Opinion issued January 13, 2022

In The

Court of Appeals

For The

First District of Texas

NO. 01-20-00042-CV

ALLEN FLORES, SHARK VENTURES, INC. D/B/A SHARK SHACK, BLISS, INC. D/B/A BLISS LOUNGE, AND BARFLY LOUNGE, INC. D/B/A PLAYGROUND PATIO BAR, Appellants

V.

THE CITY OF GALVESTON, TEXAS, YAGA'S ENTERTAINMENT, INC., AND BRIAN MAXWELL, IN HIS OFFICIAL CAPACITY ONLY, Appellees

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On Appeal from the 212th District Court
Galveston County, Texas
Trial Court Case No. 19CV2139

MEMORANDUM OPINION

Allen Flores operates three businesses in the City of Galveston's Historic Strand District—Shark Ventures, Inc. d/b/a Shark Shack, Bliss, Inc. d/b/a Bliss

Lounge, and Barfly Lounge, Inc. d/b/a Playground Patio Bar (together with Flores, the "appellants"). Appellants filed suit against the City of Galveston (the "City") and City Manager Brian Maxwell (collectively, the "City Defendants"), in his official capacity, primarily seeking injunctive and declaratory relief barring the performance of a contract between the City and Yaga's Entertainment, Inc. ("Yaga's") for the planning, promotion, and management of the City's annual Mardi Gras festival. The City Defendants filed a plea to the jurisdiction, asserting the doctrines of governmental immunity and standing. The trial court granted the City Defendants' plea to the jurisdiction and dismissed the suit. In a single issue on appeal, appellants contend the trial court erred in granting the jurisdictional plea.

We affirm.

Background

The contract that is the subject of this appeal is the Galveston Mardi Gras Promoter Agreement 2016-18 (the "Contract") regarding the City's selection of Yaga's "to plan, organize, promote, and manage" its annual Mardi Gras festival, which has at times drawn as many as 300,000 visitors during festival weekends. The initial term of the Contract was, as its title suggests, for the 2016 to 2018 festival

years.[1] However, the City Defendants exercised an option in the Contract to extend its terms for two more years, making the Contract effective for the 2019 and 2020 festival years. The Contract expressly recognized the festival's "direct positive financial effect on the City due to the increased sales tax, permit fees and hotel occupancy revenue the City collects."

Described generally, the Contract authorized Yaga's to plan, promote, and manage the festival vendors, food, beverages, and entertainment, while the City retained responsibility for police and fire protection, emergency medical services, public works, sanitation, and code enforcement. The Contract obligated Yaga's to pay the City an annual event fee of $100,000 to "help offset [its] costs incurred in connection with" the Contract. Beyond this fee, however, the City agreed not to require Yaga's to obtain any permits or otherwise charge Yaga's "any permit fees, offset fees, or other fees of any kind whatsoever" in connection with the festival events or the production of the festival events.

The Contract conferred Yaga's with certain exclusive rights within the contractually defined festival areas—the "Event Areas." Except for certain festival parades, the City agreed not to "approve any other special events permits for any

[1] This Contract is not the first Mardi Gras Galveston Promoter Agreement the City has executed with Yaga's. Their first agreement, which contained many of the same terms, covered the 2011-2015 festival years.

Mardi Gras related or Mardi Gras themed events" in the thirty days before and after each festival, if "the [e]vent in question require[d] the use of City streets, right-of-way or other City property." In addition, Yaga's had the exclusive right to:

- "control . . . the approved dates, times and routes for all parades, processions and other organized activities that involve the use of City granted permits to travel into or through the Event Areas";
- "secure the Event Areas from public access, . . . charge admission to the public at rates to be established by Yaga's from time to time[, and] retain 100% of the proceeds from such admission";[2]
- "assign and sell space in the closed street areas [to vendors] and retain 100% of the proceeds";[3]
- "grant or deny permits to all strolling vendors who operate on, or sell to customers, who are on the public right-of-ways during the Events, within and around the perimeter of the Event Areas and along the parade routes";
- "sell vendor space to vendors with temporary permits from [the] Texas Alcoholic Beverage Commission, enabling them to sell alcoholic beverages to [e]vent participants in any and all Event [A]reas, subject to state and local alcoholic beverage regulations";
- "sell advertising and sponsorship regarding the [e]vents and for other Mardi Gras themed events in the City (excluding the parades described

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[2] In addition to the admission fee, Yaga's charged festival attendants a one dollar "Attendant Fee." Per the terms of the Contract, Yaga's was required to pay the entirety of this fee to the City for the first 60,000 attendees, one half of the fee for attendees between 60,001 and 75,000, and no part of the fee upon reaching 75,001 attendees. For the 2019 festival, the festival attendants were required to pay for admission for a total of 26 hours during the festival's first weekend and 20 hours during the festival's second weekend.

[3] Vendors remained subject to removal by the City for failure to obtain all required permits or for "health and safety violations or for blocking public streets."

[in the Contract]) which involve any use of City or public property, and retain 100% of the revenue"; and

- "regulate and grant permits for all Mardi Gras or [e]vent related signage in the Event Areas and around the perimeter of the Event Areas."

The Contract expressly required that the City "provid[e] and hir[e]" certified peace officers for crowd and traffic control but that Yaga's "provide at its expense security at all gates [sic] entrances." The City also agreed to provide the vehicle barriers necessary for street closures and the labor and materials for cleanup of "City streets, sidewalks and other City property in or about the Event [A]reas during and after" the festival events.

The City Defendants claim that by contracting with Yaga's, the City rid itself of some of the financial burden associated with the annual Mardi Gras festival and got a "better bang for [its] buck." While the City's costs associated with the Mardi Gras festival had exceeded $600,000 in years past, the City's net cost for the 2019 Mardi Gras festival conducted under the Contract fell to $255,000, when the annual event fee paid by Yaga's and the fees paid by festival attendees were considered. This incremental cost was paid using general expenditures and the City's Hotel Occupancy Tax ("HOT") funds.

Appellants initially sued the City and Yaga's,[4] and later amended their pleading to include Maxwell as a defendant in his official capacity. In the amended petition, appellants sought three forms of relief: (1) injunctive relief (both temporary and permanent) prohibiting the Contract's performance, (2) a declaratory judgment that the Contract was "illegal, contrary to public policy, void and [of] no effect," and (3) damages of up to $200,000.

As grounds for the requested injunctive and declaratory relief, appellants contended the Contract violated the Texas constitution and laws. They alleged that the Contract violated prohibitions in the Texas constitution against delegating legislative or regulatory powers to a private entity,[5] subsidizing a private entity,[6] and establishing a monopoly in favor of a private entity.[7] In addition, appellants alleged that the Contract was not statutorily compliant because it restricted public use of the streets and sidewalks in the Event Areas in a manner inconsistent with the Transportation Code,[8] required the expenditure of the City's HOT funds in a manner

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4 Yaga's has not participated in this appeal because appellants' claims against it are not the subject of the appealed-from order granting the City Defendants' plea to the jurisdiction.

5 *See* TEX. CONST. art. III, § 1.

6 *See id.* art III, § 52(a).

7 *See id.* art. I, § 26.

8 *See* TEX. TRANSP. CODE § 316.021.

inconsistent with the Tax Code,[9] and avoided the competitive-bidding requirements in the Local Government Code.[10] And they further pleaded—presumably as the basis for damages—that the "virtual denial of access" to their businesses during the festival weekends was, in effect, an inverse condemnation.[11]

The City Defendants filed a plea to the jurisdiction, principally arguing that the trial court lacked subject-matter jurisdiction because appellants failed to allege facts establishing any constitutional or statutory violation and because appellants lack standing to challenge the Contract. After an evidentiary hearing, the trial court granted the plea.

Standard of Review

Whether a court has subject-matter jurisdiction is a question of law that is properly asserted in a plea to the jurisdiction. *Tex. Dep't of Parks & Wildlife v. Miranda*, 133 S.W.3d 217, 225–26 (Tex. 2004). We review the trial court's ruling on a plea to the jurisdiction de novo. *Chambers-Liberty Cntys. Navigation Dist. v. State*, 575 S.W.3d 339, 345 (Tex. 2019).

A plaintiff must allege facts that affirmatively establish the trial court's subject-matter jurisdiction. *State v. Holland*, 221 S.W.3d 639, 642 (Tex. 2007). In

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[9] *See* TEX. TAX CODE § 351.101.

[10] *See* TEX. LOC. GOV'T CODE § 252.021.

[11] *See* TEX. CONST. art. I, § 17.

determining whether the plaintiff has satisfied this burden, we construe the pleadings liberally in the plaintiff's favor and deny the plea if facts affirmatively demonstrating jurisdiction have been alleged. *Miranda*, 133 S.W.3d at 226–27.

Parties may submit evidence supporting or opposing the plea, which we review under the same standard applicable to a traditional motion for summary judgment. *Chambers-Liberty Cntys. Navigation Dist.*, 575 S.W.3d at 345 (citing *Sampson v. Univ. of Tex. at Austin*, 500 S.W.3d 380, 384 (Tex. 2016)). We take as true all evidence favorable to the plaintiff, indulging every reasonable inference and resolving any doubts in the plaintiff's favor. *Sampson*, 500 S.W.3d at 384. If the relevant evidence fails to raise a fact question on the jurisdictional issue, the court rules on the plea to the jurisdiction as a matter of law. *Miranda*, 133 S.W.3d at 228. But if the evidence creates a fact question regarding jurisdiction, then the trial court must deny the plea to the jurisdiction and allow the factfinder to resolve the issue. *Id.* at 227–28.

Jurisdiction

In their sole issue on appeal, appellants argue that the trial court erred by concluding it lacked subject-matter jurisdiction over their claims because, (1) in entering the Contract with Yaga's, the City performed a proprietary function to which governmental immunity does not apply; and (2) even if entering the Contract were a governmental function implicating governmental immunity, each of their

claims falls within a waiver of immunity. The City Defendants take the opposite position on these points and assert that the plea to the jurisdiction was properly granted because appellants lack standing.

A. Justiciability

We begin with the question of the justiciability of appellants' claims. The City Defendants employ the doctrine of standing to argue that the courts lack jurisdiction because appellants' claims are not justiciable. *See, e.g.*, *Bland Indep. Sch. Dist. v. Blue*, 34 S.W.3d 547, 553–54 (Tex. 2000) ("Standing is a prerequisite to subject-matter jurisdiction, and subject-matter jurisdiction is essential to a court's power to decide a case."); *City of Galveston v. Galveston Mun. Police Ass'n*, No. 14-11-00192-CV, 2011 WL 4920885 (Tex. App.—Houston [14th Dist.] Oct. 18, 2011, no pet.) (mem. op.) ("Issues of justiciability, such as mootness, ripeness, and standing, implicate a court's subject matter jurisdiction."). The standing doctrine identifies suits that are appropriate for judicial resolution. *Brown v. Todd*, 53 S.W.3d 297, 305 (Tex. 2001); *Tex. Ass'n of Bus. v. Tex. Air Control Bd.*, 852 S.W.2d 440, 443 (Tex. 1993). Standing assures there is a real controversy between the parties that will be determined by the judicial declaration sought. *Texas Ass'n of Bus.*, 852 S.W.2d at 446. The doctrine of mootness may be related to standing. *Buzbee v. Clear Channel Outdoor, LLC*, 616 S.W.3d 14, 21 (Tex. App.—Houston [14th Dist.] 2020, no pet.). "For a plaintiff to have standing, a controversy must exist between the

parties at every stage of the legal proceedings, including the appeal." *Williams v. Lara*, 52 S.W.3d 171, 184 (Tex. 2001). We address these related doctrines in turn.

1. Did appellants plead facts demonstrating a particular injury?

The City Defendants' plea to the jurisdiction challenged appellants' constitutional standing. *See id.* at 178 ("Standing is a constitutional prerequisite to maintaining suit in . . . state court."). The general rule for standing, unless it is conferred by statute, is that a plaintiff must demonstrate an interest in a dispute distinct from that of the general public, such that the defendant's actions have caused the plaintiff some particular injury. *Id.* at 178; *see Hunt v. Bass*, 664 S.W.2d 323, 324 (Tex. 1984) ("Standing consists of some interest peculiar to the person individually and not as a member of the general public."). The City Defendants argue that appellants lack standing because they failed to plead facts demonstrating a particular injury. Appellants respond that they have alleged a particular injury because their "trade is wrecked" annually by the performance of the Contract terms for the Mardi Gras festivals.

Construing the facts alleged in the amended petition in appellants' favor, as we must, appellants have demonstrated a particular injury distinct from that of the general public. Their allegations are not limited to generalized grievances. Appellants allege in the amended petition that they are business owners and the three businesses "hold leases adjacent to the Strand," meaning they are located and operate

their business within the Event Area that is subject to the Contract. They allege that their business operations were negatively impacted by the performance of the Contract because the Contract authorized Yaga's to (1) restrict access and charge for admission to the area where they operate at certain times during the festival weekends and (2) place vendors that compete with their business in "immediate proximity." In other words, based on their locations within the restricted Event Area, appellants allege some damage or threat of harm that is peculiar to the appellants and distinct from any harm suffered by the public at large by the performance of the Contract. Consequently, the trial court could not have concluded that it lacked subject-matter jurisdiction on this basis.

2. Are appellants' claims moot?

That appellants adequately alleged a particular injury does not fully resolve the standing inquiry in this case. There is another question of whether appellants' claim for injunctive relief, and their related claim for declaratory relief, have both been rendered moot by the performance of the Contract.[12] *See, e.g.*, *Hulett v. W.*

[12] Appellants addressed the potential mootness of their claims in their reply, which was filed after on March 30, 2020, about one month after the 2020 Mardi Gras festival concluded. The City Defendants did not raise mootness in their appellees' brief, which also was filed after the 2020 Mardi Gras festival concluded. Even though the City Defendants have not argued that appellants' claims for injunctive and declaratory relief are moot, we may raise the issue *sua sponte* because subject-matter jurisdiction is essential to a court's authority to dispose of cases. *See, e.g.*, *Tex. Ass'n of Bus. v. Tex. Air Control Bd.*, 852 S.W.2d 440, 445–46 (Tex. 1993) (subject-matter jurisdiction may not be waived by parties and may be raised for first time on appeal by any party or court itself).

Lamar Rural High Sch. Dist., 232 S.W.2d 669, 670 (Tex. 1950) (suit to enjoin performance of contract becomes moot after contract has been fully performed); *see also Speer v. Presbyterian Child. Home & Serv. Agency*, 847 S.W.2d 227, 229 (Tex. 1993) (when request for injunctive relief becomes moot because action sought to be enjoined has been accomplished, request for declaratory relief also becomes moot).

The mootness doctrine applies to cases in which a justiciable controversy exists between the parties when the case arose, but the live controversy ceases because of subsequent events. *Matthews v. Kountze Indep. Sch. Dist.*, 484 S.W.3d 416, 418 (Tex. 2016). As we have already stated, if a controversy ceases to exist at any time during the pendency of the legal proceedings, even on appeal, the case becomes moot. *Williams*, 52 S.W.3d at 184. An issue becomes moot "when one seeks a judgment on some matter which, when rendered for any reason cannot have any practical legal effect on a then-existing controversy." *Thomas v. Cook*, 350 S.W.3d 382, 389 (Tex. App.—Houston [14th Dist.] 2011, pet. denied); *see O'Shea v. Littleton*, 414 U.S. 488, 495–96 (1974) ("Past exposure to illegal conduct does not in itself show a present case or controversy regarding injunctive relief . . . if unaccompanied by any continuing, present adverse effects."). "If a case becomes moot, the parties lose standing to maintain their claims." *Williams*, 52 S.W.3d at 184.

In their amended petition, appellants sought to enjoin the City Defendants, together with Yaga's, from performing the Contract by:

- Disbursing, transferring or expending any public funds from the City . . . to or for the benefit of Yaga's . . . or any service related to the implementation or performance of any event to which Yaga's . . . is a participant[;]

- Disbursing, transferring or expending any funds derived from the Hotel Occupancy Tax until further order of th[e] [c]ourt;

- Blocking, closing or otherwise impeding pedestrian traffic from any right of way, sidewalk, parking space or street in the [Event Area] described in the [C]ontract . . . ;

- Charging, attempting to charge or soliciting money from any person as a condition of entering a public street in the [Event Area] described in the [C]ontract . . . ; [and]

- Selling or purporting to sell any license, franchise or other permission to operate any concession for the sale of food or alcoholic or non-alcoholic beverages within the [Event Area] described in the [C]ontract.

In their reply brief, appellants acknowledge the action they seek to enjoin—the performance of the Contract—has been accomplished at this stage of the legal proceedings. This acknowledgement is consistent with the Contract documents, including Exhibit B, which is an event schedule indicating that the 2020 festival events concluded on February 24, 2020. Our analysis of whether appellants' claims against the City Defendants have been rendered moot can extend to matters outside the record. *See* TEX. GOV'T CODE § 22.220(c) ("Each court of appeals may, on affidavit or otherwise, as the court may determine, ascertain the matters of fact that

are necessary to the proper exercise of its jurisdiction."); *Sabine Offshore Serv., Inc. v. City of Port Arthur*, 595 S.W.2d 840, 841 (Tex. 1979) (recognizing matters outside record can be considered by court only in determining its own jurisdiction). We therefore consider appellants' acknowledgment that the Contract has been fully performed. This leads to the conclusion that appellants' claims against the City Defendants for injunctive and declaratory relief are moot.

For example, in *Hulett v. West Lamar Rural High School District*, a group of taxpayers sued to enjoin their school district from constructing school buildings made from wood because the bonds authorizing the construction called for materials other than wood. 232 S.W.2d at 669. The trial court denied the plaintiffs' request for a temporary injunction, and by the time the matter reached the court of appeals, the construction was already 90 to 95 percent complete. *Id.* The court of appeals concluded the plaintiffs' lawsuit was moot. *Id.* By the time the matter was heard by the Texas Supreme Court, the parties acknowledged at oral argument that the contract had been "fully performed, that the buildings had been accepted by the school authorities, and that the contract price had been fully paid by the school district to the contractor." *Id.* at 670. The Supreme Court concluded that the case was moot, leading to dismissal of the plaintiffs' claims. *Id.*

Citing *Hulett*, other courts have recognized that lawsuits seeking injunctive and declaratory relief from the performance of a contract become moot after the

contract has been fully performed, thereby depriving a plaintiff of standing. *See, e.g.*, *City of El Paso v. Waterblasting Techs., Inc.*, 491 S.W.3d 890, 905 (Tex. App.—El Paso 2016, no pet.) (acknowledging request for injunctive relief prohibiting city from making payments under contract had become moot when contract in question had been fully performed); *Verney v. Abbott*, No. 2006 WL 2082085, at *8 (Tex. App.—Austin July 28, 2006, no pet.) ("Additionally, a suit to enjoin the performance of a contract becomes moot after the contract has been fully performed.").

Appellants urge that we should reach a different conclusion in this case because exceptions to the mootness doctrine apply. First is the exception providing that a "defendant's cessation of challenged conduct does not, in itself, deprive a court of the power to hear or determine claims for prospective relief." *Matthews*, 484 S.W.3d at 418. Second is the exception for claims that are capable of repetition yet evade review, which applies when: "(1) the challenged action was too short in duration to be litigated fully before the action ceased or expired; and (2) a reasonable expectation exists that the same complaining party will be subjected to the same action again." *Williams*, 52 S.W.3d at 184.

To demonstrate the application of the first exception—voluntary cessation of conduct—appellants cite *Matthews v. Kountze Independent School District*. At issue in *Matthews* was whether a suit brought by middle and high school cheerleaders, who had been prohibited by the school district from displaying banners containing

religious signs or messages at school-sponsored events, was moot. 484 S.W.3d at 417. The school district filed a plea to the jurisdiction asserting mootness considering its subsequent adoption of a resolution, which provided that the school district was "not required to prohibit messages on school banners . . . that display fleeting expressions of community sentiment solely because the source or origin of such message is religious," but retained "the right to restrict the content of school banners." *Id.* The trial court denied the plea, but the court of appeals held that the suit was moot because the school district had "voluntarily discontinued" its previous prohibition on such banners. *Id.*

On review, the Texas Supreme Court explained that a defendant's cessation of the challenged conduct does not by itself deprive a court of jurisdiction. *Id.* at 418. "If it did, defendants could control the jurisdiction of courts with protestations of repentance and reform, while remaining free to return to their old ways." *Id.* Such a result "would obviously defeat the public interest in having the legality of the challenged conduct settled." *Id.* But the Texas Supreme Court acknowledged that "dismissal may be appropriate when subsequent events make 'absolutely clear that the challenged conduct could not reasonably be expected to recur.'" *Id.* (citation and internal alteration omitted). The Texas Supreme Court cautioned that the burden on the moving party is a heavy one and concluded that the school district's voluntary abandonment provided no assurance that it would not resume the challenged conduct

in the future. *Id.* at 418, 420. A significant factor in the Texas Supreme Court's analysis was the school district's continued defense of the constitutionality of its prohibition on the banner's religious content and its authority to restrict such content. *Id.* at 419.

Relying on the *Matthews*' holding, appellants reason that dismissal is not appropriate because the burden of showing that the challenged conduct could not reasonably be expected to recur is "insurmountable" in this case. The record demonstrates that the City has already entered two contracts with Yaga's, one right after the other in 2011 and 2015, using the same allegedly unlawful model. Appellants assert in their reply brief that the City has already announced its willingness to pursue the same contractual arrangement for future Mardi Gras festivals, an assertion which the City Defendants have not disputed.

But unlike *Matthews*, the City Defendants are not attempting to "control the jurisdiction of courts" through a voluntary cessation of conduct. *See* 484 S.W.3d at 418. The City Defendants did not take any action to terminate the Contract or otherwise avoid performance of its terms. *See, e.g.*, *Davis v. Hays Cnty.*, No. 03-19-00925-CV, 2020 WL 6533658, at *3–5 (Tex. App.—Austin Nov. 6, 2020, no pet.) (mem. op.) (cancellation by County of contract for third-party to process violations of traffic regulations did not moot request for declaratory judgment declaring contract void); *Wilson v. Cmty. Health Choice Tex., Inc.*, 607 S.W.3d 843,

849–51 (Tex. App.—Austin 2020, pet. filed) (cancellation of Medicaid service contracts did not moot ultra vires claim seeking injunctive and declaratory relief on basis that contracts were unlawful). To the contrary, the mootness question exists here because the Contract was fully performed. We therefore conclude that the exception for a voluntary cessation of challenged conduct does not apply.

We reach the same conclusion as to appellants' assertion that the City Defendants' challenged conduct is capable of repetition and likely to recur. The capable-of-repetition-yet-evading-review exception to the mootness doctrine applies only in rare circumstances. *Williams*, 52 S.W.3d at 184. To invoke the exception, a plaintiff must prove that: "(1) the challenged action was too short in duration to be litigated fully before the action ceased or expired; and (2) a reasonable expectation exists that the same complaining party will be subjected to the same action again." *Id.*

We have found one case addressing the application of the capable-of-repetition-yet-evading-review exception when a contract that was the subject of requests for injunctive and declaratory relief was fully performed or had expired by its own terms. *See Labrado v. Cnty. of El Paso*, 132 S.W.3d 581, 589–92 (Tex. App.—El Paso 2004, no pet.). In resolving whether the plaintiffs' request for injunctive and declaratory relief was moot, the *Labrado* court noted that a "suit to enjoin the performance of a contract becomes moot after the contract has been fully

performed," and that "[w]hen a request for injunctive relief becomes moot because the action sought to be enjoined has been accomplished, a request for declaratory relief also becomes moot." *Id.* The court ultimately concluded, however, that the plaintiffs' claims survived under the capable-of-repetition-yet-evading-review exception. *Id.* at 591. The court noted that because the contracts would have expired by their own terms before their lawsuit was resolved, even if the court had granted a temporary injunction, the contracts could and had evaded judicial review by a court. *Id.* The court also held that the transit contracts were "capable of repetition," as the county periodically solicited bids on the contracts, and the same bidders typically submitted bids in response to the county's solicitations. *Id.* The court therefore concluded that the plaintiffs might be subjected to the same violations in the future if the court did not rule on the validity of the county's bid procedures. *Id.* at 591–92.

The facts of this case distinguish it from *Labrado*. Unlike the contracts in *Labrado*, which evaded review because they were time sensitive, one-year contracts and would have expired on their own terms before litigation concluded even if the parties had obtained a temporary injunction, the performance of the Contract here could have been temporarily enjoined by the trial court and remained subject to review by the trial court given its multi-year term. Certainly, the filing of, ruling on, and resulting interlocutory appeal from the City Defendants' jurisdictional plea prevented the appellants from obtaining a ruling on their request for temporary

injunctive relief before the Contract expired. But that does not mean the duration of appellants' claim was so short that it evaded review. This Contract governed five annual Mardi Gras festivals, from 2016 to 2020, and the previous contract between City and Yaga's also applied to the five annual Mardi Gras festivals before those. Thus, unlike in *Labrado*, the challenged action was not so short in duration to be litigated fully before the action ceased or expired. This case thus does not fit in the narrow exception for claims that are capable of repetition yet evade review. *See Williams*, 52 S.W.3d at 184.

In sum, we hold appellants' claims seeking injunctive and declaratory relief from the Contract that has been fully performed and expired by its own terms are moot. Although we conclude that appellants' claims seeking injunctive and declaratory relief are moot, our mootness analysis is not dispositive of appellants' additional claim alleging that the performance of the Contract achieved a taking of their property in a constitutional sense, i.e., an inverse condemnation. We thus turn to whether the plea to the jurisdiction was properly granted as to that claim.

B. Governmental Immunity

Having concluded that the requests for injunctive and declaratory relief are moot, appellants' only remaining claim alleges an inverse condemnation. Appellants argue that the trial court erred by dismissing this claim because it was not barred by governmental immunity. Appellants contend they properly pleaded that the City's

performance of the Contract—permitting Yaga's to restrict and charge admission for access to the public streets and rights-of-way to which their businesses are adjacent at certain times on the festival weekends—created a substantial impairment without compensation in violation of article I, section 17 of the Texas Constitution, i.e., the takings clause. TEX. CONST. art. I, § 17. And they assert that the performance of the Contract "unreasonably and substantially interfered with [their] reasonable investment backed expectations."

1. Does the inverse condemnation claim implicate governmental immunity?

First, we note appellants' argument that governmental immunity is not implicated in this lawsuit because the City's execution of the Contract was a proprietary function, not a governmental function. This argument invokes the governmental-proprietary dichotomy. The governmental-proprietary dichotomy recognizes that immunity protects a governmental unit from suits based on its performance of a governmental function, but not a proprietary function. *Wasson Interests, Ltd. v. City of Jacksonville*, 489 S.W.3d 427, 430 (Tex. 2016) ("*Wasson I*"). Unlike governmental functions, for which municipalities have traditionally been afforded some degree of governmental immunity, proprietary functions have subjected municipalities to the same duties and liabilities as those incurred by private persons and corporations. *Wasson Interests, Ltd. v. City of Jacksonville*, 559 S.W.3d 142, 146 (Tex. 2018) ("*Wasson II*"); *see also Tooke v. City*

of Mexia, 197 S.W.3d 325, 343 (Tex. 2006) ("proprietary functions" are acts conducted by city "in its private capacity, for the benefit only of those within its corporate limits, and not as an arm of the government"); *Oldfield v. City of Hous.*, 15 S.W.3d 219, 226 (Tex. App.—Houston [14th Dist.] 2000, pet. denied) ("Governmental functions are what a municipality *must* do for its citizens and proprietary functions are what a municipality *may, in its discretion, perform* for its inhabitants." (emphasis in original)), *superseded by statute on other grounds as recognized in Thin Van Truong v. City of Houston*, 99 S.W.3d 204 (Tex. App.—Houston [1st Dist.] 2002, no pet.).

The governmental-proprietary dichotomy is based on the reality that sovereign immunity is inherent in the State's sovereignty, and municipalities share in that protection when they act "as a branch of the State" but not when they act "in a proprietary, non-governmental capacity." *Wasson I*, 489 S.W.3d at 430. "Whether a municipality enjoys immunity from suit thus depends on the relationship, or lack thereof, between the municipality and the state, not the relationship between the municipality and the party bringing suit." *Wasson II*, 559 S.W.3d at 146 (internal quotation omitted).

The Supreme Court has expressly instructed that the governmental-proprietary dichotomy applies in tort and breach-of-contract cases. *See Wasson I*, 489 S.W.3d at 429–30. Even though this is neither a tort case nor a breach-of-

contract case, appellants urge that the dichotomy should still control our analysis because the City performed a proprietary function by entering into the Contract. The City Defendants urge the opposite, pointing out that appellants have cited no case law applying the governmental-proprietary dichotomy in the governmental immunity context where the underlying claim did not arise from the municipality's alleged tortious behavior or breach of contract.

We need not resolve the parties' dispute about the application of the governmental-proprietary dichotomy because it is well established that "[s]overeign immunity does not shield the government from liability for compensation under the takings clause." *Harris Cnty. Flood Control Dist. v. Kerr*, 499 S.W.3d 793, 799 (Tex. 2016); *City of Houston v. Carlson*, 451 S.W.3d 828, 830 (Tex. 2014)("It is well settled that the Texas Constitution waives governmental immunity with respect to inverse-condemnation claims.").

2. Have appellants properly pleaded an inverse-condemnation claim?

Still, an inverse-condemnation claim must be predicated upon a viable allegation of a taking. *Carlson*, 451 S.W.3d at 830. Absent a properly pleaded takings claim, immunity is retained. *Id.* "Whether particular facts are enough to constitute a taking is a question of law." *Gen. Servs. Comm'n v. Little-Tex Insulation Co.*, 39 S.W.3d 591, 598 (Tex. 2001).

Article I, Section 17 of the Texas Constitution provides that "[n]o person's property shall be taken, damaged or 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 bring an inverse-condemnation claim to recover the resulting damages. *Westgate, Ltd. v. State*, 843 S.W.2d 448, 452 (Tex. 1992). "An inverse condemnation may occur when the government physically appropriates or invades the property, or when it unreasonably interferes with the landowner's right to use and enjoy the property, such as by restricting access." *Id.*

To plead inverse condemnation, a plaintiff must allege that (1) a governmental entity intentionally performed certain acts, (2) resulting in the taking, damaging, or destruction of its property, (3) for public use. *Gen. Servs. Comm'n*, 39 S.W.3d at 598; *see also Steele v. City of Hous.*, 603 S.W.2d 786, 788–92 (Tex. 1980). In this regard, appellants alleged that the performance of the Contract—permitting Yaga's to restrict access to the Event Area at certain times during festival weekends—"substantially interfere[d] with [their] reasonable investment[-]backed expectations."

The government's interference with access to property may be the basis of an inverse-condemnation claim if access is materially and substantially impaired. *State v. Delany*, 197 S.W.3d 297, 299 (Tex. 2006); *City of Houston v. Texan Land and*

Cattle Co., 138 S.W.3d 382, 387 (Tex. App.—Houston [14th Dist.] 2004, no pet.). To show substantial and material impairment of access, the plaintiff must establish (1) a total temporary restriction of access, (2) a partial permanent restriction of access, or (3) a partial temporary restriction of access due to illegal or negligent activity. *State v. Schmidt*, 867 S.W.2d 769, 775 (Tex. 1993).

Appellants allege their property—their businesses—was damaged by a temporary, partial restriction of access. Here, there is no dispute that appellants operate their businesses in the Event Area and that the Contract allowed Yaga's to fence the Event Area and, at certain times, close the gates to restrict entry to only those festival attendees who paid the admission and attendant fees. The record shows that the gate times for festival weekends, when access to the Event Area was restricted and Yaga's could charge admission, were as follows:

- *First Friday*: Gates are secured at 5 PM for the opening and removed/moved at midnight after Mardi Gras shuts down. (7 hours closed);

- *First Saturday*: Gates are secured at 11 AM for the opening and are removed/moved at midnight after Mardi Gras shuts down. (13 hours closed);

- *First Sunday*: Gates are secured at 11 AM for the opening and are removed/moved at 5 PM after Mardi Gras shuts down. (6 hours closed);

- *Second Friday*: Gates are secured at 5 PM for the opening and removed/moved at midnight after Mardi Gras shuts down. (7 hours closed);

- *Second Saturday*: Gates are secured at 11 AM for the opening and are removed/moved at midnight after Mardi Gras shuts down. (13 hours closed);

- *Second Sunday*: Gates are not used, as this is a free day; and

- *Fat Tuesday*: Gates are not used.

Though appellants have not explained why they assert the restriction was partial despite the installation of fencing and gated entries around the entire Event Area, we presume it is because entry to the Event Area was not completely barred. Instead, entry required payment of a fee. Appellants alleged that the requirement for its customers to pay this fee reduced their business. They have not alleged that the temporary restriction of access imposed by the Contract rendered their businesses valueless.

Appellants cite *Mayhew v. Town of Sunnyvale*, 964 S.W.2d 922 (Tex. 1998), for the proposition that government action that substantially interferes with reasonable investment backed expectations may constitute an unconstitutional taking. But the case does not support their position. In *Mayhew*, the Town of Sunnyvale denied the Mayhews' proposal to convert their acreage into a planned development with density in excess of then allowable one-dwelling-unit-per-acre residential zoning. *Id.* at 926–27. Had their proposal been approved, the Mayhews planned to sell their property to a builder who would only develop the property if it could build a minimum of 3600 units. *Id.* at 926.

In considering whether the denial of the development proposal was a compensable taking, the Texas Supreme Court noted that the denial had not deprived the Mayhews of all economically viable use of the property or totally destroyed the value of the property. *Id.* at 936–37. Still, the Texas Supreme Court instructed, "a taking can occur if the regulation has a severe enough economic impact and the regulation interferes with distinct investment-backed expectations." *Id.* at 937 (citing *Lucas v. S.C. Coastal Council,* 505 U.S. 1003, 1019 n.8 (1992) (takings are to be measured by the "economic impact of the regulation on the claimant and . . . the extent to which the regulation has interfered with distinct investment-backed expectations"); *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 124 (1978) (same); *Taub v. City of Deer Park*, 882 S.W.2d 824, 826 (Tex. 1994) (sufficiently severe economic impact can constitute taking)). Finding that the Mayhews "had no reasonable investment-backed expectation to build 3,600 units on their property," the Texas Supreme Court held that the Town had not unreasonably interfered with their right to use and enjoy their property by denying their planned development proposal. *Id.*

We reach the same conclusion in this case. As described above, the performance of the Contract restricted access to appellants' businesses for 26 hours during the first festival weekend and for 20 hours during the second festival weekend. Appellants have not cited, and we have not found, any authority that would

support a conclusion that a partial restriction of access for a total of 46 hours split over two weekends, once a year, is a sufficiently severe economic impact to interfere with distinct investment-backed expectations and amount to a taking. Consequently, we hold that the trial court did not err in granting the plea to the jurisdiction on appellants' inverse-condemnation claim.

Conclusion

We affirm the trial court's order granting the City Defendants' plea to the jurisdiction.[13]

Amparo Guerra
Justice

Panel consists of Justices Countiss, Rivas-Molloy, and Guerra.

[13] Appellants' pending motions for abatement and to file additional materials are denied.