

City of Ranger Plea to the Jurisdiction

Cause No. CV2246534

91st Judicial District

Eastland County

Bradford E. Bullock for City of Ranger



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Foundation's Last-Minute Response

- Less than 48 hours before a hearing that has been scheduled for months (and moved by City's counsel at the request of opposing counsel due to a conflict), the Foundation filed a 30-page response.
- The response criticizes the City for not addressing the proprietary/governmental dichotomy addressed in *Wasson I* and *II*, but there is a major problem with this criticism –
 - **The Foundation does not plead that the contract was proprietary!**
 - To the contrary, the Foundation pled that the City's immunity is **waived**, which necessarily implies that immunity exists in the first place.
 - *Wasson I, II* address whether immunity applies in the first place and because the Foundation did not plead the 2022 Amendment was proprietary, it was impossible for the City to address this issue in its plea.
 - If the Court is going to consider this new, unpled theory, the City requests that the Court take this matter under advisement and allow the City the opportunity to provide reply briefing to address this new issue.

Summary of Factual Allegations

- Airfield Foundation alleges that the parties entered a 12/4/2018 Lease for the Airfield to lease and manage the Ranger Municipal Airport.
- Airfield Foundation alleges that the parties entered a 1/31/2022 Amendment for the conveyance of real property (the airfield) to Plaintiff in exchange for “restoration” of the City’s existing 1928 vintage hangar to its “historical size and appearance.”
- Airfield Foundation sues the City for specific performance to force conveyance of city-owned real property to the Foundation.

Summary of Plaintiff's Claims

- 12/30/22 – Ranger Airfield files Original Petition
 - Count 1 – Breach of Contract
 - Seeks specific performance (i.e., conveyance of real property)
 - Alleges Local Government Code Sec. 271.152 immunity waiver
 - Seeks attorney's fees under Chapter 38 Civil Practice & Remedies Code
 - Count 2 – Anticipatory Breach of Contract
 - Seeks specific performance (i.e., conveyance of real property)
 - Alleges Local Government Code Sec. 271.152 immunity waiver
 - Seeks attorney's fees under Ch. 38 Civil Practice & Remedies Code
 - Count 3 – Declaratory Judgment
 - Seeks declarations relating to contract validity and enforcement thereof
 - Alleges UDJA immunity waiver and LGC 271.152 immunity waiver
 - Seeks attorney's fees under UDJA

Ranger's Plea to the Jurisdiction Grounds

- Section 271.172 only waives governmental immunity for contracts for “goods and services,” Airfield Foundation judicially admits the 2022 Amendment is contract for conveyance of real property, which lacks “essential terms” and is not “properly executed”
- UDJA contains no waiver-by-conduct exception and does not waive immunity to enforce or interpret contracts
- 2022 Amendment violates Texas Constitution’s prohibition on granting funds or value to private parties, thereby rendering contract void
- 2022 Amendment is void for failing to comply with Local Government code Chapters 253, 272 governing conveyance of public property
- Attorney’s fee claims do not invoke jurisdiction because Ranger is immune

Pleas to the Jurisdiction

- A plea to the jurisdiction is used to defeat a cause of action without regard to the merit of the claim asserted. *Bland Indep. Sch. Dist. v. Blue*, 34 S.W.3d 547, 554 (Tex. 2000).
- Courts focus first on the plaintiff's petition to determine whether the plaintiff has pled facts that affirmatively demonstrate that the trial court has subject matter jurisdiction. *Weir Bros., Inc. v. Longview Econ. Dev. Corp.*, 373 S.W.3d 841, 844 (Tex. App.—Dallas 2012, no pet.).
- Courts may consider jurisdictional evidence submitted by the parties and must do so when necessary to resolve jurisdictional questions. *Bland Indep. Sch. Dist. at 555.*

Plaintiff Bears the Burden to Establish Jurisdiction

- The plaintiff bears the burden to allege facts that affirmatively demonstrate the trial court's jurisdiction to hear a case. *Tex. Ass'n of Bus. v. Tex. Air Control Bd.*, 852 S.W.2d 440, 446 (Tex.1993).
- The plaintiff must also affirmatively demonstrate the court's jurisdiction by alleging a valid waiver of immunity. *Dallas Area Rapid Transit v. Whitley*, 104 S.W.3d 540, 542 (Tex. 2003).

Immunity Waivers Must Be Clear and Unambiguous/Waiver by Conduct Rejected

- A waiver of sovereign immunity requires clear and unambiguous statutory language.” *Tex. Office of Comptroller of Pub. Accounts v. Saito*, 372 S.W.3d 311, 313 (Tex.App.—Dallas 2012, pet. denied).
- When construing a statute that purportedly waives sovereign immunity, courts generally resolve ambiguities by **retaining immunity**. *Wichita Falls State Hosp. v. Taylor*, 106 S.W.3d 692, 697 (Tex. 2003), judgment withdrawn and reissued (May 13, 2003).
- Texas Supreme Court has repeatedly refused to recognize a “waiver-by-conduct” exception. *Health & Human Services Comm'n v. Vazquez*, 667 S.W.3d 290, 295 (Tex. 2022).

Plea Ground 1 – Sec. 271.152 Does Not Waive Ranger's Immunity

- Section 271.152 is a limited immunity waiver and only applies to contracts that:
 - State “essential terms”
 - For “goods and services” to the local government
 - That are “properly executed”

The 2022 Amendment Lacks Essential Terms

- Sec. 271.152 does not define “essential terms,” but courts “have 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).
- The 2022 Amendment contains no information from which a reader can discern the “price to be paid” by the Foundation (i.e., the amount of consideration Ranger receives for the conveyance of real property).
- Likewise, the 2022 Amendment contains no information from which a reader can discern the time for performance by the Foundation. It is silent.

The 2022 Amendment is Not for Goods or Services to the City

- Sec. 271.152 only applies to contracts for “goods or services.”
- As a matter of law, Sec. 271.152 **does not** apply to contracts whose primary purpose is to convey real property interests. *Triple BB, LLC v. Vill. Of Briarcliff*, 566 S.W.3d 385, 395 (Tex.App.-Austin 2018, pet. denied).
- The Airport Foundation has judicially admitted that the 2022 Amendment’s purpose was to convey ownership of real property to the Foundation. See Original Pet. Para. 10.

The 2022 Amendment Purports to Sell Real Property

- “It is contended by appellants that an exchange of property is not a sale of property and that since an exchange is shown in this case, the charter provision requiring the City to advertise and have a hearing of any proposed ‘sale’ of its property does not apply. We cannot agree with this contention. Although there is a technical distinction between a sale and an exchange of property, **a sale in its broadest sense comprehends any transfer of property from one person to another for a valuable consideration.**” *McKinney v. City of Abilene*, 250 S.W.2d 924, 925 (Tex. App.—Eastland 1952, writ ref’d n.r.e.).

The 2022 Amendment is not Properly Executed

- Proper execution of a contract is not a mere “technicality” and Sec. 271.152 only waives immunity if all applicable legal requirements are met. *El Paso Educ. Initiative, Inc. v. Amex Properties, LLC*, 602 S.W.3d 521, 532 (Tex. 2020).
- The 2022 Amendment is not properly executed because:
 - It fails to comply with mandatory requirements of Gov’t Code Sec. 2252.908, which imposes a mandatory duty on a party submitting a contract to the government to submit an ethics disclosure form. *City of Hutto v. Legacy Hutto*, 2022 WL 2811856, at *2.
 - It failed to comply with required bidding process notice requirements mandated by state law. Loc. Gov’t Code Sec. 253.008.

Plea Ground 2 - UDJA Does Not Waive Immunity for Pleaded Claims

- The UDJA does not waive immunity for claims that seek to establish a contract's validity with a governmental entity. *Mustang Special Util. Dist. v. Providence Vill.*, 392 S.W.3d 311, 316 (Tex. App.—Fort Worth 2012, no pet.).
- The UDJA also 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).
- **Thus, any request to replead an *ultra vires* claim against Ranger's elected officials in their official capacities would be futile.**

Plea Ground 3 – 2022 Amendment Violates Texas Constitution and is Void and Non-justiciable

- The Texas Constitution forbids cities from gratuitously granting money or things of value “in aid of” third parties. Tex. Const. art. III, sec. 52(a); *Tex. Mun. League Intergov'tl Risk Pool v. Tex. Workers' Comp. Comm'n*, 74 S.W.3d 377, 383 (Tex. 2002).
- The court articulated a three-part test to determine if a transfer of funds or value from a public entity to a private entity is constitutional:
 - The public entity must ensure that the transfer is to “accomplish a public purpose, not to benefit private parties;
 - The public entity must retain public control over the funds to ensure that the public purpose is accomplished and to protect the public's investment; and
 - The public entity must ensure that the political subdivision receives a return benefit.

An Unconstitutionally Void Contract is a Nullity

- A contract is void if it violates a specific statute (or constitutional limitation) or is against public policy. *Swain v. Wiley Coll.*, 74 S.W.3d 143, 146 (Tex. App.—Texarkana 2002, no pet.).
- A court may grant a motion to dismiss for failure to state a viable cause of action when the party pleads itself out of court. *Baca v. Sanchez*, 172 S.W.3d 93, 96 (Tex. App.—El Paso 2005, no pet.).

Plea Ground 4 – Voidness for Failure to Comply with Chapters 253, 272 LGC

- 272.001 of the Local Government Code requires that before public property is sold, the public entity must publish newspaper notice on two separate dates with the second publication at least 14 days prior to the sale/exchange.
- 272.002 exempts the publication requirement only if the land is sold to an “independent foundation” for development, but in that case, the public entity **must** obtain an appraisal (or it is conveyed at an auction) and sell the land for fair market value as determined by the appraisal.
- There is no allegation in the pleadings that this occurred and repleading would be futile because the City’s undisputed jurisdictional evidence shows this did not occur prior to the execution of the 2022 Amendment.
- Therefore, Plaintiff cannot plead a viable cause of action and this claim should be dismissed.

Plea Ground 4 – Voidness for Failure to Comply with Chapters 253, 272 LGC

- Section 253.011 of the Local Government Code dispenses with notice and bidding requirements in the sale of public property but only under limited circumstances.
- The conveyance must be to a “nonprofit organization” exempt from federal taxation.
- The Foundation judicially admits that it “should be exempt from these [notice] requirements because it will soon complete its registration as a non-profit organization under Section 253.011 of the Local Government Code.”
- **This is apparently a judicial admission that at the time of the alleged conveyance of real property, it was NOT a registered non-profit organization; therefore, it is not entitled to the notice waiver under 253.011.**

Plea Ground 5 – Attorney’s Fees

- If immunity is not waived for the underlying cause of action, immunity is not waived for an award of attorney’s fees. *See Tex. Nat. Res. Conservation Comm'n v. IT-Davy*, 74 S.W.3d 849, 860 (Tex. 2002); *City of Corinth v. NuRock Dev., Inc.*, 293 S.W.3d 360, 370 (Tex. App.—Fort Worth 2009, no pet.) (if underlying claim is dismissed for lack of jurisdiction, associated attorney’s fees claims must also be dismissed).

The Foundation's New Argument

- The Foundation spends most of its response raising an entirely new argument that the contract in question is proprietary and not governmental (meaning immunity does not apply in the first place).
- **The Foundation does not plead this theory in its petition.**
- The Foundation instead implicitly concedes that immunity applies because it states that the City's immunity is waived and cites to allegedly applicable immunity waivers.
- This new unpled theory deserves attention because the Foundation's formulaic approach and conclusion can be rebutted.

Proprietary vs. Governmental Act

- To answer the proprietary vs. governmental question, courts focus on the nature of the contract, not the nature of the breach.
- Courts look to the list of governmental functions in the Texas Tort Claims Act for guidance answering the question.
- Courts consider four factors when making the determination:
 - Was act of entering contract mandatory or discretionary?
 - Does contract benefit general public or city residents?
 - Was city acting on State's behalf or its own?
 - Is act of entering contract sufficiently related to governmental functions?
- *Hays St. Bridge Restoration Group v. City of San Antonio*, 570 S.W.3d 697, 705 (Tex. 2019).

The Foundation's Arguments are Contradictory

- On the one hand, the Foundation argues that the combined purpose of the 2018 Lease and the 2022 Amendment is to improve, operate and maintain a municipal airport and to support economic development by sale of parcels it intends to subdivide to private third-parties.
- It discusses the statewide tourism it brings in via airshows and explains that its actions under the contracts will lure in new land purchasers, and it explains the historical significance of the airfield.
- On the other hand, it says that these actions **only** benefit the City and that the contract is proprietary.
- This is inherently contradictory.

TTCA's List of Applicable Government Functions

- If the City's contracts with the Foundation were for the improvement, operation, maintenance and development of the City's airport, **as the Foundation argues**, then by definition, the purpose of the contracts was a governmental function as defined by the Texas Tort Claims Act, which lists "**airports used for flight activities**" as a governmental function. Tex. Civ. Prac. & Rem. Code Ann. § 101.0215 (10).
- Other governmental functions are also implicated – "museums," "civic centers," "transportation systems," "vehicle and motor driven equipment maintenance," and "community development ... authorized by Chapter 373 Local Government Code." Tex. Civ. Prac. & Rem. Code Ann. § 101.0215 (14, 16, 22, 24, 34).

Chapter 373 Local Government Code

- Chapter 373 – Community Development in Municipalities provides that the following activities are for public purposes:
 - Expansion and improvement of community services;
 - More rational use of land;
 - Improved arrangement of industrial/recreational centers;
 - Restoration and preservation of properties of special value for historic and aesthetic reasons;
 - Alleviation of economic distress through stimulation of private investment in blighted areas.
- **These are, by definition, governmental functions.** Tex. Loc. Gov't Code Ann. § 373.002.