

Local Projects and Governmental Immunity: When is a City Protected from Suit?

By Jeff Chapman

The previous month's column addressed the statutory framework for waiving sovereign immunity in Texas for liability from contracts. In addition to that waiver, recent court decisions have examined when a governmental entity might waive immunity and be exposed to liability and damages that go beyond the limited category of damages that I addressed last month. In the most recent case, *Wasson Interests v. City of Jacksonville*, the court determined that a city can be sued if the city has acted in a proprietary manner as compared to a governmental manner.

This case is significant because the general consensus when dealing with construction projects in which a city or other local governmental entity was directly or tangentially involved was that the government could not be sued unless it was in a direct contract with a contractor. And, even in that situation, the available remedies and damages are limited in the manner discussed in last month's column.

In *Wasson*, the city built a reservoir and then leased the adjacent land to various individuals and entities. Under the lease, the lessors paid rent to the city and agreed to only use the land for residential purposes. When the Wassons changed their use of the house they built on the leasehold from their residence to an event space, the city terminated their lease because the Wassons were in violation of the lease's prohibition against commercial usage. The Wassons challenged the decision and sued the city based on breach of the lease. While the Wassons did not appear to sue the city for damages for lost revenue from the lease cancellation, they did seek an injunction preventing the city from terminating the lease.

The city responded to the lawsuit with a defense of immunity. The case made its way through the court system until it reached the Texas Supreme Court. The supreme court ruled that the city did not have immunity because the leasing of property at the reservoir was a proprietary function and not an essential governmental function. The court held that the city continues to enjoy the protections of immunity for essential governmental functions, but that a city cannot benefit from the protection of immunity when the city acts to only benefit certain citizens that reside within the city limits rather than the entire public at large.

In *Wasson*, because the leases of property around the reservoir were entered into the benefit those citizens who held the leases and, I suspect, because the activity was a revenue generating action that was designed to benefit the city and its needs concerning provision of services, the act of leasing city-owned property was determined to be proprietary. Because of that decision, the Wassons were free to sue the city and try to get the relief they felt entitled to receive.

In order to determine whether a governmental act falls under an essential or proprietary function, the legislature has enumerated a list of governmental functions. That list is found in the Tort Claims Act. Under the Tort Claims Act, a city can be liable even for essential governmental actions if a person is injured from the operation of a motor vehicle used in the provision of a listed governmental function. One key distinction that *Wasson* makes and expands on is that immunity is also waived for nonessential govern-

mental functions for damages that arise from actions that do not involve a motor vehicle—such as the breach of a lease agreement.

The list provided by the legislature is codified in section 101.0215 of the civil practice and remedies code. That statute outlines 36 different items that the legislature considers essential governmental services. For these services, presumably, a city enjoys immunity from liability for damages as long as the damages are not caused by a motor vehicle. Some of these functions include the following:

- Street construction and design
- Bridge construction and maintenance
- Street maintenance
- Establishment and maintenance of jails
- Sanitary and storm sewers
- Airports
- Parks
- Dams and reservoirs

Each of these actions above are related to construction. Before *Wasson*, a city would be limited to damages for these actions only where a contractor was suing for contract damages.

After *Wasson*, one can envision a scenario where a city acts in a manner associated with one of these functions but ancillary to the essential governmental function. If in the performance of those acts the city causes damages, *Wasson* may provide an avenue for a contractor who may not have a contract with the city to assert a damages claim. For example, if the city is performing work on an adjacent site and actions by the city cause a retaining wall to collapse, thereby damaging equipment or constructed improvements on the adjacent site, there may be a scenario where the city can be sued for that property damages even if the damage was not caused by the use of heavy equipment. If the city designed the work and it failed, then a claim may arise. Of course, the project the city was performing would have to fall within the proprietary function in order to open that door.

Apart from the statutory list addressed above, the *Wasson* court provided the following definition of a proprietary function. This definition may be helpful in assisting a potential claimant determine whether a lawsuit is available. "Proprietary functions... are those 'performed by a city, in its discretion, primarily for the benefit of those within the corporate limits of the municipality,' and 'not as an arm of the government.' These are usually activities 'that can be, and often are, provided by private persons.'"



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A Balanced Approach to Construction Law.

While *Wasson* specifically dealt with municipal liability, the analysis might apply to other local governmental entities. Like in *Wasson*, a river authority or other entity might construct an improvement like a reservoir, and then perform additional functions that the court may view as proprietary.

