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11-23-00204-CV
ELEVENTH COURT OF APPEALS
EASTLAND, TEXAS
1/16/2024 9:48 AM
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NO. 11-23-00204-CV

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

CITY OF RANGER, A TEXAS MUNICIPAL CORPORATION
Appellant
v.

RANGER AIRFIELD MAINTENANCE FOUNDATION
Appellee

From the 91st Judicial District Court, Eastland County, Texas,
Trial Court Cause No. CV2246534

APPELLANT'S REPLY BRIEF

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ORAL ARGUMENT REQUESTED

IDENTITY OF PARTIES AND COUNSEL

Pursuant to TEX. R. APP. P. 38(a), the following are all of the parties and counsel to the interlocutory order appealed from:

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STATEMENT OF THE CASE

Nature of Underlying Proceeding:	This case involves Ranger Airfield Maintenance Foundation's lawsuit (Tab 2) against the City of Ranger for a breach of contract claim and anticipatory breach of contract claim related to an alleged conveyance of public property to a private entity (Tab 3), which purported to be an amendment to a lease agreement with the City (Tab 4). After the trial court heard the City of Ranger's plea (Tab 5), but before it ruled on it, the Foundation filed an amended pleading (Tab 6), wherein it also asserted a declaratory judgment claim on the contract in question and sued current and former council members in their official capacities under an "ultra vires" theory.
Trial Court:	91st Judicial District of Eastland County, Texas, the Honorable Steven R. Herod presiding.
Order on which Appeal is based:	On August 17, 2023, Judge Herod denied the City of Ranger's plea to the jurisdiction (Tab 1). The City timely filed a notice of appeal of that Order (Tab 7).

STATEMENT REGARDING ORAL ARGUMENT

This case involves governmental immunity, and contract interpretation, in the context of a long and detailed course of conduct between the Foundation and Ranger. Oral argument should be helpful to the Court in both discussing the fairly involved and intersecting substantive law, as well as the complex factual background in which it is being applied.

STATEMENT OF FACTS

Ranger adopts and incorporates its statement of facts set forth in its Appellant's Brief.

SUMMARY OF THE ARGUMENT

Ranger adopts and incorporates its summary of its argument set forth in its Appellant's Brief.

REPLY ARGUMENT & AUTHORITIES

Ranger adopts and incorporates its argument and authorities set forth in its Appellant's Brief. Ranger offers the following additional argument in reply to the arguments raised in the Foundation's response brief.

I. Ranger acted in a governmental capacity when it entered the Lease and the Amendment and governmental immunity applies in the first instance.

The first question the Court must answer is whether immunity applies in the first place, and then, if so, whether it is waived. Immunity applies.

A. The Foundation misapplies the elements courts consider when determining the proprietary/governmental dichotomy based upon its well-pleaded facts and the undisputed jurisdictional evidence.

Determining whether an act is discretionary or proprietary, and, thus, whether governmental immunity exists in the first place, presents a "thorny" problem in the contract interpretation context. *City of League City v. Jimmy Changas, Inc.*, 670 S.W.3d 494, 497 (Tex. 2023). The critical determination is in which capacity the

city acted when it ***entered*** the contract in question, not when the breach allegedly occured. *Wasson Interests, Ltd. v. City of Jacksonville*, 559 S.W.3d 142, 149-50 (Tex. 2018) [*Wasson II*]).

The Texas Constitution expressly authorizes the Legislature to define governmental and proprietary functions for all purposes. *Jimmy Changas, Inc.*, 670 S.W.3d at 499. The Legislature has done this in the tort claims context. *Id*. The Texas Tort Claims Act ("TTCA") aids a court's inquiry when applying the dichotomy in the contract claim context. *Id*. at 500. As the Texas Supreme Court explained in *Jimmy Changas, Inc*., "[i]f a particular activity is ***not included*** in the statutory list of governmental functions, we look to the definitions under both the common law and the statute." *Id*. (emphasis supplied). Based on those definitions, a court considers four factors:

> (1) whether the city's act of entering into the contract was mandatory or discretionary, (2) whether the contract 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 contract, and (4) 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.

Id.

In *Wasson II*, the Texas Supreme Court acknowledged that applying these factors is not a "cut-and-dried task," and that some factors may point to one result while others point to the opposite result. *Wasson II* at 153-54. Courts have repeatedly

recognized that governmental functions "encompass activities that are ***closely related to or necessary*** for performance of governmental activities designated by statute." *Id*. (emphasis in original).

Wasson II is instructive because it provides lower courts with a plethora of examples of conduct thas has been held proprietary or governmental, as the case may be. When reviewing these examples, a pattern emerges—when an act has been legislatively defined as governmental (e.g., when it is found on the list in § 101.0215 of the TTCA, for example), courts tend to find that those acts and those related to or necessary for their performance are governmental. And when the activity is not legislatively defined as governmental, courts tend to examine the four factors much more closely to determine if the act in question is closely related to a traditional or legislatively defined governmental function. *See id*.

For example, a city acted in a proprietary manner when it entered oil and gas leases (simply leasing surface property or mineral rights is not on the TTCA list, nor closely related to any governmental function listed by the TTCA). *Id*. at 149. Likewise, a city acted in a proprietary manner when it entered an insurance contract (purchasing insurance is not on the TTCA list, nor closely related to any governmental function listed in the TTCA). *Id*. A city also acted in a proprietary manner when it contracted with a private party to install pollution-control equipment

in a city power plant. *Id*. (citing *Wheelabrator Air Pollution Control, Inc. v. City of San Antonio*, 489 S.W.3d 448, 450 (Tex. 2016)).

The *Wheelabrator* example is particularly instructive because rather than addressing a function that simply was not on the "governmental" list in the TTCA, the court noted not only that public utilities had long been expressly defined as proprietary under the common law, but that the operation and maintenance of a public utility (i.e., such as the power plant contract at issue in *Wheelabrator*) is expressly designated as a proprietary function by the TTCA. *Wheelabrator Air Pollution Control, Inc.*, 489 S.W.3d at 450 (citing Tex. Civ. Prac. & Rem. Code § 101.0215(b)(1)). Because the function in question had been legislatively established as proprietary, determining the nature of the contract in question became substantially less thorny. This is nearly uniformly true when the function in question is expressly listed in the TTCA as governmental or proprietary.

Sometimes the subject of the challenged contracts contain mixed functions. *Wasson II* addresses how to analyze mixed functions and provides numerous examples. Contracts that merely "touch upon" a governmental function are insufficient to render a proprietary action governmental:

> *See also Davis v. City of Lubbock*, No. 07-16-00080-CV, 2018 WL 736344, at *4 (Tex. App.—Amarillo Feb. 6, 2018, no pet. h.) (mem. op.) ("[T]he sale of the baled hay is sufficiently closely related to the performance of the City's TCEQ-permitted activities as to come within the governmental functions the permit authorizes."); *Smith v. City of League City*, 338 S.W.3d 114, 128 (Tex. App.—Houston [14th Dist.]

> 2011, no pet.) (holding city's decisions concerning bridge "were closely related to the governmental function of 'bridge construction and maintenance.' "); *City of Elgin v. Reagan*, No. 03-06-00504-CV, 2009 WL 483344, at *3 (Tex. App.—Austin Feb. 26, 2009, no pet.) (mem. op.) (allowing the public to adopt animals from a city-owned shelter was "so closely related to" the enumerated governmental function of "animal control" as to be governmental); *Ethio Exp. Shuttle Serv., Inc. v. City of Houston*, 164 S.W.3d 751, 756 (Tex. App.—Houston [14th Dist.] 2005, no pet.) (holding operation of shuttle service to airport was "well aligned" with enumerated governmental functions of "airports, regulation of traffic, and transportation systems"); *Tex. River Barges v. City of San Antonio*, 21 S.W.3d 347, 356 (Tex. App.—San Antonio 2000, pet. denied) ("Clearly, the City's removal of TRB's barge from the City-owned marina was a governmental function, since the Act expressly defines the operation of marinas as a governmental function.").

Id. at 153 n. 7.

In *Davis*, the court "readily" concluded that the sale of hay was sufficiently related to governmental functions expressly defined by the TTCA (sanitation, storm sewers, water and sewer service). *Davis* at *3. In *Smith*, the court concluded that a city's decision not to rebuild a bridge was encompassed under a governmental function expressly defined by the TTCA (bridge construction/maintenance).[1] *Smith* at 128. In *Reagan*, the court concluded that the adoption of dogs to the public was

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[1] *Smith* is also important for another proposition. The Foundation appears to argue that Ranger's motivation for why it entered the contract in question is relevant. See Appellee's Brief at 17 (arguing without citation to the record that Ranger's intent for entering the contract was to "bolster [local] economic development.") As *Smith* and other cases hold, a city's actual motive for engaging in a governmental function is inconsequential. *Smith* at 129 (citing *City of San Antonio v. Butler*, 131 S.W.3d 170, 177–78 (Tex.App.-San Antonio 2004, pet. denied) ("[A]ll activities associated with the operation of one of the government functions listed in section 101.0215(a) are governmental and cannot be considered proprietary, regardless of the city's motive for engaging in the activity.")).

closely related to a governmental function expressly defined by the TTCA (animal control).[2] *Reagan* at *3. The *Butler* holding cited in *Reagan* further notes that the Texas Supreme Court has affirmed the Dallas Court of Appeals' decision to refuse to consider that some activities related to the operation of a city park might be proprietary where the TTCA lists "parks and zoos" as a governmental function. *Butler*, 131 S.W.3d 178 (citing *Mitchell v. City of Dallas*, 855 S.W.2d 741, 744 (Tex.App.-Dallas 1993), aff'd, 870 S.W.2d 21 (Tex.1994)). The Dallas Court of Appeals is not the only one to take this approach. *Texas River Barges*, cited in *Wasson II* and by the court in *Ethio Exp. Shuttle Service* held that because the city's actions were encompassed within a governmental function listed by the TTCA, it had ***no discretion*** to declare the actions proprietary. *Ethio Exp. Shuttle Serv., Inc.*, 164 S.W.3d at 756 (emphasis supplied).

These holdings strongly inform what it means for a function to merely "touch upon" a governmental function expressly listed by the TTCA and ***not*** fall under the "governmental function" umbrella. When it enacted the TTCA, the Legislature

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2 *Reagan* arrived at this conclusion because of two important cases cited therein that further discuss what it means to be "closely related" governmental function. First, *City of Houston v. Petroleum Traders Corp*. holds that the purchase of fuel by a city was a governmental function because it was necessary for the performance of fire and police protection, a governmental function designated by the TTCA. 261 S.W.3d 350, 357 (Tex.App.-Houston [14th Dist.] 2008, no pet.). Second, *City of San Antonio v. Butler* holds that even though it produced profit for the city, the sale of alcohol at a concert was a governmental function because it was associated with a governmental function designated by the TTCA—civic centers, convention centers, coliseums. 131 S.W.3d 170, 177–78 (Tex.App.-San Antonio 2004, pet. denied).

exercised its express constitutional authority to declare functions proprietary or governmental and courts must closely hue to that expression of legislative authority and be "guided" by these designations. *Wheelabrator Air Pollution Control, Inc.*, 489 S.W.3d at 452. Here, the Foundation urges this Court to ignore the Legislature's designation of airports and museums as governmental functions (functions expressly listed in the contract in question – Tab 3), but its arguments for such a contrary result are not sound. *Town of Highland Park v. McCullers*, No. 05-19-01431-CV, 2021 WL 2766390 (Tex. App.—Dallas June 29, 2021, no pet.) (in determining whether a city's actions are proprietary or governmental, courts must first consider whether the action falls within one of the enumerated functions TTCA).

B. The Foundation's mandatory/discretionary focus is specious.

In support of its argument that the contract in dispute is proprietary (Tab 3), the Foundation argues that because Ranger negotiated its terms, deliberated it at multiple meetings, and adopted it by a vote of the body, it must have acted in a discretionary manner, meaning the contract is proprietary and immunity does not apply. Appellee's Brief at 15-17. But this argument is specious. ***Every*** contract a city enters must be deliberated at (at least one) properly noticed open meeting and approved by a vote of the body in open session—otherwise, the contract is void and unenforceable. *City of Bonham v. Sw. Sanitation, Inc.*, 871 S.W.2d 765, 767 (Tex. App.—Texarkana 1994, writ denied) ("A city or county may contract ***only*** upon

express authorization of the city council or commissioners court by vote of that body reflected in the minutes.") (emphasis supplied).

If the Foundation's argument were correct (that if a city negotiates the terms of a contract and makes a discretionary vote to approve it, it is a proprietary act), then ***all*** municipal contracts would be proprietary and immunity could ***never*** apply because cities must necessarily exercise such "discretion" on ***every*** contract they enter. The Foundation cites no authority for this proposition because it would eviscerate governmental immunity and no court has ever so held.

Every contract is "discretionary" in the sense that it requires a meeting of the minds; that is, a mutual understanding and assent to the terms of the agreement. *Potcinske v. McDonald Prop. Investments, Ltd.*, 245 S.W.3d 526, 530 (Tex. App.—Houston [1st Dist.] 2007, no pet.). The idea that a city necessarily acts in a proprietary fashion if it "negotiates" terms that it deems favorable or acceptable (presumably because it is acting in its own interest) would mean that immunity never applies because every valid contract requires that the contracting parties assent to its material terms. Of course, that is ***not*** the holding of *Wasson II*, *Wheelabrator*, *Jimmy Changas* or any other court that has correctly applied the governmental/proprietary dichotomy. The Foundation's argument regarding the exercise of discretion is not the law nor should it be and this Court should reject it.

C. The Foundation's argument regarding the contract's benefits are not only incorrect, but it rewrites the contract in the process.

The Foundation correctly states that the best way to determine the purpose of a contract is to review its terms. Appellee's Brief at 17. But that is where its correct articulation of the law and the facts ends. After reminding the Court to review the Amendment (Tab 3), it then again attempts to attribute motives to Ranger by asking the Court to look ***beyond*** the Agreement and the Lease (Tab 3, Tab 4) and to glean the City's intent from or speculate about its intentions by considering the meetings leading up to the Amendment's adoption. Appellee's Brief at 18-19. It attributes economic development purposes to Ranger for the exclusive benefit of the City despite the fact that no such language is actually contained in the Amendment (Tab 3).

In fact, the word "development" only appears once and that is where the contract says that the "Airport Property" (which the contract defines as a ***municipal airport***) is to be granted to the Foundation "to facilitate development of the property around the Airport with personally owned hangars [by third-parties]." See Tab 3. There is no indication in the Amendment that only Ranger benefits from third-party sales of property, which would occur ***after*** the property is conveyed to the Foundation, around a facility that ***must*** continue to be operated as municipal airport or it reverts to the City. See Tab 3. ***The Foundation then cites its own counsel's argument*** in the hearing on the City's plea for the proposition that Ranger "understood" that the purpose of the contract was to promote business and stimulate

the City's economy. Appellee's Brief at p. 18. ***It then cites its own unsupported argument*** in its response to Ranger's plea (and not even the factual statements alleged in its live pleading) for the proposition that the purpose of the Amendment (Tab 3) was to allow for a water main for increased firefighting capabilities. Appellee's Brief at p. 18.

Of course, neither the Foundation's counsel nor a court can speculate about a city's motive for entering a contract and the Foundation cannot manufacture a motive simply by referencing its own unsupported argument in the record. *See Butler*, 131 S.W.3d at 177. Nor can a plaintiff "split" aspects of a city's operation into discrete functions and recharacterize certain functions as proprietary. *City of Plano v. Homoky*, 294 S.W.3d 809, 815 (Tex. App.—Dallas 2009, no pet.) (declining to split a golf course and its related premises into separate functions).

But setting that aside, the Foundation's reliance on *City of Westworth Vill. v. City of White Settlement* for the proposition that the Amendment (Tab 3) (or the Lease from which it springs (Tab 4)) is a Chapter 380 economic development agreement is entirely misplaced. 558 S.W.3d 232, 245 (Tex. App.—Fort Worth 2018, pet. denied). The first and most obvious distinction between the contract in *Westworth Village* and the Amendment (Tab 3), is that the *Westworth Village* contract was explicitly entered as a Chapter 380 development agreement. *Id*. at 236-37. It stated that its purpose was to "promote local economic development" and the

court found that the essence of the contract was that one city would make periodic payments to the other city based on tax revenue generated as a result of the Chapter 380 economic development agreement. *Id*. at 237. Obviously, none of those terms, or even terms remotely resembling those terms, are present in the Amendment (Tab 3) or the underlying Lease (Tab 4).

Perhaps the most obvious distinction is that the Amendment provides that conveyance of the Airport Property to the Foundation is not free and clear—it comes with a right of reverter if the Foundation stops operating the property as a municipal airport. Tab 3. Thus, unlike *Westworth Village*, in which the essence of the agreement was explicitly for the economic development of the city in question by obtaining a new Wal-Mart, the Foundation must continue to operate the property as a municipal airport or the property reverts to Ranger. Tab 3. Because of this reverter provision, it is clear that when Ranger entered the Amendment (assuming without conceding that such a conveyance was lawful in the first place), the conveyance was for the benefit of the general public, which will continue to use the property as a municipal airport regardless of who owns the "dirt." Tab 3. The contract in *Westworth Village* could not serve a more different purpose. Accordingly, the public benefit is clear. Ranger was not acting like a private property owner and simply selling its property on the open market—it was acting in a governmental capacity

and ensuring that the property's underlying use as a municipal airport remained intact.

D. Ranger acted for the public and the required continued use of the property as a municipal airport reflects that the Amendment does more than "touch upon" a governmental function.

If Ranger were acting in a proprietary capacity (e.g., as a seller of property on the open market), one would expect the Amendment to convey the Airport Property to the Foundation in perpetuity without a right of reverter that requires the property to be maintained as an express governmental function. But (assuming the conveyance is legal in the first place, which Ranger disputes), Ranger did not do that. The Foundation is not free to dig up the runways, tear down the historic hangar museum, and turn the Airport Property into a shopping center or a carwash or a Burger King, or whatever other use the applicable zoning would allow. The Foundation's argument that "nothing" in the Amendment would indicate that Ranger acted in a governmental capacity when it purported to enter the Amendment simply ignores the fact that this property conveyance is not perpetual and that the Foundation did not acquire the entire bundle of sticks (assuming it can acquire any at all under the circumstances). The right of reverter is not "nothing" and the Foundation's efforts to ignore it are unavailing.

Assuming arguendo that the property conveyance were legal, because the Foundation must continue to operate the Airport Property as a municipal airport, it

is bound by the Municipal Airports Act ("MAA"). Tex. Transp. Code Ann. § 22.002; *Hale v. City of Bonham*, 477 S.W.3d 452, 457 (Tex. App.—Texarkana 2015, pet. denied). The MAA expressly defines the operation of a municipal airport as a governmental function. *Id*. The MAA also provides that a city may enter into a contract with a person "***for a term not exceeding 40 years***"[3] … "granting the privilege of using or improving the airport or air navigation facility, a portion or facility of the airport or air navigation facility, or space in the airport or air navigation facility for commercial purposes." *Id*. (citing Tex. Transp. Code Ann. § 22.021).

Thus, at a minimum, the MAA establishes that the improvement, maintenance and operation of an airport or air navigation facility and the acquisition and use of property and privileges on behalf of a local government is a public and governmental function as a matter of law and that Ranger acted for the public and the State when it purported to enter the Amendment. Tab 3. It also establishes that Ranger's conduct (by requiring that the property continue to be used as a municipal airport) was essential to a governmental function. *See id*.

II. Ranger's immunity is not waived.

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[3] The MAA also provides that a local government can dispose of airport property ***subject to the laws of the state*** and that bidding and notice requirements do not apply only if the property is part of an air navigation facility that is a former military installation and the disposition is part of a plan to to redevelop it as an airport-related industrial park or community and it promotes the best interest of the community. Tex. Transp. Code Ann. § 22.024. Clearly, the MAA contemplates that municipal airports, except under a limited exception not applicable here, are subject to notice and bidding requirements.

Because the Court should conclude that Ranger acted in a governmental capacity when it entered the Lease (Tab 4) and the Amendment (Tab 3), the next step is to determine whether its immunity is waived. The Foundation's arguments that Ranger's immunity is waived are unavailing. If the Foundation fails to establish that at least one essential element for waiver is met, waiver is not established. The Foundation failed to meet its burden on one or more essential elements.

A. The Amendment does not contain essential terms.

The Foundation's argument that the Amendment contains essential terms is premised on two points. First, it argues that the Amendment (Tab 3) must be read together with the Lease (Tab 4) as a single contract, which together contain all of the essential terms necessary to establish that the Lease is the kind of contract for which Ranger's immunity is waived. Appellee's Brief at p. 24. Second, it argues that even if terms are missing, the Court can supply them and again on multiple occasions cites its own argument to the trial court to establish what Ranger allegedly "understood" about the missing terms.[4]

[4] For example, the Foundation cites its written response to Ranger's plea in which it argues (without record evidence) that it submitted two pages to Ranger detailing the hangar restoration and scope (Appellant's Brief at p. 26, citing to CR163), it also cites to its counsel's oral argument to the trial court for the proposition that Ranger understood the value it would supposedly receive from the restoration (Appellant's Brief at p. 26, citing to RR41:19-42:2). The Court is obligated to disregard these assertions regarding what Ranger "understood" because they are not based on record evidence and the Foundation does not cite the Court to well-pled facts in its pleading that the Court must accept as true.

First, although a court generally accepts a party's well-pled facts as true, the actual language of the Amendment and the Lease control over the Foundation's characterization of them in its arguments or even its pleadings. *See Heckman v. Williamson Cnty.*, 369 S.W.3d 137, 150 (Tex. 2012) (courts must consider jurisdictional evidence when necessary to resolve the jurisdictional issue). In other words, the Foundation's pleadings and argument cannot alter, enlarge, or negate the contract terms set forth in the relevant documents. *See id*.

Thus, while the Lease (Tab 4) might play a role in understanding the Amendment (Tab 3), because the Amendment explicitly replaced Sections 1-7 of the Lease with new Sections 1-7 (referred to as "Articles" in the Lease – Tab 4), the Foundation cannot point to the prior "Articles" 1-7 as operative for any purpose because they have been superseded by the Amendment. See Tab 3.

Thus, the Foundation is left to argue that although price and time of performance, which have repeatedly been held to constitute essential terms, are simply missing from the Amendment (Tab 4), they aren't really that important or that Ranger really "knew" them anyway. Appellant's Brief at p. 26-27. Of course, materiality of contract terms is determined on a case-by-case basis. *Clear Creek Indep. Sch. Dist. v. Cotton Commercial USA, Inc.*, 529 S.W.3d 569, 582 (Tex. App.—Houston [14th Dist.] 2017, pet. denied) (citing *Amedisys, Inc. v. Kingwood Home Health Care, LLC*, 437 S.W.3d 507, 514 (Tex. 2014) (materiality of a contract

term is determined on contract-by-contract basis, "in light of the circumstances of the contract")).

Clear Creek provides a good example of when a court was able to determine that a rather generic phrase like "restoration services" was sufficient to constitute an essential term because of the circumstances surrounding performance under the contract, which are simply not present in the record evidence before this Court. *Id*. In Clear Creek, the school district did not specify any "particular aspect or task that it claim[ed] was missing from the agreement" other than the weak argument that the words "debris removal" were not in the contract. *Id*. But the facts present in that record showed that the contractor had performed and been partially paid by the district and that the dispute was not centered around work that was unauthorized by the contract, but rather over a claim that the contractor was charging too much. *Id*. The court found it especially compelling that the contractor had performed and that the district had kept the benefits of that performance and noted that when a party has rendered substantial performance, courts will more readily find that "the ***apparently incomplete*** agreement was in fact complete." *Id*. at 583 (emphasis supplied). Thus, the court implicitly found that terms were missing, but the circumstances of performance allowed it to fill them in.

The Foundation relies on *Clear Creek* but misses this critical basis for its holding that "restoration services" was sufficiently descriptive because the services

had been performed, accepted, and partially paid for by the district. *Id*. No analogous facts exist here. The Foundation seeks to compel performance (transfer of property), not receive final payment for a service that the Foundation has provided, been accepted, and partially paid for by Ranger. *Clear Creek* is easily distinguishable. Moreover, the Foundation's *ispe dixit* that the "manner and parameters of the restoration are not essential to the bargain" is without support in the record or the law. Appellee's Brief at p. 26.

Finally, although the Foundation is correct to point out that contracts are construed to avoid forfeiture, it fails to understand that this common law rule is counterbalanced by the fact that immunity waivers are strictly construed in favor of retaining immunity. *PHI, Inc. v. Tex. Juvenile Justice Dep't*, 593 S.W.3d 296, 303 (Tex. 2019). Because this is a contract with a governmental entity, it must fit within the immunity waiver and a court cannot supply missing terms based on counsel's argument about what a city might have understood or believed. There is nothing in the Amendment to suggest that price was not "material" instead of being missing.[5]

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[5] Because this contract contemplates the transfer of public property to a private entity, the price the Foundation pays for that public property is constitutionally mandated to be a material contract term as a matter of law because cities may not gratuitously transfer things of value to benefit to private parties absent a sufficient quid pro quo. *Tex. Mun. League Intergovernmental Risk Pool v. Tex. Workers' Comp. Comm'n*, 74 S.W.3d 377, 383 (Tex. 2002). Implicit in the Texas Supreme Court's holding that the constitutional prohibition on gratuitous transfers is not triggered if a city receives "consideration" is the notion that such consideration must be sufficient. *See id*. Nobody could seriously argue that the constitutional prohibition would not be triggered if a city transferred public property worth millions to a private developer for ten dollars. Thus, the question of consideration must be one of degree.

And contrary to the Foundation's argument that Ranger failed to meet a burden to demonstrate that price and scope of work was material (Appellant's Brief at p. 26), it is the Foundation's burden to establish jurisdiction, not Ranger's burden to negate it. *Town of Shady Shores v. Swanson*, 590 S.W.3d 544, 550 (Tex. 2019) (plaintiff has burden to affirmatively demonstrate the trial court's jurisdiction, which includes burden of establishing valid waiver of immunity). For these reasons, the Foundation's arguments related to essential terms are not well-founded and the trial court should have granted Ranger's plea because the Amendment does not contain essential terms.

B. The Foundation is not providing a new service to Ranger.

The Foundation argues that because the Amendment (Tab 3) and the underlying Lease (Tab 4) together constitute the agreement and must be read together, the Lease terms satisfy the "services" element necessary for waiver under Chapter 271. Appellant's Brief at p. 31-32. Assuming without conceding that is true, then the Amendment is without additional consideration for the conveyance of public property, which is the very performance the Foundation is attempting to compel, meaning the essential term "price" is wholly missing from the Amendment. Thus, even if the Foundation is right and it is providing a service to Ranger, the lack of additional consideration for the conveyance of real property necessarily negates the "essential term" element.

C. The Amendment is not properly executed.

Assuming arguendo that the referenced amendment to Section 2252.908 of the Government Code retroactively validates the Foundation's unquestioned failure to comply with the law at the time the Amendment (Tab 4) was executed, that is not the only ground on which Ranger argued that it was not properly executed, meaning that the Foundation failed to establish an essential element of immunity waiver under Chapter 271 of the Local Government Code.

First, the Foundation's argument that this property conveyance should not be subject to notice and bidding requirements because the Court should "exempt" it from a requirement that it be registered as a non-profit organization because it will "soon" complete this requirement is eye-popping. See Appellant's Brief at p. 38-39. Obviously, neither this Court nor the trial court can "exempt" a party from compliance with mandatory state law requirements related to the conveyance of public property because a party's organizational status is "close enough." This is not a game of horseshoes. Ranger need not repeat its arguments that the Foundation does not qualify for any of the lawful exemptions for notice and bidding requirements under state law related to the disposition of public property and incorporates those arguments herein.

Second, the MAA makes it clear that municipal airport property is subject to notice and bidding requirements except under a limited exception not applicable to

the Airport Property. Tex. Transp. Code Ann. § 22.024. It is undisputed that the Airport Property was not publicly bid—the only question is whether the Foundation's jurisdictional evidence establishes that it fits within a waiver to this mandatory requirement. This Court would not be the first to assess whether a contract is "properly executed" under Chapter 271 for failure to undergo public bidding. *Beaumont Indep. Sch. District v. LRG-Loss Recovery Group LLC*, No. 09-22-00144-CV, 2023 WL 3521936, at *9 (Tex. App.—Beaumont May 18, 2023, pet. filed). In *BISD*, the court concluded that the school district did not demonstrate that the contract was void for failure to undergo public bidding because the jurisdictional evidence established that the contract in question was for professional services, which is exempted from the competitive bidding requirement. *Id*. However, BISD stands for the proposition that if the contract ***is*** subject to competitive bidding and that bidding did not occur, a court would be obligated to find that the contract was not properly executed and immunity under Chapter 271 is not waived. *See id*. (emphasis supplied).

Unlike the contract in BISD, which was for professional services, there is no question that the conveyance of municipal airport property must go through the public bidding process unless the party to whom the property is conveyed actually qualifies for an exemption. Tex. Transp. Code Ann. § 22.024; Tex. Loc. Gov't Code Ann. § 253.011. Not only does the Foundation judicially admit that its registration

as a non-profit organization is still incomplete (Appellee's Brief at p. 39), rendering it ineligible for the exemption in section 253.011, this exemption ***also*** requires that the property must be conveyed "for consideration described by this section." Tex. Loc. Gov't Code Ann. § 253.011 ©.

The transfer of property is only authorized if the "consideration" reflects that the qualified non-profit uses the property to primarily promote "public purposes." Tex. Loc. Gov't Code Ann. § 253.011 (d). The Foundation argues that the subdivision of Ranger's historic airfield into parcels owned by private parties (with the Foundation keeping the profits from this subdivision and development) comports with the "public purpose" requirement. Appellee's Brief at p. 39-40. But while this statute does not define "public purpose," the determination of what constitutes a public purpose in other contexts is left to the courts. *Corsicana Indus. Found., Inc. v. City of Corsicana*, No. 10-17-00316-CV, 2024 WL 118969, at *5 (Tex. App.—Waco Jan. 11, 2024, no pet. h.) (citing *Hous. Auth. v. Higginbotham*, 143 S.W.2d 79, 83 (Tex. 1940)).

Thus, when determining whether a statute accomplishes a public purpose, courts have adopted a three-part test: (1) ensure that the state's predominant purpose is to accomplish a public purpose, not to benefit private parties; (2) retain public control over the funds to ensure that the public purpose is accomplished and to protect the public's investment; and (3) ensure that the political subdivision receives

a return benefit. *Id*. Here, the predominant purpose of the Amendment (Tab 3) and the relief that the Foundation seeks is to convert a publicly owned historical airport property into predominantly privately owned land, much of which will be subdivided and developed by the Foundation into private residential lots, for which the Foundation, and not the City of Ranger, will reap a financial windfall from sales.

Moreover, while Ranger maintains a right of reversion under the Amendment (Tab 3), contrary to the Foundation's argument that Ranger retains significant control over the property, Ranger otherwise surrenders virtually ***all*** operational control over the Airport Property other than the enforcement of its generally applicable zoning authority because Ranger would only retain ownership of one small parcel on which the historic hangar is located. In other words, because the Amendment's Section 7 (Tab 3) supersedes the Lease's Article 7 (Tab 4), Ranger loses the ability under the Lease to control the appearance of other buildings on the Airport Property or approve all alterations and improvements in advance (Tab 4). CR176. This is not the substantial public control over the property that courts look for in the three-part test. *Id*. at *5 citing (*Key v. Comm'rs Court*, 727 S.W.2d 667, 669 (Tex. App.—Texarkana 1987, no pet.) (per curiam) (considering whether county violated article III, Section 52(a) when it transferred projects to a non-profit entity and failed to retain public control)). The control over public property Ranger relinquishes to a private party, which will financially benefit from the subdivision

and sale of lots to private parties, is negligible compared to the control that Ranger currently possesses over its public property.

So not only are private parties benefitted at the expense of the public, but Ranger retains almost no control over how the Foundation ***develops*** the Airport Property so long as it remains compliant with general zoning designations. See Tab 3 (which provides that in the event of a conflict between the Lease and the Amendment, the Amendment controls). CR181-82. Yes—the property must be used as an airport, or it reverts, but in reality that simply means that the Foundation must maintain some runways it would now own, and otherwise can develop the property any way it chooses so long as it does not dig up or shorten the relatively tiny portion of the property that makes up runways. This does not meet the public purpose test. Accordingly, the trial court should have found that Chapter 271 does not waive Ranger's immunity under the Amendment (Tab 3) and Ranger respectfully requests that this Court reverse and render the judgment that the trial court should have rendered.

III. The Foundation's claims should be barred by the Texas Constitution.

The Foundation's argument that the property was conveyed for sufficient consideration is that notwithstanding the fact that the Amendment provides no metric by which to ascertain the value Ranger would receive in exchange for conveying public property to a private party that is admittedly not a fully qualified

non-profit, the Amendment uses boilerplate "good and valuable consideration" language. Appellee's Brief at p. 41. Thus, the Texas Constitution's prohibition on gratuitous conveyances is satisfied. Of course, if that were true, every conveyance of public property would satisfy the Texas Constitution's prohibition simply by reciting that boilerplate language.

The Foundation also criticizes Ranger for offering "no evidence" that the consideration is insufficient, but that argument suffers from two flaws. First, the Amendment (Tab 4) contains no indication of the amount of consideration that is actually provided to Ranger. Second, it is the Foundation's burden to affirmatively establish jurisdiction and an applicable immunity waiver. *Swanson*, 590 S.W.3d at 550.

Having already explained why the Amendment (Tab 3) does not meet the public purpose test, Ranger need not explain that again in response to the argument raised by the Foundation. The Foundation wants public property converted into private property so that it can be subdivided, developed and sold. It is not shy about its objectives. But public property cannot be converted to private property without adequate consideration to the public and without it being sold to the highest bidder. The Foundation's response to Ranger's argument is unavailing.

IV. Ranger's immunity is not waived for contract construction under the UDJA.

Curiously, the Foundation cites *Ben Bolt-Palito Blanco Consol. Indep. Sch. Dist. v. Tex. Political Subdivisions Prop./Cas. Joint Self-Ins. Fund* for the proposition that the UDJA waives governmental immunity for contract construction claims. 212 S.W.3d 320, 330 (Tex. 2006). See Appellee's Brief at p. 44. Perhaps the jump cite referenced by the Foundation is a typographical error, but it appears that the Foundation has cited to the dissent authored by Justice Willett. Additionally, *Ben Bolt-Palito* did not consider the UDJA, rather it discussed waiver under Chapter 271.

It is difficult to ascertain the gist of the Foundation's argument, but there is no question that a city's immunity is not waived under the UDJA for contract construction or enforcement and nothing cited by the Foundation suggests otherwise.

V. Ranger's immunity from attorney's fees is not waived.

Assuming the Court concludes that Chapter 271 does not waive Ranger's immunity as Ranger believes that it should, then the Foundation has no viable claim for attorney's fees because the UDJA does not waive a city's immunity for construction and enforcement of contracts. *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). The Foundation's arguments to the contrary are simply wrong. Accordingly, Ranger's immunity is not waived for attorney's fees.

VI. The Foundation's amended petition is part of the record and if the Court agrees that its original petition does not invoke jurisdiction, its amended petition demonstrates that remand for repleading is futile.

The Foundation misapprehends the nature of Ranger's argument regarding the amended petition it filed after the hearing on the City's plea, but before the trial court entered its order (thus depriving the City of the ability to address it in the trial court). It is well-established that if the Court determines that the Foundation's original petition does not invoke the trial court's jurisdiction, the the Court must determine whether remand for repleading is appropriate. *Tex. A & M Univ. Sys. v. Koseoglu*, 233 S.W.3d 835, 837 (Tex. 2007). It is undisputed that appellate courts have the jurisdiction to make this determination. *Id*.

Ranger's argument is that remand is futile because the Foundation cannot cure its pleading defects and the Foundation has conveniently previewed what its new pleading would be—an *ultra vires* claim against the City's officials—which demonstrates the futility of a remand.

The Foundation misapprehends the purpose of an *ultra vires* claim and the relief available. A successful *ultra vires* claim is only entitled to prospective injunctive relief ordering officials to follow the law. *Chambers-Liberty Ctys. Navigation Dist. v. State*, 575 S.W.3d 339, 345 (Tex. 2019) ("Only *prospective* injunctive relief is available on an *ultra vires* claim.") (emphasis in original). It is well-established that *ultra vires* suits cannot be used to enforce performance under

a contract or impose contractual liabilities. *Tex. Nat. Res. Conservation Comm'n v. IT-Davy*, 74 S.W.3d 849, 855 (Tex. 2002). But that is apparently how the Foundation wants to use its proposed *ultra vires* claim. Appellee's Brief at p. 47-48. This would be a futile remand because the Foundation's *ultra vires* suit would not invoke the trial court's jurisdiction either. This Court need not remand a matter for repleading when doing so is futile. *Johnson v. Williams*, No. 02-19-00089-CV, 2019 WL 6334689, at *5 (Tex. App.—Fort Worth Nov. 27, 2019, pet. denied) (remand not required when it would be futile and cannot cure a pleading defect).

Accordingly, this Court need not remand this matter to the trial court for repleading because the Foundation's new claims, which it conveniently previewed for the Court, will not invoke the trial court's jurisdiction either.

PRAYER

The trial court erred in denying Ranger's Plea to the Jurisdiction because the LGCCA does not waive its immunity for the breach claims asserted by the Foundation or for the relief that the Foundation seeks. The trial court also erred in denying Ranger's Plea because the Foundation's UDJA claims do not invoke the trial court's jurisdiction because it is seeking a declaration of rights under a contract and is not challenging the validity of an ordinance. The trial court also erred in denying Ranger's Plea because the Foundation's claims for attorneys' fees do not independently invoke the trial court's jurisdiction. Moreover, this Court need not

remand this case to the trial court because the Foundation's *ultra vires* claims set forth in its amended petition do not invoke the trial court's jurisdiction.

The City of Ranger, therefore, prays that the trial court's order denying its plea to the jurisdiction be reversed and judgment rendered in favor of Ranger and that the Foundation's claims be dismissed with prejudice, and for such other relief, at law or in equity, to which Ranger is justly entitled.

Respectfully submitted,

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CERTIFICATE OF SERVICE

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APPENDIX

Tab 1. Order Denying Defendant's Plea to the Jurisdiction

Tab 2. Ranger Airfield Maintenance Foundation Original Petition

Tab 3. 2022 First Amendment to Lease Agreement

Tab 4. 2018 Lease Agreement

Tab 5. City of Ranger's Plea to the Jurisdiction and Plaintiff's Response

Tab 6. Ranger Airfield Maintenance First Amended Petition

Tab 7. City of Ranger Notice of Appeal

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