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ELEVENTH COURT OF APPEALS
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NO. 11-23-00204-CV

IN THE COURT OF APPEALS
FOR THE ELEVENTH APPELLATE DISTRICT
AT EASTLAND, TEXAS

CITY OF RANGER, A TEXAS MUNICIPAL CORPORATION,
***Appellant*,**

v.

RANGER AIRFIELD MAINTENANCE FOUNDATION,
***Appellee*.**

On Appeal from the 91st Judicial District Court, Eastland County, Texas
Trial Court Cause No. CV2246534

APPELLEE'S OPENING BRIEF

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ORAL ARGUMENT CONDITIONALLY REQUESTED

IDENTITY OF PARTIES AND COUNSEL

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STATEMENT OF THE CASE

Trial court:	91st District Court of Eastland County, Texas, Honorable Steven R. Herod, presiding.
Nature of the case:	This interlocutory appeal primarily concerns a contractual dispute between the City and Foundation regarding a lease ("Lease") to restore and preserve the historic grass airfield ("Airfield") and conveyance ("Amendment") of the Ranger Municipal Airport ("Airport"). CR 5-39. The city filed a Plea to the Jurisdiction ("Plea") based on governmental immunity. CR 45-105.
Trial court's disposition:	After briefing and a hearing (1RR), the trial court signed an order on August 17, 2023, denying the City's Plea. CR 284.
Relief sought:	The Foundation requests that the Court affirm the trial court's denial of the Plea.

STATEMENT REGARDING ORAL ARGUMENT

Pursuant to TEX. R. APP. P. 39, the Foundation does not believe oral argument is necessary because it would not advance consideration and determination of the issue raised by this appeal, as it is apparent from the record that the trial court did not error by denying the City's plea to the jurisdiction. To the extent the Court believes oral argument would be beneficial, the Foundation respectfully requests an opportunity to participate.

ISSUES RESTATED

RESTATED ISSUE NO. 1: Whether the City was acting in its proprietary capacity, not its governmental capacity, when it entered into the agreements with the Foundation, which precludes the application of governmental immunity.

RESTATED ISSUE NO. 2: Whether the City waived governmental immunity under Chapter 271 of the Local Government Code.

RESTATED ISSUE NO. 3: Whether the City's position that the Foundation should not be allowed to replead is a proper issue for the Court to consider on this appeal since it was never raised or presented in the trial court and the trial court has never ruled on the issue.

STATEMENT OF FACTS

A. The City agrees to allow the Foundation to restore and preserve the historic airfield under a Lease and then agrees to convey the surrounding real property under an Amendment.

The Foundation is a non-profit organization dedicated to performing the services of rehabilitating, restoring, preserving, and supporting the historic grass airfield in Ranger, Texas. CR 127; 161. Through the work of the Foundation, the Airfield is known as a vital part of the Ranger community as a tourist, educational and amusement attraction. CR 127; 161. The Foundation hosts airshows and other public events, offers flying lessons to high school students through its high school pilot program, and offers flight experiences to residents and tourists in historic aircraft. CR 127; 161. The Foundation and its dedicated volunteers have spent fifteen (15) years serving the City and its residents through their work preserving and maintaining the Airfield. CR 127; 161.

In 2018, the City could not provide the funds and services required to preserve the Airfield on its own. CR 161. The Airfield needed to be restored and preserved for the City residents, so the Foundation stepped in to provide the much-needed improvements. CR 161.

In December 2018, the Foundation, entered into a Lease Agreement (the "Lease") with the City for the 81 acres of land that comprises the Ranger Municipal

Airport to facilitate the Foundation's preservation efforts for the Airfield. CR 161; 165–83.

The purpose of the Lease was to provide the Foundation a right to use and occupy the Airport in exchange for the Foundation's agreement to maintain and preserve the airfield. CR 162. The Lease was unanimously approved and authorized by the City Commissioners and signed by the Mayor. CR 161.

The City and the Foundation operated under the Lease for three years without issue. CR 161. After the Lease was signed, the Foundation made major improvements to the airfield property at no cost to the City, including constructing the first hangar on the property since 1928; opening the interim museum about the historic airfield that is open to the public; moving over fifteen hundred yards of dirt into a flood area, removing the dilapidated and dangerous office building; constructing a 1920s air mail concrete arrow, building three bathrooms for Airfield visitors with showers for campers, installing over fifteen hundred feet of high fencing, purchasing land on both ends of the Airfield for runway protection, and much more. CR 161–62.

Subsequently, in January 2022, the Foundation and the City entered into the First Amendment to the Lease Agreement (the "Amendment" together with the Lease, the "Agreement"). CR 162; 185–87.

The terms of the Amendment provided for the transfer of property at the Airfield to the Foundation in exchange for the Foundation providing certain improvements and the Foundation's continued work to maintain the property as a public airfield and to restore and maintain the City's historic 1928 hangar. CR 162; 185.

The City maintained a right of reversion to the airport runways and infield. CR 162; 185. Moreover, the City's historical 1928 hangar would remain the property of the City under the Amendment. CR 185. The hangar would remain open to the public as a museum, but the Foundation would fund, maintain, and provide a much-needed restoration to the historic hangar. CR 162. The restored hangar would house the permanent airfield museum and be filled with period-correct antique aircraft, vehicles, and memorabilia already owned by the Foundation. *Id.*

Restoration of the City's historical hangar is not work the City can afford to do itself, and the Foundation's agreement to restore the historical hangar for the City and continue to maintain the property was more than sufficient consideration for the Amendment. The Foundation estimates that it will cost the Foundation more than $200,000 in direct expenses to restore the historic hangar, with a majority of the work performed by volunteers, when quoted without consideration of the volunteer effort restoration cost would exceed $500,000. CR 162. The City expressly acknowledged this consideration by approving the Amendment, which stated in part

that "for good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged by both [the City] and [the Foundation]. . ." CR 185. It was the City's insistence during the negotiations of the Amendment that the 1928 hangar remained owned by the City. CR 129.

Through the Amendment, the City expressly represented that it "desire[d] to ***convey ownership*** of the Airport to [the Foundation] upon the satisfaction of certain improvements." Specifically, the City agreed that:

> 1. Additional Hangars. Lessee shall permit not less than three (3) new, vintage-style appearance aircraft hangars to be constructed on Airport property by approved third parties. Lessee also agrees to sublease to each third party constructing a new hangar, a lot of land in the dimensions of the newly constructed hangar. Said lots will be sold/transferred to private ownership upon execution of Section 3 below. The aforementioned third parties are subject to approval by Lessee, and that approval cannot be unreasonably withheld.
>
> 2. 1928 Hangar. Lessee shall restore Lessor's 60'x60' 1928 hangar to its historical 1928 size and appearance.
>
> 3. Purchase Option. Upon completion of Sections 1 & 2 above and subject to adherence to all provisions that are required under Texas Department of Transportation Airport Division, Lessor shall convey to Lessee the Airport and Airport Property as set out in Exhibit "A" attached hereto and incorporated herein. Airport Property shall include Airport land, rights, fixtures, and appurtenances, but shall not include the approximately 80'x80' lot of land upon which the City's 1928 hangar. Such hanger shall continue to serve as the Leased Premises under the Lease between Lessor and Lessee. Conveyance shall be under a Special Warranty Deed with an automatic right of reversion outlined in 4 below.

CR 185.

The Amendment further contained the following right of reversion:

> 4. Right of Reverter. Under the terms of the Special Warranty Deed, Lessee is granted the Airport and Airport Property to facilitate development of the property around the Airport with personally owned hangers. Subject to the Special Warranty Deed, Lessee agrees that the Airport's current runways and infield will not be developed, and no currently existing runway (longest being Runway 1/19, 3400 feet) will be shortened more than 25% in length or in any way permanently closed. If any of these events occur, Lessee's right of ownership to the runways and the infield shall automatically revert to Lessor.

Id.

The Amendment was on the agenda for discussion and approval at four City Commission meetings. CR 162. The process of gaining approval from the City Commissioners lasted just shy of 100 days. CR 162. Ultimately, the Amendment was unanimously approved and authorized by the City Commissioners. CR 162. The City was even represented by counsel in this transaction, whereas the Foundation was not. CR 162. The City's attorney made no mention of the alleged requirement of an ethics disclosure or any other requirements that needed to be fulfilled to enter the Amendment. CR 162. In accordance with the City Charter, the Mayor executed the Amendment to effectuate the Amendment between the Parties. CR 186; 209-10. None of these facts are in dispute.

B. The Foundation performs under the Amendment, but the City refuses to honor its agreement.

Pursuant to the Amendment, the Foundation went to work fulfilling its contractual obligations to the City. CR 162–63. Specifically, as was required under the Amendment, the Foundation found approved third parties who were willing to build not less than three new, vintage-style appearance aircraft hangars on the Ranger Airport property. CR 162–63; 185. Further, the Foundation raised more than $200,000 in funds to restore the City's existing 1928 hangar to its historical size and appearance. CR 163. The Foundation and its volunteers also continued to provide

the services outlined in the Lease, including but not limited to mowing the grass airfield and maintaining, promoting, and preserving the Airfield. CR 163.

The Foundation spent six months preparing the property for construction and finalizing building designs, including ordering more than $100,000 in supplies. CR 163. The Foundation's services to the City are important to Ranger's history and current City business and tourism. The City of Ranger's website even promotes the Airfield to visitors.[1] The City acknowledges on its website that the Airfield is leased and supported by the Foundation.

Id.

In short, the Foundation endeavored to fulfill all its contractual obligations and conditions under the Amendment and has already provided much-needed value to the City.

In exchange for these efforts, and only upon completion of the construction of the new hangars and the restoration of the historic hangar, the City expressly

[1] *See* http://www.rangertx.gov/airfield.html (last accessed on July 25, 2023).

agreed it "shall convey to [the Foundation] the Airport and Airport Property . . . ." CR 185.

However, instead of complying with its obligations under the Amendment, and before the Foundation could complete construction, the City anticipatorily breached the Amendment by ordering the Foundation to stop construction on the Airfield. This order was given without a vote by the City commissioners. CR 132.

C. Procedural Background

On December 30, 2022, the Foundation filed its original petition against the City to enforce the parties' agreement, asserting claims for breach of contract, anticipatory breach of contract, and requesting a declaratory judgment. CR 5–39.

The City answered (CR 40–44) and filed a Plea to the Jurisdiction, asserting governmental immunity from suit. CR 45–105. Among their arguments, the City asserted that the Amendment was not "properly executed." CR 59–63. The Foundation filed a response (CR 126–216), and the parties appeared for a hearing on the Plea on July 27, 2023, which consisted of arguments from counsel. 1RR. At the conclusion of the hearing, the trial court prudently took the matter under advisement to allow for some additional briefing[2] and fully study the issues. 1RR 55:17–56:13.

[2] The City filed a reply (CR 217–232), and the Foundation filed a supplement to its response (CR 233–244).

In light of the City's position that it did not properly execute the Amendment, on August 10, 2023, the Foundation filed a First Amended Petition to add former and current City Commissioners because the City had taken the position those commissioners had acted outside of their legal or statutory authority by executing the Amendment. CR 245–284. The First Amended Petition is the Foundation's live pleading.

On August 17, 2023, the trial court signed an order denying the City's Plea in its entirety. CR 284. This interlocutory appeal followed. CR 289–91.

SUMMARY OF THE ARGUMENT

The City acted in its proprietary rather than governmental function by entering into the Lease and Amendment with the Foundation, which means the City waived governmental immunity from suit. Moreover, the City's actions were in accord with Chapter 271 of the Local Government Code, which results in waiver of governmental immunity. Yet by its Plea and this appeal, the City seeks to avoid its contracts with the Foundation. If the City prevails, it will have been allowed to make a promise with its fingers crossed. The law of governmental immunity does not permit—let alone require—this result. Therefore, the Court should overrule the City's first two issues and affirm the denial of the City's Plea.

The City's final issue, challenging whether the Foundation should be permitted to file the First Amended Petition, is not appropriate for the Court to consider because it was never presented to or otherwise challenged in the trial court and because the trial court never made such ruling from which the City can appeal. Thus, the City's third issue should be overruled. Upon overruling the City's issues, this case should be remanded to the trial court.

ARGUMENT & AUTHORITIES

Applicable Law and Standard of Review

A plea to the jurisdiction contests a trial court's subject matter jurisdiction. *Texas Dep't of Transp. v. Jones*, 8 S.W.3d 636, 638 (Tex. 1999); *Benefit Realty Corp. v. City of Carrollton*, 141 S.W.3d 346, 348 (Tex. App.—Dallas 2004, pet. denied). By asserting a plea to the jurisdiction, a party contests the trial court's authority over the subject matter of the dispute without regard to whether the claims asserted have merit. *Bland Indep. Sch. Dist. v. Blue*, 34 S.W.3d 547, 554 (Tex. 2000). The reviewing court should first look to the pleadings to determine if jurisdiction is proper, construing the pleadings liberally in favor of the plaintiff and looking to the pleader's intent. *Tex. Dep't of Park & Wildlife v. Miranda*, 133 S.W.3d 217, 226 (Tex. 2004). The allegations found in the pleadings may either affirmatively demonstrate or negate the Court's jurisdiction. *Id.* at 226-27. If the pleadings do neither, it is an issue of pleading sufficiency and the plaintiff should be given an opportunity to amend the pleadings. *Id.* If a plea to the jurisdiction challenges the existence of jurisdictional facts, the Court may consider relevant evidence submitted by the parties, as necessary to resolve the jurisdictional issues raised. *Id.* at 227.

Whether a court has subject matter jurisdiction is a question of law. *Id.* at 226; *Texas Natural Res. Conservation Comm'n v. IT-Davy*, 74 S.W.3d 849, 855 (Tex. 2002); *State Dep't of Hwys. & Pub. Transp. v. Gonzalez*, 82 S.W.3d 322, 327 (Tex.

2002). The plea to the jurisdiction standard mirrors the standard for a traditional motion for summary judgment. *Miranda*, 133 S.W.3d at 228; *City of Fort Worth v. Robinson*, 300 S.W.3d 892, 895 (Tex. App.—Fort Worth 2009, no pet.). The governmental unit must meet the summary judgment standard of proof for its assertion that the trial court lacks jurisdiction. *Miranda*, 133 S.W.3d at 228; *Robinson*, 300 S.W.3d at 895. By requiring the government to meet the summary judgment standard of proof in cases such as this one, a plaintiff is protected from having to "put on their case simply to establish jurisdiction." *Bland*, 34 S.W.3d at 554. While the standard for a plea to the jurisdiction is similar to that of traditional summary judgment, the burden is lower because the Court does not consider the merits of the plaintiff's case. *See County of Cameron v. Brown*, 80 S.W.3d 549, 555 (Tex. 2002).

When the evidence creates a fact issue regarding a jurisdictional challenge, the issue becomes one for the fact-finder to decide. *Miranda*, 133 S.W.3d at 227-28. The Court may rule on the plea as a matter of law only "if the relevant evidence is undisputed or fails to raise a fact question on the jurisdictional issue . . . ." *Id.* at 228. In considering the evidence, the Court must "take as true all evidence favorable to the nonmovant" and "indulge every reasonable inference and resolve any doubts in the nonmovant's favor." *Id.*

RESTATED ISSUE 1: The City cannot assert governmental immunity on its proprietary actions.

The City contends that by entering into the Lease and Amendment, it was acting in its governmental rather than proprietary function, and therefore enjoys immunity from suit. Ant's Br. at 12–16. However, the City has no immunity when it engages in proprietary acts, such as entering into the Agreement with the Foundation. Texas courts draw a bright line between the governmental and proprietary dichotomy.

A. The governmental / proprietary dichotomy

A city operates by exercising both its governmental and proprietary functions, and the capacity in which a governmental entity functions determines whether it maintains immunity from suit. Governmental entities are *not* immune from lawsuits arising out of the performance of proprietary functions, whereas they may be immune from lawsuits arising out of the performance of governmental functions. *Wasson Interests, Ltd. v. City of Jacksonville*, 489 S.W.3d 427, 430 (Tex. 2016) ("*Wasson I*"). In *Wasson I*, the Texas Supreme Court held that the governmental/proprietary dichotomy can be applied in contract claims, whereas historically, the dichotomy had only been applied to tort claims. *Id.* at 430. ("In sum, sovereign immunity does not imbue a city with derivative immunity when it performs proprietary functions. This is true whether a city commits a tort or breaches a contract."); *see also Wheelabrator Air Pollution Control, Inc. v. City of San*

Antonio, 489 S.W.3d 448, 451 (Tex. 2016) ("[A] city does not have derivative immunity when it engages in a proprietary function, even in the contract-claims context.").

A city's proprietary function is one that is discretionary and performed mainly for the benefit of the governmental entity itself—not the greater State of Texas. *Wasson Interests Ltd. v. City of Jacksonville*, 559 S.W.3d 142, 147 (Tex. 2018) ("*Wasson II*"). Texas courts have highlighted the discretionary nature of the action is a key distinction between the proprietary and governmental functions: "Governmental functions are what a municipality *must* do for its citizens and proprietary functions are what a municipality *may, in its discretion*, perform for its inhabitants." *Canario's, Inc. v. City of Austin*, No. 03-14-00455-CV, 2015 WL 5096650, at *3 (Tex. App.—Austin Aug. 26, 2015, pet. denied) (emphasis added) (quoting *Oldfield v. City of Houston*, 15 S.W.3d 219, 226 (Tex. App.—Houston [14th Dist.] 2000, pet. denied), *superseded by statute on other grounds as recognized in Truong v. City of Houston*, 99 S.W.3d 204, 210 (Tex. App.—Houston [1st Dist.] 2002, no pet.); *see also City of New Braunfels v. Carowest Land, Ltd.*, 432 S.W.3d 501, 519 (Tex. App.—Austin 2014, no pet.) (explaining that a city performs proprietary function if it acts in its private capacity for benefit of only those within its corporate limits and not as arm of State (quoting *Tooke v. City of Mexia*, 197 S.W.3d 325, 343 (Tex. 2006))).

The City contends the Lease and Amendment represent governmental functions as a matter of law. Ant's Br. at 17. Rather than accept this self-serving characterization, the Court should look to the following factors in determining whether a function is proprietary or governmental: (1) whether the City's act of entering into the Amendment was mandatory or discretionary, (2) whether the Amendment was intended to benefit the general public or the City's residents, (3) whether the City was acting on the State's behalf or its own behalf when it entered the Amendment, and (4) whether the City's act of entering the Amendment was sufficiently related to a governmental function to render the act governmental even if it would otherwise have been proprietary. *Wasson II*, 559 S.W.3d at 150. As shown below, each of these factors weighs in favor of the City entering into the Amendment as part of its proprietary function.

B. The City exercised its discretion when it debated for four council meetings before ultimately electing to enter into the Amendment.

It is readily apparent that the City's decision to pursue negotiations to amend and then enter into the Amendment with the Foundation was a discretionary not mandatory act, as discretionary acts are those that require "personal deliberation, decision and judgment[.]" *City of Wichita Falls v. Norman*, 963 S.W.2d 211, 215 (Tex. App.—Fort Worth 1998, pet. dism'd w.o.j.). While exercising powers related to airports is listed as a governmental function under the Texas Tort Claims Act ("TTCA"), this Amendment falls more in line with an economic development

program similar to those contemplated by Chapter 380. Notably, the Texas Supreme Court recently instructed that the TTCA's classifications merely serve as "guidance in the contract-claims context—rather than binding lists to be interpreted narrowly." *City of League City v. Jimmy Changas, Inc.*, __ S.W.3d ___, No. 21-0307, 2023 WL 3909986, at *5 (Tex. June 9, 2023) (quoting *Hays Street Bridge Restoration Group v. City of San Antonio*, 570 S.W.3d 697, 705 n.46 (Tex. 2019)). In *Jimmy Changas*, the Court held that a city entering a Chapter 380 agreement that provided for economic development activities to the municipality and its residents was a proprietary function. *Id.* at *9.

The Amendment provides economic development benefits similar to those that fall within the statutory framework of Chapter 380, which provides that a government entity "*may* establish and provide for the administration of one or more programs, including for making loans and grants of public money . . . to promote state or local economic development and to stimulate business and commercial activity *in the municipality*." TEX. LOC. GOV'T CODE § 380.001(a) (emphasis added). The legislature specifically stated that a governmental entity "may"—not "must"—provide such economic development programs. Thus, the plain text supports that the legislature's intent was to create a permissive power where a city can still exercise discretion in deciding *whether or not* to enter into a contract.

The Amendment was intended to develop the Airfield in a manner that would promote economic development and stimulate commercial activity in the City. Ranger's City Commissioners unanimously approved the Amendment after debating the Amendment in four meetings. CR 130. The need for four meetings to debate the topic in and of itself indicates that it was up to the City's discretion to decide whether or not to agree to the Amendment. The State did not require or mandate that the City enter into the Amendment with the Foundation. The City was acting in its proprietary function when it agreed to grant the land to the Foundation to further bolster economic development. Therefore, this factor favors the City was acting in its proprietary function.

C. The City entered into the Amendment as a benefit to itself and its residents—not the greater State of Texas

Reviewing the terms of the contract itself is the best way to determine whether the City intended to provide local or state benefits. *See City of Westworth Village v. City of White Settlement*, 558 S.W.3d 232, 244-45 (Tex. App.—Fort Worth 2018, pet. denied). Tellingly, the Amendment is silent as to whether it conferred any benefit to the greater State of Texas. A review of the Amendment makes clear that the City entered into the Amendment to benefit the City and in the interest of its residents, not the general public, by developing a historic airfield and providing economic benefits and jobs to Ranger by developing the additional hangars. This is

because the legislature provides that the City's proprietary functions benefit its residents. TEX. CIV. PRAC. REM. CODE § 101.0215(b).

It is significant that a primary reason the City Commissioners wanted and pursued the Amendment was the benefits it would bring to the City of Ranger. First and foremost, the Foundation initially asked the City Commissioners at the October 25, 2021 council meeting if they wished to possibly amend the lease for Airfield development, or keep the 2018 contract unchanged until its expiration in 2048. CR 166. The Council unanimously voted to negotiate for amendment in that meeting and 98 days later, after receiving their final draft from their attorney, approved the amendment. CR 162. The Council understood the Foundation's purpose is to maintain Ranger Airfield, and promote the golden age of aviation through airshows and entertainment events that draw up to 300 airplanes to Ranger, which promotes business and stimulates the economy in Ranger as tourists arrive in Ranger to enjoy the Airfield. 1RR 41:18 – 42:3.

Further, the Foundation and the City determined the Amendment would positively impact economic development in Ranger and increase City of Ranger revenues by 1) returning land removed from the tax rolls in 1928 to tax generating, and 2) the addition of a water main being extended to the Airfield would, in turn, supply water to the Airfield and nearby Ranger economic development land. The water main would increase the City's utility sales, directly benefiting the City, not

the State. CR 137, 171. The Foundation and the Ranger Economic Development Corporation also planned that the water main would allow for increased firefighting capabilities, which would encourage builders to build in Ranger. CR 137.

The Amendment directly benefits the City and its residents. Because the City did not enter into the Amendment primarily to benefit the general public, this factor also weighs in favor of a proprietary function. *See City of White Settlement*, 558 S.W.3d at 245 (finding cities acted primarily to economically benefit their municipalities).

D. The City was not acting for the State of Texas when it entered into the Amendment.

The third factor "further distinguishes between acts a city chooses to perform in its private capacity to benefit its residents from those sovereign acts it is required to perform as an arm or agent of the state in the exercise of a strictly governmental function solely for the public benefit." *Jimmy Changas, Inc.*, 2023 WL 3909986, at *7 (internal quotations omitted).

The Court in *Jimmy Changas* stated that absent some indication to the contrary, it is likely that a city was acting on its own behalf if the first and second factors both indicate a city entered into the contract as a proprietary function. *Id.* Like in *Jimmy Changas*, nothing in the terms of this Amendment would indicate in any way that the City was acting on the State's behalf and not its own when it entered

into the Amendment. Therefore, this factor favors the City was acting in its proprietary function.

E. The City's conduct entering into the Amendment was not essential to a governmental function.

The final factor considers "whether 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." *Wasson II*, 559 S.W.3d at 150.

In *Jimmy Changas*, the Texas Supreme Court reiterated its holding that "not all activities 'associated' with a governmental function are 'governmental,' and [t]he fact that a city's proprietary action 'touches upon' a governmental function is insufficient to render the proprietary action governmental. Instead, a city's proprietary action may be treated as governmental only if it is essential to the city's governmental actions." *Jimmy Changas, Inc.*, 2023 WL 3909986, at *8 (internal citations omitted) (quoting *Wasson II*, 559 S.W.3d at 152-53).

In a footnote, the City argues that the restoration of the airfield is a governmental function because the TTCA does not distinguish between a commercial and private airfield. Ant's Br. at 14 n.3. But the Amendment is not essential to a governmental function related to airports because the Airfield is historic and not a commercial airport that serves the greater public. CR 161. The TTCA does not require the Court to turn a blind eye to this reality. Therefore, the

fourth factor also indicates the City acted in a proprietary capacity on its own behalf when it entered into the Amendment.

Considering the relevant factors, the Court should conclude that the City was acting in its proprietary function, and as such, the trial court's denial of the City's Plea was not error. The City's first issue should be overruled.

RESTATED ISSUE NO. 2: The application of Chapter 271 of the Local Government Code results in waiver of governmental immunity.

The trial court also did not err when it denied the City's Plea because the City waived governmental immunity when it entered the Agreement with the Foundation for the restoration, maintenance, and construction services to the 1928 hangar and the Airport Property.

The Foundation pleaded that Chapter 271 of the Local Government Code provided a waiver of immunity for its breach of contract claim against the City. CR 11 at ¶ 25 ("Pursuant to Texas Government Code § 271.152, the City has waived sovereign immunity to this suit for the purpose of adjudicating this breach of contract claim because the City entered into a contract with the Foundation that is subject to Texas Government Code § 271."). The waiver under Chapter 271 has two primary elements. Section 271.152 states the following: (1) a local governmental entity that is authorized by statute or the constitution to enter a contract and (2) that enters into a contract subject to this Subchapter waives sovereign immunity to suit for the purpose of adjudicating a claim for breach of the contract, subject to the terms and

conditions of this Subchapter. TEX. LOC. GOV'T CODE § 271.152. If the Foundation is successful in pleading these two elements, then according "to its plain terms, the statute by clear and unambiguous language waives a governmental entity's immunity from suit for breach of written contract." *City of Houston v. Williams*, 353 S.W.3d 128, 134 (Tex. 2011) (citing *Ben Bolt–Palito Blanco Consol. Indep. Sch. Dist. v. Tex. Political Subdivs. Prop./Cas. Joint Self–Ins. Fund*, 212 S.W.3d 320, 327 (Tex. 2006)).

In its opening brief, the City does not take issue with the first element. As to the second element, to overcome the City's Plea, the Foundation needed to establish that the City entered into a contract subject to the waiver of immunity provided for under section 271.152. A "contract subject to this Subchapter" has four elements: (1) A written contract; (2) stating the essential terms of the agreement; (3) for providing goods and services to the local governmental entity; and (4) that it is properly executed on behalf of the local governmental entity. TEX. LOC. GOV'T CODE § 271.152(2)(A).

As shown below, the Foundation has met the requirement to plead and prove the elements required by section 271.152 sufficient to overcome the City's Plea to the Jurisdiction.

A. Section 271.152 applies and bars the City's immunity Plea.

Section 271.152 of the Local Government Contract Claims Act (the "Act") clearly and unambiguously waives the City's immunity from suit. Section 271.152 provides:

> A local governmental entity that is authorized by statute or the constitution to enter into a contract and that enters into a contract subject to this subchapter waives sovereign immunity to suit for the purpose of adjudicating a claim for breach of the contract, subject to the terms and conditions of this subchapter.

TEX. LOC. GOV'T CODE § 271.152.

"According to its plain terms, the statute by clear and unambiguous language waives a governmental entity's immunity from suit for breach of written contract." *City of Houston v. Williams*, 353 S.W.3d 128, 134 (Tex. 2011) (citing *Ben Bolt–Palito Blanco Consol. Indep. Sch. Dist. v. Tex. Political Subdivs. Prop./Cas. Joint Self–Ins. Fund*, 212 S.W.3d 320, 327 (Tex. 2006)). The City argues that section 271.152 is inapplicable because the Foundation has not sued upon a "contract subject to this subchapter" and therefore the City has not waived sovereign immunity. Ant's Br. at 24. A "contract subject to this subchapter is defined as "a written contract stating the essential terms of the agreement for providing goods or services to the local governmental entity that is properly executed on behalf of the local governmental entity." TEX. LOC. GOV'T CODE § 271.152. The City incorrectly argues that the Agreement does not meet these requirements because it (1) does not

contain essential terms, (2) is not a contract for goods or services, and (3) is not properly executed. Ant's Br. at 24-37. The Agreement fits squarely within the requirements of Section 271.152, and accordingly, the City has waived its immunity from suit.

1. The Lease, together with the Amendment, contain sufficient essential terms to satisfy the requirements of Section 271.152.

As a preliminary matter, the City attempts to mislead the Court by asserting "the 2022 Amendment lacks essential terms." Ant's Br. at 24. The question is not whether the Amendment alone satisfies the element, it is whether the entire written contract, the Lease which includes the Amendment (the "Agreement"), satisfies the elements contained in section 271.152 (it does). It is blackletter law that contracts may be embodied in more than one document: "It is well-established law that instruments pertaining to the same transaction may be read together as to ascertain the parties' intent." *Fort Worth ISD v. City of Fort Worth*, 22 S.W.3d 831, 840–41 (Tex. 2000). Each document in isolation need not contain all the terms surrounding a transaction. Instead, only the essential terms are required when construed as a whole. Therefore, the Amendment and the Lease should be read together to determine if the Parties' Agreement contains all essential terms.

The Foundation pleaded and evidence was submitted to the trial court to establish the Agreement's essential terms. A contract's essential terms are those that the parties would reasonably consider "vitally important ingredients" to their

bargain. *See Barrow-Shaver Res. Co. v. Carrizo Oil & Gas, Inc.*, 590 S.W.3d 471, 481 (Tex. 2019). To be enforceable, "a contract must be sufficiently definite in its material terms so that a court can understand what the promisor undertook." *See Barrow-Shaver Res. Co. v. Carrizo Oil & Gas, Inc.*, 590 S.W.3d 471, 481 (Tex. 2019). "Contracts should be examined on a case-by-case basis to determine which terms are material or essential." *Port Freeport v. RLB Contracting Inc.*, 369 S.W.3d 581, 589 (Tex. App.—Houston [1st Dist.] 2012, pet. denied) (quoting *Parker Drilling Co. v. Romfor Supply Co.*, 316 S.W.3d 68, 74 (Tex. App.—Houston [14th Dist.] 2010, pet. denied)). A contract is legally binding "if its terms are sufficiently definite to enable a court to understand the parties' obligations." *Id*. (quoting *Fort Worth ISD*, 22 S.W.3d at 846). Section 271.151 does not define 'essential terms,' but [the Texas Supreme Court has] characterized 'essential terms' as, among other things, 'the time of performance, the price to be paid, . . . [and] the service to be rendered.'" *City of Houston v. Williams*, 353 S.W.3d 128, 138-39 (Tex. 2011) (quoting *Kirby Lake Dev. Ltd. v. Clear Lake City Water Auth*., 320 S.W.3d 829, 838 (Tex. 2010)).

The material and essential terms of the Amendment were agreed upon and specified in Sections 1-7 of the Amendment to the Lease. CR 185-86. The City incorrectly states the contract does not contain an essential term because it does not adequately define the parameters of the restoration efforts the Foundation will

undertake on the 1928 hangar. Ant's Br. at 25. To the contrary, the Amendment contained the size of 60 feet by 60 feet for the 1928 hangar. CR 185. The manner and parameters of the restoration are not essential to the bargain that was reached between the City and the Foundation. The City has wholly failed to establish that the method or the precise size and appearance of the 1928 hangar restoration was vitally important to the Parties at the time of the Agreement. *See Abatement Inc. v. Williams*, 324 S.W.3d 858, 862 (Tex. App.—Houston [14th Dist.] 2010, pet. denied) (noting that a contract's failure to define how profits were to be calculated was not fatal absent evidence establishing that a particular method of calculating profits was important to the parties at the time of the agreement, when payment on the contract was to be based on the profits). The City conveniently and completely ignores that after receiving in August 2022 from the Foundation two pages detailing the hangar restoration cost and scope (CR 163), that the Council then voted to "effectuate the terms of that certain Lease Agreement, dated the 4th day of December 2018, as amended by that certain First Amendment to Lease Agreement, dated the 31st day of January 2022." CR 97-99.

Additionally, the City has not established that the cost or timeline of the restoration would be essential or material to the parties at the time of entering the Agreement. The Lease stated the restoration of the hangar would be done at the Foundation's expense. CR 161; 168. The Foundation presented evidence that the

restoration expense was not material to the Foundation as it agreed to fully fund the restoration in exchange for the conveyance of the airfield property. CR 162. The City presented no evidence the exact cost of the restoration was material to the City because it agreed the cost, paid by the Foundation, would be in lieu of paying cash to purchase the Airfield. The City also understood the value it would receive from the Foundation's restoration services, the restored hangar, and the vast improvement to the Airfield for community and tourist attractions. 1RR 41:19 – 42:2. Knowing the value of its property, the City entered the Agreement agreeing that a fair exchange for the property was the restoration of the hangar, irrespective of the cost of the restoration. The material parameters for the time of performance are included in the Amendment, mainly that the Parties' performances are contingent upon each other's performance. Therefore, the time of performance was not material because the conveyance would not occur until and unless the restoration of the hangar was completed.

At least one Texas court has decided that describing the scope of work as "restoration services" is sufficient to establish the essential terms of a contract. *See Clear Creek ISD v. Cotton Commercial USA, Inc.*, 529 S.W.3d 569, 581 (Tex. App.—Houston [14th Dist.] 2017, pet. denied) (concluding the contract contained all essential terms when it generally described the party's obligation as "restoration services" without defining what "restoration services" entailed.). In *Clear Creek*

ISD, the Texas Supreme Court concluded that "despite the contract's lack of detailed specificity, we conclude that [the agreement] nonetheless meets the "low threshold" of an agreement for services that states all essential terms and is therefore enforceable." *Id*. at 585. Accordingly, so long as the written contract does not fail for indefiniteness, then the written contract states the essential terms of the agreement for purposes of Section 271.152's waiver of immunity.

Here, the Agreement does not fail for indefiniteness because its terms are sufficiently definite to enable the court to understand both the City and the Foundation's obligations under the Agreement. The Agreement contains all essential terms because it lists the Foundation's obligation to restore the hangar. *See id*. at 581.

Finally, the Court must bear in mind (as the City fails to do) that contracts are to be construed to avoid a forfeiture. If the parties' conduct shows they clearly intended to agree and a reasonably certain basis for granting a remedy exists, then courts will find the contract terms definite enough to provide that remedy, even though one or more material terms may be omitted. *Smith v. Barnhart*, 576 S.W.3d 407, 417 (Tex. App.—Houston [1st Dist.] 2019, no pet.) (citing *Fischer v. CTMI LLC*, 479 S.W.3d 231, 239 (Tex. 2016)). Indeed, the court "may imply material terms that can reasonably be implied, such as the price, duration, or time for performance." *Id*.

Simply put, the material and essential terms to the City and the Foundation at the time of the Amendment were that the Airport and Airport Property would be conveyed to the Foundation upon completion of: (1) the construction of at least three vintage-style aircraft hangars and, (2) the restoration of the 1928 hangar. The Foundation's responsibilities and obligations and the City's responsibilities and obligations under the Agreement were clear and specific. The City's hypotheticals and what-ifs are no basis to second-guess the trial court's decision. Ant's Br. at 30. The essential terms were included within the Agreement, and accordingly, the Foundation met this element.

2. The Amendment related to the Foundation providing services to the City.

The third element of showing a contract subject to Chapter 271 requires that the contract at issue involves providing goods and services to the local governmental entity. TEX. LOC. GOV'T CODE § 271.152(2)(A). The Amendment dictated the City would convey the Airport and the Airport Property in exchange for the Foundation furnishing services to the City and for the City's benefit. The City concedes that under Texas law, the term "services" has been broadly defined to "encompass a wide array of activities" and includes "any act performed for the benefit of another under some arrangement or agreement whereby such act was to have been performed." *See Kirby Lake Development, Ltd. v. Clear Lake City Water Authority*, 320 S.W.3d 829,

838 (Tex. 2010). Under this incredibly broad and generous definition of "services," the Amendment clearly satisfies the third element.

Further, services provided to a governmental entity need not be the primary purpose of the contract to satisfy an immunity waiver. *See id.* The Texas Supreme Court has expressly noted the purpose of Section 271.152 was to *loosen* the immunity bar as to local governments given the authority to enter contracts. *Id*. at 838-39. The court found that the term "services" was broad enough to encompass a wide array of activities, generally including any act performed for the benefit of another. *Id.* at 839; *see also City of Houston v. Williams*, 353 S.W.3d 128, 139 (Tex. 2011). Another Texas court found that constructing a road for the town as a condition for approval of other development permits for a governmental entity was considered "services" for the purpose of chapter 271. *Town of Flower Mound v. Rembert Enterprises, Inc.*, 369 S.W.3d 465, 470 (Tex. App.—Fort Worth 2012, reh'g denied). There, the court found the developer's work in setting the manner of constructing the road, designing and constructing the road, and working with TXDOT regarding the location, alignment, design, and construction of the right turn lane were all services to the governmental body sufficient to waive immunity. *Id*. at 473. A governmental entity waived immunity even in a case where the developer was merely authorized to hire third parties. *See Clear Lake City Water Auth. v. MCR Corp.*, No. 01-08-00955-CV, 2010 WL 1053057, at *9 (Tex. App.—Houston [1st

Dist.] Mar. 11, 2010, pet. denied) (stating the mere fact "that the Agreement authorized [developer] to contract with third parties for the construction of the Facilities along with streets, roads, and bridges, [was] sufficient to constitute the provision of services to the [governmental entity], within the meaning of 271.152.").

A Texas appellate court recently concluded a governmental unit waived its immunity under section 271.152 by entering into a contract for services to include "design and construction of water, sewer, and drainage facilities to serve" the underlying property. *Travis County Municipal Utility District No. 10 v. Waterford Lago Vista, LLC*, No. 07-23-00182-CV, 2023 WL 8042570, at *2 (Tex. App.—Amarillo Nov. 20, 2023, no pet. h.) (citing *Kirby*, 320 S.W.3d at 832-32, 839).

The City argues that the Foundation's maintenance and restoration services was included in the original Lease and therefore was not the basis for the services contract waiver because the services were not "new or unique" services. Ant's Br. at 29. The City does not cite a single case to support this argument. As stated above, pursuant to longstanding contract principles, the Lease and the Amendment should be read together. Therefore, the services contained in the Lease *and* the Amendment constitute a services contract that waive immunity.

The Agreement in its entirety, details the many services the Foundation is to provide to the City. The Amendment outlines that the Foundation shall provide the following services to the City:

> (1) the Foundation shall permit the construction and hire the third parties to construct at least three aircraft hangars on the Airport Property;
>
> (2) the Foundation shall sublease the property on which each hangar is constructed, and then once constructed the hangar properties will be subject to taxes, bringing more revenue to the City;
>
> (3) the Foundation shall provide restoration services on the City's 1928 hangar; and
>
> (4) the Foundation shall continue to maintain and operate the 1928 hangar for the benefit of the City under the terms of the Lease.

CR185-86.

The Agreement undoubtedly constitutes as a services contract. Accordingly, the Foundation has satisfied the third element.

3. The Amendment was properly executed as contemplated by Chapter 271.

Both the Foundation's Original Petition and its First Amended Petition sufficiently pleads that the City Commissioners unanimously approved the Amendment, and that Ranger's Mayor, on behalf of the City, properly executed the Amendment. CR at ¶ 13; 250 at ¶ 15. These facts are not genuinely in dispute. Nor is the fact that the City reaped the benefit of the execution of this Amendment while the Foundation raised money for the restoration of the 1928 hangar and the construction of the additional hangars. Nevertheless, the City now argues that the contract was not properly executed as required under section 271.152. Ant's Br. at 24. The argument should be rejected for numerous reasons.

a. Chapter 271 does not define the phrase "properly executed."

Neither section 271.151, section 271.152, nor the local government code defines the words or phrases "properly executed." The Texas Supreme Court has stated that for immunity to be waived based on a contract, the contract must be properly executed "in accord with the statutes and regulations prescribing that authority." *See El Paso Educ. Initiative, Inc. v. Amex Properties*, *LLC*, 602 S.W.3d 521 (Tex. 2020). However, case law instructs that the construction of "properly executed" "does not require, as part of 'proper execution,' compliance with all laws and statutes governing a particular governmental entity." *See Housing Auth. of City of Dallas v. Killingsworth*, 331 S.W.3d 806, 812 (Tex. App.—Dallas 2011, pet. denied). The authority to enter into contracts can be dictated by documents adopted by a governmental entity for its own governance, such as a city charter. *See, e.g., City of Houston Clear Channel Outdoor, Inc.*, 233 S.W.3d 441, 446 (Tex. App.—Houston [14th Dist] 2007, no pet.) (looking to city charter to determine whether contract was "properly executed.") The City's "proper execution" argument fails for two reasons: (1) the City Commissioners unanimously authorized the contract for services; and (2) the Mayor of Ranger executed the Amendment.

b. The evidence attached to the City's Plea supports that the Amendment was "properly executed."

While the Foundation's pleading properly alleges facts to support its position that the Amendment was authorized and properly executed, the City's own jurisdictional evidence also supports it. The City attached meeting minutes conclusively establishing the City Commissioners' approval to enter the Amendment. *Killingsworth*, 331 S.W.3d at 812. Only after the City Commissioners approved the Amendment did the Mayor execute the Amendment. CR 162, 186, 193–215. This is a stark contrast to the *Amex* case, where the board president acted on his own in secret to execute the contract. 602 S.W.3d at 533-34. Accordingly, the trial court properly concluded that the evidence supported that the Amendment was "properly executed."

c. The City's public disclosure argument should be rejected because strict compliance with the ethics disclosure form contemplated in section 2252.908 is not necessary to "properly execute" as evidenced by the recent amendment to section 2252.908.

Compliance with section 2252.908 of the Texas Government Code does not affect the "proper execution" of a contract with a government entity as it pertains to a waiver of immunity. Section 225.908 requires parties to submit a conflict-of-interest form or disclosure and is recognized as a transparency law. TEX GOV'T CODE § 2252.908. The City relies heavily on the non-binding and distinguishable *City of Hutto v. Legacy Hutto, LLC* case to support this argument (notably, this case is

currently before the Texas Supreme Court on appeal). *See City of Hutto v. Legacy Hutto, LLC*, No. 07-21-00089-CV, 2022 WL 2811856, at *2 (Tex. App.—Amarillo July 18, 2022, pet. filed). The City points to no other courts that have held section 2252.908 applies to the proper execution of a contract with a local government entity.

The Legislature's recent amendment to section 2252.908 illustrates section 2252.908 was never intended to function as a jurisdictional bar for a plaintiff's claims. *See* Tex. HB 1817, 2023-2024, 8th Legislature. The amendment allows the Foundation to cure the alleged procedural defect in submission of a disclosure form (which it has since done).

The recent amendment to section 2252.908 creates a notice procedure to rectify situations, precisely like the present situation, where a disclosure form may have been overlooked before that contract can be invalidated. A review of the legislative history demonstrates that HB 1817 was enacted to address the City's primary case it relies on, *City of Hutto v. Legacy Hutto, LLC*.

In passing the amendment, the author and sponsor of the bill issued a statement of intent that cited the *City of Hutto* case as a justification for the amendment:

> In 2015, the legislature enacted legislation that required governmental entities to file a disclosure of interested parties, otherwise known as a Form 1295, with the Texas Ethics Commission for certain contracts. In 2022, a

> development company, Legacy Hutto LLC, sued the City of Hutto for breach of contract. The judge found that the city had not verified whether a Form 1295 was submitted and on file, therefore not complying with state government transparency laws. As such, the judge found that the contract had not been properly executed. **With this ruling, the potential now exists for any government contract without a Form 1295 on file to be found void. H.B. 1817 seeks to prevent this from occurring** by updating the disclosure of interested parties' statute to allow for a cure period of 10 business days if a Form 1295 is found to not be on file.

H.B. 1817, Bill Analysis (emphasis added).[3]

The amendment passed, and subpart (f-1) was added to section 2552.908 as follows:

> A contract described by Subsection (b) entered into by a governmental entity or state agency is voidable for failure to provide the disclosure of interested parties required by this section only if:
>
> (1) the governmental entity or state agency submits to the business entity written notice of the business entity's failure to provide the required disclosure; and
>
> (2) the business entity fails to submit to the governmental entity or state agency the required disclosure on or before the 10th business day after the date the business entity receives the written notice under Subdivision (1).

HB 1817's application is explicitly meant to be retroactive as demonstrated by Section 3, which provides,

[3] Available at https://capitol.texas.gov/tlodocs/88R/analysis/html/HB01817H.htm (last accessed December 4, 2023).

> A contract described by Section 2252.908(b), Government Code, that was executed before the effective date of this Act is presumed to have been properly executed in accordance with Section 2252.908, Government Code, if an action to void or invalidate the contract has not been filed with a court in this state before the effective date of this Act.

Accordingly, the statutory amendment is specifically on point and should be applied to the Foundation. The Foundation did not bring claims to void or invalidate its own contract. Additionally, the City did not "file an action" to void or invalidate the contract. The only thing the City filed was a plea to the jurisdiction. Therefore, under a strict reading, the Amendment must be presumed to be properly executed.

Further, it cannot be ignored that the Foundation never received written notice that a 1295 Ethics Disclosure Form was needed by the City. In fact, the City did the exact opposite. The City requested information from the Foundation and the Foundation has been transparent with its plans for the airport, including the restoration of the hangar. The Foundation answered every question posed to it by the City. With this information in hand, the City sent a letter to the Foundation's counsel unequivocally ratifying the Amendment. CR 238, 241. The City's attorney wrote, "[t]his letter is to inform you that the City of Ranger . . . has determined to effectuate the terms of that certain Lease Agreement . . . as amended by that certain First Amendment to Lease Agreement, dated the 31st day of January 2022 . . . ." CR 241. Without notice, the Foundation was never given a chance to cure the alleged fatal

defect to the execution of the Amendment and this alleged deficiency cannot be used against the Foundation to establish that the Amendment was not "properly executed."

On August 2, 2023, pursuant to section 2252.908(f-1) of the Texas Government Code, the Foundation submitted the proper Disclosure Form with the Texas Ethics Commission and the Foundation's counsel sent the Disclosure Form to the City. CR 243.

The City's arguments individually, and as a whole, demonstrate that the trial court was correct in denying the City's Plea to the Jurisdiction, and the decision should be affirmed.

d. The Amendment was properly executed despite not having a formal bidding process prior to the execution.

The City also argues that the Amendment was not properly executed because public land cannot be conveyed without first adhering to bidding process requirements. Ant's Br. at 34. This argument fails because the conveyance contained in the Amendment did not have to comply with the bidding process requirements for two reasons.

First, section (b) of the Local Government Code 272.001 details that the notice and bidding requirements of 272.001(a) do not apply to "land that the political subdivision wants to have developed by contract with an independent foundation[.]" TEX. LOC. GOV'T CODE § 272.001(b)(4). The Foundation is an independent

foundation and the Airfield is land that the City agreed to have restored and developed by the Foundation. Second, the Foundation should be exempt from these requirements because it will soon complete its registration as a non-profit organization under Section 253.011 of the Local Government Code. TEX. LOC. GOV'T CODE § 253.011; TEX. GOV'T CODE § 2252.906. The Foundation satisfies the requirements of these sections because it is an organization that should be exempt from federal taxation under Section 501(c)(3) of the Internal Revenue Code. The Foundation's Certificate of Formation, which was attached to Plaintiff's Response to Defendant's Plea to the Jurisdiction, unequivocally states the purpose of the Foundation is for "charitable and educational purposes within the meaning of Section 501(c)(3) . . . and to promote public interest and education through rehabilitation, restoration, maintenance and/or construction structures, property and assets of historical or educational value in the State of Texas." CR 189–90. Further, the fundraising arm of the Airfield, Ranger Airfield Foundation ("RAF"), is already a non-profit organization under Section 253.011. RAF was formed in 2008 and is a 501(c)(3) non-profit organization. CR 189; 1RR 47:1-7. RAF has always been the fundraising vehicle for the Foundation and its work. However, in 2018, at the City's insistence, RAF formed the Foundation to enter the Lease.

The City states that the Foundation is not exempt because the property will not be used "in a manner that primarily promotes a public purpose of the

municipality." TEX. LOC. GOV'T CODE § 253.011. Ant's Br. at 35. It states that the Foundation does not seek to promote a public purpose because some of the land will contain privately owned hangars. *Id.* at 35–36. However, this is untrue. The Airfield has and will continue to provide tourism and amusement attractions for the City residents and visitors, despite private hangars occupying some of the Airfield Property. Under the Agreement, the runways, the runway safety areas, and the infield of the property will remain undeveloped, open to the public, and subject to the City's right of reversion. Additionally, the area around the 1928 hangar will be open for continued public use for City events and a public museum.

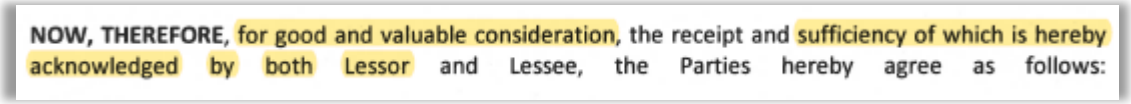
The Mayor of Ranger properly executed the Amendment after it was unanimously approved and authorized by the City Commissioners of Ranger. Because the City waived its immunity, the trial court properly denied the City's Plea to the Jurisdiction.

B. The Foundation's claims are not barred by the Texas Constitution because the Foundation is a non-profit corporation and the Amendment is supported by consideration.

The City's next argument is that the Texas Constitution prohibits the conveyance because it grants public funds to private parties. Ant's Br. at 37–41. The City contends that the consideration for the conveyance is insufficient and the Amendment's statement on the adequacy of consideration is not "well-pled." *Id.* at 37–38. The City erroneously states that the problem with the allegation of sufficient

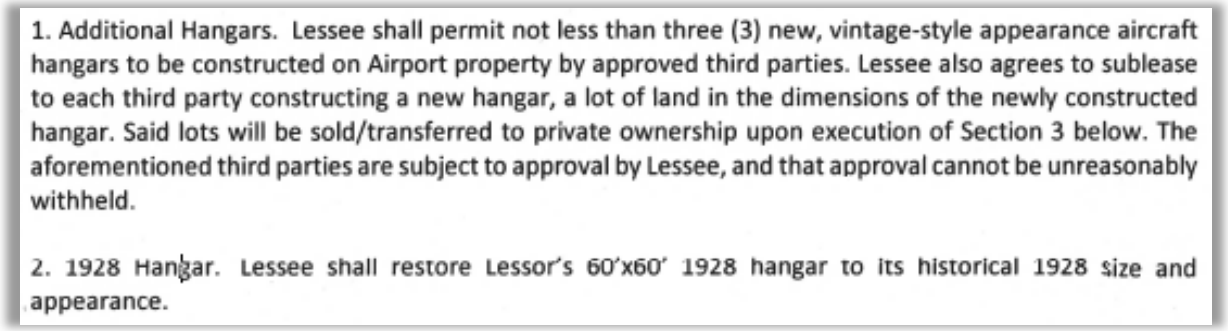
consideration is that the Amendment "contains no language supporting it." *Id.* at 38. The language of the Amendment demonstrates this is patently untrue.

The Amendment states the following:



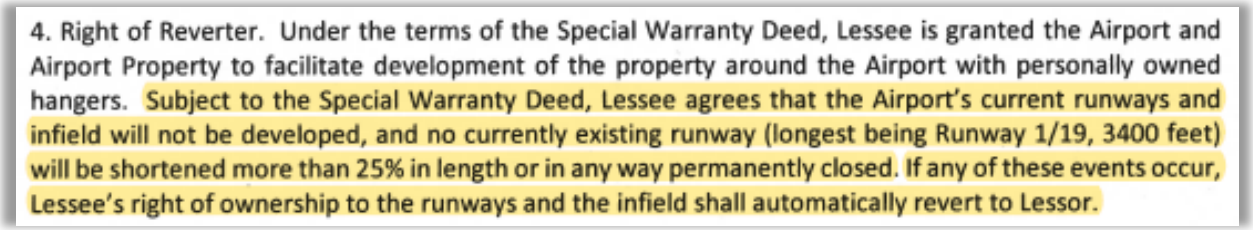
NOW, THEREFORE, for good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged by both Lessor and Lessee, the Parties hereby agree as follows:

CR 185 (highlight added). The Amendment goes on to detail the consideration agreed to by the parties:



1. Additional Hangars. Lessee shall permit not less than three (3) new, vintage-style appearance aircraft hangars to be constructed on Airport property by approved third parties. Lessee also agrees to sublease to each third party constructing a new hangar, a lot of land in the dimensions of the newly constructed hangar. Said lots will be sold/transferred to private ownership upon execution of Section 3 below. The aforementioned third parties are subject to approval by Lessee, and that approval cannot be unreasonably withheld.

2. 1928 Hangar. Lessee shall restore Lessor's 60'x60' 1928 hangar to its historical 1928 size and appearance.



4. Right of Reverter. Under the terms of the Special Warranty Deed, Lessee is granted the Airport and Airport Property to facilitate development of the property around the Airport with personally owned hangers. Subject to the Special Warranty Deed, Lessee agrees that the Airport's current runways and infield will not be developed, and no currently existing runway (longest being Runway 1/19, 3400 feet) will be shortened more than 25% in length or in any way permanently closed. If any of these events occur, Lessee's right of ownership to the runways and the infield shall automatically revert to Lessor.

Id. (highlight added).

By unanimously voting to approve the Amendment and the Mayor executing the Amendment, the City and its City Commissioners acknowledged the consideration was sufficient in exchange for the conveyance of the Airfield Property.

Importantly, the City offers no evidence—only conjecture and innuendo—that the consideration is in fact insufficient.

Next, the City argues that without sufficient consideration, the Texas Constitution prohibits the granting of monies "to any individual, association of individuals, municipal or other corporations whatsoever," with certain exceptions. Ant's Br. at 39. The Foundation, as acknowledged by the City, is a non-profit organization and the conveyance in the Amendment fits squarely one of the exceptions to this prohibition. The attorney general, citing *Texas Municipal League Intergovernmental Risk Pool v. Workers' Compensation Commission*, has devised a three-part test requiring governmental entities making a conveyance or grant of public moneys or thing of value to:

a. Ensure the predominant purpose of the expenditure is to accomplish a public purpose, not to benefit private parties;

b. Retain public control over funds to ensure that the public purpose is accomplished; and protect the public's investment; and

c. Ensure that the political subdivision receives a return benefit.

See Tex. Att'y Gen. Op. No. GA-0076 (2003) (citing *Tex. Mun. League Intergov't Risk Pool v. Tex. Workers' Comp. Comm'n*, 74 S.W.3d 377, 384 (Tex. 2002)).

The conveyance of the Airfield Property in the Amendment easily satisfies this test. As to the first prong, the predominant purpose of the Amendment is to convey the Airfield Property to the Foundation, which will accomplish a public

purpose. As detailed above, keeping the historic Airfield open as an airport provides tourism and amusement attractions for the City. Admittedly, new hangars will be constructed and sold to private owners, but that does not negate the fact that the purpose of the Airfield and the soon-to-be restored historic hangar is to provide a public benefit to the City of Ranger and its citizens. The new hangars will provide revenue to the Foundation for the Airfield to remain open for the City and will ensure that the public will get the benefit of the Foundation's continued preservation efforts under the Lease, including "maintaining and operating the Airport and improvements as a tribute to the Golden Age of Aviation . . . ." CR 165.

As to the second prong, the Foundation clears this threshold as well. The City argues that the Amendment purports to relinquish all control over the 81 acres and therefore fails the second prong. Ant's Br. at 40. However, the City retains sufficient control over the Airfield Property after conveyance to protect the public's investment. The Amendment details that the City shall retain control over the historic hangar that drives public interest in the Airfield. Additionally, the Amendment contains a right of reversion that protects the public's investment. The Airfield Property is to be conveyed under a Special Warranty Deed that will limit the Foundation's right to modify or develop the Airfield Property. The Foundation agreed to the following:

4. Right of Reverter. Under the terms of the Special Warranty Deed, Lessee is granted the Airport and Airport Property to facilitate development of the property around the Airport with personally owned hangers. Subject to the Special Warranty Deed, Lessee agrees that the Airport's current runways and infield will not be developed, and no currently existing runway (longest being Runway 1/19, 3400 feet) will be shortened more than 25% in length or in any way permanently closed. If any of these events occur, Lessee's right of ownership to the runways and the infield shall automatically revert to Lessor.

CR 181 (highlight added).

Accordingly, the City retains control over how the Airfield Property can and cannot be used by the Foundation, so the second prong is satisfied.

Finally, the Foundation satisfies the third and final prong of the test because the City receives a return benefit of the bargained-for consideration of the Foundation's restoration services as detailed above. The City's argument that the Texas Constitution bars the Amendment fails.

C. The City does not have governmental immunity from the Foundation's claim for declaratory judgment.

The Foundation has brought a claim for declaratory judgment against the City seeking a declaration of its right under the Amendment. CR 254–56. The City argues that the Foundation cannot bring a declaration claim to alter the underlying nature of the suit. Ant's Br. at 41–45. But the Texas Supreme Court has held that governmental immunity is waived for claims to determine a parties' rights to a contract subject to Section 271.151(2). *See Ben Bolt-Palito Blanco Consol. ISD*, 212 S.W.3d at 330 (holding immunity from suit was waived under chapter 271 as to a lawsuit for declaratory judgment seeking determination of whether loss was covered

under an insurance policy); *see also Houston Cmty. Coll. Sys. v. HV BTW, LP*, 589 S.W.3d 204, 218 (Tex. App.—Houston [14th Dist.] 2019, no pet.). The City contends "[n]or does the UDJA waive immunity when a plaintiff seeks declaration of his or her rights under a statute or other law" and cites the *Texas Department of Transportation v. Sefzik* case to support this proposition. Ant's Br. at 43 (citing *Tex. Dep't of Transp. v. Sefzik*, 355 S.W.3d 618, 622 (Tex. 2011).

However, the *Sefzik* case states that there are particular cases where the UDJA waives sovereign immunity. 355 S.W.3d at 622. There, the court decided that immunity was not waived for the UDJA claim because the plaintiff was not challenging the statutes' validity but rather the governmental entity's actions under the statute. *Id.* Accordingly, the Texas Supreme Court acknowledged that, as is the case here, proper claims under the UDJA waive sovereign immunity. *Id.*

The Foundation is entitled to seek a declaration determining its rights to the Airfield Property under the Agreement because the City waived its immunity by entering the contract. The City's argument to the contrary should be rejected.

D. The City waived governmental immunity with respect to the Foundation's claim for attorneys' fees.

Because the City's immunity is waived as to the declaratory judgment and breach of contract causes of action, it is also waived as to the Foundation's request for attorneys' fees in the event the Foundation's declaratory judgment and breach of contract causes of action are successfully prosecuted against the City. Section

271.153 expressly provides that a party can recover reasonable and necessary attorneys' fees from a governmental entity that waived its immunity by contract under section 271.

Additionally, in *City of Dallas v. Jones*, the court held that to the extent a city was not immune from the request for a declaratory judgment, it was not immune from the request for attorneys' fees. *City of Dallas v. Jones,* No. 05-09-01379-CV, 2010 WL 2839614, 331 S.W.3d 781 (Tex. App.—Dallas July 21, 2010, pet. filed, Rule 53.7(f) motion granted) (finding that the trial court did not err in denying the city's Plea to the Jurisdiction for attorneys' fees); *see also Tex. Educ. Agency v. Leeper*, 893 S.W.2d 432, 446 (Tex. 1994). Accordingly, the trial court did not err by concluding the City waived immunity from the Foundation's claim for attorneys' fees.

In light of the foregoing, the City's second issue should be overruled.

RESTATED ISSUE NO. 3: Whether the Foundation's Amended Petition should be stricken.

After spending pages of argument on why the Amendment was not properly executed, the City shifts gears in its final issue and appears to contend that in the event the Court agrees with the City that it did not waive immunity from suit, the Foundation should not be permitted to pursue its *ultra vires* claims against the City Commissioners in its First Amended Petition. Ant's Br. at 47–51. First, this is not a proper issue for the Court to resolve because there was no ruling in the trial court,

so there is no error to consider. Second (and only if the Court elects to consider an issue not presented below), the City's position that it cannot be liable under a contract and that its officials cannot be liable if the Court determines those same officials acted outside of the scope of their authority should be rejected.

A. The City cannot ask the Court to address an issue that has not been raised in the trial court.

It is axiomatic that appellate courts cannot consider issues not raised in the trial court. *See* TEX. R. APP. P. 33.1(a), 38.2(a)(1); *Greene v. Farmers Ins. Exch.*, 446 S.W.3d 761, 764 at n.4 (Tex. 2014) (explaining that appellate courts cannot consider issues that were not raised in the trial court). Yet the City asks the Court to do just that and resolve the issue of whether the Foundation's Amended Petition should be stricken. Ant's Br. at 47. The Court should overrule the City's third issue because it was never raised (let alone ruled on) at the trial court.

B. The City cannot avoid the *ultra vires* implications of its position that the Amendment was not properly executed.

Even if the Court considers the City's third issue, it should be overruled because the Foundation properly alleges that the City, its City Commissioners, including Mayor John Casey, exceeded their authority in the *ultra vires* acts.

Sovereign immunity does not bar claims alleging *ultra vires* conduct—that the official acted without legal authority in carrying out his or her duties. *See City of El Paso v. Heinrich*, 284 S.W.3d 366, 369-70 (Tex. 2009) (affirming denial of plea

to the jurisdiction in an action to determine or protect rights from city official who has acted without statutory authority); *Houston Belt & Terminal Ry. Co. v. City of Houston*, 487 S.W.3d 154, 157-58 (Tex. 2016). A plaintiff has a cognizable *ultra vires* claim when the allegations demonstrate the official in question acted without legal authority. *See Trauth v. K.E.*, 2020 Tex. App. LEXIS 7254, at *6. The court construes relevant statutes that define the scope of the officials' legal authority and applies them to the facts alleged to ascertain whether the officials' actions were beyond their legal authority. *See id*.

The Foundation has a cognizable *ultra vires* claim if the City did not, as it claims, have authority to enter the Amendment. A government official may be sued, in his official capacity, for *ultra vires* acts. *Heinrich*, 284 S.W.3d 366, 370. A suit to require compliance with the law is not barred merely because it compels the government actor to follow the law. *See id*. at 372.

If the City acted without authority, as the City alleges, then the Foundation will proceed on its already-filed First Amended Petition so that it can assert claims against the current and former City Commissioners involved in approving the Amendment. Yet the City audaciously asserts that the Foundation does not identify "any acts that the commissioners took that exceeded their authority." Ant's Br. at 51. This self-serving assertion is remarkable given the City's argument that the Amendment was not properly executed. In the event that the Court agrees that the

Amendment was not properly executed, the Foundation should be able to pursue its *ultra vires* claims against the City Commissioners.

The City's third issue should be overruled.

PRAYER

Therefore, Appellee requests that the Court affirm denial of Appellant's Plea to the Jurisdiction, and for all other relief to which Appellee is justly entitled.

Date: December 4, 2023.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to TEX. R. APP. P. 9.4, I hereby certify that, absent the caption, identity of parties and counsel, statement regarding oral argument, table of contents, index of authorities, statement of the case, restatement of issues presented, signature, proof of service, certification, certificate of compliance, and any appendices, the computer program used to prepare this document prior to its conversion to portable document format calculate the number of words in the foregoing brief as 10,738.

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CERTIFICATE OF SERVICE

I certify that on December 4, 2023, a true and correct copy of the foregoing instrument was served on all counsel pursuant to the Texas Rules of Appellate Procedure.

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