TEXAS COURT OF APPEALS, THIRD DISTRICT, AT AUSTIN

NO. 03-15-00371-CV

City of Dallas, Appellant

v.

The Sabine River Authority of Texas, Appellee

FROM THE DISTRICT COURT OF TRAVIS COUNTY, 53RD JUDICIAL DISTRICT
NO. D-1-GN-15-000398, HONORABLE STEPHEN YELENOSKY, JUDGE PRESIDING

M E M O R A N D U M O P I N I O N

The City of Dallas appeals from the trial court's order granting the plea to the jurisdiction filed by the Sabine River Authority (SRA). The City filed a petition for review with the Public Utilities Commission (PUC) concerning the increased rate SRA began charging the City for wholesale water. *See generally* 16 Tex. Admin. Code §§ 24.128–.138 (Pub. Util. Comm'n) (setting forth guidelines and procedural requirements for petitions for review concerning wholesale water rates).[1] The parties disputed whether the increased rate had been set pursuant to a written contract, and the administrative law judge (ALJ) abated the proceeding. *See id.* § 24.131(d) (Comm'n's Review of Petition or Appeal) (providing that if seller and buyer do not agree that rate is charged pursuant to written contract, ALJ shall abate proceedings until contract dispute over whether rate is

[1] All citations to Chapter 16 of the Texas Administrative Code are to rules promulgated by the Public Utility Commission.

part of contract has been resolved by court of proper jurisdiction). The City then sued SRA in district court under the Uniform Declaratory Judgments Act (UDJA), seeking a declaration that the water rate set by SRA was not charged pursuant to the written contract between the parties. *See* Tex. Civ. Prac. & Rem. Code §§ 37.001–.011. SRA filed its plea to the jurisdiction, claiming governmental immunity. For the reasons that follow, we affirm the trial court's order granting SRA's plea to the jurisdiction.

BACKGROUND

SRA is a political subdivision of the State created in 1949 pursuant to Article XVI, Section 59 of the Texas Constitution. *See* Tex. Const. art. XVI, § 59 (declaring development of storm and flood waters and water of rivers and streams of State for irrigation, power, and all other useful purposes to be public purpose and authorizing creation of conservation and reclamation districts); Act of Apr. 27, 1949, 51st Leg., R.S., ch. 110, §§ 1–32, 1949 Tex. Gen. Laws 193, 193–205, *amended by* Act of May 21, 1973, 63d Leg. R.S., ch. 238, §§ 1–4, secs. 14, 18, 1973 Tex. Gen. Laws 557, 557–65 (SRA Enabling Statute). SRA provides wholesale raw water to the City pursuant to a set of written contracts (the Contract) that SRA entered into with the City and the City's predecessors. The Contract contained a provision for automatic renewal effective November 1, 2014, for a 40-year term. The renewal provision stated:

> The amount of compensation that [SRA] shall be entitled to receive during any renewal term (exclusive of the City's pro rata share of the Service Charge) shall be determined by mutual agreement between the City and [SRA], taking into account such price as is prevailing in the general area at the time for like contract sales of water of similar quality, quantity and contract period. . . . In the event that the City and [SRA] are unable to agree upon the amount of such compensation prior to

> expiration of the term, the [PUC] may establish interim compensation to be paid by the City to [SRA].

The City and SRA were unable to reach an agreement as to the amount of compensation, and on October 13, 2014, SRA notified the City that on October 9, 2014, its board of directors had unilaterally approved a new compensation payment amount for the next forty-year renewal term.[2]

The City filed a petition with the PUC for review of the October 9, 2014 action, complaining of the renewal rate and requesting interim rates. *See* Tex. Water Code § 12.013(a) (setting out PUC's rate-fixing power over wholesale water rates), (d) (outlining PUC's jurisdiction under section 12.013), (e) (providing that PUC may establish interim rates during pendency of rate proceeding). The PUC referred the case to the State Office of Administrative Hearings (SOAH). *See* 16 Tex. Admin. Code § 24.131(a) (Comm'n's Review of Petition or Appeal) (providing that if PUC determines that petition meets requirements, it shall forward petition to SOAH for evidentiary hearing). Following a prehearing conference, the ALJ issued an order stating that if the parties did not agree that the rate was charged pursuant to a written contract, he must abate the proceeding, and setting a pretrial conference to establish interim rates. *See id.* § 24.131(b) (providing that petition or appeal of rate charged pursuant to written contract is to be forwarded to SOAH for evidentiary hearing on public interest), (c) (providing that petition or appeal of rate not charged pursuant to written contract is to be forwarded to SOAH for evidentiary hearing on rate), (d) (providing that if seller and buyer do not agree that rate is charged pursuant to written contract, ALJ shall abate

[2] The City states, and SRA does not dispute, that the renewal rate was a 900% increase over the previous rate.

proceedings until contract dispute over whether rate is part of contract has been resolved by court of proper jurisdiction). The City did not agree that SRA had set the rate pursuant to the Contract, and the ALJ abated the proceeding. *See id.* § 24.141(d).

The City then filed this suit against SRA in district court seeking declarations that the renewal rate set by SRA in its action of October 9, 2014, was not set pursuant to a written contract and that SRA's "legislative act in the nature of an ordinance or statute setting those rates" was invalid. SRA filed a plea to the jurisdiction on the basis of governmental immunity. After briefing and a hearing, the trial court granted SRA's plea, and the City filed this appeal.

STANDARD OF REVIEW AND APPLICABLE LAW

As a political subdivision of the State, SRA "possess[es] governmental immunity from suit unless the Legislature has waived that immunity . . . in 'clear and unambiguous language.'" *See Byrdson Servs., LLC v. South E. Tex. Reg'l Planning Comm'n*, ___ S.W.3d ___, No. 15-0158, 2016 Tex. LEXIS 1152, at *4 (Tex. Dec. 23, 2016) (quoting *Tooke v. City of Mexia*, 197 S.W.3d 325, 328–29 (Tex. 2006)). Governmental immunity from suit implicates a court's subject matter jurisdiction and is therefore properly asserted in a plea to the jurisdiction. *Houston Belt & Terminal Ry. Co. v. City of Hous.*, 487 S.W.3d 154, 160 (Tex. 2016); *Texas Dep't of Parks & Wildlife v. Miranda*, 133 S.W.3d 217, 226 (Tex. 2004). A plea questioning the trial court's subject matter jurisdiction raises a question of law that we review de novo. *Westbrook v. Penley*, 231 S.W.3d 389, 394 (Tex. 2007); *Miranda*, 133 S.W.3d at 226. "The burden is on the plaintiff to affirmatively demonstrate the trial court's jurisdiction." *Heckman v. Williamson Cty.*, 369 S.W.3d 137, 150 (Tex. 2012); *accord Ex parte Springsteen*, 506 S.W.3d 789, 798 n.50 (Tex.

App.—Austin 2016, pet. filed) (citing *City of Elsa v. Gonzalez*, 325 S.W.3d 622, 625 (Tex. 2010) (per curiam)). When, as here, a plea to the jurisdiction challenges the pleadings, we look to the pleader's intent, construe the pleadings liberally in favor of jurisdiction, and accept the allegations in the pleadings as true to determine if the pleader has alleged sufficient facts to affirmatively demonstrate the trial court's jurisdiction to hear the cause. *Heckman*, 369 S.W.3d at 150; *City of El Paso v. Heinrich*, 284 S.W.3d 366, 378 (Tex. 2009); *Miranda*, 133 S.W.3d at 226. When the pleadings fail to allege sufficient facts to affirmatively demonstrate the trial court's jurisdiction but do not affirmatively demonstrate an incurable jurisdictional defect, the issue is one of pleading sufficiency, and the plaintiff should be given an opportunity to amend. *Miranda*, 133 S.W.3d at 226–27. If the pleadings affirmatively negate the existence of jurisdiction, then a plea to the jurisdiction may be granted without allowing the plaintiff an opportunity to amend. *Id.* at 227.

The UDJA gives Texas courts the power to "declare rights, status, and other legal relations whether or not further relief is or could be claimed." Tex. Civ. Prac. & Rem. Code § 37.003(a). "A person interested under a . . . written contract . . . or whose rights . . . are affected by a statute, municipal ordinance [or] contract . . . may have determined any question of construction or validity arising under the . . . statute, ordinance, [or] contract . . . and obtain a declaration of rights, status, or legal relations thereunder." *Id*. § 37.004(a). The UDJA, however, does not create or augment a trial court's subject matter jurisdiction (aside from its own limited waiver of immunity)—it is "merely a procedural device for deciding cases already within a court's jurisdiction . . . ." *Texas Ass'n of Bus. v. Texas Air Control Bd.*, 852 S.W.2d 440, 444 (Tex. 1993); *see Texas Dep't of Transp. v. Sefzik*, 355 S.W.3d 618, 621–22 (Tex. 2011) (per curiam) (noting that Texas

Supreme Court has consistently stated that "UDJA does not enlarge the trial court's jurisdiction but is 'merely a procedural device for deciding cases already within a court's jurisdiction'"); *see also Strayhorn v. Raytheon E–Sys., Inc.*, 101 S.W.3d 558, 572 (Tex. App.—Austin 2003, pet. denied) ("To establish jurisdiction under the UDJA, a party must plead the existence of an 'underlying controversy' within the scope of section 37.004 of the [UDJA].").

The UDJA "is not a general waiver of sovereign immunity" but only waives "immunity for certain claims." *Texas Parks & Wildlife Dep't v. Sawyer Trust*, 354 S.W.3d 384, 388 (Tex. 2011); *McLane Co. v. Texas Alcoholic Beverage Comm'n*, No. 03-16-00415-CV, ___ S.W.3d ___, 2017 Tex. App. LEXIS 851, at *4 (Tex. App.—Austin Feb. 1, 2017, pet. filed). "For example, the state may be a proper party to a declaratory judgment action that challenges the validity of a statute." *Sefzik*, 355 S.W.3d at 622. "[T]he UDJA's sole feature that can impact trial-court jurisdiction to entertain a substantive claim is the statute's implied limited waiver of sovereign or governmental immunity that permits claims challenging the validity of ordinances or statutes." *Ex parte Springsteen*, 506 S.W.3d at 799 (citing *Texas Lottery Comm'n v. First State Bank of DeQueen*, 325 S.W.3d 628, 634–35 (Tex. 2010) (citing Tex. Civ. Prac. & Rem. Code § 37.006(b))).

However, "the UDJA does not waive the state's sovereign immunity when the plaintiff seeks a declaration of his or her rights under a statute or other law." *Sefzik*, 355 S.W.3d at 622; *see Heinrich*, 284 S.W.3d at 372–73 (explaining that "government entities themselves—as opposed to their officers in their official capacity—remain immune from suit" against claims brought under UDJA that challenge government's actions taken under law); *McLane Co.*,

2017 Tex. App. LEXIS 851, *6–7 (observing that plaintiff was not challenging validity of statute but was challenging agency's actions under it and concluding that "UDJA does not waive sovereign immunity for 'bare statutory construction claims'"). Such a claim can be asserted directly against the governmental entity only to the extent jurisdiction has been established through some other means, such as through an independent waiver of immunity. *Sefzik*, 355 S.W.3d at 621–22; *see Sawyer Trust*, 354 S.W.3d at 388 (explaining that "sovereign immunity will bar an otherwise proper [U]DJA claim that has the effect of establishing a right to relief against the State for which the Legislature has not waived sovereign immunity" (citing *City of Hous. v. Williams*, 216 S.W.3d 827, 828–29 (Tex. 2007) (per curiam))). Nor does the UDJA waive immunity for suits based on contract disputes. *See Texas Nat. Res. Conservation Comm'n v. IT-Davy*, 74 S.W.3d 849, 855, 860 (Tex. 2002) (stating that suits to establish contract's validity, to enforce performance under contract, or to impose contractual liabilities are suits against State and holding that UDJA does not allow suits against political subdivisions of State for breach of contract). "[A] party cannot circumvent a sovereign immunity bar by recasting a breach of contract claim as a UDJA claim." *Schriver v. Texas Dep't of Transp.*, 293 S.W.3d 846, 849 n.7 (Tex. App.—Fort Worth 2009, no pet.). "And a litigant's couching its requested relief in terms of declaratory relief does not alter the underlying nature of the suit." *Sawyer Trust*, 354 S.W.3d at 388 (citing *Heinrich*, 284 S.W.3d at 370–71; *IT-Davy*, 74 S.W.3d at 855).

The City's issues require us to construe applicable statutes and rules. Statutory construction is a question of law that we review de novo. *See Railroad Comm'n v. Texas Citizens for a Safe Future & Clean Water*, 336 S.W.3d 619, 624 (Tex. 2011). Our primary concern is the

express statutory language. *See Galbraith Eng'g Consultants, Inc. v. Pochucha*, 290 S.W.3d 863, 867 (Tex. 2009). We apply the plain meaning of the text unless a different meaning is supplied by legislative definition or is apparent from the context or unless the plain meaning leads to absurd results. *Marks v. St. Luke's Episcopal Hosp.*, 319 S.W.3d 658, 663 (Tex. 2010). We construe administrative rules in the same manner as statutes. *TGS-NOPEC Geophysical Co. v. Combs*, 340 S.W.3d 432, 438 (Tex. 2011).

ANALYSIS

The City asserts two bases for waiver of SRA's governmental immunity. First, the City contends that the UDJA waives immunity for its request for declaratory relief concerning the validity of SRA's rate-setting action. Second, it argues that the Legislature waived SRA's immunity under the Texas Water Code for purposes of the underlying proceeding and this ancillary judicial proceeding. We address each alleged basis in turn.

UDJA

In its first issue, the City argues that its request for declaratory relief concerning the validity of SRA's rate-setting action falls within the purview of the UDJA's waiver of immunity for challenges to the validity of a statute or ordinance. The City does not contend that it challenges a statute or ordinance but argues that the UDJA's limited waiver covers challenges to "a statute, ordinance, *or other legislative pronouncement*" and that SRA's action was "ratemaking," which is legislative in nature. (Emphasis added.) We do not find this argument persuasive.

The UDJA contains an express waiver of immunity for challenges to the validity of a statute or ordinance. Tex. Civ. Prac. & Rem. Code § 37.006(b); *Sefzik*, 355 S.W.3d at 622 & n.3;

see Pochucha, 290 S.W.3d at 867. It does not, however, expressly waive immunity for challenges to the broader category of "other legislative pronouncements." Tex. Civ. Prac. & Rem. Code § 37.006(b); *see Pochucha*, 290 S.W.3d at 867; *IT-Davy*, 74 S.W.3d at 854 ("Legislative consent to sue the State must be expressed in 'clear and unambiguous language.'" (quoting Tex. Gov't Code § 311.034)). Although the Texas Supreme Court has used the term "legislative pronouncement" in addressing this sort of jurisdictional issue, it has done so in cases involving challenges to statutes and ordinances, using the term to refer to those challenged statutes and ordinances, not to expand the UDJA's limited waiver of immunity. *See Texas Educ. Agency v. Leeper*, 893 S.W.2d 432, 446 (Tex. 1994) (holding that UDJA provides that persons may sue to challenge ordinances or statutes and that governmental entities must be joined in those "suits to construe their legislative pronouncements"); *DeQueen*, 325 S.W.3d at 634 (explaining holding in *Leeper* that "because the [U]DJA permits statutory challenges and governmental entities may be bound by those challenges, the [U]DJA contemplates entities must be joined in those suits" "to construe legislative pronouncements"); *Heinrich*, 284 S.W.3d at 373 n.6 (citing *Leeper* for holding as explained in *DeQueen*); *IT-Davy*, 74 S.W.3d at 854 (explaining *Leeper* holding as explained in *DeQueen*); *see also Iliff v. Iliff*, 339 S.W.3d 74, 81 (Tex. 2011) ("'A court may not judicially amend a statute and add words that are not implicitly contained in the language of the statute.'" (quoting *Lee v. City of Hous.*, 807 S.W.2d 290, 294–95 (Tex. 1991))).

Further, even if we were to conclude that the UDJA's waiver of immunity extends to a broader range of challenges to "other legislative pronouncements," SRA's act of setting a new rate was not "ratemaking" or legislative in nature based upon the record before us. "Ratemaking has

been likened to a legislative activity, even though it is carried out by an administrative agency." *Central Power & Light Co. v. Public Util. Comm'n of Tex.*, 36 S.W.3d 547, 554 (Tex. App.—Austin 2000, pet. denied); *see Railroad Comm'n v. Houston Nat. Gas Corp.*, 289 S.W.2d 559, 562 (Tex. 1956) (stating that it is fundamental that fixing of utility rates is legislative function of State delegated to subordinate body). However, "[g]enerally, an administrative agency acts in a legislative capacity when it addresses broad questions of public policy and promulgates rules for future application 'to all or some part of those subject to its power.'" *Macias v. Rylander*, 995 S.W.2d 829, 833 (Tex. App.—Austin 1999, no pet.); *accord City of Corinth v. NuRock Dev., Inc.*, 293 S.W.3d 360, 368 (Tex. App.—Fort Worth 2009, no pet.) (stating that legislation is "designed to address broad questions of public policy and to promulgate laws that those subject to government's power must follow in future conduct"). In contrast, an administrative body acts in a judicial capacity when it determines facts related to specific parties and its action "concerns only the parties immediately affected." *Macias*, 995 S.W.2d at 833. "In determining whether an administrative agency was acting in a legislative or judicial capacity, we ask whether the administrative action implements broad public policy or concerns only the parties immediately affected." *Id.*; *see also Scott v. Texas State Bd. of Med. Exam'rs*, 384 S.W.2d 686, 690–91 (Tex. 1964) (distinguishing between agency action that "involves public policy or is policy-making in effect" and action that "concerns only the parties who are immediately affected"). An act or instrument that "memorializes a specific act to resolve a specific, isolated dispute between specific parties . . . establishe[s] no rule or law that all members of the public must adhere to in future conduct." *NuRock*, 293 S.W.3d at 368–69.

Here, SRA unilaterally approved a compensation rate in the context of a contract renewal between it and the City, and the rate affected only the sale of water from SRA to the City. Although the City could be expected to pass the rate increase on to its customers, the increased rate would have no broader application to other purchasers of wholesale water from SRA or to other members of the general public in the future. *See id.*; *Macias*, 995 S.W.2d at 833. Put another way, it was not a water rate broadly applicable to all of SRA's water sales. Nor does the fact that the renewal rate SRA decided to charge the City is subject to PUC review convert a rate that is applicable only to the City into an act with broad public application. *Scott*, 384 S.W.2d at 690–91; *Macias*, 995 S.W.2d at 833. Thus, even if we were to conclude that the UDJA's waiver of immunity encompasses challenges to "other legislative pronouncements" such as ratemaking, we cannot agree that SRA's act of increasing the price the City is to pay for water under the Contract constituted "ratemaking." *See Scott*, 384 S.W.2d at 691 (concluding that in revoking medical license, agency "was not engaged in promulgating rules of general application or deciding question of broad policy"); *NuRock*, 293 S.W.3d at 368–69 (holding that, where settlement agreement lacked characteristics of statutes and ordinances designed to address broad questions of public policy and affect members of public, UDJA did not waive city's immunity for suit seeking declaratory relief that NuRock did not breach settlement agreement or otherwise fail to meet obligations to city); *Macias*, 995 S.W.2d at 833 (holding that comptroller acted in judicial or quasi-judicial, not legislative, capacity in suspending individual's customs broker's license).[3]

[3] The City contends that to conclude that SRA's action was not ratesetting is contrary to its enabling legislation. *See* Tex. Rev. Civ. Stat. art. 8280–133, §§ 14(e), 14(m), 15, 30. However, the provisions of SRA's enabling statute relied on by the City merely provide that "the compensation

In its petition, the City complained of SRA's conduct in setting a new rate. Among its allegations were that SRA "did not follow the [Contract] and purported to set its own rate," that SRA's "unilateral action" in adopting a rate had "no support in the language of the [Contract]" and was "in violation of the [C]ontract," and that SRA adopted a rate that "was not a negotiated rate" and that "conflicts with the descriptive terms of the [Contract]." In essence, the City sought declarations that SRA breached the Contract in setting a new water rate unilaterally rather than by agreement, as contemplated by the Contract. The UDJA does not waive immunity for suits for breach of contract or to enforce performance under a contract. *IT-Davy*, 74 S.W.3d at 860 (stating that IT-Davy was "seeking declaratory judgment only in an attempt to have the trial court decide its breach-of-contract claim" and holding that immunity was not waived under UDJA); *Schriver*, 293 S.W.3d at 849 n.7 (noting that party cannot circumvent sovereign immunity bar by recasting breach of contract claim as UDJA claim). The City emphasizes that it does not seek monetary damages and therefore is not

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charged" for SRA's sale of water is subject to regulation by the PUC as successor to the Board of Water Engineers, *see id.* §§ 14(e), 30, that SRA shall "prescribe fees" that are "reasonable and equitable," *see id.* § 14(m), and that SRA's actions are subject to PUC supervision, *see id.* § 15. The plain language of these provisions does not convert SRA's actions under color of contract into "ratemaking power." *See Galbraith Eng'g Consultants, Inc. v. Pochucha*, 290 S.W.3d 863, 867 (Tex. 2009); *Marks v. St. Luke's Episcopal Hosp.*, 319 S.W.3d 658, 663 (Tex. 2010). Rather, SRA's "compensation" and "fees" are subject to PUC "supervision," *see* Tex. Rev. Civ. Stat. art. 8280–133, §§ 14(e), 14(m), 15, 30, and ultimate "rate-fixing power" is vested in the PUC, *see* Tex. Water Code § 12.013(a) (Rate-Fixing Power) (PUC shall fix reasonable rates for furnishing of raw or treated water on wholesale basis); *see also Texas Water Comm'n v. Brushy Creek Mun. Util. Dist.*, 917 S.W.2d 19, 20, 22–23 (Tex. 1996) (where water purchaser petitioned predecessor to PUC to establish just and reasonable rate in place of rate established in contract with water supplier, holding that ratemaking authority of predecessor to PUC could be invoked by wholesale water suppliers as well as by wholesale water purchasers). Further, this argument ignores that the rate set in this case applies only to the City's purchases of water from SRA through its contractual relationship with SRA.

attempting to characterize a suit for monetary damages as a UDJA claim. *See IT-Davy*, 74 S.W.3d at 856 (stating that party cannot circumvent State's immunity from suit "by characterizing a suit for money damages, such as a contract dispute, as [UDJA] claim"). Nonetheless, the City's claims arise from a contract dispute, the City seeks declarations that SRA, in essence, violated the terms of the Contract in unilaterally setting a renewal rate, and the fact that the City does not seek monetary damages is not dispositive in that its claims equally implicate immunity because they seek to control state action, i.e., SRA's setting of a renewal rate. *See id.* at 855–56 (explaining that suits to enforce performance under contract attempt to control state action); *Creedmoor-Maha Water Supply Corp. v. Texas Comm'n on Envtl. Quality*, 307 S.W.3d 505, 515 (Tex. App.—Austin 2010, no pet.) (concluding that fact that plaintiff did not seek monetary relief was not dispositive because claims equally implicated sovereign immunity where effect of remedy sought was to control state action). For these reasons, we conclude that the UDJA does not waive SRA's immunity from the City's request for declaratory relief. We overrule the City's first issue.

Texas Water Code

In its second issue, the City argues that the Legislature has waived SRA's immunity from the City's claims through the Texas Water Code provisions that give the PUC jurisdiction to review SRA's "rate-setting action." *See* Tex. Water Code §§ 12.013 (granting PUC jurisdiction to review and fix reasonable rates for wholesale water), 13.043 (giving PUC jurisdiction over appeals from rate proceedings). Pursuant to its rulemaking authority, *see id.* § 13.041(b); Tex. Util. Code § 14.002, the PUC adopted Rule 24.131(d), which provides that an ALJ may abate a rate-review proceeding for resolution "by a court of proper jurisdiction" of a dispute between the buyer and seller

as to whether the protested rate is charged pursuant to a written contract, *see* 16 Tex. Admin. Code § 24.131(d). The City contends that the PUC's jurisdiction over SRA under the Water Code and its unchallenged rule referring this dispute to the district court have the effect of waiving SRA's immunity for the limited purpose of this ancillary suit—to obtain a determination as to whether the rate set by SRA was set pursuant to a written contract.

The gravamen of the City's argument is that the PUC, by adopting rule 24.131(d) and providing for abatement and resolution of the dispute by a court of proper jurisdiction, has waived SRA's governmental immunity. The fatal flaw in the City's reasoning is that only the Legislature can waive sovereign immunity. *Reata Constr. Corp. v. City of Dall.*, 197 S.W.3d 371, 375 (Tex. 2006) ("We have consistently deferred to the Legislature to waive [sovereign and governmental] immunity."); *IT-Davy*, 74 S.W.3d at 853 ("[I]t is 'the Legislature's sole province to waive or abrogate sovereign immunity . . . .'" (quoting *Federal Sign v. Texas S. Univ.*, 951 S.W.2d 401, 409 (Tex. 1997))). "Texas law is well settled that only the Legislature can waive governmental immunity, and when it does so, it must use clear and unambiguous language." *Kerrville State Hosp. v. Fernandez*, 28 S.W.3d 1, 10–11 (Tex. 2000) (Hecht, J., dissenting); *see* Tex. Gov't Code § 311.034 ("In order to preserve the Legislature's interest in managing state fiscal matters through the appropriations process, a statute shall not be construed as a waiver of sovereign immunity unless the waiver is effected by clear and unambiguous language."); *IT-Davy*, 74 S.W.3d at 854 ("Legislative consent to sue the State must be expressed in 'clear and unambiguous language.'" (quoting Tex. Gov't Code § 311.034)). Neither the Legislature's grant to the PUC of jurisdiction over wholesale water rate-fixing and appeals from rate proceedings nor its grant of rulemaking

authority constitutes a clear and unambiguous waiver of SRA's immunity from the City's claims. *See* Tex. Water Code §§ 12.013, 13.041, .043; Tex. Util Code § 14.002.

Even though the validity of Rule 24.131 is not before us, the City argues that in *Canyon Regional Water Authority v. Guadalupe-Blanco River Authority*, our sister court "recognized that state agency administrative rules 'have the same force as statutes,'" and "upheld" Rule 24.131's predecessor. *See* 286 S.W.3d 397, 403, 405–06 (Tex. App.—Corpus Christi 2008, no pet.). In *Canyon*, the water purchaser challenged the validity of the predecessor rule's provision requiring that a public interest hearing be held before a ratemaking hearing in rate disputes. *See id.* at 405. The issue before us that implicates Rule 24.131 is not its validity but whether it waives SRA's immunity. While the facts of *Canyon* are somewhat similar to those of this case, including abatement for determination by the district court of whether the disputed rate was set pursuant to a written contract, *see id.* at 399–402, neither the parties nor the court in *Canyon* raised the issue of the water authority's governmental immunity. Here, the issue of immunity was expressly raised by SRA in its plea to the jurisdiction, and, in fact, we are "obliged to ascertain that subject matter jurisdiction exists regardless of whether the parties have questioned it." *University of Tex. Sw. Med. Ctr. v. Loutzenhiser*, 140 S.W.3d 351, 358 (Tex. 2004), *superceded by statute on other grounds*, Act of May 25, 2005, 79th Leg., R.S., ch. 1150, § 1, 2005 Tex. Gen. Laws 3783, 3783 (codified at Tex. Gov't Code § 311.034); *accord City of Austin v. Utility Assocs.*, No. 03-16-00565-CV, ___ S.W.3d ___, 2017 Tex. App. LEXIS 2548, at *8 (Tex. App.—Austin Mar. 24, 2017, no pet. h.) (stating that review of subject matter jurisdiction is not limited to "precise jurisdictional challenges or arguments presented by the parties, because jurisdictional requirements may not be waived and

'can be—and if in doubt, must be—raised by a court on its own at any time,' including on appeal" (quoting *Finance Comm'n of Tex. v. Norwood*, 418 S.W.3d 566, 580 (Tex. 2013))).

The City also relies on *Canyon* for the principle that agency rules have the same force and effect as statutes. *See Canyon*, 286 S.W.3d at 403 (citing *Rodriguez v. Service Lloyds Ins. Co.*, 997 S.W.2d 248, 254 (Tex. 1999)). However, as the *Canyon* court recognized, only "valid agency rules and regulations, promulgated *within the agency's authority*, have the force and effect of law." *Id.* at 404 (emphasis added) (citing *Lewis v. Jacksonville Bldg. & Loan Ass'n*, 540 S.W.2d 307, 310 (Tex. 1976)). An administrative agency has no inherent authority of its own and may exercise only those powers that the legislature confers upon it in clear and express language and those implied powers reasonably necessary to conduct its duties. *Texas Mun. Power Agency v. Public Util. Comm'n of Tex.*, 253 S.W.3d 184, 192–93 (Tex. 2007); *Texas Nat. Res. Conservation Comm'n v. Lakeshore Util. Co.*, 164 S.W.3d 368, 377 (Tex. 2005). The City has pointed us to no statutory provision granting or identifying any power of the PUC to waive the governmental immunity of SRA, and we are aware of none. *See Reata*, 197 S.W.3d at 375 (stating that only Legislature can waive immunity). Nor can we conclude that such power is impliedly necessary for the PUC to carry out its responsibilities. *See Texas Mun. Power Agency*, 253 S.W.3d at 193–94 (declining to conclude that the authority to regulate power sales contracts was "'reasonably necessary' [for the PUC] to carry out any express duty or function assigned to the [it] under chapter 35 [of the Public Utility Regulatory Act]" where chapter 35 was silent as to such authority). Thus, the City's reliance on *Canyon* is misplaced. We conclude that neither the provisions of the Texas Water Code cited by the

City, Rule 24.131, nor the statutory provisions and rule in conjunction waive SRA's immunity from the City's declaratory judgment claims.[4] We overrule the City's second issue.

CONCLUSION

Having overruled the City's issues, we affirm the trial court's order granting SRA's plea to the jurisdiction and dismissing the City's claims.

Cindy Olson Bourland, Justice

Before Chief Justice Rose, Justices Pemberton and Bourland

Affirmed

Filed: June 7, 2017

[4] In its response brief, SRA argues that there is no waiver of immunity under the "*Taylor* factors," *see Wichita Falls State Hosp. v. Taylor*, 106 S.W.3d 692, 697–98 (Tex. 2003) (observing that on "rare occasions" courts have found waiver of sovereign immunity absent explicit language and setting out factors to guide analysis in determining whether Legislature has clearly and unambiguously waived immunity), or under the consideration articulated in *Kerrville State Hospital v. Fernandez*, 28 S.W.3d 1, 6 (Tex. 2000) (considering whether statute would have no meaning absent waiver in deciding whether statute waived immunity). Although the City addresses these factors in its reply brief, it did not argue in its opening brief that we should infer a waiver of immunity from the language of the cited Water Code provisions or Rule 24.131 based on the *Taylor* factors or the *Fernandez* consideration. But assuming these arguments are preserved, we would conclude that they provide no basis on which to infer waiver of immunity here. *See Taylor*, 106 S.W.3d at 697–98 (outlining factors: (1) statute must waive immunity "beyond doubt," (2) ambiguity is resolved in favor of immunity, (3) waiver will be found if statute requires joinder of governmental entity in lawsuit for which immunity would otherwise attach, and (4) waiver will be found if it is enacted with simultaneous measures to insulate public resources from reach of judgment creditors); *Fernandez*, 28 S.W.3d at 6 (inferring waiver where statute had no meaning absent waiver).