AFFIRMED and Opinion Filed November 12, 2021

In The
Court of Appeals
Fifth District of Texas at Dallas

No. 05-21-00241-CV

CITY OF DALLAS, Appellant
V.
OXLEY LEASING NORTH LOOP, LLC, Appellee

On Appeal from the 134th Judicial District Court
Dallas County, Texas
Trial Court Cause No. DC-20-15606

MEMORANDUM OPINION

Before Justices Schenck, Smith, and Garcia
Opinion by Justice Schenck

This interlocutory appeal arises from a lawsuit claiming breach of a lease agreement. The City of Dallas (the "City") challenges the trial court's denial of its plea to the jurisdiction. More particularly, the City contends the trial court erred in denying its plea because Oxley Leasing North Loop, LLC's ("Oxley") claims are based on the City's performance of a governmental function for which there is no statutory waiver of immunity. Because we conclude Oxley's claims are instead based on the City's performance of a proprietary function, we affirm the trial court's order denying the City's plea to the jurisdiction. Because all issues are settled in law, we issue this memorandum opinion. TEX. R. APP. P. 47.4.

BACKGROUND

The facts relevant to this appeal are as follows. The City has owned and operated Dallas Executive Airport, formerly known as Redbird Airport, since at least 1945. In 1970, the City created a Land Use and Development Plan ("Development Plan") for the airport. The Development Plan identified several portions of airport property for potential development, designating some as airfield operations, airfield related development, non-aviation related development, and open space/recreational. Among the portions of property identified for potential development for non-aviation related purposes was a 55-acre tract located on the east side of the airport with frontage on Hampton Road and Marvin D. Love Freeway (the "Property"),[1] which, if developed as a commercial office park, would be a source of general revenue available for the operation of the airport.

On June 16, 1975, the City leased the Property to First Continental Bank "to be used, occupied and enjoyed by Lessee for carrying on a banking business or for any other legal purpose or purposes."[2] At that time, the Property was a vacant lot, and the City agreed to construct a barrier and a road to physically separate the Property from the back of the airport. The lease provided for an initial term of forty years with several renewal options, specifically a ten-year renewal followed by two

[1] The physical address of the Property is 5801 Marvin D. Love Freeway.

[2] The Dallas City Council approved the lease by resolution that provided any and all proceeds that may accrue from the lease herein shall be credited by the City Auditor to Airport Revenue Fund 015.

twenty-year renewals, conditioned on the lessee timely providing the City with written notice of its intent to exercise the option. The lessee's interest in the Property was assigned several times, with Oxley acquiring rights under the lease on April 25, 2014.

Whether Oxley properly exercised the renewal option to extend the lease term beyond the initial term is in dispute.[3] After the expiration of the initial term, Oxley continued to occupy the Property and pay rent. On August 20, 2020, the City sent Oxley an eviction letter. On October 15, 2020, Oxley filed a breach of contract action against the City and additionally sought a declaration as to the status of the lease and, as an alternative to the breach of contract claim, equitable relief excusing its failure to provide the required notice.

The City filed a plea to the jurisdiction asserting that governmental immunity bars Oxley's claims. Oxley responded asserting the City's discretionary decision to lease land owned by the City to operate a bank was a proprietary, rather than a governmental, function and, consequently, no immunity from suit or liability obtains, and a determination of a legislative waiver of immunity is not necessary.[4] The trial court denied the plea. This interlocutory appeal followed.

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[3] Oxley contends its Property Manager, John Hurst, now deceased, advised Oxley that he had timely sent the notice of renewal to the City. Oxley is unable to locate that notice, and the City claims it did not receive same.

[4] We note that a governmental entity waives its immunity *from liability* by entering into a contract, voluntarily binding itself like any other party to the agreement. *Tooke v. City of Mexia*, 197 S.W.3d 325, 332 (Tex. 2006). But only the legislature can waive governmental immunity *from suit*, and when it chooses

DISCUSSION

I. Standard of Review

A plea to the jurisdiction is a dilatory plea by which a party challenges the trial court's jurisdiction to determine the subject matter of the action. *Bland Indep. Sch. Dist. v. Blue*, 34 S.W.3d 547, 554 (Tex. 2000). Whether a court has subject-matter jurisdiction is a question of law. *Tex. Dep't of Parks & Wildlife v. Miranda*, 133 S.W.3d 217, 226 (Tex. 2004). Therefore, we review a trial court's order denying a jurisdictional plea based on a claim of governmental immunity *de novo*. *Tex. Nat. Res. Conservation Comm'n v. IT-Davy*, 74 S.W.3d 849, 855 (Tex. 2002).

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to waive such immunity, it must express that intent using clear and unambiguous language. *Lubbock Cty. Water Control & Imp. Dist. v. Chur & Akin, L.L.C.*, 442 S.W.3d 297, 301 (Tex. 2014).

The legislature enacted the Local Government Contract Claims Act (the "Act"), effective September 1, 2005, to waive immunity from suit *under certain circumstances*. Section 271.152 of the local government code provides:

> 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* 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. LOC. GOV'T CODE ANN. § 271.152 (emphasis added). The "subject to" phrases incorporate the other provisions of the Act to define the scope of its waiver of immunity. *Zachry Constr. Corp. v. Port of Houston Auth. of Harris Cty.*, 449 S.W.3d 98, 108 (Tex. 2014). Section 271.151(2) defines "contract subject to this subchapter" to mean a written contract for the provision of goods or services to the local governmental entity, or a written contract for the sale or delivery of not less than 1,000 acre-feet of reclaimed water by a local governmental entity intended for industrial use. *Id.* § 271.151(2). Section 271.153 limits the application of the waiver to an award of the balance due under the contract, the amount owed for change orders or additional work requested, reasonable and necessary attorney's fees, and interest allowed by law and may not include consequential damages, exemplary damages, or damages for unabsorbed home office overhead. TEX. LOC. GOV'T CODE ANN. § 271.153. Here, the contract at issue concerns the lease of commercial property and Oxley seeks lost expected rental income. Because we determine the City acted in a proprietary capacity in entering into the lease, we need not determine whether there would be a waiver of immunity from suit in this case under the Act. TEX. R. APP. P. 47.1; *City of Dallas v. Trinity E. Energy, LLC*, No. 05-16-00349-CV, 2017 WL 491259, at *4 (Tex. App.—Dallas Feb. 7, 2017, pet. denied) (mem. op.).

A jurisdictional plea may challenge the pleadings, the existence of jurisdictional facts, or both. *Alamo Heights Indep. Sch. Dist. v. Clark*, 544 S.W.3d 755, 770 (Tex. 2018). Here, the City challenged the existence of jurisdictional facts. Accordingly, we consider the relevant evidence submitted. *Miranda*, 133 S.W.3d at 227. This standard of review mirrors that of a traditional motion for summary judgment. *Clark*, 544 S.W.3d at 771.

II. Municipalities and Governmental and Proprietary Functions

Municipal corporations, such as the City, exercise their broad powers through two different roles: proprietary and governmental. *Wasson Interests v. City of Jacksonville* ("*Wasson II*"), 559 S.W.3d 142, 146 (Tex. 2018). Immunity protects municipalities from suit based on the performance of a governmental function barring an express, statutory waiver of immunity. *IT-Davy*, 74 S.W.3d at 853. Governmental functions include those activities normally performed by governmental units, such as provision of police and fire protection. *Wasson II*, 559 S.W.3d at 147. In contrast, when a municipality embarks on a proprietary function, it is subject to the same duties and liabilities as those incurred by private persons and corporations and is not immune from suit. *Id.* at 146. Thus, in determining whether the trial court erred in denying the City's plea to the jurisdiction, we must determine whether the City acted in its governmental or proprietary capacity when it entered into the lease at issue here. *Id.* at 149.

To determine the boundaries of governmental immunity in a breach of contract case, we must consider the relevant statutory provisions as well as the common law. *Id.* at 147–48. We are to aid our inquiry by looking to the definitions for governmental and proprietary functions that the legislature set forth in the Texas Tort Claims Act ("TTCA"). *Id.* (explaining the statutory definitions and designations can aid the inquiry when applying the dichotomy in contract–claims context); *see also City of McKinney v. KLA Int'l Sports Mgmt, LLC*, No. 05-20-00659-CV, 2021 WL 389096, at *3 (Tex. App.—Dallas Feb. 4, 2021, no pet.) (mem. op.) (same).

Under the TTCA, governmental functions are defined as "those functions that are enjoined on a municipality by law and are given it by the state as part of the state's sovereignty, to be exercised by the municipality in the interest of the general public." TEX. CIV. PRAC. & REM. CODE ANN. § 101.0215(a). The TTCA includes a non-exclusive list of thirty-six functions that are deemed to be governmental in nature. *Id.* The TTCA further defines proprietary functions as "those . . . that a municipality may, in its discretion, perform in the interest of the inhabitants of the municipality." *Id.* § 101.0215(b). The TTCA includes a non-exclusive list of three such proprietary functions.[5] Under prior panel authority, if a function is designated in section 101.0215 as governmental, we have no discretion to determine that it is

[5] The specific proprietary functions identified in section 101.0215 are the operation and maintenance of a public utility, amusements owned and operated by the municipality, and any activity that is abnormally dangerous or ultrahazardous. *Id.* § 101.0215(b).

proprietary. *City of Carrollton v. Weir Brothers Contracting, LLC*, No. 05-20-00714-CV, 2021 WL 1084554, at *3 (Tex. App.—Dallas Mar. 22, 2021, pet. denied) (mem. op.). If, on the other hand, the TTCA does not enumerate a function as either "governmental" or "proprietary," we apply the general definitions of these functions using the factors set out in *Wasson II* to determine the nature of the function. *Wasson II*, 559 S.W.3d at 150. And it is the nature of the function the municipality was performing when it entered into the contract that governs our analysis. *Id.* at 154.

III. Nature of the City's Activity

A. *The Texas Torts Claim Act*

The City contends that, in entering into the lease, its conduct fell within one of the legislatively enumerated governmental functions identified in the TTCA, namely "airports." *See* CIV. PRAC. & REM. § 101.0215(a)(10). We disagree. Notwithstanding the City's use of the income generated by the lease as a source of revenue for the airport, at its core, the nature of the contract itself is the lease of real property, not the operation of an airport. And, as the supreme court stated in *Wasson II*, "[T]he Tort Claims Act does not enumerate leasing property as a governmental function." *Wasson II*, 559 S.W.3d at 150. This Court has likewise concluded that "[l]easing property is not a function enumerated as either governmental or proprietary in section 101.0215. *Weir Bros.*, 2021 WL 1084554, at *5.

B. *The Texas Transportation Code*

Next, the City argues that various provisions of the Texas Transportation Code, concerning county and municipal airports, establish the contract at issue here involves a governmental function.

Specifically, the City relies on section 22.002(a) of the transportation code and the Texas Supreme Court's application of that provision in *Dallas/Fort Worth International Airport Board v. Vizant Techs., LLC*, 576 S.W.3d 362 (Tex. 2019). The City's reliance on same is misplaced.

In *Vizant*, citing to section 22.002(a) of the transportation code, the Texas Supreme Court noted that the legislature has unambiguously declared that the "maintenance, operation, [and] regulation of an airport" and the "exercise of any other power granted" for that purpose "are public and governmental functions, exercised for a public purpose, and matters of public necessity." *Id.* at 367. In that case, the supreme court analyzed whether a local governmental entity was engaged in a governmental function in entering into a contract "to analyze [an] airport's payment-processing costs (including costs for processing credit-card payments) and to provide recommendations on how the airport could reduce those costs." *Id.* at 364. The court concluded the entity so engaged was participating in a governmental function in entering into the contract because the contract was entered into "for the purpose of analyzing and reducing the airport's expenses." *Id.* at 367. But that case and several others, citing section 22.002(a) in concluding a governmental entity entered into a contract in its governmental capacity, are materially different from the

instant case in that the very contract at issue in those cases actually involved a specific airport operation. *See id.*; *see also City of Cleburne v. RT General, LLC*, No. 10-20-00037-CV, 2020 WL 7394519, at *4 (Tex. App.—Waco Dec. 16, 2020, no pet.) (mem. op.) (lease involving operation, construction, and maintenance of a hanger at City's municipal airport); *Elizabeth Benavides Elite Aviation, Inc. v. City of Laredo*, No. 04-19-00717-CV, 2020 WL 2044678, at *1 (Tex. App.—San Antonio Apr. 29, 2020, no pet.) (mem. op.) (lease agreement for a tract of land at Laredo International Airport "for the purpose of storage and dispensing of aviation fuels for fueling aircraft" and that involved construction of concrete fuel containment pad for installation of aboveground fuel storage tanks); *Hale v. City of Bonham*, 477 S.W.3d 452, 457 (Tex. App.—Texarkana 2015, pet. denied) (lease of an airport hangar); *City of El Paso v. Viel*, 523 S.W.3d 876, 884-85 (Tex. App.—El Paso 2017, no pet.) (lease of cargo warehouse at El Paso International Airport to tenant). Retail banking, physically separated from an airport, is not, in and of itself, integral to the operation of an airport.

In this case, the mere fact that the City leased property located at the airport is not determinative of the nature of that activity. And the City's focus on its motive for leasing the Property, to generate revenue for the airport, ignores the fact that the operative inquiry is not the lessor's subjective motivation for the application of the resulting revenue stream, but rather the nature of the lease itself. The lease at issue here permits the lessee to carry on a banking business or any other legal purpose or

purposes on the leased premises. And the Property is identified by the City as non-aviation related. Thus, we have little difficulty concluding the lease was not for an airport purpose, and section 22.002 of the transportation code does not transform it into a governmental function.

Next, the City relies on section 22.021(a)(1) of the transportation code. That section provides:

> [I]n operating an airport or air navigation facility . . . a local government may enter into a contract, lease, or other arrangement . . . granting the privilege of using or improving . . . a portion or facility of the airport or air navigation facility, or space in the airport or air navigation facility for commercial purposes.

TRANSP. § 22.021(a)(1). Airport is defined in the transportation code as:

> (A) An area used or intended for use for the landing and takeoff of aircraft;
>
> (B) An appurtenant area used or intended for use for an airport building or other airport facility or right-of-way; and
>
> (C) An airport building or facility located on an appurtenant area.

Id. § 22.001(2). The Property is not used for the landing and takeoff of aircraft and is not an appurtenant area used for an airport building, facility, or right-of-way. Instead, the Property is physically separated from the airport and used by commercial tenants that have no relationship with the airport or its operations. The master plan describes the Property as "non-aviation." Accordingly, the City's lease of the Property is not the leasing of airport property under section 22.021.

Next, the City urges that it is entitled to governmental immunity because section 22.054 of the transportation code requires that "revenue received by the [City] from the ownership, control, or operation of an airport or air navigation facility" shall be deposited into an airport fund. *Id.* § 22.054. The revenue received from the lease of the Property is not revenue received from the ownership, control, or operation of the airport, however. And transportation code section 22.012's general grant of power to finance government operations does not convert every contract entered into by the City to generate revenue into a governmental function. *Id.* § 22.012. Moreover, transportation code section 22.019's general grant of permission to enter contracts necessary to the execution of a power granted the local government, is likewise not determinative of the nature of the contract.

C. *Wasson II* Factors

Because the TTCA does not enumerate leasing property as a governmental or a proprietary function, and because we find the City's reliance on various provisions of the transportation code to be unpersuasive, given the facts of this case, we must apply the general definitions of the functions and the four factors enumerated by the Texas Supreme Court in *Wasson II* to determine the nature of the City's act of entering into the lease at issue. 559 S.W.3d at 150. Those factors are (1) whether the City's act of entering into the contract was mandatory or discretionary, (2) whether the contract was intended to benefit the general public or the City's residents, (3) whether the City was acting on the State's behalf or its own behalf

when it entered the contract, and (4) whether the City's act of entering into the contract was sufficiently related to a governmental function to render the act governmental even if it would otherwise have been proprietary. *Id.* When some factors point to one result while others point to the opposite result, courts should consider immunity's nature and purpose and the derivative nature of a city's access to that protection. *Id.* at 154.

1. Was Entering into the Lease Mandatory or Discretionary?

Here, as in *Wasson II*, the City had no obligation to lease the Property to First Continental Bank. *See Wasson II*, 559 S.W.3d at 151. And the fact that under the transportation code the City had a limited set of options for using the Property does not transform its act of leasing the Property into a governmental function. The City had options. It could have left the land unused, or used it strictly for airport or City purposes, as it did with other portions of property within the airport's original boundaries. Instead, it chose to generate revenue by granting long-term leases to private parties for non-aviation purposes. Thus, we conclude that the City exercised its discretion when it entered into the lease. *See Hays Street Bridge Restoration Grp. v. City of San Antonio*, 570 S.W.3d 697, 705–706 (Tex. 2019) (City's funding agreement with State required it to fund 20% of project's estimated cost, City's decision to enlist Restoration Group to help raise money was discretionary); *see also City of Dallas v. Trinity E. Energy, LLC*, No. 05-16-00349-CV; 2017 WL 491259, at *4–5 (Tex. App.—Dallas Feb. 7, 2017, pet. denied) (mem. op.) (rejecting

argument that mineral lease entered into to earn revenue to support governmental actions is governmental function).

2. Was the Lease Primarily a Public or Resident Benefit?

Generally, a city's governmental functions benefit the general public, and its proprietary functions benefit its own residents. CIV. PRAC. & REM. § 101.0215. A city's proprietary contracts will often benefit some nonresidents, and its governmental contracts will often benefit some residents. *Wasson II*, 559 S.W.3d at 151. Ultimately, whether a contract primarily benefits one or the other will often indicate whether it is proprietary or governmental. *Id.*

Here, as in *Wasson II*, the nature of the private lease necessarily excludes the general public from benefiting from the premises. *Id.* at 152. When the lease is with a private entity engaged in private enterprise, as here, the benefits of the lease primarily accrue to the City and the private lessee, not the public at large. *See Weir Bros.*, 2021 WL 1084554, at *5 ("Although open to the general public, as most private businesses are, [the lessee's] operation of the sports complex is not in the interest of the general public, but in its own interest as a private business venture.").

The City urges because the rental income on the lease is used to pay for airport operations, it primarily benefits the general public. While the general public may receive some benefit from the City's use of the proceeds under the lease, the payments are made to the City and thus enhance the City's budget. *See Wasson II*, 559 S.W.3d at 152; *see also City of Tyler v. Owens*, No. 12-16-00128-CV, 2019 WL

3024756, at *6 (Tex. App.—Tyler July 10, 2019, pet. denied) (mem. op.). Accordingly, on balance, we conclude the City and the lessee, not the public at large, are the primary beneficiaries of the lease.

3. Did the City Act on the State's or its Own Behalf

Governmental functions are those in which a city acts as a branch of the state or an arm of the government rather than on its own behalf. *Wasson Interests, Ltd. v. City of Jacksonville*, 489 S.W.3d 427, 430 (Tex. 2016); *Tooke v. City of Mexia*, 197 S.W.3d 325, 343 (Tex. 2006). When a city performs a discretionary function on its own behalf, it ceases to derive its authority, and thus its immunity, from the state's sovereignty. *Wasson II*, 559 S.W.3d at 152.

In *Wasson II*, in discussing the third factor, the supreme court concluded the city was acting on its own behalf because the decision to lease the property was entirely discretionary and the lease primarily benefitted the City's residents. *Id.* The same is true here. There is no evidence in the record that the City entered into the lease as a branch or arm of the state government. To the contrary, every indication in this record is that the City entered into the lease on its own behalf.

4. Was the Lease Sufficiently Related to a Governmental Function as to Render the Act Governmental

Finally, we consider the extent to which the City's decision to lease the Property was related to its governmental functions. The fact that a city's proprietary action bears some metaphysical relation to a governmental function is insufficient

to render the proprietary action governmental. *Id.* at 153. Instead, "a city's proprietary action may be treated as governmental only if it is ***essential*** to the city's governmental actions." *Id.* (emphasis added) (holding that leasing lakefront property was not essential to city's operation or maintenance of lake).

The City contends it acted in its governmental capacity when it entered into the lease because the lease serves to fund airport operations. But simply being a source of revenue to support a governmental function does not convert an otherwise proprietary function into a governmental one. *Id.* at 151. If the act of earning revenue to support a governmental function were sufficient to convert a proprietary function into a governmental one, cities could simply subvert judicial jurisdiction by directing the revenue from it into a governmental coffer.

The record here shows the City's decision to lease the Property was a discretionary act conducted on its own behalf primarily for the benefit of its residents. Accordingly, we conclude the City's action was proprietary in nature. *Wasson II*, 449 S.W.3d at 150. Because governmental immunity does not apply to claims arising from a city's proprietary acts, the trial court did not err in denying the City's plea to the jurisdiction. We overrule the City's issues.

CONCLUSION

The City was engaged in a proprietary function when it leased the Property to First Continental Bank, and thus governmental immunity does not bar Oxley's

claims, as a successor in interest to that lease. We affirm the trial court's order denying the City's plea to the jurisdiction.

/David J. Schenck/
DAVID J. SCHENCK
JUSTICE

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Court of Appeals
Fifth District of Texas at Dallas

JUDGMENT

CITY OF DALLAS, Appellant No. 05-21-00241-CV V. OXLEY LEASING NORTH LOOP, LLC, Appellee	On Appeal from the 134th Judicial District Court, Dallas County, Texas Trial Court Cause No. DC-20-15606. Opinion delivered by Justice Schenck. Justices Smith and Garcia participating.

In accordance with this Court's opinion of this date, the trial court's order denying the City of Dallas's plea to the jurisdiction is **AFFIRMED**.

It is **ORDERED** that appellee OXLEY LEASING NORTH LOOP, LLC recover its costs of this appeal from appellant CITY OF DALLAS.

Judgment entered this 12th day of November 2021.