# COURT OF APPEALS
**SECOND DISTRICT OF TEXAS**
**FORT WORTH**

**NO. 02-16-00356-CV**

CITY OF BEDFORD, TEXAS — APPELLANT

V.

APARTMENT ASSOCIATION OF TARRANT COUNTY, INC. — APPELLEE

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FROM THE 17TH DISTRICT COURT OF TARRANT COUNTY
TRIAL COURT NO. 017-284750-16

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## MEMORANDUM OPINION[1]

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The Apartment Association of Tarrant County, Inc. is a trade association whose members include multifamily-property owners in Bedford, Texas. In this suit, the Association is representing and advocating for its members' interests by seeking to protect them from what it alleges are excessive fees, too-frequent

[1]*See* Tex. R. App. P. 47.4.

inspections, and unlawful taxes imposed by the City of Bedford, Texas. After the Association sued the City, the City filed a plea to the jurisdiction arguing that the trial court lacks jurisdiction over this suit because the City's governmental immunity has not been waived. The trial court disagreed and denied the City's plea. The City has appealed, raising what we construe as seven issues. We affirm in part and reverse in part.

## I. Background

In April 2016, the Association sued the City for declaratory and injunctive relief, alleging that three city ordinances regulating multifamily properties in Bedford were unconstitutional: Ordinance 2334 and Ordinances 16-3151 and 16-3152. Ordinance 2334—enacted in October 2014—increased the annual license and inspection fees for multifamily properties from $9.00 to $18.00 per unit. Ordinances 16-3151 and 16-3152—enacted in March 2016—effectively repealed Ordinance 2334 by increasing annual license and inspection fees based on a three-tier rating system. Under the new scheme, annual license fees are $13.20 per unit and inspection fees are $10.00 per unit per inspection. Because the new ordinances require a minimum of two inspections per year, the annual inspection fees per unit are at least $20.00 and can be as high as $40.00 per unit. Thus, the total annual license and inspection fees range from $33.20 to $53.20 per unit.

According to the Association, the fees assessed under Ordinances 16-3151 and 16-3152 are the highest in the State of Texas, and the City has the

highest mandatory-inspection rate in the state. The Association alleges that the number of required annual inspections and the additional inspection fees will have a "chilling and adverse effect" on the multifamily-property business in the City and will devalue multifamily properties in the City by about $9 million.

The Association seeks (1) declarations that the fees assessed under all three ordinances are unreasonable, excessive, and without a rational basis, and that the ordinances thus violate multifamily-property owners' substantive-due-process rights under the Texas constitution[2] and constitute an impermissible occupation tax under the Texas constitution;[3] (2) a declaration that multifamily-property owners who paid fees under Ordinance 2334 are entitled to a refund; and (3) an injunction against the City from enforcing Ordinances 16-3151 and 16-3152 and from spending any illegal fees it collected under Ordinance 2334. The Association also seeks its attorney's fees under civil practice and remedies code chapter 37.

In its jurisdictional plea, the City argued that its governmental immunity has not been waived because (1) the Association lacks standing to pursue its claims on behalf of its members; (2) the declaratory-judgments act does not waive the City's immunity with respect to the Association's refund claim because it is really a request for money damages; (3) declaratory relief is inappropriate because the

[2]Tex. Const. art. I, § 19.

[3]Tex. Const. art. VIII, § 1(f).

Association has not alleged any actual harm and instead seeks an impermissible advisory ruling; (4) the Association has not pleaded any facts to support a claim for injunctive relief against the City; and (5) the Association cannot recover attorney's fees under chapter 37 because it has not pleaded a proper claim for relief.

The City later filed a combined summary-judgment motion and brief in support of the plea to the jurisdiction. The City expanded on some of the arguments it made in its jurisdictional plea and attached certified copies of the ordinances—which contain legislative findings and the ordinances' stated purposes—along with an affidavit from the City's "Strategic Services Manager" explaining Ordinances 16-3151 and 16-3152's purposes and the City's method for calculating the license and inspection fees.

After a nonevidentiary hearing, the trial court denied the City's plea.

## II. Standard of Review

A plea to the jurisdiction is a dilatory plea that seeks dismissal of a case for lack of subject-matter jurisdiction. *Harris Cty. v. Sykes*, 136 S.W.3d 635, 638 (Tex. 2004). Such a plea may challenge whether the plaintiff has met its burden of alleging jurisdictional facts or may challenge the existence of jurisdictional facts. *See Tex. Dep't of Parks & Wildlife v. Miranda*, 133 S.W.3d 217, 226–27 (Tex. 2004). We review de novo a trial court's ruling on a plea to the jurisdiction. *Id.* at 228. When the plea challenges the pleadings, we determine whether the plaintiff has met its burden of alleging facts affirmatively

demonstrating that the trial court has subject-matter jurisdiction. *City of Keller v. Hall*, 433 S.W.3d 708, 712–13 (Tex. App.—Fort Worth 2014, pet. denied). We construe the pleadings liberally in the plaintiff's favor, accept all factual allegations as true, and look to the plaintiff's intent. *Heckman v. Williamson Cty.*, 369 S.W.3d 137, 150 (Tex. 2012). If the pleadings are insufficient to establish jurisdiction but do not affirmatively demonstrate an incurable defect in jurisdiction, the plaintiff should be afforded the opportunity to amend. *See Miranda*, 133 S.W.3d at 226–27.

When a plea to the jurisdiction challenges the existence of jurisdictional facts, our review mirrors that of a traditional summary-judgment motion. *Mission Consol. Indep. Sch. Dist. v. Garcia*, 372 S.W.3d 629, 635 (Tex. 2012); *see* Tex. R. Civ. P. 166a(c). We take as true all evidence favorable to the plaintiff, and we indulge every reasonable inference and resolve any doubts in the plaintiff's favor. *Miranda*, 133 S.W.3d at 228. The defendant carries the initial burden of establishing that the trial court lacks jurisdiction. *Garcia*, 372 S.W.3d at 635. If the defendant meets that burden, the plaintiff must then demonstrate that a disputed material fact exists regarding the jurisdictional issue. *Id.* If a fact issue exists, the trial court should deny the plea. *Id.* But if the evidence is undisputed or the plaintiff fails to raise a fact question on the jurisdictional issue, the plea must be granted as a matter of law. *See id.*

## III. The Association's Standing

The City does not challenge the Association's standing in a separate issue, but as part of its argument it asserts that the Association lacks standing to seek money damages on its members' behalf. We construe this argument as the City's seventh issue and address it separately because standing is a component of subject-matter jurisdiction and must be established to maintain a lawsuit. *See Tex. Ass'n of Bus. v. Tex. Air Control Bd.*, 852 S.W.2d 440, 444–46 (Tex. 1993).

An association has standing to sue on its members' behalf when (1) its members would otherwise have standing to sue in their own right, (2) the interests it seeks to protect are germane to the organization's purpose, and (3) neither the claim asserted nor the relief requested requires each of the individual members' participation in the lawsuit. *Big Rock Investors Ass'n v. Big Rock Petroleum, Inc.*, 409 S.W.3d 845, 848 (Tex. App.—Fort Worth 2013, pet. denied) (citing *Hunt v. Wash. State Apple Advert. Comm'n*, 432 U.S. 333, 343, 97 S. Ct. 2434, 2441 (1977); *Tex. Ass'n of Bus.*, 852 S.W.2d at 447). The City does not dispute—and we agree—that the Association has satisfied the first two prongs for the associational-standing test. But the City claimed in the trial court[4] and maintains on appeal that the Association cannot meet the test's third prong,

[4]A plea to the jurisdiction is proper to challenge a party's lack of standing. *Big Rock*, 409 S.W.3d at 848 (citing *M.D. Anderson Cancer Ctr. v. Novak*, 52 S.W.3d 704, 710–11 (Tex. 2001); *Waco Indep. Sch. Dist. v. Gibson*, 22 S.W.3d 849, 850 (Tex. 2000)).

asserting that if the Association is seeking money damages on its members' behalf, then the Association does not have associational standing.

That third prong—requiring that neither the claim asserted nor the relief requested requires the individual members' participation—focuses on the matters of administrative convenience and efficiency, not on elements of a case or controversy within the Constitution's meaning. *Id.* at 849 (citing *United Food & Comm'l Workers Union Local 751 v. Brown Grp., Inc.*, 517 U.S. 544, 557, 116 S. Ct. 1529, 1536 (1996)). That is, this prong is not constitutional but rather is prudential and is based on judicial-economy concerns. *Id.* (citing *United Food*, 517 U.S. at 556–57, 116 S. Ct. at 1536). As we recognized in *Big Rock*, sifting through an association's claims and its requested relief to decide which kinds of things would (or would not) require its individual members to participate in the litigation, and thus to evaluate any resulting impact on prudential concerns, is "somewhat tricky." *Id.* Usually, standing issues bar an association's claim for damages on its members' behalf because such suits typically require each individual member to participate as a party to establish its own damages. *Id.* An association lacks standing to seek money damages unique to its individual members as a normal rule, but it does generally have standing to seek declaratory relief, injunctive relief, or some other type of prospective equitable relief on its members' behalf. *Id.* at 850. When an association seeks these latter forms of relief, it can reasonably be supposed that the remedy, if granted, will benefit those association members actually injured; prudential concerns are thus

advanced, and the association may have standing to invoke the court's remedial powers on its members' behalf. *Id.*; *see, e.g.*, *Hunt*, 432 U.S. at 344, 97 S. Ct. at 2442 (recognizing that neither the commission's "interstate commerce claim nor [its] request for declaratory and injunctive relief requires individualized proof and both are thus properly resolved in a group context"); *Tex. Ass'n of Bus.*, 852 S.W.2d at 448 (holding that "TAB seeks only prospective relief, raises only issues of law, and need not prove the individual circumstances of its members to obtain that relief, thus meeting the third prong" of the associational-standing test).

Here, the Association pleaded claims for declaratory and injunctive relief that benefited its members and does not seek money damages on its members' behalf. It seeks a declaration that the ordinances are invalid, an injunction preventing the City from acting under those ordinances, and a declaration that multifamily-property owners in Bedford are entitled to a refund of excessive fees if Ordinance 2334 is declared to have been invalid. The Association does not seek actual refunds for those property owners. Whether multifamily-property owners in Bedford are entitled to a refund as an overarching matter does not require any individual inquiries. *Cf. Self-Ins. Inst. of Am., Inc. v. Korioth*, 53 F.3d 694, 696 (5th Cir. 1995) (op. on reh'g) (reversing order refunding taxes and fees because association challenging tax had standing to seek injunctive relief but not to claim a refund on its members' behalf because of necessity of determining eligibility and amount of individual refunds). Neither the claims asserted nor the

relief sought requires the members' individual participation, and the Association's claims and the relief sought will apply equally to its members.

We conclude that the Association has satisfied the associational-standing test's third prong and thus may raise the claims brought in this suit. We overrule the City's seventh issue.

## IV. The Association's Declaratory-Judgment Claims

In what we construe as four issues, the City argues that the trial court erred by denying the City's plea to the jurisdiction with respect to the Association's declaratory-judgment claims because (1) immunity is not waived where the Association failed to allege facts demonstrating a valid constitutional claim, (2) the Association cannot plead a justiciable controversy over a repealed ordinance, (3) the declaratory-judgments act does not waive immunity for a claim challenging a repealed ordinance's validity, and (4) the declaratory-judgments act does not waive immunity for the Association's refund claim because the Association pleaded this claim solely to recover money damages.

### A. Governmental immunity for declaratory-judgment claims

Unless the state consents to suit, sovereign immunity deprives a trial court of jurisdiction for lawsuits against the state or certain governmental units. *Miranda*, 133 S.W.3d at 224. Cities are political subdivisions of the state and, absent waiver, are entitled to governmental immunity. *Reata Constr. Corp. v. City of Dallas*, 197 S.W.3d 371, 374 (Tex. 2006) (op. on reh'g). The declaratory-judgments act ("the Act") allows a person whose "rights, status, or other legal

relations are affected by a . . . municipal ordinance" to "have determined any question of construction or validity arising under the . . . ordinance" and to "obtain a declaration of rights, status, or other legal relations thereunder." Tex. Civ. Prac. & Rem. Code Ann. § 37.004(a) (West 2015). The Act thus provides a limited governmental-immunity waiver for declaratory-judgment claims against municipalities. *City of New Braunfels v. Carowest Land, Ltd.*, 432 S.W.3d 501, 530 (Tex. App.—Austin 2014, no pet.); *see* Tex. Civ. Prac. & Rem. Code Ann. § 37.006(b) (West 2015) ("In any proceeding that involves the validity of a municipal ordinance or franchise, the municipality must be made a party and is entitled to be heard . . . ."). Immunity is waived when a party seeks a declaration that an ordinance or statute is invalid. *City of N. Richland Hills v. Home Town Urban Partners Ltd.*, 340 S.W.3d 900, 911 (Tex. App.—Fort Worth 2011, no pet.) (op. on reh'g); *see Tex. Dep't of Transp. v. Sefzik*, 355 S.W.3d 618, 622 & n.3 (Tex. 2011); *City of El Paso v. Heinrich*, 284 S.W.3d 366, 373 n.6 (Tex. 2009). But rather than creating or enlarging a trial court's jurisdiction, the Act is simply a procedural device for deciding cases already within the court's jurisdiction. *Sefzik*, 355 S.W.3d at 621–22.

**B. The sufficiency of the Association's pleadings**

In its first issue, the City recognizes that the Association's declaratory-judgment claims challenge the ordinances' validity but contends that the Association has not alleged facts affirmatively demonstrating that the trial court has subject-matter jurisdiction over those claims. In support of its requests for

declaratory relief, the Association alleged that the ordinances' license and inspection fees are unreasonable, excessive, and without a rational basis, and thus constitute an impermissible occupation tax in violation of article VIII, section 1(f) of the Texas constitution and violate multifamily-property owners' substantive-due-process rights under article I, section 19 of the Texas constitution. The Association also alleged that the City uses the fees to cover the costs of its police and fire-department personnel.

We conclude that these factual allegations suffice to demonstrate subject-matter jurisdiction over the Association's declaratory-judgment claims challenging the ordinances' validity. If arbitrary and unreasonable, a city's action violates substantive due process. *See Mayhew v. Town of Sunnyvale*, 964 S.W.2d 922, 938 (Tex. 1998), *cert. denied*, 526 U.S. 1144 (1999). And a fee's reasonableness determines, in part, whether the fee is an occupation tax, which a city may not levy if the tax exceeds "one half of the tax levied by the State for the same period on such profession or business." Tex. Const. art. VIII, § 1(f). This constitutional provision also (logically) prohibits a municipality from levying an occupation tax where the State has not previously levied such a tax in the first place. *City of Houston v. Harris Cty. Outdoor Advert. Ass'n*, 879 S.W.2d 322, 326 (Tex. App.—Houston [14th Dist.] 1994, writ denied), *cert. denied*, 516 U.S. 822 (1995).

To determine whether an assessment is a fee or a tax under article VIII, section 1(f), courts consider whether the assessment's primary purpose is regulation or revenue-raising. *See Lowenberg v. City of Dallas*, 261 S.W.3d 54,

57–58 (Tex. 2008) (citing *Hurt v. Cooper*, 110 S.W.2d 896, 899 (Tex. 1937)); *Harris Cty. Outdoor Advert. Ass'n*, 879 S.W.2d at 326. If the primary purpose is to regulate, then it is a license fee, but if the primary purpose is to raise revenue, then the ordinance is an occupation tax. *Harris Cty. Outdoor Advert. Ass'n*, 879 S.W.2d at 326. The "critical issue" in determining the assessment's primary purpose is "whether the assessment is intended to raise revenue in excess of that reasonably needed for regulation." *Tex. Boll Weevil Eradication Found., Inc. v. Lewellen*, 952 S.W.2d 454, 461 (Tex. 1997). "To be reasonable, a license fee cannot be excessive nor more than reasonably necessary to cover the cost of granting the license and of exercising proper police regulation, or it must bear some reasonable relationship to the legitimate object of the licensing ordinance." *Harris Cty. Outdoor Advert. Ass'n*, 879 S.W.2d at 326–27. Here, the Association pleaded that the fees were unreasonable and excessive and that the ordinances were intended to raise revenue. We thus conclude that the Association alleged sufficient facts to invoke the immunity waiver under the Act.

In addition to challenging the sufficiency of the Association's pleadings, the City asserts that the Association's ability to prove its case is a prerequisite to invoking the Act's governmental-immunity waiver. The City claims that the ordinances' legislative findings and stated purposes establish that the City's actions were not arbitrary and capricious and that the City's calculation of the fee amounts—based, as it says, on the estimated costs of regulating multifamily properties in Bedford—proves that the license and inspection fees "are based on

the cost of a regulatory scheme and police regulation." The City argues that because it proved that the license and inspection fees are not arbitrary or unreasonable and are not an illegal tax, the ordinances are valid. And, according to the City, because the ordinances are valid, the trial court lacks subject-matter jurisdiction over the Association's claims challenging those ordinances' validity.[5]

The City wrongly contends, though, that an immunity waiver under the Act is conditioned on a plaintiff's proving liability. In considering this contention, one of our sister courts has stated:

> The [Act] does not include a statutory expression, like the expression in the Texas Tort Claims Act, that conditions waiver of governmental immunity on a showing of potential liability. Under the [Act], governmental immunity is waived if the proceeding involves

[5]The City's plea to the jurisdiction challenged only the trial court's jurisdiction over the Association's Ordinance 2334 claims. The City challenged the trial court's jurisdiction over the Association's remaining claims in its brief in support of its plea, but the trial court did not consider the arguments in, or the evidence attached to, that brief. The Association asserts that we should consider only the arguments in the City's plea to the jurisdiction and ignore those first appearing in the later-filed supporting brief. The Association cites *City of Dallas v. Heard* for the proposition that this court's jurisdiction is limited to reviewing the grounds raised in the City's plea to the jurisdiction. 252 S.W.3d 98, 103 (Tex. App.—Dallas 2008, pet. denied) ("[An appellate court's] jurisdiction is limited to reviewing the grant or denial of the plea to the jurisdiction that was filed."). But several years later, the Texas Supreme Court disapproved the line of cases upon which *Heard* relied, holding in *Rusk State Hospital v. Black* that "if immunity is first asserted on interlocutory appeal, section 51.014(a) does not preclude the appellate court from having to consider the issue at the outset in order to determine whether it has jurisdiction to address the merits." 392 S.W.3d 88, 95 & n.3 (Tex. 2012). We therefore address all the City's immunity arguments. *See Dallas Metrocare Servs. v. Juarez*, 420 S.W.3d 39, 41 (Tex. 2013) ("Under *Rusk*, an appellate court must consider all of a defendant's immunity arguments, whether the governmental entity raised other jurisdictional arguments in the trial court or none at all.").

> the validity of a municipal ordinance. Nothing more. Nothing less. For jurisdictional purposes, what is required is a pleading that would support the invalidation of the ordinance. . . .

*City of Dallas v. E. Vill. Ass'n*, 480 S.W.3d 37, 46 (Tex. App.—Dallas 2015, pet. denied) (op. on reh'g). Thus, we need not evaluate the Association's claims' merit.[6] *See id.* Because the Association has pleaded bases upon which the ordinances would be void, it has pleaded a claim under the Act for which immunity is waived. We overrule the City's first issue.

**C. The repealed ordinance (Ordinance 2334)**

In its second, third, and fourth issues, the City specifically challenges jurisdiction over the Association's declaratory-judgment claims regarding Ordinance 2334. The City argues that because this ordinance has been repealed, immunity is not waived under the Act and that the Association is seeking an improper advisory ruling. The City also argues that immunity is not waived because the Association pleaded this declaratory-judgment claim solely to recover money damages. We address each of these arguments in turn.

**1. The Association is not seeking an advisory ruling.**

In support of its second issue, the City argues that any declaration regarding Ordinance 2334's validity would be advisory because (1) no

[6]At oral argument, the City asserted that we should examine its evidence in determining jurisdiction over the Association's declaratory-judgment claims as we did in determining whether the plaintiff stated a valid inverse-condemnation claim waiving governmental immunity in *City of Argyle v. Pierce*. 258 S.W.3d 674, 682–86 (Tex. App.—Fort Worth 2008, pet. dism'd). But this is not an inverse-condemnation case, and so *Pierce* does not apply.

controversy exists about the Association's members' rights and status under the ordinance because it has been repealed, (2) the Association is asking for a declaration that multifamily-property owners who paid the fees are entitled to a refund but has not joined those members, and (3) a declaration that the Association's members are entitled to a refund would create controversy rather than resolve it.

A declaratory-judgment action "requires a justiciable controversy as to the rights and status of parties actually before the court for adjudication, and the declaration sought must actually resolve the controversy." *Brooks v. Northglen Ass'n*, 141 S.W.3d 158, 163–64 (Tex. 2004). A justiciable controversy is a real and substantial controversy involving a genuine conflict of tangible interests and not just a theoretical dispute. *Bonham State Bank v. Beadle*, 907 S.W.2d 465, 467 (Tex. 1995). The Act is "merely a procedural device for deciding cases already within a court's jurisdiction rather than a legislative enlargement of a court's power, permitting the rendition of advisory opinions," which are prohibited under both the Texas and federal constitutions. *Tex. Ass'n of Bus.*, 852 S.W.2d at 444.

Even though the City does not couch it as such, its contention that the Association fails to allege a justiciable controversy regarding Ordinance 2334 because it has been repealed is a mootness argument. The constitutional roots of justiciability doctrines, such as ripeness, standing, and mootness, lie in the prohibition on advisory opinions. *Patterson v. Planned Parenthood of*

*Houston & Se. Tex. Inc.*, 971 S.W.2d 439, 442 (Tex. 1998); *see Matthews v. Kountze Indep. Sch. Dist.*, 484 S.W.3d 416, 418 (Tex. 2016) (stating that the mootness doctrine prevents courts from rendering advisory opinions). "A case becomes moot if a controversy ceases to exist or the parties lack a legally cognizable interest in the outcome." *Allstate Ins. Co. v. Hallman*, 159 S.W.3d 640, 642 (Tex. 2005). Mootness implicates subject-matter jurisdiction. *City of Dallas v. Woodfield*, 305 S.W.3d 412, 416 (Tex. App.—Dallas 2010, no pet.).

The mootness doctrine dictates that courts avoid rendering advisory opinions by deciding only issues presenting a "live" controversy at the time of the decision. *Young v. Young*, 168 S.W.3d 276, 287 (Tex. App.—Dallas 2005, no pet.) (citing *Camarena v. Tex. Emp't Comm'n*, 754 S.W.2d 149, 151 (Tex. 1988)). An issue becomes moot (1) when it appears that one seeks to obtain a judgment on some controversy that in reality does not exist or (2) when one seeks a judgment on some matter that, when rendered for any reason, cannot have any practical legal effect on a then-existing controversy. *Id.*

But repeal of Ordinance 2334 does not moot the Association's claims. Even after repeal, the question remains whether that ordinance violated the constitution and, if so, what relief should be entered. Put another way, the repeal obviated the Association's need to seek a declaration voiding the ordinance, but the repeal did not remedy any harm the ordinance might have caused the Association's members. We thus conclude that the Association's claims are not moot. *See Lowenberg*, 261 S.W.3d at 59 (rendering judgment for plaintiffs in

declaratory-judgment tax-refund suit and explaining that city "cannot extract millions in unlawful fees and fines, decide the whole thing was a mistake, keep the money, and insist the whole matter is moot" and that "[f]or those who paid, the controversy remains real").

In addition to its mootness argument, the City also argues that any ruling concerning Ordinance 2334's validity would be advisory because the Association has asked for a declaration that its members who paid the illegal fees are entitled to a refund, but the Association is not entitled to that relief; its members are, but they have not been joined as parties. *See* Tex. Civ. Prac. & Rem. Code Ann. § 37.006(a) ("When declaratory relief is sought, all persons who have or claim any interest that would be affected by the declaration must be made parties. A declaration does not prejudice the rights of a person not a party to the proceeding."). But the failure to join an affected party to a declaratory-judgment action does not deprive a trial court of subject-matter jurisdiction over the case. *Brooks*, 141 S.W.3d at 162; *Mining v. Hays Cty. Bail Bond Bd.*, No. 03-05-00448-CV, 2006 WL 952402, at *5 (Tex. App.—Austin Apr. 14, 2006, no pet.) (mem. op.); *Wilchester W. Concerned Homeowners LDEF, Inc. v. Wilchester W. Fund, Inc.*, 177 S.W.3d 552, 559–60 (Tex. App.—Houston [1st Dist.] 2005, pet. denied) (op. on reh'g); *see Cooper v. Tex. Gulf Indus., Inc.*, 513 S.W.2d 200, 204 (Tex. 1974) (stating that "it would be rare indeed if there were a person whose

presence was so indispensable in the sense that his absence deprives the court of jurisdiction to adjudicate between the parties already joined").[7]

The City also speculates that any declaration that the Association's members are entitled to a refund will create not resolve controversy "as apartment complex owners would line[ ]up at the courthouse steps to seek their 'entitled' refund." But the controversy before the trial court is Ordinance 2334's validity, and the declarations that the Association seeks—that the ordinance is invalid and that Bedford multifamily-property owners are entitled to a refund of any excessive fees—would in fact resolve that controversy. Any individual multifamily-property owner's right to a refund is for a later date, and the controversy the City posits is merely hypothetical.

We overrule the City's second issue.

**2. The Act's immunity waiver is not limited to ordinances currently in effect.**

In its third issue, the City contends that the immunity waiver under the Act is limited to claims challenging the validity of ordinances currently in effect. Without citing any legal authority, the City asserts that because Ordinance 2334 has been repealed and replaced, immunity is not waived because "there can be no question of validity with regard to an ordinance that doesn't exist." But the Act's language does not limit the immunity waiver only to ordinances

[7]As the Association pointed out, joining its members "would defeat the very basis for associational standing."

currently in effect. *See* Tex. Civ. Prac. & Rem. Code Ann. § 37.006(b) ("In any proceeding that involves the validity of a municipal ordinance or franchise, the municipality must be made a party . . . ."). We therefore overrule the City's third issue.

**3. The Association's refund claim is not a claim for money damages.**

In what we construe as its fourth issue, the City argues that the trial court lacked jurisdiction over the Association's claim requesting a declaration that multifamily-property owners are entitled to a refund of excess fees paid under Ordinance 2334 because "[i]t is well settled that 'private parties cannot circumvent the State's sovereign immunity from suit by characterizing a suit for money damages . . . as a declaratory-judgment claim.'" *Heinrich*, 284 S.W.3d at 371 (quoting *Tex. Nat. Res. Conservation Comm'n v. IT-Davy*, 74 S.W.3d 849, 856 (Tex. 2002)). True; but it is also well settled that a person who pays government fees and taxes under business compulsion, duress, implied duress, fraud, or mutual mistake of fact has a claim for their repayment that is not barred by governmental immunity. *See Gatesco, Inc. v. City of Rosenberg*, 312 S.W.3d 140, 144 (Tex. App.—Houston [14th Dist.] 2010, no pet.) (stating that "governmental immunity will not defeat a claim for declaratory or injunctive relief seeking the refund of illegally collected taxes or fees if the plaintiff alleges 'that the payments were made as a result of fraud, mutual mistake of fact, or duress, whether express or implied'" (quoting *Nivens v. City of League City*, 245 S.W.3d 470, 474 (Tex. App.—Houston [1st Dist.] 2007, pet. denied) (op. on reh'g))); *see*

*also Lowenberg*, 261 S.W.3d at 59 (rendering declaratory judgment against City in declaratory-judgment tax-refund suit); *McDaniel v. Town of Double Oak*, No. 02-10-00452-CV, 2012 WL 662367, at *8 (Tex. App.—Fort Worth Mar. 1, 2012, pet. denied) (mem. op.) (collecting cases). As one of our sister courts explained:

> Governmental immunity from suit defeats a trial court's subject-matter jurisdiction and is properly asserted in a plea to the jurisdiction. Generally, a party suing a governmental entity must establish consent to sue, which may be alleged either by reference to a statute or to express legislative permission.
>
> However, where a claim for declaratory or injunctive relief is brought seeking the refund of illegally collected tax payments, governmental immunity will not apply if the taxpayer alleges that the payments were made as a result of fraud, mutual mistake of fact, or duress, whether express or implied. The revenue generated from a tax determined to be illegal should not be treated as property of the State or municipality to which the principles of sovereign immunity apply, and an illegally collected fee should be refunded if paid as a result of fraud, mutual mistake of fact, or duress, without respect to waiver of sovereign immunity. No legislative consent to sue is needed under these circumstances.

*Nivens*, 245 S.W.3d at 474 (citations omitted).

But even construing its pleadings liberally, the Association has not adequately pleaded facts necessary to invoke the trial court's jurisdiction under this doctrine; the Association does not allege that its members paid fees under business compulsion, duress, implied duress, fraud, or mutual mistake of fact. *See, e.g.*, *Dallas Cty. Cmty. Coll. Dist. v. Bolton*, 185 S.W.3d 868, 877–79 (Tex. 2005) (stating that the Texas Supreme Court has "consistently recognized business compulsion arising from payment of government fees and taxes coerced by financial penalties, loss of livelihood, or substantial damage to a

business," and that reimbursement of illegal fees and taxes is allowed, in essence, when the public entity compels compliance with a void law and subjects the person to punishment if he refuses or fails to comply); *Crow v. City of Corpus Christi*, 209 S.W.2d 922, 924–25 (Tex. 1948) (discussing business compulsion and duress with regard to cases in which businesses were faced with either paying illegal fees or forfeiting their right to do business); *Tara Partners, Ltd. v. City of S. Houston*, 282 S.W.3d 564, 577 (Tex. App.—Houston [14th Dist.] 2009, pet. denied) (holding that, even construed liberally, plaintiffs' petition failed to allege facts indicating that they made payments as a result of fraud, mistake of fact, or duress when they failed to plead the potential for penalties or late payment charges and cessation of service); *Saturn Capital Corp. v. City of Houston*, 246 S.W.3d 242, 246 (Tex. App.—Houston [14th Dist.] 2007, pet. denied) (describing duress necessary to authorize illegal-fee recovery as "when the unauthorized . . . fee is required, necessary, or shall be paid to avoid the government's ability to charge penalties or halt a person from earning a living or operating a business"); *cf. Nivens*, 245 S.W.3d at 474–75 (holding that the trial court did not err by granting the city's jurisdictional plea when plaintiffs' pleadings failed to seek declaratory or injunctive relief regarding refund of excessive tax payments *and* failed to allege that they made any payments as a result of fraud, mutual mistake of fact, or duress).

We thus sustain the City's fourth issue. Because the Association's pleadings with respect to its refund claim are insufficient to establish jurisdiction

but do not affirmatively demonstrate an incurable jurisdictional defect, the Association should be afforded the opportunity to amend its pleadings. *See Miranda*, 133 S.W.3d at 226–27.

## V. The Association's Claims for Injunctive Relief

In its fifth issue, the City argues that the trial court erred by denying its plea to the jurisdiction with respect to the Association's claims for injunctive relief because there is no immunity waiver for such claims against a municipality.

As the City notes, governmental entities retain immunity from claims for injunctive relief based on allegations that government officials have violated the law or have failed to perform a ministerial act. *See Heinrich*, 284 S.W.3d at 372–73. Those claims must be brought against the responsible government actors in their official capacities. *See id.* at 373 (holding that suits alleging ultra vires actions by government officials "cannot be brought against the state, which retains immunity, but must be brought against the state actors in their official capacity" and explaining that "[t]his is true even though the suit is, for all practical purposes, against the state"); *see also Sefzik*, 355 S.W.3d at 621 (recognizing that proper defendant in ultra vires suit is official "whose acts or omissions allegedly trampled on the plaintiff's rights, not the state agency itself").

Here, the Association seeks temporary and permanent relief enjoining the City from (1) assessing or collecting any license or inspection fees exceeding $18 per unit annually against the owners or any person in control of any multifamily property in Bedford, (2) enforcing the fee rates in Ordinances 16-

3151 and 16-3152, (3) spending any illegal fees collected from the City under Ordinance 2334, and (4) inspecting any multifamily property in Bedford more than twice per year. The Association has not alleged that City officials have acted illegally or failed to act. Because the Association challenged the ordinances' validity rather than complaining that City officials illegally acted or failed to act, the ultra-vires exception does not apply, and the City is not immune from the Association's suit. *See Patel v. Tex. Dep't of Licensing & Regulation*, 469 S.W.3d 69, 77 (Tex. 2015); *see also City of Elsa v. M.A.L.*, 226 S.W.3d 390, 392 (Tex. 2007) (concluding that "the court of appeals did not err by refusing to dismiss the plaintiffs' claims [against the city] for injunctive relief based on alleged constitutional violations"). We overrule the City's fifth issue.

## VI. The Association's Attorney's-Fees Claim

In its sixth issue, the City argues that the trial court does not have jurisdiction to award the Association attorney's fees because the Association did not plead a valid declaratory-judgment claim against the City. *See Home Town Urban Partners*, 340 S.W.3d at 913 (agreeing with city's contention that a plaintiff cannot recover attorney's fees under the Act for any declarations over which the city's immunity from suit has not been waived).

Apart from the Association's declaratory-judgment refund claim as currently pleaded, the City's immunity from suit with respect to the Association's declaratory-judgment claims has been waived. As a result, the City is not immune from the Association's claim for attorney's fees under the Act. *See* Tex.

Civ. Prac. & Rem. Code Ann. § 37.009 (West 2015) ("In any proceeding under this chapter, the court may award costs and reasonable and necessary attorney's fees as are equitable and just."); *Tex. Educ. Agency v. Leeper*, 893 S.W.2d 432, 446 (Tex. 1994) ("We conclude that by authorizing declaratory judgment actions to construe the legislative enactments of governmental entities and authorizing awards of attorney fees, the [Act] necessarily waives governmental immunity for such awards."). We overrule the City's sixth issue.

## VII. Conclusion

Having sustained the City's fourth issue, we reverse that part of the trial court's order denying the City's plea to the jurisdiction on the Association's declaratory-judgment refund claim and order the trial court to afford the Association the opportunity to amend its pleadings on that claim. Having overruled the City's remaining issues, we affirm the remainder of the trial court's order denying the City's plea to the jurisdiction.

/s/ Elizabeth Kerr
ELIZABETH KERR
JUSTICE

PANEL: LIVINGSTON, C.J.; SUDDERTH and KERR, JJ.

DELIVERED: August 10, 2017