TEXAS COURT OF APPEALS, THIRD DISTRICT, AT AUSTIN

NO. 03-21-00378-CV

City of Kyle, Texas; Kyle Mayor Travis Mitchell in his Official Capacity; and Kyle City Council Members Dex Ellison, Tracy Scheel, Robert Rizo, Alex Villalobos, Rick Koch, and Michael Tobias, in their Official Capacities, Appellants

v.

Lila Knight; Timothy A. Kay; Helen Brown-Kay; and Save Our Springs Alliance, Inc., Appellees

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FROM THE 453RD DISTRICT COURT OF HAYS COUNTY
NO. 20-2048, THE HONORABLE MARGARET G. MIRABAL, JUDGE PRESIDING

MEMORANDUM OPINION

Plaintiffs Lila Knight, Timothy A. Kay, Helen Brown-Kay and Save Our Springs Alliance, Inc., (collectively, Plaintiffs) brought suit against the City of Kyle, Texas; Mayor Travis Mitchell in his Official Capacity; and Kyle City Council Members Dex Ellison, Tracy Scheel, Robert Rizo, Alex Villalobos, Rick Koch and Michael Tobias, in their Official Capacities (collectively, the City).[1] The suit challenged the City's annexation and development

[1] We refer to appellants collectively as the "City," except when addressing claims against Travis Mitchell, Dex Ellison, Tracy Scheel, Robert Rizo, Alex Villalobos, Rich Koch, and Michael Tobias, where we refer to them as "City Officials."

agreement (Development Agreement) of a third-party development located in Hays County.[2] We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

Save Our Springs Alliance, Inc., (SOS Alliance) is a membership association and a charitable corporation that seeks to protect the Edwards Aquifer, its springs, and the "natural and cultural heritage of the Texas Hill Country." The individual plaintiffs Lila Knight, Timothy A. Kay, and Helen Brown-Kay (collectively, Individual Plaintiffs) are residents, voters, and taxpayers within the City of Kyle. SOS Alliance and the Individual Plaintiffs brought suit challenging the City's approval of the Development Agreement.

In early 2016, landowners Robert Scott Nance, Jason Bradshaw, and Joel Bradshaw (the Owners) submitted to the City a request for voluntary annexation of their properties, totaling approximately 3268.6 acres of land. The Owners' request for annexation was conditioned upon "reaching agreement on a mutually approved form of development agreement for the property." Based on this condition, the Owners and City engaged in negotiations to govern the development of the annexed property, which resulted in the Development Agreement. That Development Agreement represents a bilateral, contractual agreement with the Owners, setting out terms governing the development of approximately 3,268.6 acres of land annexed from the Owners (Nance–Bradshaw property). The Development Agreement calls for the construction of a new bridge spanning across the Blanco River, for which the Development Agreement obligates the City to seek local, state, and federal funds for its construction. In addition, the Development Agreement

[2] Unless otherwise specified, we refer to the collection of the Development Agreement, Annexation Ordinance, and ordinance adopting amendments to the City of Kyle's comprehensive and transportation plans as the "Development Agreement."

provides for the development of 9,000 "living unit equivalents" (LUEs) on the property. Pursuant to Article I of the Development Agreement, the City's execution of the Development Agreement constitutes a "binding obligation of the City" that shall remain binding upon the City for a period of up to 45 years (which includes two extensions that may occur at the sole election of the Owners). The manner of development, and phasing thereof, remains the sole discretion of the Owners.

The terms of the Development Agreement require the City to approve all development permits that may be requested for the property up to the 9,000 LUE allotment, regardless of the type, scale, or consequences of that development. To ensure the terms of the Development Agreement will be implemented, the Development Agreement obligates the City Council to approve future amendments to the City's utilities, transportation, and comprehensive plans. To guarantee this level of entitlement, Plaintiffs claim, the Development Agreement "waives the applicability of certain Texas vested-rights statutes and nullifies effects of future City Council zoning decisions." The Development Agreement requires the current City Council and future City Councils to expend public funds to implement various provisions of the agreement, including the use of taxpayer dollars to increase roadway infrastructure and the use of public utility revenue to provide water and wastewater services for the LUEs.

In May 2017, without providing the statutorily required period for public comment and review, the members of the Kyle City Council voted 4-2 to approve the Development Agreement. The same day, the members voted 5-1 to approve the annexation ordinance. On October 17, 2017, the City Council voted to amend its transportation plan to include plans for a bridge spanning the Blanco River.

On September 15, 2020, Plaintiffs filed their original petition against the City, challenging the City's approval of the Development Agreement. In their pleadings, SOS Alliance

alleges that the Development Agreement impedes its members' interests in maintaining water quality and quantity of the Edwards Aquifer and the Blanco River. According to SOS Alliance, the development created by the 9,000 LUEs would significantly increase population in the area, causing increased traffic, noise, light, and pollution of these water sources. Increased development would also create a larger risk for erosion and sedimentation that threatens the water quality of the Blanco River, and by extension, the Edwards Aquifer.

The Individual Plaintiffs, who are residents, voters, and taxpayers within the City of Kyle, are also members of SOS Alliance and each lives in close proximity to the Nance–Bradshaw property. The Individual Plaintiffs allege the implementation of the Development Agreement will cause harm to their environmental, civic, personal safety, mobility, procedural, recreational, aesthetic, property, and voting interests. Plaintiffs claim that the City Officials' approval of the Development Agreement was an ultra vires act because it was approved without opportunity for public comment or review, as required by the Kyle City Charter and the Texas Open Meetings Act (TOMA), and because it unconstitutionally bartered away legislative powers to a private third party. SOS Alliance and the Individual Plaintiffs collectively sought an injunction to enjoin the implementation of the Development Agreement and to enjoin the City from the future expenditure of public funds to implement, comply with, or further any of the City's obligations under the Development Agreement.

The City filed a single motion encompassing a plea to the jurisdiction, a Rule 91a motion to dismiss, and a motion for partial summary judgment. After taking the motion under submission, the trial court entered an order denying the City's plea to the jurisdiction and Rule 91a motion to dismiss but granted the City's motion for partial summary judgment on Plaintiffs' first, third, and fifth causes of action as untimely pursuant to the Texas Validation Statute. *See* Tex.

Loc. Gov't Code § 51.003 (providing that a governmental act or proceeding of a municipality is conclusively presumed to be valid and to have occurred in accordance with all applicable statutes and ordinances as of the date it occurred assuming a lawsuit to annul or invalidate the proceeding has not been filed before the third anniversary of the effective date). The trial court denied the City's motion for partial summary judgment with respect to Plaintiffs' second cause of action that the City acted ultra vires in adopting the Development Agreement and also denied the City's motion for partial summary judgment on Plaintiffs' fourth and fifth causes of action involving alleged violations of the Texas Constitution. This interlocutory appeal followed.

DISCUSSION

Jurisdiction/Scope of Review

Plaintiffs' first amended petition alleges six causes of action against the City and the City Officials: [3]

(1) The City's adoption and approval of the Development Agreement should be invalidated because the agenda notice is insufficient under the TOMA;

(2) The City's adoption of amendments to the comprehensive plan and transportation plan violate the TOMA, the Kyle City Charter, and common law; therefore the City Officials' actions in adopting them were ultra vires;

(3) The City's adoption of the Development Agreement, without opportunity for public review, should be invalidated for violating the Kyle City Charter;

(4) The Development Agreement should be invalidated for violating SOS's statutory and procedural rights under Chapter 211 of the Local Government Code and for violating the City's own legislative zoning authority;

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[3] Plaintiffs' first amended petition contains references to two "Third Cause[s] of Action." This led to confusion after the trial court entered its ruling on the City's plea, leading Plaintiffs to submit a motion for reconsideration in order to gain clarification. In response, the trial court withdrew its original order and entered a new one, considering the second "third" claim as the fourth claim, and the subsequent "fourth" and "fifth" claims as the "fifth" and "sixth" claims.

(5) By approving the Development Agreement, the City unconstitutionally bartered away its legislative authority and police powers to a private entity;

(6) The approval of the Development Agreement and annexation ordinance resulted in an unconstitutional extension of the City of Kyle's extraterritorial jurisdiction.

The trial court granted the City's motion for partial summary judgment on the first, third, and sixth causes of action. Because no one challenges that ruling, only the second, fourth, and fifth causes of action are the subject of this appeal.

On appeal, the City presents the following issues:

(1) The trial court erred by failing to dismiss all of Plaintiffs' claims related to the City's annexation of the Nance–Bradshaw property;

(2) The trial court erred by failing to dismiss all of Plaintiffs' claims related to the City's approval of the Development Agreement;

(3) The trial court erred by failing to dismiss all of Plaintiffs' claims related to the City's May 16, 2017, approval of a comprehensive plan;

(4) The trial court erred by failing to dismiss Plaintiffs' "Non-TOMA" claims related to the City's October 4, 2017, approval of a transportation plan;

(5) Plaintiffs failed to assert cognizable ultra vires claims against City Officials; therefore, the trial court erred by failing to dismiss Plaintiffs' request for injunctive relief.

In sum, the City claims the trial court erred by failing to dismiss Plaintiffs' suit in its entirely except for one claim. [4]

As a threshold matter, we must first define the scope of this appeal. Generally, appeals may only be taken from final judgments or orders. *See Lehmann v. Har-Con Corp.*,

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[4] The City does not dispute that the trial court has subject-matter jurisdiction over Plaintiffs' TOMA challenge related to the sufficiency of an agenda notice.

39 S.W.3d 191, 195 (Tex. 2001). This interlocutory appeal stems from the denial of a plea to the jurisdiction, Rule 91a motion to dismiss, and a motion for partial summary judgment that were merged into one procedural vehicle.

A plea to the jurisdiction challenges a court's jurisdiction to hear the case. *Texas Dep't of Parks & Wildlife v. Miranda*, 133 S.W.3d 217, 226 (Tex. 2004). A plea to the jurisdiction is a dilatory plea that challenges the trial court's subject-matter jurisdiction without regard to whether the asserted claims have merit. *See Harris County v. Sykes*, 136 S.W.3d 635, 638 (Tex. 2004)*; see also Bland Indep. Sch. Dist. v. Blue*, 34 S.W.3d 547, 554 (Tex. 2000). Whether a pleader has alleged facts that affirmatively demonstrate the trial court's subject matter jurisdiction is a question of law reviewed de novo. *See Miranda*, 133 S.W.3d at 226. The burden is on the plaintiff to affirmatively demonstrate the trial court's jurisdiction. *See Heckman v. Williamson County*, 369 S.W.3d 137, 150 (Tex. 2012). In reviewing a plea to the jurisdiction, we begin with the plaintiff's live pleadings and determine if the plaintiff has alleged facts that affirmatively demonstrate the trial court's jurisdiction to hear the cause. *See Miranda*, 133 S.W.3d at 226. In making this assessment, we construe the plaintiff's pleadings liberally, taking all assertions as true, and look to the plaintiff's intent. *Id.* If a plea to the jurisdiction challenges the existence of jurisdictional facts, we may consider evidence and must do so when necessary to resolve the jurisdictional issues raised. *Id.* at 227; *see also Bland Indep. Sch. Dist*, 34 S.W.3d at 555. "Our ultimate inquiry is whether the plaintiff's pleaded and un-negated facts, taken as true and liberally construed with an eye to the pleader's intent, would affirmatively demonstrate a claim or claims within the trial court's jurisdiction." *Brantley v. Texas Youth Comm'n*, 365 S.W.3d 89, 94 (Tex. App.—Austin 2011, no pet.). However, courts must consider only the plaintiff's

pleadings and the evidence pertinent to the jurisdictional inquiry and take care not to weigh the merits of the case. *See County of Cameron v. Brown*, 80 S.W.3d 549, 555 (Tex. 2002).

In contrast to a plea to the jurisdiction, the denial of a Rule 91a motion is generally not subject to an interlocutory appeal. *See* Tex. Civ. Prac. & Rem. Code § 51.014(a). Dismissal is appropriate under Rule 91a "if the allegations, taken as true, together with inferences reasonably drawn from them, do not entitle the claimant to the relief sought . . . [or] no reasonable person could believe the facts pleaded." Tex. R. Civ. P. 91a.1; *see also City of Dallas v. Sanchez*, 494 S.W.3d 722, 724 (Tex. 2016). However, a Rule 91a motion can also challenge the court's subject-matter jurisdiction based on the pleaded facts. *See Sanchez*, 494 S.W.3d at 725. Thus, to the extent the City's Rule 91a motion was used to challenge the trial court's subject-matter jurisdiction, it effectively constitutes a plea to the jurisdiction. *See City of Austin v. Liberty Mut. Ins.*, 431 S.W.3d 817, 822 (Tex. App.—Austin 2014, no pet.) (exercising jurisdiction over appeal of trial court's denial of Rule 91a motion because substance of motion challenged trial court's jurisdiction).

This interlocutory appeal is authorized by Section 51.014(a)(8) of the Texas Civil Practice and Remedies Code (providing right to interlocutory appeal when court grants or denies plea to jurisdiction by governmental unit). Tex. Civ. Prac. & Rem. Code § 51.014(a)(8); *Texas Dep't of Criminal Justice v. Simons*, 140 S.W.3d 338, 349 (Tex. 2004), *rev'd on other grounds*, 578 S.W.3d 57 (Tex. 2019) ("The reference to 'plea to the jurisdiction' [in Section 51.014(a)(8)] is not to a particular procedural vehicle but to the substance of the issue raised. Thus, an interlocutory appeal may be taken from a refusal to dismiss for want of jurisdiction whether the jurisdictional argument is presented by plea to the jurisdiction or some other vehicle, such as a motion for summary judgment."). The scope of this appeal is therefore limited to the City's

challenge of the trial court's subject-matter jurisdiction, specifically whether Plaintiffs have standing to assert their claims as to the constitutionality of the Development Agreement, and whether Plaintiffs have pleaded sufficient facts to bring an ultra vires claim against the City Officials. We do not have jurisdiction to address the merits of any of the denied claims. *See County of Cameron*, 80 S.W.3d at 555. Accordingly, we construe the City's appealable issues as follows:

(1) Whether the trial court erred in denying the City's plea to the jurisdiction on Plaintiffs' second cause of action that the city officials acted ultra vires in approving the Development Agreement; [5]

(2) Whether the trial court erred in denying the City's plea to the jurisdiction on Plaintiffs' fourth and fifth causes of action because Plaintiffs lacked standing to assert them.

The City argues that Plaintiffs have not pleaded a viable ultra vires claim against the City Officials, and that both SOS Alliance and the Individual Plaintiffs lack standing to challenge the constitutionality of the Development Agreement because they have not shown a particularized, imminent risk of harm that is separate from the type of harm experienced from the public at large. Because it is dispositive, we first discuss whether the Plaintiffs have standing.

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[5] In an abundance of caution, to ensure our jurisdiction over this interlocutory appeal, we will construe any claims brought in the motion for partial summary judgment as claims brought in the City's plea to the jurisdiction. *See* Tex. Civ. Prac. & Rem. Code § 51.014(a)(8); *see also Thomas v. Long,* 207 S.W.3d 334, 339 (Tex. 2006) (explaining that interlocutory appeal may be taken under subsection (a)(8) irrespective of the selected procedural vehicle).

I. Whether SOS Alliance and Individual Plaintiffs have standing to challenge the Development Agreement

The Individual Plaintiffs and SOS Alliance assert different theories of standing to challenge the Development Agreement: the Individual Plaintiffs assert taxpayer and ratepayer standing while SOS Alliance alleges associational standing.

The City challenges the Individual Plaintiffs' claim of taxpayer standing, arguing they did not plead sufficient facts to show that public expenditures are at risk of being used for illegal purposes. The City also argues that SOS Alliance lacks associational standing because it has not alleged its members have suffered either past harm or a prospective, non-speculative risk of future harm that is separate from harm suffered by the public at large.

Standing is a component of subject matter jurisdiction, which cannot be waived and may be raised for the first time on appeal. *Texas Ass'n of Bus. v. Texas Air Control Bd.*, 852 S.W.2d 440, 445 (Tex. 1993). To establish standing in Texas courts, a plaintiff must allege a concrete injury and there must be a real controversy between the parties. *See Heckman*, 369 S.W.3d at 154. In determining whether the plaintiff has adequately alleged a concrete injury sufficient to invoke standing, courts will look solely to the plaintiff's pleadings. *See Texas Ass'n of Bus.*, 852 S.W.2d at 446. Because the standing determination is made by looking to the plaintiff's pleadings, the mere fact that a plaintiff may ultimately not prevail on the merits of the lawsuit does not deprive the plaintiff of standing. *See Farmers Tex. Cnty. Mut. Ins. v. Beasley*, 598 S.W.3d 237, 241 (Tex. 2020) quoting *DaimlerChrysler Corp. v. Inman,* 252 S.W.3d 299, 305 (Tex. 2008) ("A plaintiff does not lack standing simply because he cannot prevail on the merits of his claim; he lacks standing because his claim of injury is too slight for a court to afford redress.").

A. Whether SOS Alliance has sufficiently pleaded associational standing

An association has standing to sue on behalf of its members if: (1) its members would otherwise have standing to sue in their own right; (2) the interests the organization seeks to protect are germane to the organization's purposes; and (3) neither the claim asserted, nor the relief requested, requires the participation of individual members in the lawsuit. *Texas Ass'n of Business*, 852 S.W.2d at 446–47 (citing *Hunt v. Washington State Apple Advert. Comm'n,* 432 U.S. 333, 343 (1977)). The first prong of the *Hunt* test should not be interpreted to impose unreasonable obstacles to associational representation. *Id.* The United States Supreme Court has stated that "the purpose of the first [prong] of the *Hunt* test is simply to weed out plaintiffs who try to bring cases, which could not otherwise be brought, by manufacturing allegations of standing that lack any real foundation." *Id.* (citing *New York State Club Ass'n v. City of New York*, 487 U.S. 1, 9 (1988)). The City challenges only the first prong.

SOS Alliance claims an interest in maintaining the water quality and water quantity of the Edwards Aquifer, along with the water quality of the Blanco River, which interacts with and recharges the Edwards Aquifer. As part of its mission, SOS Alliance "monitors and opposes development activities within the Texas Hill Country that threaten water quality and quantity in the Edwards Aquifer and the natural and cultural heritage of the Texas Hill Country, including, the use of taxpayer monies, development entitlements, and other governmental programs that subsidize or incentivize such development." SOS Alliance contends that the Development Agreement would contribute to erosion and sedimentation of both waterways through pollution and wastewater run-off. It also contends that the Development Agreement, through both its commercial and residential developments, would increase the population of the area by an

estimated 25,000 people (an approximate 50% increase over the existing population of Kyle) and substantially increase traffic, noise, and light affecting nearby residents.

1. Pollution/erosion

SOS Alliance contends that the Development Agreement will contribute to groundwater contamination and pollution. The Edwards Aquifer is a limestone aquifer with poor filtration capability, making it vulnerable to pollution from urban development and increased vehicular traffic, such as oil, grease, and other urban contaminants that wash off pavement and make their way into waterways and recharge features. The proposed construction would increase sediment loads that wash off construction sites and increase erosion and sedimentation that threaten the water quality of the Blanco River and the Edwards Aquifer. The Development Agreement permits over 1,300 acres over the Aquifer's Recharge Zone to be paved over with impervious cover, which "inhibits the recharge of the aquifer, increases stormwater discharge into the Blanco River, and leads to increased flooding risks and erosion of riverbanks, resulting in higher levels of sediment that contaminate the aquifer and its springs, especially during heavy rainfall events."[6] SOS Alliance has members who rely on the Edwards Aquifer as a domestic water supply, including members who directly obtain groundwater through wells adjacent to and near the Nance–Bradshaw property, who will be injured from increased groundwater contamination caused by development of the property.

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[6] Impervious cover is often defined as any type of human-made surface that prevents rainwater from being directly absorbed into the ground (i.e., rooftops, patios, driveways, and sidewalks).

2. Property owners

SOS Alliance's members own land immediately adjacent to and near the Nance–Bradshaw property. These members enjoy "clean water from their wells, bird and wildlife observation, dark skies, quiet nights, very limited traffic, and the scenic beauty of undeveloped land and land developed at a very low-density, rural scale." These members' conservation, recreation, personal health and safety, property, and aesthetic interests are allegedly harmed by the developments authorized and subsidized by the Development Agreement. As adjacent landowners, SOS Alliance members claim their property interests are injured by the light, traffic, noise, water pollution, and traffic that will result from the Development Agreement, as well their aesthetic and environmental interests.

3. Roadways/traffic

SOS Alliance has members who use roads daily that would be impacted and reconfigured under the terms of the Development Agreement, creating increased traffic. It contends that routes from the Nance–Bradshaw property to Highway Interstate 35 (I-35) are rare and already carry substantial traffic. As a result, SOS Alliance claims its members will suffer direct and particular harm to their personal health, safety, and time interests as a result of the massive traffic increases caused by the development.

4. Procedural and voting rights

SOS Alliance has members who own property adjacent to and/or within the 200 feet boundary of the property who will be denied certain rights, including statutorily required notice, the opportunity to present testimony at public hearings before the Kyle Planning and Zoning Commission and Kyle City Council, and the right to protest zoning changes. In addition to the

landowners, SOS Alliance's members also include residents and voters of the City of Kyle who "have had their procedural and voting rights injured by the City's contracting away of municipal zoning and legislative powers, such as their right to notice and an opportunity to be heard in zoning and other legislative matters, as well as their right to campaign for and elect council members with authority to zone the Nance–Bradshaw [p]roperty, in whole or in part, through the required notice, public hearing, and other substantive and procedural standards."

5. *Aesthetic/visual*

SOS Alliance suggests that the Development Agreement will also harm its members' "aesthetic and environmental interests." SOS Alliance has members who enjoy paddling on this undeveloped, scenic, and clean stretch of the Blanco River. Their personal health, recreational, and aesthetic interests will be directly harmed by the water, noise and light pollution that will result from the approved development, and the visual intrusion of a bridge and riverside development approved and funded by the Development Agreement.

6. *Expenditures from public funds*

SOS Alliance's members are residents and landowners within the City of Kyle or its extraterritorial jurisdiction who pay both property and sales tax. They are also ratepayers of City of Kyle water and wastewater utility services. SOS Alliance claims these members will be harmed from "increased taxes and utility rates resulting from the City of Kyle's contractual commitments contained within the Development Agreement, including but not limited to the use of taxpayer dollars to extend and expand road and bridge infrastructure and the use of utility revenue to serve and support 9,000 new LUEs."

The City relies on this Court's holding in *Save Our Springs Alliance v. City of Dripping Springs* to support its contention that SOS Alliance lacks associational standing to challenge the Development Agreement. *See Save Our Springs All., Inc. v. City of Dripping Springs*, 304 S.W.3d 871 (Tex. App.—Austin, 2010, pet. denied). In that case, SOS Alliance filed suit against the City of Dripping Springs arguing, inter alia, that the City's proposed development agreements for residential, commercial, and recreational use would result in added pollution to the environmentally sensitive Edwards Aquifer, affecting various areas including the Barton Springs pool. *Id.* at 876. SOS Alliance sought a declaration that the agreements violated the Texas Constitution. *Id.* This Court held that SOS Alliance lacked standing to pursue these claims because any injury to its members' environmental, scientific, and recreational interests generally (meaning without any interest in or connection to the real property involved) was "not the type of interference with a legally protected interest or injury that confers standing as a matter of state law." *Id.* at 882. However, *Dripping Springs* is readily distinguishable.

In *Dripping Springs*, this Court held that the mere possibility that pollutants from the developments could contribute to run-off into the aquifer, without any evidence or allegations, was insufficient to show an injury that was "actual and imminent, [and not merely] hypothetical." *Id.* at 882; *see also DaimlerChrysler Corp.*, 252 S.W.3d at 304–05. This Court explained:

> According to SOS Alliance's experts' affidavits, rainfall on the contributing zone flows east to the recharge zone, where it enters the underground aquifer, and then flows north and mostly resurfaces at the Barton Springs pool. The experts further aver that pollutants from the developments would be added to this run-off into the aquifer, and that there is already evidence of increased pollutants at the Barton Springs pool. Given the specific description contained in SOS Alliance's jurisdictional evidence of the flow direction toward and within the aquifer, there **must be evidence in the record to show that the properties of the members who express concern about pollution to their water supply are in a location that is**

> **at least potentially "downflow" from the developments.** SOS Alliance did not present any allegations or evidence on this point.

Dripping Springs, 304 S.W.3d at 883 (emphasis added). Here, by contrast, SOS Alliance's evidence of affidavits and reports show that its land-owning members' close proximity to the development would very likely increase their exposure to water contamination and pollution. In one example, SOS Alliance showed that pollution generated by the development approved by the Development Agreement would flow towards both property owned by SOS Alliance members and downstream water recreation sites owned or frequented by SOS Alliance members. SOS Alliance's evidence included a report from an environmental expert showing dye injection locations into Blanco River and testimony that dye was detected in 23 wells and 18 springs, including both in the San Marcos and Barton Springs complexes.[7] The expert also produced a map showing the location of water supply wells within a 5-mile buffer to the Nance–Bradshaw property. Through this evidence, SOS Alliance showed that members who rely on the Edwards Aquifer as a domestic water supply, including members who directly obtain groundwater through wells adjacent to and near the property and members who own land where the wells are contained, will be injured from increased groundwater contamination caused by development of the property. Increased groundwater contamination on landowners' property is an injury sufficiently particularized so as to distinguish the harm from that experienced by the general public.

Dripping Springs may be further distinguished because in that case, this Court held that SOS Alliance did not have taxpayer standing based only on the expenditure of public funds

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[7] These dye trace studies involve the injection of organic, non-toxic dye into the aquifer recharge locations in order to document connecting flow paths and travel times.

that would allegedly be reimbursed by the owners to the city. *Id.* at 886. In that case, the only public funds in question involved the payment of legal fees to defend the allegedly unlawful agreement. *Id.* Here, by contrast, the Plaintiffs have provided detailed allegations regarding the expenditure of public funds through several channels: the guaranteed reimbursements for the oversizing of roads, the guaranteed prioritization of the provision of water and wastewater services, and the reimbursement of sales and property tax payments.[8]

In sum, unlike the jurisdictional evidence presented in *Dripping Springs*, SOS Alliance's pleadings and jurisdictional evidence in this case show that the harm to its members is beyond hypothetical: its members either own land that will be at risk of deterioration through pollution or erosion or use the wells from the Aquifer as a source of groundwater that will suffer an imminent risk of contamination, as provided by the dye study. *See Lake Medina Conservation Soc'y v. Texas Nat. Res. Conservation Comm'n,* 980 S.W.2d 511, 515–16 (Tex. App.—Austin 1998, pet. denied) (holding that organization's members would have standing in their own right because they owned waterfront property, waterfront businesses, and private wells in area of proposed development); *see also Heat Energy Advanced Tech., Inc. v. West Dallas Coalition for Env't. Justice,* 962 S.W.2d 288, 295 (Tex. App.—Austin 1998, pet. denied) (holding that the proximity of member's home to challenged development, combined with that member's allegation of odors affecting his breathing, was sufficient to establish standing); *City of Laredo v. Rio Grande H20 Guardian*, No. 04-10-00872-CV, 2011 WL 3122205, at *4–5 (Tex. App.—San Antonio July 27, 2011, no pet.) (mem. op.) (concluding plaintiffs could show "concrete and particularized"

[8] Plaintiffs claim these expenditures are illegal because the City does not possess legal authority to pay the Owners' reimbursements from tax revenue in exchange for the Owners' agreement to permit the annexation of the property.

injury where plaintiff's members owned property near rezoned property and asserted that they would be "adversely affected by the pollution, litter, noise, light, traffic, dust, and other disturbances likely to result from the rezoned areas."). Construing the pleadings liberally in favor of the Plaintiffs, looking to the Plaintiffs' intent, and accepting all factual allegations as true, as we must at this stage, *see Miranda*, 133 S.W.3d at 228, we hold that Plaintiffs alleged sufficient facts, which were unchallenged by the City, demonstrating its individual members, or at least one of them, could sue in their own right. This satisfies the first prong of the *Hunt* associational standing test.[9]

B. Whether the Individual Plaintiffs have alleged taxpayer standing

Taxpayers may bring suit to enjoin the expenditure of public funds that result from an illegal or void contract. *See Hendee v. Dewhurst*, 228 S.W.3d 354, 380 (Tex. App.—Austin 2007, pet. denied) (citing *Osborne v. Keith*, 177 S.W.2d 198, 200–01 (Tex. 1944)). Taxpayer standing is a limited judicially-created exception to traditional standing requirements. *Williams v. Lara*, 52 S.W.3d 171, 180 (Tex. 2001). In order to assert taxpayer standing, "[m]unicipal taxpayers need only establish that they pay taxes to the relevant entity, and that public funds are expended on the allegedly unconstitutional activity." *Id.* at 181. Because of the relative closeness between municipalities and their taxpayers, this test is applied more leniently than for establishing other forms of taxpayer standing, such as those brought in the state or federal context. *Id.*

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[9] Because we have determined that SOS Alliance has sufficiently pleaded facts to show associational standing based on the first and only *Hunt* prong challenged by the City, an analysis into the second and third prongs is unnecessary. *See* Tex. R. App. P. 47.1 ("The court of appeals must hand down a written opinion that is as brief as practicable but that addresses every issue raised and necessary to final disposition of the appeal.").

The Individual Plaintiffs claim, as members of SOS Alliance and as residents and taxpayers of the City of Kyle, that they are subject to the previously mentioned negative effects of the Development Agreement as set out above. In addition, Ms. Knight and Mr. and Mrs. Kay claim they will be negatively affected as they live in close proximity to the Nance–Bradshaw property and rely upon the roads that will be affected by the proposed development. Furthermore, as a voting member of the City of Kyle's planning and zoning commission, Mr. Kay will have no more discretion over voting decisions, as the Development Agreement subjects the City to obligations that must occur, regardless of a vote. For the following reasons, we hold that the Individual Plaintiffs have pleaded sufficient facts to implicate the trial court's subject-matter jurisdiction.

The City suggests that the Individual Plaintiffs lack standing because they cannot show that expenditures resulting from contractual commitments in the allegedly void Development Agreement are unlawful on other grounds. However, the Texas Supreme Court has long recognized "the right of a taxpaying citizen to maintain an action in a court of equity to enjoin public officials from expending public funds under a contract that is void or illegal." *See Osborne*, 177 S.W.2d at 200. The taxpayer need not claim that the expenditure themselves are aimed at an unlawful purpose, but rather that they *result* from a void or illegal contract or invalid appropriation. *See Hendee*, 228 S.W.3d at 379–380 (emphasis added). The City appears to suggest that the taxpayer standing analysis at this stage necessarily requires an analysis, and eventually, conclusion, that the Development Agreement was either void or illegal. Plaintiffs counter that such an analysis is unnecessary at this stage, claiming: "[w]hen the merits are reached, SOS intends to show that gift-wrapping all the legislative authority of the [City Officials] and handing it over to a third party is not a legal transaction. For now, it is sufficient that SOS has fully alleged

viable ultra vires claims that the Development Agreement, and the annexation [and the amendments] that [are] part of it, are void and that SOS members and individual plaintiffs are taxpaying residents, voters, and property owners in the City of Kyle." Because we hold, *infra*, that Plaintiffs' pleadings sufficiently allege an ultra vires claim, we agree. Accordingly, because at this stage in the litigation the Individual Plaintiffs are merely seeking to invoke the trial court's subject-matter jurisdiction by establishing taxpayer standing, our analysis into the voidness of the Development Agreement ends here.[10] *See Chambers–Liberty Cntys. Navigation Dist. v. State*, 575 S.W.3d 339, 355 (Tex. 2019) (acknowledging that, while questions of law at jurisdictional stage "may closely resemble the questions that will dictate the ultimate outcome of the litigation," resolution of merits remains separate matter from resolution of interlocutory appeal).

The City also argues that the specific dollar amounts and unspecified timing of dollar amounts are too speculative in nature to be considered prospective harm. *See Hendee*, 228 S.W.3d at 381 (noting that taxpayers only enjoy standing for prospective expenditures). Plaintiffs counter that the speculative nature of the expenditures *is* the harm: they argue that much of the timing and the amounts of the expenditure of public funds made by the City relies heavily on the absolute discretion of a private party (the Owners), "which includes guaranteed reimbursements for the oversizing of roadways, the guaranteed prioritization of the provision of water and wastewater services according to the Owners' desired development scale and timeline, and the reimbursement of sales and property tax payments, depending on the timing of the Owners'

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[10] We also apply this principle to the City's allegations that Plaintiffs' claims related to the May 16, 2017 approval of a comprehensive plan are barred by the Texas Validation Statute. *See* Tex. Loc. Gov't Code § 51.003. We decline to address the merits of this issue, noting that this type of claim will be better adjudicated through a traditional motion for summary judgment. *See City of Austin v. Savetownlake.org*, No. 03-07-00410-CV, 2008 WL 3877683 at *15 (Tex. App.—Austin Aug. 22, 2008, no pet.) (mem. op.).

development." Plaintiffs claim that substantial amounts of "would-be general fund dollars" will be due to the Owners as soon a single water meter anywhere on the Nance–Bradshaw property is installed, and that such an installation "is a condition that can be met at any time in the imminent future." To support this contention, Plaintiffs provided an anticipated schedule of the delivery of water and wastewater services for the proposed residential development, showing that the property might have its first LUEs as early as 2022.

Because the threshold for establishing taxpayer standing in an ultra vires suit is a low one, *see Williams*, 52 S.W.3d at 181, the Individual Plaintiffs need only establish that they pay taxes (public funds) to the relevant entity, and that those taxes are expended on the allegedly unconstitutional activity. *Id.* In the scope of this interlocutory appeal, we must construe the pleadings liberally in favor of the Plaintiffs, look to the Plaintiffs' intent, and accept all factual allegations as true. *See Miranda*, 133 S.W.3d at 228. Based on this standard, we conclude that the Individual Plaintiffs have sufficiently alleged that they are City of Kyle taxpayers, and that taxpayer dollars will be used at some point for the purpose of executing the terms of the allegedly void Development Agreement. Accordingly, the pleadings and attached evidence are sufficient to establish the Individual Plaintiffs' taxpayer standing to challenge the Development Agreement. We overrule the City's first issue.

II. Whether the Plaintiffs have pleaded an ultra vires claim

Plaintiffs allege that the City Officials acted ultra vires—in other words, without legal authority—by adopting the Development Agreement without the statutorily required public processes and opportunities for public input. Specifically, Plaintiffs contend that the City Officials violated Section 10.03 of the Kyle City Charter because none of its provisions, including certain provisions requiring public hearings and public review, were followed before the City Officials

voted to approve the Development Agreement. The Plaintiffs also alleged that, in approving the Development Agreement, the City bartered away its legislative authority and police power to a private entity, violating their rights under the Texas Constitution. Accordingly, Plaintiffs suggest that the City Officials acted ultra vires in their approval of the Development Agreement and should be enjoined from recognizing as valid and enforcing and implementing the Development Agreement. The requested injunction also seeks to enjoin the City Officials from adopting any future development agreements in violation of the Kyle City Charter, which requires proposed ordinances to be posted in advance of the meeting for public review and consideration.

Local governmental entities are generally immune from claims unless the Legislature has clearly and unambiguously waived such immunity and the plaintiff properly alleges a valid waiver in its pleadings. *See Dallas Area Rapid Transit v. Whitley*, 104 S.W.3d 540, 542 (Tex. 2003) ("In a suit against a governmental unit, the plaintiff must affirmatively demonstrate the court's jurisdiction by alleging a valid waiver of immunity.").

However, while governmental immunity provides broad protection to the state and its officers, it does not bar a suit against a governmental officer for acting outside his authority, i.e., an ultra vires suit. *See Houston Belt & Terminal Ry. v. City of Hous.*, 487 S.W.3d 154, 161 (Tex. 2016); *see also City of El Paso v. Heinrich*, 284 S.W.3d 366, 372 (Tex. 2009). An ultra vires action is one in which the plaintiff seeks relief in an official-capacity suit against a government actor who allegedly has violated statutory or constitutional provisions by acting without legal authority or by failing to perform a purely ministerial act. *Heinrich,* 284 S.W.3d at 372–73. Suits alleging ultra vires or unconstitutional conduct by a government official "do not seek to alter government policy but rather to enforce existing policy" by compelling a government official "to comply with statutory or constitutional provisions." *Id.* at 372 (providing that available relief in

ultra vires suit is limited to prospective, injunctive relief and declaratory relief). To state a cognizable ultra vires claim, the plaintiff must allege, and ultimately prove at trial, that the elected officials acted without legal authority or failed to perform a ministerial act. *Hall v. McRaven*, 508 S.W.3d 232, 238 (Tex. 2017). Relevant here, city council members act without legal authority when they violate their city charter, state statutes, or the Texas Constitutions. *See Heinrich*, 284 S.W.3d at 377 (viable ultra vires claim existed where city council members acted in violation of state statute and Texas Constitution); *see also Suarez v. Silvas*, 613 S.W.3d 549, 556 (Tex. App.—San Antonio, 2020, no pet.) (mem. op.) (concluding that ultra vires claims existed where other city councilmembers acted without legal authority when they violated city charter by declaring plaintiff council member's position forfeited).

The City concedes in its brief that governmental immunity does not bar ultra vires suits.[11] The City argues, however, that the Development Agreement was presumptively valid—and therefore legal—under the Kyle City Charter and various state laws, and therefore the City Officials did not act ultra vires in approving it. Specifically, it claims that the approval of the Development Agreement was a "completely discretionary decision" that was "legislatively authorized." It claims that Kyle is a home-rule city which exercises "organic powers" given to it by the Texas Constitution.

Plaintiffs respond that the analysis as to whether the agreements were presumptively valid requires an analysis into the merits of Plaintiffs' claims, which they believe

[11] The City also recognizes that the TOMA provides a clear and unambiguous waiver of governmental immunity from suits seeking injunctive and mandamus relief. *See Town of Shady Shores v. Swanson*, 590 S.W.3d 544, 554 (Tex. 2019); *see also* Tex. Gov't Code § 551.142(a) ("An interested person . . . may bring an action by mandamus or injunction to stop, prevent, or reverse a violation or threatened violation of this chapter by members of a governmental body.").

would be premature at this point. We agree to some extent, but find that a brief analysis into whether Plaintiffs have sufficiently pleaded that the City Officials acted without legal authority in approving the Development Agreement is necessary. *See Bland Indep. Sch. Dist*, 34 S.W.3d at 555 (explaining that appellate courts may consider relevant evidence submitted by parties and must do so when necessary to resolve jurisdictional issues raised).

Plaintiffs' second cause of action asserts that the City Officials violated the Kyle City Charter, the TOMA, and common law by contractually adopting specific amendments to the City Comprehensive and Transportation Plans. Specifically, they claim that Section 551.043 of the TOMA requires seventy-two hour advance notice of any meeting of a legislative body during which formal action can occur. They also claim that Article 10 of the Kyle City Charter sets out its own procedural requirements for the review and consideration of the City's comprehensive plan and proposed amendments which includes notice to residents and opportunities to weigh in at public hearings before the Planning and Zoning Commission and the City Council. Plaintiffs explain that the comprehensive plan provides that "all public and private development shall conform with such adopted comprehensive plan, or the applicable elements or portions thereof." Specifically, Plaintiffs allege that Section 10.03 of the Kyle City Charter requires that:

> all land development regulations including zoning and map, subdivision regulations, roadway plan, all public improvements, public facilities, public utilities projects and all city regulatory actions relating to land use, subdivision and development approval shall be consistent with the comprehensive plan, element or portion thereof as adopted, except to the extent, if any, as provided by law.

As a result, ordinances such as the Development Agreement that grant entitlements to land must be consistent with the comprehensive plan. Under this section of the Kyle City Charter, amendments to the comprehensive plan must follow the same procedures for review,

consideration, and recommendation as the initial adoption of the comprehensive plan itself, which includes public hearings before the Zoning and Planning Commission and the City Council prior to adoption. Because the transportation plan is part of the City's comprehensive plan, Plaintiffs claim, amendments to the transportation plan must also follow the same procedures as an amendment to the comprehensive plan.

Plaintiffs claim that the City Officials' approval of the Development Agreement was therefore inconsistent with the provisions of the Kyle comprehensive plan and the Kyle transportation plan. Despite this, and without providing an opportunity for public hearings and public review as required by Section 10.03 of the Kyle City Charter, the City Officials voted to approve the Development Agreement in May 2017. Two weeks later, Plaintiffs claim, in keeping with its contractual obligations under the Development Agreement, the City Officials also voted to approve amendments to its comprehensive plan, incorporating the provisions of the Development Agreement into both the comprehensive plan's text and Future Land Use map. Finally, Plaintiffs claim that on October 4, 2017, again without a public hearing as required by Section 10.03 of the Kyle City Charter, the City Officials voted to amend its transportation plan to include the Blanco River Span Bridge, noting its contractual requirements under the Development Agreement to approve such amendment.

These allegations explain in great detail how the Plaintiffs believe the City Officials, in approving the amendments to the Development Agreement, acted beyond their legal authority: Plaintiffs describe the specific actions taken by the City Officials, describe the relevant laws and regulations they believe must be constitutionally followed, and then explain how those specific actions violated various provisions of either common law or the Kyle City Charter and the TOMA. Construing the pleadings liberally in the Plaintiffs' favor, which we must at this stage,

see Miranda, 133 S.W.3d at 228, we conclude that Plaintiffs have pleaded sufficient facts to show that the elected City Officials acted without legal authority in approving the Development Agreement. Accordingly, they have stated a viable ultra vires claim sufficient to establish an exception to the City's governmental immunity. Whether Plaintiffs will ultimately prevail on the merits of that claim is an analysis reserved for the finder of fact, which we are not. We overrule the City's second issue.

CONCLUSION

Having concluded that SOS Alliance and the Individual Plaintiffs have standing to bring their claims and have pleaded sufficient facts to invoke the trial court's subject-matter jurisdiction on their constitutional challenges to the City's approval of the Development Agreement and their claim that the City Officials acted ultra vires in approving it, we affirm the trial court's order denying the City's motion for partial summary judgment on these claims. We remand the case to the trial court for further proceedings consistent with this opinion.

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Edward Smith, Justice

Before Justices Baker, Smith, and Theofanis

Affirmed

Filed: August 30, 2023