

**NO. 12-12-00006-CV**

**IN THE COURT OF APPEALS**

**TWELFTH COURT OF APPEALS DISTRICT**

**TYLER, TEXAS**

*CITY OF CANTON, TEXAS,  
APPELLANT*

§

*APPEAL FROM THE 294TH*

*V.*

§

*JUDICIAL DISTRICT COURT*

*ZANBAKA, USA, LLC d/b/a  
DUKE'S TRAVEL PLAZA,  
APPELLEES*

§

*VAN ZANDT COUNTY, TEXAS*

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***MEMORANDUM OPINION***

The City of Canton, Texas, appeals the trial court's denial of its plea to the jurisdiction and motion to dismiss. The City raises six issues on appeal. We reverse and render.

**BACKGROUND**

Zanbaka, USA, LLC d/b/a Duke's Travel Plaza (Duke) entered into an agreement with the Canton Economic Development Corporation (CEDC), a Texas nonprofit corporation, to fund a sewer line and lift station to its travel plaza located along Interstate 20 in Van Zandt County, Texas. Pursuant to the terms of the agreement, before the CEDC would be required to fund the construction of the sewer line and lift station, the following conditions precedent were required:

1. Annexation of Duke's I-20 real property into the City of Canton;
2. Duke's creation of sixty to seventy new jobs with a minimum of fifty being full time;
3. Confirmation from Duke that the Myrtle Springs Water Association had the capacity and would provide water to Duke;
4. Duke's installation of a fire hydrant for its property as needed and directed by the City of Canton; and

5. Duke's submission of its monthly water bill to the City of Canton by the fifteenth of each month.

Following the fulfillment of these conditions, the City delayed the construction of the sewer line and lift station for several months. Duke filed suit against the City alleging that it had entered into a written contract with Duke wherein Duke agreed to provide goods and services to it. By its suit, Duke sought a declaratory judgment to determine the parties' rights and obligations under Texas Local Government Code, Section 271.152.

The City filed a plea to the jurisdiction and motion to dismiss arguing it was immune from suit because Section 271.152 did not apply given the facts of the lawsuit. After a hearing on the matter, the trial court denied the City's plea to the jurisdiction and motion to dismiss. This appeal followed.

#### **PLEA TO THE JURISDICTION**

In its third issue, the City contends the trial court incorrectly denied its plea to the jurisdiction and motion to dismiss because it did not waive its immunity from suit under Section 271.152.

#### **Standard of Review and Governing Law**

The Uniform Declaratory Judgment Act does not create or augment a trial court's subject matter jurisdiction—it merely provides a remedy where subject-matter jurisdiction already exists. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 37.003(a) (West 2008) (“A court of record within its jurisdiction has power to declare rights, status and other legal relations . . . .”); *Tex. Court Reporters Certification Bd. v. Esquire Deposition Services, L.L.C.*, 240 S.W.3d 79, 92 n.6 (Tex. App.—Austin 2007, no pet.). Absent a waiver of sovereign immunity, a state entity cannot be sued. *See Tex. Dep't of Transp. v. Jones*, 8 S.W.3d 636, 638 (Tex. 1999). Sovereign immunity from suit defeats a trial court's subject matter jurisdiction and is properly asserted in a plea to the jurisdiction. *Tex. Dep't of Parks & Wildlife v. Miranda*, 133 S.W.3d 217, 225–26 (Tex. 2004). A plea questioning the trial court's jurisdiction raises a question of law that we review de novo. *State v. Holland*, 221 S.W.3d 639, 642 (Tex. 2007). In reviewing a plea to the jurisdiction, we review the pleadings and any evidence relevant to the jurisdictional issue. *Tex. Dep't of Crim. Justice v. Miller*, 51 S.W.3d 583, 587 (Tex. 2001). The plaintiff has the burden of alleging facts sufficient to

demonstrate the trial court’s jurisdiction. *Miranda*, 133 S.W.3d at 226. If the pleadings illustrate incurable defects in jurisdiction, a plea to the jurisdiction is properly granted. *Id.* at 226–27.

A local governmental entity that is authorized by statute or the constitution to enter into a contract and that enters into a contract subject to this subchapter<sup>1</sup> waives sovereign immunity to suit for the purpose of adjudicating a claim for breach of the contract, subject to the terms and conditions of this subchapter. TEX. LOCAL GOV’T CODE ANN. § 271.152 (West 2005). A “contract subject to this subchapter” is statutorily defined as “a written contract stating the essential terms of the agreement for providing goods and services to the local governmental entity that is properly executed on behalf of the local governmental entity.” *Id.* § 271.151(2).

Statutory construction is a question of law, which we review de novo. *Tex. Lottery Comm’n v. First State Bank of DeQueen*, 325 S.W.3d 628, 635 (Tex. 2010); *City of Rockwall v. Hughes*, 246 S.W.3d 621, 625 (Tex. 2008). In determining whether Section 271.151(2) applies here, we look to the legislature’s intent. *See Tex. Lottery Comm’n*, 325 S.W.3d at 635. We construe the statute’s words according to their plain and common meaning. *City of Rockwall*, 246 S.W.3d at 625. In construing a statute, we may consider, among other matters, the object sought to be attained, circumstances under which the statute was enacted, legislative history, the common law or former statutory provisions, including laws on the same or similar subjects, and the caption. *See* TEX. GOV’T CODE ANN. § 311.023 (West 2013).

### **Provision of Goods and Services**

In Duke’s first amended original petition, it alleged that “the [trial] court has jurisdiction of this suit because the Texas Legislature waived [the] City of Canton’s immunity from suit by enactment of Texas Local Gov’t Code § 271.152.” Duke further alleged that the City entered into a written contract whereby Duke would provide goods or services to it. Thus, Duke contended that the City waived its immunity when it executed the contract and, later, breached that contract “by suspending and delaying indefinitely further performance of its contractual obligations.” In its plea to the jurisdiction and motion to dismiss, the City argued, in pertinent part, that it had not waived its immunity from suit because the contract between Duke and the CEDC did not involve Duke’s providing it goods and services as required for its waiver of immunity under Section 271.152.

The Texas Legislature enacted Section 271.152 “to loosen the immunity bar so that all local government entities that have been given or are given the statutory authority to enter into contracts

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<sup>1</sup> Subchapter I. is entitled “Adjudication of Claims Arising Under Written Contracts With Local Government Entities[.]”

shall not be immune from suits arising from those contracts.” *Kirby Lake Dev., Ltd. v. Clear Lake City Water Auth.*, 320 S.W.3d 829, 838 (Tex. 2010). Moreover, it specifically defined the type of contract described in Section 271.152 as “a written contract stating the essential terms of the agreement for providing goods or services to the local governmental entity.” TEX. LOCAL GOV’T CODE ANN. § 271.151(2). Thus, the relevant inquiry is whether the agreement in this case entails Duke’s provision of “goods and services” to the City. See *Kirby Lake Dev., Ltd.*, 320 S.W.3d at 839.

*Statutory Construction of Section 271.151(2)*

Duke contends that the “goods and services” it provided to the City under its agreement with the CEDC were the annexation of its real property, its creation of new jobs, and its installation of a fire hydrant on the annexed real property. Yet the purpose of the agreement between Duke and the CEDC was to provide funding for a sewer line and lift station to Duke’s real property. And that was the primary purpose of the agreement. Any benefits that would flow from that primary purpose are indirect and attenuated benefits. See *E. Houston Apts. v. City of Houston*, 294 S.W.3d 723, 736 (Tex. App.–Houston [1st Dist.] 2009, no pet.). Section 271.152 does not apply to contracts where the governmental entity receives an indirect or attenuated benefit. *Id.*

In *Berkman v. City of Keene*, 311 S.W.3d 523 (Tex. App.–Waco 2009, pet. denied), the city entered into a contract to provide, among other things, sewer services to a landowner for thirty-five years. *Id.* at 524–25. The landowner contended that when he used the property as a home for children who were wards of the state and allowed his property to be annexed, he was providing services to the city that caused the contract to fall under the waiver of immunity set forth in Section 271.152. See *id.* at 527. The court of appeals determined that both of these benefits to the city were indirect in nature and, therefore, the contract between the landowner and the city did not fall under Section 271.152. See *id.*; see also *E. Houston Estate Apts.*, 294 S.W.3d at 736 (providing economic benefit to some citizens as part of funding contract is indirect, attenuated benefit that does not fall under Section 271.152).

Similar to the facts in *Berkman*, Duke’s conceding to annexation of its land, creating jobs, and installing of a solitary fire hydrant were indirect, attenuated benefits to the City. If every contract that conferred some attenuated benefit on a governmental entity constituted a contract for goods or services, the limitation of contracts covered by Section 271.152 to “contract for goods or services provided to the entity” loses all meaning. *E. Houston Estate Apts., LLC*, 294 S.W.3d at 736. Nothing in the statute or in its legislative history supports such an interpretation. *Id.* The

legislature, had it intended to waive immunity from liability for every contract participated in by governmental entities, could have done so. *See id.* We must interpret the limitation as having some meaning. *Id.* Thus, we conclude that Duke did not contract to provide any service or good directly to the City. Therefore, we conclude that the City did not waive its immunity from suit under Section 271.152. Accordingly, the trial court erred in denying the City's plea to the jurisdiction and motion to dismiss. The City's third issue is sustained in part.<sup>2</sup>

#### **DISPOSITION**

Having sustained the City's third issue in part, we *reverse* the trial court's judgment and *render* a judgment *dismissing* the cause for *want of jurisdiction*.

**JAMES T. WORTHEN**  
Chief Justice

Opinion delivered May 31, 2013.

*Panel consisted of Worthen, C.J., Griffith, J., and Hoyle, J.*

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<sup>2</sup> Our determination that the City's third issue should be sustained in part is dispositive of this appeal. Therefore, we need not address the City's remaining arguments comprising its third issue, which are whether (a) Chapter 271 waives immunity from suit for a municipality where the plaintiff seeks only equitable relief and (b) the contract at issue lacked essential terms. *See* TEX. R. APP. P. 47.1. Further, we need not address the City's remaining issues, which are whether (1) Duke's claim is ripe, (2) the City can be liable as a nonparty to the contract, (3) the Uniform Declaratory Judgment Act waives immunity from suit when relief requested pertains to the performance of a contractual agreement, and (4) the trial court had subject matter jurisdiction over Duke's claims for specific performance and attorney's fees. *Id.*



**COURT OF APPEALS  
TWELFTH COURT OF APPEALS DISTRICT OF TEXAS  
JUDGMENT**

**MAY 31, 2013**

**NO. 12-12-00006-CV**

**CITY OF CANTON, TEXAS,**

Appellant

V.

**ZANBAKA, USA, LLC d/b/a DUKE'S TRAVEL PLAZA,**

Appellee

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Appeal from the 294<sup>th</sup> Judicial District Court  
of Van Zandt County, Texas. (Tr.Ct.No. 11-00679)

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THIS CAUSE came to be heard on the appellate record and the briefs filed herein, and the same being considered, because it is the opinion of this court the trial court erred in denying the City's plea to the jurisdiction and motion to dismiss and that its judgment same should be reversed and rendered, and the case dismissed for want of jurisdiction.

It is therefore ORDERED, ADJUDGED and DECREED by this court that the judgment of the trial court denying the City's plea to the jurisdiction and motion to dismiss be, and the same is, hereby **reversed** and judgment is **rendered dismissing** the cause **for want of jurisdiction**; and that this decision be certified to the court below for observance.

James T. Worthen, Chief Justice.

*Panel consisted of Worthen, C.J., Griffith, J., and Hoyle, J.*