

**TEXAS COURT OF APPEALS, THIRD DISTRICT, AT AUSTIN**

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**NO. 03-16-00880-CV**

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**West Travis County Public Utility Agency, Appellant**

**v.**

**Travis County Municipal Utility District No. 12, Appellee**

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**FROM THE DISTRICT COURT OF TRAVIS COUNTY, 201ST JUDICIAL DISTRICT  
NO. D-1-GN-16-002274, HONORABLE STEPHEN YELENOSKY, JUDGE PRESIDING**

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**CONCURRING AND DISSENTING OPINION**

Under the Texas Supreme Court’s precedents guiding our construction of Local Government Code Section 271.152, the governmental immunity of West Travis County Public Utility Agency is waived with respect to claims for breach of its “Wholesale Water Services Agreement” with Travis County Municipal Utility District No. 12 by virtue of the District’s conveyance of the “Master Meter” under the Agreement.<sup>1</sup> However, only the District’s claims for

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<sup>1</sup> See, e.g., *Kirby Lake Dev., Ltd. v. Clear Lake City Water Auth.*, 320 S.W.3d 829, 839 (Tex. 2010) (explaining that “services” as used in Section 271.152 “is broad enough to encompass a wide array of activities,” “includes generally any act performed for the benefit of another,” and holding that water and sewer facilities constructed for government entity sufficed); *id.* (deriving from *Ben Bolt-Palito Blanco Consol. Indep. Sch. Dist. v. Texas Political Subdivs. Prop./Cas. Joint Self-Ins. Fund*, 212 S.W.3d 320, 327 (Tex. 2006), the propositions that “[t]he services provided . . . need not be the primary purpose of the agreement,” nor does the claim have to be based on the portion of the agreement under which “services” or “goods” are provided); *id.* at 838 (explaining that “essential terms” as used in Section 271.152 “generally . . . include ‘the time of performance, the price to be paid, the work to be done, the service to be rendered, or the property to be transferred’” (quoting *Liberto v. D.F. Stauffer Biscuit Co.*, 441 F.3d 318, 324 (5th Cir. 2006))); see also *Zachry Constr.*

direct damages allegedly attributable to such breach, interest, and attorney’s fees come within that waiver; the District’s claim for specific performance remains barred.<sup>2</sup> Accordingly, I join in the Court’s judgment only with respect to the District’s specific-performance claim. I would otherwise affirm the district court’s order.

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Bob Pemberton, Justice

Before Justices Puryear, Pemberton, and Goodwin

Filed: August 29, 2017

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*Corp. v. Port of Hous.*, 449 S.W.3d 98, 110–114 (Tex. 2014) (explaining that “the balance due and owed by the local governmental entity under the contract” as used in Section 271.153, which in turn limits scope of Section 271.152’s waiver, need not be specified in the contract, but “is simply the amount of damages for breach of contract payable and unpaid,” and that “[d]irect damages for breach . . . certainly qualify”); *Lubbock Cnty. Water Control & Improvement Dist. v. Church & Akin, L.L.C.*, 442 S.W.3d 297, 305 (Tex. 2014) (while observing that absence of express agreement by 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,” acknowledging that “a party may agree to provide goods or services in exchange for something other than payment”).

<sup>2</sup> See Tex. Loc. Gov’t Code § 271.153(a) (permitting damages limited to “the balance due and owed,” other amounts owed for change orders, “reasonable and necessary attorney’s fees that are equitable and just,” and “interest as allowed by law”); *cf. id.* § 271.153(c) (authorizing amount of “[a]ctual damages, specific performance, or injunctive relief” in an adjudication under different provision of chapter governing certain contracts for sale or delivery of water); see also *City of El Paso v. Heinrich*, 284 S.W.3d 366, 370–73 (Tex. 2009) (clarifying that suits seeking equitable relief against governmental entities, not merely suits for money damages, generally implicate sovereign or governmental immunity); *City of New Braunfels v. Carowest Land, Ltd.*, \_\_\_ S.W.3d \_\_\_, \_\_\_, 2017 Tex. App. LEXIS 6130, \*14–18 (Tex. App.—June 29, Austin 2017, no pet. h.) (clarifying that statutory immunity waivers that specify remedies are limited to those forms of relief and cannot be applied in a so-called transitive manner to permit additional remedies).