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ENFORCEMENT OF DEVELOPMENT AGREEMENTS

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ENFORCEMENT OF DEVELOPMENT AGREEMENTS

"A promise made is a promise kept": When one makes a promise, it should be done with the intention of following through.

Hundreds of agreements are entered into between landowners/developers and governmental entities every month. It is fair to say that most of these agreements are made with the best intentions of complying with the terms. But as time passes and circumstances change either party may decide to not continue with compliance. When that happens litigation may ensue. Most of these lawsuits involve a developer/landowner as a plaintiff against a municipal defendant.

1. Does immunity bar the plaintiff's suit?

As a general rule, the first issue to be addressed in a contract enforcement lawsuit is whether immunity bars the lawsuit. Governmental immunity has two components: immunity from liability and immunity from suit. *Tooke v. Mexia*, 197 S.W.3d 325, 332 (Tex. 2006). A governmental entity that enters into a contract waives its immunity from liability but retains its immunity from suit unless its immunity from suit is specifically waived by the Legislature. *Id.* Governmental immunity from suit implicates a trial court's subject matter jurisdiction and is properly asserted in a plea to the jurisdiction. *See Engelman Irrigation Dist. v. Shields Brothers. Inc.*, 514 S.W.3d 746, 751 (Tex. 2017). The ultimate inquiry is whether the particular facts presented affirmatively demonstrate a claim within the trial court's subject-matter jurisdiction. *City of El Paso v. Heinrich*, 284 S.W.3d 366, 378 (Tex. 2009).

The court's analysis must begin with an evaluation of the plaintiff's pleadings. *Tex. Dep't of Parks & Wildlife v. Miranda*, 133 S.W.3d 217, 226 (Tex. 2004). When examining the pleadings, courts construe them liberally in favor of conferring jurisdiction. *Id.* If the pleadings do not contain sufficient facts to affirmatively demonstrate the trial court's jurisdiction, but do not affirmatively demonstrate incurable defects in jurisdiction, the issue is one of pleading sufficiency and the plaintiffs should be given the opportunity to amend. *Id. at 226-27.* But if the pleadings affirmatively negate jurisdiction, then a plea the jurisdiction may be granted without allowing the plaintiffs an opportunity to amend. *Id*. at 227.

2. What is the significance of a court ruling on a plea to the jurisdiction?

The major advantage for the governmental entity is the ability to file an interlocutory appeal to the court of appeals following the trial court ruling on the immunity claims. In Texas, only certain kinds of orders such as temporary injunctions and governmental immunity pleas to the jurisdiction qualify for interlocutory appeals. Tex. Civ. Prac. & Rem. Code § 51.014(a).

If processed in accordance with the Texas Rules of Civil Procedure, the underlying case may be stayed until the appeal is finally resolved at the appellate level. Tex. Civ. Prac. & Rem. Code § 51.014(b). This means that no discovery can be conducted or hearings or trials scheduled. Delay is typically the government's friend and the developer's enemy and interlocutory appeals can delay a final resolution of litigation for several years.

The Dallas court of Appeals recently issued opinions in two land use cases involving the City of Dallas. One of these cases is 20 years old. *City of Dallas v. Millwee Jackson JV*, 2023 Tex. App. LEXIS 783 (Tex. App.—Dallas, 2023). The other case is over 10 years old. *City of Dallas v. Trinity East Energy, LLC*, 2022 Tex. App. LEXIS 5392 (Tex. App.—Dallas, 2022). Neither case has yet to be considered by the Texas Supreme Court. Interlocutory appeals were filed previously in both of these cases which significantly lengthened the timeframe for a resolution.

3. Is the contract governmental or proprietary?

Virtually all contracts with cities are considered to be governmental in nature. Occasionally a court will rule that a contract is instead proprietary in nature. In these situations, the governmental entity is treated like a private party. Classifying a contract as proprietary means the city cannot claim immunity as to breach of contract and torts causes of action.

The Supreme Court of Texas extended the application of the governmental-proprietary dichotomy to claims for breach of contract in *Wasson Interests, Ltd. v. City of Jacksonville*, 489 S.W.3d 427 passim (Tex. 2016). The court held that a municipality does not enjoy governmental immunity when it acts in its proprietary capacity, whether the claim sounds in tort or breach of contract. *Id*. at 439 ("[S]overeign 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, so long as in each situation the city acts of its own volition for its ow benefit and not as a branch of the state.").

In determining whether a function is governmental or proprietary, courts are guided by the Texas Tort Claims Act. *Id*. The Tort Claims Act provides a non-exclusive list of functions the legislature deemed were governmental; that list does not include leases of land or minerals. *See* Tex. Civ. Prac. & Rem. Code Ann. § 101.0215(a) (West Supp. 2016). Governmental functions are "those acts which are public in nature and performed by the municipality 'as the agent of the State in furtherance of general law for the interest of the public at large.'" *Gates v. City of Dallas*, 704 S.W.2d 737, 738-39 (Tex. 1986) (quoting *City of Crystal City v. Crystal City Country Club*, 486 S.W.2d 887, 889 (Tex. Civ. App.—Beaumont 1972, writ ref'd n.r.e.)).

The Tort Claims Act also provides a non-exclusive list of proprietary functions and defines proprietary as "those functions that a municipality may, in its discretion, perform in the interest of the inhabitants of the municipality." Tex. Civ. Prac. & Rem. Code Ann. § 101.0215(b). "[P]roprietary functions are not performed under the authority or for the benefit of the state" or "pursuant to the will of 'the people.'" *Wasson*, 489 S.W.3d at 436-37 (quoting *Tooke v. City of Mexia*, 197 S.W.3d 325, 343 (Tex. 2006)). Instead, a proprietary function is one which the city conducts for the benefit of only those who live within the city's corporate limits. *Id*. at 436.

The Supreme Court followed up in *Wasson Interests v. City of Jacksonville ("Wasson II")*, 559 S.W.3d 142, 146 (Tex. 2018). There are four factors enumerated by the Texas Supreme Court in *Wasson II* to determine the nature of the City's actions. 559 S.W.3d at 150. Those factors are whether (1) the City's act of entering into the contract was mandatory or discretionary, (2) the contract was intended to benefit the general public or the City's residents, (3) the City was acting

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