

# Watch out for that pothole! Navigating Common Legal Hurdles for Municipal Utilities

**Nathan Vassar & Lora Naismith**  
Lloyd Gosselink Rochelle & Townsend, P.C.  
[www.lglawfirm.com](http://www.lglawfirm.com)

**2024 TMUA Utility Leadership and Management  
Conference**  
**March 1, 2024**

- Sovereign and Governmental Immunity
- Exceptions to Immunity
  - Government Entity Liability under the Texas Tort Claims Act
  - Waivers of Immunity
- Case Studies
  - Weatherford International, LLC v. City of Midland
  - City of Ames v. City of Liberty

## Sovereign Immunity is:

- a. Not having to read or hear about the royal family's drama
- b. Protection for the government from being sued
- c. The government's right to get away with anything

## What is a tort?

- a. My favorite fruity dessert
- b. An action causing injury to a person or property
- c. A funny word lawyers use to sound smart

## How would you describe negligence?

- a. Not stopping at a stop sign
- b. Not putting out a no-slip sign on a wet floor
- c. Failure to do something to avoid harm to others
- d. All of the above



# Sovereign Immunity

- “The King can do no wrong.”
- Origins in Medieval and early law of England to ensure immunity for the King
- Preserved in the US Constitution for the United States and each state individually

- Generally, government entities may not be sued without consent as a product of sovereign immunity.
- Government entities include:
  - State government entities (departments, boards, agencies, etc.)
  - Cities and Counties
  - Certain Districts (drainage, water improvement, water control, public health, river authority, etc.)
  - Emergency Service Organizations
  - Any other entity whose status and authority are granted by the Constitution or legislative laws.
  - Municipalities functioning in a governmental capacity for certain tasks.



- Recognized by Texas courts in the mid-1800's as a way to provide immunity to Texas governmental entities.
- “No state can be sued in her own courts without her own consent, and then only in the manner indicated by that consent.”
  - Hosner v. De Young, 1 Tex. 764, 769 (1847).

# Purpose of Sovereign Immunity



- Protect government funds used for the benefit of the public.

- Protect official decision-making authority.



# Types of Sovereign Immunity

- Federal Sovereign Immunity
  - Qualified Immunity
  - Absolute Immunity
- State Immunity – Eleventh Amendment
- Texas Governmental Immunity

## Sovereign Immunity

- Refers to the federal government or state's immunity from suit and liability

## Governmental Immunity

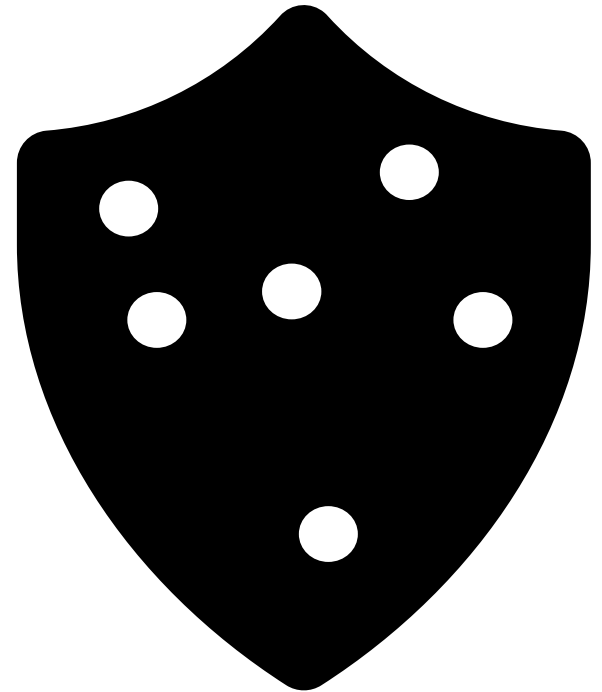
- Refers to the immunity of political subdivisions of the state (cities, utilities, districts, etc.)

- Municipalities?
  - Yes
- Counties?
  - Yes
- State of Texas?
  - No
- Special Districts (MUDs, SUDs, MWDs, etc)?
  - Yes

# Governmental Immunity

- EPA?
  - No
- Schools?
  - Yes
- Housing Authorities?
  - Yes

- Purpose: To protect subdivisions of the state from lawsuits for money damages and from suits seeking to control governmental entities' lawful actions by a final court decision
- Protects political subdivisions from lawsuits unless the legislature has clearly and unambiguously waived that immunity



- A contractor brings a declaratory judgment action seeking to compel arbitration of a contract dispute with a town regarding payment for alleged extra work and costs involved in working on the town's water and sanitary sewer system



Is this a suit for  
damages?



Is this a suit  
seeking to control  
the town action  
with a judgment?



Is the town  
protected by  
governmental  
immunity?



The background of the slide features a photograph of the Texas State Capitol building in Austin, Texas, with its ornate facade and arched windows. To the right, the Texas state flag is flying on a tall pole against a clear blue sky. A large, light green hexagonal shape is overlaid in the center of the image, containing the text.

# **Texas Tort Claims Act**

- Texas enacted the Texas Tort Claims Act (TTCA) to waive immunity for certain actions made by employees of government entities.
- Essentially, this waiver provides consent to be sued for certain actions.



- The TTCA waives immunity for political subdivisions conducting governmental functions, which are those functions that are enjoined on a municipality by law
- The TTCA does not apply to damages arising from a proprietary function, which are those functions that a municipality *may* perform, in its discretion

## Governmental Functions

- Street construction and design
- Garbage and solid waste operations
- Sanitary and storm sewers
- Waterworks
- Parks, zoos, museums, libraries, recreational facilities
- Dams and reservoirs
- Zoning, planning, plat approval
- Traffic, traffic signals and maintenance

## Proprietary Functions

- Operation and maintenance of a public utility
- Abnormally dangerous or hazardous activities



# Why does it matter whether a function is “Governmental” or “Proprietary”

# What is a tort?

- A tort is a fancy lawyer word for personal injury
- When someone commits a tort, they have done something (or not done something) that causes injury to another person.
- These injuries can cause the person who committed the tort to compensate the injured person in damages.



# What is a tort?

## Common Torts:

- Causing death or injury
- Defamation of reputation
- Medical malpractice
- Damage to property
- Trespass to property
- Defective and dangerous products



Sovereign Immunity  
Protects the  
Government from  
being sued for many  
common torts.

# Waiver of Immunity for Certain Torts



Property Damage,  
Death or Injury Caused  
by Motor-Driven  
Vehicle or Equipment

Death or Injury  
Caused by a  
Condition or Use of  
Property.



## Tort Liability under the TTCA

- *Causing death or injury*
- Defamation of reputation
- Medical malpractice
- *Damage to property*
- Trespass to property
- Defective and dangerous products





# Motor-Driven Vehicles and Equipment

# Waiver of Immunity: Motor-Driven Vehicles and Equipment

Personal Injury, Death, or Property Damage caused by:

1. An *employee* of the government entity;
2. Acting within the *scope of employment*;
3. Acts wrongfully, fails to act, or is negligent;
4. While operating or using a motor-driven vehicle or motor-driven equipment.

# Who is considered an employee?

- Anyone paid by the government, whom the government employer has the legal right to control or direct.
- Does not include independent contractors *unless* the contract terms include the government's ability to control the contractor's work.
- Unpaid volunteers are not considered employees.



- Task assigned by the employer specifically or generally as part of duties
- Intended to serve an employer's purpose
- Connection between the employee's job duties and the action causing injury
- The employee's motives are irrelevant if acting within the scope of employment.

# Wrongful Acts or Omission

- A wrongful act occurs when the employee does something in violation of a law.
- An omission occurs when the employee is does not do something required by law.

- Negligence occurs when an employee fails to exercise reasonable care necessary to avoid a foreseeable risk of property damage, death, or injury.
- The injury *must be caused by the failure* to carefully operate the motorized vehicle or equipment.

# Motor-Operated Vehicles and Equipment

- Vehicles, boats,
- Drivable equipment
- Motor-driven equipment such as floodgates (except those owned by river authorities), pumps, cranes, etc.
- Implements attached to motor-operated equipment (i.e. an auger operated by a tractor)

The City of Unlucky Occurrences hires a contractor, Careless Carl, to clear property to build a nursing home adjacent to a developed neighborhood. While operating the bulldozer, Carl receives a hilarious video in a text from his best friend. Without stopping the bulldozer, Carl watches the video and replies to his friend. In the process, Carl knocks over a tall tree in the wrong direction. This tree hits a live power line, which falls into a resident's yard, setting their backyard kitchen on fire. Upon noticing this, Carl immediately calls the local fire department who arrives quickly and extinguishes the fire. No one is injured, but the resident must now rebuild their dream outdoor kitchen.

Can the resident sue the City of Unlucky Occurrences?

# Waiver of Immunity: Motor-Driven Vehicles and Equipment

Personal Injury, Death, or Property Damage caused by:

1. An *employee* of the government entity;
2. Acting within the *scope of employment*;
3. Acts wrongfully, fails to act, or is negligent;
4. While operating or using a motor-driven vehicle or motor-driven equipment.

- Adequate and comprehensive training programs.
- Driving and Machinery Operation policies and procedures.
- Regular inspection of vehicles and equipment.
- Ensure appropriate operator licenses are obtained and renewed
- Background checks of drivers and operators



# Property Conditions and Use



# Property Use or Condition Liability

- Immunity is waived for conditions or uses of property based on the duty of care owed to others to warn of dangers or make the property safe.
- This duty of care owed is specific to the type of defect and the use of the property.

# Unreasonably Dangerous Condition

- A condition is not unreasonably dangerous just because it causes an injury.
- Every-day hazards become unreasonably dangerous when there are unique characteristics or prior complaints or history of injuries caused by the same condition.
- An unreasonably dangerous condition occurs when a reasonable person would not expect a condition to exist based on the type of property or regular use of the property.

# Types of Premise Defects and Uses of Property

- General use of property
- Recreational use of property
- Paid use of property
- Special defects on roadways and streets

The Government owes a duty to warn of a danger or use of a property or make the condition reasonably safe when:

1. Government has actual knowledge;
2. Of an unreasonably dangerous condition;
3. Which is not also known by the injured party.

- Actual knowledge can be proved when there is:
  - A consistent record or history of danger
  - Evidence of reports of the condition to staff
  - Knowledge that condition was present at the time of alleged injury

# Recreational Uses

- Recreational “use” includes:
  - Hunting and fishing
  - Swimming and boating
  - Camping, picnicking, and hiking
  - Dog-walking
  - Disc-golf and rock climbing
  - Any other activity associated with the outdoors



- The Government owes a duty to avoid willful, wanton acts or gross negligence.
- Gross negligence usually involves awareness of a condition which the injured party was not aware of AND the conscious disregard to of the danger.

The government owes a duty to provide notice or reasonably make an unreasonably dangerous condition reasonably safe when:

- The government has actual knowledge of the condition OR
- The government should have knowledge of the condition if properly managing, inspecting, and maintaining property.



# Duty of Care: Special Defects

- Special defects apply to obstructions or excavations in or on roadways that affect its general use.
- This does not apply to obstructions or excavations on the side or near the roadway.
- The government owes a duty of care to notify and make reasonably safe when it has actual knowledge or it should know of the condition.



# Comparison of Premise Liability

	Recreational Use	General Use	Paid Use	Special Defect
Willful, Wanton, Grossly Negligent	X	X	X	X
Actual Knowledge and Failed to Warn/Make Safe		X	X	X
Should have known of condition and failed to warn/make safe			X	X

# Notice for Certain Uses

- Must post limited liability signs for hockey, skating, soap box derby, and paintball use of government-owned, operated or maintained property.
- This informs the public that there is limited liability for such recreational uses of property.

A fifth-grade class from the local elementary school is touring a water facility operated by the Generous Water District to learn about its operations. During the tour, a student slips on a large puddle of water on her way to the restroom, causing a broken wrist. After investigating the incident, the facility manager finds that the water was running out of the restroom from an overflowing toilet. At the time of the incident, there were no signs warning others of a slippery floor.

Can the student's parents sue the Generous Water District?

The Government owes a duty to warn of a danger or use of a property or make the condition reasonably safe when:

1. Government has actual knowledge;
2. Of an unreasonably dangerous condition;
3. Which is not also known by the injured party.

- Regular inspection of property owned and operated by the entity.
- Regular inspections of elevators, fire alarms, and other equipment used by the public.
- Proper signage to warn of dangers to the public.
- Notification and Reporting System for identifying issues needing repair.
- Prompt response to reports of unsafe conditions.

A close-up photograph of a judge in black robes, holding a wooden gavel. The judge's face is partially visible in the background. A large green hexagonal overlay is centered over the image, containing the text "Liability Limitations" in bold black font. The background is slightly blurred, showing a red and white striped flag.

**Liability  
Limitations**

# Maximum Damages Under TTCA

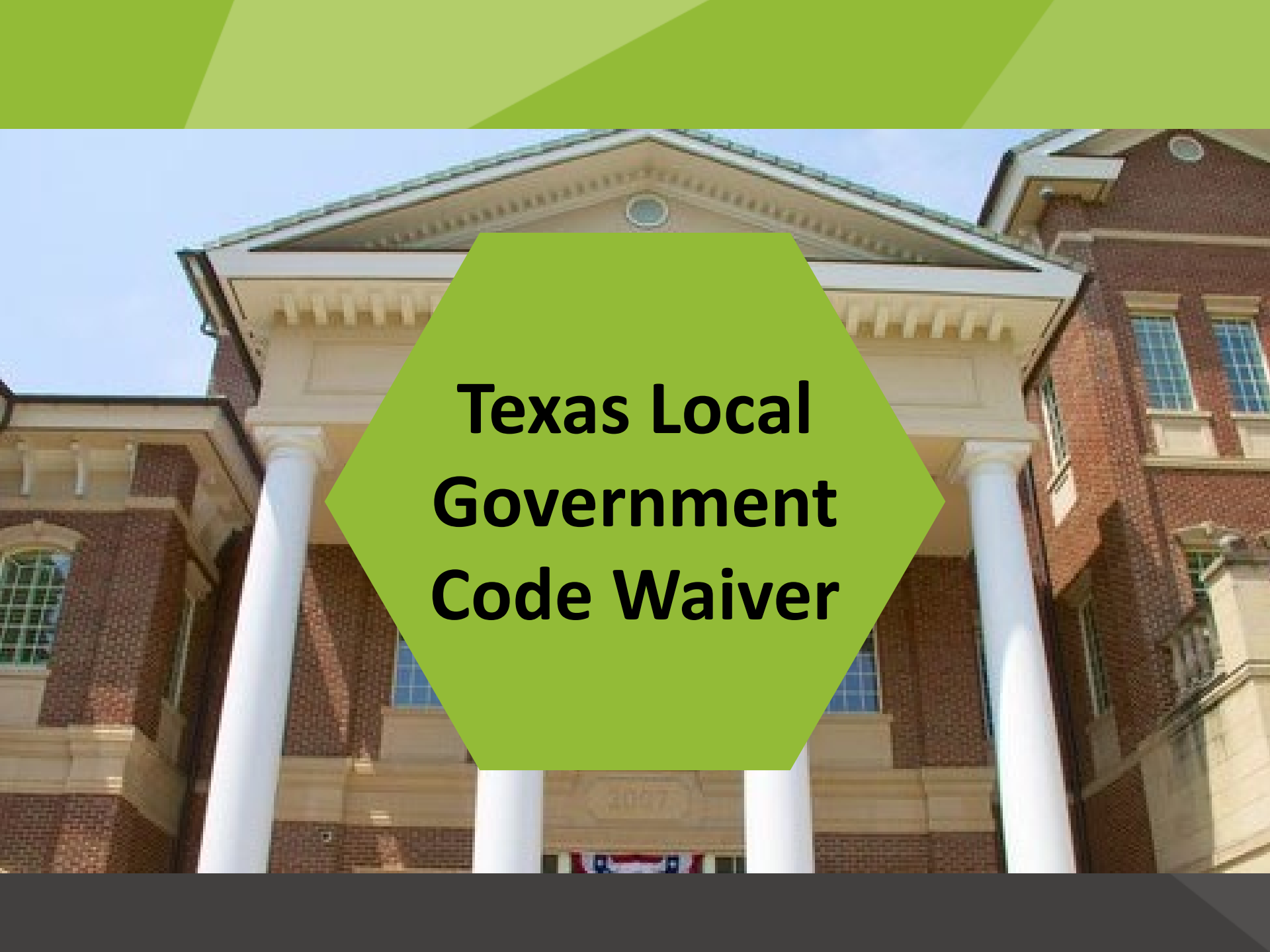
	State	Local	Municipal
Personal Injury per person	\$250,000	\$100,000	\$250,000
Personal Injury per occurrence	\$500,000	\$300,000	\$500,000
Property injury or destruction per occurrence	\$100,000	\$100,000	\$100,000



- In *Gulf Coast Center v. Curry* (2022), the Supreme Court of Texas concluded that the trial court had no jurisdiction to enter an award of \$216,000 in a personal injury action against a public community center

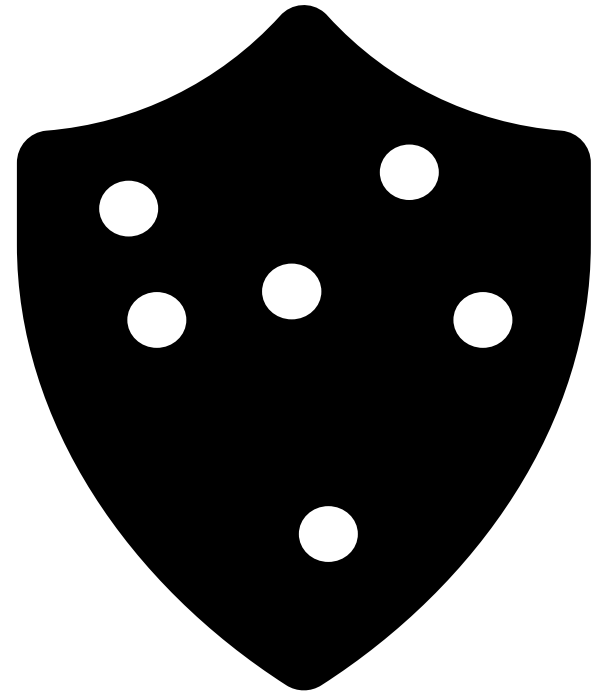
- Governmental entities enjoy stronger protection from damage exposure in a personal injury suit
- Personal injury plaintiffs must affirmatively plead and prove that an entity is a state agency or municipality under the Tort Claims Act to recover more than \$100,000

- Sovereign immunity generally protects governmental entities from being sued.
- The Texas Tort Claims Act provides consent for governmental entities to be sued for certain types of acts causing injury, death and property damage.
- Damages to compensate for the injury, death or property damage are capped at specific amounts.
- Employing preventative measures can limit liability in the event that a person is able to sue a governmental entity under the TCTA.



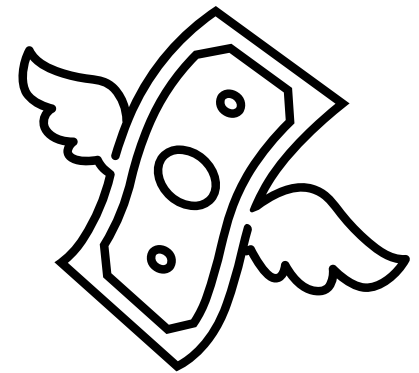
**Texas Local  
Government  
Code Waiver**

- Texas Local Government Code § 271.152 waives certain local governmental entities' immunity from suit for specified breach of contract claims



- “A local governmental entity that is authorized by statute or the constitution to enter into a contract and that enters into *a contract subject to this subchapter* waives sovereign immunity to suit for the purpose of adjudicating a claim for breach of the contract, subject to the terms and conditions of this subchapter.”

- Recovery under this provision is limited to:
  - the balance due and owed by the local governmental entity under the contract including any amount owed as compensation for the increased cost to perform the work as a direct result of owner-caused delays or acceleration
- Cannot recover consequential or exemplary damages



# What types of contracts?

## Goods and Services

- a written contract stating the essential terms of the agreement for providing goods or services to the local governmental entity that is properly executed on behalf of the local governmental entity

## Sale and delivery of reclaimed water

- a written contract, including a right of first refusal, regarding the sale or delivery of not less than 1,000 acre-feet of reclaimed water by a local governmental entity intended for industrial use





# Case Study: City of Ames v. City of Liberty

- Suit over wholesale wastewater contract and overage amounts tied to excessive flows (daily and monthly calculation)
- Key question before trial court and appellate court was immunity



- Ames filed a Plea to the Jurisdiction, claiming it had governmental immunity
- What do you think? Does Ames have immunity? Or was it waived by Section 271?

# Was the contract covered under Section 271?

CS270758

- Written Contract?
- Essential terms of the agreement?
- Goods and services?
- Properly executed?



“Sign here to indicate you have no idea what you’ve signed for.”

- An agreement's "essential terms" are those that parties would reasonably regard as "vitally important ingredients" of their bargain
- Essential terms generally include:
  - Names of the parties
  - Property at issue
  - Basic obligations
  - Time of performance
  - Price to be paid
  - Service to be rendered

- “Taking these terms together with the nature and purpose of the Contract as a whole, we find that the Contract pertains to the flow of wastewater and sewage on a continual, ongoing basis, which is reflected by the use of the terms “daily” and “constant,” and is sufficiently definite to confirm that the parties intended to be bound and would enable a court to enforce the Contract.”

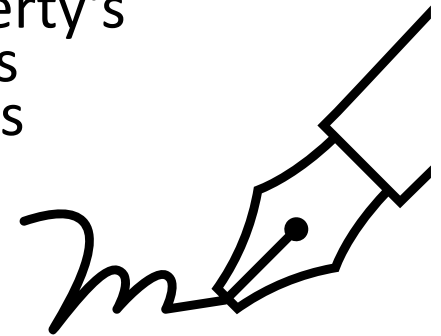
# Contract for Goods and Services

- Ames has sent Liberty wastewater, and Liberty has treated it pursuant to the contract
- The Court found that the collection and treatment of wastewater is in fact a service, and the contract is therefore subject to Section 271
- “Ames has cited no legal authority for its argument that a pleading that states it supplied “goods and services” disqualifies the Contract from the waiver of immunity under section 271.151, and we are aware of none... Therefore, we reject this argument.”



# Proper Execution

- The contract was signed by the mayors of each respective city
- In its pleadings, Liberty provided the signed agreement
- Ames presented no evidence showing that the contract was not properly executed
- The Court held that absent such evidence, Liberty's pleadings were sufficient to show proper execution
- Ames offered no evidence to controvert Liberty's pleadings. Therefore, Ames failed to meet its burden to create a disputed fact issue on this point.





# Immunity was WAIVED

- The Court found that the wastewater disposal contract was a contract for goods and services subject to Section 271.152
  - “We conclude that Chapter 271 applies to this dispute.”
- Because the State Legislature expressly waived immunity for such contracts, Ames did not enjoy governmental immunity and can be sued

- If contracting with another governmental entity, include clear terms regarding waiver of immunity
- Ensure the scope of the goods or services provided are clear and unambiguous



# **Other Express Waivers**



Case Study: Weatherford International,  
LLC v. City of Midland

- Weatherford International, LLC (Weatherford) purchased land in the 1990s
- An environmental assessment found contaminants on the property
- The source of these contaminants was speculated to be from an old electronics manufacturer north of the property



- TCEQ required Weatherford to remediate the property
- Weatherford filed suit against the City of Midland to recover costs of remediation, claiming the City was partially responsible because its sewer pipes ran through the property
- Midland filed a Plea to the Jurisdiction, claiming governmental immunity



- The Solid Waste Disposal Act (SWDA) exists to safeguard the health, welfare, and physical property of the people, and to protect the environment by controlling the management of solid waste.
- Under SWDA, an entity can recover the costs of remediation from another entity that is responsible for the waste
- A plaintiff must prove that the defendant is a “person responsible for solid waste”

- A “person” includes a governmental entity

“an individual, corporation, organization, government or **governmental subdivision** or agency, business trust, partnership, association, or any other legal entity”



- A person is “responsible” for solid waste if the person:
  - Is an owner or operator of a solid waste facility
  - Arranged for the processing, storage, or disposal of the solid waste, or accepted the waste for transportation

- Owner or operator of a *solid waste facility*

“all contiguous land, including structures, appurtenances, and other improvements on the land, used for processing, storing, or disposing of **solid waste.**”



- Solid waste?

“garbage, rubbish, refuse, sludge from a waste treatment plant, water supply treatment plant, or air pollution control facility, and other discarded material, including solid, liquid, semisolid, or contained gaseous material resulting from industrial, municipal, commercial, mining, and agricultural operations and from community and institutional activities. **The term: (A) does not include: (i) solid or dissolved material in domestic sewage ....**”

# Owner/Operator?

- The legislature expressly waived immunity for a governmental subdivision that is responsible for solid waste that is not domestic sewage
- Does Midland have immunity?

- A person is “responsible” for solid waste if the person:
  - Is an owner or operator of a solid waste facility
  - Arranged for the processing, storage, or disposal of the solid waste, or accepted the waste for transportation

- A person is “responsible” for solid waste if the person:
  - Is an owner or operator of a solid waste facility
  - Arranged for the processing, storage, or disposal of the solid waste, or accepted the waste for transportation

# Arranger or Acceptor?

- By contract, agreement, or otherwise, arranged to process, store, or dispose of solid waste owned or possessed by the person
- Did Midland give permission to the entity disposing of the waste?

# Arranger or Acceptor?

- Weatherford argued that Midland authorized the disposal of the contaminants
- Pretreatment program
  - City ordinances expressly prohibited the disposal of the contaminants through the City's collection system without authorization





- Hearsay Evidence
  - Weatherford's *only* evidence implicating Midland was hearsay upon hearsay and completely inadmissible
- Without evidence, Weatherford failed to prove that Midland permitted this disposal



- To plead a cost-recovery claim under SWDA Weatherford had to show Midland was a “person responsible for solid waste”
- To overcome Midland’s Plea to the Jurisdiction claiming governmental immunity, Weatherford had to, at a minimum, show a fact issue as to whether SWDA applied to a domestic sewage collection system

- The Court found that SWDA does not apply to a domestic sewer system

“[T]he SWDA's cost-recovery provision does not apply to the allegations and subject matter—i.e., a domestic wastewater collection system—that form the factual basis of the claims that Weatherford has asserted against the City in this case.”

A close-up photograph of a judge's hands in black judicial robes, holding a wooden gavel. The judge is positioned behind a wooden bench. A large, light green hexagonal graphic is overlaid on the center of the image, containing the text 'Court Procedures' in a bold, black, sans-serif font. The background is slightly blurred, showing a red and white striped flag.

# **Court Procedures**

# Plaintiff?

- The party seeking relief against the governmental entity bears the burden of alleging facts that affirmatively demonstrate the court's jurisdiction to hear the case
- Must demonstrate an express waiver

# Defendant?

- File a Plea to the Jurisdiction (PTJ) claiming governmental immunity
- A PTJ may challenge the pleadings, the existence of jurisdictional facts, or both.
- Note: when the PTJ challenges the existence of jurisdictional facts, the court will consider evidence to resolve jurisdictional issues



THANK YOU!

---

QUESTIONS?

