CAUSE NO. CV2246534

RANGER AIRFIELD MAINTENANCE FOUNDATION, Plaintiff, v. CITY OF RANGER, a Texas Municipal Corporation, Defendant.	§ § § § § § § § § §	IN THE DISTRICT COURT OF 91st JUDICIAL DISTRICT EASTLAND COUNTY, TEXAS

DEFENDANT'S REPLY TO PLAINTIFF'S RESPONSE TO DEFENDANT'S PLEA TO THE JURISDICITON

TO THE HONORABLE JUDGE OF SAID COURT:

COMES NOW Defendant City of Ranger, Texas ("Ranger") in the above-entitled and numbered cause, and files this reply to Plaintiff Ranger Airfield Maintenance Foundation's ("Foundation") response to Ranger's Plea to the Jurisdiction and would respectfully show unto the Court as follows.

I. SUMMARY OF REPLY

The Foundation's response raises new and unpled theories, which Ranger could neither anticipate nor address in advance of the City's long-scheduled hearing on its plea. Nevertheless, the Foundation's response fails to overcome or address the jurisdictional deficiencies inherent in its lawsuit against Ranger. It is clear that no amount of repleading can cure these jurisdictional deficiencies and its breach of contract claim asking the Court to order the transfer of public property to the Foundation cannot proceed.

First, the Foundation's new unpled argument that the 2022 Amendment is a proprietary contract (meaning immunity does not apply in the first instance) should be

rejected. The Texas Tort Claims Act ("TTCA") provides that "airports used for flight activities," the operation of museums, transportation systems and community development authorized by Chapter 373 of the Local Government Code are all governmental functions as a matter of law. If the underlying nature of the contract(s) is as the Foundation argues[1] – to run and develop a functioning airport and museum for the City – the purpose of the 2018 Lease and 2022 Amendment are plainly governmental in nature. Ranger will show that, on balance, the four factors the Court must consider in making this determination decidedly weigh in favor of finding a governmental function.

This leads to the next question the Court must answer. Assuming *arguendo* the Court determines that the operation of an airport and museum for the City by the Foundation constitute "services" to the City, is its immunity waived under section 271.152 (the Local Government Contract Claim Act or "LGCCA") under the 2022 Agreement?[2] The answer is still no. Although contracts for goods or services are covered by the LGCCA waiver, immunity is only waived if the contract in question ***also*** states "essential terms," and is "properly executed." The Foundation's *post hoc* declaration[3] purporting to explain the terms of the 2022 Amendment cannot supply missing essential terms and the 2022 Amendment is still not properly executed under binding Texas Supreme Court precedent. The Foundation judicially admits it provided no 1295 Ethics Disclosure form to the City and its jurisdictional

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[1] See Foundation Response ¶4 (purpose of 2018 Lease to "maintain and preserve the airfield"); ¶5 (Foundation "open[ed] the interim museum about the historic airfield"); ¶7 (2022 Amendment provides for Foundation's "continued work to maintain the property as a public airfield").

[2] Ranger does not concede that the ***2022 Amendment*** is a contract for services to the City – it is a contract for the conveyance of publicly owned real property to a private party, as judicially admitted by the Foundation. On the other hand, the 2018 Lease, appears to contemplate the provision of services to the City (operation, maintenance of a functioning airport/museum). The Foundation appears to argue that the services in the 2018 Lease should be imputed to apply to the 2022 Amendment. Ranger will explain why this is not proper.

[3] See Foundation Exhibit A – Jared Calvert Declaration.

evidence does not demonstrate that this property transfer is exempt from mandatory notice and bidding requirements.

Next, the Foundation's argument that the Uniform Declaratory Judgments Act ("UDJA") waives immunity for contract declarations and enforcement is simply wrong. Its reliance on a 2019 Houston 14th District case is misplaced because that case's description of the Texas Supreme Court's holding in the *Ben Bolt-Palito Blanco* case is imprecise at best. The law is clear that the UDJA cannot be used to interpret or enforce contracts against local governments and *Ben Bolt-Palito Blanco* does not change that.

Finally, Ranger addresses the miscellaneous arguments advanced by the Foundation. First, repleading an *ultra vires* claim against the City Council in their official capacity is futile because *ultra vires* claims cannot be used to obtain contract enforcement. Second, the Foundation is attempting to enforce a contract that is void against public policy because it constitutes a gratuitous transfer of public property. Third, the Foundation judicially admitted that it was not registered non-profit corporation at the time that the 2022 Amendment was entered[4]; therefore, it is not exempt from any public notice requirements related to the conveyance of public property.

In sum, while it is undisputed that the City Council unanimously voted for the 2022 Amendment, that is not the relevant legal question. The relevant question is whether, under the well-pled facts and jurisdictional evidence, the Foundation has established that Ranger's immunity is waived for a contract claim to order the City to convey public property to a private party for an unidentifiable amount of consideration. The answer is no.

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[4] See Foundation Response, pp. 24-25. The fact that a totally separate entity (Ranger Airfield Foundation or "RAF") that is not a party to either the 2018 Lease or 2022 Amendment might have been a non-profit at the time (even that is unclear) is immaterial.

II. JURISDICTIONAL EVIDENCE

Ranger adopts and incorporates its jurisdictional evidence herein as if set forth verbatim.

III. BACKGROUND AND FACTS

Ranger adopts and incorporates its background and facts set forth in its plea herein as if set forth verbatim.

IV. REPLY ARGUMENT AND AUTHORITY[5]

A. The Underlying Contract(s) are Governmental, Not Proprietary

When a governmental entity is sued, courts undertake a structured analysis to determine if the plaintiff has invoked the trial court's subject matter jurisdiction. First, courts determine the applicability of immunity in the first instance. *Hays St. Bridge Restoration Group v. City of San Antonio*, 570 S.W.3d 697, 703 (Tex. 2019). Second, if immunity exists, then the court determines if it has been clearly and unambiguously waived by an applicable statutory waiver enacted by the Legislature. *Id*.

The *Wasson I* and *Wasson II* cases govern the analysis of whether a municipal action challenged in a breach-of-contract case is proprietary or governmental. *Id*. (citing *Wasson Interests, Ltd. v. City of Jacksonville*, 489 S.W.3d 427, 433 (Tex. 2016) [*Wasson I*] and *Wasson Interests, Ltd. v. City of Jacksonville*, 559 S.W.3d 142, 151 (Tex. 2018) [*Wasson II*]). The proper inquiry to answer the proprietary/governmental act question is whether the city was engaged in a governmental or proprietary function when it entered the contract, not when an alleged breach occurs. *Wasson II* at 149-50.

[5] Ranger adopts and incorporates herein for all purposes all previously raised arguments set forth in its plea. Ranger does not waive any argument previously raised therein.

To answer the question, the court considers four factors:

> whether (1) the City's act of entering into the [contract] was mandatory or discretionary, (2) the [contract was] intended to benefit the general public or the City's residents, (3) the City was acting on the State's behalf or its own behalf when it entered the [contract], and (4) the City's act of entering into the [contract] was sufficiently related to a governmental function to render the act governmental even if it would otherwise have been proprietary.

Hays Street Bridge Restoration Group at 705. In *Hays Street*, the Supreme Court considered whether a memorandum of understanding ("MOU") that San Antonio discretionarily entered with a bridge restoration group was proprietary or governmental. Although entering the MOU was discretionary (favoring proprietary act), the other factors weighed in favor of a governmental act. *Id*. at 705-06. The same is true here.

While Ranger voluntarily entered the 2022 Amendment (and the 2018 Lease), the Foundation repeatedly judicially admits (as set forth previously) that the purpose of these agreements is for the operation and maintenance of a working airport and museum. In *Hays Street*, the activities constituted governmental functions under the TTCA (bridge construction/maintenance and community development/urban renewal). *Id*. Here, the activities contemplated by the agreements also constitute governmental functions as a matter of law (airports used for flight, museums, transportation systems) under the TTCA. Tex. Civ. Prac. & Rem Code Ann. §101.0215(a)(14, 16, 22, 24).[6]

In *Hays Street*, the Court noted that the bridge restoration group conceded in its brief that the bridge in question was an important "cultural landmark" and that it was to be

[6] The Foundation would have this Court rewrite the TTCA by arguing that because the airfield is allegedly not a "commercial" airport, its operation is not a governmental function. See Response, p. 14. But the TTCA does not state that a municipal airport must be for "commercial" flights. It simply says, "aiports used for flight activities." Tex. Civ. Prac. & Rem. Code Ann. §101.0215(a)(10). Courts cannot judicially rewrite statutes. *City of League City v. Jimmy Changas, Inc.*, No. 21-0307, 2023 WL 3909986, at *4 (Tex. June 9, 2023).

restored for "residents and ***visitors***." *Id*. (emphasis in original). Here, the Foundation concedes in its response that the airfield is "historic," that the it hosts air shows for "tourists," and that the agreements' purpose is for "preservation" of the airfields. See Foundation Response, page 1. And while none of this alleged "preservation" is funded by the State of Texas, the funding source is not one of the four factors courts consider under *Wasson II*. Rather, as the Foundation judicially admits, the alleged purpose of the areements is to improve the airfield at no alleged cost to the City (i.e., its taxpayers). See Response, p. 3.

Therefore, while Ranger's decision to enter the agreements was discretionary, the Foundation judicially admits that their alleged purpose is to promote tourism by hosting air shows and improve and maintain a historic, operational airport and museum by encouraging community development (all governmental functions). See Response, pp. 2-3. Contrast that with the lease in *Wasson II*, where the City was simply acting as a landlord leasing individual lots to tenants, which were not essential to the operation or maintenance of the lake or a marina. *Wasson II* at 152-53. Had the city in *Wasson II* been leasing to tenants who operated or maintained a city marina, the outcome would likely have been different because operation of a city marina is a governmental function. Tex. Civ. Prac. & Rem Code Ann. §101.0215(a)(23). That distinction is key and this situation is much more analogous to the *Hays Street* facts than to the *Wasson II* facts.

Jimmy Changas, another recent Texas Supreme Court case discussing the governmental/proprietary distinction, is also more analogous to the situation in *Wasson II* and not *Hays Street*. *City of League City v. Jimmy Changas, Inc.*, No. 21-0307, 2023 WL 3909986, at *4 (Tex. June 9, 2023). First, unlike here, the League City's activity of entering a lease agreement with a restaurant was not on the TTCA list of governmental functions. *Id*. at

*4. The restaurant did not perform any governmental function ***on behalf*** of the city – it sold chimichangas. *Id*. Just like in *Wasson II*, the city simply acted like a landlord (i.e., a private person) and any incidental economic benefit to the public was not a governmental function. *Id*.

Accordingly, this Court should find that immunity applies in the first instance. This means the next step is determining whether Ranger's immunity is clearly and unambiguously waived.

B. Ranger's Immunity Remains Intact Under 271.172

Ranger adopts and incorporates its prior argument herein as if set forth verbatim, but offers the following additional comments on the Foundations arguments related to "essential terms," "goods and services," and "proper[] execution." Tex. Loc. Gov't Code Ann. §271.152.

i. Essential Terms

The Foundation argues that the 2018 Lease and the 2022 Amendment should be read together to discern whether the 2022 Amendment (which is the contract the Foundation is trying to enforce) contains all essential terms. Notwithstanding that the Court should confine itself to the four corners of the 2022 Amendment as argued by Ranger previously, the 2018 Lease still does not prop up the 2022 Amendment enough to save it.[7]

First, the Court should differentiate the "services" provided to the City in the 2018 Lease versus the alleged "services" in the 2022 Amendment, which must be supported by its

[7] The Foundation repeatedly offers argument about what the 2022 Amendment "meant" and occasionally refers the Court to the Calvert declaration, but not always. For example, the Foundation argues that it gave the City "detailed plans" for the restoration project at a council meeting before the vote. Response, p. 15. This is unsupported by jurisdictional evidence and is not even pled in the original petition, but even if the Court accepted this unsupported, unverified argument as true, it is immaterial. The 2022 Agreement – the contract the Foundation wants to enforce – has NO "detailed plans" for the restoration in question.

own independent consideration. *Cheung-Loon, LLC v. Cergon, Inc.*, 392 S.W.3d 738, 747 (Tex. App.—Dallas 2012, no pet.). The Foundation conflates the services allegedly provided in the 2018 Lease and attempts to argue that they serve as consideration for the 2022 Amendment, but if the Foundation is already obligated to perform them under the 2018 Lease, the Foundation cannot double dip and count that as consideration for the 2022 Amendment as well.

Second, even if the Court determines that the Foundation provides a service to the City in the 2022 Amendment and the service itself is sufficiently defined (i.e., restoration of a hangar), the ***value*** of that service is totally undefined, which means the 2022 Agreement does not contain the price paid by the Foundation for the transfer of public property. *Clear Creek ISD*, cited by the Foundation is easily distinguished because in that case, the contract contained a rate sheet that provided for payment in accordance with a rate schedule – thus, the price paid was known or ascertainable. *Clear Creek Indep. Sch. Dist. v. Cotton Commercial USA, Inc.*, 529 S.W.3d 569, 573 (Tex. App.—Houston [14th Dist.] 2017, pet. denied). Here, it is impossible to calculate a price paid by reference to the 2022 Amendment – no price sheet is attached and even if the Court considers the alleged consideration (restoration of a hangar) as a service to the City, the amount of of that consideration cannot be ascertained by reference to the contract.

That term is undeniably material because without it, there is no way to determine if the real property is being conveyed for adequate consideration, as required by the Texas Constitution and Chapters 253 and 272 of the Local Government Code.

ii. Proper Execution

The Foundation wholly misconstrues the Texas Supreme Court's holding in *Amex Properties* and the Amarillo court's holding in *Hutto Legacy*. It is undisputed that the Council voted to approve a transfer of property in the 2022 Amendment. That is not the (only) point of those cases. Here, it is undisputed (and the Foundation admitted) that it did not comply with the 1295 Ethics Form requirement and the property was not publicly noticed for transfer or sale prior to the execution of the 2022 Amendment.

The legal principle on which those cases rest is that the failure to comply with ***any*** applicable statutory requirements in the execution of a contract means that it is not "properly executed." The Texas Supreme Court explained:

> It is not enough, then, that an open-enrollment charter school's representative signs a contract. Rather, to avail itself of a waiver of immunity, a party asserting a breach-of-contract claim against an open-enrollment charter school must demonstrate that the contract's execution comports with the authority the legislature granted the school in its charter, ***including the statutory and regulatory requirements*** placed on open-enrollment charter schools entering (or seeking to enter) contractual relationships. We look to that framework to determine whether this lease was "properly executed."

Amex Properties, LLC, 602 S.W.3d at 532.

The *Hutto Legacy* case is not the only intermediate appellate court to agree with this analysis. The El Paso court construed *Amex Properties* the same way, noting:

> The Supreme Court noted the term "properly executed," remained undefined by the Local Government Code. Id. Giving the term its plain and common meaning, the Court read the statute "to give effect to every word." Id. at 531-32. Doing so, it found the term "proper" to mean "[a]ppropriate, suitable, right, fit, or correct; according to the rules." *Id*. at 532. Construing the words together, and in context to the statute as a whole, the Supreme Court held the term "properly executed contract" lead to "the inexorable conclusion that not all executed contracts qualify for [a statutory] waiver." *Id*. ***Finding the Education Code had imposed formalities on the school which were undisputedly not followed, the Court held the lease agreement had not been properly formed***.

Grossman v. City of El Paso, 642 S.W.3d 85, 113 (Tex. App.—El Paso 2021, pet. dism'd). Thus, *Hutto Legacy* is not some strange outlier. When the Legislature imposes a mandatory duty before a party may contract with a governmental body, and the party fails to follow that mandatory duty, a contract is not properly executed. The fact that the Legislature may impose "legal formalities" on government contracts should not be surprising and the fact that they are "formalities" does not excuse their non-performance.

Moreover, the District's argument that because it might be a non-profit (although not fully registered at the time of the contract execution apparently), it got ***close enough*** to a 1295 Ethics form requirement is totally unsupported by any reference to binding or even persuasive authority. That is because none exists for this proposition.

Finally, the Foundation's arguments related to bidding and notice requirements should also be rejected. First, accepting as true its contention that it is a "foundation" that wants to develop land (notwithstanding that land development is not part of its non-profit functions according to its own jurisdictional evidence), that exception to section 272.001 notice requirements only applies ***after*** an appraisal determining fair market value is obtained or it is noticed for public auction. Tex. Loc. Gov't Code Ann. § 272.001(b). The Foundation cannot plead its way out of that deficiency because the City's jurisdictional evidence establishes that this never happened. This means the 2022 Amendment was not properly executed.

Second, the Foundation judicially admitted that it was not a registered non-profit at the time it entered the 2022 Amendment with the City. See Response, p. 24-25. This admission is binding on the Foundation. The exception to public notice and bidding under Chapter 253 of the Local Government Code upon which the Foundation relies states, "In this

section, "nonprofit organization" means an organization exempt from federal taxation under Section 501(c)(3), Internal Revenue Code of 1986, as amended." Tex. Loc. Gov't Code Ann. § 253.011(a). It does not say anything about organizations that "***will soon be exempt from federal taxation.***" This means the 2022 Amendment was not properly executed.

Setting that troubling admission aside, the exemption to notice and bidding also requires that:

> Consideration for the transfer authorized by this section shall be in the form of an agreement between the parties that requires the nonprofit organization to use the property in a manner that primarily promotes a public purpose of the municipality. If the nonprofit organization at any time fails to use the property in that manner, ownership of ***the property*** automatically reverts to the municipality.

Tex. Loc. Gov't Code Ann. § 253.011(d) (emphasis supplied). The Foundation's answer to this requirement is that if it breaches the 2022 Amendment, then ***a portion*** of "the property" will revert back to Ranger. See Response, p. 30. But that is not what the statute requires. It does not say that "***a portion*** of the property automatically reverts to the municipality." It says "the property," which means the entire parcel conveyed to the non-profit. Thus, on its face, the reverter clause in the 2022 Amendment violates section 253.011(d) on this basis alone. This means the 2022 Amendment was not properly executed.

Of course, this assumes that transferring public property to the Foundation so that it can build hangars it will own and subdivide the land and sell off parcels for private residences constitutes a "public purpose" in the first place. On its face, such an argument is nonsensical.

C. The UDJA Does Not Permit Contract Enforcement Claims Against the Government

At the risk of redundancy, Ranger reminds the Court of the following law governing the scope of the UDJA immunity waiver:

> In addition to clarifying when the UDJA waives governmental immunity, the supreme court has explained that governmental immunity ***bars*** a request for declaratory relief against a governmental entity (1) that constitutes a suit to recover money damages or (2) that seeks to establish a contract's validity, to enforce performance under a contract, or to impose contractual liabilities-actions that effectively control state action.

Mustang Special Util. Dist. v. Providence Vill., 392 S.W.3d 311, 316 (Tex. App.—Fort Worth 2012, no pet.) (emphasis in original); *see also City of Austin v. Util. Associates, Inc.*, 517 S.W.3d 300, 312 (Tex. App.—Austin 2017, pet. denied).

In response, the Foundation relies on *Houston Cmty. Coll. Sys. v. HV BTW, LP*, 589, which misstated the holding in *Ben Bolt*. S.W.3d 204, 218 (Tex. App.—Houston [14th Dist.] 2019, no pet.) ("The supreme court has acknowledged that a party can bring a claim under the UDJA to determine the rights of parties to a contract subject to chapter 271."). That is simply a misstatement of *Ben Bolt*. In *Ben Bolt*, a school district originally filed a declaratory judgment claim against the Texas Political Subdivision self-Insurance Fund asking for a declaration under a self-insurance contract. *Ben Bolt-Palito Blanco Consol. Indep. Sch. Dist. v. Tex. Political Subdivisions Prop./Cas. Joint Self-Ins. Fund*, 212 S.W.3d 320, 323 (Tex. 2006).

That claim was dismissed for want of jurisdiction by the appellate court, but while the matter was in litigation, the Legislature enacted section 271.152. *Id*. The rest of the *Ben Bolt* opinion discusses waiver of immunity under section 271.152 and the court ultimately held that the Fund's immunity was waived by section 271.152. *Id*. at 328. The UDJA played no role in the Texas Supreme Court's decision in *Ben Bolt* and the Houston Court's single sentence in *HV BTW, LP* saying otherwise is plainly not a proper interpretation of the *Ben Bolt* holding.

D. Attorney's Fees

Ranger adopts and incorporates its argument on attorney's fees herein as if set forth verbatim. The Foundation's arguments that it is entitled to attorney's fees are unpersuasive and should be rejected. Because it has failed to invoke the Court's jurisdiction, attorney fee's are not available under either Chapte 271 or the UDJA, or Chapter 38 of the Civil Practice and Remedies Code.

E. Repleading

The Foundation asks for the chance to replead an ultra vires claim against Ranger's officials. This would be futile. While the UDJA allows ultra vires claims against officials in their official capacities, it does not waive immunity for suits against state officials seeking to enforce performance under a contract, or to impose contractual liabilities against a governmental unit. *City of El Paso v. Heinrich*, 284 S.W.3d 366, 372 (Tex. 2009). It only allows prospective injunctive relief, not any sort of specific performance under a contract or money damages. *Id*.

Conclusion and Prayer

The Foundation failed to assert claims that can survive Ranger's governmental immunity or be cured by repleading. Either immunity is not waived, or the contract is void and unenforceable as a matter of law. Either way, the Foundation does not invoke this Court's jurisdiction and its claims must be dismissed with prejudice. Repleading cannot cure these fatal deficiencies and the Foundation need not be given an opportunity to drag out this litigation. Ranger cannot be forced to comply with a void contract and the taxpayers cannot be forced to give up public property.

WHEREFORE PREMISES CONSIDERED, Ranger respectfully request that the Court GRANT its Plea to the Jurisdiction and DISMISS WITH PREJUDICE all of Plaintiff's claims; that upon final hearing render judgment that Plaintiff takes nothing; that upon final hearing find that Plaintiff has failed to plead a viable cause of action against Defendant; and for such further relief, in law or equity, to which it has shown itself to be justly entitled.

Respectfully submitted,

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