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***Sovereign Immunity: Whether a governmental entity is immune from suit for breach of contract depends on whether the contract was entered as a governmental function, not whether the conduct allegedly breaching the contract was governmental in nature.***

**Long-term lakeshore land leases for residential use is a proprietary, not governmental, function and the governmental entity is not immune from suit for an alleged breach.**

In *tort* actions, governmental entities are immune only from suits arising out of governmental, not proprietary, functions. Two years ago, in *Wasson Interests, Ltd. v. City of Jacksonville*, 489 S.W.3d 427, 430 (Tex. 2016), this dichotomy was extended to breach-of-contract actions for purposes of immunity from suit. The case was remanded for resolution, but made its way to the court a second time for a determination of whether the city’s potential liability arose out of a governmental or proprietary function and what activity should be considered in deciding that question.

When the city built a water reservoir, it decided to also grant long-term leases to shoreline lots. These leases were limited to use only for residential purposes. The city terminated a lease after a dispute arose over whether a lessee was using the house built on the lease for an impermissible commercial purpose. The city maintained that it was immune from suit because it terminated the lease, in part, in an exercise of its governmental power to maintain a safe water supply and preserve the value of the lakeshore lots.

In [\*Wasson Interests v. City of Jacksonville\*](#), a unanimous court ruled on rehearing<sup>2</sup> in an opinion written by Justice Boyd. The opinion reasoned whether governmental immunity applies to a breach-of-contract claim against a municipality depends on whether the municipality was engaged in a governmental or proprietary function when it entered, not by the nature of the conduct allegedly breaching, the contract.

“[T]he focus belongs on the nature of the contract, not the nature of the breach. If a municipality contracts in its proprietary capacity but later breaches that contract for governmental reasons, immunity does not apply. Conversely, if a municipality contracts in its governmental capacity but breaches that contract for proprietary reasons, immunity does apply.”

The court then decided whether leasing lakefront property was a governmental or proprietary function. Although the Tort Claims Act did not apply to the claims at issue, the court looked to it for guidance about whether a particular activity was governmental or proprietary.

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<sup>1</sup> The opinions expressed are solely those of the author. They do not necessarily represent the views of Munsch, Hardt Kopf & Harr, P.C. or its clients.

<sup>2</sup> The original opinion in this case was issued June 1, 2018. The opinion on rehearing differs from the original by remanding the case to the court of appeals to consider the city’s other arguments for sovereign immunity. The original opinion remanded the case to the trial court. Because of the revised disposition of the cause, the original opinion will be omitted from the yet-to-be-supplied summaries of the opinions issued June 1.

Generally, a governmental function is one delegated by the State for the benefit of the *general* public and exercised by the city to discharge responsibility that would otherwise be that of the State. A function is proprietary if it is one performed in the interest of and primarily for the benefit of the city's inhabitants. Governmental functions are usually mandatory obligations. Leasing land was not mandatory.

Governmental functions benefit the general public, not just residents of the political subdivision. However, providing a benefit beyond the territorial limits of the governmental entity is not decisive. The court holds that one must look to the *primary* beneficiaries to categorize it as governmental or propriety. That some incidental benefit accrues to those outside the entity's borders will not automatically make the activity governmental.

The third factor examined was whether the city was acting on its own behalf or whether it was acting as a branch of the State. If the latter, sovereign immunity would apply. The court ruled that leasing the lakefront properties was for its own benefit. Here, the opinion engages in a bit of circular reasoning by pointing out that leasing land was discretionary and the primary beneficiaries were the city and its citizens.

The last factor considered was the relation of the activity – leasing lakefront property – to a governmental function. While controlling the use of the land on the shores of the reservoir may have been associated with the governmental function of maintaining the public water supply, it was not *necessary* for doing so. Only activities that are closely related or necessary to the governmental function are also governmental in nature. Accordingly, the court ruled that the city was not immune from the leaseholder's breach-of-contract suit.