (3) excerpts from the deposition of Scottie Aplin, a GLO staff attorney; (4) excerpts from the deposition of Brandon Hill, a City employee; (5) a transcript of a temporary restraining order hearing on September 5, 2017; (6) an email from Aplin to appellees' counsel; and (7) a "Construction Certificate and Dune Protection Permit Requirements Checklist" promulgated by the GLO.

[6] In its reply brief, the GLO notes that the evidence considered by the *Chambers-Liberty* Court included the lease agreement which was the subject of the suit and which was attached as an exhibit to the

the other hand, is analogous to *Reaves* because the GLO's jurisdictional arguments were made and considered exclusively within the context of its Rule 91a motion.[7] As in *Reaves*, this case must be judged under the constraints of Rule 91a because that is the procedural framework which the GLO's motion invoked and by which the trial court made its decision. *See Reaves*, 518 S.W.3d at 605. Accordingly, we do not consider the evidence attached to appellees' response to the GLO's Rule 91a motion.

B. Applicable Law

1. Takings/Inverse Condemnation

State-level government agencies like the GLO are ordinarily immune to suit. *Sawyer Tr.*, 354 S.W.3d at 388. But "[s]overeign immunity does not shield the government from liability for compensation" under the takings clause of the Texas Constitution. *Harris Cty. Flood Control Dist. v. Kerr*, 499 S.W.3d 793, 799 (Tex. 2016) (op. on reh'g); *see Gen. Servs. Comm'n v. Little-Tex Insulation Co.*, 39 S.W.3d 591, 598 (Tex. 2001); *Steele v. City of Houston*, 603 S.W.2d 786, 791 (Tex. 1980) ("The Constitution itself is the authorization for compensation for the destruction of property and is a waiver of governmental immunity for the taking, damaging or destruction of property for public use."). That clause provides: "No person's property shall be taken, damaged or destroyed

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pleadings pursuant to Rule 59. *See* TEX. R. CIV. P. 59 (providing that "written instruments, constituting, in whole or in part, the claim sued on, or the matter set up in defense, may be made a part of the pleadings"); TEX. R. CIV. P. 91a.6 (permitting consideration of pleading exhibits under Rule 59 in determining Rule 91a motion). But the supreme court did not limit its consideration of jurisdictional evidence to pleading exhibits authorized by Rule 59. *See Chambers-Liberty Cntys. Navigation Dist. v. State* 575 S.W.3d 339, 349–50 (Tex. 2019) (combined appeal & orig. proceeding) ("Our analysis of the immunity questions raised in this interlocutory appeal requires a review of the Lease and other evidence and legal questions that necessarily implicate the underlying merits of the State's case. But, as noted, this review is sometimes necessary at the jurisdictional stage.").

[7] The GLO's answer to appellees' suit included a traditional plea to the jurisdiction. But that plea was never heard or explicitly ruled upon by the trial court. Instead, the record makes clear that the GLO's jurisdictional challenges were considered only in the context of its Rule 91a motion.

for or applied to public use without adequate compensation being made, unless by the consent of such person." TEX. CONST. art. I, § 17(a).

To invoke the trial court's jurisdiction against a governmental entity under the takings clause, a plaintiff must plead a facially valid takings claim. *Bell v. City of Dallas*, 146 S.W.3d 819, 825 (Tex. App.—Dallas 2004, no pet.); *see City of Houston v. Carlson*, 451 S.W.3d 828, 830 (Tex. 2014) ("[An inverse condemnation claim] is predicated upon a viable allegation of taking."); *Hearts Bluff Game Ranch, Inc. v. State*, 381 S.W.3d 468, 476 (Tex. 2012) ("In the absence of a properly pled takings claim, the state retains immunity."). Whether particular factual allegations are enough to state a valid takings claim is a question of law. *Gen. Servs. Comm'n*, 39 S.W.3d at 598.

Generally, a plaintiff asserting an unconstitutional taking must plead facts showing the government "intentionally took or damaged their property for public use" or "was substantially certain that would be the result." *Kerr*, 499 S.W.3d at 799 (citing *City of Keller v. Wilson*, 168 S.W.3d 802, 808 (Tex. 2005)). A takings claim cannot be supported by proof of mere negligent conduct by the government, nor can it be shown by the government's nonfeasance or lack of action. *See id.* at 799–800 (citing *City of Tyler v. Likes*, 962 S.W.2d 489, 505 (Tex. 1997)). "[T]he requisite intent is present when a governmental entity knows that a specific act is causing identifiable harm or knows that the harm is substantially certain to result." *Id.* (citing *Tarrant Reg'l Water Dist. v. Gragg*, 151 S.W.3d 546, 555 (Tex. 2004)). "[W]here courts have found direct governmental actions in which the governmental defendant had regulatory authority over the matter causing the plaintiff's harm, they have generally found a taking." *Hearts Bluff Game Ranch*, 381 S.W.3d at 480.

2. PRPRPA

Subchapter B of the PRPRPA allows a private real property owner to file a contested case with a State agency to determine whether a "governmental action" of the agency "results in a taking." TEX. GOV'T CODE ANN. § 2007.022. A property owner who has "exhausted all administrative remedies available" within the State agency and is aggrieved by the agency's final decision is entitled to judicial review in district court under the Administrative Procedures Act. *Id.* § 2007.025(b).[8]

A "taking" is defined in the statute as:

> (A) a governmental action that affects private real property, in whole or in part or temporarily or permanently, in a manner that requires the governmental entity to compensate the private real property owner as provided by the Fifth and Fourteenth Amendments to the United States Constitution or Section 17 or 19, Article I, Texas Constitution; or
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> (B) a governmental action that:
>
> > (i) affects an owner's private real property that is the subject of the governmental action, in whole or in part or temporarily or permanently, in a manner that restricts or limits the owner's right to the property that would otherwise exist in the absence of the governmental action; and
> >
> > (ii) is the producing cause of a reduction of at least 25 percent in the market value of the affected private real property, determined by comparing the market value of the property as if the governmental action is not in effect and the market value of the property determined as if the governmental action is in effect.

Id. § 2007.002(5). The PRPRPA applies only to the following "governmental actions":

> (1) the adoption or issuance of an ordinance, rule, regulatory requirement, resolution, policy, guideline, or similar measure;
>
> (2) an action that imposes a physical invasion or requires a dedication

[8] The PRPRPA waives sovereign immunity "to the extent of liability created by this chapter." *See* TEX. GOV'T CODE ANN. § 2007.004(a).

or exaction of private real property;

(3) an action by a municipality 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; and

(4) enforcement of a governmental action listed in Subdivisions (1) through (3), whether the enforcement of the governmental action is accomplished through the use of permitting, citations, orders, judicial or quasi-judicial proceedings, or other similar means.

Id. § 2007.003(a).

If the property owner establishes in a contested case under PRPRPA that a "governmental action" resulted in a "taking," the State agency must "rescind the governmental action, or the part of the governmental action resulting in the taking, as applied to the private real property owner," within thirty days. *Id.* § 2007.024(a). Alternatively, the governmental entity may elect to pay the property owner damages in an amount determined by the fact finder, in which case the order rescinding the offending governmental action must be withdrawn. *Id.* § 2007.025(c), (d). The prevailing party in a contested case under the PRPRPA—whether it be the property owner or the governmental entity—is entitled to recover attorney's fees. *Id.* § 2007.026.

Subchapter C of the PRPRPA imposes certain requirements on any government entity that proposes to engage in an action described in § 2007.003(a)(1) through (a)(3) "which may result in a taking." *Id.* § 2007.042(a). For example, the government entity must provide public notice, including a "reasonably specific description of the proposed action," via newspaper publication at least thirty days prior to the action. *Id.* And, before the public notice is provided, the government entity must prepare a written takings impact assessment (TIA) which describes the proposed action, determines whether the action

will constitute a taking, and describes "reasonable alternative actions that could accomplish the specified purpose[.]" *Id.* § 2007.043.

C. Analysis

The question in this case is whether appellees' live petition raised a valid takings claim against the GLO, in particular, as opposed to the City. The GLO contends by its first issue that the answer to that question is no because the petition did not allege the GLO took any "intentional, affirmative, direct, and definite detrimental action" related to the construction of the walkway.

Appellees' seventh amended petition alleged the following:

> 5. On an unknown date and without notice to the Plaintiffs Defendant [City] issued a building permit to erect a wooden walkover (boardwalk) on a lot adjacent to 2500 Gulf Blvd, the property of Plaintiffs, to extend from the street over the sand dunes to the open beach. Said walkover is now fully built. It is named Seaside Circle, at Beach access number 6, between the buildings at 2500 Gulf Blvd and 2412 Gulf Blvd.
>
> 6. Plaintiffs protested the building of the view blocking, eyesore walkover as inappropriate and unnecessary for the limited number of potential users of the walkway. Said protest was denied despite the fact that Plaintiffs had no notice of this walkway being built from either Defendant.
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> 7. The Plaintiffs further requested in writing a modification of the walkover so that in it would be less obstructive and less of an eye sore to its neighboring properties and owners. The Defendants have refused to take any action to cease on [sic] modify construction.
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> 8. The building of the walkover has materially diminished the value of Plaintiffs' adjoining property by:
>
> > A. Blocking the view of the Gulf of Mexico to the South of the Plaintiffs' property.
> >
> > B. Building a walkover substantially higher in elevation than the Plaintiffs' property for no reason.
> >
> > C. Building a walkover with a water faucet for cleaning and body washing which is exactly overlooking Plaintiffs' property.

D. Infringing on the privacy of Plaintiffs' property.

E. Causing traffic and parking problems for the Plaintiffs' property.

F. Encroaching on the Plaintiffs' property with an eyesore.

G. Unreasonably interfering with Plaintiffs' enjoyment of their property.

H. Inversing [sic] condemning the Plaintiffs' property by building an eyesore that diminishes property value.

I. Unlawfully taking the Plaintiffs' property by diminishing its value by blocking the view of the Gulf of Mexico.

J. Violating Section 2007 of the Texas Government Code.

K. Imposing a greater than necessary burden to the adjoining landowners in violation of Section 2007.003(c) of the Texas Government Code.

L. Failing to provide to the State a proper Takings Impact Assessment required under Section 2007.043, Tex. Govt Code.

M. Obtaining from the State permission to build an overpass based [sic] with a Void Takings Impact Assessment under Section 2007.044, Tex. Govt Code.

9. Sometime in August, 2017, the Defendant [City] decided to build a beach walk-over adjacent to Plaintiffs' property with the Defendant State's approval. Said construction was without Plaintiffs' input or cooperation and denied Plaintiffs' access to the view of the Gulf of Mexico without adequate compensation. The Defendants have taken Plaintiffs' property for public use by actual physical invasion of Plaintiffs' property and by an unreasonable interference with the Plaintiffs' right to use and enjoy their property.

The Defendants have failed and refused to hold formal proceedings for the purpose of compensating Plaintiffs for taking part of their property for public use.

10. Plaintiffs reallege paragraphs 1-8 and above that Defendants' conduct constituted a governmental action under the Texas Private Real Property Rights Preservation Act, Section 2007.003 of the Texas Government Code in that Defendants' action imposed a physical invasion of the Plaintiffs' property which the Defendants authorized and paid for it to be built. This is a "Taking" under Section 2007.002(5)(A) of the Texas Government Code in that the Defendants' action affected Plaintiffs' private real property in a manner requiring the governmental entity to compensate the private real

property owner as provided by the 5th and 14th amendments to the U.S. Constitution and Article 1 sections 17 and 19 of the Texas Constitution.

Further, this "Taking" violated Section 2007.003(a)(3) in that the actions of the Defendants building this boardwalk on land belonging to the State of Texas with financing by the Federal Government confers extra territorial jurisdiction on the Defendant [City] as well as complete jurisdiction on the Defendant State.

11. Alternatively, Defendants' action constituted a taking under Section 2007.002(5)(B) of the Texas Government Code in that Defendants' action affected Plaintiffs' private property in a manner which restricts or limits Plaintiffs' rights to the property and is a producing cause of a reduction of at least 25% in the market value of Plaintiffs' real property.

12. Alternatively, the Defendants' action in building a walkover, is an inverse condemnation without due process which deprived Plaintiffs of the use, benefit and enjoyment of their land for which they seek compensation in an amount within the jurisdictional limits of this Court. This is also a violation of Art. 1, Section 17, of the Texas Constitution.

13. The Defendants failed to give notice of their governmental action as required under Section 2007.042, Texas Government Code and Texas General Land Office regulations for any action affecting a sand dune. The Defendants' failure was intentional and without authority. No notice was provided to Plaintiffs which showed the specifics of the [City]'s walkover to include height, width, construction material, access and maintenance.

14. Further no "Taking Impact Assessment" was prepared or provided to Plaintiff in violation of Section 2007.043, Texas Government Code. No assessment of the burden imposed by the [City]'s walkover on the private property owners was ever done. No benefits to society assessment was ever made. No alternatives to the height, material width, maintenance, etc. of the walkover was ever presented or discussed with Plaintiffs in violation of Section 2007.043, Texas Government Code.

Disregarding allegations clearly limited to the City as well as bare legal conclusions, *see Reaves*, 518 S.W.3d at 605, we summarize appellees' factual allegations against the GLO[9] as follows: (1) it failed to give them notice of the walkway's

[9] The seventh amended petition states: "Defendant Texas General Land Office is a governmental unit of the State of Texas (State) as defined by Section 101.001(3)(A) of the Texas Civil Practice & Remedies Code." As the GLO's counsel noted at the final hearing, the GLO is not the same entity as the State of Texas. Nevertheless, we assume for purposes of this opinion that the petition's references to the "State" are actually references to the GLO, which is the only State-level entity named as a defendant.

construction as required by government code § 2007.042 and GLO regulations; (2) it "refused to take any action" to cease or modify the construction of the walkway; (3) it "failed and refused" to hold "formal proceedings for the purpose of compensating" them; (4) it "permi[tted]" the City to construct the walkway without a TIA, or with a "void" TIA, in violation of government code § 2007.043; and (5) it "approv[ed]" or "authorized" the City's building of the walkway.

The first three factual allegations do not suggest that the GLO undertook any affirmative, direct action related to the building of the walkway; thus, these allegations cannot support a valid takings claim against the GLO. *See Kerr*, 499 S.W.3d at 800 ("We have not recognized a takings claim for nonfeasance."); *Hearts Bluff Game Ranch*, 381 S.W.3d at 480.

The fourth factual allegation complains that GLO "permit[ted]" the City to build the walkway without a TIA. A governmental action requiring a TIA is void if one is not prepared. *Id.* § 2007.044(a). "A private real property owner affected by a governmental action taken without the preparation of a [TIA] as required by [the PRPRPA] may bring suit for a declaration of the invalidity of the governmental action." *Id.* § 2007.044. As the GLO notes, however, the TIA requirement applies only to proposed "governmental actions" listed in § 2007.003(a)(1) through (a)(3). *Id.* § 2007.043(a); *see id.* § 2007.003(a)(1)–(3). Accordingly, when a government defendant merely "enforce[s]" another governmental action via "permitting, citations, orders, judicial or quasi-judicial proceedings, or other similar means," the TIA requirement does not apply. *Id.* § 2007.043(a); *see id.* § 2007.003(a)(4). Thus, to the extent appellees argue the GLO violated the statute by giving the City "permission" to build the walkway without a TIA, that

claim fails.

Appellees note on appeal that, in their live petition, they alleged the walkway constituted a "physical invasion" of their property. *See id.* § 2007.003(a)(2). They also argue that the GLO's action in "approving" the City's construction of the walkway can be "fairly described as adoption, or issuance, or enforcement, of an ordinance, rule, regulatory requirement, resolution, policy, guideline, or similar measure." *See id.* § 2007.003(a)(1). They argue that a TIA was therefore required by the PRPRPA. *See id.* § 2007.043(a). We disagree. The specific factual allegations made in appellees' live petition, even when construed in appellees' favor, do not plausibly support a conclusion that the GLO's actions fell within these definitions.

Finally, we consider the fifth factual allegation appellees make against the GLO—that it "authorized" or "approved" the City's building of the walkway. Appellees are correct that this allegation, taken as true, suggests that the GLO undertook an affirmative and intentional direct act in relation to the construction of the walkway. The GLO argues, though, that it did not have the legal authority to "approve beachfront construction projects," and therefore, the allegation is "not reasonably believable" and cannot support a valid takings claim.

We agree. Chapter 61 of Texas Natural Resources Code, the Open Beaches Act, provides that the commissioner of the GLO (i.e., the Texas Land Commissioner) "shall strictly and vigorously enforce the prohibition against encroachments on and interferences with the public beach easement." TEX. NAT. RES. CODE ANN. § 61.011(c). If a landowner proposes construction adjacent to a public beach, he or she must "submit a development plan to the appropriate local government," and the local government must

then forward the development plan to the Land Commissioner. *Id.* § 61.015(c). The Land Commissioner "may submit comments on the proposed construction to the local government." *Id.* The local government must then certify that the proposed construction is either consistent or inconsistent with the local government's beach access and use plan. *Id.* § 61.015(f). The local government may include in the certification "any reasonable terms and conditions it finds necessary to assure adequate public beach access and use rights consistent with" the Dune Protection Act. *Id.* § 61.015(g).

The Dune Protection Act, chapter 63 of Texas Natural Resources Code, provides that a person must obtain a permit "from the appropriate commissioners court or municipal governing body" prior to "damag[ing], destroy[ing], or remov[ing] a sand dune or portion of a sand dune" or "kill[ing], destroy[ing], or remov[ing] any vegetation growing on a sand dune seaward of a dune protection line or within a critical dune area." *Id.* §§ 63.051, .091. Upon receiving an application for a permit under this statute, the commissioners court or municipality governing body must notify the Land Commissioner. *Id.* § 63.056(a). The Land Commissioner may then "submit any written or oral comments regarding the effect of the proposed activity on the dunes that protect state-owned land, shores, and submerged land." *Id.* § 63.056(b). Ultimately, the commissioners court or municipality governing body may grant the permit if "the particular conduct proposed will not materially weaken the dune or materially damage vegetation on the dune or reduce its effectiveness as a means of protection from the effects of high wind and water[.]" *Id.* § 63.054(a).

Under both the Open Beaches Act and the Dune Protection Act, the authority for approving beachfront construction rests solely with the applicable local government entity,

not the GLO or the Land Commissioner. Though these statutes allow for the Land Commissioner to provide input to the local government authority via "comment," there is no pleading alleging that any such comment was made in this case—or, if made, had any causal relationship to the City's building of the walkway. Appellees have not suggested any other legal mechanism by which the GLO could have plausibly "approved" or "authorized" the City's construction of the walkway. *See Hearts Bluff Game Ranch*, 381 S.W.3d at 480 (observing that "a lack of regulatory authority over the land-use decision at issue is dispositive in takings cases").

Even construed liberally and in appellees' favor, the seventh amended petition does not provide a factual basis to conclude that the GLO would be liable on a takings claim, either under the Texas Constitution or the PRPRPA. The allegations, taken as true, together with inferences reasonably drawn therefrom, would not entitle appellees to any relief as against the GLO. *See* TEX. R. CIV. P. 91a. Therefore, the trial court erred in denying the Rule 91a motion.[10] We sustain the GLO's first issue and do not address its other issues. See TEX. R. APP. P. 47.1.

IV. CONCLUSION

The trial court's judgment is reversed. We render judgment granting the GLO's Rule 91a motion and dismissing appellees' claims against the GLO.

DORI CONTRERAS
Chief Justice

Delivered and filed the
21st day of May, 2020.

[10] We express no opinion on the viability of appellees' takings claims against the City.