Fourth Court of Appeals
San Antonio, Texas

MEMORANDUM OPINION

No. 04-21-00257-CV

Michael **SHANNON**, Director of Development Services Department, City of San Antonio, Texas; and City of San Antonio, Texas,
Appellants

v.

Arlene W. **BLAIR** and Plaintiff Class Petitioners,
Appellees

From the 407th Judicial District Court, Bexar County, Texas
Trial Court No. 2020-CI-23022
Honorable Mary Lou Alvarez, Judge Presiding

Opinion by: Luz Elena D. Chapa, Justice

Sitting: Rebeca C. Martinez, Chief Justice
Luz Elena D. Chapa, Justice
Beth Watkins, Justice

Delivered and Filed: September 28, 2022

REVERSED AND RENDERED IN PART; VACATED IN PART

Appellants Michael Shannon and the City of San Antonio ("the City") appeal the trial court's denial of their plea to the jurisdiction. The City argues, among other things, the trial court did not have jurisdiction to hear the claims of appellees Arlene W. Blair and the putative class in this lawsuit because appellees have no standing and the claims are barred by governmental immunity. Because we conclude the claims are barred by governmental immunity, we reverse the trial court's denial of the plea to the jurisdiction, vacate the trial court's grant of the motion for class certification, and render judgment for the City dismissing this case for lack of jurisdiction.

BACKGROUND

This dispute concerns the City's enforcement of certain ordinances requiring owners to keep their properties and abutting alleys free of garbage and overgrown brush. *See* San Antonio, Tex., Code of Ordinances ch. 14, art. VII, §§ 14-61, 14-64. Blair and a putative class of San Antonio property owners in the Dellcrest and Eastwood Village subdivisions own properties abutting alleys. They sued the City seeking, among other things, a declaratory judgment that the City owned the alleys, and therefore Blair and the putative class were not required to maintain the alleys.

After filing suit, Blair and the putative class moved to certify the class. The City followed that motion by filing a plea to the jurisdiction, arguing Blair did not have standing and the claims were barred by governmental immunity. After a hearing on the motions and additional filings by the parties, the trial court signed an order denying the plea to the jurisdiction and granting the class certification motion.

This appeal followed.

STANDARD OF REVIEW

An appellate court reviews questions of standing de novo. *Farmers Tex. Cnty. Mut. Ins. Co. v. Beasley*, 598 S.W.3d 237, 240 (Tex. 2020). "This is because standing is a component of subject matter jurisdiction." *Id.* "In applying a de novo standard of review to a standing determination, reviewing courts 'construe the pleadings in the plaintiff's favor, but we also consider relevant evidence offered by the parties.'" *Id.* (quoting *In re H.S.*, 550 S.W.3d 151, 155 (Tex. 2018)).

"A defendant may challenge a plaintiff's standing by filing a plea to the jurisdiction." *Id.* at 241. "Because a plea to the jurisdiction raises a question of standing, we also review a plea to the jurisdiction de novo." *Id.* at 240. "The burden is on the plaintiff to affirmatively demonstrate

the trial court's jurisdiction." *Heckman v. Williamson County*, 369 S.W.3d 137, 150 (Tex. 2012); *see, e.g.*, *Matzen v. McLane*, No. 20-0523, 2021 WL 5977218, at *4 (Tex. Dec. 17, 2021). "At the plea to the jurisdiction stage, governmental officials may challenge jurisdiction based solely on the pleadings or may challenge jurisdictional facts." *Jones v. Turner*, 646 S.W.3d 319, 325 (Tex. 2022). "When the pleadings are challenged, we review whether the alleged facts, if true, affirmatively demonstrate jurisdiction; because we construe pleadings liberally in favor of the pleader, we will grant a plea to the jurisdiction without an opportunity to replead only if the pleadings affirmatively negate jurisdiction." *Id.* "When jurisdictional facts are challenged, we consider relevant evidence in the record and will grant the plea only if there is no question of fact as to the jurisdictional issue." *Id* "'This standard mirrors our review of summary judgments,' such that we take as true all evidence favorable to the nonmovants, and we indulge every reasonable inference and resolve any doubts in their favor.'" *Id.* (quoting *City of El Paso v. Heinrich*, 284 S.W.3d 366, 378 (Tex. 2009)).

STANDING

The City challenges Blair's pleadings and jurisdictional facts, arguing Blair does not have standing because she has not alleged anything more than a speculative injury no different from the public, and has shown no evidence of injury. Blair argues she has standing because injunctive and declaratory relief are required to stop the threat of the City's enforcement of ordinances requiring her to maintain alleys she does not own.

A. Applicable Law

"To maintain standing, a plaintiff must show: (1) an injury in fact that is both concrete and particularized and actual or imminent, not conjectural or hypothetical; (2) that the injury is fairly traceable to the defendant's challenged action; and (3) that it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." *Data Foundry, Inc. v. City*

of Austin, 620 S.W.3d 692, 696 (Tex. 2021); *see, e.g.*, *Perez v. Turner*, No. 20-0382, 2022 WL 2080868, at *4 (Tex. June 10, 2022). "[A] plaintiff does not lack standing simply because some other legal principle may prevent [them] from prevailing on the merits; rather, a plaintiff lacks standing if [their] 'claim of injury is too slight for a court to afford redress.'" *Data Foundry*, 620 S.W.3d at 696 (quoting *DaimlerChrysler Corp. v. Inman*, 252 S.W.3d 299, 305 (Tex. 2008)). "The threshold standing inquiry 'in no way depends on the merits of the [plaintiff's] contention that particular conduct is illegal.'" *Perez*, 2022 WL 2080868, at *4 (quoting *Data Foundry*, 620 S.W.3d at 696).

B. Discussion

1. The Petition

"The standing inquiry 'requires careful judicial examination of a complaint's allegations to ascertain whether the particular plaintiff is entitled to an adjudication of the particular claims asserted.'" *Heckman*, 369 S.W.3d at 155 (quoting *Allen v. Wright*, 468 U.S. 737, 752 (1984)). Because we must carefully examine Blair's allegations to determine whether Blair has standing, we must first determine what filing we are reviewing.

The City argues the trial court erred in permitting Blair to amend her pleading after the hearing on the two motions because she cannot correct chronic jurisdictional defects to maintain jurisdiction in the case. The order shows the court did not allow Blair to amend her pleading and the record does not support the City's contention that Blair filed an amended petition. After the hearing, Blair filed a reply entitled "Plaintiff's Reply to Defendant's Response to First Amended Joint Response of Arlene W. Blair, et al. and Movant Class Petitioners to Defendants' Motion to Dismiss and Plea to Jurisdiction of Plaintiff's Original Complaint and Joined with Motion to Allow Amended Pleading" (hereinafter "Reply and Motion"). Blair's Reply and Motion included no amended petition, but it was accompanied by a declaration and exhibits. "Exhibit L" is entitled

"First Amended Petition," but it is not an amended petition. It is a copy of a response to the City's plea to the jurisdiction entitled "First Amended Joint Response of Arlene W. Blair, et al. and Movant Class Petitioners to Defendants' Motion to Dismiss and Plea to Jurisdiction of Plaintiff's Original Complaint Joined with First Amended Response to Opposition to Certify Class Action."[1]

The crux of the City's contention is Blair filed additional evidence after the hearing. However, the City's objection to the trial court's consideration of such evidence is without merit. In determining whether Blair has standing, the trial court may consider any relevant evidence offered by the parties on standing. *See, e.g.*, *Beasley*, 598 S.W.3d at 240. Here, the City indicated it was challenging the jurisdictional facts, and the trial court explained in its order—issued after the City filed two responses to Blair's Reply and Motion—it considered relevant evidence on jurisdiction including "the submissions, briefs, amendments, supplements, evidence, responses, replies, objections, and all filings on file in this case" in denying the plea to the jurisdiction.

We therefore carefully consider the allegations in the original petition, along with any relevant evidence, in determining whether Blair has standing. *See id.*

2. Discussion

In the original petition, Blair brought two declaratory judgment claims. To determine whether Blair has standing on behalf of the class, we must determine the law of standing when a party files a claim for prospective relief. The Uniform Declaratory Judgments Act's purpose is "to settle and afford relief from uncertainty and insecurity with respect to rights, status, and other legal relations." TEX. CIV. PRAC. & REM. CODE § 37.002(b). The Act "is to be liberally construed and

[1] If Blair intended the "First Amended Joint Response of Arlene W. Blair, et al. and Movant Class Petitioners to Defendants' Motion to Dismiss and Plea to Jurisdiction of Plaintiff's Original Complaint Joined with First Amended Response to Opposition to Certify Class Action"—to be construed as its amended petition, Blair did not assert this argument to the trial court, and does not assert it on appeal, and nothing in Exhibit L indicates it is an amended petition. *See* TEX. R. CIV. P. 47, 71; *State Bar of Tex. v. Heard*, 603 S.W.2d 829, 833 (Tex. 1980); *see also* TEX. R. CIV. P. 46, 64 & 78.

administered." *Id.* Under the Act, any "person . . . whose rights, status, or other legal relations are affected by a . . . municipal ordinance . . . may have determined any question of construction or validity arising under the . . . ordinance . . . and obtain a declaration of rights, status, or other legal relations thereunder." TEX. CIV. PRAC. & REM. CODE § 37.004. However, "the UDJA does not authorize a court to decide a case in which the issues are hypothetical or contingent—the dispute must still involve an actual controversy." *Sw. Elec. Power Co. v. Lynch*, 595 S.W.3d 678, 684 (Tex. 2020). At the same time, a declaratory judgment action brought under the UDJA "is not confined to cases in which the parties have a cause of action apart from the Act itself." *City of Dallas v. Homan*, No. 05-20-01111-CV, 2022 WL 969631, at *3 (Tex. App.—Dallas Mar. 31, 2022, no pet.) (mem. op.) (quoting *Tex. Dep't of Pub. Safety v. Moore*, 985 S.W.2d 149, 153 (Tex. App.—Austin 1998, no pet.)) (internal quotation marks omitted).

The test for standing where a party seeks declaratory relief asks whether "[1] a real controversy between the parties [will be] . . . [2] actually determined by the judicial declaration sought." *Sneed v. Webre*, 465 S.W.3d 169, 180 (Tex. 2015) (quoting *Tex. Ass'n of Bus. v. Tex. Air Control Bd.*, 852 S.W.2d 440, 446 (Tex. 1993)). To establish these elements, "[a] person seeking a declaratory judgment need not have incurred actual injury." *City of San Antonio v. Greater San Antonio Builders Ass'n*, No. 04-12-00745-CV, 2013 WL 2247468, at *3 (Tex. App.—San Antonio May 22, 2013, no pet.) (mem. op.) (quoting *Bexar Metro. Water Dist. v. City of Bulverde*, 156 S.W.3d 79, 88 (Tex. App.—Austin 2004, pet. denied)) (internal quotation marks omitted). "Declaratory-judgment actions are intended to determine the rights of parties when a controversy has arisen, before any wrong has actually been committed, and are preventative in nature." *Id.* (quoting *Bexar Metro. Water Dist.*, 156 S.W.3d at 88) (internal quotation marks omitted). "To constitute a justiciable controversy, there must exist a real and substantial controversy involving genuine conflict of tangible interests and not merely a theoretical dispute." *Id.* at *2 (quoting

Bexar–Medina–Atascosa Counties Water Control & Imp. Dist. No. 1 v. Medina Lake Prot. Ass'n, 640 S.W.2d 778, 779-80 (Tex. App.—San Antonio 1982, writ ref'd n.r.e.)) (internal quotation marks omitted).

Blair brings two claims for declaratory relief against the City. Turning to Blair's first declaratory judgment claim, Blair seeks a declaration she and members of the putative class do not have to maintain dedicated alleys abutting their properties pursuant to ordinance sections 14-61 and 14-64 because they are not the "owners" under the ordinances.

The parties do not dispute Blair lives at the address set forth in the petition, which abuts an alley in the Dellcrest subdivision. The City argues, instead, Blair has failed to plead or prove the City has brought an actual enforcement action against her for failure to comply with the alley ordinances, threatened one, or she has otherwise paid a fee for violating the alley ordinances. Blair alleges "Class Plaintiffs, including members of the putative class of residents of Dellcrest and Eastwood similarly situated, each of whom owning property abutting an alley has either received or is threatened to receive a code enforcement violation for failure to maintain alleys dedicated to the City."[2] In support, Blair provides a list of residents in the Dellcrest subdivision, where Blair lives, that have received code enforcement violations notices.

The City does not dispute the list's accuracy and presents no relevant evidence to contradict Blair's pleadings. Instead, it argues these residents have received notices for violating the ordinances at issue, claiming they have only received a notice akin to Blair's Exhibit H, entitled "Notice of Scheduled Alley Inspection." The inspection notice provides "City code sections 14 – 61 and 14 – 64 require that alleys be kept clean and unobstructed at all times. . . . If you need

[2] Blair further alleged in the petition that "[s]ome or all of the Plaintiffs" in the case "received posted notice(s) of administrative code enforcement violations" from San Antonio.

assistance in determining if your Alley is in compliance with the City Code, please Contact the Code Enforcement Officer named below."[3] Blair also includes as evidence signed petitions from subdivision residents, including herself, in response to the enforcement of the ordinances. In the petitions, which are identical in form, the residents complain they have been forced to mow the alleys under the threat of being cited and fined by the city, now realizing this is the City's responsibility. They add that, as a result, they are joining a class action lawsuit. In further support, Blair includes her affidavit providing she is "aware the City . . . has enforced code violations to some of my neighbors, and that my alley is similar to theirs: unpaved and has not been maintained for years. I understand we are all in the same neighborhood, under the same dedication, and that the neighboring community has the same issues with alley maintenance and the city."

Reviewing the pleadings in Blair's favor, taking as true all evidence favorable to the nonmovants, and indulging every reasonable inference and resolving any doubts in the nonmovant's favor, the City has failed to conclusively demonstrate there is no genuine issue of fact as to whether Blair has standing. *Cf. Jones*, 646 S.W.3d at 328 (denying plea to the jurisdiction where, based on record, Texas Supreme Court could not resolve immunity issue, and city failed to "conclusively demonstrate[]" no genuine issue of fact exists as to immunity's applicability). As Blair has alleged, and as the evidence shows, the City has issued notices to residences to keep the alleys clean and unobstructed at all times to remain in compliance with the ordinances, and Blair provides a list of residences receiving the notices which include residents in her neighborhood and on her block. Blair's petition provides she has been forced to maintain the alley under the threat

[3] The notice goes on to provide an inspection date and the name and contact information of a code enforcement officer. Blair further alleges, upon information and belief, residents of the Eastwood subdivision received the same notice.

of having the ordinances enforced against her. And the City has presented no relevant evidence to contradict Blair.[4]

We therefore cannot conclude the trial court erred when it denied the plea to the jurisdiction on standing grounds.

RIPENESS

The City also argues Blair's first declaratory judgment claim is unripe. "[I]ssues affecting subject-matter jurisdiction, like ripeness, [may be] raised for the first time on appeal, including interlocutory appeal." *In re Coppola*, 535 S.W.3d 506, 510 (Tex. 2017). "Ripeness is a component of subject matter jurisdiction that focuses on a lawsuit's timing" and is subject to de novo review. *Lynch*, 595 S.W.3d at 682-83; *see Mayhew v. Town of Sunnyvale*, 964 S.W.2d 922, 928 (Tex. 1998). In general, whether a case is ripe depends on "whether the facts are sufficiently developed so that an injury has occurred or is likely to occur, rather than being contingent or remote." *Lynch*, 595 S.W.3d at 683 (quoting *Waco Indep. Sch. Dist. v. Gibson*, 22 S.W.3d 849, 851-52 (Tex. 2000)) (internal quotation marks omitted). "If the plaintiff's claimed injury is based on 'hypothetical facts, or upon events that have not yet come to pass,' then the case is not ripe, and the court lacks subject matter jurisdiction." *Id.* (quoting *Gibson*, 22 S.W.3d at 851–52). However, the Texas Supreme Court acknowledges "UDJA suits are often brought with an eye to future harm." *Id.* at 685. "To be sure, the often future-looking nature of UDJA suits does not remove the requirement that the court must have subject matter jurisdiction over the suit—that is, that the parties must have

[4] The City also argues Blair does not have standing to bring a claim against the City and appellant Shannon on behalf of the putative class. We need not consider this issue. *See* TEX. R. APP. P. 47.1. For class standing, an individual-named plaintiff must have standing. *See Heckman*, 369 S.W.3d at 154 ("If at least one named plaintiff had individual standing to bring at least one claim, then the court of appeals erred in holding that none of the plaintiffs had standing to sue and therefore erred by dismissing the entire case on that basis."). Because we conclude there remains an issue of fact as to whether Blair has standing on her first declaratory judgment claim, it necessarily follows that, at the very least, there remains an issue of fact as to whether Blair has standing to bring a claim against the City and Shannon, as class representative.

standing, and a ripe, justiciable controversy must exist." *Id.* A plaintiff therefore presents a court "with a justiciable controversy when the plaintiff asserts that a live controversy exists, harm will occur if the controversy is left unresolved," and the declaration sought "actually resolve[s] the controversy." *Id.* (quoting *Brooks v. Northglen Ass'n*, 141 S.W.3d 158, 164 (Tex. 2004)) (internal quotation marks omitted).

Reviewing the pleadings in Blair's favor, taking as true all evidence favorable to the nonmovants, and indulging every reasonable inference and resolving any doubts in the nonmovant's favor, the City has not established by undisputed evidence Blair's claim is unripe. Even if Blair has not been fined, the City has served notices on residents stating they must ensure the alleys remain clean and there is a dispute over whether the residents are required to keep the alleys clean. And Blair states she has been forced to maintain the alleys behind her house even though she does not own the alleys. Such a dispute is not merely academic or theoretical. *See id.* (concluding claims ripe because not merely academic or theoretical). And the controversy would be resolved by a declaration stating the residents were under no obligation to maintain the alleys. *See id.* Like the issue of standing, the City has presented no relevant evidence to contradict Blair.

We therefore cannot conclude Blair's claim is unripe.

GOVERNMENTAL IMMUNITY

The City also argues governmental immunity applies to Blair's suit because Blair is not challenging the ordinances' validity or constitutionality and only seeks a declaration construing her rights under the ordinance. Blair admits she is not challenging the ordinances' validity but argues governmental immunity does not apply because she is suing Shannon under the ultra vires exception to immunity for his imminent enforcement of the ordinances against Blair and the putative class.

"Governmental immunity protects political subdivisions of the state, such as cities and their officers, from liability." *Hous. Belt & Terminal Ry. Co. v. City of Houston*, 487 S.W.3d 154, 157 (Tex. 2016). "To defeat a plea to the jurisdiction based on . . . governmental immunity, a plaintiff must plead facts that, if true, establish a viable claim that is not barred by immunity." *Perez*, 2022 WL 2080868, at *4. "If the plaintiff's claim lacks merit even when taking the pleaded facts as true, the pleading has not overcome the government's immunity." *Id.*

The UDJA provides only a limited waiver of governmental immunity for challenges to an ordinance's validity. *Town of Shady Shores v. Swanson*, 590 S.W.3d 544, 552-53 (Tex. 2019). "[T]he UDJA does not waive [governmental] immunity when the plaintiff seeks a declaration of his or her rights under a statute or other law." *Tex. Dep't of Transp. v. Sefzik*, 355 S.W.3d 618, 621 (Tex. 2011); *see also City of Justin v. Wesolak*, No. 02-15-00379-CV, 2016 WL 2989568, at *3 (Tex. App.—Fort Worth May 19, 2016, no pet.) (mem. op.) (citing *Sefzik*, 355 S.W.3d at 620). However, governmental immunity does not bar a suit for ultra vires claims seeking prospective declaratory relief against government officials for acting without legal authority. *Matzen*, 2021 WL 5977218, at *3.

The City argues Blair has failed to plead a claim within the ultra vires exception to immunity because Blair has failed to plead any facts indicating Shannon acted without legal authority or outside the scope of his duties as the Director of Development Services and Head Enforcement Officer for San Antonio. Blair argues she seeks a declaratory judgment that Shannon is acting outside his legal authority—i.e., ultra vires—if he enforces the alley ordinances against her and the putative class members as owners because the City owns the alleys.

A. The Ultra Vires Exception

"'To fall within th[e] ultra vires exception,' . . . 'a suit must not complain of a government officer's exercise of discretion, but rather must allege, and ultimately prove, that the officer acted

without legal authority or failed to perform a purely ministerial act.'"[5] *Hous. Belt*, 487 S.W.3d at 161 (quoting *Heinrich*, 284 S.W.3d at 372). A government officer acts without legal authority if the officer's exercise of judgment or limited discretion is "without reference to or in conflict with the constraints of the law authorizing the official to act." *Id.* If the law authorizing the government officer to act grants the officer "absolute discretion—free decision-making without any constraints"—a challenge to the exercise of discretion under such a law is barred by governmental immunity. *See id.* 161-63.

"[W]hether a suit attacking an exercise of limited discretion will be barred is dependent upon the grant of authority at issue in any particular case." *Id.* at 164. "[A]s a general rule, 'a public officer has no discretion or authority to misinterpret the law.'" *Id.* at 163. (quoting *In re Smith*, 333 S.W.3d 582, 585 (Tex. 2011) (orig. proceeding)). However, it does not necessarily follow "that any legal mistake is an *ultra vires* act." *Hall v. McRaven*, 508 S.W.3d 232, 241 (Tex. 2017). When a city official acts pursuant to an ordinance the official is charged with enforcing, the official may act ultra vires if the official "exceed[s] the scope" of what the ordinance permits the official to do or ignores "explicit constraints" in the ordinance governing the official's actions. *Id.* at 241-42. For example, in *Houston Belt*, a public works director's permeability determination regarding the plaintiff's property could only be made based on digital map data or similar media. *See id.* at 242. The Texas Supreme Court concluded the director committed an ultra vires act by exceeding those limits and considering aerial photographs instead. *See id.*

In contrast, if a government official is "simply tasked with making a determination" and "that is it," the government official's "discretion in making that determination is otherwise

[5] "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.'" *Phillips v. McNeill*, 635 S.W.3d 620, 628 (Tex. 2021) (quoting *Sw. Bell Tel., L.P. v. Emmett*, 459 S.W.3d 578, 587 (Tex. 2015)).

unconstrained." *Id.* Under such circumstances, the government official "is not overstepping [their] authority; . . . even if ultimately erroneous." *Id.* at 242-43. The Texas Supreme Court addressed such unconstrained discretion in *Hall v. McRaven*. In *McRaven*, the court considered whether William McRaven's alleged misinterpretation of Family Educational Rights and Privacy Act (FERPA) constituted an ultra vires act.[6] *Id.* at 240-41. The court assumed without deciding McRaven had incorrectly interpreted FERPA, but it concluded the incorrect interpretation was not an ultra vires act because McRaven's duty was established by a regent's rule providing he "shall determine whether a Regent may review information that is protected by [FERPA]." *Id.* at 242. In contrast with *Houston Belt*, McRaven's "discretion in making that determination [was] otherwise unconstrained." *Id.* at 242. As the court explained, McRaven was required to "redact information he determined protected under FERPA, and he did just that." *Id.* at 242 (concluding his discretion to interpret FERPA under regent's rule absolute and further reasoning McRaven was not misinterpreting his "organic authority but rather federal privacy law—a law collateral to [his] authority"); *cf. Van Boven v. Freshour*, No. 20-0117, 2022 WL 2015663, at *5 (Tex. June 3, 2022) (concluding actions ultra vires where Texas law required board to report all disciplinary actions to U.S. Secretary of Health and Human Services "according to applicable federal rules and statute" and board failed to comply with federal reporting requirements); *Chambers-Liberty Cntys. Navigation Dist. v. State*, 575 S.W.3d 339, 353 (Tex. 2019) (concluding district's commissioners exceeded their authority by entering into lease that purported to grant exclusive right to cultivate and harvest oysters on submerged land beneath state waters because authority to grant such rights rests exclusively with Parks and Wildlife Department, not commissioners).

[6] McRaven was then-Chancellor of The University of Texas System.

B. Discussion

1. Blair's First Declaratory Judgment Claim

Blair contends the ultra vires act in the first declaratory judgment claim is "the attempted application of the maintenance responsibility to 'owners' under ordinance sections 14-61 and 14-64, when Plaintiffs are not true 'owners.'" Shannon is therefore acting without authority and not in compliance with the ordinances.

To decide whether governmental immunity bars the first declaratory judgment claim, we must determine the grant of authority to Shannon under the ordinances at issue. *See Hous. Belt*, 487 S.W.3d at 161. "We apply rules of statutory construction to construe municipal ordinances." *Id.* at 164. "Our primary objective in construing the ordinance is to ascertain and give effect to the enacting body's intent." *Id.* "To discern that intent, we start with the plain and ordinary meaning of the ordinance's words, using any definitions provided by the enacting body." *Id.* "We read the ordinance as a whole, presuming the enacting body purposefully included each word and construing the ordinance to avoid rendering any word or provision meaningless." *Id.* (citation omitted). "Undefined terms are afforded their ordinary meaning unless a different or more precise definition is apparent from the context of the statute." *Wilson v. Cmty. Health Choice Tex., Inc.*, 607 S.W.3d 843, 852 (Tex. App.—Austin 2020, pet. denied). "When clear, the text is determinative of the enacting body's intent unless the plain meaning produces an absurd result." *Hous. Belt*, 487 S.W.3d at 164-65.

Section 14-61 provides, in pertinent part:

> (a) . . . [T]he following conditions are found to be a threat to the public health, safety, and/or welfare and are declared a public nuisance; the prompt abatement of which is a public necessity:
>
> . . .

> (2) All lots and parcels of land within the city shall be kept completely free and clear of garbage, trash, debris, rubbish, waste, wood and metal scrap, inoperative or abandoned appliances and furniture.
>
> . . . .
>
> (b) It is the duty and responsibility of the owner of a lot or parcel of land within the city to keep and maintain said lot or parcel of land free of public nuisances.
>
> (c) The owner of the lot or parcel must abate any public nuisance within seven (7) calendar days after the date the notice is mailed.

San Antonio, Tex., Code of Ordinances ch. 14, art. VII, § 14-61. Subsection (a) defines "public nuisance." Subsection (b) imposes an obligation on lot owners to keep their lots free of public nuisances. Neither "owner" nor "lot" are defined in section 14-61 or in Article VII—"Lot Clearance"—where the ordinance is found. However, Chapter 14—where Article VII appears—defines owner as "includ[ing], but not limited to, any equitable owner, any person having a possessory right to the land or building or the person occupying it, any part owner, joint owner, tenant in common, tenant in partnership, joint tenant or tenant by the entirety." Ordinance § 14-1. Chapter 14 defines a lot as "hav[ing] its ordinary meaning" but "shall also include all land lying between the property line of any lot and the center of adjacent alleys." The ordinary meaning of "lot" is a "tract of land . . . that is a component of a block in a municipal plat." *Lot*, BLACK'S LAW DICTIONARY (11th ed. 2019), *available at Westlaw*.

Section 14-62 provides, in pertinent part, "[w]henever the director of development services receives information of the existence of any lot or parcel that contains a public nuisance as defined by this Code, the director . . . shall cause written notice to be issued to the owner of the lot or parcel of the violation."[7] Subsection (c) of section 14-61 provides the owner must abate the public

[7] Section 14-62 exempts the notice requirement for certain circumstances and provides for summary abatement by the City pursuant to section 14-65, but neither party addresses the applicability of the notice exemption or summary abatement, and we do not address that issue here. *See* TEX. R. APP. P. 47.1.

nuisance within seven days of the notice's mailing. Ordinance § 14-61. Read together, under section 14-61, a tenant or an owner of land—including all land between the owner's property line and the center line of an adjacent alley—must keep the land garbage free. If the director of development services learns a tenant or owner has not kept it garbage free, the director shall issue a violation notice. Upon the notice's mailing, the tenant or owner has seven days to clear the garbage.

While section 14-61 focuses on keeping lots garbage free, subsection (h) of section 14-64 addresses keeping alleys free of obstruction. It provides, in pertinent part, "[i]t shall be the duty of an owner, tenant or occupant of properties abutting an alleyway to keep the alleyway clear of obstructions caused by intruding and overhanging brush and/or tree limbs." Ordinance § 14-64. Section 14-64 does not define its terms. However, the ordinance appears in Article VII addressing lot clearance, sections 14-61 and 14-64 were enacted at the same time, and it is reasonable to conclude Article VII's drafters intended to apply the same definitions applied to public nuisances in section 14-61 to section 14-64 on alley obstruction. *See Hous. Belt*, 487 S.W.3d at 164. The terms "property" and "abut" are not defined in the ordinance, in Chapter 14's definitions section in section 14-1, or in Article VII where sections 14-61 to 14-64 are found. Because the ordinance's plain language indicates its purpose is to keep alleys free of obstruction, it is reasonable to assume "property" in the ordinance means "real property" which is defined as "[l]and anything growing on, attached to, or erected on it." *Property*, BLACK'S LAW DICTIONARY (11th ed. 2019), *available at Westlaw* (defining "real property"). Abut is defined as "[t]o join at a border or boundary, to share a common boundary with." *Abut*, BLACK'S LAW DICTIONARY (11th ed. 2019), *available at Westlaw*. Read together, owners—or their tenants—of land sharing a boundary with an alley have a duty to keep the alley clear of brush and tree limb obstruction.

The remainder of ordinance section 14-64 provides, in pertinent part:

> (a) If the owner fails to comply with the terms of this article within seven (7) days of notice of a violation, the city may cause the work necessary to abate the violation to be done at the owner's expense.
>
> (b) Whenever the city shall abate a violation as provided by this article, the director of development services may select a private contractor to cut the vegetation and/or clean the land to bring the lot or parcel into compliance.
>
> . . . .
>
> (d) The city shall assess costs to the owner for all work done or improvements made as is needed to bring any lot or parcel into compliance with this article, including an administrative cost of one hundred eighty dollars ($180.00) and cause the expense hereof to be assessed on the real estate, lot or lots upon which such expense is incurred.

Therefore, if the owner—defined as owner or tenant—fails to comply with Article VII's terms related to public nuisance, *see* § 14-61, or keeping alleys obstruction free, *see* § 14-64, the city *may* abate the violation at the owner's expense. If the city abates the violation, the director of development services may select a private contractor for the abatement, and the city shall assess costs on the owner for all work done.

Blair argues Shannon, as director and head enforcement officer, is threatening to apply the maintenance responsibility to "owners" under ordinance sections 14-61 and 14-64, when Plaintiffs are not the "owners." Blair claims such enforcement amounts to an action without legal authority because Blair and the class are not the owner "in fee" under the statute. Blair cites subsection (h) of section 14-64—the provision establishing the duty—but the "real substance" of Blair's claim is the City's enforcement of the duties under the ordinances under subsection (a). *See Tex. Parks & Wildlife Dep't v. Sawyer Tr.*, 354 S.W.3d 384, 389 (Tex. 2011) ("The central test for determining jurisdiction is whether the 'real substance' of the plaintiff's claims falls within the scope of a waiver of immunity from suit."). Subsection (a) of section 14-64 provides, in pertinent part, "the city *may* cause the work necessary to abate the violation to be done at the owner's expense." The

provision identifies "the city" as the enforcer, in contrast to its use of "the director of development services" in subsection (b). This suggests the use of "city" was intentional. Because the enforcement of the ordinance is within the City's authority and Blair only challenges the ordinance's application, not its validity or constitutionality, governmental immunity bars Blair's claim. *See Sefzik*, 355 S.W.3d at 620, 622; *Wesolak*, 2016 WL 2989568, at *3.

Assuming for the sake of argument governmental immunity does not bar the claims because Blair and the putative class challenge only the application of the ordinance, section 14-64 establishes the City's enforcement of the ordinance is discretionary. The use of "may" in subsection (a) of section 14-64 is consistent with the use of the term "may" in subsection (b) which provides the director of development services "may" hire a private contractor to bring the lot into compliance. The use of "may" in those provisions contrasts with the use of "shall" in subsection (d) in the same ordinance: "[t]he city shall assess costs to the owner for all work done." The use of the term "may" is therefore consistent with a plain language reading of the word as "[t]o be permitted" or "[t]o be a possibility." *See May*, BLACK'S LAW DICTIONARY (11th ed. 2019), *available at Westlaw*. And a "violation" is a violation of the "terms of this article." This would include a violation by an owner—defined as owner *or tenant*—of the duty to keep: (1) property to the center of the alley garbage free, *see* § 14-61, and (2) alleys clear of obstruction from overhanging brush and trees. Thus, once triggered, the City has broad, unconstrained legal authority, based on the use of the term "may," to decide whether to abate violations by owners or tenants. *See McRaven*, 508 S.W.3d at 242-43 (government official is "simply tasked with making a determination" and "that is it," the government official's "discretion in making that determination is otherwise unconstrained"). In other words, the City decides when to enforce the ordinance. Such broad discretion in enforcement is protected by governmental immunity and falls

outside the ultra vires exception. *See McRaven*, 508 S.W.3d at 242-43; *Hous. Belt*, 487 S.W.3d at 162, 164.

Because Blair's first declaratory judgment claim does not fall within the ultra vires exception of governmental immunity, the trial court lacked subject-matter jurisdiction to hear the claim.

2. Blair's Second Declaratory Judgment Claim

Turning to Blair's second declaratory judgment claim, Blair and the putative class seek a declaration that actual and threatened enforcement of the ordinances requiring the landowners to provide maintenance to the alleys is an unconstitutional taking under article 1, Section 17 of the Texas Constitution. In opposition to Blair's claim, the City urges Blair simply attempts to recast a takings claim as a declaratory judgment claim and did not plead any actual payments made in connection with a violation of the ordinance. Blair responds she is not pursuing a takings claim, but is instead seeking declaratory and injunctive relief for a "threat of constitutional taking of her money as property." Blair argues, at the same time, she has properly pleaded a takings claim.

The real substance of Blair's petition and evidence is to posit the City owns the alleys, and it cannot enforce the public nuisance and alley maintenance ordinances against Blair and the class because they are not the owners. *Sawyer Tr.*, 354 S.W.3d at 389 (quoting *Dall. Cnty. Mental Health & Retardation v. Bossley*, 968 S.W.2d 339, 343-44 (Tex. 1998)). This is supported by Blair's request for relief in the petition: a declaratory judgment that she and the putative class have no obligation to maintain dedicated alleys abutting their property because they are not the "owners" under the ordinances. In other words, Blair's second claim is just a restatement of her first claim, and the trial court lacks subject-matter jurisdiction to hear it.

Even if Blair's claim was actually a takings claim for money damages, Blair's claim is brought as an ultra vires claim against appellant Shannon in his official capacity. Ultra vires

claimants are only entitled to prospective relief, like declaratory relief, not retrospective relief like money damages for takings. *See, e.g.*, *Garcia v. City of Willis*, 593 S.W.3d 201, 207 (Tex. 2019); *see also City of Dallas v. Albert*, 354 S.W.3d 368, 378 (Tex. 2011) ("[A] party cannot circumvent governmental immunity by characterizing a suit for money damages as a claim for declaratory judgment."). Moreover, a litigant is "at least required to seek administrative relief before filing a takings claim in district court." *Garcia*, 593 S.W.3d at 212; *see also id.* at 211 ("[A] litigant must avail itself of statutory remedies that may moot its takings claim, rather than directly institute a separate proceeding asserting such a claim." (quoting *City of Dallas v. Stewart*, 361 S.W.3d 562, 569 (Tex. 2012)) (internal quotation marks omitted)). Nothing in the record shows Blair sought administrative relief, and the trial court therefore lacked subject-matter jurisdiction to hear Blair's second claim.

Because both of Blair's declaratory judgment claims fall outside the ultra vires exception, the claims are barred by governmental immunity, and the trial court erred in denying the plea to the jurisdiction.

C. Repleading

"The question then becomes whether [Blair and the putative class] are entitled to an opportunity to amend. Texas courts allow parties to replead unless their pleadings demonstrate incurable defects." *Von Dohlen v. City of San Antonio*, 643 S.W.3d 387, 397 (Tex. 2022); *see, e.g.*, *Tex. Dep't of Parks & Wildlife v. Miranda*, 133 S.W.3d 217, 226-27 (Tex. 2004) ("If the pleadings do not contain sufficient facts to affirmatively demonstrate the trial court[']s jurisdiction but do not affirmatively demonstrate incurable defects in jurisdiction, the issue is one of pleading sufficiency and the plaintiffs should be afforded the opportunity to amend."). "Texas law does not favor striking defective pleadings without providing plaintiffs an opportunity to replead."

Von Dohlen, 643 S.W.3d at 397. "Thus, so long as petitioners' pleading does not affirmatively demonstrate the absence of jurisdiction, they should be given an opportunity to amend." *Id.*

Here, the petition alleges Shannon's enforcement of the ordinances is outside his legal authority because Blair and the putative class are not "owners" under the ordinances. However, the plain language of the ordinances show it is the City's authority, not Shannon's, to enforce the ordinances, and the City's immunity is not waived. *See Sefzik*, 355 S.W.3d at 620, 622; *Wesolak*, 2016 WL 2989568, at *3. Moreover, as the foregoing analysis demonstrates, the usage of "may" in the ordinance establishes its enforcement, once triggered, is within the broad discretion of the enforcer, and Blair and the putative class could not establish as a matter of law enforcement is beyond the legal authority granted under the ordinance. *See McRaven*, 508 S.W.3d at 242-43; *Hous. Belt*, 487 S.W.3d at 161-64; *Clint Indep. Sch. Dist. v. Marquez*, 487 S.W.3d 538, 559 (Tex. 2016) (lack of jurisdiction "arises not from a lack of factual allegations but from the nature of the . . . claims"). In addition, the use of "owner" in sections 14-61 and 14-64 means "owner or tenant" and not simply owner "in fee" as Blair and the putative class claim. Therefore, the enforcement of the ordinances against Blair or members of the putative class is permissible so long as they either owned the lot or were tenants. The actual ownership "in fee" of the property is therefore not dispositive under the ordinance. *Cf. State v. Lueck*, 290 S.W.3d 876, 880 (Tex. 2009) (concluding pleadings affirmatively negated jurisdiction because email at issue did not report violation of law as required by statute and email was directed to supervisor who was not "law enforcement authority" under the statute).

Because these allegations affirmatively negate a waiver of immunity, the petition demonstrates an incurable defect. Blair and the putative class are therefore not entitled to an opportunity to replead and are not granted one here. *See Von Dohlen*, 643 S.W.3d at 397; *see also Tex. Dep't of Ins., Div. of Workers' Comp. v. Brumfield*, No. 04-15-00473-CV, 2016 WL 2936380,

at *6 (Tex. App.—San Antonio May 18, 2016, no pet.) (mem. op.) ("In addition, Brumfield has already joined both the Division and the Commissioner in his suit, and we have determined that the ultra vires exception to sovereign immunity does not apply here. Because the defects in Brumfield's pleadings are not curable, Brumfield is not entitled to replead."); *cf. Perez*, 2022 WL 2080868, at *10 (granting opportunity to replead where several years had passed since amended pleading at issue filed and intervening events bore significantly on original claims).

For these reasons, we reverse the trial court's denial of the plea to the jurisdiction and dismiss the case for lack of jurisdiction.[8]

CLASS CERTIFICATION

Because the trial court lacks subject-matter jurisdiction, we vacate the portion of the trial court's order granting class certification. *See Tex. Mut. Ins. Co. v. Vasquez*, No. 04-14-00295-CV, 2015 WL 2339777, at *1 (Tex. App.—San Antonio May 13, 2015, no pet.) (mem. op.) (granting plea to jurisdiction and vacating separate trial court order); *see also Wells Fargo Bank, N.A. v. Wolf*, 444 S.W.3d 685, 688 (Tex. App.—Houston [14th Dist.] 2014, no pet.) (citing *Tex. Com. Bank, N.A. v. Grizzle*, 96 S.W.3d 240, 255 (Tex. 2002)) (holding trial court erred by certifying class when plaintiffs had no live claim on cause of action addressed by certification order).

CONCLUSION

We reverse the trial court's June 29, 2021 order denying the City's plea to the jurisdiction, we vacate the portion of that order granting class certification, and we render judgment granting the City's plea to the jurisdiction and dismiss the case for lack of jurisdiction.

Luz Elena D. Chapa, Justice

[8] "[W]e express no opinion as to the availability or viability of any future claims." *San Jacinto River Auth. v. Ray*, No. 14-19-00095-CV, 2021 WL 2154081, at *6 (Tex. App.—Houston [14th Dist.] May 27, 2021, no pet.) (mem. op.).