Opinion issued October 28, 2021

In The

Court of Appeals

For The

First District of Texas

NO. 01-19-00768-CV

TOWN PARK CENTER, LLC, Appellant

V.

CITY OF SEALY, TEXAS; JANICE WHITEHEAD, MAYOR; LLOYD MERRELL, CITY MANAGER; AND WARREN ESCOVY, ASSISTANT CITY MANAGER, Appellees

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On Appeal from the 155th District Court
Austin County, Texas
Trial Court Case No. 2019V-0062

O P I N I O N

Following two prior nonsuits, plaintiff Town Park Center, LLC, filed the instant lawsuit against defendants City of Sealy, mayor Janice Whitehead, city

manager Lloyd Merrell, and assistant city manager Warren Escovy (together, "City Officials") in their official capacities. The trial court dismissed the lawsuit against all defendants with prejudice.

In four issues, Town Park Center argues that the trial court erred by (1) granting the City's plea to the jurisdiction based on res judicata when res judicata is a merits defense; (2) dismissing the lawsuit on res judicata grounds when no prior final adjudication on the merits exists and the alleged defects in a prior lawsuit were curable, but no opportunity to amend was provided in the prior suit; (3) dismissing the claims against the City Officials when only the City of Sealy filed a plea to the jurisdiction, and (4) failing to recognize that governmental immunity does not bar any of the claims against the defendants. We affirm in part and reverse in part.

Background

A. Town Park Center and the City of Sealy Execute the Economic Development Agreement

Town Park Center owns a 71-acre tract of land along Interstate 10 within Sealy city limits. On April 28, 2015, Town Park Center and the City executed an Economic Development Agreement ("the Agreement" or "the EDA") to develop a commercial shopping center on the property. The Agreement stated that development of the property "will result in the creation of numerous employment opportunities for the citizens of the City, shall promote state and local economic development and stimulate business and commercial activity in the City," will

"ultimately better enhance the City's economic growth," and will "substantially advance a legitimate interest of the City including increases of property tax base, local employment opportunities and city sales tax revenue." The parties expressly stated that they entered into the Agreement pursuant to Local Government Code Chapter 380, which allows municipalities to establish grant programs to promote local economic development. *See* TEX. LOC. GOV'T CODE § 380.001(a).

Under the Agreement, Town Park Center agreed to develop and construct the shopping center according to a development plan that the City had approved. Proposed tenants included several restaurants, a bank, a hotel, and a major grocery store. The Agreement set out approved and prohibited land uses for the property, as well as architectural design requirements. The City agreed to pay annual economic development grant payments to Town Park Center "as an incentive to comply with this Agreement." The payments to Town Park Center would be based on the City's share of municipal sales and use tax revenue collected from within the project's boundaries.

The Agreement required Town Park Center to design, construct, and maintain a storm water collection and drainage system. The parties agreed:

> Developer, at his option, may participate in the B&PW Park regional storm water detention pond in an amount not to exceed any available remaining capacity, at a cost of $15,000 per acre foot of capacity. Purchase of said capacity shall be the responsibility of the Developer. Upon Developer request, City agrees to reserve all remaining excess capacity for the Project on the submittal of a deposit of $2000/acre foot

> of capacity, which deposit reservation will apply to purchase price as capacity is needed. The deposit will be forfeited if the complete purchase is not completed within 5 years of execution of this Agreement.

Town Park Center also bore the obligation to "provide the infrastructure for water and wastewater service into the Project from existing service lines adjacent to the property." It further agreed to construct all internal access streets, as well as "Town Park Drive," which would be funded entirely by Town Park Center but would become a public right-of-way. The EDA also included provisions concerning the design, funding, and construction of a frontage road along I-10.

B. Town Park Center Files Its First and Second Lawsuits Against the City

On February 8, 2017, Town Park Center first filed suit against the City, as well as mayor Mark Stolarski, city manager Larry Kuciemba, and city engineer David Kelly (collectively, "the individual defendants"). Town Park Center asserted claims for breach of contract and sought declaratory and injunctive relief. It alleged that the City's governmental immunity was waived because the EDA constituted a contract for goods or services as defined by Local Government Code Chapter 271. Town Park Center further argued that the individual defendants were not immune because Town Park Center was suing them for *ultra vires* acts.

Town Park Center's liability theory was that the EDA required the defendants to sell stormwater detention capacity to Town Park Center and the defendants had breached the agreement by failing to do so. Town Park Center owned approximately

12 acre feet of detention capacity in the JAC Park detention pond. The City-owned detention capacity in the B&PW Park Regional Detention Pond is close to the project site, and according to Town Park Center, approximately 21 acre feet of capacity remained at this location.

Pursuant to a city resolution, the City had previously issued a fee schedule reflecting that capacity in the B&PW Park detention pond was available for sale at $15,000 per acre foot of storage. The parties agreed in the EDA that Town Park Center could, at its option, purchase capacity in this detention pond. Upon request and payment of a deposit of $2,000 per acre foot of capacity by Town Park Center, the City agreed to reserve excess capacity for Town Park Center. Town Park Center alleged that from 2015 through 2017, the City refused to provide information concerning the remaining capacity in the B&PW Park detention pond, refused to sell any capacity from that pond to Town Park Center, and impermissibly imposed a limit on its use of capacity in the JAC Park detention pond that would not be sufficient to meet the off-site storage needs of an HEB grocery store, a potential major tenant of the project.

Town Park Center alleged that the City's actions with respect to the sale of capacity in the B&PW Park detention pond constituted a breach of the EDA, and it sought damages of over $1.8 million. Town Park Center also sought a declaratory judgment specifying the rights and obligations of the parties under the EDA. Town

Park Center also asserted *ultra vires* claims against the individual defendants in connection with their actions relating to the refusal to sell storage capacity. Further, Town Park Center sought injunctive relief requiring the City to "formally approve and acknowledge both the existence and the availability to [Town Park Center] of the offsite detention."

The defendants immediately filed pleas to the jurisdiction asserting governmental immunity. The trial court granted the City's plea and denied the individual defendants' plea on February 16, 2017. This order did not include any language dismissing Town Park Center's claims against the City.

The individual defendants filed an interlocutory appeal of the denial of their plea to the jurisdiction. *See City of Sealy v. Town Park Ctr.*, No. 01-17-00127-CV, 2017 WL 3634025 (Tex. App.—Houston [1st Dist.] Aug. 24, 2017, no pet.) (mem. op.) (per curiam). While this interlocutory appeal was pending, Town Park Center nonsuited all its claims and argued that the nonsuit made the appeal moot. The individual defendants filed a response brief in our Court, arguing that Town Park Center could not nonsuit its claims while the appeal was pending.

We issued an opinion agreeing with Town Park Center that the interlocutory appeal was moot. Specifically, we held that Town Park Center was not prohibited from nonsuiting its claims while the appeal was pending and that the nonsuit rendered the individual defendants' interlocutory appeal moot. *Id.* at *2–3. Yet in so

holding, we cautioned that "if the trial court's order granting the City's jurisdictional plea has become final, it has done so only by virtue of Town Park's nonsuit." *Id.* at *2 n.2 (citing *Hyundai Motor Co. v. Alvarado*, 892 S.W.2d 853, 855 (Tex. 1995) (per curiam) (nonsuit filed after court has ruled on claim results in dismissal of claim with prejudice)).

While the individual defendants' interlocutory appeal was pending, Town Park Center filed a second substantively identical lawsuit against the City, Stolarski, Kuciemba, and finance director Steven Kutra in March 2017. *See id.* at *1. Town Park Center later non-suited this petition "based on the assurances that such an action would enable the City to negotiate with [Town Park Center] a settlement agreement." The parties, however, were unable to settle the dispute.

C. Town Park Center Files a Third Lawsuit Against the City

In April 2019, Town Park Center filed a third suit against the City, mayor Janice Whitehead, city manager Lloyd Merrell, and assistant city manager Warren Escovy. Town Park Center alleged that governmental immunity was waived for its claims for mandamus, declaratory, and injunctive relief under the "vested rights provision" of Local Government Code section 245.006(b). Town Park Center further alleged that Local Government Code Chapter 271 waived immunity for its breach of contract and declaratory judgment claims because the EDA constituted a contract for goods or services.

The factual allegations in this third lawsuit were substantively identical to the allegations in Town Park Center's first and second lawsuits. Town Park Center asserted that the City breached the EDA by refusing to sell storage capacity in the B&PW Park detention pond to Town Park Center and by limiting Town Park Center's use of storage capacity in JAC Park. Town Park Center further asserted that in February 2009, six years before the parties signed the EDA, the City submitted a letter outlining plans for the project, and this letter established "the date which was effective for vesting of rights as provided in Texas Local Government Code 245.002."[1] Town Park Center alleged that it had a vested right, as well as a right under the EDA, to purchase storage capacity in B&PW Park. Town Park Center thus sought mandamus, declaratory, and injunctive relief pursuant to Local Government Code section 245.006, monetary damages for breach of the EDA, and a declaratory judgment specifying the rights and obligations of the parties under the EDA.

Town Park Center filed two supplemental petitions in August 2019. In its first supplemental petition, Town Park Center alleged a takings claim on the ground that

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[1] Local Government Code section 245.002(a) provides that regulatory agencies "shall consider the approval, disapproval, or conditional approval of an application for a permit solely on the basis of any orders, regulations, ordinances, rules, expiration dates, or other properly adopted requirements in effect at the time . . . (1) the original application for the permit is filed for review for any purpose, including review for administrative completeness; or (2) a plan for development of real property or plat application is filed with a regulatory agency." TEX. LOC. GOV'T CODE § 245.002(a).

it was denied all beneficial use of its property and "the loss of marketability created by the denial of its vested right to off-site detention was so burdensome as to constitute a compensable taking" of its property. In its second supplemental petition, Town Park Center alleged additional facts to support its argument that the EDA was a contract for goods or services under Local Government Code Chapter 271. Town Park Center specifically pleaded that it was not seeking damages against the City that were not allowed by Chapter 271. Town Park Center further alleged that the City Officials were acting *ultra vires* because their actions in refusing to sell detention pond capacity violated a City of Sealy resolution that added the purchase of storm water detention capacity in the B&PW Park detention pond to the City's "Schedule of Fees."

On June 19, 2019, the City filed a "Plea to the Jurisdiction" seeking dismissal on multiple grounds, and it filed a "Supplement to Plea to the Jurisdiction" on August 12, 2019. First, the City argued that Town Park Center had brought the same claims based on the same factual allegations in the first lawsuit in February 2017. The trial court had granted the City's plea to the jurisdiction. As such, the City argued that all of the claims either had been brought or could have been brought in the first lawsuit and were therefore barred by res judicata.

The City further argued that all claims were barred by governmental immunity. According to the City, Local Government Code Chapter 271 did not

waive immunity because the EDA was not a contract for providing goods or services to the City. The City further argued that the Local Government Code Section 245.002 "vested rights" statute was inapplicable because it only requires the City to base its permit-approval decisions on the requirements in effect when the City receives the permit application.

With respect to the takings claim, the City argued in a supplement to its plea to the jurisdiction that "only affirmative action by the government will support a takings claim," but Town Park Center had not alleged any action by the City that could constitute a taking. Finally, the City argued Town Park Center could not maintain an *ultra vires* claim against the City Officials because Town Park Center had not alleged any facts indicating that the City Officials acted without legal authority or failed to perform a purely ministerial act. The City sought dismissal of Town Park Center's claims with prejudice.

Although the City styled its filing as the "City of Sealy's Plea to the Jurisdiction," the City stated in a footnote that it had been sued directly, as well as "redundantly" through the claims against Whitehead, Merrell, and Escovy in their official capacities. The City further argued that the claims against the City Officials "are no different than the claims asserted against the City and must be treated as duplications of Plaintiff's claims against the City because official-capacity suits merely represent another way of pleading an action against an entity."

Town Park Center filed a response to the plea to the jurisdiction on August 12. In that document, Town Park Center argued that the Court could not resolve the City's res judicata affirmative defense on a plea to the jurisdiction because res judicata was a plea in bar. Town Park Center also disputed the City's contention that governmental immunity was waived.

The appellate record does not indicate when the plea to the jurisdiction was set for a hearing. The trial court made a docket entry on August 13 taking the plea under advisement and giving the parties a week to submit additional authorities. The City of Sealy filed a "City of Sealy's Second Supplement to Plea to the Jurisdiction" on August 20. In that filing, the City stated: "Consistent with the leave granted by the Court at the oral hearing on this motion, the City of Sealy, sued directly and redundantly through its officials in their official capacities, and the individual Defendants supplement their Plea to the Jurisdiction." That supplemental filing asserted that Town Park Center had not—and could not—plead facts demonstrating that the City Officials, who were not in office at the time of the events complained about, had acted *ultra vires*. The City later filed a "Third Supplement" in which the City "and the individual Defendants" made additional res judicata and governmental immunity arguments.

On September 10, the trial court granted the plea to the jurisdiction in an order without stating any reasons and dismissed Town Park Center's third lawsuit with prejudice. This appeal followed.

Standard of Review

A trial court's ruling on a jurisdictional plea is subject to de novo review. *Houston Belt & Terminal Ry. Co. v. City of Houston*, 487 S.W.3d 154, 160 (Tex. 2016); *Tex. Nat. Res. Conservation Comm'n v. IT-Davy*, 74 S.W.3d 849, 855 (Tex. 2002). 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). Although the plaintiffs' claims may form the context in which the jurisdictional plea is determined, the purpose of the plea is "to defeat a cause of action without regard to whether the claims asserted have merit." *Bland Indep. Sch. Dist. v. Blue*, 34 S.W.3d 547, 554 (Tex. 2000); *see Chambers-Liberty Ctys. Navigation Dist. v. State*, 575 S.W.3d 339, 345 (Tex. 2019) (noting that jurisdictional inquiry may "unavoidably implicate the underlying substantive merits of the case when, as often happens in *ultra vires* claims, the jurisdictional inquiry and the merits inquiry are intertwined").

Review of a plea challenging the existence of jurisdictional facts mirrors that of a traditional summary-judgment motion. *Mission Consol. Indep. Sch. Dist. v. Garcia*, 372 S.W.3d 629, 635 (Tex. 2012); *City of Houston v. Guthrie*, 332 S.W.3d

578, 587 (Tex. App.—Houston [1st Dist.] 2009, pet. denied) ("[T]his standard generally mirrors that of a summary judgment under Texas Rule of Civil Procedure 166a(c) . . . . By requiring the [governmental body] to meet the summary judgment standard of proof . . . , we protect the plaintiffs from having to put on their case simply to establish jurisdiction."); *see also* TEX. R. CIV. P. 166a(c). A court may consider evidence as necessary to resolve a dispute over the jurisdictional facts, even if the evidence "implicates both the subject matter jurisdiction of the court and the merits of the case." *Tex. Dep't of Parks & Wildlife v. Miranda*, 133 S.W.3d 217, 226 (Tex. 2004); *see Klumb v. Houston Mun. Emps. Pension Sys.*, 458 S.W.3d 1, 8 (Tex. 2015). We take as true all evidence favorable to the plaintiffs, indulging every reasonable inference and resolving any doubts in their favor. *Miranda*, 133 S.W.3d at 228.

If the governmental body meets its burden to establish that the trial court lacks jurisdiction, then the plaintiffs must show a disputed material fact regarding the jurisdictional question. *Id.* at 227–28. If the evidence raises a fact issue regarding jurisdiction, the plea cannot be granted and a factfinder must resolve the issue. *Id.* If the evidence is undisputed or fails to raise a fact issue, the plea must be determined as a matter of law. *Id.* at 228.

When a plea to the jurisdiction challenges the pleadings, we determine whether the pleader has alleged facts that affirmatively demonstrate the trial court's

subject-matter jurisdiction to hear the case. *Houston Belt & Terminal Ry.*, 487 S.W.3d at 160. We construe the pleadings liberally in favor of the pleader and look to the pleader's intent. *Id.* If the pleadings do not contain sufficient facts to affirmatively demonstrate jurisdiction but do not affirmatively demonstrate incurable jurisdictional defects, the issue is one of pleading sufficiency and the plaintiff should be given an opportunity to amend its pleadings. *Miranda*, 133 S.W.3d at 226–27. Only if the pleadings affirmatively negate jurisdiction should the trial court grant the plea to the jurisdiction without affording the plaintiff an opportunity to amend. *Houston Belt & Terminal Ry.*, 487 S.W.3d at 160; *Miranda*, 133 S.W.3d at 227.

Analysis

I. Res Judicata

Res judicata is a generic term for the related concepts of claim preclusion (res judicata) and issue preclusion (collateral estoppel). *Barnes v. United Parcel Serv., Inc.*, 395 S.W.3d 165, 173 (Tex. App.—Houston [1st Dist.] 2012, pet. denied). Here, Town Park Center argues that the trial court granted the City's plea to the jurisdiction and dismissed its third lawsuit with prejudice on the basis that the doctrine of res judicata barred all claims against defendants.[2] Town Park Center contends that this

[2] The order of dismissal does not identify the ground for dismissal. Therefore, we must consider whether the judgment can be affirmed based on either res judicata or governmental immunity. *See Villarreal v. Harris Cty.*, 226 S.W.3d 537, 541 (Tex.

was error because res judicata is an affirmative defense (plea in bar) instead of a jurisdictional bar to suit. Town Park Center objected to the trial court's resolution of defendants' res judicata argument in a plea to the jurisdiction on this basis.

The City and the City Officials respond that, even if their res judicata argument and collateral estoppel arguments were procedurally improper, we should review the judgment as though the court had instead granted a take-nothing judgment on a summary judgment motion. They argue that because a take-nothing judgment has the same effect as a dismissal with prejudice, the difference between the two is purely "semantic."

We agree with Town Park Center. The distinction between a plea to the jurisdiction and a plea in bar is significant, not semantic. A plea to the jurisdiction is a challenge to the court's power to hear the suit, which, if sustained, requires dismissal of the case. *Tex. Highway Dep't v. Jarrell*, 418 S.W.2d 486, 488 (Tex. 1967). By contrast, "a plea of res judicata is not a plea in abatement or a plea to the jurisdiction, but is a plea in bar." *Id.*; *Houston Firemen's Relief & Ret. Fund*, 121 S.W.3d 415, 437 n.21 (Tex. App.—Houston [1st Dist.] 2003, no pet.) (holding that res judicata is "an affirmative defense on the merits, not a jurisdictional bar"). "Affirmative defenses are 'pleas in bar,' and do not provide a justification for

App.—Houston [1st Dist.] 2006, no pet.) (stating that when order granting plea to jurisdiction does not state ground on which it was granted, appellate court will sustain order if any ground asserted by movant is meritorious).

summary dismissal on the pleadings." *Montgomery Cty. v. Fuqua*, 22 S.W.3d 662, 669 (Tex. App.—Beaumont 2000, pet. denied). An "affirmative defense" like res judicata "should be raised through a motion for summary judgment or proven at trial." *Reyes v. Thrifty Motors, Inc*., No. 01-15-00699-CV, 2016 WL 3571101, at *2 (Tex. App.—Houston [1st Dist.] June 30, 2016, no pet) (mem. op.).

The Texas Supreme Court has cautioned that the practice of misnaming a plea in bar in order to procure a preliminary trial is confusing and not to be encouraged. *Kelley v. Bluff Creek Oil Co*., 309 S.W.2d 208, 214–15 (1958). Nevertheless, a "speedy and final judgment may be obtained on the basis of matters in bar and without the formality of a trial on the merits, if the parties so agree or if recourse is had to the process of summary judgment where contested fact issues are not present." *Id*. at 214.

There is no such agreement here. Far from it, Town Park Center expressly objected to resolving an affirmative defense of res judicata in a plea-to-the-jurisdiction posture, but the trial court granted the plea over Town Park Center's objection. In these circumstances, Texas courts will affirm only if the proceeding—though misnamed—can be characterized as a true summary judgment proceeding. *Walker v. Sharpe*, 807 S.W.2d 442, 447 (Tex. App.—Corpus Christi–Edinburg 1991, no writ) (reversing and remanding where plaintiff "did not agree to the preliminary disposition of the motion to dismiss, and the trial court granted dismissal

over [plaintiff's] objection that summary judgment was the only proper way to dispose of the res judicata defense before trial"); *see Tex. Underground, Inc. v. Tex. Workforce Comm'n*, 335 S.W.3d 670, 676 (Tex. App.—Dallas 2011, no pet.) ("In this case, however, the trial court granted dismissal over Texas Underground's objection that the TWC's motion to dismiss should be filed as a summary judgment motion. Therefore, the dismissal of Texas Underground's suit can be affirmed only if the proceeding can be characterized as a summary judgment."); *cf. State v. Narvaez*, 900 S.W.2d 846, 847 (Tex. App.—Corpus Christi 1995, no writ) (reviewing res judicata adjudication as summary judgment where plaintiff did not object to resolving defense in preliminary hearing).

The proceeding below lacked the hallmarks of a true summary judgment proceeding, especially adequate notice. "Notice of hearing for submission of a summary-judgment motion is mandatory and essential to due process." *Ready v. Alpha Bldg. Corp*., 467 S.W.3d 580, 584 (Tex. App.—Houston [1st Dist.] 2015, no pet.). The summary-judgment movant must serve the motion along with any supporting affidavits on the opposing party at least 21 days before the time specified for the hearing. *See* TEX. R. CIV. P. 166a(c). "Because summary judgment is such a harsh remedy, the notice provisions of Rule 166a(c) must be strictly construed." *Viesca v. Andrews*, No. 01-13-00659-CV, 2014 WL 4260355, at *5 (Tex. App.—Houston [1st Dist.] Aug. 28, 2014, no pet.) (mem. op.); *see Ready*, 467 S.W.3d at

584 ("The notice provisions associated with summary-judgment procedure under Rule 166a are strictly construed.").

Although the parties acknowledge that the trial court held a hearing on the plea to the jurisdiction, the appellate record does not reveal when the hearing was held. What's more, once a summary judgment motion is filed, amending the motion to add new grounds restarts the 21-day notice period for the hearing. *Sams v. N.L. Indus., Inc*., 735 S.W.2d 486, 488 (Tex. App.—Houston [1st Dist.] 1987, no writ) (concluding that new grounds asserted in reply brief were new summary judgment motion that restarted 21-day notice period). Here, the "City's Second Supplement to Plea to the Jurisdiction" raised new grounds for dismissal based on the 2011 City of Sealy Resolution, thereby restarting the hearing deadline. Yet in this filing, the City recounted that the trial court had *already held* a hearing on the City's plea to the jurisdiction. The record contains no indication that the trial court set another hearing to consider the new grounds raised in the supplement.

That was not the only procedural misstep. A trial court may not grant summary judgment in favor of a party that does not properly move for it by motion. *Willy v. Winkler*, No. 01-10-00115-CV, 2010 WL 5187719, at *2 (Tex. App.—Houston [1st Dist.] Dec. 23, 2010, no pet.) (mem. op.); *see Teer v. Duddlesten*, 664 S.W.2d 702, 703 (Tex. 1984) (op. on reh'g); *Sw. Invs. Diversified, Inc. v. Estate of Mieszkuc*, 171 S.W.3d 461, 468 n.15 (Tex. App.—Houston [14th Dist.] July 26, 2005, no pet.); *see*

also Young v. Hodde, 682 S.W.2d 236, 237 (Tex. 1984) (per curiam) (agreeing with court of appeals that "trial court erred in rendering the take-nothing judgment against" defendant's counterclaim "in the absence of a motion for summary judgment by [the plaintiff] seeking that relief"). Town Park City argues that the City Officials were not parties to the plea to the jurisdiction. Here, the "City of Sealy's Plea to the Jurisdiction" and the "City of Sealy's Supplement to Plea to the Jurisdiction" purport to be filed only on behalf of the City itself. The City Officials were not a party to these filings.[3] Although the Second Supplement purports to join the City Officials, the trial court never held a hearing on the Second Supplement.

Defendants' failure to follow summary judgment procedure distinguishes this case from those in which courts have reviewed a preliminary dismissal as though it were a summary judgment. *See, e.g.*, *Cuba v. Williams*, No. 01-18-00122-CV, 2019 WL 1716061, at *3 (Tex. App.—Houston [1st Dist.] Apr. 18, 2019, no pet.) (mem. op.) (reviewing motion to dismiss as summary judgment motion where motion was filed 21 days prior to hearing on motion); *Briggs v. Toyota Mfg. of Tex*., 337 S.W.3d

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[3] Defendants argue that any motion filed by the City is necessarily joined by the City Officials because all of the claims against the City Officials are merely "redundant" of those asserted against the State. We disagree. The Texas Supreme Court has held that a suit seeking a declaratory remedy for an official's *ultra vires* act must be brought against the city official in her official capacity. *City of El Paso v. Heinrich*, 284 S.W.3d 366, 373 (Tex. 2009). It "cannot be brought against the [city], which retains immunity, but must be brought against the [city] actors in their official capacity." *See id.* This is true even though the suit is, "for all practical purposes," against the City. *See id.* Just as a plaintiff must sue the proper party, defendants cannot ignore the distinctions between the parties in litigating that suit.

275, 281 (Tex. App.—San Antonio 2010, no pet.) (although defendant asserted affirmative defense in motion to dismiss, record indicated that summary-judgment procedure was utilized in connection with motion to dismiss, including filing motion 21 days prior to hearing). "When parties do not adhere to proper motion practice, 'it is unclear what rules and standards we should apply on appeal.'" *Tex. Underground*, 335 S.W.3d at 676 (citations and internal quotation marks omitted). We need not muddle and guess.

Given these procedural irregularities, we do not reach the parties' res judicata arguments. Instead, we must determine whether the judgment on each of Town Park Center's four claims can be affirmed based on governmental immunity, which is properly raised in a plea to the jurisdiction. If governmental immunity does not require dismissal, then we must remand for further proceedings.

II. Governmental Immunity

Turning to governmental immunity, we find that the trial court did not err by dismissing Town Park Center's vested rights claim, takings claim, and *ultra vires* claim. We do, however, find that the trial court erred by dismissing Town Park Center's claim for breach of the EDA.

Sovereign immunity protects the State of Texas and its agencies from suit and liability. Governmental immunity provides similar protections to political subdivisions of the State, such as cities. *Chambers-Liberty Ctys. Navigation Dist.*,

575 S.W.3d at 344. It is undisputed that the City of Sealy is a political subdivision of the State for immunity purposes. Governmental immunity includes both immunity from liability, which bars enforcement of a judgment against a governmental entity, and immunity from suit, which bars suit against the entity altogether. *Lubbock Cty. Water Control & Improvement Dist. v. Church & Akin, L.L.C.*, 442 S.W.3d 297, 300 (Tex. 2014). Immunity from suit deprives the trial court of subject-matter jurisdiction and completely bars a plaintiff's claim. *Id.*

Governmental immunity bars suit against the City unless the Legislature has waived the City's immunity. *Chambers-Liberty Ctys. Navigation Dist.*, 575 S.W.3d at 344; *Hall v. McRaven*, 508 S.W.3d 232, 238 (Tex. 2017) ("The sovereign may, however, waive or limit its immunity."). If the Legislature waives immunity by statute, it must do so by clear and unambiguous language. *Chambers-Liberty Ctys. Navigation Dist.*, 575 S.W.3d at 344; 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.").

A. Breach of EDA

A governmental entity that enters into a contract necessarily waives immunity from liability, voluntarily binding itself to the terms of the contract, but it does not waive immunity from suit. *Church & Akin*, 442 S.W.3d at 300. Local Government

Code Chapter 271 addresses the authority of municipalities and other local governments to enter into contracts. Section 271.152 provides that "[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 § 271.152; *Church & Akin*, 442 S.W.3d at 300; *Ben Bolt-Palito Blanco Consol. Indep. Sch. Dist. v. Tex. Political Subdivisions Prop./Cas. Joint Self-Ins. Fund*, 212 S.W.3d 320, 327 (Tex. 2006) ("[B]y enacting section 271.152, the Legislature intended to loosen the immunity bar so that *all* local governmental entities that have been given or are given the statutory authority to enter into contracts shall not be immune from suits arising from those contracts.") (internal quotations omitted).

A "contract subject to this subchapter" means "a written contract stating the essential terms of the agreement for providing goods or services to the local governmental entity that is properly executed on behalf of the local governmental entity." TEX. LOC. GOV'T CODE § 271.151(2)(A). Section 271.153 limits the total amount of money that can be awarded in a suit against a local governmental entity to "the balance due and owed by the local governmental entity under the contract as it may have been amended, including any amount owed as compensation for the increased cost to perform the work as a direct result of owner-caused delays or

acceleration"; the amount owed for change orders or additional work the contractor is directed to perform by a local governmental entity in connection with the contract; reasonable and necessary attorney's fees that are equitable and just; and interest as allowed by law. *Id.* § 271.153(a). Consequential damages and exemplary damages may not be awarded. *Id.* § 271.153(b).

Courts must look beyond the title of a written contract to determine whether it satisfies the waiver requirements of Chapter 271. *Church & Akin,* 442 S.W.3d at 301. Chapter 271 does not define "services," and "the term is broad enough to encompass a wide array of activities." *Kirby Lake Dev., Ltd. v. Clear Lake City Water Auth.*, 320 S.W.3d 829, 839 (Tex. 2010). Courts have interpreted "services" to generally include "any act performed for the benefit of another under some arrangement or agreement whereby such act was to have been performed." *Houston Cmty. Coll. Sys. v. HV BTW, LP,* 589 S.W.3d 204, 210 (Tex. App.—Houston [14th Dist.] 2019, no pet.); *City of Galveston v. CDM Smith, Inc.*, 470 S.W.3d 558, 566 (Tex. App.—Houston [14th Dist.] 2015, pet. denied).

The services provided to the governmental entity "need not be the primary purpose of the agreement." *Church & Akin*, 442 S.W.3d at 302; *Kirby Lake Dev.*, 320 S.W.3d at 839. However, "[w]hen a party has no right under a contract to receive services, the mere fact that it may receive services as a result of the contract is insufficient to invoke chapter 271's waiver of immunity. At best, such services are

only an 'indirect' and attenuated' benefit under the contract." *Church & Akin*, 442 S.W.3d at 303; *E. Houston Estate Apartments, L.L.C. v. City of Houston*, 294 S.W.3d 723, 736 (Tex. App.—Houston [1st Dist.] 2009, no pet.) ("The plain meaning of the statute supports the conclusion that section 271.152 does not apply to contracts like the one . . . in which the benefit that the City would receive is an indirect, attenuated one."); *Berkman v. City of Keene*, 311 S.W.3d 523, 527 (Tex. App.—Waco 2009, pet. denied) (holding that contract providing only "indirect" or "attenuated" benefits to governmental entity does not waive immunity under Chapter 271).

"Construing section 271.152's waiver of immunity with section 271.153(a)'s limitation on damages to which the waiver applies, the waiver will typically apply only to contracts in which the governmental entity agrees to pay the claimant for the goods or services that the claimant agrees to provide to the governmental entity." *Church & Akin*, 442 S.W.3d at 304. The Texas Supreme Court has acknowledged that a party may agree to provide goods or services "in exchange for something other than payment," but "the absence of any agreement by the governmental entity to pay for goods or services may indicate that the claimant did not in fact agree to provide goods or services to the governmental entity." *Id.* at 305.

The City argues that the EDA is not a contract for goods and services under Chapter 271. It argues that the EDA relates solely to Town Park Center's efforts to develop its own property, and any benefits or services that the City might receive

due to the contract are indirect and attenuated. As support, the City points out that, under the EDA, the City did not agree to pay Town Park Center for anything. Rather, the City agreed to provide Town Park Center with an annual grant of public funds to encourage it to develop its property, and this grant was contingent on Town Park Center's development of the property and the City's receipt of sales and use taxes from businesses to be constructed on the property. We disagree and conclude that the EDA constitutes a contract for goods or services under Chapter 271.

The EDA recited that the property "is proposed to be developed for low-moderate intensity commercial and retail uses, and will result in the creation of numerous employment opportunities for the citizens of the City, shall promote state and local economic development and stimulate business and commercial activity in the City." The EDA further stated that development of the project "will ultimately better enhance the City's economic growth." The City agreed to pay annual grant payments to Town Park Center as an incentive for Town Park Center to develop its property in accordance with the EDA. These payments were to be calculated based on the City's share of sales and use tax revenue collected from within the boundaries of the project, and the City's obligation to make the payments was "subject to the actual receipt of any sales and use taxes." The parties also agreed that the EDA "is for the mutual benefit of development of the Property, and that the development

standards and land use and design requirements of this Agreement constitute good and sufficient consideration for the Grant Payments."

Town Park Center agreed to provide "the infrastructure for water and wastewater service into the Project from existing service lines adjacent to the property," and the City agreed to provide water and wastewater treatment services to the property. Town Park Center also agreed to construct internal access streets throughout the property, and these driveways would be owned, operated, and maintained by Town Park Center. However, while Town Park Center was to fund 100% of the cost of designing and constructing Town Park Drive, the parties agreed that this road "shall be dedicated as a public right-of-way." The EDA also required Town Park Center to partially fund the design and construction of a frontage road along I-10. The Plan of Development, attached as an exhibit to the EDA, proposed that Town Park Drive would cross through the development and would connect an existing street, Miller Road, to the to-be-built I-10 frontage road.

We agree with the City that the primary purpose of the EDA was to encourage Town Park Center to develop property that it owns by designing and constructing a retail shopping center. In doing this, however, the parties agreed that Town Park Center was obligated, among other things, to partially fund the design and construction of the I-10 frontage road and to design and construct Town Park Drive. Town Park Drive then would become a public right-of-way connecting an existing

city street to the newly-built frontage road. We conclude that these are "services" provided to the City within the definition of section 271.151(2)(A). *See JNC Land Co. v. City of El Paso*, 479 S.W.3d 903, 911 (Tex. App.—El Paso 2015, pet. denied) (concluding that agreement requiring developer to improve right-of-way extensions and dedicate them to city, dedicate and improve neighborhood and community parkland, and set aside real property for future acquisition by city constituted contract for goods or services under Chapter 271); *Town of Flower Mound v. Rembert Enters., Inc.*, 369 S.W.3d 465, 473 (Tex. App.—Fort Worth 2012, pet. denied) (concluding that contract requiring plaintiff to construct road, design and construct right-turn lane, and work with Texas Department of Transportation concerning design and construction of right-turn lane was contract requiring plaintiff to perform services to city and therefore fell within section 271.152's waiver of immunity); *see also Church & Akin*, 442 S.W.3d at 302 (stating that services provided to governmental entity under contract need not be primary purpose of agreement).

The City argues that any services provided to it under the EDA are merely indirect or attenuated benefits, and it cites the San Antonio Court of Appeals' decision in *CHW-Lattas Creek, L.P. v. City of Alice* as support. In *CHW-Lattas Creek*, the parties entered into a development agreement under Local Government Code Chapter 380, as the parties did in this case. *See* 565 S.W.3d 779, 782 (Tex.

App.—San Antonio 2018, pet. denied). Under this agreement, CHW agreed to sell 22 acres of land to the City of Alice and dedicate another 18 acres of land to the city, and the city agreed to facilitate the construction of a hotel on the property and to construct a multi-use complex including an amphitheater, an aquatic center, and a conference center. *Id.* at 782–83. CHW also agreed to dedicate the surface estate of an additional 30 acres to the city for use as a city park. *Id.* at 783. The parties also agreed that CHW would submit a petition for voluntary annexation of its entire property—over 350 acres—and the parties would work together to create a development plan for the property. *Id.*

After the city allegedly failed to construct roads, increase water pressure to serve the property, and construct the amphitheater, CHW sued the city for breach of contract. *Id.* at 784. The trial court granted the city's plea to the jurisdiction and dismissed the case on immunity grounds. *Id.* The San Antonio Court stated that the parties agreed to "undertake various activities to develop" the property and "cooperate with each other in doing so." *Id.* at 788. While the city agreed to facilitate the project, the agreement "did not obligate or require CHW to provide any services to the City, and the City did not agree to pay CHW for any services." *Id.* Any actions that CHW took pursuant to the agreement "were in furtherance of CHW's desire to develop its land and were not services provided to the City under the essential terms of the Development Agreement." *Id.* The San Antonio Court concluded that the

development agreement was not an agreement to provide services to the city, and therefore the city had not waived its immunity under Chapter 271. *Id.* at 789; *see also E. Houston Estate Apartments*, 294 S.W.3d at 734–37 (holding that agreement between city and owner of empty apartment building for city to loan owner portion of funds received from federal agency so owner could rehabilitate privately-owned apartment building was not contract for goods and services under Chapter 271 because agreement contained no requirement that owner provide any municipal service to city, and any benefit city would receive from refurbishing housing for low-income families was indirect and attenuated benefit).

Unlike the development agreement at issue in *CHW-Lattas Creek*—in which the City of Alice agreed to bear construction responsibilities on property conveyed to it by CHW—the EDA required Town Park Center to take actions that provided a service to the City: construction of Town Park Drive and the I-10 frontage road. Furthermore, the parties agreed that the project would mutually benefit both Town Park Center as the owner of the property and the City by "stimulat[ing] business and commercial activity in the City" and "better enhanc[ing] the City's economic growth." This is a benefit provided directly to the City. *Cf. City of League City v. Jimmy Changas, Inc.*, 619 S.W.3d 819, 827 (Tex. App.—Houston [14th Dist.] 2021, pet. filed) (concluding that Chapter 380 agreement in which city agreed to provide incentives for plaintiff to build restaurant within city limits was proprietary function

of city—not governmental function—because agreement was primarily intended to benefit city, and emphasizing language that purpose of agreement was to "stimulate business and commercial activity" in city and that development "will contribute to the economic development of the City by generating employment and other economic benefits to the City").

The City correctly points out that the EDA only requires the City to make annual grant payments from sales and use taxes generated within the property's boundaries and does not obligate the City to pay Town Park Center for construction of Town Park Drive or the I-10 frontage road. The Texas Supreme Court has stated that "the absence of any agreement by the governmental entity to pay for goods or services may indicate that the claimant did not in fact agree to provide goods or services to the governmental entity," but it has also noted that a party may agree to provide goods or services "in exchange for something other than payment." *See Church & Akin*, 442 S.W.3d at 305. The fact that the EDA does not require the City to pay Town Park Center specifically for construction of Town Park Drive and the I-10 frontage road therefore does not necessarily mean that the EDA is not a contract for goods or services.

We conclude that the EDA is a contract for goods or services within the meaning of Chapter 271. *See* TEX. LOC. GOV'T CODE § 271.151(2). Town Park Center has thus established a waiver of immunity with respect to its breach of

contract claim against the City. *See id.* § 271.152. We therefore hold that the trial court erred by granting the City's plea to the jurisdiction on Town Park Center's claim for breach of the EDA.

B. "Vested Rights" Claim

Local Government Code Chapter 245 "creates a system by which property developers can rely on a municipality's land-use regulations in effect at the time the original application for a permit had been filed." *City of Houston v. Commons at Lake Houston, Ltd.*, 587 S.W.3d 494, 499 (Tex. App.—Houston [14th Dist.] 2019, no pet.). Section 245.002(a) provides:

> Each regulatory agency shall consider the approval, disapproval, or conditional approval of an application for a permit solely on the basis of any orders, regulations, ordinances, rules, expiration dates, or other properly adopted requirements in effect at the time:
>
> (1) the original application for the permit is filed for review for any purpose, including review for administrative completeness; or
>
> (2) a plan for development of real property or plat application is filed with a regulatory agency.

TEX. LOC. GOV'T CODE § 245.002(a). A permit applicant's rights accrue "on the filing of an original application or plan for development or plat application that gives the regulatory agency fair notice of the project and the nature of the permit sought." *Id.* § 245.002(a-1). Section 245.002 "establishes that municipal regulatory agencies must consider a permit application under the terms of the ordinances that were in

effect at the time a permit, development plan, or plat application was filed." *Commons at Lake Houston*, 587 S.W.3d at 499.

Chapter 245 defines "permit" as "a license, certificate, approval, registration, consent, permit, contract or other agreement for construction related to, or provision of, service from a water or wastewater utility owned, operated, or controlled by a regulatory agency, or other form of authorization required by law, rule, regulation, order, or ordinance that a person must obtain to perform an action or initiate, continue, or complete a project for which the permit is sought." TEX. LOC. GOV'T CODE § 245.001(1). Chapter 245 also defines "project" as "an endeavor over which a regulatory agency exerts its jurisdiction and for which one or more permits are required to initiate, continue, or complete the endeavor." *Id.* § 245.001(3). Section 245.006 provides that Chapter 245 is enforceable "only through mandamus or declaratory or injunctive relief" and further provides that "[a] political subdivision's immunity from suit is waived in regard to an action under this chapter." *Id.* § 245.006(a)–(b).

Under Chapter 245, once the first application for a permit required for a property-development project is filed with a regulatory agency, the agency's regulations are "effectively 'frozen' in their then-current state and the agency is prohibited from subsequent regulatory changes to further restrict the property's use." *Hatchett v. W. Travis Cty. Pub. Util. Agency*, 598 S.W.3d 744, 748 (Tex. App.—

Austin 2020, pet. denied); *Harper Park Two, LP v. City of Austin*, 359 S.W.3d 247, 248–49 (Tex. App.—Austin 2011, pet. denied). Upon filing of the first permit application, the project has "vested rights" and "is not subject to intervening regulations or changes after the vesting date." *Hatchett*, 598 S.W.3d at 749 (quoting *City of San Antonio v. Rogers Shavano Ranch, Ltd.*, 383 S.W.3d 234, 245 (Tex. App.—San Antonio 2012, pet. denied)). Rights vest in a particular project, not the property itself. *Id.* "The obvious intent of chapter 245 is to prohibit land-use regulators from changing the rules governing development projects 'in the middle of the game' . . . ." *Harper Park Two*, 359 S.W.3d at 250.

Town Park Center alleged that the parties entered into the EDA in April 2015 "in conjunction with" final approval for the plat of the project.[4] Under a prior drainage plan, the City added over 23.1 acre feet of storm water detention capacity to the B&PW Park detention pond, and the project fell within the drainage basin for this facility. Town Park Center alleged that the EDA granted it a right to purchase

[4] Town Park Center alleged that the vesting date for the project occurred in February 2009 when the City submitted "a letter outlining plans for 71.3 acres for the Town Park Center and IH-10 frontage road projects." Under Local Government Code section 245.002(a), however, vesting occurs at the time "the original application for the permit is filed for review for any purpose" or "a plan for development of real property or plat application is filed with a regulatory agency." TEX. LOC. GOV'T CODE § 245.002(a). The vesting date is therefore not the date the City submitted a letter concerning plans for the project; rather, the vesting date is the date Town Park Center filed the plan for development or plat application with the applicable City regulatory agency. *See id.* § 245.002(a-1). This date does not appear in the record; however, Town Park Center alleges that the plat for the project was finally approved in April 2015.

storage capacity in B&PW Park, but after the parties executed the EDA, City officials refused to allow Town Park Center to purchase storage capacity. Town Park Center further alleged that, to meet the needs of HEB, Town Park Center attempted to assign HEB 4.86 acre feet of storage capacity in JAC Park—capacity that Town Park Center itself owned—but the City "refuse[d] to acknowledge" this assignment.

Chapter 245 protects developers from changes in land-use regulations after a plat application or a plan for development of the property has been filed with a regulatory agency. *See Hatchett*, 598 S.W.3d at 748; *Commons at Lake Houston*, 587 S.W.3d at 499; *Harper Park Two,* 359 S.W.3d at 248–49. Town Park Center alleged that it had "vested rights" in the project at least by the date the City approved the final plat for the project. Town Park Center is correct that the City, in considering a permit—a term which is broadly defined under section 245.001(1) to include an "approval" or "other form of authorization"—in connection with the project, was required to apply only its "orders, regulations, ordinances, rules, expiration dates, or other properly adopted requirements in effect at the time." *See* TEX. LOC. GOV'T CODE § 245.001, 245.002(a); *Harper Park Two*, 359 S.W.3d at 252.

With respect to its claim that the City has denied its vested rights to purchase storm water detention capacity, Town Park Center alleges that City of Sealy Resolution 2011-05 required the City to sell it detention capacity from B&PW Park. We disagree based on the plain language of that resolution. That resolution amended

the City's "Schedule of Fees" to provide that the City could sell capacity in B&PW Park, that the city engineer must determine whether the intended use of the capacity was acceptable, and that the City could sell capacity for $15,000 per acre foot. This resolution did not require the City to sell storage capacity in B&PW Park.

Town Park Center has not identified any City order, regulation, ordinance, rule, or other requirement in effect when its rights in the project vested that mandates the sale of capacity from either B&PW Park or JAC Park.[5] Instead, any alleged right that Town Park Center has to purchase capacity in B&PW Park arises solely from the EDA.

Although Town Park Center has asserted a claim that the City breached the EDA by refusing to sell it capacity from B&PW Park, it has not alleged that the City had *changed* its orders, regulations, ordinances, rules, expiration dates, or other requirements after the vesting date of the project and impermissibly attempted to apply these changed requirements to the project. We therefore conclude that Town Park Center's allegations that the City violated the vested rights statutes by refusing to sell it detention capacity do not state a valid claim under Chapter 245, and

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[5] In its original petition filed in the first lawsuit in February 2017, Town Park Center alleged that the City "unilaterally impose[d] a one acre limit on the use of any detention capacity from the JAC Park pond, thus allowing the City to deny a request for a letter to [HEB] acknowledging the offsite detention capacity [Town Park Center] had assigned to them." Town Park Center, however, did not include this allegation in its original petition filed in the underlying lawsuit.

therefore the City's governmental immunity for this claim has not been waived.[6] *See City of Floresville v. Starnes Inv. Grp., LLC*, 502 S.W.3d 859, 869–70 (Tex. App.—San Antonio 2016, no pet.) (concluding that trial court erred by denying city's plea to jurisdiction on Chapter 245 claim in part because plaintiff did not point to any change in city's regulations that occurred after plaintiff filed zoning application).

C. Takings Claim

Article I, section 17 of the Texas Constitution provides that "[n]o person's property shall be taken, damaged, destroyed for or applied to public use without adequate compensation being made." TEX. CONST. art. I, § 17. If the government appropriates property without paying adequate compensation, the owner may recover the damages resulting from the taking in an inverse condemnation suit. *Westgate, Ltd. v. State*, 843 S.W.2d 448, 452 (Tex. 1992).

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[6] Town Park Center also alleged that, after the City had initially refused to sell capacity from B&PW Park, it had agreed to provide the City with a Master Drainage Plan for the project "based on the assurance that [Town Park Center] would then be able to satisfy the demands of [HEB]." The City did not approve the sale of capacity after submission of the drainage plan; no ordinance required submission of the drainage plan; and, to Town Park Center's knowledge, no other developer had ever been required to submit such a plan. Town Park Center alleged: "Detention capacity sufficient to complete the construction of Town Park Center Drive has been denied or delayed by requiring additional engineering calculations that were not required as of the date of vesting . . . ." Town Park Center has not focused on these allegations in its briefing in the trial court or on appeal, and it has not provided any substantive analysis or case law on whether these allegations state a sufficient claim under the vested rights statutes to waive governmental immunity. *See* TEX. R. APP. P. 38.1(i).

A taking may be either physical or regulatory. *Mayhew v. Town of Sunnyvale*, 964 S.W.2d 922, 933 (Tex. 1998). A physical taking is an unwarranted physical appropriation or invasion of the property. *City of Houston v. Norcini*, 317 S.W.3d 287, 292 (Tex. App.—Houston [1st Dist.] 2009, pet. denied). A regulatory taking can occur when a governmental agency imposes restrictions that either deny a property owner all economically viable use of its property or that unreasonably interfere with the owner's right to use and enjoy the property. *Id.* Here, Town Park Center alleged a regulatory taking of its property.[7]

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[7] At the time the City first filed its plea to the jurisdiction, Town Park Center had not asserted a takings claim. Town Park Center then supplemented its petition to assert a takings claim and responded to the City's plea to the jurisdiction, noting that the City had not amended its plea to address the takings claim. Town Park Center did not otherwise address its takings claim in this response. The City then supplemented its plea to the jurisdiction and argued that the City's alleged failure to sell drainage capacity to Town Park Center did not constitute a taking under the Texas Constitution. The City did not acknowledge the distinction between physical takings and regulatory takings in its supplement. Instead, the City argued that Town Park Center's "effort to include an inverse condemnation claim, filed only after the City filed its most recent plea, also does not effect a waiver of the City's immunity." The City also argued that Town Park Center's takings claim is a disguised claim for breach of contract and that property owners do not have a vested right to use their property in any certain way without restriction. The City also cited a Texas Supreme Court case in the physical takings context for the proposition that only affirmative action by a governmental entity, and not non-feasance, will support a takings claim. *See Harris Cty. Flood Control Dist. v. Kerr*, 499 S.W.3d 793, 799 (Tex. 2016). Town Park Center did not amend its response or file a supplemental response to the City's supplemental plea to the jurisdiction. Town Park Center thus has not provided any arguments in writing to the trial court demonstrating a waiver of immunity with respect to its takings claim. *See Town of Shady Shores v. Swanson*, 590 S.W.3d 544, 550 (Tex. 2019) ("A plaintiff has the burden to affirmatively demonstrate the trial court's jurisdiction. That burden encompasses the burden of establishing a waiver of sovereign immunity in suits against the government.").

Courts have identified four distinct theories that may be invoked when the plaintiff challenges a governmental regulation as an unconstitutional taking: (1) a physical taking, which occurs when a regulatory action requires a property owner to suffer physical invasion of his property; (2) a total regulatory taking, which occurs when a regulatory action completely deprives an owner of all economically beneficial use of its property; (3) a taking which occurs when a regulatory action unreasonably interferes with a property owner's right to use and enjoy its property; and (4) a land-use exaction, which occurs when a governmental entity requires a property owner to give up its right for just compensation for property taken in exchange for a discretionary benefit conferred by the government. *See Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 548 (2005); *Edwards Aquifer Auth. v. Day*, 369 S.W.3d 814, 838–39 (Tex. 2012); *City of Houston v. Maguire Oil Co.*, 342 S.W.3d 726, 735–36 (Tex. App.—Houston [14th Dist.] 2011, pet. denied).

Town Park Center alleges the second category of regulatory takings—a "total regulatory taking" in which a regulatory action deprives it of all economically beneficial use of its property. Under this category of regulatory takings, a taking occurs when the regulatory action denies all economically beneficial or productive use of land, such that the property owner must, as a result of the regulation, effectively leave its property "economically idle." *Lucas v. S. Carolina Coastal Council*, 505 U.S. 1003, 1015, 1019 (1992).

If the regulatory action is a "total regulatory taking," the government must pay just compensation unless "'background principles of nuisance and property law' independently restrict the owner's use of the property." *Lingle*, 544 U.S. at 538 (quoting *Lucas*, 505 U.S. at 1029). The Supreme Court later stated that its holding in *Lucas* was "limited to 'the extraordinary circumstance when *no* productive or economically beneficial use of land is permitted.'" *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 535 U.S. 302, 330 (2002); *see Lingle*, 544 U.S. at 539 ("In the *Lucas* context, of course, the complete elimination of a property's value is the determinative factor."); *Palazzolo v. Rhode Island*, 533 U.S. 606, 631 (2001) ("Assuming a taking is otherwise established, a State may not evade the duty to compensate on the premise that the landowner is left with a token interest."); *see also Sheffield Dev. Co. v. City of Glenn Heights*, 140 S.W.3d 660, 671 (Tex. 2004) (noting that "total regulatory takings" are limited to "extraordinary circumstance" in which no productive or economically beneficial use of land is permitted and landowner is left with token interest in property).

Sovereign and governmental immunity do not shield the government from liability for compensation under the takings clause. *Harris Cty. Flood Control Dist. v. Kerr*, 499 S.W.3d 793, 799 (Tex. 2016); *State v. Brownlow*, 319 S.W.3d 649, 652 (Tex. 2010) ("Sovereign immunity from suit does not protect the State from a claim under the takings clause."). To defeat a plea to the jurisdiction, the plaintiff need

only plead sufficient facts to show the elements of a takings claim. *Tex. S. Univ. v. State St. Bank & Tr. Co.*, 212 S.W.3d 893, 904 (Tex. App.—Houston [1st Dist.] 2007, pet. denied). However, "[i]n the absence of a properly pled takings claim, the state retains immunity." *Hearts Bluff Game Ranch, Inc. v. State*, 381 S.W.3d 468, 476 (Tex. 2012); *see Cernosek Enters., Inc. v. City of Mont Belvieu*, 338 S.W.3d 655, 662 (Tex. App.—Houston [1st Dist.] 2011, no pet.) (concluding that trial court did not err by granting plea to jurisdiction when plaintiff did not "state specific facts evincing a [regulatory] taking" by governmental entity).

Town Park Center asserted its takings claim in its first supplemental petition. Town Park Center alleged that it was deprived of the beneficial use of the property beginning in October 2015, when the City prohibited the sale of off-site storage capacity in the B&PW Park detention pond and instead effectively required Town Park Center to provide on-site storage capacity. It alleged "that the loss of marketability created by the denial of its vested right to off-site detention was so burdensome as to constitute a compensable taking." Town Park Center alleged that the value of the property was at least $7.1 million, "or, alternatively, $10.8 million if valued at the selling price of the first property sold, being 10.565 acres to HEB Grocery Company." Town Park Center also alleged, in its original petition filed in April 2019, that it had been able to close on its contract with HEB, although it had

to make a concession that "included the assigning of an additional 1.9 acres to HEB for use as their 'on-site' detention, as wrongfully required by the City."

Although Town Park Center alleges that by refusing to allow it to purchase storage capacity in the B&PW Park detention pond the City deprived it of the beneficial use of the property, Town Park Center has not alleged any facts supporting this assertion. Instead, Town Park Center acknowledged in its original petition that, despite the City's refusals to sell it storage capacity in the B&PW Park detention pond, it had closed on its contract with HEB by agreeing to allow HEB more acreage so it could have on-site storage capacity.

Moreover, the possibility of using on-site storage capacity was contemplated in the EDA itself, which provided that "[o]n-site storm water detention and off-site storm water detention may be utilized on this project and will be in accordance with the City ordinances and state law." Denying Town Park Center use of storage capacity in B&PW Park might require Town Park Center to adjust its plans for the development or amend the plat for the development such that space for on-site storage capacity may be designated. Town Park Center has not, however, alleged that the property could no longer be used for its intended purpose of developing a shopping center, nor has it alleged that the property had been rendered valueless by the City's decision. *See Hearts Bluff Game Ranch*, 381 S.W.3d at 476 ("Evidence

submitted with the plea may rebut the pleadings and undermine the waiver of immunity.").

We conclude that Town Park Center has not asserted a valid total regulatory takings claim; instead, Town Park Center's pleadings affirmatively negate a total regulatory takings claim. *See Houston Belt & Terminal Ry.*, 487 S.W.3d at 160 (stating that if pleadings affirmatively negate jurisdiction, trial court should grant plea to the jurisdiction without affording plaintiff opportunity to amend); *Cernosek Enters.*, 338 S.W.3d at 662 (concluding that allegations that "property value has been seriously diminished, [its] property and lives (as well as the lives of employees and customers) are at serious risk, [it] has lost business, and [its] general welfare and ability to enjoy a peaceable community [has] been seriously harmed" do not state specific facts demonstrating regulatory taking); *contra Vill. of Tiki Island v. Ronquille*, 463 S.W.3d 562, 575–78 (Tex. App.—Houston [1st Dist.] 2015, no pet.) (concluding that plaintiff's petition specifically alleged how city's actions affected her use of property and harm resulting from city's actions, such that plaintiff sufficiently alleged how city ordinance unreasonably interfered with her right to use and enjoy property). We hold that the trial court properly granted the City's plea to the jurisdiction on Town Park Center's takings claim.

D. Ultra Vires *Claims Against City Officials*

Town Park Center challenges the dismissal of the City Officials on two grounds. First, Town Park Center argues that the City Officials never filed a plea to the jurisdiction, so the trial court erred by dismissing them from the suit. Second, Town Park Center argues that its claims against the City Officials fall within the *ultra vires* act exception to governmental immunity. We disagree on both points.

Resolving Town Park Center's first argument is complicated by the fact that the parties did not adhere to the Texas Rules of Civil Procedure governing pleadings. Specifically, the parties made numerous "supplements" to their pleadings when they should have filed pleading amendments. This Court has held that a supplemental pleading "may only be used to respond to the last preceding pleading filed by another party; it may not be used to amend one's own pleading." *Retzlaff v. Tex. Dep't of Criminal Justice*, 135 S.W.3d 731, 737 (Tex. App.—Houston [1st Dist.] 2003, no pet.) (citing TEX. R. CIV. P. 69). "Consequently, a supplemental pleading is not an appropriate method of stating a new cause of action or an additional affirmative defense." *Id.* (citing *Wegener v. Erdman*, 154 S.W.2d 969, 970 (Tex. App.—Fort Worth 1941, no writ)). The appropriate method to add a cause of action or affirmative defense is to amend the deficient pleading. TEX. R. CIV. P. 62. When an amended pleading is filed, the amended pleading supersedes and supplants the prior

pleading, which may no longer be considered. *See* TEX. R. CIV. P. 65; *Retzlaff*, 135 S.W.3d at 737–38.

The parties did not follow these rules. Instead of filing an amended petition, Town Park Center filed "supplements" to its original petition in the Third Lawsuit adding new claims, including the claim against the City Officials alleging *ultra vires* acts. Defendants did not object to these "supplements," however. Similarly, the City filed multiple "supplements" to its plea to the jurisdiction adding new grounds for dismissal when it should have amended its original plea. Yet Town Park Center never objected to this procedural impropriety. Thus, any objections are deemed waived. *See* TEX. R. CIV. P. 90 (providing that any objection to mistitled or otherwise defective pleading must be made in writing before judgment is signed or objection is deemed waived).

On appeal, the parties assume that the trial court considered the various supplements to the petition and the plea to the jurisdiction in dismissing the claims against all defendants. No party has argued that any supplement superseded or supplanted any prior filing. In this confusing posture, we find that the City Officials joined the City's Plea to the Jurisdiction in the Second Supplement to the Plea to the Jurisdiction. The City's initial plea to the jurisdiction was entitled "City of Sealy's Plea to the Jurisdiction." This document did not purport to be filed on behalf of the

individual City Officials. Nevertheless, in the "Second Supplement," the City stated that it "and the individual Defendants supplement their Plea to the Jurisdiction."

Although Town Park Center never filed a response to this document, Town Park Center had already extensively briefed its argument that there was no immunity bar for its claims alleging *ultra vires* acts by the City Officials. In the City's "Plea to the Jurisdiction" and in its First Supplement, the City argued that immunity barred any claims against the City Officials. The City Officials then joined that Plea to the Jurisdiction in the Second Supplement, which made additional arguments on this same point.

Turning to immunity, we find that the trial court did not err in dismissing the claims against the City Officials. Even if the Legislature has not waived a governmental entity's immunity, a claim may proceed against a governmental official in their official capacity if the plaintiff successfully alleges that the official is engaging in *ultra vires* conduct. *Chambers-Liberty Ctys. Navigation Dist.*, 575 S.W.3d at 344; *Hall*, 508 S.W.3d at 238; *City of El Paso v. Heinrich*, 284 S.W.3d 366, 372 (Tex. 2009). An *ultra vires* suit does not attempt to exert control over the state; rather, this suit "attempt[s] to reassert the control of the state." *Houston Belt & Terminal Ry.*, 487 S.W.3d at 164 (quoting *Heinrich*, 284 S.W.3d at 372).

A plaintiff bringing an *ultra vires* claim must allege and ultimately prove that the official acted without legal authority or failed to perform a purely ministerial act.

Chambers-Liberty Ctys. Navigation Dist., 575 S.W.3d at 344–45 (quoting *Heinrich*, 284 S.W.3d at 372). A government officer with some discretion to interpret and apply a law may nevertheless act without legal authority—and thus act *ultra vires*—if the officer exceeds the bounds of their granted authority or if their acts conflict with the law itself. *Hall*, 508 S.W.3d at 238; *Houston Belt & Terminal Ry.*, 487 S.W.3d at 164 ("[G]overnmental immunity only extends to those government officers who are acting consistently with the law, which includes those who act within their granted discretion."). "Ministerial acts" are those "where the law prescribes and defines the duties to be performed with such precision and certainty as to leave nothing to the exercise of discretion or judgment." *Hall*, 508 S.W.3d at 238 (quoting *Sw. Bell Tel., L.P. v. Emmett*, 459 S.W.3d 578, 587 (Tex. 2015)).

Generally, retrospective monetary relief is barred and a plaintiff may only obtain prospective injunctive relief on an *ultra vires* claim. *Chambers-Liberty Ctys. Navigation Dist.*, 575 S.W.3d at 345. If the injury has already occurred and the only plausible remedy to the plaintiff is monetary damages, "an *ultra vires* claim will not lie." *City of Houston v. Houston Mun. Emps. Pension Sys.*, 549 S.W.3d 566, 576 (Tex. 2018). If the alleged *ultra vires* conduct is governmental inaction, a court may issue a writ of mandamus compelling action to bring the official into conformity with the law. *Id.* A writ of mandamus can be used to compel a public official to perform a ministerial act. *Id.* at 577. Merely failing to comply with a contract does

not give rise to an *ultra vires* claim. *Id.* at 576; *Klumb*, 458 S.W.3d at 12 ("[N]oncompliance with a contract does not give rise to an *ultra vires* claim.").

Town Park Center argues that the City Officials have acted *ultra vires* by violating City of Sealy Resolution 2011-05, which "clearly addresses the purchasing [of] storm water detention capacity in the pond located at the B&PW.'" As discussed above, this resolution amended the City's "Schedule of Fees" to "include fees for purchasing storm water detention capacity in the pond located at the B&PW Park." The resolution further stated that "the City Engineer shall evaluate its intended use as requested and determine if it is acceptable." Under the new schedule, capacity in the B&PW Park could be purchased for $15,000 per acre foot.

Importantly, however, Resolution 2011-05 does not mandate the sale of detention capacity from B&PW Park. It instead only provides that the City *may* sell detention capacity from B&PW Park, tasks the city engineer with determining whether the intended use is acceptable, and sets the cost for purchasing capacity at $15,000 per acre foot. The resolution does not require any city official to sell detention capacity to interested purchasers.

Because the resolution itself does not require the City to sell capacity from B&PW Park, the sale of this capacity is not a ministerial act, or an act that "the law prescribes and defines the duties to be performed with such precision and certainty as to leave nothing to the exercise of discretion or judgment." *See Hall*, 508 S.W.3d

at 238. Any obligation that city officials have to sell detention capacity in B&PW Park arises solely from the EDA, but failure to comply with a contract does not give rise to an *ultra vires* claim. *See Houston Mun. Emps. Pension Sys.*, 549 S.W.3d at 576; *Klumb*, 458 S.W.3d at 12. We conclude that Town Park Center has not alleged a proper *ultra vires* claim against the City Officials. We hold that the trial court did not err by granting the plea to the jurisdiction on this claim.

Conclusion

We reverse the portion of the trial court's judgment granting the City's plea to the jurisdiction on Town Park Center's claim for breach of the Economic Development Agreement, and we remand that claim to the trial court for further proceedings. We affirm the remainder of the trial court's judgment.

April L. Farris
Justice

Panel consists of Justices Kelly, Guerra, and Farris.